IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

DEBORAH L. WALLER and WILLIAM WALLER, Plaintiffs, SHELTER INSURANCE COMPANIES, Intervening Plaintiff/ Appellant, VS. DONALD H. AMMON, SAMELSON-LEON CO., INC., and NICOTIANA ENTERPRISES, INC., Defendants/Appellees.	)	**FILED** **June 19, 1998** **Cecil W. Crowson** **Appellate Court Clerk** Williamson Circuit No. 93021 Appeal No. 01A01-9606-CV-00260

APPEAL FROM THE CIRCUIT COURT
FOR WILLIAMSON COUNTY
AT FRANKLIN, TENNESSEE

THE HONORABLE HENRY DENMARK BELL, JUDGE

For Shelter Insurance Companies:

Joseph M. Huffaker
Ortale, Kelley, Herbert & Crawford
Nashville, Tennessee

For Deborah L. and William Waller:

Thomas C. Gorham
James L. Woodard & Associates
Franklin, Tennessee

VACATED AND REMANDED

WILLIAM C. KOCH, JR., JUDGE

O P I N I O N

This appeal involves a dispute between a motorist and her insurance company over the company's subrogation claim and its obligation to pay the motorist the maximum amount of its policy's medical expense coverage. Following a collision in which her vehicle was struck from the rear, the motorist brought suit in the Circuit Court for Williamson County against the driver of the other vehicle and his employer. The motorist's insurance company intervened to recover from the defendants the payments it made to the motorist for part of her medical expenses. The motorist eventually settled with the defendants, and the trial court dismissed all claims against the defendants after they paid into court an amount equal to the payments for medical expenses advanced by the motorist's insurer. The motorist thereafter moved for summary judgment on her claims for the funds paid into court and for the unpaid medical expenses under her insurance policy. The trial court awarded the motorist the funds paid into court and also gave her a judgment for the unpaid medical expenses up to her insurance policy's limits. We have determined that the summary judgment was unwarranted and, accordingly, vacate the judgment and remand the case for further proceedings.

I.

In April 1991, Donald H. Ammon drove his truck into the rear end of an automobile being driven by Deborah L. Waller. Ms. Waller suffered personal injuries as a result of the collision and incurred approximately $6,800 in medical expenses. She and her spouse later filed suit in the Circuit Court for Williamson County against Mr. Ammon, his employer at the time of the accident, and the corporation that had merged with his employer.

When the collision occurred, Ms. Waller's automobile insurance policy with Shelter Insurance Companies provided her with coverage up to $5,000 for reasonable medical expenses incurred within three years from the date of an accident for necessary medical services for bodily injuries caused by the accident. Shelter paid Ms. Waller $1,841.67 of her medical expenses and required her to sign a loan receipt stating that she would repay the money if she recovered damages from the defendants. Ms. Waller submitted other claims for medical expenses, but Shelter

declined to pay them. In June 1993, Shelter filed an intervening complaint against the three original defendants seeking to recover the $1,841.67 it had paid to Ms. Waller. Ms. Waller responded to Shelter's intervening complaint by denying that Shelter was entitled to subrogation and by filing a cross-claim against Shelter for the remaining $3,158.33 in her policy's medical expense coverage.

A jury returned a verdict for the defendants in March 1994, but the trial court set aside the verdict and granted Ms. Waller and her spouse a new trial. Before the second trial, Ms. Waller and her spouse agreed to a $15,000 settlement with the original defendants. Shelter was aware of these negotiations but was never consulted about the amount of the settlement. On August 31, 1994, the trial court entered an agreed order dismissing all claims against the original defendants in return for their agreement to pay $1,841.67 into court which was to be held pending the resolution of the dispute between Ms. Waller and Shelter concerning Shelter's subrogation claim. Shelter's lawyer executed this agreed order.

