[Cite as *Callihan v. Niles*, 2012-Ohio-38.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

VICKIE CALLIHAN,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2011-T-0025**
- vs -	:	
CITY OF NILES, OHIO, et al.,	:	
Defendants-Appellants.	:	

Civil Appeal from the Court of Common Pleas, Case No. 2009 CV 1103.

Judgment: Reversed and remanded.

Martin F. White and *James J. Crisan*, Martin F. White Co., L.P.A., 156 Park Avenue, N.E., P.O. Box 1150, Warren, OH 44482-1150 (For Plaintiff-Appellee).

Jeffrey M. Embleton and *Tracey S. McGurk*, Mansour, Gavin, Gerlack & Manos Co., L.P.A., 55 Public Square, Suite 2150, Cleveland, OH 44113-1994 (For Defendants-Appellants).

TIMOTHY P. CANNON, P.J.

{¶1} Appellants, the city of Niles, Ohio, and Enterprise Group Planning, Inc., appeal the judgment of the Trumbull County Court of Common Pleas granting appellee's motion for summary judgment. For the reasons that follow, the judgment is reversed and the case remanded.

{¶2} In 2005, appellee, Vickie Callihan, was injured as a result of an automobile accident while riding as a passenger in a vehicle operated by her husband. As a

dependant, Callihan was able to recover under her husband's medical employment-benefit plan through the city of Niles, Ohio ("the city"). Enterprise Group Planning, Inc. ("EGP"), the administrator of the city's benefit plan, paid $18,563.96 in medical expenses to Callihan. The health-benefits plan EGP prepared for the city (the "EGP Plan") included the following subrogation provision under Section 11:

{¶3} "To the full extent of all payments made or received under this Plan, the Covered Person hereby assigns and agrees to subrogate the Plan to all rights, claims, and interests which the Covered Person has or may have against any Third Party to enforce this claim. As a condition to and in consideration of coverage under this Plan, the Covered Person also agrees to fully reimburse the Plan to the complete extent of any Recovery (1) received from or on behalf of a Third Party, and (2) arising out of or relation to the events or circumstances which produced the Covered Loss. The Plan's rights of assignment, subrogation, and reimbursement are primary and shall come before any and all rights held by the Covered Person, his or her attorney, representative or any other party, to any Recovery. Except where the Covered Person and the Company or its designee expressly agrees otherwise, in writing, it is understood that there shall be no pro rata distribution of any Recovery between the Covered Person and the Plan ***."

{¶4} Section 7 of the EGP Plan supplies the relevant definitions:

{¶5} "Third Party" is defined as "[a]ny person, corporation, partnership, association, or other identifiable entity, except the Plan and Covered Person who suffered the covered loss. Third parties include, without limitation, insurers of third parties and insurers of the Covered Person."

{¶6} "Recovery" is defined as "[a]ny payment, consideration, value, or return from any source whatsoever. Recoveries include, without limitation, payments received through uninsured motorist coverage ***."

{¶7} "Covered Person" is defined as an eligible employee who has been approved for coverage or any eligible "dependent," as defined in the plan, who has been approved for coverage.

{¶8} Callihan was covered under a Grange automotive policy for uninsured motorists since her husband's Grange policy excluded benefits for injuries sustained by a family member of the insured. Grange paid Callihan $25,000—the limit under this uninsured policy. Callihan netted $16,480.02 of the Grange proceeds after attorney's fees. As a result of the $25,000 payment, EGP sought reimbursement for the complete $18,563.96 paid in medical expenses, plus attorney's fees.

{¶9} Callihan filed a complaint for declaratory judgment concerning EGP's rights, if any, to the $18,563.96. Appellants filed a motion for summary judgment. Callihan filed a cross-motion for summary judgment. The trial court entered summary judgment for Callihan, finding that, contrary to appellants' contentions, there was no contractual right of subrogation since the language was ambiguous.

{¶10} Appellants timely appeal and assert the following assignment of error:

{¶11} "The trial court committed prejudicial error in granting Plaintiff-Appellee Vickie Callihan's Motion for Summary Judgment."

