STATE OF MICHIGAN

COURT OF APPEALS

JOHN UDELL and TRANSAMERICA INSURANCE COMPANY,

Plaintiffs-Appellants,

v No. 91957

GEORGIE BOY MANUFACTURING, INC.,

Defendant-Appellee.

Before: J.B. Sullivan, P.J., and G.R. McDonald and J.M. Graves, Jr.,* JJ.

PER CURIAM

Plaintiffs appeal as of right from an order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10) and dismissing plaintiffs' complaint with prejudice. We affirm.

This case arises from an injury sustained by plaintiff John Udell following an automobile accident on January 28, 1983. Udell was required to undergo hospitalization and receive medical care and treatment. At the time of the accident, Udell was an employee of defendant and was provided with group insurance benefits under a plan known as the Georgie Boy Manufacturing Trust. This plan provided Udell with hospitalization and medical benefits. Udell also insured by plaintiff Transamerica Insurance Company, which provided personal injury protection, pursuant to the provisions of Michigan's no-fault act as part of its automobile insurance benefits.

Udell applied to the Georgie Boy Trust for payment of his incurred expenses, however, the trust refused payment under its coordination of benefits provision, contending that Transamerica's policy was primary vis-a-vis defendant's plan, and thus responsible for Udell's hospitalization and medical bills. Udell then received personal injury protection (PIP) benefits

* Circuit judge, sitting on the Court of Appeals by assignment.

under his no-fault insurance policy with Transamerica. Udell and Transamerica then filed a complaint against defendant seeking reimbursement to Transamerica for all PIP benefits paid to Udell and a declaration that the benefits under the Georgie Boy Trust were primary to Udell's PIP benefits pursuant to Michigan's no-fault act, MCL 500.3109(a); MSA 24.13109(1).

A default judgment was entered against defendant for $15,255.16. Further, an order declared that defendant was primarily liable for Udell's expenses and defendant was ordered to pay all hospital benefits and other benefits payable to Udell under defendant's plan without regard to the existence to Transamerica's PIP policy.

On January 28, 1985, the court set aside its default judgment against defendant. On January 10, 1986, defendant filed a motion for summary disposition pursuant to MCR 2.116(C)(10). Following a hearing, the court granted defendant's motion holding that (1) the Michigan Insurance Code is preempted by the "deemer" clause of the Employment Retirement Income and Security Act of 1974 (ERISA), 29 USC 1001 et seq., (2) the Georgie Boy Trust is not engaged in the insurance business and, therefore, not governed by the provisions of the Michigan Insurance Code, and (3) the trust is a "voluntary association of employees" and, therefore, exempt from the insurance code pursuant to MCL 500.128; MSA 24.1128. We find that summary disposition was properly granted.

The Georgie Boy Trust is an employee benefits trust which provides certain medical benefits to employees of Georgie Boy Manufacturing, Inc. The trust is exempt from federal income tax as a voluntary beneficiary association pursuant to § 501(c)(9) of the Internal Revenue Code of 1954. Each participating employee pays $24 per month for family coverage, while Georgie Boy pays $89 per month for each employee for that coverage.

ERISA is a comprehensive and reticulated scheme regulating employee benefit plans, such as the Georgie Boy Trust, Alessi v Raybestos-Manhattan, Inc, 451 US 504, 510; 101 S Ct 1895; 68 L Ed 2d 402, 408 (1981). Congress intended ERISA to supersede all state laws that "relate" to employee benefit plans. See 29 USC 1144(a). However, an insurance savings clause is included in the act and provides that "nothing in this title shall be construed to exempt or relieve any person from any law of any state which regulates insurance, banking, or securities." 29 USC 1144 (B)(2)(A).

Plaintiffs argue that the Georgie Boy Trust is an insurance, regulation of which, is within the domain of the Michigan Insurance Code, MCL 500.100 et seq.; MSA 24.1100 et seq. We do not agree. ERISA also includes a so-called "deemer provision" which provides in part:

> "Neither an employee benefit plan . . ., nor any trust established under such a plan, shall be deemed to be an insurance company or other insurer . . . or to be engaged in the business of insurance . . . for purposes of any law of any State purporting to regulate insurance companies, insurance contracts . . ." (Emphasis added.) 29 USC 1144(b)(2)(B).

29 USC 1002 contains the following definitions:

> "(1) The terms 'employee welfare benefit plan' and 'welfare plan' mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance of otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 302(c) of the Labor Management Relations Act, 1947 [29 USCS §186(c)] (other than pensions on retirement or death, and insurance to provide such pensions).
>
> * * *
>
> "(3) The term 'employee benefit plan' or 'plan' means an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan."

We find that this "deemer provision" bars the state from labeling the Georgie Boy Trust "an insurance company or other insurer . . . or engaged in the business of insurance" so as to allow this State to apply its no-fault insurance laws to the plan.

