STATE OF MICHIGAN

COURT OF APPEALS

BERNIDINE JONES, Conservator of the Estate of DAVID L. JONES, a legally incapacitated person,

Plaintiff-Appellant,

v No. 104934

BLUE CROSS & BLUE SHIELD OF MICHIGAN,

Defendant-Appellee.

BLUE CROSS & BLUE SHIELD OF MICHIGAN,

Plaintiff-Appellee,

v No. 104935

BERNIDINE JONES, Conservator of the Estate of DAVID L. JONES, a legally incapacitated person, and SLOAN, BENEFIEL, FARRER, NEWTON & GLISTA,

Defendants-Appellants.

Before: Maher, P.J., and Holbrook, Jr. and R.E. Noble,* JJ.

PER CURIAM

Bernidine Jones, as conservator of the estate of David L. Jones, appeals as of right from the August 31, 1987 decision of the Kalamazoo Circuit Court that (1) Jones could not receive duplicate medical benefits from Blue Cross and Blue Shield of Michigan (BCBSM), (2) the contractual provisions of the health care plan provided by General Motors Corporation and administered by BCBSM relating to nonduplication of benefits and subrogation rights did not violate the Michigan No-Fault Insurance Act's proscription against assignment of future benefits, MCL 500.3143; MSA 24.13143, and (3) BCBSM could recover benefits mistakenly paid to Jones (i.e., $11,591.05).

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

On June 1, 1985, David L. Jones was injured when the motorcycle he was riding collided with a car driven by Dennis Williams. As required by statute, Williams' no-fault insurer, Transamerica Insurance Company, paid for all of Jones' medical expenses, which totalled $229,796.57.

At the time of the accident, Jones was covered by a health insurance program offered by his employer, GM, and administered by BCBSM. Apparently, Jones was initially refused medical benefits under the program so he filed suit in the Kalamazoo Circuit Court to compel payment. BCBSM subsequently paid $11,591.05 in medical benefits, of which $11,381.55 was placed in trust by Jones' attorney.

In September 1986, BCBSM was just about to approve Jones' claim and pay an additional $91,692.77 in benefits when an employee of BCBSM noticed, for the first time, that because Jones was riding a motorcycle the no-fault insurer of Williams had paid his medical expenses. This was important because of two provisions contained in the health care plan. The first provision pertained to the coordination of benefits and provided:

> "(a) Health care benefits paid under this Program shall not duplicate benefits from other sources, (e.g., group plans, comprehensive plans, pre-paid plans, governmental plans, etc.), nor serve to relieve other persons or organizations of their liability (contractual or otherwise).
>
> "(b) Consistent with the above objectives, the Corporation may establish systems and procedures for eliminating duplication of benefits, and the carriers shall implement such systems and procedures."

The second provision, a subrogation clause, read:

> "(a) In the event of any payment of health care benefits to, or on behalf of, an enrollee by a carrier, such carrier shall be subrogated to all such enrollee's rights of recovery for such benefits against any person or organization, <u>except against insurers on policies of insurance issued to and in the name of such enrollee</u>." (Emphasis added.)

This latter provision was also included in the following group health care benefit certificate issued by BCBSM to GM:

> "SUBROGATION: In the event BCBSM makes payment for services under this contract, BCBSM will be

> subrogated to all of the member's right of recovery against any person or organization (i.e., BCBSM will have the member's right to recover for benefit payments). However, BCBSM will not be subrogated against insurers on policies of insurance which are issued to and in the name of the member.
>
> "The member is required to execute and deliver any instruments and papers and do whatever else is necessary to secure these rights, and may take no action prejudicing the rights and interests of BCBSM. All sums recovered by suit, settlement, or otherwise, for hospital, medical, or other service benefits must be paid over to BCBSM."

In light of the above provisions, BCBSM moved to amend its pleadings to deny any liability to Jones and to recover benefits previously paid. BCBSM also moved to adjourn the trial in the matter. Due to the proximity of the scheduled trial date (less than one month away), the court denied BCBSM's motions. Thereafter, BCBSM instituted its own action against Jones for reimbursement. When trial in Jones' case was later adjourned, the court consolidated both cases.