Thereafter, Ms. Waller moved for a summary judgment on her defense that Shelter was not entitled to recover the funds it had advanced for her medical expenses and on her cross-claim for the unpaid balance of her medical expense coverage. Shelter responded by arguing that Ms. Waller's settlement with the original defendants had fully compensated her for her medical expenses and, therefore, that she was not entitled to collect an additional $3,158.33 under the policy and that it was entitled to the $1,841.67 being held by the court. In April 1996, the trial court entered an order granting the summary judgment and awarding Ms. Waller and her spouse a judgment for both the $1,841.67 paid into court and for an additional $3,158.33. Shelter has appealed.

II.

Summary judgments enjoy no presumption of correctness on appeal. *See City of Tullahoma v. Bedford County*, 938 S.W.2d 408, 412 (Tenn. 1997); *McClung v. Delta Square Ltd. Partnership*, 937 S.W.2d 891, 894 (Tenn. 1996). Accordingly, appellate courts reviewing a decision to grant a summary judgment must make a fresh determination of whether the requirements of Tenn. R. Civ. P. 56 have been satisfied.

See Hunter v. Brown, 955 S.W.2d 49, 50-51 (Tenn. 1997); *Mason v. Seaton*, 942 S.W.2d 470, 472 (Tenn. 1997). Summary judgments are appropriate only when there are no genuine material factual disputes regarding the claim or defense embodied in the motion and when the moving party is entitled to a judgment as a matter of law. *See* Tenn. R. Civ. P. 56.04; *Bain v. Wells*, 936 S.W.2d 618, 622 (Tenn. 1997); *Carvell v. Bottoms*, 900 S.W.2d 23, 26 (Tenn. 1995).

In summary judgment proceedings, courts must view the evidence in the light most favorable to the nonmoving party and must draw all reasonable inferences in the nonmoving party's favor. *See Robinson v. Omer*, 952 S.W.2d 423, 426 (Tenn. 1997). Thus, a summary judgment should be granted only when the undisputed facts reasonably support one conclusion -- that the moving party is entitled to a judgment as a matter of law. *See McCall v. Wilder*, 913 S.W.2d 150, 153 (Tenn. 1995); *Carvell v. Bottoms*, 900 S.W.2d at 26. A party may obtain a summary judgment by demonstrating that the nonmoving party will be unable to prove an essential element of its case, *see Byrd v. Hall*, 847 S.W.2d 208, 212-13 (Tenn. 1993), because this necessarily renders all other facts immaterial. *See Alexander v. Memphis Individual Practice Ass'n*, 870 S.W.2d 278, 280 (Tenn. 1993); *Strauss v. Wyatt, Tarrant, Combs, Gilbert & Milom*, 911 S.W.2d 727, 729 (Tenn. Ct. App. 1995).

III.

SHELTER'S SUBROGATION RIGHTS

Shelter's claim that it is entitled to the $1,841.67 paid into court by the original defendants rests on a single theory - subrogation. It asserts that it is entitled to these funds because it paid $1,841.67 of Ms. Waller's medical expenses before she settled with the original defendants. Ms. Waller asserts that Shelter's subrogation claim must fail because the subrogation provision in Shelter's policy does not include payments for medical expenses under Coverage C and because Shelter is not entitled to equitable relief.

A.

Subrogation is an equitable doctrine that facilitates the adjustment of rights to avoid unjust enrichment in many types of situations by substituting one person or entity in place of another in regard to some claim or right that the second person or entity may have against a third party. *See Castleman Constr. Co. v. Pennington*, 222 Tenn. 82, 93-95, 432 S.W.2d 669, 674-75 (1968); Robert E. Keeton & Alan I. Widiss, *Insurance Law* § 3.10(a)(1) (1988); 2 Joseph Story, *Commentaries on Equity Jurisprudence* § 717, at 124 (W.H. Lyon, ed., 14th ed. 1918). The doctrine benefits persons who are required to pay another's debt to protect their own interests, *see Merchants' Bank & Trust Co. v. Bushnell*, 142 Tenn. 275, 279, 218 S.W. 709, 710 (1920); *Amos v. Central Coal Co.*, 38 Tenn. App. 626, 638, 277 S.W.2d 457, 462 (1954); 4 John N. Pomeroy, *Treatise on Equity Jurisprudence* § 1419, at 1073 (Spencer W. Symons, ed., 5th ed. 1941), but it is granted only when it will not cause injustice to other parties. *See Travelers Ins. Co. v. Williams*, 541 S.W.2d 587, 590 (Tenn. 1976); *Greenlaw v. Pettit*, 87 Tenn. 467, 480, 11 S.W. 357, ___ (1889).

