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**EXPLANATION OF WHY THIS CASE IS A CASE OF
PUBLIC OR GREAT GENERAL INTEREST AND
INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION**

This case involves the integrity of a self-funded, employee benefit plan, and the discretion of its plan administrators to manage same without unwarranted interference in the form of judicial review. The plan expressly provides that “[t]he Plan Administrator has the exclusive right to interpret and administer the Plan, and these decisions are conclusive and binding.” Ignoring this contractual language, and the requisite discretion which it imparts, the courts below have substituted their judgments (albeit on differing rationales) for that of the plan administrator, relating to the interpretation of benefits and coverage. If the courts can exercise such authority, through the mechanism of a declaratory judgment action, then the plan administration and appeal process is substantially altered. This eliminates a material aspect of a self-funded, employee benefit plan, leading to uncertainty and unmanageable expenses, undermining the integrity of the plan itself.

When a benefit plan, such as that involved in this case, provides for broad discretion in the administrator to interpret and render determinations as to the scope of coverage, and further provides for a specific appeal and review process in which the determinations are deemed conclusive and binding, judicial review should be limited to application of an arbitrary and capricious standard. Otherwise, the viability of the plan is left to the unfettered interpretation and expansion of benefits by the courts. In order for employers, like the appellant, Wayne County Commissioners, to be in a position to afford to provide self-funded employee benefit plans, such employers must be empowered with discretion to reasonably interpret and enforce the parameters of plan coverage. Employers cannot simply absorb ever-expanding costs, resulting from unpredictable judicial extensions of coverage.

STATEMENT OF THE CASE AND FACTS

The appellees, Donna and Michael Daugherty, filed their complaint for declaratory judgment in this case on June 12, 2009, in the Wayne County Court of Common Pleas. In their complaint, the appellees sought a determination that a plan of group health coverage provided coverage for an implanted, “osseointegrated auditory” device (a Bone Anchored Hearing Aid) which the appellee, Donna Daugherty, acquired. (Complaint, ¶ 3). According to the appellees, the subject device was a “prosthesis.” (Complaint, ¶¶ 3, 4). Appellants, Wayne County Board of County Commissioners and United Healthcare Insurance Company, timely answered the complaint on August 12, 2009 and August 26, 2009, respectively.

Following a period for discovery, the parties agreed to brief the issues for the lower court, and stipulations were submitted along with various discovery materials. Both appellees and appellants submitted a primary brief, followed by a reply brief on behalf of the appellants. After this briefing was concluded, the court entered its judgment in favor of the appellees on September 14, 2010. (Appendix “B”). Therein, the lower court held that “[b]ecause there is nothing clearly excluding the BAHA [“Bone Anchored Hearing Aid”] device either in the exclusions section of the SPD [“Summary Plan Description”] or in the prosthetic device section, . . . the court determines that the BAHA device is covered under the Benefit Plan.”

Appellants timely filed their notice of appeal on October 14, 2010, to the Ninth District Court of Appeals. The appellate court affirmed in a decision and journal entry dated October 24, 2011. In its judgment, the Court of Appeals held that “[i]f the BAHA device is a hearing aid, . . . it is excluded under the Summary Plan Description as a [h]ealth service . . . that do[es] not meet the definition of a “Covered Health Service.”” However, the appellate court then went on to determine

that the BAHA was somehow a “prosthesis” and, thus, covered under the plan. Neither lower court decision is tenable under the facts of this case. The plan administrators correctly determined that the BAHA is a “hearing aid” by function and not a “prosthesis” (not a replacement for an “external body part”). Had due deference been given to the proper determinations of the plan administrators, judgment would have been entered in favor of the appellants.

The Benefit Plan in question is a self-insured plan covering employees of Wayne County. The Wayne County Board of Commissioners is the Plan Sponsor and Plan Administrator and, pursuant to the terms of an Administrative Services Agreement, claims are administered by United Healthcare Insurance Company. It is undisputed that the appellee, Michael Daugherty, is an employee-enrollee in the subject group Benefit Plan. It is further undisputed in this case that the appellee, Donna Daugherty, qualifies as an insured under the subject plan, as the spouse of the employee-enrollee.

