COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO

KAREN DEVORE	:	
	:	
Plaintiff,		**CASE NO. 2015 CVC 01381**
	:	
vs.		**Judge McBride**
	:	
ISAAC BRUEGGEMANN, ET AL.,		**DECISION/ENTRY**
	:	
Defendants.		

Carl W. Zugelter, counsel for the plaintiff Karen Devore, 1285 W. Ohio Pike, Amelia, Ohio 45102

Todd J. McKenna, counsel for the defendant American Family Insurance Company, 1900 Polaris Parkway, Suite 200B, Columbus, Ohio 43240

This cause is before the court for consideration of the motion for partial summary judgment filed by the plaintiff Karen Devore on September 15, 2016. The court heard oral arguments on the motion on November 18, 2016. At the conclusion of the oral arguments of counsel, the court took the motion under advisement.

Upon consideration of the motion, the evidence before the court, the oral and written arguments of counsel, and the applicable law, the court now renders this written decision.

FACTS OF THE CASE AND PROCEDURAL BACKGROUND

This case involves an insurance dispute arising from an auto accident. The plaintiff Karen Devore was involved in an automobile accident with the defendant Isaac Brueggemann on December 13, 2013.[1] The plaintiff alleges that she incurred injuries that are serious and permanent.[2]

At the time of the accident, the plaintiff had an insurance policy with the defendant American Family Insurance Company (hereinafter referred to as "American Family").[3] American Family paid the plaintiff $14,268.97 under the medical payment provisions of its insurance contract with her.[4]

The insurance contract contained the following provisions related to American Family's reimbursement rights:

> **"GENERAL CONDITIONS * * *
>
> 7. Our Recovery Rights
>
> If we pay under this policy, we are entitled to all the rights of recovery of the person to or for whom payment was made. That person must sign and deliver to us any legal papers relating to that recovery, do whatever else is necessary to help us exercise those rights and do nothing after loss to harm our rights.
>
> When we make a payment under this policy to or for a person who also collects from another, the amount collected from the other shall be repaid to us to the extent of our payment."[5]

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[1] Compl. ¶ 1.
[2] Compl. ¶ 2.
[3] Pls. Ex. C, Stipulation of Facts.
[4] Pls. Ex. C, Stipulation of Facts.
[5] Pls. Ex. A, Insurance Policy, pgs. 11-12.

American Family indicates that the following provisions are also relevant to reimbursement:

> "MEDICAL EXPENSE COVERAGE – OHIO
>
> With respect to the coverage provided by this endorsement, the provisions of the policy apply unless modified by this endorsement. You have this coverage if Medical Expense Coverage is shown in the Declarations. * * *
>
> D. LIMITS OF LIABILITY
>
> 3. No one will be entitled to duplicate payments for the same elements of loss. Any amount we pay under this coverage to or for an injured person applies against any other coverage application to the loss so that there is not a duplication of payment. * * *"[6]

On October 19, 2015 the plaintiff filed a complaint against several parties. She filed a claim of negligence against Isaac Brueggemann, a claim for set offs and credits against American Family's claims for subrogation and reimbursement, and a claim for set offs and credits against any claims that the Ohio Department of Medicaid may have had. In its answer, filed on November 20, 2015, American Family asserted a counterclaim against the plaintiff for reimbursement of the $14,268.97 it had paid out for medical bills.

The plaintiff settled her claims against Isaac Brueggemann for the liability policy limit on his insurance, which was $50,000.[7] On September 1, 2016, the plaintiff filed an amended complaint. The amended complaint stated that she had settled her claims against Isaac Brueggemann and the Ohio Department of Medicaid. In her amended complaint, the plaintiff sought a declaratory judgment declaring that American Family

[6] Pls. Ex. A, Insurance Policy, pgs. 26-27.
[7] Pls. Ex. C, Stipulation of Facts.

does not have any subrogation or reimbursement rights until the plaintiff is made whole and that the $50,000 settlement she has received is insufficient to make her whole.

On September 25, 2016, the plaintiff moved for partial summary judgment against American Family asking that the court (1) find that the make-whole doctrine applies against American Family's reimbursement claim, preventing it from receiving reimbursement until the plaintiff has been made whole and (2) find that the burden of proof rests upon American Family to prove that the plaintiff was not made whole.

On September 21, 2016, the court entered a stipulated dismissal with prejudice of Isaac Brueggemann and the Ohio Department of Medicaid. On September 22, 2016, American Family filed its answer to the plaintiff's amended complaint and included a counterclaim against the plaintiff for reimbursement of the $14,268.97.

American Family filed its response in opposition to the plaintiff's partial motion for summary judgment on October 14, 2016, and the plaintiff filed her reply on October 28, 2016. The court heard oral argument on the motion on November 18, 2016, at which time the court took the motion under advisement.