The doctrine of subrogation takes two forms: conventional subrogation which arises from a contract or agreement, *see Tennessee Farmers Mut. Ins. Co. v. Rader*, 219 Tenn. 384, 388, 410 S.W.2d 171, 173 (1966); *U.S.F.&G. v. Elam*, 198 Tenn. 194, 213, 278 S.W.2d 693, 701 (1955), and legal subrogation which arises by operation of law based on general principles of equity and justice. *See Wimberly v. American Cas. Co.*, 584 S.W.2d 200, 203 (Tenn. 1979). Both conventional and legal subrogation provide the same remedy. *See Castleman Constr. Co. v. Pennington*, 222 Tenn. at 95, 432 S.W.2d at 675.

In the context of insurance, the general rule is that an insurer, upon paying a loss, is subrogated in a corresponding amount to its insured's right of action against the third party whose negligence caused the loss. *See Miller v. Russell*, 674 S.W.2d 290, 291 (Tenn. Ct. App. 1983); 6A John A. Appleman & Jean Appleman, *Insurance Law and Practice* § 4051, at 103 (1972). This rule applies whether the insurer has paid all or a part of its insured's loss. *See Miller v. Russell*, 674 S.W.2d at 291; *see also Max of Switzerland, Inc. v. Allright Corp.*, 930 P.2d 1010, 1013 (Ariz. Ct. App. 1997); *Southern Farm Bureau Cas. Ins. Co. v. Sonnier*, 406 So.2d 178, 179-80 (La. 1981); 15 Patrick D. Kelly, *Blashfield Automobile Law and Practice* § 483.1, at 160-61 (3d ed. 1969).

Under Tennessee's version of the subrogation doctrine, an insurer cannot invoke its subrogation rights until its insured has been made whole. *See Wimberly v. American Cas. Co.*, 584 S.W.2d at 203; *Mullins v. Parkey*, 874 S.W.2d 12, 14-15 (Tenn. Ct. App. 1992). In determining whether an insured has been "made whole" the courts should consider not just the payments made to the insured by the insurance company, but also the payments to the insured by or on behalf of the party or parties whose fault caused the insured's injuries or damage. *See Eastwood v. Glens Falls Ins. Co.*, 646 S.W.2d 156, 158 (Tenn. 1983); *Firemans' Fund Ins. Co. v. Rankins*, No. 88-1117-II, 1988 WL 85482, at *1 (Tenn. Ct. App. Aug. 12, 1988) (No Tenn. R. App. P. 11 application filed).

B.

Shelter advances two alternative theories for its subrogation claim. First, it asserts that it is entitled to conventional subrogation based on the subrogation provision in its automobile insurance policy. This provision states that

> In the event of any payment under COVERAGES A, B, E, F, or G of this policy, or under any other coverage where permitted by applicable law, we will be subrogated to all rights of recovery for which the insured or any person receiving the payment may have against any person or organization. The Insured, or such person, shall execute and deliver instruments and papers and do whatever else is necessary to secure such rights. The Insured, or such person, shall do nothing after loss to prejudice these rights.

Shelter's $1,841.67 payment to Ms. Waller was required by Coverage C[1] of its policy. Even though Coverage C is not specifically mentioned in the subrogation provision, Shelter asserts that Coverage C is included because it is "other coverage . . . permitted by applicable law." Ms. Waller responds that the omission of Coverage C reflects the parties' intent not to extend subrogation rights to payments under Coverage C.