At issue is a specific claim for benefits under the plan. Mrs. Daugherty applied for benefit coverage for the implantation of an auditory device, for the purpose of treating deafness in her right ear. She was not treating for any loss to either external ear body part. The claim for coverage, for the cost of said device in particular, was denied under the terms of the group coverage document. The device in question was a “Bone Anchored Hearing Aid” (BAHA System) and its function has been described by the appellee’s physician as follows:

Direct bone conduction is using the bone as a pathway for sound to travel to the functioning inner ear, or cochlea, without involving the external ear or ear canal. Sound is transferred from the sound processor via an external abutment to the titanium fixture, which is to be placed in the patient’s skull bone behind the ear. The BAHA System has been cleared by the Food & Drug Administration (FDA), as a viable treatment option for patients.

Again, Mrs. Daugherty's condition involved "single-sided deafness (SSD)", with hearing loss in her right ear.

The Benefit Plan involved in this matter does not provide coverage for "hearing aids." Thus, when the appellee's claim was initially reviewed by the claims administrator, United Healthcare, the claim was denied because the "[p]urchase cost and fitting charge for hearing aids is not a covered benefit under the plan." Upon review by the Board of Commissioners, under the applicable appeal process, the claims administrator's determination was affirmed by the Board. The Board agreed that the BAHA was not covered, since the plan "does not cover hearing aids," and the BAHA System was not covered as a "prosthetic device." Throughout this case, the appellees have not contended that the Benefit Plan actually provides hearing aid coverage (the Court of Appeals agreed it does not); rather, they characterize the BAHA System as a "prosthesis" for purposes of seeking coverage. In their complaint, the Daughertys claimed that the appellant Board "applied the wrong definition" when the claim was considered and denied.

For the following reasons, the review determination of the appellant Board of Commissioners should have been ratified by the lower courts, and the appellees' claim for declaratory judgment should have been rejected. The interpretations and decisions of the plan administrators was not shown to be arbitrary or capricious. A BAHA System is, as its name even implies, a Bone Anchored *Hearing Aid* and, thus, not covered under the Wayne County employee Benefit Plan. Otherwise, because a BAHA does not "replace an external body part," it is not a "prosthetic device," and does not qualify for coverage under the benefit plan in question.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. 1:

AN EMPLOYEE BENEFIT PLAN WHICH EXPRESSLY PROVIDES THAT THE DECISIONS OF THE PLAN ADMINISTRATOR ARE CONCLUSIVE AND BINDING MUST BE GIVEN DEFERENCE, AND A COURT CANNOT SUBSTITUTE ITS JUDGMENT FOR THAT OF THE ADMINISTRATOR, INASMUCH AS REVIEW IS LIMITED TO AN ARBITRARY AND CAPRICIOUS STANDARD.

The determination made by the Board of Commissioners was not, in any fashion, arbitrary, capricious or unreasonable, in the interpretation and implementation of the Benefit Plan in this instance. Thus, the appellants' determinations should have been confirmed by the lower courts.

Pursuant to the Benefit Plan, "[t]he Plan Administrator has the exclusive right to interpret and administer the Plan, and these decisions are conclusive and binding." (Summary Plan Description, Section 6 - Appeals; Section 9 - Interpretation of Benefits). The latter clause expressly provides that the Board, and Claims Administrator, "have sole and exclusive discretion to do all of the following: - Interpret Benefits under the Plan." While the subject plan is a "government" plan not expressly covered by ERISA (29 U.S.C. 1002-32), the same principles of deference should be applied. "When there is a reasoned explanation based on the evidence for denying benefits, it is not an arbitrary or capricious decision." E.g., Truett v. Community Mutual Ins. Co. (1993), 91 Ohio App. 3d 741, 744. In this case, the record contains the Board's reasoned explanation, based on the evidence, for denying the benefits claimed for the BAHA. Consequently, the Board's determination was not arbitrary or capricious, and the appellees' claim should have failed. See also, Coyne v. General Motors (1988), 46 Ohio App. 3d 123; and Roberts v. Independence Blue Cross (E.D. Pa., 2005), 2005 U.S. LEXIS 1366 (Because administrator exercises discretion expressly reserved in the

plan, to determine eligibility for benefits or construe the plan's terms, review is limited to "arbitrary and capricious standard.").