While the cases were pending for trial, the parties stipulated to the damages issues. It was agreed that, should Jones prevail, he would be entitled to the benefits already paid by BCBSM ($11,591.05), plus an additional $166,692.27, exclusive of costs and interest. On the other hand, should BCBSM succeed, it could recover the money previously paid and would be absolved of any liability under the health care program. The parties also stipulated to the facts giving rise to their dispute (set forth ante).

The underlying facts having been agreed upon, the trial court rendered a decision on August 31, 1987, as to the legal issues raised by the parties concerning liability. Three separate issues were discussed: First, whether the subrogation clause was violative of the no-fault act's proscription against assignment of benefits; second, whether BCBSM waived subrogation because payment was made to Jones when it knew or should have known that Transamerica Insurance Company, Williams' no-fault insurer, paid for Jones' medical expenses; and third, whether the Employee

Retirement Income Security Act of 1974 (ERISA), 29 USC § 1001 et seq., preempted Jones' claim for breach of insurance contract.

The trial court ruled that the subrogation clause did not amount to an assignment in violation of the no-fault act. Rather, the clause was "very carefully drawn" to specifically exclude recovery of duplicative benefits by injured parties in cases such as this. The court also rejected Jones' claim that BCBSM should be estopped from denying liability. The court found that BCBSM's request for reimbursement was not untimely and that Jones had not detrimentally relied on the money already paid by BCBSM. Because of its rulings on the first two issues, the court held it was unnecessary to address BCBSM's ERISA preemption claim.[1] BCBSM was consequently held to be entitled to the $11,591.05 previously paid to Jones.

Jones thereafter filed appeals as of right in the case instituted by his conservator and the case instituted by BCBSM. Those cases were consolidated for consideration by this Court.

The first issue presented on appeal is whether the trial court erred in ruling that the subrogation clause did not violate the no-fault act's proscription against assignment of benefits. MCL 500.3143; MSA 24.13143. That statutory section provides: "An agreement for assignment of a right to benefits payable in the future is void." We find that BCBSM's rights under the subrogation clause do not constitute an "assignment" as proscribed by the no-fault act.

The differences between "assignment" and "subrogation" were explained in 6A CJS, Assignments, § 5d, pp 597-598:

> "The terms 'subrogation' and 'equitable assignment' are sometimes used synonymously when used without regard to strict technical accuracy. Both are creatures of equity, and both result in the substitution of one person in place of another with relation to the debt or property involved.
>
> "Subrogation, however, differs materially from an assignment. Subrogation is the act of the law, depending not upon contract, but upon the principles of equity, while assignment is the act of the parties, and depends generally on intention. Subrogation

> presupposes an actual payment and satisfaction of the debt or claim to which the party is subrogated, although the remedy is kept alive in equity for the benefit of the one who made the payment under circumstances entitling him to contribution or indemnity, while assignment necessarily contemplates the continued existence of the debt or claim assigned. Subrogation operates only to secure contribution and indemnity, whereas an assignment transfers the whole claim. An assignment involves the dangers of champerty and maintenance while subrogation does not."

These distinctions, although technically subtle, are legally significant.

In enacting the nonassignability section of the no-fault act, the Legislature was apparently concerned that an individual might assign away his or her rights to future benefits in exchange for some present right, and ultimately be left without means to pay for medical expenses which accrue in the future. This concern is not applicable in the situation of a subrogation agreement. With subrogation, the injured party's future medical expenses will be paid -- the only question is, by whom? If another party is legally or contractually liable for the medical expenses, the subrogee is entitled to contribution or indemnification from that person. If, such as here, the subrogee pays for expenses already paid by another party, the subrogee may recover the money paid from the injured party. In either case, though, the injured party's medical expenses have been paid. In the latter situation, the injured party is simply not allowed to obtain a double recovery of his or her expenses.

