ORIGINAL

No. 10-1904

In the Supreme Court of Ohio

APPEAL FROM THE COURT OF APPEALS
NINTH APPELLATE DISTRICT
SUMMIT COUNTY, OHIO
CASE NO. 24906

NAPHCARE, INC.,
Plaintiff-Appellant,

v.

COUNTY COUNCIL OF SUMMIT COUNTY OHIO, et al.,
Defendants-Appellees.

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT NAPHCARE, INC.

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APPENDIX

I. EXPLANATION OF WHY THIS CASE INVOLVES AN ISSUE OF PUBLIC AND GREAT GENERAL INTEREST

This appeal is from a decision that awards Summit County a $600,000 windfall by applying certification requirements from the 19th century "Burns Law" to a contract for outsourced inmate medical services under the 1996 "Pay-for-Stay" Bill. The Court of Appeals adopted the County's claim that the contract was "void" because no certification confirming that county monies had been appropriated for the contract was attached, and Appellant NaphCare, Inc. thus has no recourse to recoup $600,000 it paid third-party providers for medical care provided to Summit County inmates over a two-year period.

This Court has never addressed the question of whether the Burns Law certification requirement applies to contracts permitted by Ohio's Pay-for-Stay Bill. But it has held that a "rule of reason" must prevail when considering the applicability of the certification requirement to a particular type of governmental contract. The contract at issue here enabled the County to comply with its statutorily-mandated duty to supply medical care to every inmate by incorporating floating cost features based on the number of inmates treated and the costs of off-site care. Since the costs necessarily fluctuated, no set amount of funds could have been "appropriated." This is precisely the type of contract that justifies and requires a rule of reason. This Court should accept jurisdiction and reverse because:

- The applicability of the Burns law to contracts executed under the Pay-for-Stay Bill is an issue of first impression;
- An appellate decision entitling counties to "void" contracts providing statutorily-mandated medical care to inmates is inimical to the purpose and implementation of the Pay-for-Stay Bill; and

- A rule of law mandating the appropriation of a fixed sum of money to supply medical care to an unknown and unknowable number of inmates will drive up the costs of inmate medical service for all counties in Ohio.

For certain governmental contracts involving the payment of money, a statute originally known as the Burns Law requires the responsible fiscal officer to certify that sufficient money has been appropriated to meet the contractual obligation. Where the Burns Law applies, the failure to obtain such a certification prior to the making of the contract renders the agreement void and unenforceable. R.C. 5705.41(D)(1). The object of this law is to preclude the creation of *new* obligations against the government that exceed funds available for that purpose. See *State v. Kuhner* (1923), 107 Ohio St. 406, 413-14. Until the Ninth District's decision in this case, the Burns Law had never been applied to contracts that discharged a county's *pre-existing* constitutional and statutory obligation to provide and pay for inmate medical services. And no court had addressed whether a vendor who has paid third-party medical providers for necessary medical care afforded to county prisoners may assert a claim for unjust enrichment when the county fails to reimburse the vendor for those payments.

The Ninth District's decision awarding Appellee Summit County a $600,000 windfall by voiding its contractual obligation to reimburse Appellant NaphCare, Inc. for payments made to third-party medical providers raises two important questions of first impression for this Court:

1. Are county contracts with commercial providers for medical services authorized by R.C. 341.20 void absent a Burns Law certification?

2. If so, may a commercial provider that has paid for prisoner medical services on the county's behalf under the void contract obtain restitution?

The application of the Burns Law to contracts for inmate medical services presents an important issue for this Court and one of public and great general interest. No prior case has examined the amendments to R.C. 341.20 that were included in Ohio's 1996 Jail Pay-for-Stay Bill (Sub. H.B. 480), which permitted counties to outsource inmate medical care by entering into contracts with commercial providers. The Ninth District held that all such contracts are subject to the Burns Law. The decision errs in two respects.

First, it fails to apply the "rule of reason" established by this Court's precedents. Despite the seemingly broad statutory language stating that the Burns Law applies to "any contract" made by a subdivision or taxing unit, this Court has applied a "rule of reason" analysis and held that the law does not apply to contracts the law "was not intended or designed to cover," including contracts as to which the "practical difficulties" in the law's application "are apparent." *Village of Mayfield Heights v. Irish* (1934), 128 Ohio St. 329, 334. Nothing in the history of the Burns Law suggests that the 1800s legislature that enacted it intended that law to apply to contracts that facilitated the discharge of the county's *pre-existing* obligation to provide and pay for prisoner medical care; the Burns Law was adopted at a time when inmate medical care was under the oversight of the court of common pleas, and a prisoner's Eighth Amendment right to medical care had not yet been recognized.

Second, the "practical difficulties" in the law's application to medical service contracts authorized by R.C. 341.20 "are apparent." The pricing for such contracts must necessarily take into account the number of prisoners in the county jail during the contract year, the number of those prisoners who will experience an illness or condition requiring medical care, the cost of the medical care provided for those conditions on-site, and the cost of any off-site treatment by a third-party provider. These numbers cannot be determined with precision in advance. To account for these budgetary uncertainties, commercial contracts for inmate medical services routinely include flexible mechanisms (such as a per diem charge) that adjust pricing based on the number of jail inmates. Such contracts also include a "pass-through" mechanism whereby costs for certain infrequent and expensive off-site care will be reimbursed (in whole or in part) by the responsible governmental entity.

