STATE OF MICHIGAN

COURT OF APPEALS

WILLIAM R. WIERINGA, BARBARA JEAN WIERINGA, and NIKOLE WIERINGA,

Plaintiffs-Appellees,

v

BLUE CARE NETWORK,

Defendant-Appellant.

FOR PUBLICATION
October 3, 1994
9:20 a.m.

No. 160244
LC No. 92-76323-CK

Before: Michael Kelly, P.J., and Hood and Stephen Miller*, JJ.

HOOD, J.

Defendant Blue Care Network appeals as of right the trial court's order denying defendant's motion for summary disposition and granting summary disposition in favor of plaintiffs. We affirm.

The relevant facts are undisputed. Plaintiffs, who are Michigan residents, were injured in an automobile accident while travelling in Pennsylvania. At the time of the accident, defendant was plaintiffs' health care provider. Plaintiffs were also insured under a coordinated motor vehicle insurance policy issued by Wolverine Mutual Insurance Company. Under the coordinated policy defendant became the primary provider for plaintiffs, while Wolverine was designated as the secondary provider. Consequently, defendant, as the primary provider, paid medical expenses in the amount of $29,716.44 on behalf of plaintiffs for injuries sustained in the accident.

Plaintiffs subsequently instituted a third-party tort claim against one Mr. Gonczarow, who drove the other vehicle involved in the accident. Like plaintiffs, Mr. Gonczarow did not live in Pennsylvania at the time of the accident. He was an Indiana resident. Before plaintiffs actually filed their claim, Gonczarow and his insurer, Hawkeye-Security Insurance Company, agreed to settle. The settlement amount exceeded the $29,716.44 currently in dispute. However, because defendant had asserted a lien against the settlement seeking reimbursement of the $29,716.44, Hawkeye issued two checks totaling $29,716.44 to plaintiffs and defendant jointly (one check for $27,439.74 was made payable to plaintiffs William and Barbara Wieringa and defendant and one check for $2,276.70 was made payable to Nikole Wieringa and defendant). The checks were held in escrow pending resolution of this matter.

Plaintiffs filed a declaratory action asserting that they were entitled to the escrowed funds. Plaintiffs also claimed that defendant's lien was void. Defendant then filed its own declaratory action against plaintiffs, asserting that it was entitled to the $29,716.44 as reimbursement for medical expenses pursuant to the subrogation language of the insurance contract. Competing motions for summary disposition were filed. The trial court granted plaintiffs' motion for summary disposition, entered a declaratory judgment against defendant, and awarded plaintiffs the escrowed funds. Defendant claims that the trial court erred in granting summary disposition and declaratory relief to plaintiffs. We disagree.

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

In reviewing a trial court's decision to grant summary disposition, this Court conducts a de novo review to determine whether the pleadings showed that a party was entitled to judgment as a matter of law or whether affidavits or other documentary evidence showed that no genuine issue of material facts existed. MCR 2.116(I); Asher v Exxon Co, 200 Mich App 635, 638; 504 NW2d 728 (1993). If either inquiry results in an affirmative response, the trial court should have rendered judgment without delay. Id.

Defendant claims that it is entitled to reimbursement pursuant to the subrogation clause contained in the insurance contract. More specifically, defendant argues that the trial court erred in treating it, a health and accident insurer, as a no-fault insurer and treating benefits it paid to plaintiffs as no-fault benefits. Defendant asserts that it should not be required to comply with the requirements of the no-fault act simply because plaintiff elected to coordinate insurance coverage and look to defendant for primary no-fault coverage. According to defendant, it is not a no-fault insurer and, thus, the language of the contract should control.

Defendant relies on Auto Club v New York Life Ins Co., 440 Mich 126; 485 NW2d 695 (1992) in support of this position. In that case Auto Club Insurance Association, a no-fault insurance carrier, brought an action against New York Life Insurance Company, a health insurance carrier, seeking reimbursement for coordinated medical expenses paid to an insured for injuries sustained in an automobile accident. New York Life moved for summary disposition, claiming that Auto Club's suit was barred because it had not been filed withINhe one-year limitation period provided in § 3145(1) of the no-fault act. The trial court denied New York Life's motion for summary disposition and found § 3145 inapplicable. In so doing, the trial court concluded that Auto Club's suit was not an action for personal protection insurance benefits, but rather an action for health and accident benefits under the insurance contract issued by New York Life. Therefore, the trial court concluded that the action was governed by the six-year statute of limitations period applicable to contract actions.

