STATE OF MICHIGAN

COURT OF APPEALS

MICHIGAN HEAD & SPINE INSTITUTE, PC, Plaintiff-Appellant,	UNPUBLISHED September 18, 2018
v	No. 340656 Oakland Circuit Court
HASTINGS MUTUAL INSURANCE COMPANY, Defendant-Appellee.	LC No. 2017-160314-NF

Before: SWARTZLE, P.J., and JANSEN and O'BRIEN, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting summary disposition in favor of defendant. We affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

I. BACKGROUND

Kelly Potocki was covered under a personal-injury-protection (PIP) policy with defendant. Plaintiff provided medical services to Potocki for injuries she allegedly suffered in an automobile accident. Following treatment, Potocki assigned her right to payment to plaintiff. Plaintiff submitted claims for payment to defendant—the alleged first-party no-fault insurer—but defendant allegedly did not fully reimburse plaintiff for the services it provided to Potocki. Plaintiff commenced this action against defendant for recovery of first-party no-fault benefits, asserting entitlement to recovery under assignment-of-benefits and third-party-beneficiary theories. The trial court granted summary disposition in favor of defendant concluding that Potocki's assignment of her claim was barred by the anti-assignment clause in defendant's policy and that plaintiff was not an intended beneficiary of the policy and was therefore not entitled to enforce it.

This appeal followed.

II. ANALYSIS

A trial court's decision on a motion for summary disposition is reviewed de novo. *Dell v Citizens Ins Co of America*, 312 Mich App 734, 739; 880 NW2d 280 (2015). Defendant sought summary disposition under MCR 2.116(C)(8) and (C)(10). The trial court did not indicate under

which court rule it was granting summary disposition; however, because the issues presented to the trial court entailed consideration of material outside the pleadings, we conclude that MCR 2.116(C)(10) is the relevant court rule. "A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the claim, and is appropriately granted when, except as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law." *Tomra of North America, Inc v Dep't of Treasury*, ___ Mich App ___, ___; ___ NW2d ___ (2018) (Docket No. 336871); slip op at 2.

Assignment of Benefits. Plaintiff argues that the trial court erred by granting summary disposition to defendant with respect to its assignment-of-benefits theory of recovery. We agree.

In *Covenant Med Ctr, Inc v State Farm Mut Auto Ins Co*, 500 Mich 191, 195-196, 217-218; 895 NW2d 490 (2017), our Supreme Court held that healthcare providers lack an independent statutory cause of action against no-fault insurers to recover PIP benefits. Yet, the *Covenant* Court also stated that its holding was "not intended to alter an insured's ability to assign his or her right to past or presently due benefits to a healthcare provider." *Id*. at 217 n 40. Rather, only the assignment of future benefits is prohibited. *Id*., citing MCL 500.3143 and *Prof Rehab Assoc v State Farm Mut Auto Ins Co*, 228 Mich App 167, 172; 577 NW2d 909 (1998). Moreover, this Court has recently held that an anti-assignment clause in a no-fault policy is unenforceable to prohibit an assignment that occurred after the loss or the accrual of the claim to payment "because such a prohibition of assignment violates Michigan public policy that is part of our common law as set forth by our Supreme Court." *Jawad A Shah, MD, PC v State Farm Mut Auto Ins Co*, ___ Mich App ___, ___; ___ NW2d ___ (2018) (Docket No. 340370); slip op at 9, citing *Rory v Continental Ins Co*, 473 Mich 457, 469-471; 703 NW2d 23 (2005), and *Roger Williams Ins Co v Carrington*, 43 Mich 252, 254; 5 NW 303 (1880).

Here, Potocki's assignment to plaintiff was for past or presently due benefits. Under *Shah*, the anti-assignment provision in defendant's policy is void as against public policy and presents no obstacle to plaintiff's claim under an assignment-of-benefits theory. The trial court erred by concluding otherwise. To the extent that defendant invites this Court to declare a conflict with *Shah*, we decline to do so.