The interpretation of a written agreement involves a question of law. *See Hardeman County Bank v. Stallings*, 917 S.W.2d 695, 699 (Tenn. Ct. App. 1995);

[1]Coverage C of Ms. Waller's automobile insurance policy provides that Shelter will pay up to $5,000 for "all reasonable medical expenses which . . . [Ms. Waller] . . . incurred within three years from the date of accident for necessary medical services for bodily injury . . . caused by accident."

Rainey v. Stansell, 836 S.W.2d 117, 118 (Tenn. Ct. App. 1992). Courts will interpret these agreements as written, *see Whaley v. Underwood*, 922 S.W.2d 110, 112 (Tenn. Ct. App. 1995); *Hillsboro Plaza Enters. v. Moon*, 860 S.W.2d 45, 47 (Tenn. Ct. App. 1993), and will give contractual terms their natural and ordinary meaning in light of the context in which they are used. *See Wilson v. Moore*, 929 S.W.2d 367, 373 (Tenn. Ct. App. 1996); *Gredig v. Tennessee Farmers Mut. Ins. Co.*, 891 S.W.2d 909, 912 (Tenn. Ct. App. 1994).

The courts should construe contracts reasonably, *see ACG, Inc. v. Southeast Elevator, Inc.*, 912 S.W.2d 163, 168 (Tenn. Ct. App. 1995); *Setters v. Permanent Gen. Assurance Corp.*, 937 S.W.2d 950, 953 (Tenn. Ct. App. 1996), and should avoid making a new contract for parties who have already spoken for themselves. *See Hillsboro Plaza Enters. v. Moon*, 860 S.W.2d at 47. If a contract contains an ambiguous provision, the courts should strive for an interpretation that gives the fullest possible effect to the parties' intentions as reflected in the language of the contract. *See Rainey v. Stansell*, 836 S.W.2d at 118-19. However, ambiguities should be construed most strongly against the party who drafted the contract. *See Harrell v. Minnesota Mut. Life Ins. Co.*, 937 S.W.2d 809, 814 (Tenn. 1996); *Hanover Ins. Co. v. Haney*, 221 Tenn. 148, 153, 425 S.W.2d 590, 592 (1968); *Travelers Ins. Co. v. Aetna Cas. & Sur. Co.*, 491 S.W.2d 363, 365 (Tenn. 1973).

After reviewing the subrogation provision objectively, *see Richards v. Taylor*, 926 S.W.2d 569, 571 (Tenn. Ct. App. 1996), we have determined that it is capable of more than one interpretation. On one hand, the language making the clause applicable to "any other coverage where permitted by law" favors including payments to an insured under Coverage C within the subrogation agreement. On the other hand, however, the specific mention of Coverages A, B, E, F, and G could reasonably mean that the parties intended that payments under coverages other than the five mentioned would not be subject to claims for subrogation under the policy. *See S.M.R. Enters., Inc. v. Southern Haircutters, Inc.*, 662 S.W.2d 944, 949 (Tenn. Ct. App. 1983) (holding that where a contract, by its express terms, includes one or more things of a class, it simultaneously implies the exclusion of the balance of that class).

Shelter could have easily included Coverage C with the other five coverages specifically mentioned in its policy's subrogation provision. Because Shelter failed to do so, we conclude that it did not intend to obtain conventional subrogation rights for payments under Coverage C. This interpretation is consistent with our obligation to construe ambiguous terms in insurance policies in favor of the insured. *See Tennessee Farmers Mut. Ins. Co. v. Witt*, 857 S.W.2d 26, ___ (Tenn. 1993); *Omaha Property & Cas. Ins. Co. v. Johnson*, 866 S.W.2d 539, 541 (Tenn. Ct. App. 1993). Ms. Waller had no specific notice in her policy that Shelter could attempt to recover from her any payments made for medical expenses advanced under Coverage C. Accordingly, we find that Shelter's automobile insurance policy does not support a claim for conventional subrogation with regard to payments made pursuant to Coverage C.[2]

