[Cite as *Cawrse v. Allstate Ins. Co.*, 2009-Ohio-2843.]

COURT OF APPEALS
ASHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

CHARLES R. CAWRSE

Plaintiff-Appellee

-vs-

ALLSTATE INSURANCE COMPANY

Defendant-Appellant

JUDGES:
Hon. Sheila G. Farmer, P.J.
Hon. W. Scott Gwin, J.
Hon. William B. Hoffman, J.

Case No. 09COA002

O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Municipal Court, Case No. 08CV100778
JUDGMENT:	Affirmed/Reversed in Part; Judgment Vacated; New Amount Entered
DATE OF JUDGMENT ENTRY:	June 12, 2009

APPEARANCES:

For Plaintiff-Appellee

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For Defendant-Appellant

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Farmer, P.J.

{¶1} On May 22, 2008, appellee, Charles Cawrse, filed a small claims complaint against appellant, Allstate Insurance Company. Appellee alleged breach of contract regarding the denial of appellee's insurance claim for his covered vehicle. Appellee claimed he had loaned the vehicle to his estranged daughter and she abused the vehicle, thereby vandalizing it and causing damage to the vehicle.

{¶2} A hearing before a magistrate was held on June 18, 2008. The magistrate found appellant failed to investigate the claim, and awarded appellee $2,609.04 plus costs and interest. Appellant filed objections. By judgment order filed December 19, 2008, the trial court denied the objections and adopted the magistrate's decision.

{¶3} Appellant filed an appeal and this matter is now before this court for consideration. Assignments of error are as follows:

I

{¶4} "THE COURT ERRED IN FINDING THAT PLAINTIFF-APPELLEE'S CLAIM WAS IMPROPERLY DENIED."

II

{¶5} "THE COURT ERRED IN FINDING THAT DEFENDANT-APPELLANT ACTED WITH BAD FAITH IN THEIR INVESTIGATION AND DENIAL OF PLAINTIFF-APPELLEE'S CLAIM."

I

{¶6} Appellant claims the trial court erred in finding for appellee on his breach of contract claim. Specifically, appellant claims the trial court's conclusion, that appellee's claim of $2,609.04 for towing, mechanical work, and damage to his insured

vehicle was covered under the insurance policy at issue, was against the manifest weight of the evidence. We agree in part.

{¶7} A judgment supported by some competent, credible evidence will not be reversed by a reviewing court as against the manifest weight of the evidence. *C.E. Morris Co. v. Foley Construction Co.* (1978), 54 Ohio St.2d 279. A reviewing court must not substitute its judgment for that of the trial court where there exists some competent and credible evidence supporting the judgment rendered by the trial court. *Myers v. Garson,* 66 Ohio St.3d 610, 1993-Ohio-9.

{¶8} The policy sub judice covers "Property Damage Liability" as follows:

{¶9} "General Statement of Coverage

{¶10} "If a premium is shown on the Policy Declarations for Bodily Injury Liability Coverage and Property Damage Liability Coverage, Allstate will pay damages which an insured person is legally obligated to pay because of:

{¶11} "1. Bodily injury sustained by any person, and

{¶12} "2. damage to, or destruction of, property.

{¶13} "Under these coverages, your policy protects an insured person from liability for damages arising out of the ownership, maintenance or operation, loading or unloading of an insured auto." See, Defendant's Exhibit D at Part 1.

{¶14} In the magistrate's decision of November 13, 2008, adopted by the trial court via judgment order filed December 19, 2008, the following reasons were given for granting an award to appellee:

{¶15} "In sum, Allstate never investigated the issue of vandalism as reported by Cawrse, despite evidence that this possibility existed. Cawrse and his daughter's

mother were prepared to provide statements to this effect. There was evidence the vehicle problems arose when it was in the possession of Cawrse's estranged daughter and that in all probability the worsened condition resulted while in her possession. There was also evidence that Cawrse had difficulty obtaining possession of the car from his daughter and the problems arose immediately after he succeeded in doing so. He at all times suspected vandalism by his daughter and reported the claim as such. Allstate did nothing to investigate this possibility. It is not disputed that vandalism is a covered loss under the policy's comprehensive provisions. Further, Cawrse was forced to pay a tow charge and mechanical fee authorized by Allstate, not Cawrse, to secure return of his vehicle from Fredericktown Chevrolet.

{¶16} "As a result of the failure of Allstate to investigate and cover the claim, Cawrse suffered losses in the amount of $2609.04 for towing, Mechanical work, and damage to the vehicle."

{¶17} In reviewing appellee's testimony, it is apparent he claimed damages to his vehicle based upon the "theory" that his estranged daughter abused the vehicle. Appellee characterized the abuse as vandalism. T. at 8. Appellee argued that appellant failed to investigate his claim of vandalism, and the trial court accepted this argument.

{¶18} Appellant's evidence included the report of Mark Sargent, a forensic mechanic, who opined the damage to the vehicle was not caused by a collision:

{¶19} "Figures No. 20 and 21 show some mechanical damage to the lower portion of the radiator. This was in all likelihood done when the radiator was removed from the vehicle. There were several different impact angles in this area, which would

be consistent with a tool or similar object used to cause this damage. The area just above the mechanical damage was slightly bent, although it was not perforated.

{¶20} "It should be noted that the condenser, located directly in front of the radiator, showed no evidence of impact abrasion and penetration, therefore the marking in this area would be consistent with a non-impact related event. The damage to the cooling fins (sic) in the radiator core in no way jeopardized the proper operation of the vehicle." See Defendant's Exhibit A at Page 15.