The lower courts should have given due deference to the administrative determinations of the appellants in connection with this case. Frankly, the courts needed to look no further than the express language of the plan description itself, to limit judicial review. The benefit plan clearly lodges discretion in interpretation and administration of the plan with the Board and its designee. That discretion is necessary to protect the integrity and solvency of the self-funded plan provided for employees. Review of determinations by the courts is, in recognition of the discretion and plan language, appropriately limited to an arbitrary and capricious standard. The lower courts, however, refused to restrict their involvement in this case.

Proposition of Law No. II:

THE SCOPE OF COVERAGE UNDER AN EMPLOYEE BENEFIT PLAN IS NOT DETERMINED BY ITS EXCLUSIONS BUT, INSTEAD, BY THE EXPRESS PROVISIONS WHICH GRANT BENEFITS, AND IN THE ABSENCE OF LANGUAGE EXTENDING COVERAGE FOR THE COST OF A BONE-ANCHORED HEARING AID, A COURT CANNOT DECLARE SUCH COVERAGE TO EXIST.

The trial court held that the benefit plan was "ambiguous" and, thus, provided coverage for the BAHA. The Court of Appeals rejected this approach. "[T]he Summary Plan Description is clear, and we disagree with the trial court's determination that it is ambiguous." (Appendix "A," P. 4). The appellate court recognized that "[i]f the BAHA device is a hearing aid, . . . it is excluded under the Summary Plan Description as a '[h]ealth service . . . that do[es] not meet the definition of a 'Covered Health Service.'" This should have ended the lower court's inquiry. The BAHA functions as a hearing aid – to restore the function of hearing in the treatment of the appellee's

“single sided deafness.” As the trial court observed: “Mrs. Daugherty had deafness in the right ear known as single sided deafness. This was remedied through the addition of a BAHA device.” (Appendix “B,” P. 9).

Regardless of whether the BAHA is, specifically, a “hearing aid,” for the same reasons noted by the appellate court, the cost of same was still not a covered expense under the plan. Simply, a BAHA is not defined in the plan as a “Covered Health Service” under the grant language of the plan in the first instance. The exclusions in the plan do not, somehow, expand the scope of coverage. To the contrary, the exclusion for “[h]ealth service . . . that do[es] not meet the definition of a ‘Covered Health Service’” reinforced the absence of coverage in this instance.

Under Ohio law, it is well-established that the construction of a contract, including a contract of insurance, is generally a matter of law for the Court. Chicago Title Ins. Co. v. Huntington Natl. Bank (1999), 87 Ohio St. 3d 270, 273. A court is to interpret a contract so as to carry out the intent of the parties. Aultman Hosp. Assn. v. Community Mut. Ins. Co. (1989), 46 Ohio St. 3d 51, 54; Skivolocki v. East Ohio Gas Co. (1974), 38 Ohio St. 2d 244. Of course, the “intent of the parties to a contract is presumed to reside in the language they chose to employ in the agreement.” E.g., Osbourne v. Ahern (Dec. 1, 2005), Jackson App. No. 05CA9, 2005-Ohio-6517, ¶17; Kelly v. Medical Life Ins. Co. (1987), 31 Ohio St. 3d 130. Moreover, there can be no implied covenants in a contract in relation to any matter specifically covered by the written terms of the contract itself. Kachelmacher v. Laird (1915), 92 Ohio St. 324, 324. 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. Latina v. Woodpath Dev. Co. (1991), 57 Ohio St. 3d 212, 214.

It is likewise fundamental that, under Ohio law, courts are bound by the plain and unambiguous terms of a contract and cannot enlarge or extend the contract by implication. E.g., Drumm v. Blue Cross (1974), 40 Ohio App. 2d 421, 425. In the enforcement of written agreements, the language and terms therein are to be given their plain, common and ordinary meaning. Aultman Hosp. Assn. v. Community Mut. Ins. Co., supra, 53-54; Alexander v. Buckeye Pipe Line Co. (1978), 53 Ohio St. 2d 241, syl. ¶¶ 1-2. Accordingly, when a contract is clear and unambiguous, the interpretation and enforcement of the contract is a matter of law for the court. E.g., Seringetti Construction v. City of Cincinnati (1988), 51 Ohio App. 3d 1, syl. ¶ 2; Shifrin v. Forest City Enterprises (1992), 64 Ohio St. 3d 635, 638. “Where a contract is clear and unambiguous, the court must give effect to the express terms when determining the rights and obligations of the parties.” Saydell v. Geppetto’s Pizza & Ribs (1994), 100 Ohio App. 3d 111, 119, citing Shifrin, supra.