{¶12} An appellate court reviews an award of summary judgment de novo. *Grafton v. Ohio Edison Co*. (1996), 77 Ohio St.3d 102, 105. Thus, the court of appeals applies "the same standard as the trial court, viewing the facts in the case in a light most

favorable to the non-moving party and resolving any doubt in favor of the non-moving party." *Viock v. Stowe-Woodward Co*. (1983), 13 Ohio App.3d 7, 12.

{¶13} Pursuant to Civil Rule 56(C), summary judgment is proper if:

{¶14} "(1) No genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party." *Temple v. Wean United, Inc*. (1977), 50 Ohio St.2d 317, 327.

{¶15} To prevail on a motion for summary judgment, the moving party must be able to prove there is no genuine issue as to any material fact, and therefore judgment as a matter of law is appropriate. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293. If the moving party satisfies this burden, the non-moving party has the reciprocal burden to present evidence that some issue of material fact remains for the trial court to resolve. Id.

{¶16} The issue in this case is a contractual subrogation agreement controlled by contract principles. "In Ohio, there are three distinct kinds of subrogation: legal, statutory, and conventional. *** Conventional subrogation is premised on the contractual obligations of the parties, either express or implied. The focus of conventional subrogation is the agreement of the parties." *Blue Cross & Blue Shield Mut. of Ohio v. Hrenko* (1995) 72 Ohio St.3d 120, 121, citing *State v. Jones* (1980), 61 Ohio St.2d 99, 100-101.

{¶17} In Ohio, the default subrogation rule is that "'where an insured has not interfered with an insurer's subrogation rights, the insurer may neither be reimbursed for payments made to the insured nor seek setoff from the limits of its coverage *until the insured has been fully compensated* for his injuries.'" (Emphasis sic.) *N. Buckeye Edn. Council Group Health Benefits Plan v. Lawson*, 103 Ohio St.3d 188, 2004-Ohio-4886, at ¶25, quoting *James v. Michigan Mut. Ins. Co.* (1985), 18 Ohio St.3d 386, 388. However, this equitable limit on subrogation, known as the "make-whole doctrine," may be overridden and avoided by agreement, e.g., through a well-defined subrogation clause in a contract. Id. at ¶16. In order to avoid the default "make-whole doctrine," the agreement must clearly and unambiguously establish "both (1) that the insurer has a right to a full or partial recovery of amounts paid by it on the insured's behalf and (2) that the insurer will be accorded priority over the insured as to any funds recovered." Id. at paragraph two of the syllabus.

{¶18} At the onset, the parameters of this court's review must be established. Our review is based only on the EGP Plan, which establishes the rights and obligations of the parties hereto. After the accident, Callihan also completed a "Subrogation Questionnaire" for EGP, which contained a "subrogation acknowledgement" above Callihan's signature. The trial court considered the language of both the EGP Plan and the "Subrogation Questionnaire." The trial court then determined that Callihan was not bound by the terms of the "subrogation acknowledgement" since it was not supported by independent consideration. All parties are in agreement on this point. As a result, it was improper for the trial court to consider the "subrogation acknowledgement" in order

to create ambiguity. Any ambiguity must be resolved within the contract of insurance itself.

{¶19} "Although ambiguous provisions in an insurance policy must be construed strictly against the insurer and liberally in favor of the insured, *** it is equally well settled that a court cannot create ambiguity in a contract where there is none. *** Ambiguity exists only when a provision at issue is susceptible of more than one reasonable interpretation." *Lager v. Miller-Gonzalez*, 120 Ohio St.3d 47, 2008-Ohio-4838, at ¶16, citing *King v. Nationwide Ins. Co.* (1988), 35 Ohio St.3d 208, syllabus, and *Hacker v. Dickman* (1996), 75 Ohio St.3d 118, 119.

{¶20} The Supreme Court of Ohio has determined that neither equity nor public policy, but instead the principles of contract interpretation control the outcome. "A clear and unambiguous agreement so providing [for subrogation] is not unenforceable as against public policy, irrespective of whether the settlement or judgment provides full compensation for the insured's total damages." *N. Buckeye Edn. Council Group*, 2004-Ohio-4886, paragraph one of the syllabus.

{¶21} The Court further stated that it is irrelevant whether the contracting party was fully compensated since "it does not logically follow that because a fully compensated plaintiff is bound to his contractual obligations, a plaintiff who is not fully compensated is not also bound to his or her contractual obligations." Id. at ¶19.

