[Cite as *Lee v. Stark Cty. Schools Council of Govts.*, 2010-Ohio-3570.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

JULIE A. LEE	JUDGES:
Plaintiff-Appellee	Hon. W. Scott Gwin, P. J. Hon. John W. Wise, J. Hon. Patricia A. Delaney, J.
-vs-	Case No. 2009 CA 00276
STARK COUNTY SCHOOLS COUNCIL OF GOVERNMENTS	
Defendant-Appellant	<u>O P I N I O N</u>

CHARACTER OF PROCEEDING:	Civil Appeal from the Court of Common Pleas, Case No. 2009 CV 02311
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	August 2, 2010

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
STEVEN P. OKEY THE OKEY LAW FIRM 337 Third Street, NW Canton, Ohio 44702-1786	JOHN B. WIRTZ 220 Market Avenue South Suite 600 Canton, Ohio 44702

Wise, J.

{¶1} Defendant-Appellant Stark County Schools Council of Governments appeals the October 15, 2009, decision of the Stark County Court of Common Pleas granting summary judgment in favor of Plaintiff-Appellee Julie A. Lee.

STATEMENT OF THE CASE AND FACTS

{¶2} This case involves a reimbursement provision contained in a health benefits plan (Plan). The relevant facts are as follows:

{¶3} On September 14, 2004, the insured, Plaintiff-Appellee Julie A. Lee was seriously injured in an automobile accident by a third-party tortfeasor. As a result of the accident, Lee suffered a right orbital fracture, injuries to her neck and back, and serious injury to her right knee. The damage to her knee required three operations and left her with a permanent injury and a limp. Lee was 25 years old at the time of the accident. Her life expectancy was determined to be 56.6 years and her medical specials are $182,752.30.

{¶4} At the time of the accident, Lee was an insured under a plan of medical and health insurance issued by Defendant-Appellant Stark County Schools Council of Governments. Defendant-Appellant is a regional council of school districts and related agencies established pursuant to Ohio Revise Code Chapter 167.

{¶5} Lee received benefits under the Plan in the amount of $155,921.19 for medical expense resulting from the above accident.

{¶6} Ms. Lee brought suit against the tortfeasor and, on February 23, 2009, she settled her claim with the tortfeasor for his liability insurance limits of $250,000.00.

{¶7} As a result of the above settlement, Defendant-Appellant demanded that Lee repay the full $155,921.19 pursuant to its right of reimbursement.

{¶8} On June 12, 2009, Plaintiff-Appellee filed a declaratory judgment action seeking a determination as to the rights and obligations of the parties with regard to the reimbursement and subrogation provisions contained in Defendant-Appellant's benefit plan.

{¶9} Defendant-Appellant filed a counter-claim seeking a declaratory judgment and setting forth a claim for breach of contract.

{¶10} On August 31, 2009, Plaintiff-Appellee filed a motion for summary judgment, followed by Defendant-Appellant's Response, Plaintiff-Appellee's Reply and Defendant-Appellant's Sur-Reply.

{¶11} By judgment Entry filed October 15, 2009, the trial court granted Plaintiff-Appellee's Motion for summary judgment.

{¶12} Appellant now appeals, assigning the following error for review:

ASSIGNMENT OF ERROR

{¶13} "I. THE TRIAL COURT COMMITTED ERROR BY GRANTING SUMMARY JUDGMENT ON THE ISSUE OF WHETHER THE SUBROGATION AND REIMBURSEMENT CLAUSE IS ENFORCEABLE IN LIGHT OF THE MAKE-WHOLE DOCTRINE."

I.

{¶14} In its sole assignment of error, Appellant asserts that the trial court erred in granting Appellee's motion for summary judgment. We disagree.

{¶15} Specifically, Appellant asserts that the trial court should have made a specific monetary finding as to Appellee's total damages and further, that it should have considered the payments made by Appellant in its determination of the total compensation received by Appellee.

{¶16} Summary judgment proceedings present the appellate court with the unique opportunity of reviewing the evidence in the same manner as the trial court. *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St.3d 35, 36. Civ.R. 56(C) provides, in pertinent part:

{¶17} "Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. * * * A summary judgment shall not be rendered unless it appears from such evidence or stipulation and only therefrom, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, such party being entitled to have the evidence or stipulation construed most strongly in his favor."

{¶18} Pursuant to the above rule, a trial court may not enter a summary judgment if it appears a material fact is genuinely disputed. The party moving for summary judgment bears the initial burden of informing the trial court of the basis for its motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact. The moving party may not make a conclusory assertion that the non-moving party has no evidence to prove its case. The moving party must

specifically point to some evidence which demonstrates the non-moving party cannot support its claim. If the moving party satisfies this requirement, the burden shifts to the non-moving party to set forth specific facts demonstrating there is a genuine issue of material fact for trial. *Vahila v. Hall*, 77 Ohio St.3d 421, 429, 1997-Ohio-259, citing *Dresher v. Burt*, 75 Ohio St.3d 280, 1996-Ohio-107.

{¶19} It is based upon this standard that we review Appellant's assignments of error.

{¶20} The issues before the trial court in the case sub judice centered around the applicability if the "make-whole doctrine", which provides that "unless the terms of a subrogation agreement clearly and unambiguously provide otherwise, a health insurer's subrogation interests will not be given priority where doing so will result in less than a full recovery to the insured." *Northern Buckeye Edn. Council Group Health Benefits Plan v. Lawson* (2003), 154 Ohio App.3d 659, 664, 798 N.E.2d 667, 2003-Ohio-5196, affirmed 103 Ohio St.3d 188, 814 N.E.2d 1210, 2004-Ohio-4886 (emphasis added). Thus, as a general rule, an insured must be "made whole" before the insurer may claim reimbursement. *Acuff v. Motorists Mut. Ins. Co.,* 10th Dist. No. 06AP-613, 2007-Ohio-938, ¶ 21.