Summit County's conduct reflected this reality. Its prior inmate medical service contract with another vendor contained a "pass-through" mechanism similar to the one at issue in this case, which Summit County complied with by making $94,000 worth of reimbursement payments over the last five months of the contract. Accordingly, the "pass-through" provision in NaphCare's contract with Summit County — specifying that NaphCare would be entitled to reimbursement for payments to off-site medical service providers in excess of $150,000 during the contract year — was not novel. And Summit County's lawyers reviewed and approved the NaphCare contract prior to its execution. Indeed, it was not more than one year after this case was filed that Summit County

adopted the litigation position that its contract with NaphCare was void due to the County's failure to comply with the Burns Law.

By ossifying Summit County's litigation position into a rule of law, the Ninth District's decision will abolish the "pass-through" and "per diem" pricing mechanisms routinely employed in inmate medical service contracts by imposing the unworkable budgetary constraint that the price for these fluctuating charges must by fixed in advance. Accordingly, the upshot of the Ninth District's decision is a fixed-fee contract with no caps for excessive expenditures — an arrangement that is essentially an insurance contract, with the premium set by the vendor and paid by the government. Such an insurance arrangement is not what R.C. 341.20 purports to authorize, and not what Summit County had entered into even before its contract with NaphCare. Moreover, a fixed-fee arrangement would increase the costs of every Ohio county that chooses to enter into such a contract.

Facing wide fluctuations in the cost of medical care, a vendor that wishes to continue to do business in Ohio must either: 1) build in enough profit to mitigate the risk of a volatile increase in health care costs during the contract year; or 2) bid with less regard for that risk while maintaining a fall-back position of terminating the contract if it becomes untenable. Both of these options increase costs for the county — either directly (through the insurance-like premium required to offset the risk of increased costs) or indirectly (through the transaction costs experienced by the county in bridging the gap between a terminated contract and a new deal). And such an increase in costs is plainly

inconsistent with the purposes of Ohio's 1996 Jail Pay-for-Stay Bill, which was structured to permit counties to explore ways in which governmental liability for medical costs could be *reduced*. See, e.g., Sub. H.B. No. 480 §3(C).

Because the prospective certainty required by the Burns Law conflicts with the broad contracting authority supplied by R.C. 341.20, and because R.C. 341.20 "particularly and specifically" applies to county contracts with commercial providers of inmate medical services, this Court should accept jurisdiction and hold that the contracting authority supplied by R.C. 341.20 "must prevail" over the Burns Law and is "determinative." *Ohio Water Service Co. v. City of Washington* (1936), 131 Ohio St. 459, 465.

Alternatively, restitution is necessary to prevent unjust enrichment where a commercial provider has paid for prisoner medical services on the county's behalf under a "void" contract. The pre-existing legal obligation of the county to provide prison medical services and pay for those services distinguishes this case from prior actions in which this Court has denied a quantum meruit recovery and warrants this Court's review.

The authorities relied on by the Ninth District (App. Op. at ¶¶21-22, Appx. 8) deny unjust enrichment in the factual context of *discretionary* public projects. Here, the claims arise out of a contract executed to facilitate the discharge of a pre-existing obligation imposed by law. Instead of protecting taxpayers by preventing "evasion" of protective statutes, the refusal to recognize a claim in such circumstances grants taxpayers a windfall by excusing the government from making payments it is otherwise

required to make. There is no principled basis for refusing to recognize an unjust enrichment claim when it is the municipal taxpayers themselves who have been unjustly enriched.

II. STATEMENT OF THE CASE AND FACTS

Before contracting with NaphCare, Summit County contracted with Prison Health Services to supply medical services at its jail. Summit County's contract with Prison Health Services contained an "aggregate cap" of $75,000 for certain "pass through" off-site medical services (such as emergency room and hospital visits) performed by outside vendors — meaning that Prison Health Services would cover the first $75,000 of those costs during the contract year, but would be entitled to reimbursement for all amounts paid in excess of $75,000 during the contract year (the "overage"). In the five-month time period leading up to the bidding for the 2004-2005 medical services contract, Summit County paid an overage of at least $94,000 to Prison Health Services.

Following a competitive bidding process, Summit County awarded the contract for medical services to NaphCare for the October 1, 2004 to September 30, 2005 contract year. Summit County's attorney negotiated the resulting contract with NaphCare, which included two consecutive one-year renewal options. Pursuant to the contract, NaphCare was obligated to provide on-site staffing and certain medical services, medical supplies and administrative services at the Summit County jail. NaphCare performed these obligations. In exchange, Summit County agreed to pay: 1) "base compensation"; 2) a per diem charge if the average daily inmate population exceeded 660 inmates; and 3) any

overages arising out of payments by NaphCare for "Aggregate Cap Services" in excess of $150,000 during the contract year. These Aggregate Cap Services included, among other things, in-patient hospitalization, x-rays, ambulance services, emergency room services, and clinical laboratory services. The contract specified such services "will only be provided as a result of emergency circumstances or when deemed medically necessary by NaphCare's medical personnel."