In Metro Life v Ins Bureau, 424 Mich 656; 384 NW2d 25 (1986) our Supreme Court held that a foreign insurance company doing business in Michigan was required to pay a 2% premium tax imposed by MCL 500.440(1)(a); MSA 24.1440(1)(a) on employee contributions toward their own participatory benefits plan, even though supplied by the foreign insurance company on a nonprofit, nonactuarial basis. However, the Supreme Court remanded the matter to this Court for consideration of whether ERISA preempts the 2% tax imposed by the insurance code. On remand, this Court held that the premium tax imposed by the Michigan Insurance Code was not preempted by ERISA, rejecting plaintiff's argument that the "deemer" clause of ERISA requires preemption. MONY v Ins Bureau (On Remand), 155 Mich App 128, 133; 399 NW2d 466 (1986). In doing so this Court explained that

> ". . . the deemer clause merely provides that a state may not deem an employee benefit plan to be an insurance company, insurer, or in the business of insurance for the purposes of its insurance laws. Wadsworth v Whaland, supra. It does not forbid the state from indirectly affecting employee benefit plans by regulating group insurance. Id."

The Court went on to state that "sections 440 and 441 of the insurance code are not directed at employee benefit plans provided by noninsurer employers but at insurance companies doing business in Michigan. In our view, the 'deemer' clause is inapplicable."

We find this distinction to be without merit. To apply the premium tax we need to declare that the employee benefit plan is an insurance. Michigan's premium tax applies to foreign insurers committed to do and doing business in this state. MCL 500.440; MSA 24.1440. (Emphasis added.) However, the "deemer

provision" of ERISA could not be clearer and specifically states that employee benefit plans shall not be deemed to be engaged in the business of insurance for purposes of any law of any state purporting to regulate insurance companies. 29 USC 1144(b)(2)(B).

Even if we were to rule that Georgie Boy Manufacturing, Inc. was in the "business of insurance" for purposes of the Michigan Insurance Code, the Georgie Boy Trust is exempt from compliance with the Code because it is a "voluntary association of employees" as defined in MCL 500.128; MSA 24.1128. This section states that:

> "This code shall not apply to:
>
> * * *
>
> "(4) Voluntary associations of employees which provide death, accident or sickness benefits to persons employed by the same employer." MCL 500.128(4); MSA 24.1128(4).

The trial court found that Georgie Boy Trust is a "voluntary association of employees" within the ordinary meaning of the term. We agree.

The words "voluntary association of employees" should be given their customary or ordinary meaning. Even though employees of Georgie Boy Manufacturing, Inc., may have no alternative health insurance plan within the company, they still participate in the trust on a voluntary basis. They are an "association" as defined in John v John, 47 Mich App 413, 417; 209 NW2d 536 (1973): a number of persons uniting together for some special purpose, business or for a certain object. The Georgie Boy Trust meets this definition.

Further support for the trial court's ruling that the trust was exempt as a voluntary association is shown by the trust's tax free status under § 501(c)(9) of the Internal Revenue Code, which exempts

> "voluntary employee's beneficiary associations providing for the payment of life, sickness, accident or other benefits to the members of such association

> or their dependents for designated beneficiaries, if no part of the net earnings of such association inures (other than through such payments) to the benefit of any private shareholder or individual."

Finally, we are not persuaded by plaintiffs that there was a genuine issue as to the nature of the trust and whether there was a stop-loss provision, or whether the trust was completely insured. During oral argument, the trial court questioned defendant on this issue. Defendant described the trust as "self insured to a fairly large degree" but that there was a limit for which an outside policy had been purchased as protection. This stop-loss provision does not alter the nature of the trust, thus, the trial court did not err in granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(1). See Michigan United Food and Commercial Workers Unions v Baerwaldt, 767 F2d 308, 312-313 (CA 6, 1985).

We affirm the order of the circuit court granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10) and dismissing plaintiffs' complaint with prejudice.

/s/ Joseph B. Sullivan
/s/ James M. Graves Jr.

STATE OF MICHIGAN

COURT OF APPEALS

JOHN UDELL and TRANSAMERICA INSURANCE COMPANY,

Plaintiffs-Appellants,

v No. 91957

GEORGIE BOY MANUFACTURING, INC.,

Defendant-Appellee.

Before: Sullivan, P.J., and McDonald and J.M. Graves, Jr.,* JJ.

McDONALD, J. (dissenting).

I disagree.

Defendant conceded at oral argument that it's plan has "stop-loss" insurance. We have previously held that commercially insured ERISA plans are subject to Michigan insurance laws and § 3109a applies to conflicting coordinated benefit provisions in health insurance and no fault plans. State Farm v C A Muer Corp, 154 Mich App 330; 397 NW2d 299. See also Northern Group Services v Auto Owners, 833 F2d 85 (1987).

I would reverse and grant summary judgment in favor of plaintiffs under Federal Kemper Insurance Co v Health Insurance Administration Inc, 424 Mich 537; 383 NW2d 590 (1986).

/s/Gary R. McDonald

---

*Circuit judge, sitting on the Court of Appeals by assignment.