{¶22} Though somewhat counterintuitive, the Supreme Court suggests that public policy considerations must be abandoned "'even where a party has made a bad bargain, contracted away all his rights, and has been left in the position of doing all the work while another may benefit from the work. Where various written documents exist,

it is the court's duty to interpret their meaning, and reach a decision by using the usual tools of contractual interpretation (e.g., the written documents, the intent of the parties, and the acts of the parties) and not by a determination of what is fair, equitable, or just.'" Id. at ¶20, quoting *Ervin v. Garner* (1971), 25 Ohio St.2d 231, 239-240. At the center of such a harsh rule is the principle that courts should not rewrite contracts for parties. Id.

{¶23} Our review is therefore limited to whether the language under Section 11 of the EGP Plan would allow EGP to have absolute priority in the subrogation process.

{¶24} Considering the definitions found in Section 7 of the EGP Plan and giving those terms their plain and ordinary meaning, Callihan is a "covered person" since the term includes "any eligible dependent who has been approved for coverage." Grange, Callihan's insurance provider, is a "third party" since the definition expressly includes "insurers of the Covered Person." The $25,000 Callihan received from Grange is "recovery" under the EGP Plan since it was a "payment[] received through uninsured motorist coverage."

{¶25} With these definitions in mind, we apply the two requirements found in *N. Buckeye*, supra, to Section 11 of the EGP Plan. First, the subrogation clause indicates that the EGP Plan has a right to a full or partial recovery of the amounts paid by it on the insured's behalf if funds were received from any other source: "the Covered Person also agrees to fully reimburse the Plan to the complete extent of any Recovery (1) received from or on behalf of a Third Party[.]"

{¶26} Second, the subrogation clause further states that the EGP Plan's right to reimbursement takes priority over that of the covered person: "The Plan's rights of *** subrogation, and reimbursement are primary and shall come before any and all rights

held by the Covered Person, his or her attorney, representative or any other party, to any Recovery."

{¶27} Thus, the plain language of the EGP Plan clearly and unambiguously contains provisions that purport to contractually eliminate the "make-whole doctrine." Appellants' assignment of error has merit.

{¶28} Although summary judgment was not appropriate as a matter of law, we note that the outcome in this case is disturbing. EGP will be "made whole," receiving a 100% reimbursement of the benefits it has advanced. Callihan, the injured party, will receive a minimal distribution, if any, which will not even reimburse her for her significant out-of-pocket losses. Had Callihan not attempted to receive any payout from Grange, she still would have received only $18,563.96 to cover $33,013.24 in losses, including over $28,000 in medical expenses. Callihan was in a position where, no matter what action she took, she would be left with thousands of dollars in losses—despite premiums being paid each month to Grange to protect against such a threat.

{¶29} While the Supreme Court in *N. Buckeye*, supra, addressed a situation similar to the instant case, it is worth noting that the injured party in that case actually received *more* than the benefit provider, an amount well above any out-of-pocket expense, including all of that party's underinsured motorist coverage. Similarly, in *Hrenko*, where the subrogation clause was ultimately upheld as "clear, relatively concise and not limited," the insured had already been fully compensated for his injuries. 72 Ohio St.3d at 122. The *Hrenko* Court explained: "To permit Hrenko to circumvent the subrogation clause and to receive payment for medical expenses from both his group

health insurer and his uninsured motorist carrier would place Hrenko in a better position than he was in before the accident." Id. at 123.

{¶30} Those cases, therefore, do not raise the serious concerns of the case before us. Callihan paid premiums, in one form or the other, for two different protections: one for coverage of health insurance expenses and one for uninsured motorist protection. As it turns out, her payment of uninsured motorist premiums has inured *solely* to the benefit of the health insurer. It is difficult to imagine the parties contemplated and intended this result. This may suggest that the Supreme Court could have a different view of the public policy considerations where the benefit is uninsured/underinsured coverage paid for by the injured party. Even though both the provider and the injured party sustained a loss, the injured party *pays out and receives nothing*, *while the benefit provider is made whole*.

{¶31} Further, it is clear in this case that the recovery from Grange was accomplished solely as a result of the efforts of Callihan and her counsel. Had they not pursued the uninsured motorist claim, it is questionable whether EGP would have ever pursued it.