During the 2004-2005 contract year, NaphCare paid numerous providers for Aggregate Cap Services that exceeded the $150,000, but Summit County breached the agreement by repeatedly refusing to reimburse NaphCare for these overages. At the same time Summit County was refusing to pay the overages, its attorneys elected to renew the medical service contract with NaphCare for the 2005-2006 year. While Summit County originally planned to rebid the contract for the 2005-2006 year, it ultimately threw out all the bids based on its conclusion that those bids were too high. The one-page renewal was drafted by Summit County's attorney and effective from September 30, 2005 to September 30, 2006. With one exception not relevant here, the renewal did not modify any of the terms and conditions of the 2004-2005 contract. When Summit County continued to refuse to pay overages during the 2005-2006 contract year, NaphCare terminated the renewal effective August 2006. In the aggregate, NaphCare expended over $600,000 on overages for which it received no reimbursement. This lawsuit followed.

The purported Burns Law violation that formed the crux of the rulings below did not materialize until very late in these proceedings. NaphCare filed suit against Summit County in September 2006 for its failure to comply with the reimbursement provisions of the contract and renewal, asserting claims for (among other things) breach of contact and unjust enrichment. During discovery, witness after witness for Summit County asserted that the reason it failed to pay the overages was a purported lack of "proper documentation" supporting the overage invoices. It was not until a year and a half later, during the initial round of summary judgment briefing, that Summit County adopted the litigation position that it violated R.C. 5705.41(D)(1).

The trial court granted Summit County's motion for summary judgment with respect to NaphCare's claims for breach of contract and unjust enrichment and the court of appeals affirmed.

III. ARGUMENT

Proposition of Law No. 1:

Inmate medical service contracts executed pursuant to R.C. 341.20 are not subject to R.C. 5705.41.

The Ninth District erred in holding that there is no conflict between R.C. 341.20 and R.C. 5707.41(D)(1) because the former statute did not "specify the steps necessary to ensure the validity of that contract." App. Op., ¶16, Appx. 7. The law does not require that the conflict appear on the face of the statute; "an express prohibition in one provision of an act that another provision allows is not necessary for a conflict to exist." *State v. Conyers* (1999), 87 Ohio St.3d 246, 249. More importantly, this Court's Burns Law

precedents teach that it is important to explore whether the certification requirement renders other Code provisions unworkable in application when determining whether a conflict exists. E.g., *Ohio Water Services v. City of Washington* (1936), 131 Ohio St. 459, 465 (examining the workability of the certificate of available funds requirement in the context of public utility contracts, concluding that such a certificate is "absolutely irreconcilable with the various statutes regulating and controlling public utilities," and holding that those statutes "particularly and specifically apply" and "prevail and become determinative of the question").

Here, a conflict exists because the application of the Burns Law to inmate medical service contracts governed by R.C. 341.20 will, for the reasons explained more fully above, confine the scope of that provision to an unworkable insurance arrangement. Since R.C. 341.20 is the statute that is specific to the issue of county contracts for inmate medical services, it "prevails as an exception to [R.C. 5705.41(D)(1)], unless the general provision is the later adoption and the manifest intent is that the general provision prevail." R.C. 1.51. Neither of those conditions applies here. As explained above, the Burns Law was adopted first: the amendment to R.C. 341.20 permitting inmate medical services contracts did not occur until 1996, and the certificate of available funds provision is over 100 years old. See *Irish*, supra at 332 (explaining that "varying forms" of the certificate of available funds requirement had, as of 1934, "been on the statute books of Ohio for a period of more than half a century"). The specific grant of contracting authority contained in R.C. 341.20 prevails and controls for this reason alone.

Regardless of the order of adoption, however, R.C. 341.20 would still apply because there is no "manifest intent" that the certificate of available funds provision apply to inmate medical service contracts. For both of these reasons, the specific grant of contracting authority contained in R.C. 341.20 prevails over the certificate of available funds provision in the Burns Law, now codified at R.C. 5705.41(D)(1), and governs Summit County's contract and renewal with NaphCare.

Proposition of Law No. 2:

> **A vendor that pays third-party medical providers for necessary medical care afforded to county jail inmates may assert an unjust enrichment claim to seek reimbursement for those payments from the county. (*Lathrop Co. v. City of Toledo* (1966), 5 Ohio St.2d 165, clarified.)**

This Court has explained that when the policies for refusing to recognize an unjust enrichment claim against a governmental entity do not apply, "neither should the rule denying a quantum meruit recovery." *Lathrop Co. v. City of Toledo* (1966), 6 Ohio St.2d 165, 176. Two policies support the general rule against permitting claims for unjust enrichment against a governmental entity: 1) to enforce the restrictive requirements on governmental contracts by precluding their circumvention, id. at 176; and 2) "to protect the taxpayer from the fiscal irresponsibility of governmental officials," *Bd. of Cty. Commrs. of Jefferson Cty. v. Bd. of Cty. Commrs. of Island Creek Twp.* (1981), 3 Ohio App.3d 336, 338. Neither applies here.

First, denying NaphCare a right to recover for unjust enrichment will not "enforce" R.C. 5705.41(D)(1) — the object of which, as explained above, is to prevent the creation of a valid obligation against the county beyond the funds at its disposal. The contract and renewal did not create an obligation against Summit County; they merely facilitated the discharge of the county's enduring obligation to pay for inmate medical services, which arises under R.C. 341.01 and the Eighth Amendment to the United States Constitution. See 2008 Ohio Atty. Gen. Ops. No. 2008-031, 2008 WL 4190012; 1985 Ohio Atty. Gen. Ops. No. 85-054, 1985 WL 204517. Accordingly, preventing NaphCare from asserting an unjust enrichment claim will not "preclude the circumvention" of the Burns Law.