Defendant also argues that prohibiting an assignment would be consistent with "the broader rule in Michigan prohibiting the splitting of causes of action." Defendant cites *Gen Accident Fire & Life Assurance Corp v Sircey*, 354 Mich 478, 482; 93 NW2d 315 (1958), for the following proposition: "In this state the rule against splitting of causes of action is strictly enforced to prevent vexation and expense to a defendant. It is a rule of justice that one shall present his whole cause of action in one suit." Yet, defendant ignores subsequent case law holding that "MCR 2.205 has replaced the common-law rule against splitting a cause of action." *United Servs Auto Ass'n v Nothelfer*, 195 Mich App 87, 89; 489 NW2d 150 (1992). MCR 2.205(A) provides that "persons having such interests in the subject matter of an action that their presence in the action is essential to permit the court to render complete relief must be made parties and aligned as plaintiffs or defendants in accordance with their respective interests."

The burden is on a defendant to object to nonjoinder or misjoinder—"the defendant must make a timely assertion of the position that separate suits violate the rule prohibiting the splitting of actions." *United Servs Auto Ass'n*, 195 Mich App at 89-90. In the present case, there is no

indication of any separate suit filed by Potocki or anyone else against defendant with respect to this matter, and defendant has made no request for joinder in accordance with MCR 2.205. Defendant's argument concerning the purported splitting of a cause of action thus lacks merit. Accordingly, we reverse the trial court's grant of summary disposition on plaintiff's assignment-of-benefits claim.

Third-Party Beneficiary. Next, plaintiff argues that the trial court erred in granting summary disposition to defendant on plaintiff's third-party-beneficiary claim. We disagree.

In *Covenant*, 500 Mich at 217 n 39, our Supreme Court declined to make a "blanket assertion" that "healthcare providers are incidental rather than intended beneficiaries of a contract between the insured and the insurer." The determination would rest "on the specific terms of the contract between the relevant parties." *Id*. The third-party-beneficiary statute, MCL 600.1405, states, in relevant part:

> Any person for whose benefit a promise is made by way of contract, as hereinafter defined, has the same right to enforce said promise that he would have had if the said promise had been made directly to him as the promisee.
>
> (1) A promise shall be construed to have been made for the benefit of a person whenever the promisor of said promise had undertaken to give or to do or refrain from doing something directly to or for said person.

"The plain language of this statute reflects that not every person incidentally benefitted by a contractual promise has a right to sue for breach of that promise. Thus, only intended, not incidental, third-party beneficiaries may sue for a breach of a contractual promise in their favor." *Schmalfeldt v North Pointe Ins Co*, 469 Mich 422, 427; 670 NW2d 651 (2003) (cleaned up). "A person is a third-party beneficiary of a contract only when that contract establishes that a promisor has undertaken a promise 'directly' to or for that person." *Id*. at 428 (cleaned up). "By using the modifier 'directly,' the Legislature intended to assure that contracting parties are clearly aware that the scope of their contractual undertakings encompasses a third party, directly referred to in the contract, before the third party is able to enforce the contract." *Id*. (cleaned up). The objective form and meaning of the contract itself is used to determine whether a person is an intended third-party beneficiary. *Id*. "A third-party beneficiary may be a member of a class, but the class must be sufficiently described." *Shay v Aldrich*, 487 Mich 648, 663; 790 NW2d 629 (2010) (cleaned up).

Here, plaintiff has not identified any language in the no-fault insurance policies that directly refers to plaintiff or that sufficiently describes a class of which plaintiff is a member. Thus, plaintiff has not shown than an issue of fact exists regarding whether it was an intended beneficiary of the PIP policies. The trial court thus properly granted summary disposition to defendant on plaintiff's third-party-beneficiary claim.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Brock A. Swartzle
/s/ Kathleen Jansen
/s/ Colleen A. O'Brien