Shelter's second theory is that it is entitled to legal subrogation even if it has not made out a claim for conventional subrogation. It asserts that it stands in the shoes of Ms. Waller to the extent of the $1,841.67 it paid in response to her claims for medical expenses under Coverage C. In order to be entitled to legal subrogation, Shelter must demonstrate that Ms. Waller has been "made whole" with regard to the medical expenses she incurred as a result of the collision with Mr. Ammon. Ms. Waller vigorously asserts that she has not been made whole. Thus, Shelter's right to legal subrogation can succeed only if Shelter can prove (1) that it made a payment to Ms. Waller for medical expenses that should have been paid by the original defendants and (2) that the funds Ms. Waller received in her settlement with the original defendants, together with the funds it paid to Ms. Waller, have made Ms. Waller whole.

Shelter used a "loan receipt" transaction when it paid Ms. Waller the $1,841.67 for her medical expenses. When it tendered the funds, it required Ms. Waller to sign a loan receipt for $1,841.67 containing an agreement to repay Shelter if she recovered from the original defendants as a result of the April 24, 1992 accident. Deciding

[2]Shelter has not argued that it is entitled to conventional subrogation based upon the terms of the loan receipt Ms. Waller signed. Accordingly, we do not address in this opinion whether a loan receipt such as the one involved in this case could provide the basis for a conventional subrogation claim.

whether to characterize this transaction as a loan or a payment is significant. If it is a loan, it will not support a claim for subrogation because it is not a "payment" of an obligation for which another is primarily liable. *See Central Nat'l Ins. Co. v. Dixon*, 559 P.2d 1187, 1188-89 (Nev. 1977); *State Farm Mut. Auto Ins. Co. v. Wee*, 196 N.W.2d 54, 57 (N.D. 1971). However, a loan receipt transaction that is essentially a payment will support a claim for legal subrogation. *See Deming & Co. v. Merchants' Cotton-Press & Storage Co.*, 90 Tenn. 306, 332, 17 S.W. 89, 94 (1891); *see also Executive Jet Aviation, Inc. v. United States*, 507 F.2d 508, 511-13 (6th Cir. 1974) (applying Ohio law); *Mut v. Newark Ins. Co.*, 289 So. 2d 237, 249-50 (La. Ct. App. 1973); 6A John A. Appleman & Jean Appleman, *Insurance Law and Practice* § 4051, 114-15 (1972). The parties' intentions govern whether a loan receipt transaction is a payment or a loan for the purposes of a subrogation claim. *See Ratcliff v. Smith*, 298 S.W.2d 18, 20 (Ky. Ct. App. 1957).

Under the undisputed facts of this case, we find that Shelter's payment of $1,841.67 to Ms. Waller was a payment rather than a loan. Ms. Waller did not make an unconditional promise to repay the funds. By the terms of the loan receipt, she was obligated to repay the money only if she recovered from the third party who was primarily liable for her injuries. In addition, the loan receipt did not require repayment on a date certain and did not require the payment of interest on the funds advanced. Based on these facts, Shelter's payment of $1,841.67 to Ms. Waller can support a claim for legal subrogation.

In order to be entitled to legal subrogation, Shelter must still demonstrate that Ms. Waller has been made whole with regard to the risk for which she obtained insurance. In this case, Shelter was obligated to indemnify Ms. Waller for up to $5,000 of her medical expenses resulting from the accident. Ms. Waller received $15,000 in her settlement with the original defendants in addition to the $1,841.67 she received from Shelter. Thus, we must determine whether Ms. Waller's receipt of $16,841.67 has made her whole with regard to her medical expenses.

The record does not contain a copy of the settlement agreement between Ms. Waller and the original defendants. Thus, we cannot determine whether the parties to the settlement undertook to allocate the settlement proceeds to particular damage claims or whether they intended for the settlement to cover Ms. Waller's claims for

medical expenses. This matter must be addressed by the trial court on the remand of this case. If the settlement proceeds were not intended to be applied to Ms. Waller's medical expense claims, then she may not have been made whole, and Shelter would not be entitled to legal subrogation for $1,841.67.