Second, denying NaphCare a right to recover for unjust enrichment does not protect the taxpayer from fiscal irresponsibility. Summit County would have been required to pay medical service providers directly for care received by its jail inmates under applicable statutory and constitutional law in the absence of the contract and renewal. Accordingly, County taxpayers will receive an unjustified windfall if Summit County is not required to pay restitution for NaphCare's efforts on behalf of the County to satisfy the County's pre-existing statutory and constitutional obligations.

IV. CONCLUSION

For all of the above reasons, NaphCare respectfully requests that this Court accept jurisdiction so that the important issues of first impression identified above may be reviewed on the merits.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing **Memorandum in Support of Jurisdiction of Appellant NaphCare, Inc.** has been served this 4th day of November, 2010, by U.S. Mail, postage prepaid, upon the following:

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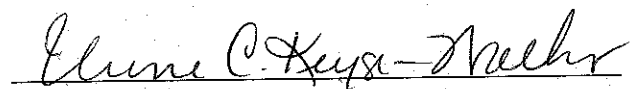

One of the Attorneys for Appellant
NaphCare, Inc.

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APPENDIX

COPY

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

NAPHCARE, INC.

C. A. No. 24906

140

Appellant

v.

COUNTY COUNCIL OF SUMMIT COUNTY OHIO, et al.

Appellees

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CV 2006-09-5693

DECISION AND JOURNAL ENTRY

Dated: September 22, 2010

BELFANCE, Presiding Judge.

{¶1} Plaintiff-Appellant NaphCare, Inc. appeals the judgment of the Summit County Court of Common Pleas which denied its motion for summary judgment and granted summary judgment in favor of Defendants-Appellees Summit County, County Council of Summit County, Summit County Board of Control, James B. McCarthy, Russell Pry, John Donofrio, Summit County Sheriff's Office, and John Doe Employees, Officials, and Agencies of Summit County (collectively "the County"). For the reasons set forth below, we affirm.

BACKGROUND

{¶2} NaphCare is an Alabama-based provider of managed care services to correctional institutions in various states. After a bidding process, NaphCare entered into a contract with Summit County, through the County Executive, and the Sheriff of Summit County, to provide health care services to inmates at the Summit County Jail in 2004. The 2004 contract provided that the County would pay NaphCare a base compensation of $1,563,110.40, assuming an inmate

population not to exceed 660. Per diem rates were provided for in the contract if the inmate population exceeded that number. The base compensation was to be paid in equal monthly installments. The contract also contained provisions for what is labeled as "Aggregate Cap Services[.]" Aggregate cap services included inpatient hospitalization, x-rays, ambulance services, outpatient procedures, emergency room services, eye laboratory services, off-site physician services, on-site specialty clinics, clinical laboratory services, and pharmaceuticals. These services were only to be provided "as a result of emergency circumstances or when deemed medically necessary by NaphCare's medical personnel." The contract provided that NaphCare would be liable for $150,000 of costs associated with aggregate cap services. Under the contract, the County would be responsible for reimbursing NaphCare for any amount exceeding $150,000. The County agreed to pay NaphCare monthly for amounts exceeding the $150,000 after receiving a "detailed invoice" from NaphCare. Attached to, and part of the contract, was "Exhibit A" which included NaphCare's proposal and revised proposal. Also attached to the contract was a purchase order from Summit County for $390,777.60, the equivalent of the cost of three months due under the contract for the base compensation. The purchase order dated September 16, 2004, included at the bottom, a certification signed by the Summit County Fiscal Officer certifying that the money to meet the obligation in the order had been lawfully appropriated. There is no dispute that the County paid the base compensation due under the 2004 contract.

{¶3} In November 2005, the County renewed the contract for an additional year, as provided under the original contract. The term was to begin on September 30, 2005 and end on September 30, 2006. The base compensation due for the second year was $1,641,266. The other terms of the contract, including the aggregate cap services provisions, largely remained

unchanged. Attached to the renewal, was a similar purchase order with a similar certification, this time for $410,316.51, or the equivalent of three payments due pursuant to the base compensation rates. There is no dispute that the County paid the base compensation due under the 2005 contract.

{¶4} NaphCare terminated the contract on August 8, 2006 due to the County's alleged failure to pay for the costs of aggregate cap services exceeding $150,000.[1] NaphCare filed the instant suit on September 12, 2006 alleging claims for breach of contract, conversion, unjust enrichment, and fraud. NaphCare sought over $700,000 in damages. The County filed an answer denying the majority of the allegations. The County subsequently filed multiple amended answers. Initial motions for summary judgment were held in abeyance.

{¶5} On May 11, 2009, NaphCare renewed its motion for summary judgment and the County filed a new motion for summary judgment. Both parties responded to the other's respective motion. The County contended in its motion that the contract was void as NaphCare was seeking to recover an amount not certified by the County as required by R.C. 5705.41(D)(1). The County attached multiple purchase orders for various amounts, each containing certifications by the fiscal officer, and an affidavit attesting to the accuracy of the purchase orders. On May 14, 2009, NaphCare filed an amended complaint and thereafter the County filed an answer in response. NaphCare then filed a "Partial Dismissal Entry of Two Claims[.]"