In this case, the restriction of coverage for hearing aids and BAHAs in the Benefit Plan is clear and unambiguous and, therefore, entitled to be enforced as written, as a matter of law. E.g., Hybud Equip. Corp. v. Sphere Drake Ins. Co., Ltd. (1992), 64 Ohio St. 3d 657, 665; and Chicago Title Ins. Co. v. Huntington Natl. Bank (1999), 87 Ohio St. 3d 270, 273. Simply, a hearing aid (or BAHA) is not a “Covered Health Service.” Otherwise, the BAHA System is not properly characterized as a “prosthesis,” for purposes of coverage. Coverage for prosthetic devices is also limited under the Benefit Plan, and it clearly does not extend to a BAHA System.

Under Ohio law, it is fundamental that “where the provisions of an insurance policy are clear and unambiguous courts may not indulge themselves in enlarging the contract by implication in order to embrace an object distinct from that contemplated by the parties, (citation omitted), nor read into the contract a meaning not placed there by an act of the parties, (citation omitted), nor make a

new contract for the parties where their unequivocal acts demonstrate an intention to the contrary.” Associated Visual Communications v. Erie Insurance Group (Feb. 20, 2007), Stark App. No. 2006 CA 00092, ¶25. With respect to an insurance policy, a court “is not permitted to alter a lawful contract by imputing an intent contrary to that expressed by the parties.” Westfield v. Galatis, 100 Ohio St. 3d 216, 2003-Ohio-5849, ¶12. Moreover, a court “will not add language to the contract which is not there.” E.g., Erie Ins. Group v. Tully (June 6, 1983), Stark App. No. CA-6063. Again, and importantly, terms of the insurance policy are to be given their plain and ordinary meaning and construction. E.g., Cincinnati Ins. Co. v. CPS Holdings, Inc., 115 Ohio St. 3d 306, 2007 -Ohio-4917, ¶ 7; Sarmiento v. Grange Mut. Cas. Co., 106 Ohio St. 3d 403, 2005-Ohio-403, ¶ 9.

The threshold question then is nothing more than an artful attempt to elevate form over function. The “plain, common and ordinary” meaning of a “hearing aid” is a “device to improve hearing.” (E.g., Encyclopedia.com, hearing aid). The BAHA System at issue in this case was just that, a device to improve hearing for the claimant, Mrs. Daugherty, for her right ear. While the device is different in form than another type of hearing aid that fits behind or within the ear, the BAHA serves precisely the same function. As noted in the definition at Encyclopedia.com, a “bone-anchored h.a. (BAHA) [is] a hearing aid for those with certain forms of conductive deafness in which the vibrator is a small titanium screw fixed into the bone of the skull behind the external ear.” Id. When “hearing aid” is given its plain, common and ordinary meaning, it clearly extends to preclude coverage under the Wayne County Benefit Plan for the BAHA System used by Daugherty to treat her single-sided hearing loss. Regardless, coverage for a hearing aid or BAHA is not specifically set forth in the Plan as a “covered service” (Section 1) and, thus, coverage does not exist for the BAHA.

As a consequence, the appellees convinced the lower courts that “prosthesis” coverage under the Plan was somehow applicable. However, the extent to which “prosthetic devices” are covered under the Benefit Plan is narrowly limited, as follows:

External prosthetic devices that replace a limb or an external body part, limited to:

- Artificial arms, legs, feet and hands.
- Artificial eyes, ears and noses.
- Breast prosthesis as required by the Women’s Health and Cancer Rights Act of 1998. . . .