LEGAL STANDARD

The court must grant summary judgment, as requested by a moving party when:

> "(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 the party opposing the motion."[8]

The court must view the evidence in a light most favorable to the nonmoving party.[9] Even the inferences drawn from the evidence and underlying facts must be construed in favor of the nonmoving party, such as inferences drawn from affidavits, depositions, etc.[10] A fact is material when, under the governing substantive law, the facts "might affect the outcome of the suit."[11]

Whether a genuine issue exists is answered by the following inquiry: Does the evidence present "a sufficient disagreement to require submission to a jury" or is it "so one-sided that the party must prevail as a matter of law"?[12] This threshold inquiry determines whether there are "any genuine factual issues that can properly be resolved only by a finder of fact because they may reasonably be resolved in favor of either party."[13]

The movant bears the burden to show that no genuine issue exists as to any material fact, and it is entitled to judgment as a matter of law.[14] This burden requires the movant to "specifically delineate the basis upon which summary judgment is sought in

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[8] *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317, 327, 364 N.E.2d 267 (1977). *See Davis v. Loopco Indus., Inc.*, 66 Ohio St.3d 64, 65-66, 609 N.E.2d 144 (1993) (holding same); Civ.R. 56(C).

[9] *Welco Indus. Inc. v. Applied Cos.*, 67 Ohio St.3d 344, 356, 617 N.E.2d 1129 (1993); *Willis v. Frank Hoover Supply*, 26 Ohio St.3d 186, 188, 497 N.E.2d 1118 (1986); *Williams v. First United Church of Christ*, 37 Ohio St.2d 150, 152, 309 N.E.2d 924 (1974).

[10] *Hannah v. Dayton Power & Light Co.*, 82 Ohio St.3d 482, 485, 696 N.E.2d 1044 (1998), citing *Turner v. Turner*, 67 Ohio St.3d 337, 341, 617 N.E.2d 1123 (1993).

[11] *Anderson v. Liberty-Lobby Inc.* 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202, 211 (1986).

[12] Id. at 251-52.

[13] Id. at 250.

[14] *AAAA Enterprises, Inc. v. River Place Community Urban Redevelopment Corp.*, 50 Ohio St.3d 157, 161, 553 N.E.2d 597 (1990); *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 66, 375 N.E.2d 46 (1978).

order to allow the opposing party a meaningful opportunity to respond."[15] If the movant fails to satisfy its initial burden, the motion for summary judgment must be denied.[16]

However, if the movant satisfies this burden, then the nonmoving party has a "reciprocal burden" to set forth specific facts, beyond the allegations and denials in the pleadings, demonstrating that a "triable issue of fact" remains.[17] The duty of the nonmoving party is more than that of resisting the motion's allegations.[18] Instead, this burden requires the nonmoving party to "produce evidence on any issue for which [the nonmoving] party bears the burden of production at trial."[19] The nonmoving party must present documentary evidence of specific facts showing that there is a genuine issue for trial.[20] It may not rely on the pleadings or unsupported allegations.[21]

Under Civ.R. 56(C), the only evidence that may be considered when ruling on a motion for summary judgment is "pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action."[22] The trial court maintains the sound discretion to admit or exclude relevant evidence.[23] When a document falls outside the enumerated

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[15] *Mitseff v. Wheeler*, 38 Ohio St.3d 112, 526 N.E.2d 798 (1988), syllabus.
[16] Id. *See HSBC Mtge. Serve. v. Williams*, 12th Dist. Butler No. CA2013-09-174, 2014-Ohio-3778, ¶ 8 (holding same).
[17] *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 662 N.E.2d 264 (1996).
[18] *Wells Fargo*, 2013-Ohio-855 at ¶ 25.
[19] (Citation omitted.) *Wing v. Anchor Media Ltd. Of Texas*, 59 Ohio St.3d 108, 570 N.E.2d 1095 (1991), paragraph three of the syllabus; *See Welco Indus., Inc.*, 67 Ohio St.3d at 346 (holding same).
[20] *Williams*, 2014-Ohio-3778 at ¶ 8. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).
[21] Id.
[22] *See Wells Fargo*, 2013-Ohio-855 at ¶ 15, citing *State ex rel. Varnau v. Wenninger*, 12th Dist. Brown No. CA2009-02-2010, 2011-Ohio-3904, ¶ 7 ("Civ.R. 56(C) provides an exclusive list of materials that a trial court may consider when deciding a motion for summary judgment.").
[23] *Green Tree Servicing, L.L.C. v. Roberts*, 12th Dist. Butler No. CA2013-03-039, 2013-Ohio-5362, ¶ 18, quoting *U.S. Bank v. Bryant*, 12th Dist. Butler No. CA2012-12-266, 2013-Ohio-3993, ¶ 10.

categories in Civ.R. 56(C), the correct method to introduce the document is to incorporate it by reference into a properly framed affidavit.[24]