{¶6} The trial court granted summary judgment to the County concluding that the contract was void and that NaphCare could not recover on its claim for unjust enrichment and

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[1] NaphCare asserts that because the 2005 renewal contract was terminated two months prior to the stated term, the County is responsible for the costs of aggregate cap services exceeding $125,000 during the 2005 term.

denied NaphCare's motion for summary judgment. NaphCare appealed. This Court questioned the finality of the order due the lack of Civ.R. 54(B) language and NaphCare's ineffective attempt to dismiss only two of its claims. The trial court issued an entry granting the County summary judgment on all of NaphCare's claims and included Civ.R. 54(B) language. This Court granted NaphCare's motion to amend the notice of appeal.

{¶7} NaphCare has raised a single assignment of error for our review, in which it asserts that the trial court erred in awarding summary judgment to the County and in denying NaphCare's summary judgment motion.

SUMMARY JUDGMENT

{¶8} We review an award of summary judgment de novo. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105. "Pursuant to Civ.R. 56(C), summary judgment is appropriately rendered when '(1) [n]o 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 that party.'" *Turner v. Turner* (1993), 67 Ohio St.3d 337, 339-340, quoting *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327.

{¶9} On a motion for summary judgment, the moving party has the burden of demonstrating that no genuine issues of material fact exist. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 292. The burden then shifts to the nonmoving party to provide evidence showing that a genuine issue of material fact does exist. Id. at 293.

R.C. 5705.41

{¶10} R.C. 5705.41(D)(1) provides that:

"No subdivision or taxing unit shall * * * [e]xcept as otherwise provided in division (D)(2) of this section and section 5705.44 of the Revised Code, make any contract or give any order involving the expenditure of money unless there is attached thereto a certificate of the fiscal officer of the subdivision that the amount required to meet the obligation or, in the case of a continuing contract to be performed in whole or in part in an ensuing fiscal year, the amount required to meet the obligation in the fiscal year in which the contract is made, has been lawfully appropriated for such purpose and is in the treasury or in process of collection to the credit of an appropriate fund free from any previous encumbrances. This certificate need be signed only by the subdivision's fiscal officer. Every such contract made without such a certificate shall be void, and no warrant shall be issued in payment of any amount due thereon. If no certificate is furnished as required, upon receipt by the taxing authority of the subdivision or taxing unit of a certificate of the fiscal officer stating that there was at the time of the making of such contract or order and at the time of the execution of such certificate a sufficient sum appropriated for the purpose of such contract and in the treasury or in process of collection to the credit of an appropriate fund free from any previous encumbrances, such taxing authority may authorize the drawing of a warrant in payment of amounts due upon such contract, but such resolution or ordinance shall be passed within thirty days after the taxing authority receives such certificate; provided that, if the amount involved is less than one hundred dollars in the case of counties or three thousand dollars in the case of all other subdivisions or taxing units, the fiscal officer may authorize it to be paid without such affirmation of the taxing authority of the subdivision or taxing unit, if such expenditure is otherwise valid."

{¶11} In discussing a substantially similar prior version of the statute, the Supreme Court stated that:

"The purpose in requiring such certificate to be made and in prohibiting public officials entering into any such contracts unless such certificate is first made is clearly to prevent fraud and the reckless expenditure of public funds, but particularly to preclude the creation of any valid obligation against the county above or beyond the fund previously provided and at hand for such purpose. Such provisions have frequently been held mandatory, and compliance therewith an absolutely essential prerequisite. In the absence of such compliance no valid contract can be entered into." *State v. Kuhner* (1923), 107 Ohio St. 406, 413-414.

Thus, where a certificate is required, failure to include one is fatal to the validity of the contract. Id.; R.C. 5705.41(D)(1).

{¶12} NaphCare essentially makes two arguments as to why a certificate was not required and thus, how the trial court erred in concluding the contract with the County is void pursuant to R.C. 5705.41. First, NaphCare asserts that a conflict exists between R.C. 341.20 and R.C. 5705.41 and that there is no evidence that the General Assembly intended R.C. 5705.41 to apply to the type of contract at issue. Second, NaphCare asserts that the certification required pursuant to R.C. 5705.41 does not apply "where compliance would be impractical."

{¶13} We begin by noting that the parties do not dispute that a certificate of available funds provided for in R.C. 5705.41(D) was not issued with, and attached to, the contract to cover the aggregate cap services.

{¶14} NaphCare asserts that R.C. 341.20 is a specific statute and R.C. 5705.41 is a general statute and because the two conflict, pursuant to R.C. 1.51, R.C. 341.20 should control. We disagree as "the Revised Code specifically imposes such a rule of construction only when the conflict between the provisions of the statutes is irreconcilable." *Stout v. Bd. of Trustees of Liverpool Twp.* (Mar. 22, 2000), 9th Dist. No. CA 2907-M, at *3. Thus, the existence of an actual conflict between two statutes is a prerequisite to the application of the statute. See R.C. 1.51. R.C. 1.51 provides that:

> "If a general provision conflicts with a special or local provision, they shall be construed, if possible, so that effect is given to both. If the conflict between the provisions is irreconcilable, the special or local provision prevails as an exception to the general provision, unless the general provision is the later adoption and the manifest intent is that the general provision prevail."

Here, even assuming that R.C. 341.20 is a specific statute and R.C. 5705.41(D) is a general statute we conclude there is no conflict between them.

{¶15} R.C. 341.20 provides in pertinent part that "[t]he board of county commissioners, with the consent of the sheriff, may contract with commercial providers for the provision to

prisoners and other persons of food services, medical services, and other programs and services necessary for the care and welfare of prisoners and other persons placed in the sheriff's charge."

