

ORIGINAL

IN THE SUPREME COURT OF OHIO

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| DONNA J. DAUGHERTY, et al., |) | |
| |) | Case No. 2011-2041 |
| Appellees, |) | |
| |) | |
| vs. |) | On Appeal from the Wayne |
| |) | County Court of Appeals, |
| WAYNE COUNTY BOARD OF, |) | Ninth Appellate District |
| COUNTY COMMISSIONERS, et al., |) | |
| |) | Court of Appeals |
| Appellants, |) | Case No. 10-CA-0046 |

MEMORANDUM IN RESPONSE TO APPELLANT'S
MEMORANDUM IN SUPPORT OF JURISDICTION

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Now come the Appellees, Donna J. Daugherty and Michael Daugherty, and state their position as to whether there is a substantial constitutional question or one of general public interest involved in this matter.

Proposition of Law No. I:

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.

Appellee's believe that they followed the appeals process as set forth in the employee benefit plan provided to them by Appellants. Each determination made by the Board of County Commissioners was arbitrary, capricious or unreasonable under the terms and conditions of the plan and under the requested coverage by Appellees. As argued by the Appellees in the lower Court, the plan does not specifically exclude hearing aids from coverage. The Plan further states that any medical procedures or appliances not specifically excluded by the plan are covered. See summary of plan description Section 10A. Each determination issued by the Board of County Commissioners was a single sentence conclusion that denied coverage because the plan did not cover hearing aids. The lower Court recognized this lack of specificity on the part of the Board of County Commissioners and therefore appropriately found for the Appellees.

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.

Appellees position concerning this proposition of law mirrors that of the last and these Appellees believe that both lower Courts rightly found in favor of the Appellees by simply reviewing the plain language of the plan. The plain language of the plan expressly states that benefits not specifically excluded are covered. A bone anchored hearing aid is not excluded. See summary plan description Section 10, Page 72.

The Appellants take exception to the lower Courts findings for the Appellees using separate and different factual determinations. It should be noted that the Appellants requested that the Trial Courts decision be reviewed *de novo* thus opening a door for such differing factual determinations. The fact that both Courts found that the bone anchored hearing aid is a prosthetic device and is covered by the plan simply goes back to the fact that there is not an exclusion under the coverage with respect to a prosthetic device. The differing view points of the lower courts is not substantial.

There is no substantial constitutional question involved in this matter. The Appellants have failed to identify a substantial constitutional question which requires the determination by this Court. Neither have they identified that there is in this matter a question of public or great general interest. While employee benefit plans interest the general public there are a variety of plans and each plan may be drafted in a multitude of ways to fit the expectations and needs of a variety of employees contemplated by the plan. The plan which the Appellants have adopted was not properly drafted to exclude the coverage for bone anchored hearing aids. This matter does not involve a substantial constitutional question nor a question of public or great general interest. It is simply a

dispute between an employer and its employee as to what was meant by a plan drafted by the employer.

Therefore this Court should not grant jurisdiction to hear this matter.

Respectfully submitted,



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PROOF OF SERVICE

A copy of the foregoing memorandum in response to appellant's memorandum in support of jurisdiction was served by ordinary U.S. mail this 5 day of January, 2012 upon James F. Mathews, BAKER, DUBLIKAR, BECK, WILEY & MATHEWS, 400 South Main Street, North Canton, OH 44720.



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