Opposing and supporting affidavits must be based on personal knowledge, must set forth facts as would be admissible into evidence, and must affirmatively show that the affiant is competent to testify on the matters in the affidavit.[25] "Personal knowledge" is defined as "[k]nowledge of the truth in regard to a particular fact or allegation, which is original and does not depend on information or hearsay."[26] "Absent evidence to the contrary, an affiant's statement that his affidavit is based on personal knowledge will suffice to meet the requirements of Civ.R. 56(E)."[27] Furthermore, if the affiant does not specifically state that he or she has personal knowledge, "personal knowledge may be inferred from the contents of the affidavit."[28]

By contrast, if certain statements in the affidavit "suggest that it is unlikely that the affiant had personal knowledge" of the facts, then "something more than a conclusory averment that the affiant has personal knowledge would be required."[29] Likewise, affidavits that merely set forth legal conclusions or opinions without stating supporting facts are insufficient to satisfy Civ.R. 56(E).[30]

Civ.R. 56(E) provides that "[s]worn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith." Thus,

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[24] *Martin v. Central Ohio Transit Auth.*, 70 Ohio App.3d 83, 89, 590 N.E.2d 411 (10th Dist.1990); *Biskupich v. Westbay Manor Nursing Home*, 33 Ohio App.3d 220, 222, 515 N.E.2d 632 (8th Dist.1986).
[25] Civ.R. 56(E); *Wells Fargo v. Smith*, Blue Sky L. Rep. P 75.026, 2013-Ohio-855, ¶ 16 (12th Dist.).
[26] *Wells Fargo*, 2013-Ohio-855 at ¶ 16.
[27] Id., citing *Churchill v. G.M.C.*, 12th Dist. No. CA2002-10-263, 2003-Ohio-4001, ¶ 11.
[28] Id.
[29] Id., quoting *Bank One, N.A. v. Swartz*, 9th Dist. No. 03CA008308, 2004-Ohio-1986, ¶ 14.
[30] *Stamper v. Middletown Hosp. Assn.*, 65 Ohio App.3d 65, 69, 582 N.E.2d 1040 (12th Dist.1989).

documents referenced in the affidavit "must be attached to the affidavit."[31] If the affiant "relies" on documents in the affidavit but fails to attach those documents, "the portions of the affidavit that reference those document[s] must be stricken."[32]

Because summary judgment is a procedural device designed to terminate litigation where there is nothing to try, it must be awarded with caution, and doubts must be resolved in favor of the nonmoving party.[33] Summary judgment is inappropriate when the facts are subject to reasonable dispute when viewed in a light favorable to the nonmoving party.[34]

LEGAL ANALYSIS

An insurance policy is a contract.[35] A "contractual subrogation agreement [is] controlled by contract principles."[36] The construction of contracts is a matter of law.[37] When undertaking contractual interpretation, the court's role is "to give effect to the intent of the parties to the agreement."[38] Courts examine "the insurance contract as a

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[31] *Wells Fargo*, 2013-Ohio-855 at ¶ 17, citing Civ.R. 56(E).
[32] Id. at ¶ 16, citing *Third Federal S. & L. Assn. of Cleveland v. Famo*, 12th Dist. No. CA2012-04-028, 2012-Ohio-5245, ¶ 10. *See State ex rel. Varnau v. Wenninger*, 12th Dist. Brown No. CA2009-02-010, 2011-Ohio-3904 (striking portions of affidavit where documents were reviewed and relied upon in drafting affidavit but not attached to the affidavit or served with it).
[33] *Loopco Indus., Inc.*, 66 Ohio St.3d at 66, 609 N.E.2d at 145.
[34] *Mers v. Dispatch Printing Co.*, 19 Ohio St.3d 100, 105-06, 483 N.E.2d 150 (1985).
[35] *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256, ¶ 9. *See Cox v. Grubb*, 12th Dist. Madison No. CA2010-09-020, 2011-Ohio-1635, ¶ 15, citing *Westfield*, 2003-Ohio-5849 at ¶ 9 ("An insurance policy is a contract.").
[36] *N. Buckeye Edn. Council Group Health Benefits Plan v. Lawson*, 103 Ohio St.3d 188, 2004-Ohio-4886, 814 N.E.2d 1210, 34 Employee Benefits Cas. 2071, ¶ 17, quoting *Blue Cross & Blue Shield Mut. of Ohio v. Hrenko*, 72 Ohio St.3d 120, 122, 647 N.E.2d 1358 (1995).
[37] *Nationwide Ins. Co. v. Johnson*, 84 Ohio App.3d 106, 108, 616 N.E.2d 525 (12th Dist. 1992), citing *Alexander v. Buckeye Pipe Line Co.*, 53 Ohio St.2d 241, 245-246, 374 N.E.2d 146 (1978).
[38] *Westfield Ins. Co.*, 2003-Ohio-5849 at ¶ 11, citing *Hamilton Ins. Serv., Inc. v. Nationwide Ins. Cos.*, 86 Ohio St.3d 270, 273, 714 N.E.2d 898 (1999). *See Kelly v. Med Life Ins. Co.*, 31 Ohio

whole and presume that the intent of the parties is reflected in the language of the policy."[39] Unless a different meaning "is clearly apparent from the contents of the policy," the court relies on the plain and ordinary meaning of the policy's language.[40]