(Summary Plan Description, Section 1, Part 18). The BAHA System obtained by Daugherty to treat her right-sided hearing loss was not for the purpose of replacing the external body part (that is, her right, outer ear). Thus, the BAHA System does not qualify for coverage under the “prosthetic device” coverage of the Benefit Plan. Stated simply, the BAHA System is not an “external prosthetic device” used to “replace an external body part;” thus, it is not an “artificial ear.” The clear intent of the Benefit Plan is to limit prosthetic device coverage to devices which actually “replace” a limb or “external body part,” such as an arm, leg, hand, eye, ear or nose. The lower courts fundamentally erred, as a matter of law, in utilizing the “prosthetic” section of the Benefit Plan to find coverage for the BAHA where no such coverage existed.

The absence of “hearing aid” language from the “exclusions” provisions of the Benefit Plan is meaningless. Again, there is no coverage for hearing aids (generally or BAHA Systems particularly) under Section 1 of the Benefit Plan, in the first instance, and thus no need to examine the exclusions for any provision relating thereto. When there is no coverage for a claim under the coverage grant language of a policy, as a threshold matter, it is then “unnecessary to determine

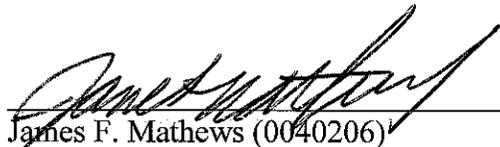
whether any exclusions to coverage contained in such policy apply.” E.g., Bogner Construction Co. v. Field & Assoc. (Jan. 13, 2009), Knox App. No. 08 CA 11, 2009-Ohio-116, ¶51. The scope of coverage is fixed under the Benefit Plan documentation, as a matter of law. “When the language of a written contract [such as an insurance policy] is clear, a court must look no further than the writing itself to find the intent of the parties.” Ross Cty. Redi-Mix Co. v. Grange Mut. Cas. Co. (Mar. 14, 2008), Ross App. No. 07 CA 2954, 2008-Ohio-1227, ¶15.

CONCLUSION

The issues addressed in this case are essential to the proper administration of self-funded, employee benefit plans. Consequently, this Court should accept review of this case.

WHEREFORE, appellants, Wayne County Board of County Commissioners and United Healthcare Insurance Company, respectfully request that the Court accept this case for review on the merits, under appellants’ propositions of law.

Respectfully submitted,



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PROOF OF SERVICE

A copy of the foregoing memorandum in support of jurisdiction was served by ordinary U.S. mail this 6th day of December, 2011, to:

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STATE OF OHIO	FILED	IN THE COURT OF APPEALS
COUNTY OF WAYNE	9TH DISTRICT	NINTH JUDICIAL DISTRICT
	COURT OF APPEALS	
)	
	2011 OCT 24 AM 7 58	
DONNA J. DAUGHERTY, et al.	TIM NEAL	C.A. No. 10CA0046
Appellees	CLERK OF COURTS	
v.		APPEAL FROM JUDGMENT
WAYNE COUNTY BOARD OF COUNTY		ENTERED IN THE
COMMISSIONERS, et al.		COURT OF COMMON PLEAS
		COUNTY OF WAYNE, OHIO
Appellants		CASE No. 09-CV-0457

DECISION AND JOURNAL ENTRY

Dated: October 24, 2011

CARR, Presiding Judge.

{¶1} Appellants, the Wayne County Board of Commissioners and United Healthcare Insurance Company (“the Insurer”), appeal the order of the Wayne County Court of Common Pleas that entered a declaratory judgment in favor of Appellees, Michael and Donna Daugherty. This Court affirms.

{¶2} The Wayne County Board of Commissioners offers health insurance coverage to its employees under a self-insured health plan, and claims under the plan are administered by United Healthcare. Mr. Daugherty is an employee covered under the plan, and as the spouse of an employee, Ms. Daugherty is also covered. Ms. Daugherty, who suffered hearing loss in one ear, sought preapproval for the surgical implantation of a “bone anchored hearing device” (“BAHA”). United Healthcare denied preapproval, but Ms. Daugherty underwent the procedure anyway. She submitted a claim for \$11,585.00, representing the necessary and reasonable

Appendix "A"

expenses for the device and implantation, for payment. United Healthcare denied coverage for \$7,700.00, and the Daughertys appealed the determination to the Board of Commissioners.

