**[Cite as *Unternaher v. Heath*, 2015-Ohio-3069.]**

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

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| GREG UNTERNAHER, ET AL. | : | JUDGES: |
| | : | |
| | : | Hon. Sheila G. Farmer, P.J. |
| Plaintiffs-Appellants | : | Hon. John W. Wise, J. |
| | : | Hon. Patricia A. Delaney, J. |
| -vs- | : | |
| | : | Case No. 14-CA-108 |
| | : | |
| HEATHER HEATH, ET AL. | : | |
| | : | |
| | : | |
| Defendants-Appellees | : | O P I N I O N |

CHARACTER OF PROCEEDING: Appeal from the Licking County Court of Common Pleas, Case No. 12 CV 486

JUDGMENT: DISMISSED

DATE OF JUDGMENT ENTRY: July 28, 2015

APPEARANCES:

For Plaintiffs-Appellants:

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*Delaney, J.*

{¶1} Plaintiffs-Appellants Greg Unternaher and Brenda Unternaher appeal the December 1, 2014 judgment entry of the Licking County Court of Common Pleas.

**FACTS AND PROCEDURAL HISTORY**

{¶2} Plaintiff-Appellant Greg Unternaher was involved in two separate motor vehicle accidents, the first occurring on April 27, 2010, and the second on July 17, 2010. Unternaher sought medical treatment after the accidents for low back pain, left and right side shoulder pain, and neck pain.

{¶3} At the time of the accidents, Unternaher was the named insured under an automobile liability policy issued by Defendant-Appellee Liberty Mutual Insurance Company. Unternaher's former attorney recommended that Unternaher file his medical bills with Liberty Mutual. The automobile liability policy provided medical payments coverage pursuant to the following terms:

> We will pay reasonable expenses incurred for necessary medical and funeral services because of "bodily injury":
>
> 1. Caused by accident; and
>
> 2. Sustained by an "insured".
>
> We will pay only those expenses incurred for services rendered within 3 years from the date of the accident.

The insured was entitled to medical payments coverage up to $25,000 per accident.

{¶4} On April 11, 2012, Greg and Brenda Unternaher filed a complaint against Defendants-Appellees Heather Heath, Renee Schlosser, and Liberty Mutual. In the complaint, the Unternahers alleged that on April 27, 2010, Heath negligently operated

her motor vehicle and struck Greg Unternaher's motor vehicle from behind, causing him bodily injury. The Unternahers next claimed Schlosser negligently operated her motor vehicle on July 16, 2010 and struck Greg Unternaher's motor vehicle from behind, causing him bodily injury. The Unternahers finally alleged in their sixth cause of action, that at the time of the accidents they were the named insureds under the Liberty Mutual automobile liability policy. They claimed they might be entitled to uninsured or underinsured motorists coverage benefits pursuant to the terms of the policy. They further argued they were entitled to recover for medical expenses incurred under the medical payments coverage of the policy.

{¶5} On May 7, 2012, Liberty Mutual filed its answer to the Unternahers' complaint. In its answer, it argued the Unternahers were not entitled to UM/UIM coverage. Liberty Mutual filed a cross-claim against Heath and Schlosser on August 14, 2012. In the cross-claim, Liberty Mutual stated that if damages were awarded to the Unternahers, Liberty Mutual was entitled to judgment for subrogation against Heath and Schlosser for medical payments coverage paid pursuant to the terms of the policy.

{¶6} Liberty Mutual filed a motion for summary judgment on September 11, 2014. In the motion, Liberty Mutual argued that pursuant to the terms of the automobile liability policy in effect at the time of the accidents, it was entitled to reimbursement of $42,369.00 paid in medical payment coverage on behalf of Greg Unternaher. The Liberty Mutual automobile liability policy states as to its right to recover payment:

**OUR RIGHT TO RECOVER PAYMENT**

A. If we make a payment under this policy and the person to or for whom payment was made has a right to recover damages from another we shall be subrogated to that right. That person shall do:

1. Whatever is necessary to enable us to exercise our rights; and

2. Nothing after loss to prejudice them.

* * *

B. If we make a payment under this policy and the person to or for whom payment is made recovers damages from another, that person shall:

1. Hold in trust for us the proceeds of the recovery; and

2. Reimburse us to the extent of our payment.

In support of the motion for summary judgment, Liberty Mutual submitted Request for Admissions deemed admitted by the Unternahers' failure to respond to the requests for admissions within 28 days of service. The Request for Admissions stated that Liberty Mutual paid $42,369.00 in medical bills on behalf of Greg Unternaher. The motion argued Liberty Mutual was entitled to judgment as a matter of law that it should be reimbursed the full amount of its medical payments in the event the Unternahers were compensated in any manner by Heath and/or Schlosser.