{¶32} At oral argument, counsel for appellants professed that Callihan "had a choice" here, that she could have declined to make a claim for her health benefits. The reality is that she did not have a choice. The provider agreements between the health insurers and health care providers allow for significant reductions to satisfy claims for medical bills. It is non-sensical to suggest there is any "choice" to be made of whether the patient should submit the bills for payment.

{¶33} The analysis conducted by the trial court was in response to Callihan's arguments that the subrogation provision in the EGP Plan was ambiguous, Grange was not a "third party," and the agreement should not be enforced as against public policy. However, there are additional questions of whether, under facts such as those presented in this case, the inequity subjects the contract to attack on other grounds which have not yet been presented to the trial court and therefore not considered above. These other grounds include (1) whether the contract can be attacked as a contract of adhesion; (2) whether subrogation should not be available from an uninsured/underinsured coverage whose premium has been paid by the "covered person"; or (3) whether specific provisions (e.g., the priority clause) are procedurally or substantively unconscionable such that the offending provisions should be avoided.

{¶34} The dissent suggests the city did not consider itself bound by the EGP Plan since it could modify, suspend, or end the EGP Plan at anytime. As such, the dissent would affirm summary judgment on the grounds that there was no enforceable contractual provision. The dissent suggests the benefits paid pursuant to the terms of the EGP Plan were "gratuitous" in nature, such that the city did not have to pay any medical bills if it did not want to because it could "suspend," "modify," or "end" the EGP Plan at "anytime," even after receiving a claim. However, appellants do not argue that the city had a choice in paying medical expenses as outlined in the EGP Plan. Neither party suggests that the relationship is based on anything other than contract principles, and we decline to decide this case on issues not raised or argued by either side. The Supreme Court of Ohio has stated in *State v. Peagler*, 76 Ohio St.3d 496, 499, fn. 2: "this court has often held that if a reviewing court chooses to consider an issue not

suggested by the parties on appeal but implicated by evidence in the record, the court of appeals should give the parties notice of its intention and an opportunity to brief the issue."

{¶35} Notwithstanding these concerns, the plain language of the EGP Plan cannot be ignored. Summary judgment due to the EGP Plan's purported ambiguity was not appropriate as a matter of law. Appellants' assignment of error has merit. The judgment of the Trumbull County Court of Common Pleas is therefore reversed, and this case is remanded for proceedings consistent with this opinion.

THOMAS R. WRIGHT, J., concurs,

DIANE V. GRENDELL, J., dissents with a Dissenting Opinion.

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{¶36} A court of appeals reviews a grant of summary judgment de novo. Accordingly, this court may affirm the decision of the lower court for reasons other than those relied upon by the lower court. See, e.g., *Lines v. Ashtabula Area City School*, 11th Dist. No. 2003-A-0062, 2004-Ohio-4535, at ¶35 ("[b]ecause an appellate court's review of a summary judgment exercise is de novo, we can substitute the proper analysis for the trial court's analysis on this point and then affirm on that basis") (citation omitted).

{¶37} Moreover, "[t]he construction of written contracts and instruments of conveyance is a matter of law" *Alexander v. Buckeye Pipeline Co.* (1978), 53 Ohio

St.2d 241, paragraph one of the syllabus. "Unlike determinations of fact which are given great deference, questions of law are reviewed by a court de novo." *Nationwide Mut. Fire Ins. Co. v. Guman Bros. Farm*, 73 Ohio St.3d 107, 108, 1995-Ohio-214.

{¶38} In the present case, the City of Niles and Enterprise Group Planning ("appellants") asserted a counterclaim against Callihan, "[p]ursuant to the terms and conditions of the [Benefit] Plan," that they "are subrogated to all of the rights of [Callihan] *** and *** are entitled to a first right of full recovery and reimbursement with respect to any recovery by [Callihan] to the extent of payment made by the Plan in the amount of EIGHTEEN THOUSAND FIVE HUNDRED SIXTY THREE AND 96/100 DOLLARS ($18,563.96)." Counterclaim of Defendants City of Niles, Ohio and Enterprise Group Planning, Inc. against Plaintiff, at ¶10.

