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**IN THE COURT OF COMMON PLEAS  
CUYAHOGA COUNTY, OHIO**

CINCINNATI INSURANCE COMPANY  
Plaintiff

PROGRESSIVE PREFERRED INSURANCE COMPANY  
Defendant

Case No: CV-10-717699

BRENDAN J SHEEHAN

**JOURNAL ENTRY**

OPINION AND JUDGMENT ENTRY. O.S.J.

\_\_\_\_\_  
Judge Signature

\_\_\_\_\_  
Date

IN THE COURT OF COMMON PLEAS  
CUYAHOGA COUNTY, OHIO

CINCINNATI INSURANCE COMPANY, )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
PROGRESSIVE PREFERRED )  
INSURANCE COMPANY, )  
 )  
Defendant. )

CASE NO. CV 10 717699  
  
JUDGE BRENDAN J. SHEEHAN

**OPINION AND JUDGMENT  
ENTRY**



I. ISSUES PRESENTED.

This matter is before the Court on the parties' cross-Motions for Summary Judgment. The issues have been fully briefed and argued to the Court.

On or about October 26, 2007, Jennifer Neal was involved in a car vs. pedestrian collision with Jane L. Rodgers in Cleveland Heights, Ohio. Jennifer Neal was insured under an automobile insurance policy agreement between Defendant Progressive Preferred Insurance Company ("Progressive") and her father that provided coverage to Ms. Neal. She was also an insured under excess policies of insurance that provided coverage for motor vehicle accidents issued by The Western Reserve Insurance Company ("Western Reserve") and Plaintiff Cincinnati Insurance Company ("Cincinnati"). Progressive's policy limits were \$500,000 and Cincinnati's limits were \$5,000,000. Both policies at issue required the insurance company's to defend actions against their insured. Western Reserve's limits were \$10,000,000 but its coverage and duties to defend Ms Neal are not at issue in this action.

On or about May 5, 2008, Ms. Rodgers' guardian filed an action concerning the collision captioned *Fred B. Rice, Guardian of Jane L. Rodgers v. Jennifer L. Neal*, Case No. CV 08 658792 in the Cuyahoga County Court of Common Pleas. Progressive retained counsel to

represent Ms. Neal; shortly thereafter, Cincinnati retained counsel to appear as co-counsel for Ms. Neal. Counsel retained by the respective insurance companies participated in pre-trial proceedings including discovery and mediation of the dispute that ultimately resolved prior to trial.

On or about February 5, 2010, Cincinnati filed the instant action seeking payment from Progressive for \$21,928.46 for legal fees, costs and expenses it incurred in defending the parties' insured in the underlying action. Cincinnati maintains that it is entitled to summary judgment because Progressive owed a duty to exercise good faith in defending and settling claims against its insured with Cincinnati bearing the costs of Progressive's alleged breach of that duty. Progressive maintains that it is entitled to summary judgment because, as it maintains, it adequately defended its insured and is not liable for costs Cincinnati was contractually obligated to incur in defending Ms. Neal.

## II. STANDARD FOR SUMMARY JUDGMENT.

Under Civ.R. 56, summary judgment is appropriate when, (1) no genuine issue as to any material fact exists, (2) the party moving for summary judgment is entitled to judgment as a matter of law, and (3) viewing the evidence most strongly in favor of the nonmoving party, reasonable minds can only reach one conclusion which is adverse to the non-moving party. *Holliman v. Allstate Ins. Co.* (1999), 86 Ohio St.3d 414; *Temple v. Wean United, Inc.* (1997), 50 Ohio St.2d 317, 327. When a motion for summary judgment is properly made and supported, the nonmoving party must set forth specific facts showing that there is a genuine issue for trial and may not merely rest on allegations or denials in the pleadings. *Dresher v. Burt* (1996), 75 Ohio St.3d 280. The nonmoving party must produce evidence on any issue for which that party bears the burden of production at trial. *Wing v. Anchor Media, Ltd.* (1991), 59 Ohio St.3d 108,

111. Further, to survive summary judgment, a plaintiff must produce more than a scintilla of evidence in support of his position. *Markle v. Cement Transit Co., Inc.* (1997), 1997 WL 578940, 2, citing *Redd v. Springfield Twp. School District* (1993), 91 Ohio App.3d 88, 92.