{¶7} On October 8, 2014, the Unternahers filed a motion for continuance and extension of time. Counsel for the Unternahers argued he did not receive Liberty Mutual's electronic transmission of the Request for Admissions. He requested additional time to respond to the Request for Admissions and the motion for summary judgment.

{¶8} The trial court granted the Unternahers additional time to respond to the Request for Admissions and the motion for summary judgment.

{¶9} The Unternahers filed their response to the motion for summary judgment on November 5, 2014. The Unternahers first contended that in their responses to the Request for Admissions, they were unable to admit or deny the amount of medical bills paid by Liberty Mutual on Greg Unternaher's behalf because they did not have a summary of the medical bills submitted to and paid by Liberty Mutual. The Unternahers next argued they did not dispute Liberty Mutual's right to recover payment as expressed in the automobile liability policy; however, Liberty Mutual's contention it was to be reimbursed if the Unternahers were compensated in any manner violated the "make whole doctrine." The Unternahers contended if the trial court granted Liberty Mutual's motion for summary judgment, Liberty Mutual would be granted priority over the Unternahers' right of recovery against Heath and Schlosser.

{¶10} On November 6, 2014, the trial court granted Liberty Mutual's motion for summary judgment.

{¶11} The trial court issued a nunc pro tunc judgment entry granting summary judgment in favor of Liberty Mutual on December 1, 2014. The judgment entry stated, "* * * Plaintiff Greg Unternaher shall reimburse Defendant Liberty Mutual Insurance Company for the medical payments made on his behalf, up to the amount of $42,369.00 from any proceeds awarded to plaintiff at trial or in settlement of this case." The nunc pro tunc judgment entry included the Civ.R. 54(B) language of "no just cause for delay."

{¶12} The Unternahers appealed the December 1, 2014 judgment entry. The underlying case was stayed on December 8, 2014.

## ASSIGNMENT OF ERROR

{¶13} The Unternahers raise one Assignment of Error:

{¶14} "SUMMARY JUDGMENT IN FAVOR OF A SUBROGATED INSURANCE CARRIER IS IMPROPER WHEN A GENUINE ISSUE OF MATERIAL FACT EXISTS AS TO WHETHER PAYMENTS WERE MADE AND WHEN THE JUDGMENT GIVES THEM PRIORITY OVER THE INSURED PARTY'S RIGHT OF RECOVERY."

## ANALYSIS

### *Final and Appealable Order*

{¶15} The first issue we must examine is whether this court has jurisdiction over the Unternahers' appeal. Although not an issue raised by either party, this Court must sua sponte address whether the December 1, 2014 judgment entry is a final and appealable order ripe for review. *State ex rel. White v. Cuyahoga Metro. Hous. Aut.,* 79 Ohio St.3d 543, 544, 1997–Ohio–366, 684 N.E.2d 72. An appellate court has jurisdiction to review and affirm, modify, or reverse judgments or final orders of the trial courts within its discretion. *See* Section 3(B)(2), Article IV, Ohio Constitution; *see also* R.C. 2505.02. If an order is not final and appealable, the appellate court is without jurisdiction to review the matter and must dismiss the appeal. *Gen. Acc. Ins. Co. v. Ins. Co. of N. Am.,* 44 Ohio St.3d 17, 20, 540 N.E.2d 266 (1989).

{¶16} A trial court order is final and appealable if it meets the requirements of R.C. 2505.02, and, if applicable, Civ.R. 54(B). R.C. 2505.02(B) provides the following:

> (B) An order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is one of the following:

> (1) An order that affects a substantial right in an action that in effect determines the action and prevents a judgment;

A substantial right is "a right that the United States Constitution, the Ohio Constitution, a statute, the common law, or a rule of procedure entitles a person to enforce or protect." R.C. 2502.02(A)(1). "An order that affects a substantial right is one which, if not immediately appealable, would foreclose appropriate relief in the future." *Nationwide Ins. Co. v. M.B. Roofing Sys., Inc*., 10th Dist. Franklin No. 12AP-44, 2012-Ohio-6195, ¶ 8 quoting *Epic Properties v. OSU LaBamba, Inc*., 10th Dist. Franklin No. 07AP-44, 2007-Ohio-5021, ¶ 13.