{¶39} Callihan raised, inter alia, the following affirmative defense: "Defendant's claims for subrogation and reimbursement fail for want of consideration." Reply to Counterclaim, at ¶11.

{¶40} It is a basic principle of contract law that "a contract is not binding unless supported by consideration." *Lake Land Emp. Group of Akron, LLC v. Columber*, 101 Ohio St.3d 242, 2004-Ohio-786, at ¶16 (citations omitted). "Gratuitous promises are not enforceable as contracts, because there is no consideration." *Cunningham v. Miller*, 11th Dist. No. 2009-T-0092, 2010-Ohio-2526, at ¶18 (citation omitted).

{¶41} The appellants' argument presupposes that the Benefit Plan constitutes a legally enforceable contract. The plain language of the Plan, however, unequivocally demonstrates that the appellants did not intend to be bound by its terms and conditions and that the benefits paid were gratuitous in nature. For this reason, the appellants may

not rely upon those terms and conditions to compel Callihan to reimburse them with the funds recovered from her uninsured motorist carrier.

{¶42} According to the Benefits Plan, Callihan was an eligible dependent as the spouse of an employee working full time. Summary Plan Description, at 15. However, the Plan itself did not form part of the employment contract with Callihan's husband. The Plan expressly states otherwise:

> **{¶43}** The Plan is not a Contract. The Plan shall not be deemed to constitute a contract between the Employer and any covered individual, or be a consideration for or an inducement or condition of the employment of any covered individual. Nothing in the Plan shall be deemed to give any covered individual the right to be retained in the service of the Company, or to interfere with the right of the Employer to discharge any covered individual at any time, with or without cause. In addition, the Employer reserves the right to modify, suspend or end the Plan at any time.

Summary Plan Description, at 1.

{¶44} This language unambiguously establishes the gratuitous nature of the benefits paid pursuant to the terms of the Plan. The city did not consider itself bound by the terms of the Plan, inasmuch as it expressly reserved "the right to modify, suspend or end the Plan at any time." As the Ohio Supreme Court has stated, "[w]here there is no binding promise, there can be no contract." *Bretz v. Union Cent. Life Ins. Co.* (1938), 134 Ohio St. 171, 177; *Carlisle v. T & R Excavating, Inc.* (1997), 123 Ohio App.3d 277, 283 ("[a] written gratuitous promise, even if it evidences an intent by the promisor to be bound, is not a contract") (citation omitted); *Fennessey v. Mount Carmel Health Sys., Inc.*, 10th Dist. No. 08AP-983, 2009-Ohio-3750, at ¶24 ("[c]ourts have *** considered the right to unilaterally alter an employee handbook as an indication of lack of mutual assent") (citation omitted).

{¶45} As the Benefits Plan at issue herein was not considered binding by the parties, the appellants may not rely upon its terms to enforce their right of subrogation.

{¶46} In the absence of an enforceable contractual provision establishing their right to priority, the appellants' right of reimbursement is subject to the make-whole doctrine. *N. Buckeye Edn. Council Group Health Benefits Plan v. Lawson*, 103 Ohio St.3d 188, 2004-Ohio-4886, at ¶10 (citations omitted).

{¶47} Since the plain language of the Benefits Plan asserts that it is not a contract, is not an inducement or consideration for employment, and is not binding, I cannot concur in a judgment that treats this document as a valid contract. This court has full authority to conduct a de novo review of the document before us, by virtue of the judgment under review being a grant of summary judgment and the issue before us being one of contract interpretation. The Ohio Supreme Court has repeatedly held "that nothing prevents a court of appeals from passing upon an error which was neither briefed nor pointed out by a party." *State v. 1981 Dodge Ram Van* (1988), 36 Ohio St.3d 168, 170 (citations omitted). At a minimum, the parties should be instructed to address this issue on appeal through supplementary briefing, rather than remanding the case to allow Callihan the opportunity of raising additional arguments regarding the conscionability of the Plan. *C. Miller Chevrolet, Inc. v. Willoughby Hills* (1974), 38 Ohio St.2d 298, 301, fn. 3 ("[i]n fairness to the parties, a Court of Appeals which contemplates a decision upon an issue not briefed should *** give the parties notice of its intention and an opportunity to brief the issue").

{¶48} Therefore, I respectfully dissent.