When the insurance policy's language is clear, the "court may look no further than the writing itself to find the intent of the parties."[41] In such a case, the court "cannot create a new contract by finding an intent not expressed in the clear and unambiguous language of the contract."[42] Nor can the court "alter the clear and unambiguous language" in order to reach a "particular result that was not intended by the parties to the contract."[43] However, "[i]t is well-settled law in Ohio that insurance policies should be construed liberally in favor of the insured" when ambiguous.[44]

A "clear and unambiguous" reimbursement agreement in an insurance contract "is not unenforceable as against public policy, irrespective of whether the settlement of

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St.3d 130, 132, 509 N.E.2d 411 (1987), citing *Skivolocki v. East Ohio Gas Co.*, 38 Ohio St.2d 244, 313 N.E.2d 374 (1974) ("The purpose of contract construction is to effectuate the intent of the parties.").

[39] *Westfield Ins. Co.*, 2003-Ohio-5849 at ¶ 11, citing *Kelly*, 31 Ohio St.3d at paragraph one of the syllabus. *See Cox*, 2011-Ohio-1635 at ¶ 15, citing *Kelly*, 31 Ohio St.3d at paragraph one of the syllabus ("An insurance contract must be examined as a whole and presume that the intent of the parties is reflected in the language used in the policy.").

[40] *Westfield Ins. Co.*, 2003-Ohio-5849 at ¶ 11, citing *Alexander v. Buckeye Pipe Line Co.*, 53 Ohio St.2d 241, 374 N.E.2d 146, paragraph two of the syllabus.

[41] *Westfield Ins. Co.*, 2003-Ohio-5849 at ¶ 11, citing *Alexander*, 53 Ohio St.2d at paragraph two of the syllabus.

[42] *Hamilton*, 86 Ohio St.3d at 273. *See Hamilton*, 86 Ohio St.3d at 274, citing *Latina v. Woodpath Dev. Co.*, 57 Ohio St.3d 212, 214, 567 N.E.2d 262 (1991) ("The agreement of the parties to a written contract is to be ascertained from the language of the instrument itself, and there can be no implication inconsistent with the express terms thereof.").

[43] *Cox*, 2011-Ohio-1635 at ¶ 15, citing *Gomolka v. State Automobile Ins. Co.*, 70 Ohio St.2d 166, 168, 436 N.E.2d 1347 (1982).

[44] *Blue Cross & Blue Shield Mut. of Ohio*, 72 Ohio St.3d at 122, citing *Yeager v. Pacific Mut. Life Ins. Co.*, 166 Ohio St. 71, 139 N.E.2d 48 (1956), paragraph one of the syllabus. *See Marcum v. State Auto Mut. Ins. Co.*, 12th Dist. Clermont No. CA2004-11-098, 2005-Ohio-4628, ¶ 16, citing *King v. Nationwide Ins. Co.*, 35 Ohio St.3d 208, 519 N.E.2d 1380 (1988), syllabus.

judgment provides full compensation for the insured's total damages."[45] While reimbursement or subrogation agreements may appear unfair, "contractual interpretation should not be decided on what is 'just' or equitable.'"[46]

Despite these principles, when construing reimbursement and subrogation agreements courts apply "the make-whole doctrine in cases where an insurer's subrogation is based in contract but the contract does not specify whether the insurer or the insured has priority over the recovered funds."[47] The make-whole doctrine is the "general rule of subrogation * * * 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."[48] Therefore, when the make-whole doctrine applies, "an insurer's subrogated interests will not be given priority where doing so will result in less than full recovery for the insured."[49]

Since the make-whole doctrine only applies when a reimbursement or subrogation agreement is unclear as to priority, it does "not override clear and