{¶17} Therefore, to qualify as final and appealable, the trial court's order must satisfy the requirements of R.C. 2505.02, and if the action involves multiple claims and/or multiple parties and the order does not enter a judgment on all the claims and/or as to all parties, the order must satisfy Civ.R. 54(B) by including express language that “there is no just reason for delay.” *Intl. Bd. of Electrical Workers, Local Union No. 8 v. Vaughn Indus., L.L.C.,* 116 Ohio St.3d 335, 2007–Ohio–6439, 879 N.E.2d 187, ¶ 7, citing *State ex rel. Scruggs v. Sadler,* 97 Ohio St.3d 78, 2002–Ohio–5315, 776 N.E.2d 101, ¶ 5–7. Civ.R. 54(B) requires a court to make an express determination there is no just reason for delay in order to make appealable an order adjudicating fewer than all the claims or the rights of fewer than all the parties. Civ.R. 54(B) must be followed when a case involves multiple claims or multiple parties. *State ex rel. A & D Ltd. Partnership v. Keefe,* 77 Ohio St.3d 50, 56, 671 N.E.2d 13 (1996). However, “the mere incantation of the required language does not turn an otherwise non-final order into a final appealable order.” *Noble v. Colwell*, 44 Ohio St.3d 92, 96, 540 N.E.2d 1381 (1989).

{¶18} In its motion for summary judgment, Liberty Mutual argued that pursuant to the terms of the automobile liability policy in effect at the time of the accidents, it was entitled to reimbursement of $42,369.00 paid in medical payment coverage on behalf of Greg Unternaher. Liberty Mutual did not file a counterclaim against the Unternahers for its claim for reimbursement pursuant to the terms of the automobile liability policy nor did Liberty Mutual file a declaratory judgment action as to its claim for reimbursement. Liberty Mutual filed a cross-claim against Heath and Schlosser, claiming that if damages were awarded to the Unternahers, Liberty Mutual was entitled to judgment for subrogation against Heath and Schlosser for medical payments coverage paid pursuant to the terms of the policy.

{¶19} The trial court granted the motion for summary judgment to find that Liberty Mutual was entitled to reimbursement from the Unternahers up to $42,369.00. At the time of the December 1, 2014 judgment, the issue of liability as to Heath and Schlosser was not determined. The trial court stayed the case upon the Unternahers' appeal of the December 1, 2014 judgment entry.

{¶20} The Tenth District Court of Appeals considered whether an order granting summary judgment on a cross-claim for indemnity or contribution was a final order in *Nationwide Mut. Fire Ins. Co. v. M.B. Roofing Sys., Inc.,* 10th Dist. Franklin No. 12AP-44, 2012-Ohio-6195. In that case, liability on the main claim was not yet been determined. *Id*. at ¶ 11. The 10th District Court of Appeals determined the judgment entry granting summary judgment on the issue of indemnity or contribution was not a final order even though the judgment entry included the trial court's certification that there was no just reason for delay. *Id*. at ¶ 10. It held that because the issue of liability

on the main claim remained unresolved, the question of whether a party was entitled to indemnity or contribution could be moot if the parties failed to establish liability for damages. *Id*. at ¶ 11. It further held the parties would not be denied effective relief if the summary judgment order was not subject to immediate review because it could seek a review of that order as part of any appeal from a final judgment on the main claim for liability. *Id*. Therefore, the judgment did not affect a substantial right by foreclosing appropriate relief in the future if it was not subject to immediate appeal. The 10th District Court of Appeals concluded the judgment entry was not a final order under R.C. 2505.02(B). *Id*.

{¶21} We find the holding of *Nationwide Mut. Fire Ins. Co. v. M.B. Roofing Sys., Inc*. is persuasive in this case. Liability has not been determined in this case. Liability and the determination of damages could implicate the applicability of the "make whole doctrine," as raised by the Unternahers. 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 set-off from the limits of its coverage *until the insured has been fully compensated* for his injuries.'" (Emphasis sic.) *Callihan v. Niles*, 7th Dist. Trumbull No. 2011-T-0025, 2012-Ohio-38, ¶ 17 citing *N. Buckeye Edn. Council Group Health Benefits Plan v. Lawson,* 103 Ohio St.3d 188, 2004–Ohio–4886, 814 N.E.2d 1210, ¶ 25, quoting *James v. Michigan Mut. Ins. Co.*, 18 Ohio St.3d 386, 388, 481 N.E.2d 272 (1985). However, the 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, 481 N.E.2d 272. 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.

{¶22} We find the December 1, 2014 judgment entry, irrespective of the inclusion of the language in the order indicating there was no just reason for delay, is not a final order. We lack jurisdiction to consider the merits of the appeal. Accordingly, we sua sponte dismiss this appeal and remand the matter to the trial court for further proceedings.

**CONCLUSION**

{¶23} The appeal of the December 1, 2014 judgment entry of the Licking County Court of Appeals is sua sponte dismissed.

{¶24} The matter is remanded to the trial court.

By: Delaney, J.,

Farmer, P.J. and

Wise, J., concur.