{¶16} Thus, R.C. 341.20 allows the board of county commissioners, with permission of the sheriff, to contract with companies like NaphCare for the provision of medical services in jails and prisons. It does not specify the steps necessary to ensure the validity of that contract. R.C. 5705.41(D)(1) on the other hand provides that *any* contract made by a subdivision or taxing unit "involving the expenditure of money" must have attached to it a certificate by the fiscal officer that the appropriate amount has been appropriated and that the failure to do so renders the contract void. We see no conflict between the two statutes.

{¶17} With respect to NaphCare's argument that the General Assembly did not intend R.C. 5705.41(D)(1) to apply to contracts provided for under R.C. 341.20, we conclude there is no merit to this argument. R.C. 5705.41(D)(1) applies by its own terms "[e]xcept as otherwise provided in division (D)(2) of [the] section and section 5705.44 of the Revised Code" to "any contract" made by a subdivision or taxing unit.

{¶18} NaphCare also argues on appeal that, in this case, issuing a certificate to cover the aggregate cap services would be impractical and thus it was not required. However, NaphCare failed to make this argument in the trial court. This Court has stated that "[i]t is axiomatic that a litigant who fails to raise an argument in the trial court forfeits his right to raise that issue on appeal[.]" *Renacci v. Evans*, 9th Dist. No. 09CA0004-M, 2009-Ohio-5154, at ¶24, quoting *Stefano & Assoc., Inc. v. Global Lending Group, Inc.*, 9th Dist. No. 23799, 2008-Ohio-177, at ¶18. NaphCare has forfeited all but plain error. *Renacci* at ¶24. However, Naphcare has not argued plain error in its brief. Moreover, "[i]n civil cases, the application of the plain error doctrine is reserved for the rarest of circumstances." Id. Therefore, this Court will not address

NaphCare's argument that including a certificate to cover the aggregate cap services would be impractical.

{¶19} Additionally, Naphcare argues that the trial court erred in denying NaphCare's motion for summary judgment with respect to its breach of contract claim. However, in the instant appeal Naphcare has failed to assert an argument warranting the conclusion that the certificate pursuant to R.C. 5705.41 was not required, and thus we cannot say the trial court erred in finding the contract was void. It is clear that NaphCare cannot recover for breach of contract if the contract is void. See *Buchanan Bridge Co. v. Campbell* (1899), 60 Ohio St. 406, 420 (stating that "contracts made in violation or disregard of such statutes are void,-not merely voidable,-and that courts will not lend their aid to enforce such a contract").

UNJUST ENRICHMENT

{¶20} NaphCare also argues that the trial court erred in concluding that NaphCare could not maintain a claim for unjust enrichment against the County. We disagree.

{¶21} As discussed above, certification pursuant to R.C. 5705.41 serves two purposes: (1) "to prevent fraud and the reckless expenditure of public funds[;]" and (2) "to preclude the creation of any valid obligation against the county above or beyond the fund previously provided and at hand for such purpose." *Kuhner*, 107 Ohio St. at 413. Allowing NaphCare to recover funds that were not certified would at the very least circumvent the latter purpose.

{¶22} The Supreme Court has noted that "[a] thread running throughout the many cases the [C]ourt has reviewed is that *the contractor* must ascertain whether the contract complies with the Constitution, statutes, charters, and ordinances so far as they are applicable. If he does not, he performs at his peril." (Emphasis added.) *The Lathrop Co. v. City of Toledo* (1966), 5 Ohio St.2d 165, 173.

> "'An occasional hardship may accrue to one who negligently fails to ascertain the authority vested in public agencies with whom he deals. In such instances, the loss should be ascribed to its true cause, the want of vigilance on the part of the sufferer, and statutes designed to protect the public should not be annulled for his benefit. * * * .'" *Vannucci v. Sheffield Village* (Jan. 10, 1990), 9th Dist. Nos. 89CA004504, 89CA004508, at *3, quoting *McCloud & Geigle v. City of Columbus* (1896), 54 Ohio St. 439, 453.

Thus, the Supreme Court of Ohio has held that "[c]ourts will leave the parties to such unlawful transaction where they have placed themselves, and will refuse to grant relief to either party." *Buchanan Bridge Co*, 60 Ohio St. at syllabus.

{¶23} "It is a long-standing principle of Ohio law that all governmental liability *ex contractu* must be express and must be entered into in the prescribed manner, and that a municipality or county is liable neither on an implied contract nor upon a *quantum meruit* by reason of benefits received." (Emphasis in original; internal quotations and citation omitted.) *Kraft Constr. Co. v. Cuyahoga Cty. Bd. of Commrs.* (1998), 128 Ohio App.3d 33, 44; see, also 20 Ohio Jurisprudence 3d (2001) 246, Counties, Townships, and Municipal Corporations, Section 259.

{¶24} Thus, we can only conclude that the trial did not err in granting summary judgment to the County with respect to NaphCare's claim for unjust enrichment.

CONCLUSION

{¶25} In light of the foregoing, we overrule NaphCare's assignment of error and affirm the judgment of the Summit County Court of Common Pleas.

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 Summit, 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 Appellant.

EVE V. BELFANCE
FOR THE COURT

CARR, J.
MOORE, J.
CONCUR

APPEARANCES:

MARK F. MCCARTY, ROBERT J. HANNA, and BENJAMIN C. SASSE, Attorneys at Law, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and CORINA STAEHLE GAFFNEY, Assistant Prosecuting Attorney, for Appellees.