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[45] *N. Buckeye Edn. Council Group Health Benefits Plan*, 2004-Ohio-4886 at ¶ 15.
[46] *N. Buckeye Edn. Council Group Health Benefits Plan*, 2004-Ohio-4886 at ¶ 20, quoting *Ervin v. Garner*, 25 Ohio St.2d 231, 239-240, 267 N.E. 769 (1971).
[47] *N. Buckeye Edn. Council Group Health Benefits Plan*, 2004-Ohio-4886 at ¶ 21.
[48] (Emphasis original.) Id. at ¶ 25, quoting *James v. Michigan Mutual Insurance Company*, 18 Ohio St.3d 386, 388, 481 N.E. 272 (1985), disapproved of on other grounds by *Cole v. Holland*, 76 Ohio St.3d 220 (1996). *See Clermont Cty. Transp. Improvement Dist. v. Tekulve*, 12th Dist. Clermont No. CA2013-05-039, 2014-Ohio-1581, ¶ 16, quoting *James*, 18 Ohio St.3d at 388 (describing the make-whole doctrine as an established, general rule of subrogation that does not allow the insurer to seek reimbursement for payments from the insured when the insured has not interfered with the insurer's subrogation rights and has not been fully compensated and made whole for his or her injuries); *Marcum*, 2005-Ohio-4629 at ¶ 19, citing *Buckeye Edn. Council Group Health Benefits Plan*, 2004-Ohio-4886 ("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 may it seek setoff from the limits of its coverage until the insured has been fully compensated for his injuries.").
[49] (Internal citations omitted.) *Clermont Cty. Transp. Improvement Dist.*, 2014-Ohio-1581 at ¶ 16, quoting *N. Buckeye Edn. Council Group Health Benefits Plan*, 2004-Ohio-4886 at ¶ 19.

unambiguous contractual provisions."[50] Accordingly, the Ohio Supreme Court has concluded that "the make-whole doctrine applies by default where a reimbursement or subrogation contract does not contain language providing otherwise."[51]

The Ohio Supreme Court examined such an unclear provision in *North Buckeye Education Council Group Health Benefits Plan v. Lawson*, 103 Ohio St.3d 188, 2004-Ohio-4886, 814 N.E.2d 1210, 34 Employee Benefits Cas. 2071, from the prior case of *James v. Michigan Mutual Insurance Company*, 18 Ohio St.3d 386, 388, 481 N.E. 272 (1985). The reimbursement agreement read as follows:

> "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."[52]

The *North Buckeye Education Council Group Health Benefits Plan* Court reflected that "[t]his contractual provision clearly established a right on the part of the insurer to funds recovered by the insured. It did not, however, address the issue of whether the insured was entitled to retain the recovered funds until fully compensated."[53] In contrast, the Court found that the reimbursement agreement at issue in *North Buckeye Education Council Group Health Benefits Plan* did provide for priority of the insurer by using the following language: "I will reimburse the Plan * * * for

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[50] *N. Buckeye Edn. Council Group Health Benefits Plan*, 2004-Ohio-4886 at ¶ 16.
[51] Id. at ¶ 25. *See Marcum*, 2005-Ohio-4629 at ¶ 19 ("This 'make-whole' doctrine applies by default where a reimbursement or subrogation clause does not contain language indicating otherwise.").
[52] *N. Buckeye Edn. Council Group Health Benefits Plan*, 2004-Ohio-4886 at ¶¶ 22-24.
[53] Id. at ¶ 25.

any amounts which are later recovered * * * irrespective of whether any such settlement or judgment may or may not provide reimbursement to me for all [of my damages]."[54]

Numerous other courts have examined reimbursement contract language that unambiguously provides for the priority of the insurer regardless of whether the insured has been made whole. For instance, in *Davala v. Ferraro*, 5th Dist. Stark No. 2011CA00135, 2012-Ohio-446, the Fifth District Court of Appeals found that the make-whole doctrine was inapplicable when a reimbursement agreement included the following language:

> "* * * The Plan is entitled to be completely compensated for any and all funds expended as a result of the Plan Member's sickness or injury regardless if the Plan Member is fully or only partially compensated. The Plan takes priority over the Plan Member of both full and partial recovery. * * * You acknowledge that the Plan's subrogation and reimbursement rights shall be considered *the first priority claim* * * *."[55]

Another example where an insurer contracted around the make-whole doctrine is found in *Callihan v. Niles*, 11th Dist. Trumbull No. 2011-T-0025, 2012-Ohio-38. The Eleventh District Court of Appeals found that the insurer's right to reimbursement priority was "clearly and unambiguously" provided for in the following "plain language" of the insurance policy: "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 other party, to any recovery."[56]

The Eleventh District Court of Appeals offered a second example of language that clearly expressed priority for the insurer in *Hawkins v. Anchors*, 11th Dist. Portage

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[54] *N. Buckeye Edn. Council Group Health Benefits Plan*, 2004-Ohio-4886 at ¶ 29.
[55] (Emphasis original.) *Davala v. Ferraro*, 5th Dist. Stark No. 2011CA00135, 2012-Ohio-446, ¶¶ 16017, 20.
[56] *Callihan v. Niles*, 11th Dist. Trumbull No. 2011-T-0025, 2012-Ohio-38, ¶¶ 26.