Moreover, under the rules of statutory interpretation, the language used in a statute must be interpreted according to the established usage of the words. Wright v Dudley, 158 Mich App 154, 157; 404 NW2d 217 (1986). In those cases which have interpreted the nonassignability section, this Court has declined to give "assignment" an expansive interpretation and instead has limited it to its ordinary meaning. See Aetna Casualty & Surety Co v Starkey, 116 Mich App 640, 644-645; 323 NW2d 325 (1982), lv den 417 Mich 929 (1983); Lewis v Aetna Casualty & Surety Co, 109

Mich App 136, 138-139; 311 NW2d 317 (1981). We agree with that strict interpretation. Had the Legislature intended to proscribe more than just assignments, it could have said so expressly. We simply have no authority to expand the plain language of MCL 500.3143; MSA 24.13143 in the manner urged by Jones. Lewis, supra.

We also reject Jones' claim that the subrogation clause does not preclude recovery of duplicative benefits under the instant circumstances. As found by the trial court, the clause was very carefully drawn to specifically exclude recovery of duplicative benefits unless the medical expenses were paid pursuant to an insurance policy issued to and in the name of the injured party (here, Jones). It cannot reasonably be disputed that Jones' medical expenses were paid not by an insurance policy issued in his name but by an insurance policy issued to a third person (Williams). The subrogation clause clearly and unambiguously gives BCBSM the right to recover the money it paid to Jones and relieves it of any liability for the expenses already paid by Transamerica.

Jones next argues that BCBSM should be held to have waived enforcement of the subrogation clause because it paid benefits knowing that Transamerica had already paid the expenses. We disagree.

It is generally recognized that a payment made under a mistake of fact when not legally payable may be recovered if the payee has not detrimentally relied on the payment and it would not be unjust to require reimbursement. General Motors Corp v Enterprise Heat & Power Co, 350 Mich 176, 181; 86 NW2d 257 (1957); Adams v Auto Club Ins Ass'n, 154 Mich App 186, 194; 397 NW2d 262 (1986), lv den 428 Mich 870 (1987). Here, Jones can hardly claim detrimental reliance since Transamerica has already paid his present medical expenses and will continue to do so in the future. Thus, the payment by BCBSM is not needed to meet

those expenses. Indeed, the bulk of the money paid by BCBSM has not been used for any expenses whatsoever but remains in a trust account of Jones' attorney. It would not be unjust to require that Jones reimburse that money to BCBSM.

Also on appeal, BCBSM requests that this Court rule on the merits of its ERISA preemption claim should we decide the other issues adversely to it. We decline to do so since (1) the claim will not affect the disposition of the case, (2) it was not ruled on below, and (3) BCBSM has not filed a cross-appeal from the trial court's decision and, therefore, has not preserved the issue on appeal. Michigan Ass'n of Administrative Law Judges v Personnel Director of the State of Michigan, 156 Mich App 388, 395; 402 NW2d 19 (1986).

Affirmed.

/s/ Richard M. Maher
/s/ Donald E. Holbrook, Jr.
/s/ Russell E. Noble

[1] It has been held that ERISA preemption is quasi-jurisdictional, i.e., if ERISA applies then the court is without jurisdiction to hear and decide (with certain exceptions) any state law claims. See, Providence Hosp v Nat'l Labor Union Health & Welfare Fund, 162 Mich App 191, 197-200; 412 NW2d 690 (1987); Sejman v Warner-Lambert Co., Inc, 845 F2d 66, 69-70 (CA 4, 1988); Berry v Dymo Graphic Systems, Inc, 394 Mass 930; 478 NE2d 707, 712 (1985); Ogden v Michigan Bell Telephone Co, 595 F Supp 961 (ED Mich, 1984). For that reason, the trial court should have first reached the merits of the preemption issue before deciding the validity of Jones' state law claim. However, because Jones did not plead a claim under ERISA's civil enforcement provision, 29 USC § 1132, the outcome would be the same -- BCBSM would still prevail in the matter. We therefore conclude that the trial court's error was harmless and the case need not be remanded for a decision on the preemption claim.