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IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

NAPHCARE, INC.,	)	CASE NO. CV-2006-09-5693
Plaintiff,	)	JUDGE McCARTY
v.	)	**[PROPOSED] SUPPLEMENTAL ORDER AND JOURNAL ENTRY**
COUNTY COUNCIL OF SUMMIT COUNTY OHIO, et al.,	)	
Defendants.	)	

On August 18, 2009, Magistrate Walsh issued an Order in the above action concluding that Plaintiff, NaphCare, Inc.'s attempted May 27, 2009 voluntary dismissal without prejudice of its claims for fraud and conversion was ineffective. The August 18, 2009 Order expressly permits Plaintiff to return to this Court "to obtain" a "final, appealable order."

Defendants' May 11, 2009 motion for summary judgment sought summary judgment on all four claims asserted by Plaintiff in this action. This Court's July 15, 2009 Order granted Defendants' motion for summary judgment on Plaintiff's claims for breach of contract and unjust enrichment. Plaintiff has not opposed Defendants' request for summary judgment on Plaintiff's claims for fraud and conversion. Accordingly, summary judgment is granted in favor of Defendants on Plaintiff's claims for fraud and conversion as unopposed.

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Having granted Defendants' motion for summary judgment as to each of Plaintiff's claims, judgment is hereby entered in favor of Defendants and against Plaintiff. This is a final order. There is no just cause for delay.

IT IS SO ORDERED.

Date:_____

Judge Alison McCarty

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IN THE COURT OF COMMON PLEAS

COUNTY OF SUMMIT

NAPHCARE Plaintiff -vs- COUNTY COUNCIL OF SUMMIT COUNTY, OHIO, et al. Defendants	CASE NO. CV 2006 09 5693 JUDGE MCCARTY **ORDER**

- - -

This case comes before the Court upon Motions for Summary Judgment, one filed by Plaintiff, NaphCare, Inc. ("NaphCare"), and the other by Defendant, County Council of Summit Ohio, et al. ("County"). For the reasons stated below, this Court hereby grants summary judgment in favor of the County.

Factual Findings

NaphCare entered into a contract with the County to provide medical services to inmates at the Summit County Jail. The dispute arose between the parties as to the amount due under the contract. NaphCare contends that the County owes money for services that NaphCare rendered from 2004 through 2006. The County argues that the contract is void, and NaphCare cannot recover any additional amounts claimed due.

The initial 2004-2005 contract provided for a base compensation of $1,563,110.40, that the County would pay to NaphCare in equal monthly installments of $130,259.20. The contract provided for "Aggregate Cap Services" limiting NaphCare's liability to a maximum of $150,000.00 per year, while the County's liability was unlimited. The parties renewed the contract for 2005-2006. The base compensation for this contract was $1,641,266.00, with payments in monthly installments of $136,722.16. NaphCare's liability for Aggregate Cap Services was again limited to $150,000.00. No cap was placed on the County's potential liability. Aggregate Cap Services include such things as inpatient hospitalization, x-rays, ambulance services, eye laboratory services, off-site physician services, on-site specialty clinics, clinical laboratory services, and pharmaceuticals. Pursuant to the contract, NaphCare would submit an invoice to the County reflecting the Aggregate Cap Services it actually performed, and the County would pay NaphCare.

NaphCare terminated the renewed contract on August 8, 2006. At that point, the County had paid each of the monthly installments. However, NaphCare claims that the County owes for the Aggregate Cap Services that exceeded NaphCare's liability limits. NaphCare asserts that the expenses for certain services it performed exceeded the aggregate cap by at least $717,000.00. The County's failure to pay these amounts claimed due is the source of this current dispute.

Law & Analysis

Summary Judgment Standard

Pursuant to Civ.R. 56(C), summary judgment is proper if:

> "(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 that party."

Temple v. Wean United, Inc. (1977), 50 Ohio St.2d 317, 327, 364 N.E.2d 267. The party moving for summary judgment bears the initial burden of informing the trial court of the basis for the motion and pointing to parts of the record that show the absence of a genuine issue of material fact. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 292-93, 1996 Ohio 107, 662 N.E.2d 264. Specifically, the moving party must support the motion by pointing to some evidence in the record of the type listed in Civ.R. 56(C). *Id.* Once this burden is satisfied, the non-moving party bears the burden of offering specific facts to show a genuine issue for trial. *Id.* at 293. The nonmoving party may not rest upon the mere allegations and denials in the pleadings but instead must point to or submit some evidentiary material that demonstrates a genuine dispute over a material fact. *Henkle v. Henkle* (1991), 75 Ohio App.3d 732, 735, 600 N.E.2d 791.

Contract

The County argues that NaphCare cannot recover for breach of contract, because the contract is void as a matter of law. R.C. 5705.41 requires a subdivision, when entering into a contract involving the expenditure of money, to obtain a certificate of the fiscal officer stating that the amount required to meet the obligation has been, or is in the process of being, appropriated. "Every such contract made without such a certificate shall be void, and no warrant shall be issued in payment of any amount due thereon." *Id.* The County did not certify the amounts claimed due for Aggregate Cap Services, and the funds for such expenditures were not appropriated. Therefore, the County contends, the contract is void and NaphCare cannot recover on the amount claimed due.