{¶21} Mr. Sargent concluded the following:

{¶22} "Following a thorough and complete evaluation of all remaining evidence in this case, and based on my knowledge, training and years of experience as a Forensic Mechanic, it is my professional opinion that the cause of the internal engine damage was an overheat condition that occurred in the engine on one or more occasions. The overheat condition was a result of the cooling fan contacting the radiator during vehicle operation.

{¶23} "The rotation of the cooling fan wore several of the radiator core tubes to the point where a leak would take place. The evacuation of coolant in this area would result in low coolant levels and an overheat condition. The overheat condition would have been indicated on the instrument cluster by the temperature warning indicator and the temperature gauge. The continued operation of the vehicle for a significant time frame will result in failure of the head gaskets, cylinder heads or the engine block. The 'CHECK ENGINE' light would also have been illuminated, as indicated by history code 14 present on the computer scan diagnostics.

{¶24} "It is my opinion that the cause of the engine failure was an improperly positioned cooling fan with no apparent collision damage to that area. There was no evidence of external collision damage that may have caused or contributed to this event. The cooling fan may not have been spaced properly or was improperly positioned at the time of previous body repair work. There was clear evidence that previous repairs were made to the subject vehicle by the introduction of aftermarket front end components.

{¶25} "The actual cause of the engine damage was the continued operation of the vehicle with a coolant leak and operation of the vehicle in an overheat state." See, Defendant's Exhibit A at Page 36.

{¶26} Taken as a whole, Mr. Sargent's opinion is consistent with appellee's theory i.e., there was abuse to the vehicle. However, appellee's theory centered upon the effect and not the cause. The described affect was that the engine ran too hot. T. at 7. Appellee admitted he installed a new radiator. Id. Subsequently, appellee discovered the vehicle had a head gasket problem. T. at 8. Other than appellee's theory that vandalism had occurred, there is no other evidence to support this claim.

{¶27} Based upon the evidence, we are presented with three possible scenarios that caused the damage to the vehicle: 1) appellee's daughter purposefully abused the vehicle by driving it in an overheated state; 2) appellee damaged the vehicle when he replaced the old radiator; or 3) the previous repair for a collision which was covered by appellant damaged the vehicle. T. at 15.

{¶28} Appellee's small claims complaint claims appellee breached the contract by not paying for the repairs to his covered vehicle. The trial court found appellant

failed to investigate the claim. We find this to be factually incorrect. Mr. Sargent's report specifically proved appellant investigated the claim and found the damages were not collision related. As noted in the magistrate's decision, there was confusion as to how to characterize the claim, either as a collision or vandalism. Once appellant determined the damage was not caused by a collision, the claim was denied. Appellee and the trial court appear to place a further burden on appellant to investigate the vandalism claim.

{¶29} Based upon our review of the evidence, we find appellee failed to meet his burden of proof (preponderance of the evidence). Preponderance of the evidence is "the greater weight of the evidence; that is, evidence that you believe because it outweighs or overbalances in your mind the evidence opposed to it. A preponderance means evidence that is *more probable,* more persuasive, or of greater probative value. It is the quality of the evidence that must be weighed." *Schneider v. Schneider* (1995), Holmes App. No. 94CA526, quoting 1 Ohio Jury Instruction (1994), Section 3.50, at 114-115. (Emphasis *sic.*)

{¶30} We further find that appellee expended $301.29 in out-of-pocket expenses to process his claim (towing fees per appellant's representative). T. at 13-14. Therefore, appellee is entitled to $301.29. The judgment of the trial court is vacated and judgment is entered for appellee in the amount of $301.29.

{¶31} Assignment of Error I is granted in part.

II

{¶32} Appellant claims the trial court erred in finding the claim was not processed in good faith. From our review of the complaint, no such claim of breach of

good faith was alleged; therefore, the finding is superfluous to the decision and hereby stricken.

{¶33} The judgment of the Municipal Court of Ashland County, Ohio is hereby affirmed in part and reversed in part. The judgment in the amount of $2,609.04 is vacated and the new amount entered is $301.29. Costs and interest as stated in the judgment order stand.

By Farmer, P.J.

Hoffman, J. concurs.

Gwin, J. dissents.

s/Sheila G. Farmer

s/William B. Hoffman

JUDGES

SGF/sg 521

Gwin, J., dissents

{¶34} I dissent from the conclusion reached by the majority.

{¶35} The majority finds the court is factually incorrect on the issue of whether Allstate failed to investigate the claim. I would find otherwise. Admittedly, Allstate did an investigation and found the damages were not the result of a collision. Allstate then denied the claim without investigating any other possibility. The majority finds Allstate had no obligation to investigate further. I believe at the very least, before it denied the claim it had the obligation to investigate the cause appellee gave, which would be covered by the policy. Because Allstate did not do so, I would find it did not properly investigate the claim.

{¶36} The majority lists three possible scenarios that could have caused the damage to appellee's vehicle, including the one appellee proposed. Sargent's opinion can be construed as supporting appellee's theory of how the damage occurred. The court was free to believe appellee's theory of the cause of the damage, and it chose to believe appellee.

{¶37} I would find the appellee met his burden of proving his case by a preponderance of the evidence. I would overrule both assignments of error.

s/W. Scott Gwin

JUDGE W. SCOTT GWIN

IN THE COURT OF APPEALS FOR ASHLAND COUNTY, OHIO

FIFTH APPELLATE DISTRICT

CHARLES R. CAWRSE	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
ALLSTATE INSURANCE COMPANY	:	
Defendant-Appellant	:	CASE NO. 09COA002

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Municipal Court of Ashland County, Ohio is hereby affirmed in part and reversed in part. The judgment in the amount of $2,609.04 is vacated and the new amount entered is $301.29. Costs and interest as stated in the judgment order stand. Costs to be divided equally between the parties.

s/ Sheila G. Farmer_____

s/William B. Hoffman_____

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JUDGES