If the settlement agreement between Ms. Waller and the original defendants is silent with regard to the allocation of the settlement proceeds or purpose of the settlement, then the trial court must conclude that the settlement was intended to resolve all of Ms. Waller's claims against the original defendants. These claims would necessarily include Ms. Waller's medical expense claims because her complaint against the original defendants alleges that she "sustained injury to the muscles and ligaments of the neck and back with acute sprain or strain" and that she "has incurred large medical bills and expenses in the treatment and diagnosis of her injuries." No conclusion can be drawn from these allegations other than that Ms. Waller was seeking to recover her medical expenses from the original defendants. Accordingly, her settlement that "in all respects" dismissed her claims against the original defendants must have been intended to dispose of her claim for medical expenses as well as her related claims for lost income and pain and suffering.

Ms. Waller's settlement with the original defendants reflects a tactical decision that accepting the $15,000 would make her whole for all her claims against the original defendants. These claims included her claims for medical expenses. Because her medical expenses amounted to approximately $6,800, the trial court must presume, in the absence of evidence to the contrary, that a portion of these settlement proceeds were intended to be applied to Ms. Waller's claim for medical expenses. Since the amount of the settlement exceeds Ms. Waller's claimed medical expenses, the trial court must then necessarily conclude that Ms. Waller has been made whole for the medical expenses she incurred as a result of the accident. If she has been made whole of these expenses, then Shelter is entitled to the $1,841.67 presently being held by the clerk of the trial court.

IV.

MS. WALLER'S CLAIM FOR THE UNPAID INSURANCE BENEFITS

Ms. Waller also asserts that she is entitled to an additional $3,158.33 from Shelter representing the difference between the $5,000 limit on Coverage C under her insurance policy and the $1,841.67 actually paid by Shelter. She argues, without citation to authority, that Shelter's "wait and see approach" was inconsistent with its contractual obligation to her and that Shelter's failure to pay her the policy limits induced her to settle with the original defendants - presumably for less than what she might have otherwise received.

Shelter's insurance policy obligated it to pay up to $5,000 in "reasonable expenses" for "necessary medical services" for the bodily injuries caused by the April 1991 accident. But, since an insurance policy is essentially an indemnity contract, *see Wattenbarger v. Tullock*, 198 Tenn. 402, 405, 280 S.W.2d 925, 926 (1955), Shelter's obligation to pay Ms. Waller's reasonable and necessary medical expenses does not arise if these expenses are paid by the party or parties who caused Ms. Waller's injuries.

The trail court erred in granting Ms. Waller a summary judgment on her claim for $3,158.33 because she has not demonstrated that she is entitled to a judgment as a matter of law. First, she has failed to prove that all of her claimed $6,800 in medical expenses stemmed from the injuries she sustained in the April 1991 accident and that they were necessary and reasonable. Second, she has not demonstrated that her $15,000 settlement with the original defendants did not have the legal effect of compensating her for these injuries. If her settlement with the original defendants included her claims for these injuries, she has already been compensated for them and cannot recover twice by seeking an additional $3,158.33 from Shelter.

V.

We vacate the summary judgment awarding Ms. Waller the $1,841.67 paid into court by the original defendants and an additional $3,158.33 from Shelter. We remand this case to the trial court with directions to determine whether Ms. Waller's settlement with the original defendants included her claims for medical expenses. If the trial court finds that it did, then it should award Shelter the $1,841.67 being held by the clerk, and it should dismiss Ms. Waller's claim for $3,158.33. If the trial court

finds that Ms. Waller's settlement with the original defendants did not include her medical expense claims, the trial court should award the $1,841.67 to Ms. Waller and should also give her a judgment against Shelter for $3,158.88. We tax the costs of this appeal in equal proportions to Shelter Insurance Company and its surety and to Deborah L. Waller for which execution, if necessary, may issue.

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WILLIAM C. KOCH, JR., JUDGE

CONCUR:

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SAMUEL L. LEWIS, JUDGE

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BEN H. CANTRELL, JUDGE