The County cites *Buchanan Bridge Co. v. Campbell* (1899), 60 Ohio St. 406, 419-20, which articulates the policy that contracts entered into by a political subdivision are void, and recovery cannot be had, if the contract does not comply with the applicable statutory provisions. Parties seeking to contract with a governmental entity "are on constructive notice of the statutory limitations on the power of the entity's agent to contract." *Shampton v. City of Springboro* (2003), 98 Ohio St. 3d 457 at ¶34, quoting *Bohach v. Advery*, Mahoning App. No. 00-CA-265, 2002 Ohio 3202. Although this policy may result in a harsh outcome for the party contracting with the subdivision, the Ohio Supreme Court has held "occasional hardship may accrue to one who negligently fails to ascertain the authority vested in public agencies with whom he deals. In such instances, the loss should be ascribed to its true cause, the want of vigilance on the part of the sufferer, and statutes designed to protect the public should not be annulled for his benefit." *Id.* at ¶35 quoting *Lathrop Co. v. Toledo* (1966), 5 Ohio St.2d 165, 173.

NaphCare contends that the contract is valid and enforceable. To support its position, NaphCare points to the fact that the County is required to pay for inmate medical services, and is authorized to do so pursuant to R.C. 341.20. R.C. 341.20 states, in pertinent part,

> [t]he board of county commissioners, with the consent of the sheriff, may contract with commercial providers for the provision to prisoners and other persons of food services, medical services, and other programs and services necessary for the care and welfare of prisoners and other persons placed in the sheriff's charge.

NaphCare reasons that R.C. 341.20 is a specific statute, which directly addresses contracts for the provision of inmate medical services and gives the County "broad contractual authority." NaphCare argues that the existence of this statute renders the general technical contract requirements of R.C. 5705.41 inapplicable to the type of inmate medical service contract that is at issue in this case. NaphCare argues that the general principles of law applicable to payment

for inmate medical services compel the conclusion that the certificate of available funds requirement of R.C. 5705.41 does not apply in contracts for inmate medical services.

Notwithstanding NaphCare's argument, the Court finds that there is no conflict between R.C. 5705.41 and R.C. 341.20. R.C. 341.20 merely authorizes the board of county commissioners, with the consent of the sheriff, to contract for medical services for the prisoners. The statute does not define this authority, nor does it specify the intended scope or breadth of the authority to contract. Nothing in the language of R.C. 341.20 indicates a legislative intent to carve out an exception to R.C. 5705.41, and NaphCare has cited no on-point authority to that effect.

The Court further finds that the contract at issue in this case is void, as it does not meet the statutory requirements of R.C. 5705.41. The contract was drafted in a manner that would expose the County to unlimited liability to reimburse NaphCare for all Aggregate Cap Services in excess of $150,000.00 per year for two years. The County did not certify or appropriate funds for the unspecified amount. Because the contract is void as a matter of law, NaphCare cannot recover the amount claimed due, and summary judgment is granted in favor of the County on NaphCare's claim for Breach of Contract.

Unjust Enrichment

NaphCare asserts that even if the contract is void as a matter of law, then it should recover upon its claim for unjust enrichment. The County contends that NaphCare cannot prevail on an equitable claim for unjust enrichment because the doctrine of unjust enrichment does not apply to municipal corporations or a charter county such as the Defendant County. *G.R. Osterland Co. v. Cleveland* (2000), 140 Ohio App.3d 574, 577; *Perrysburg Twp. V. Rossford* (2002), 149 Ohio App.3d 645, ¶ 53, see also *White v. Summit Cty. Dept. of Human Services* (2008) 9th Dist., 2009-Ohio-176, ¶10. NaphCare concedes that the doctrine of unjust

enrichment generally does not apply to governmental entities, but argues that, as a matter of policy, recovery should be permitted under these circumstances. NaphCare cites such policy reasons as enforcing restrictions on government contracts by precluding their circumvention, *Lathop*, supra, at 1676, and protecting "the taxpayer from the fiscal irresponsibility of governmental officials," *Bd. of Cty. Commrs. of Jefferson Cty. v. Bd. of Cty. Commrs. of Island Creek Twp.* (1981), 3 Ohio App.3d 336, 338.

The Court recognizes that the County is statutorily and constitutionally responsible for paying for inmate medical services. However, the policy reasons mentioned above still apply in this case. The contract at issue is void as a matter of law due to statutory noncompliance. To allow NaphCare to recover for unjust enrichment would be to circumvent the statutory restrictions on contracts. It would also expose the taxpayer to unlimited liability to reimburse NaphCare for any Aggregate Cap Services, despite the fact that no certificate was issued for the provision of those services and no funds were appropriated to meet such an uncertain obligation. Accordingly, NaphCare cannot recover quantum meruit for the amount claimed due, and summary judgment is granted in favor of the County on NaphCare's claim for Unjust Enrichment.

Conclusion

Upon review, the Court declines to grant NaphCare's Motion for Summary Judgment. The County's Motion for Summary Judgment is well taken, and judgment is hereby granted in favor of Defendant, dismissing Plaintiff NaphCare's claims.

IT IS SO ORDERED.

Alison McCarty

JUDGE ALISON MCCARTY

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cc: Corina Staehle Gaffney, Assistant Prosecuting Attorney
Kevin C. Connell, Attorney for NaphCare
Mark F. McCarthy, Attorney for Plaintiff NaphCare, Inc.

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