[Cite as *NaphCare, Inc. v. Cty. Council of Summit Cty.*, 2010-Ohio-4458.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

NAPHCARE, INC. Appellant v. COUNTY COUNCIL OF SUMMIT COUNTY OHIO, et al. Appellees	C. A. No. 24906 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CV 2006-09-5693

DECISION AND JOURNAL ENTRY

Dated: September 22, 2010

BELFANCE, Presiding Judge.

{¶1} Plaintiff-Appellant NaphCare, Inc. appeals the judgment of the Summit County Court of Common Pleas which denied its motion for summary judgment and granted summary judgment in favor of Defendants-Appellees Summit County, County Council of Summit County, Summit County Board of Control, James B. McCarthy, Russell Pry, John Donofrio, Summit County Sheriff's Office, and John Doe Employees, Officials, and Agencies of Summit County (collectively "the County"). For the reasons set forth below, we affirm.

BACKGROUND

{¶2} NaphCare is an Alabama-based provider of managed care services to correctional institutions in various states. After a bidding process, NaphCare entered into a contract with Summit County, through the County Executive, and the Sheriff of Summit County, to provide health care services to inmates at the Summit County Jail in 2004. The 2004 contract provided that the County would pay NaphCare a base compensation of $1,563,110.40, assuming an inmate

population not to exceed 660. Per diem rates were provided for in the contract if the inmate population exceeded that number. The base compensation was to be paid in equal monthly installments. The contract also contained provisions for what is labeled as "Aggregate Cap Services[.]" Aggregate cap services included inpatient hospitalization, x-rays, ambulance services, outpatient procedures, emergency room services, eye laboratory services, off-site physician services, on-site specialty clinics, clinical laboratory services, and pharmaceuticals. These services were only to be provided "as a result of emergency circumstances or when deemed medically necessary by NaphCare's medical personnel." The contract provided that NaphCare would be liable for $150,000 of costs associated with aggregate cap services. Under the contract, the County would be responsible for reimbursing NaphCare for any amount exceeding $150,000. The County agreed to pay NaphCare monthly for amounts exceeding the $150,000 after receiving a "detailed invoice" from NaphCare. Attached to, and part of the contract, was "Exhibit A" which included NaphCare's proposal and revised proposal. Also attached to the contract was a purchase order from Summit County for $390,777.60, the equivalent of the cost of three months due under the contract for the base compensation. The purchase order dated September 16, 2004, included at the bottom, a certification signed by the Summit County Fiscal Officer certifying that the money to meet the obligation in the order had been lawfully appropriated. There is no dispute that the County paid the base compensation due under the 2004 contract.

{¶3} In November 2005, the County renewed the contract for an additional year, as provided under the original contract. The term was to begin on September 30, 2005 and end on September 30, 2006. The base compensation due for the second year was $1,641,266. The other terms of the contract, including the aggregate cap services provisions, largely remained

unchanged. Attached to the renewal, was a similar purchase order with a similar certification, this time for $410,316.51, or the equivalent of three payments due pursuant to the base compensation rates. There is no dispute that the County paid the base compensation due under the 2005 contract.

{¶4} NaphCare terminated the contract on August 8, 2006 due to the County's alleged failure to pay for the costs of aggregate cap services exceeding $150,000.[1] NaphCare filed the instant suit on September 12, 2006 alleging claims for breach of contract, conversion, unjust enrichment, and fraud. NaphCare sought over $700,000 in damages. The County filed an answer denying the majority of the allegations. The County subsequently filed multiple amended answers. Initial motions for summary judgment were held in abeyance.

{¶5} On May 11, 2009, NaphCare renewed its motion for summary judgment and the County filed a new motion for summary judgment. Both parties responded to the other's respective motion. The County contended in its motion that the contract was void as NaphCare was seeking to recover an amount not certified by the County as required by R.C. 5705.41(D)(1). The County attached multiple purchase orders for various amounts, each containing certifications by the fiscal officer, and an affidavit attesting to the accuracy of the purchase orders. On May 14, 2009, NaphCare filed an amended complaint and thereafter the County filed an answer in response. NaphCare then filed a "Partial Dismissal Entry of Two Claims[.]"

{¶6} The trial court granted summary judgment to the County concluding that the contract was void and that NaphCare could not recover on its claim for unjust enrichment and

[1] NaphCare asserts that because the 2005 renewal contract was terminated two months prior to the stated term, the County is responsible for the costs of aggregate cap services exceeding $125,000 during the 2005 term.

denied NaphCare's motion for summary judgment. NaphCare appealed. This Court questioned the finality of the order due the lack of Civ.R. 54(B) language and NaphCare's ineffective attempt to dismiss only two of its claims. The trial court issued an entry granting the County summary judgment on all of NaphCare's claims and included Civ.R. 54(B) language. This Court granted NaphCare's motion to amend the notice of appeal.

{¶7} NaphCare has raised a single assignment of error for our review, in which it asserts that the trial court erred in awarding summary judgment to the County and in denying NaphCare's summary judgment motion.