{¶21} The policy herein provided:

{¶22} "**Subrogation (Right of Reimbursement)**

{¶23} "In the event benefits are paid for charges incurred by an employee as a result of accidental bodily injury or disease sustained by such employee or any of his insured dependents,

{¶24} "a. the employee shall reimburse the Plan to the extent of such benefit payments,

{¶25} "(1) out of any recovery by the employee (whether by settlement, judgement [sic] or otherwise) from any person or organization responsible for causing such injury or disease, or from their insurers, and the Plan shall have a lien upon any such recovery, or

{¶26} "(2) if the insured dependent recovers from the person or organization responsible for causing such injury or disease, or recovers from their insurers, but in no event shall such employee be required to make reimbursement in any amount exceeding the recovery made by him or his insured dependent from the person or organization responsible for causing the injury or disease, or made from their insurers.

{¶27} "b. the employee or Dependent shall execute and deliver such instruments and papers as may be required by the Plan Administrator and do whatever else is necessary to secure the rights of the Plan under (a) above."

{¶28} As an initial matter, this Court would note that while the terms subrogation and reimbursement have been used interchangeably throughout this action, and in many other cases, there is a significant difference between subrogation and reimbursement. "While subrogation and reimbursement may have similar effects, they are distinct doctrines." *Unisys Medical Plan v. Timms,* 98 F.3d 971, 973 (7th Cir.1996). "Unlike subrogation, which arises under state law and allows the insurer to stand in the shoes of its insured, reimbursement is a contractual right governed by ERISA and comes into play only after a plan member has received personal injury compensation." *Id.; Provident Life and Accident Ins. Co. v. Williams,* 858 F.Supp. 907, 911

(W.D.Ark.1994) ("While subrogation and reimbursement are similar in their effect, they are different doctrines. With subrogation, the insurer stands in the shoes of the insured. With reimbursement, the insurer has a direct right of repayment against the insured. As a matter of logic and case law, a party can have one right, but not the other.") Because subrogation and reimbursement are distinct doctrines, it is possible to find a subrogation clause in a plan to be ambiguous and a reimbursement clause to be unambiguous. Consequently, the make-whole rule may be applied to one provision and not the other." In the instant case, Appellant is asserting a right of reimbursement.

{¶29} In the case below, in applying the "make-whole" doctrine the trial court found that the "Subrogation (Right of Reimbursement)" clause contained in the Plan policy failed to establish the Plan's priority and further failed to address the issue of full compensation.

{¶30} The trial court then went on to find, based upon an affidavit submitted by Appellee detailing her injuries, medical care, surgeries, treatment, therapy and required pain management, along with a declaration that she has not been fully compensated for her injuries. Also attached to Appellee's motion for summary judgment were affidavits by Attorney Stan Rubin and Attorney Michael Zirpolo, stating that in their extensive experience in personal injury litigation, including settlement and valuation, Appellee's claim for personal injuries far exceeds the $250,000.00 limits of liability settlement she received from the tortfeasor's insurance company.

{¶31} As set forth above, once the moving party satisfies their initial burden of informing the trial court of the basis for its motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact, the burden

shifts to the non-moving party to set forth specific facts demonstrating there is a genuine issue of material fact for trial. *Vahila v. Hall, supra.*

{¶32} Upon review, we find that Appellant failed to set forth any evidence to meet this burden. Appellant, in its brief, even states that it does not dispute any of the facts as set forth in Appellee's motion for summary judgment, instead focusing on the fact that the trial court did not include in its finding a specific, numeric total damages determination. Appellant argues that it would be entitled to any amount of money recovered by Appellee in excess of such total damages.

{¶33} Upon review, while we find that the only specific monetary amounts delineated in the trial court's judgment entry were the $182,752.32 in medical bills and the $250,000.00 recovery from the tortfeasor, the trial court did find, based on the unrebutted evidence of Appellee, that her damages were in excess of $250,000.00 and that she had not been fully compensated.

{¶34} Additionally, we find that the trial court did not err in not including the $155,921.19 in medical payments received by Appellant to her total recovery amount. Appellant herein was contractually obligated to make these medical payments on behalf of Appellee, regardless of whether there was a third party liable for damages to Appellee.

{¶35} Further, as set forth above, the Plan limits its right of reimbursement to "any recovery by the employee … from any person or organization responsible for causing such injury...".

{¶36} Based on the foregoing, we find that that the trial court did not err in granting Appellee's motion for summary judgment and in finding that Appellee herein, based on the evidence presented, had not been fully compensated for her injuries.

{¶37} Appellant's sole assignment of error is overruled.

{¶38} For the reasons stated in the foregoing opinion, the judgment of the Court of Common Pleas, Stark Count, Ohio, is affirmed.

By: Wise, J.

Gwin, P. J., and

Delaney, J., concur.

/S/ JOHN W. WISE

/S/ W. SCOTT GWIN

/S/ PATRICIA A. DELANEY

JUDGES

JWW/d 0630

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

JULIE A. LEE	:	
	:	
Plaintiff-Appellee	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
STARK COUNTY SCHOOLS COUNCIL OF GOVERNMENTS	;	
	:	
	:	
Defendant-Appellant	:	Case No. 2009 CA 00276

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Stark County, Ohio, is affirmed.

Costs assessed to Appellant.

/S/ JOHN W. WISE____________________

/S/ W. SCOTT GWIN__________________

/S/ PATRICIA A. DELANEY____________

JUDGES