Nos. 2002-P0098, 2002-0-0101, and 2002-P-0102, 2004-Ohio-3341. There, the court found that the following language was "not ambiguous" as to priority: "[A]ny sum received * * * whether or not designated as payment for medical expenses shall be applied first to reimburse the plan until the plan has been repaid in full. * * * [The right of recovery is] intended to supersede the covered individual's right to be 'made whole.'"[57]

In the case of *Qualchoice, Inc. v. Paige-Thompson*, 8th Dist. Cuyahoga No. 88233, 2007-Ohio-1712, the Eighth District Court of Appeals found that the insurer's policy "clearly and unambiguously states that the 'make whole' rule does not apply."[58] The policy language that defeated the make-whole doctrine by giving the insurer priority read: "Qualchoice's right to subrogation will apply even if you have not been made whole, are not fully compensated or only partially recover for your loss."[59]

Finally, the Third District Court of Appeals in *Stephens v. Emanhiser*, 3d Dist. Seneca No. 13-99-03, 1999 WL 692408 (Aug. 24, 1999), provides another instance in which an insurer successfully avoided the application of the make-whole doctrine by providing for its own priority over the insured. The relevant insurance provision read: "[t]he plan shall be subrogated * * * whether or not those monies are sufficient to make whole the Participant to whom this Plan made its payments."[60] The *Stephens* Court concluded that this language "clearly states that the participant's right to be made whole is superseded by the plan's right to subrogation," and therefore the make-whole doctrine did not apply to prevent subrogation.

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[57] *Hawkins v. Anchors*, 11th Dist. Portage Nos. 2002-P0098, 2002-0-0101, and 2002-P-0102, 2004-Ohio-3341, ¶ 55.
[58] *Qualchoice, Inc. v. Paige-Thompson*, 8th Dist. Cuyahoga No. 88233, 2007-Ohio-1712, ¶ 29.
[59] Id.
[60] *Stephens v. Emanhiser*, 3d Dist. Seneca No. 13-99-03, 1999 WL 692408, *4 (Aug. 24, 1999).

In the case at bar the plaintiff maintains that the make-whole doctrine applies because the language regarding reimbursement in the plaintiff's policy with American Family fails to clearly and unambiguously establish both that American Family has a right to full or partial recovery and that it has priority over the plaintiff for the recovery of any funds. In contrast, American Family counters that the language set forth in the policy clearly establishes American Family's right to full reimbursement as well as its priority over the plaintiff. Further, American Family posits that the provisions relevant to this analysis include both the section on recovery rights, as well as a clause dealing with non-duplicative payments.

As explained, the court must examine the language of the policy, and if it is clear, the court must rely on the plain language.[61] The make-whole doctrine will apply by default unless the insurance policy contains language otherwise[62] or if the plaintiff has interfered with American Family's subrogation rights.[63]

American Family does not allege that the plaintiff has interfered with its right to reimbursement.[64] However, American Family does maintain that the contract includes sufficient language to establish its right to reimbursement. To subvert the make-whole doctrine, the insurance policy must contain language that establishes its priority over the

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[61] *Westfield Ins. Co.*, 2003-Ohio-5849 at ¶ 11, citing *Alexander*, 53 Ohio St.2d at paragraph two of the syllabus.

[62] *N. Buckeye Edn. Council Group Health Benefits Plan*, 2004-Ohio-4886 at ¶ 25. *See Marcum*, 2005-Ohio-4629 at ¶ 19.

[63] *N. Buckeye Edn. Council Group Health Benefits Plan*, 2004-Ohio-4886 at ¶ 25, quoting *James*, 18 Ohio St.3d at 388. *See Clermont Cty. Transp. Improvement Dist.*, 2014-Ohio-1581; *Marcum*, 2005-Ohio-4629 at ¶ 19, citing *Buckeye Edn. Council Group Health Benefits Plan*, 2004-Ohio-4886.

[64] Defs. Resp., pg. 5 ("* * * there is no direct violation of the subrogation clause * * *."). *Cf. Macejko v. Ortiz*, 7th Dist. Mahoning No. 06 MA 158, 2008-Ohio-1188, ¶ 31 (finding that the make-whole doctrine did not apply because the insureds destroyed the insurer's subrogation rights, in contravention of the insurance policy); *Clark v. Auto-Owners Mut. Ins. Co.*, 10th Dist. Franklin No. 05AP-751, 2006-Ohio-2436, ¶ 10 (finding that the make-whole doctrine was inapplicable because the insureds interfered with the insurer's subrogation rights).

plaintiff to recover from the settlement funds the plaintiff received.[65] The language at issue provides:

> "GENERAL CONDITIONS * * *
>
> 7. Our Recovery Rights
>
> If we pay under this policy, we are entitled to all the rights of recovery of the person to or for whom payment was made. That person must sign and deliver to us any legal papers relating to that recovery, do whatever else is necessary to help us exercise those rights and do nothing after loss to harm our rights.
>
> When we make a payment under this policy to or for a person who also collects from another, the amount collected from the other shall be repaid to us to the extent of our payment."[66]