{¶3} When the Board of Commissioners affirmed United Healthcare’s determination, the Daughertys filed an action seeking a declaratory judgment that, under the terms of the benefit plan, “the purchase costs and fitting charge for the implantation of an osseointegrated auditory prosthesis and *** device/components are covered charges[.]” The parties submitted cross-motions for summary judgment on stipulated facts, both relying on the terms of the “Summary Plan Description” as representative of the terms of the health insurance policy. The trial court concluded that the summary plan description is ambiguous with respect to whether the bone anchored hearing device falls within plan exclusions or within coverage for prosthetic devices and, construing the document liberally in favor of the Daughertys, concluded that the Daughertys are entitled to coverage for the device. The Insurer appealed.

ASSIGNMENT OF ERROR I

“THE TRIAL COURT ERRED IN GRANTING DECLARATORY JUDGMENT IN FAVOR OF THE APPELLEES, BASED UPON THE CLEAR AND UNAMBIGUOUS LANGUAGE OF THE PLAN OF HEATH COVERAGE AT ISSUE, TO APPELLANTS’ PREJUDICE.”

ASSIGNMENT OF ERROR II

“THE TRIAL COURT ERRED IN GRANTING DECLARATORY JUDGMENT IN FAVOR OF THE APPELLEES, WITHOUT GIVING DEFERENCE TO THE ADMINISTRATIVE DETERMINATION OF THE APPELLANTS, AS REQUIRED UNDER THE HEALTHCARE PLAN AT ISSUE, TO APPELLANTS’ PREJUDICE.”

{¶4} The Insurer’s first assignment of error is that the trial court erred by granting summary judgment to the Daughertys based on the incorrect conclusions that the BAHA device is a “prosthetic device” under the terms of the summary plan description and that the document is

ambiguous with respect to coverage. The Insurer has also argued that the trial court erred by failing to defer to the coverage decision made by the Board of Commissioners.

{¶5} This Court reviews an order that grants summary judgment de novo. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105. Summary judgment is proper if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. See Civ.R. 56(C). In applying this standard, evidence is construed in favor of the nonmoving party, and summary judgment is appropriate if reasonable minds could only conclude that judgment should be entered in favor of the movant. *Horton v. Harwick Chem. Corp.* (1995), 73 Ohio St.3d 679, 686-87. Before the trial court may consider whether the moving party is entitled to judgment as a matter of law, however, it must determine whether there are genuine issues of material fact for trial. *Byrd v. Smith*, 110 Ohio St.3d 24, 2006-Ohio-3455, at ¶12.

{¶6} The facts in this case are not disputed. In their respective motions for summary judgment, both parties relied on the Summary Plan Description, which was incorporated into the parties' stipulations. The Daughertys argued that the BAHA device is a prosthetic device covered by the terms of the summary plan description. More specifically, they argued that the Board of Commissioners' determination that the BAHA device is not covered as a hearing aid is an incorrect interpretation of the summary plan description because it does not specifically exclude hearing aids and, because the BAHA device falls within the scope of covered prostheses, it cannot fall within the "catch-all" exclusion for "[h]ealth services and supplies that do not meet the definition of a Covered Health Service[.]" Conversely, the Insurer maintained that the BAHA device does not fall within the definition of a prosthetic in the summary plan description and is, in fact, a hearing aid. The Insurer argues that although not contained within a specific

exclusion to the policy, hearing aids are excluded by operation of the catch-all exclusion for all items that are not covered health services.

{¶7} At issue in this case is whether the Choice Plus Plan (PPO) for Wayne County, administered by United Health Care, covers the implantation of the BAHA device. As such, the terms of the policy itself are fundamental to the analysis of the Daughertys' claim. In light of this, we note that the parties in this case incorporated the Summary Plan Description into their stipulations and relied upon it as representative of the terms of the health insurance plan. Although that document, by its terms, is "an overview of *** [b]enefits provided to inform the plan participants" while "the official Plan Document" sets forth the terms of the plan and controls in the event that there is a discrepancy with the Summary Plan Description, we review the parties' motions for summary judgment with respect to the stipulated evidence and, accordingly, look to the Summary Plan Description to determine whether summary judgment was properly granted.

