

D110328885

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

MONTGOMERY COUNTY, :
Plaintiff-Appellee, :
vs. :
ERIC C. DETERS, :
ERIC C. DETERS & PARTNERS, PSC, :
WILLIAM ANGEL, SR., :
REGINA ANGEL, :
WILLIAM ANGEL, JR., :
and :
JOSEPHINE ANGEL, :
Defendants-Appellants. :

APPEAL NO. C-140266
TRIAL NO. A-1300426

JUDGMENT ENTRY.

ENTERED
APR 22 2015

This cause was heard upon the appeal, the record, the briefs, and arguments.

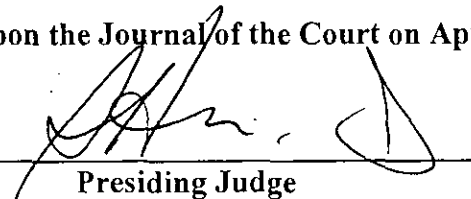
The judgment of the trial court is affirmed for the reasons set forth in the Opinion filed this date.

Further, the court holds that there were reasonable grounds for this appeal, allows no penalty and orders that costs are taxed under App. R. 24.

The court further orders that 1) a copy of this Judgment with a copy of the Opinion attached constitutes the mandate, and 2) the mandate be sent to the trial court for execution under App. R. 27.

To The Clerk:

Enter upon the Journal of the Court on April 22, 2015 per Order of the Court.

By: 
Presiding Judge

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OPINION.

**PRESENTED TO THE CLERK
OF COURTS FOR FILING**

APR 22 2015

COURT OF APPEALS

Civil Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: April 22, 2015

Ulmer & Berne, LLP, Jennifer Hageman and Alyson Terrell, for Plaintiff-Appellee,

Stephanie L. Collins, for Defendants-Appellants.

Please note: this case has been removed from the accelerated calendar.

MOCK, Judge.

{¶1} In one assignment of error, defendants-appellants Eric C. Deters, Eric C. Deters & Partners, PSC, William Angel, Sr., Regina Angel, William Angel, Jr., and Josephine Angel appeal the decision of the trial court, granting summary judgment in favor of plaintiff-appellee Montgomery County. For the reasons set forth below, we affirm.

Automobile Accident Leads to Settlement, Insurance Payments

{¶2} William and Regina Angel are married and have two children, William, Jr., and Josephine. On July 30, 2009, the Angel family was in an automobile accident caused by Michael Nagel. All four members of the family sustained injuries. At the time of the accident, William Angel was an employee of Montgomery County, Ohio. As a benefit of his employment, Mr. Angel had health insurance for himself and his family through a plan operated by the county. The plan contained the following provisions:

[I]f a Covered Person receives any payment from any Responsible Party or Insurance Coverage as a result of an injury, illness or condition, the plan has the right to recover from, and be reimbursed by, the Covered Person for all amounts the plan has paid and will pay as a result of that injury, illness or condition, from such payment, up to and including the full amount the Covered Person receives from any Responsible Party.

* * *

This plan shall be entitled to full reimbursement on a first-dollar basis from any Responsible Party's payments, even if

such payment to the Plan will result in a recovery to the Covered Person which is insufficient to make the Covered Person whole or to compensate the Covered Person in part or in whole for the damages sustained.

* * *

For purposes of this provision, the term Insurance Coverage refers to any coverage providing medical expense coverage or liability coverage including, but not limited to, uninsured motorist coverage, underinsured motorist coverage, * * * or any first party Insurance Coverage.

{¶3} The Angel family received treatment for the injuries they sustained, and their health-insurance plan paid \$63,513.89 of those expenses. A few months after the accident, Montgomery County put the Angel family on notice that it claimed a lien on any proceeds that they might receive from a third party as a result of injuries they sustained in the accident. In March of 2010, the Angel Family hired attorney Eric Deters and his law firm to represent them in a lawsuit against State Farm Insurance Company. State Farm was their automobile insurance company, and the Angels were seeking compensation under their underinsured-motorist provision, because the party who caused the accident was underinsured. The matter was quickly settled for at least \$180,460.92. The Deters firm was paid \$54,020 for its work, but Montgomery County was not compensated for its lien.