SUMMARY JUDGMENT

{¶8} We review an award of summary judgment de novo. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105. "Pursuant to Civ.R. 56(C), summary judgment is appropriately rendered when '(1) [n]o 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.'" *Turner v. Turner* (1993), 67 Ohio St.3d 337, 339-340, quoting *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327.

{¶9} On a motion for summary judgment, the moving party has the burden of demonstrating that no genuine issues of material fact exist. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 292. The burden then shifts to the nonmoving party to provide evidence showing that a genuine issue of material fact does exist. Id. at 293.

R.C. 5705.41

{¶10} R.C. 5705.41(D)(1) provides that:

> "No subdivision or taxing unit shall * * * [e]xcept as otherwise provided in division (D)(2) of this section and section 5705.44 of the Revised Code, make any contract or give any order involving the expenditure of money unless there is attached thereto a certificate of the fiscal officer of the subdivision that the amount required to meet the obligation or, in the case of a continuing contract to be performed in whole or in part in an ensuing fiscal year, the amount required to meet the obligation in the fiscal year in which the contract is made, has been lawfully appropriated for such purpose and is in the treasury or in process of collection to the credit of an appropriate fund free from any previous encumbrances. This certificate need be signed only by the subdivision's fiscal officer. Every such contract made without such a certificate shall be void, and no warrant shall be issued in payment of any amount due thereon. If no certificate is furnished as required, upon receipt by the taxing authority of the subdivision or taxing unit of a certificate of the fiscal officer stating that there was at the time of the making of such contract or order and at the time of the execution of such certificate a sufficient sum appropriated for the purpose of such contract and in the treasury or in process of collection to the credit of an appropriate fund free from any previous encumbrances, such taxing authority may authorize the drawing of a warrant in payment of amounts due upon such contract, but such resolution or ordinance shall be passed within thirty days after the taxing authority receives such certificate; provided that, if the amount involved is less than one hundred dollars in the case of counties or three thousand dollars in the case of all other subdivisions or taxing units, the fiscal officer may authorize it to be paid without such affirmation of the taxing authority of the subdivision or taxing unit, if such expenditure is otherwise valid."

{¶11} In discussing a substantially similar prior version of the statute, the Supreme Court stated that:

> "The purpose in requiring such certificate to be made and in prohibiting public officials entering into any such contracts unless such certificate is first made is clearly to prevent fraud and the reckless expenditure of public funds, but particularly to preclude the creation of any valid obligation against the county above or beyond the fund previously provided and at hand for such purpose. Such provisions have frequently been held mandatory, and compliance therewith an absolutely essential prerequisite. In the absence of such compliance no valid contract can be entered into." *State v. Kuhner* (1923), 107 Ohio St. 406, 413-414.

Thus, where a certificate is required, failure to include one is fatal to the validity of the contract. Id.; R.C. 5705.41(D)(1).

{¶12} NaphCare essentially makes two arguments as to why a certificate was not required and thus, how the trial court erred in concluding the contract with the County is void pursuant to R.C. 5705.41. First, NaphCare asserts that a conflict exists between R.C. 341.20 and R.C. 5705.41 and that there is no evidence that the General Assembly intended R.C. 5705.41 to apply to the type of contract at issue. Second, NaphCare asserts that the certification required pursuant to R.C. 5705.41 does not apply "where compliance would be impractical."

{¶13} We begin by noting that the parties do not dispute that a certificate of available funds provided for in R.C. 5705.41(D) was not issued with, and attached to, the contract to cover the aggregate cap services.

{¶14} NaphCare asserts that R.C. 341.20 is a specific statute and R.C. 5705.41 is a general statute and because the two conflict, pursuant to R.C. 1.51, R.C. 341.20 should control. We disagree as "the Revised Code specifically imposes such a rule of construction only when the conflict between the provisions of the statutes is irreconcilable." *Stout v. Bd. of Trustees of Liverpool Twp.* (Mar. 22, 2000), 9th Dist. No. CA 2907-M, at *3. Thus, the existence of an actual conflict between two statutes is a prerequisite to the application of the statute. See R.C. 1.51. R.C. 1.51 provides that:

> "If a general provision conflicts with a special or local provision, they shall be construed, if possible, so that effect is given to both. If the conflict between the provisions is irreconcilable, the special or local provision prevails as an exception to the general provision, unless the general provision is the later adoption and the manifest intent is that the general provision prevail."

Here, even assuming that R.C. 341.20 is a specific statute and R.C. 5705.41(D) is a general statute we conclude there is no conflict between them.

{¶15} R.C. 341.20 provides in pertinent part that "[t]he board of county commissioners, with the consent of the sheriff, may contract with commercial providers for the provision to

prisoners and other persons of food services, medical services, and other programs and services necessary for the care and welfare of prisoners and other persons placed in the sheriff's charge."

{¶16} Thus, R.C. 341.20 allows the board of county commissioners, with permission of the sheriff, to contract with companies like NaphCare for the provision of medical services in jails and prisons. It does not specify the steps necessary to ensure the validity of that contract. R.C. 5705.41(D)(1) on the other hand provides that *any* contract made by a subdivision or taxing unit "involving the expenditure of money" must have attached to it a certificate by the fiscal officer that the appropriate amount has been appropriated and that the failure to do so renders the contract void. We see no conflict between the two statutes.