{¶8} Hearing aids are neither specifically covered expenses nor specifically excluded expenses under the terms of the Summary Plan Description. If the BAHA device is a hearing aid, therefore, it is excluded under the Summary Plan Description as a "[h]ealth service *** that do[es] not meet the definition of a Covered Health Service[.]" In this respect, the Summary Plan Description is clear, and we disagree with the trial court's determination that it is ambiguous. Nonetheless, we agree that the Daughertys are entitled to summary judgment because, if the BAHA does qualify as a "covered health service" under the terms of the Summary Plan Description and is not otherwise excluded, Ms. Daugherty is entitled to coverage.

{¶9} Section 1.18 of the Summary Plan Description provides that prosthetic devices are covered services and further defines them as "[e]xternal prosthetic devices that replace a limb or

an external body part, limited to[] [a]rtificial arms, legs, feet and hands [and] [a]rtificial eyes, ears and noses.” Section 2, which governs exclusions, does not contain any limitation on coverage for prostheses that fall within the definition in Section 1.18. According to the evidence submitted by the Daughertys in support of their motion for summary judgment, the BAHA device is an “Osseointegrated Auditory Prosthesis,” which involves an external processor anchored to the skull bone behind the ear. The BAHA takes the place of the external ear and the ear canal and, according to the evidence the Daughertys submitted, is not a hearing aid. Inasmuch as the BAHA takes the place of the ear and ear canal, it is an external prosthetic device that replaces an ear, as set forth in Section 1.18 of the Summary Plan Description.

{¶10} The Insurer has also argued that the trial court erred in granting summary judgment to the Daughertys because terms of the Plan required deference to the decision made by the Board of Commissioners and is subject only to review for arbitrariness and capriciousness. The basis for this argument, however, is the standard of review applied to statutory actions involving discretionary decisions by a fiduciary in connection with plans subject to the Employee Retirement Income Security Act (ERISA). See, generally, *Glenn v. MetLife* (C.A.6, 2006), 461 F.3d 660, 666, applying *Firestone Tire and Rubber Co. v. Bruch* (1989), 489 U.S. 101, 113. The Insurer concedes, however, that Wayne County’s health plan is a governmental plan not subject to ERISA and offers no basis for its position that “the same principles of deference should be applied” in a declaratory judgment action in which ERISA is not at issue.

{¶11} The trial court did not err in granting summary judgment to the Daughertys, and the Insurer’s first and second assignments of error are overruled. The judgment of the Wayne County Court of Common Pleas is affirmed.

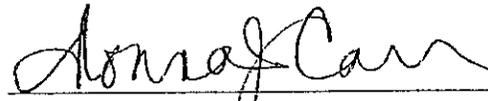
Judgment affirmed.

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 Wayne, 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 Appellants.


DONNA J. CARR
FOR THE COURT

WHITMORE, J.
DICKINSON, J.
CONCUR

APPEARANCES:

JAMES F. MATHEWS, Attorney at Law, for Appellants.

WILLIAM F. ANFANG III, Attorney at Law, for Appellees.

IN THE COURT OF COMMON PLEAS
WAYNE COUNTY, OHIO

FILED
COMMON PLEAS COURT
WAYNE COUNTY, OHIO

DONNA J. DAUGHERTY, et al.

2010 SEP 14 PM 2 02

Plaintiffs

CASE NO. 09-CV-0457

TIM NEAL
CLERK OF COURTS

vs.

DECLARATORY JUDGMENT

WAYNE COUNTY BOARD OF
COUNTY COMISSIONERS, et al.

Defendants

This case concerns a claim for coverage under the terms of an employee benefit plan (the Choice Plus Plan for Wayne County Health Benefit Plan – Group No. 708897, “Benefit Plan”) under which the plaintiffs, Donna J. Daugherty and Michael E. Daugherty, are insured. The Benefit Plan in question is a self-insured plan covering employees of Wayne County. The Wayne County Board of Commissioners is the Plan Sponsor and Plan Administrator and, pursuant to the terms of an Administrative Services Agreement, claims are administered by United Healthcare Insurance Company.

Plaintiff, Michael E. Daugherty, is an employee-enrollee in the subject group Benefit Plan, and plaintiff, Donna J. Daugherty, qualifies as an insured under the plan as the spouse of the employee-enrollee.

