STATE OF MICHIGAN

COURT OF APPEALS

EMPLOYERS MUTUAL INSURANCE COMPANIES,

Plaintiff-Appellee,

v No. 98077

AMERICAN COMMUNITY MUTUAL INSURANCE COMPANY, a Michigan insurance corporation,

Defendant-Appellant.

Before: Cynar, P.J., and Hood and Murphy, JJ.

PER CURIAM.

Defendant appeals as of right from the lower court's order granting plaintiff's motion for summary disposition pursuant to MCR 2.116(C)(9), failure to state a valid defense. We affirm.

On May 29, 1984, the insured, James Ford, was injured in an automobile accident and incurred hospital expenses of over $10,000. At the time of the accident, Ford was covered by a policy of no-fault insurance issued by plaintiff which contained a coordinated benefits clause pursuant to MCL 500.3109a; MSA 24.13109(1). Ford was also covered by a Medicare supplemental policy issued by defendant in accordance with the Medicare supplemental provisions of the Insurance Code, MCL 500.2264a-500.2279; MSA 24.12264(1)-24.12279. In April, 1986, plaintiff filed suit contending that defendant was responsible for all of Ford's medical expenses under our Supreme Court's decision in Federal Kemper Ins Co, Inc v Health Ins Administration, Inc, 424 Mich 537; 383 NW2d 590 (1986). Plaintiff then moved for summary disposition and the trial court granted plaintiff's motion. Defendant now appeals claiming that federal law requires that Medicare is secondary to no-fault insurance and Federal Kemper is inapplicable to the instant case. Therefore, the trial court erred in granting plaintiff's motion. We disagree.

A motion under GCR 1963, 117.2(2) [now MCR 2.116(C)(9)], tests the legal sufficiency of a defense. Karaskiewicz v Blue Cross & Blue Shield of Michigan, 126 Mich App 103, 110; 336 NW2d 757 (1983), lv den 418 Mich 882 (1983). The motion should be granted when the defense is so untenable that no factual development could deny the plaintiff's right to recovery. Id. This Court's review is limited to issues actually decided by the trial court. Michigan Mutual Ins Co v American Community Mutual Ins Co, 165 Mich App 269, 277; 418 NW2d 455 (1987), lv den 430 Mich 884 (1988).

This Court in West Michigan Health Care Network v Transamerica Ins Corp of America, 167 Mich App 218, 224; 421 NW2d 638 (1988), reiterated the Supreme Court's holding in Federal Kemper that, where the coordinated benefits provisions of a health insurance policy and a no-fault automobile insurance policy conflict, the health coverage insurer must be primarily liable for the payment of medical expenses incurred by the insured. In Federal Kemper, the Court indicated that its decision would further the legislative intent of § 3109a by containing auto insurance and health costs, eliminating duplicate recovery and vesting in the insured the option of coordinating benefits. Federal Kemper, supra, pp 551-552. This Court has also stated that Medicare constitutes other health and accident coverage within the meaning of § 3109a. See Lewis v Transamerica Ins Corp of America, 160 Mich App 413, 419; 408 NW2d 458 (1987), lv den 429 Mich 855 (1987), citing to LeBlanc v State Farm Mutual Automobile Ins Co, 410 Mich 173, 205; 301 NW2d 775 (1981).

We also note that defendant's analyis of the relevant portion of the Medicare statute, 42 USC 1395y(b)(1), is incorrect. That provision states that if no-fault can reasonably be expected to pay medical costs, then Medicare will not pay those costs. However, in Michigan, pursuant to the no-fault act and our Supreme Court's interpretation of that act in Federal Kemper, no-fault insurance is secondary to other health coverage.

Therefore, payment by no-fault insurance cannot reasonably be expected to be made promptly. The statute does not, as defendant argues, mandate that Medicare is secondary to no-fault benefits.

Based on the foregoing, we affirm the trial court's granting summary disposition in plaintiff's favor. All of defendant's other arguments raised on appeal are without merit.

Affirmed.

/s/Walter P. Cynar
/s/Harold Hood
/s/William B. Murphy