American Family argues that the following provision is also relevant to reimbursement:

> "MEDICAL EXPENSE COVERAGE – OHIO
>
> With respect to the coverage provided by this endorsement, the provisions of the policy apply unless modified by this endorsement. You have this coverage if Medical Expense Coverage is shown in the Declarations * * *
>
> D. LIMITS OF LIABILITY
>
> 3. No one will be entitled to duplicate payments for the same elements of loss. Any amount we pay under this coverage to or for an injured person applies against any other coverage application to the loss so that there is not a duplication payment. * * *"[67]

The language above conveys that American Family has a right to recover the amount it paid to the plaintiff, which the plaintiff has collected from another, namely the

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[65] *N. Buckeye Edn. Council Group Health Benefits Plan*, 2004-Ohio-4886 at ¶ 21.
[66] Pls. Ex. A, Insurance Policy, pgs. 11-12.
[67] Pls. Ex. A, Insurance Policy, pgs. 26-27.

tortfeasor's insurance company ("When we make a payment under this policy to or for a person who also collects from another, the amount collected from the other shall be repaid to us to the extent of our payment."). That language also establishes that American Family has a right to be repaid "to the extent of our payment," meaning a right to full reimbursement.

However, none of the language set forth above establishes American Family's right to priority over the plaintiff. In contrast to the many examples of sufficiently clear language cited above, which courts have found establish priority for the insurer irrespective of whether the insured has been made whole, the instant insurance policy does not contain any similar language. The plan does not contain any of the following provisions or any comparable language establishing American Family's priority:

- "I will reimburse the Plan * * * for any amounts which are later recovered * * * irrespective of whether any such settlement or judgment may or may not provide reimbursement to me for all [my damages]."[68]

- "* * * The Plan takes priority over the Plan Member of both full and partial recovery. * * * You acknowledge that the Plan's subrogation and reimbursement rights shall be considered the first priority claim * * *."[69]

- "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 other party, to any recovery."[70]

- "[A]ny sum received * * * whether or not designated as payment for medical expenses shall be applied first to reimburse the plan until the plan has been repaid in full. * * * [The right of recovery is] intended to supersede the covered individual's right to be 'made whole.'"[71]

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[68] *N. Buckeye Edn. Council Group Health Benefits Plan*, 2004-Ohio-4886 at ¶ 29.
[69] (Emphasis omitted.) *Davala*, 2012-Ohio-446 at ¶¶ 16-17, 20.
[70] *Callihan*, 2012-Ohio-38 at ¶ 26.
[71] *Hawkins v. Anchors*, 2004-Ohio-3341 at ¶ 55.

- "[The insurer's] right to subrogation will apply even if you have not been made whole, are not fully compensated or only partially recover for your loss."[72]

- "The plan shall be subrogated * * * whether or not those monies are sufficient to make whole the Participant to whom this Plan made its payments."[73]

Because American Family failed to include clear and unambiguous language establishing its priority, the make-whole doctrine continues to apply. Since the make-whole doctrine applies, American Family does not have a right to be reimbursed for its payment of $14,268.97 to the plaintiff from the plaintiff's $50,000 settlement *unless* the plaintiff has been fully compensated for her injuries.[74]

In its response, American Family argues that the plaintiff has been fully compensated because she accepted a settlement for her claims. American Family cites to courts that have found that "the voluntary settlement by an insured of his claims against the tortfeasor, without proof to the contrary, is persuasive evidence of the value of the insured's 'personal injury claim, and tends to prove that [the insured] * * * was fully compensated' for his injuries."[75] The plaintiff responds that other courts have refined this principle by finding that an insured's settlement is evidence that the insured

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[72] *Qualchoice, Inc.*, 2007-Ohio-1712 at ¶ 29.
[73] *Stephens*, 1999 WL 692408 at *4.
[74] *N. Buckeye Edn. Council Group Health Benefits Plan*, 2004-Ohio-4886 at ¶ 25, quoting *James*, 18 Ohio St.3d at 388.
[75] *Palmer v. Grange Mut. Cas. Co.*, 11th Dist. Trumbull No. 2008-T-0124, 2009-Ohio-3939, ¶ 40, quoting *Hawkins v. Anchors*, 2004-Ohio-3341 at ¶ 48. *See Erie Ins. Co. v. Kaltenbach*, 130 Ohio App.3d 542, 548, 720 N.E.2d 597 (10th 1998), quoting *Risener v. Erie Ins. Co.*, 91 Ohio App.3d 695, 699, 633 N.E.2d 588 (3d Dist.1993) ("the voluntary settlement by an insured of his claims against a tortfeasor, without proof to the contrary, 'is persuasive evidence of the value of [the insured's] personal injury claim, and tends to prove that [the insured] was fully compensated' for his injuries.").

has been made whole *only* when the insured settled for less than the policy limit of the tortfeasor's insurance policy.[76]

Although the parties disagree as to whether the plaintiff has been fully compensated, they agree that this is a genuine issue of material fact that must be resolved by the trier of fact at trial. The court agrees and therefore declines to make any finding as to whether the plaintiff has been fully compensated for her injuries or made whole.