At issue in this declaratory judgment action is a specific claim for benefits under the plan. Mrs. Daugherty applied for benefit coverage for the implantation of an auditory device to treat deafness in her right ear. Mrs. Daugherty was denied coverage for the costs and fitting charges of the device, but was granted coverage for the outpatient surgery involved. The device in question is a Bone Anchored Hearing Aid (“BAHA”).

Its function was described by the plaintiff's physician, Dr. Leonard Berenholz, as follows:

The procedure requires approximately 90 minutes and involves the implantation of a titanium fixture behind the ear where it osseointegrated or bonds to the temporal bone. At the time of surgery, a percutaneous abutment is attached to the fixture. After healing, an external processor is connected and adjusted for low and high frequency and gain control. The osseointegrated implant, commercially known as the BAHA system, is not a hearing aid and is cleared by the FDA for appropriate candidates who cannot benefit from external amplification. It is a medical necessity that Donna J. Daugherty be approved for the surgical implantation of the BAHA system.

Even though Dr. Berenholz is clear that the BAHA system is not a hearing aid, the defendant's January 5, 2009 letter to plaintiff states that the reason for denial of benefits for the BAHA system is that "our plan does not cover hearing aids". The Benefit Plan provides a summary plan description ("SPD") which lists services that are covered and services that are excluded under the Benefit Plan. Section 2 of the SPD covers exclusions. Nowhere in this section does it mention anything pertaining to hearing aids.

The defendant's argument that hearing aids are not covered is based on Section 2 of the SPD which states:

R. All Other Exclusions

1. Health Services and supplies that do not meet the definition of a Covered Health Service.

"Covered Health Services" are defined as:

Section 10: Glossary of Defined Terms

"Those health services provided for the purpose of preventing, diagnosing or treating a sickness, injury, mental illness, substance abuse, or their symptoms."

and

“A Covered Health Service is a health care service or supply described in (Section 1: What’s Covered – Benefits) as a Covered Health Service which is not excluded under (Section 2: What’s Not Covered – Exclusions).”

Hearing aids are not mentioned as a covered benefit in Section 1 of the SPD, nor are they mentioned as an exclusion in Section 2 of the SPD, leaving it unclear as to the intent of the policy concerning hearing aids.

An insurance policy is a contract whose interpretation is a matter of law and contract terms are to be given their plain and ordinary meaning. *Lager v. Miller-Gonzalez*, (2008), 120 Ohio St. 3d 47, 49. If provisions are susceptible of more than one interpretation, they ‘will be construed strictly against the insurer and liberally in favor of the insured.’ *King v. Nationwide Ins. Co.* (1988), 35 Ohio St.3d 208, 519 N.E.2d 1380, syllabus. Additionally, ‘an exclusion in an insurance policy will be interpreted as applying only to that which is *clearly* intended to be excluded.’ (Emphasis sic.) *Hybud Equip. Corp. v. Sphere Drake Ins. Co., Ltd.* (1992), 64 Ohio St.3d 657, 665, 597 N.E.2d 1096.”

It is undisputed that Mrs. Daugherty had deafness in the right ear known as single sided deafness. This was remedied through the addition of a BAHA device. There is nothing in the SPD clearly excluding the BAHA device which has been described by Dr. Berenholz as “...not a hearing aid at all but rather a titanium implant on which a processor is placed.” The BAHA is implanted into the skull and an external processor is attached to allow the patient to once again hear out of that side of her head, artificially replacing the purpose of the ear. There is nothing to indicate that a BAHA device operates as, or is medically considered a hearing aid. Because there is nothing clearly excluding the BAHA device either in the exclusions section of the SPD or in the

prosthetic devices section, the provisions of the contract are susceptible to more than one interpretation and must be construed strictly against the insurer and liberally in favor of the insured. For the foregoing reasons, the court determines that the BAHA device is covered under the Benefit Plan.

IT IS ORDERED, ADJUDGED AND DECREED that Plaintiff, Donna Daugherty's Motion for Summary Judgment is granted and Defendant's Motion for Summary Judgment is overruled. Plaintiff is entitled to coverage for the Bone Anchored Hearing Aid described in her Complaint.

There is no just cause for delay.


Robert J. Brown, Judge

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WAYNE COUNTY, OHIO