{¶4} Because Montgomery County was not compensated, it filed suit against the Angel family members, Deters, and the Deters law firm to recover the proceeds. After some initial discovery, Montgomery County filed

a motion for summary judgment. The trial court granted the motion, and entered judgment in favor of Montgomery County. The Angel family, Deters, and the Deters law firm (hereinafter “appellants”) have appealed.

The Trial Court Properly Granted Summary Judgment

{¶5} In one assignment of error, appellants claim that the trial court improperly granted Montgomery County’s motion for summary judgment. We disagree. A health insurer that has paid medical benefits on behalf of its insured and has been subrogated to the rights of its insured may recover from the insured after the insured recovers from the insured’s auto policy. *N. Buckeye Edn. Council Group Health Benefits Plan v. Lawson*, 103 Ohio St.3d 188, 2004-Ohio-4886, 814 N.E.2d 1210, ¶ 19, citing *Blue Cross & Blue Shield Mut. of Ohio v. Hrenko*, 72 Ohio St.3d 120, 647 N.E.2d 1358 (1995).

{¶6} Appellants’ first argument is that it is unfair for Montgomery County to recover anything, because the appellants did all the work in order to recover from Nagel and State Farm. But “a contractual subrogation agreement [is] controlled by contract principles.” *Hrenko* at 122. As the Supreme Court has noted in a similar case,

[a]lthough some may view a subrogation provision granting priority to the insurer as unfair, courts should not rewrite contracts. * * * Cases of contractual interpretation should not be decided on the basis of what is ‘just’ or equitable. This concept is applicable even where a party has made a bad bargain, contracted away all his rights, and has been left in the position of doing 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.

N. Buckeye at ¶ 20, quoting *Ervin v. Garner*, 25 Ohio St.2d 231, 239-240, 267 N.E.2d 769 (1971).

{¶7} Appellants also argue that the contract's provision is unconscionable because the parties were not in an equal bargaining position, but they have put forth no evidence that the parties were so unequally situated that the provision should not be enforced. A mere assertion of inequality of bargaining power is insufficient to establish procedural unconscionability. *MidAm Bank v. Dolin*, 6th Dist. Lucas No. L-04-1033, 2005-Ohio-3353, ¶ 85, citing *McGuffey v. LensCrafters, Inc.*, 141 Ohio App.3d 44, 749 N.E.2d 825 (12th Dist.2001).

{¶8} Finally, appellants argue that the contract is illusory and thus unenforceable because Montgomery County reserved the right to change the terms of the plan. "[A] contract is illusory only when by its terms the promisor retains an unlimited right to determine the nature or extent of his performance; the unlimited right, in effect, destroys his promise and thus makes it merely illusory." *Century 21 Am. Landmark, Inc. v. McIntyre*, 68 Ohio App.2d 126, 129-130, 427 N.E.2d 534 (1st Dist.1980). But Montgomery County's right to modify was not without limits. Rather, as provided by the contract:

[a]n amendment to this Plan may be made retroactively effective so long as it does not adversely affect the rights of Covered Persons to benefits under this Plan for covered health care expenses which are incurred after the effective date of the amendment but before the amendment is adopted.

{¶9} The contract stated that “[b]y receiving benefits * * *, the Covered Person agrees that if he or she receives any payment from any responsible party as a result of an injury * * * he or she will serve as a constructive trustee over the funds that constitute such a payment.” In exchange for having their medical bills paid under the plan, the Angels agreed to hold aside the money they recovered for repayment to Montgomery County. When they failed to do so, they breached their fiduciary duty under the plan. The trial court properly granted Montgomery County’s motion for summary judgment. We overrule appellants’ sole assignment of error, and we affirm the judgment of the trial court.

Judgment affirmed.

FISCHER, P.J., and DEWINE, J., concur.

Please note:

The court has recorded its own entry on the date of the release of this opinion.