Finally, in her motion for partial summary judgment, the plaintiff moves the court to determine which party bears the burden during trial of demonstrating that the plaintiff has been made whole, or conversely, has not been made whole. In "a civil case, a plaintiff bears the burden of proof to establish all of the elements of his claim by a preponderance of the evidence."[77] Moreover, Ohio courts have placed the burden of

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[76] *See Allen v. Binckett*, 5th Dist. Muskingum No. CT2008-0027, 2009-Ohio-2969, ¶ 26, citing *Hawkins v. True North Engergy, LLC*, 11th Dist. Portage Nos. 2002-P0098, 2002-0-0101, and 2002-P-0102, 2004-Ohio-3341. ("By settling their case for less than the limits, there was some evidence tending to prove that Appellants were fully compensated for their injuries."); *Hawkins v. Anchors*, 2004-Ohio-3341 at ¶ 56, citing *Erie Ins. Co.*, 130 Ohio App.3d 542 ("[T]he voluntary settlement by appellant tends to prove that appellant was fully compensated for her injuries to the extent that she received the maximum limit available from Anchor's insurance carrier, Progressive, as well as $115,000 from her settlement with Travelers."); *Johnson v. Progressive Ins. Co.*, 11th Dist. Lake No. 98-L-102, 1999 WL 1313672, *6 (Dec. 23, 1999) (finding that the trial court's finding that the insured was fully compensated because he settled his claims was erroneous).

[77] *Internatl. Bhd. Of Electrical Workers, Local Union No. 8 v. Vaughn Industries Inc.*, 6th Dist. Wood No. WD-07-026, 2008-Ohio-2992, ¶ 37, citing *Hanna v. Groom*, 10th Dist. Franklin No. 07AP-502, 2008-Ohio-765, ¶ 39. *See Hanna*, 2008-Ohio-765 at ¶ 39, citing *Schaffer v. Donegan*, 66 Ohio App.3d 528, 534, 585 N.E.2d 854 (2d Dist. 1990) ("[I]t is well established in Ohio that the plaintiff in a civil action bears the burden of proof on each essential element of any claim for relief set forth in the complaint."); *Ayers-Sterrett, Inc. v. Cilli*, 3d Dist. Van Wert No. 15-01-09, 2002 WL 255123, *2 (Feb. 22, 2002), citing *State v. Robinson*, 47 Ohio St.2d 103, 107, 351 N.E.2d 88 (1976) ("As a threshold matter, we note that in a civil case, the plaintiff bears the burden of proof to establish all of the elements comprising his claim by a preponderance of the evidence."); *Covey v. Bellman*, 6th Dist. Lucas No. L-99-1313, 2000 WL 1434127, *1 (Sept. 29, 2000), citing *Felger v. I-Deal Auto Sales*, 3d Dist. Van Wert No. 15-97-6 (Oct. 31, 1997).

proving a subrogation claim on the insurer bringing the claim.[78] Because American Family has a claim for reimbursement via a counterclaim against the plaintiff, American Family, as the counterclaim-plaintiff, bears the burden of proving its claim. As stated earlier, the make-whole doctrine is the default rule for subrogation in Ohio, and consequently American Family must be able to show that the plaintiff has been fully compensated for her injuries in order to succeed on its reimbursement claim at trial.

CONCLUSION

For the foregoing reasons, the court finds the plaintiff Karen Devore's motion for partial summary judgment to be well-taken and grants it. Accordingly, the court finds that (1) the make-whole doctrine applies to the defendant American Family Insurance Company's counterclaim for reimbursement, and (2) as a result, to succeed on its reimbursement counterclaim at trial, the defendant American Family Insurance Company bears the burden of proving that the plaintiff Karen Devore has been fully compensated for her injuries

[78] *See State Farm Mut. Auto Ins. Co. v. Swartz*, 5th Dist. Richland No. 2005CA0086, 2006-Ohio-2096, ¶ 32 (finding that the insurer failed to meet its burden of demonstrating its subrogation claim at trial); *Firemans Fund Insurance Co. v. Anchor Point Boat Sales and Service, Inc.*, 6th Dist. Lucas No. L-77-195, 1978 WL 214706, *2 (Apr. 28, 1978) (placing the burden of proof on the insurer for its subrogation claim).

IT IS SO ORDERED.

DATED: 2-1-17

Judge Jerry R. McBride