STATE OF MICHIGAN

COURT OF APPEALS

TRANSAMERICA INSURANCE CORPORATION,
a Michigan corporation, as subrogee of Susan Swartout,

Plaintiff–Counter
Defendant–Appellant,

v

BLUE CROSS AND BLUE SHIELD OF MICHIGAN,

Defendant–Counter
Plaintiff–Appellee.

March 20, 1991

No. 119157

TRANSAMERICA INSURANCE CORPORATION,
a Michigan corporation, as subrogee of Susan Swartout,

Plaintiff–Counter
Defendant–Appellee,

v

BLUE CROSS AND BLUE SHIELD OF MICHIGAN,

Defendant–Counter
Plaintiff–Appellant.

No. 120497

Before: MacKenzie, P.J., and McDonald and Murphy, JJ.

PER CURIAM.

In No. 119157, Transamerica Insurance Corporation (Transamerica) appeals as of right from an order granting summary disposition in favor of defendant Blue Cross and Blue Shield of Michigan (BCBS) on the ground that Transamerica's claim against BCBS was time–barred. In No. 120497, BCBS appeals as of right from an order dismissing its counterclaim for rescission of a health insurance policy and reimbursement for medical expenses paid. We affirm in both cases.

Susan Swartout sustained severe closed head injuries in a May 26, 1984 automobile accident. At the time of the accident, Swartout was covered under a coordinated no–fault insurance policy issued by Transamerica. She was also covered under a group health insurance policy issued by BCBS to her husband, from whom she had been divorced five days before the accident. Swartout was removed from the BCBS group policy on July 1, 1984 due to the divorce. However, after receiving an application for renewed coverage, BCBS notified Swartout (who was in a coma) that an individual health policy would be put into effect as of July 1, 1984 upon payment of a premium. After Swartout's father informed Transamerica of the impending lapse in health coverage, Transamerica paid BCBS the premium by check on behalf of Swartout, and continued to do so for the next two years.

According to Transamerica, Swartout's conservator applied for no–fault personal protection benefits in June 1984; Transamerica referred the matter to BCBS consistent with its coordination of benefits clause. In March 1985, after BCBS denied the conservator's claim, Transamerica paid $130,000 for Swartout's medical expenses.

On May 27, 1988, Transamerica, as Swartout's subrogee, filed this action for reimbursement of the $130,000 paid. BCBS counterclaimed, alleging that Transamerica's payment of Swartout's health insurance premiums was, as relevant to this appeal, contrary to public policy and constituted misrepresentation. BCBS sought to rescind its contract of insurance with Swartout, and further sought reimbursement from Transamerica of $384,381.37 in medical expenses BCBS had paid on behalf of Swartout.

Approximately one year after Transamerica filed its complaint, BCBS moved for summary disposition arguing for the first time that Transamerica's claim was barred by the one-year statute of limitations set forth at MCL 500.3145(1); MSA 24.13145(1), rather than the general six-year statute of limitations set forth at MCL 600.5813; MSA 27A.5813. The trial court granted the motion after allowing BCBS to amend its answer to include this affirmative defense.

BCBS's counterclaim then proceeded to trial. BCBS's claim of misrepresentation was dismissed at the beginning of trial. Following the taking of testimony, the trial court found that Transamerica did not submit to BCBS the application which resulted in the renewal of Swartout's insurance effective July 1, 1984. The court further found essentially that Transamerica was not acting in bad faith when it paid Swartout's health insurance premiums to BCBS. Finding no public policy issue arising from Transamerica's conduct, the trial court dismissed BCBS's counterclaim.

In its appeal, Transamerica argues that the trial court erred in dismissing its complaint on the basis of the one-year statute of limitations set forth at MCL 500.3145(1); MSA 24.13145(1), governing actions for recovery of no-fault personal protection insurance benefits. According to Transamerica, that statute is inapplicable because its suit against BCBS was to recover health benefits, not no-fault benefits. A panel of this Court recently rejected a similar argument in Auto Club Ins Ass'n v New York Life Ins Co, ___ Mich App ___; ___ NW2d ___ (Docket No. 115365, rel'd for publication 1/29/91), and held that when a no-fault insurer seeks to recover from a medical insurer payments made, the one-year statute of limitations controls. Under Administrative Order No. 1990-6, Auto Club, supra, is binding on this panel. We therefore find no error in the trial court's determination that Transamerica's action for reimbursement of medical payments was time-barred.

Transamerica argues, in the alternative, that BCBS waived the statute of limitations defense when it failed to raise the defense in its first responsive pleading. We reject this argument. MCR 2.111(F)(3), governing the pleading of affirmative defenses such as the statute of limitations, does not require that the defense be raised in a party's first responsive pleading. Transamerica's further argument, that the trial court erred in allowing BCBS to amend its answer to assert the statute of limitations defense, is unsupported by any authority and thus is not properly before this Court. Settles v Detroit City Clerk, 169 Mich App 797, 807; 427 NW2d 188 (1988). The trial court's decision was consistent with MCR 2.118(A)(3). We find no error.

We next consider BCBS's contention that the trial court erred in rejecting its claim that Transamerica's payment of Swartout's health insurance premiums was against public policy. We conclude that the trial court properly determined that BCBS had no cause of action against Transamerica on this ground.

This Court affords special deference to the trial court's findings where they are based on the credibility of witnesses. In re Fritz Estate, 159 Mich App 69, 76; 406 NW2d 425 (1987). Here, the court found witness Barbara Sherbino, a former Transamerica adjustor, "highly credible", and based on her testimony found that (1) Transamerica did not initiate or assist in the application for Swartout's continued health insurance coverage, and (2) there was a demand or request from someone other than Transamerica that Transamerica pay the health insurance premium.

The trial court stated:

> There is no reason to question that Transamerica had nothing to do with the application [for continued health insurance coverage with BCBS], of the filling out of the application, did not assist in that regard. The testimony is that the payments [of premiums to BCBS] would not be volunteered, that there had to be some type of general inquiry first.

> [Sherbino] claimed that she thought there was an obligation to pay the policy premium. . . . [I]t does appear to this court that there is no reason to doubt the testimony of the witness. And the court, based on the facts of this case -- I'm not saying that there may not be a case where there might be concern by this court as to a public policy argument, but based upon all of the facts in this case, the court does not find there to be a public policy issue which gives rise to be of concern to the court in the actions taken by Transamerica in paying the premium and continuing the policy of the health insurance carrier.

This holding on BCBS's public policy argument is reasonable in light of the evidence in this case. Reversal is not required.

Finally, BCBS argues that the trial court should have granted rescission of the policy it issued to Swartout because there was misrepresentation as to who paid the premium on the policy. The evidence does not support this claim. The premiums were paid with Transamerica checks, putting BCBS on notice of the identity of the payor. Accordingly, it cannot be said that Transamerica in any manner attempted to conceal or misrepresent its identity as the payor of Swartout's premiums. We find no error.

Affirmed.

/s/ Barbara B. MacKenzie
/s/ Gary R. McDonald
/s/ William B. Murphy