### III. ANALYSIS AND CONCLUSION.

The Ohio Supreme Court has stated with regard to the obligations between primary and excess carriers of an insured:

One court has noted that “\* \* \* (w)hen there is no excess insurer, the insured becomes his own excess insurer, and his single primary insurer owes him a duty of good faith in protecting him from an excess judgment and personal liability. If the insured purchases excess coverage, he in effect substitutes an excess insurer for himself. It follows that the excess insurer should assume the rights as well as the obligations of the insured in that position.” *Continental Cas. Co. v. Reserve Ins. Co.* (1976), 307 Minn. 5, 8-9, 238 N.W.2d 862. Accord *Portland General Electric Co. v. Pacific Indemnity Co.* (C.A.9, 1978), 579 F.2d 514.

*Centennial Ins. Co. v. Liberty Mut. Ins. Co.* (1980), 62 Ohio St.2d 221, 223.

Thus, an excess insurer may bring an action for bad faith against the primary insurer in the place of the insured, whose rights and obligations relating to liability above the primary insurance limits it assumed through the excess insurance policy with the insured.

It must be noted, however, that the burden of successfully asserting a bad faith claim is substantial:

A lack of good faith is the equivalent of bad faith, and bad faith, although not susceptible of concrete definition, embraces more than bad judgment or negligence. It imports a dishonest purpose, moral obliquity, conscious wrongdoing, breach of a known duty through some ulterior motive or ill will partaking of the nature of fraud. It also embraces actual intent to mislead or deceive another.”

*Id.* at 224, quoting *Slater v. Motorists Mut. Ins. Co.* (1962), 174 Ohio St. 148, paragraph two of the syllabus.

The evidence and arguments submitted to the Court demonstrate that Progressive participated in Ms. Neal's defense. The practice of law is not subject to many absolutes. The issues raised in this case present differing opinions of the measures that constitute a reasonable defense of a claim. While Cincinnati alleges that counsel retained by Progressive should have been more exhaustive in preparation or more aggressive in strategy, any failure to defend the case as Cincinnati's retained counsel recommended does not rise to the level of bad faith. Even if Cincinnati's allegations are construed most strongly against Progressive, Cincinnati could at most establish bad judgment in conducting the defense in the underlying action. Bad judgment, even if proven, is insufficient to prevail on a bad faith claim.

For the foregoing reasons,

**THE CINCINNATI INSURANCE COMPANY'S MOTION FOR SUMMARY JUDGMENT IS DENIED; AND**

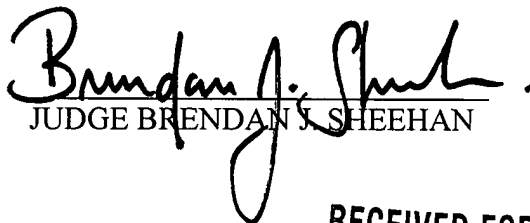
**PROGRESSIVE PREFERRED INSURANCE COMPANY'S MOTION FOR SUMMARY JUDGMENT IS GRANTED.**

**JUDGMENT IS ENTERED IN FAVOR OF DEFENDANT PROGRESSIVE AND AGAINST PLAINTIFF CINCINNATI.**

**Parties to bear their own costs.**

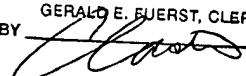
**IT IS SO ORDERED.**

Dated: 12.29.10

  
JUDGE BRENDAN J. SHEEHAN

RECEIVED FOR FILING

JAN 03 2011

GERALD E. FUERST, CLERK  
BY  DEP.

CERTIFICATE OF SERVICE

A copy of the foregoing was mailed to the following this 29<sup>th</sup> day of December, 2010:

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