{¶17} With respect to NaphCare's argument that the General Assembly did not intend R.C. 5705.41(D)(1) to apply to contracts provided for under R.C. 341.20, we conclude there is no merit to this argument. R.C. 5705.41(D)(1) applies by its own terms "[e]xcept as otherwise provided in division (D)(2) of [the] section and section 5705.44 of the Revised Code" to "any contract" made by a subdivision or taxing unit.

{¶18} NaphCare also argues on appeal that, in this case, issuing a certificate to cover the aggregate cap services would be impractical and thus it was not required. However, NaphCare failed to make this argument in the trial court. This Court has stated that "[i]t is axiomatic that a litigant who fails to raise an argument in the trial court forfeits his right to raise that issue on appeal[.]" *Renacci v. Evans*, 9th Dist. No. 09CA0004-M, 2009-Ohio-5154, at ¶24, quoting *Stefano & Assoc., Inc. v. Global Lending Group, Inc.*, 9th Dist. No. 23799, 2008-Ohio-177, at ¶18. NaphCare has forfeited all but plain error. *Renacci* at ¶24. However, Naphcare has not argued plain error in its brief. Moreover, "[i]n civil cases, the application of the plain error doctrine is reserved for the rarest of circumstances." Id. Therefore, this Court will not address

NaphCare's argument that including a certificate to cover the aggregate cap services would be impractical.

{¶19} Additionally, Naphcare argues that the trial court erred in denying NaphCare's motion for summary judgment with respect to its breach of contract claim. However, in the instant appeal Naphcare has failed to assert an argument warranting the conclusion that the certificate pursuant to R.C. 5705.41 was not required, and thus we cannot say the trial court erred in finding the contract was void. It is clear that NaphCare cannot recover for breach of contract if the contract is void. See *Buchanan Bridge Co. v. Campbell* (1899), 60 Ohio St. 406, 420 (stating that "contracts made in violation or disregard of such statutes are void,-not merely voidable,-and that courts will not lend their aid to enforce such a contract").

UNJUST ENRICHMENT

{¶20} NaphCare also argues that the trial court erred in concluding that NaphCare could not maintain a claim for unjust enrichment against the County. We disagree.

{¶21} As discussed above, certification pursuant to R.C. 5705.41 serves two purposes: (1) "to prevent fraud and the reckless expenditure of public funds[;]" and (2) "to preclude the creation of any valid obligation against the county above or beyond the fund previously provided and at hand for such purpose." *Kuhner*, 107 Ohio St. at 413. Allowing NaphCare to recover funds that were not certified would at the very least circumvent the latter purpose.

{¶22} The Supreme Court has noted that "[a] thread running throughout the many cases the [C]ourt has reviewed is that *the contractor* must ascertain whether the contract complies with the Constitution, statutes, charters, and ordinances so far as they are applicable. If he does not, he performs at his peril." (Emphasis added.) *The Lathrop Co. v. City of Toledo* (1966), 5 Ohio St.2d 165, 173.

> "'An occasional hardship may accrue to one who negligently fails to ascertain the authority vested in public agencies with whom he deals. In such instances, the loss should be ascribed to its true cause, the want of vigilance on the part of the sufferer, and statutes designed to protect the public should not be annulled for his benefit. * * * .'" *Vannucci v. Sheffield Village* (Jan. 10, 1990), 9th Dist. Nos. 89CA004504, 89CA004508, at *3, quoting *McCloud & Geigle v. City of Columbus* (1896), 54 Ohio St. 439, 453.

Thus, the Supreme Court of Ohio has held that "[c]ourts will leave the parties to such unlawful transaction where they have placed themselves, and will refuse to grant relief to either party." *Buchanan Bridge Co*, 60 Ohio St. at syllabus.

{¶23} "It is a long-standing principle of Ohio law that all governmental liability *ex contractu* must be express and must be entered into in the prescribed manner, and that a municipality or county is liable neither on an implied contract nor upon a *quantum meruit* by reason of benefits received." (Emphasis in original; internal quotations and citation omitted.) *Kraft Constr. Co. v. Cuyahoga Cty. Bd. of Commrs.* (1998), 128 Ohio App.3d 33, 44; see, also 20 Ohio Jurisprudence 3d (2001) 246, Counties, Townships, and Municipal Corporations, Section 259.

{¶24} Thus, we can only conclude that the trial did not err in granting summary judgment to the County with respect to NaphCare's claim for unjust enrichment.

CONCLUSION

{¶25} In light of the foregoing, we overrule NaphCare's assignment of error and affirm the judgment of the Summit County Court of Common Pleas.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

EVE V. BELFANCE
FOR THE COURT

CARR, J.
MOORE, J.
CONCUR

APPEARANCES:

MARK F. MCCARTY, ROBERT J. HANNA, and BENJAMIN C. SASSE, Attorneys at Law, for Appellant.

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