A panel of this Court reversed the trial court's decision, 187 Mich App 276; 466 NW2d 711 (1991) and concluded that no matter how the action was characterized, it was one for recovery of no-fault benefits paid. Therefore, the one-year limitations period under the no-fault act was deemed applicable. This decision was reversed by the Michigan Supreme Court. The Supreme Court reaffirmed the trial court's conclusion that the action was not controlled by the one-year period of limitations set forth in the no-fault act but, instead, was governed by the six-year period of limitations for contract actions. In so concluding, the Supreme Court stated that, "[e]ven though, as a result of coordination, the obligation of NY Life to provide benefits became primary, it does not follow that NY Life was transformed into a no-fault insurer any more than it follows that the benefits due under its policy were transformed into no-fault benefits." Auto Club at 139. In concluding, the Supreme Court stated that § 3145(1) of the no-fault act did not apply to plaintiff's common-law action as subrogee to recover benefits due under the health and accident insurance contract issued by defendant. Id. at 140.

Though the issue decided in Auto Club (competing statute of limitations provisions) is unrelated and dissimilar to the question presented here, defendant relies on the above-quoted language to support its argument that the provisions of the no-fault act are inapplicable in this case because it is not a no-fault insurer. Defendant, citing Auto Club, contends that even though it was the primary provider under the coordinated no-fault policy and paid medical bills as a result of the accident, it is not a no-fault insurer.

§ 3116(4) of the no-fault act, which limits the ability of insurers to obtain reimbursement after they pay benefits to insureds, provides:

> **A subtraction or reimbursement shall not be due the claimant's insurer from that portion of any recovery to the extent that recovery is**

> **realized for noneconomic loss** as provided in section 3135(1) and (2)(b) or for allowable expenses, work loss, and survivor's loss as defined in sections 3107 to 3110 in excess of the amount recovered by the claimant from his or her insurer. [emphasis added.]

Defendant argues that it was not placed in the same status as a no-fault insurer simply because plaintiffs elected to coordinate their insurance coverage and defendant was the primary insurer. Therefore, according to defendant, it is not bound by the limitations on reimbursement set forth in § 3116(4). Instead, defendant argues that the subrogation clause contained in the insurance contract should govern. For several reasons, we disagree.

§ 3.04 of the parties' insurance contract provides:

> A. Subrogation means that **Health Plan will have the same right as a Member to recover expenses for treatment of an injury or illness for which another person or organization is legally liable, to the extent Health Plan provides services in such situations**. Health Plan will be subrogated to the Member's right of recovery against the responsible person or organization.
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> B. The Member agrees, by acceptance of an identification card from Health Plan that, as a condition to receiving benefits and services under this Certificate, the Member will make a good faith effort to pursue recovery from the liable party, **and upon collection of any recoveries from any benefits and services provided by Health Plan will reimburse Health Plan.** Health Plan shall have a lien for any benefits and services rendered on any such recoveries whether by judgment, settlement, compromise, or reimbursement. [emphasis added.]

This clause makes it clear that defendant can only obtain reimbursement under the insurance contract if plaintiff receives a third-party tort recovery representing the medical expenses that defendant already paid. This result is consistent with our holding in Great Lakes Insurance v Citizens, 191 Mich App 589; 479 NW2d 20 (1991). Unlike Auto Club, Great Lakes addressed the precise issue presented for resolution in the present case. In Great Lakes we stated:

> **The medical insurance benefits paid by plaintiff, Great Lakes American Life Insurance Company, substitute for no-fault benefits otherwise payable. Under such circumstances, the contractual reimbursement rights of Great Lakes Insurance are subject to the limitations of § 3116 of the no-fault act and are therefore unenforceable**. [Id. at 600; emphasis added.]

Defendant strenuously asserts that this language is contradicted by the above-referenced statements of the Supreme Court in Auto Club, namely that payments made by a health and accident insurer to an insured following an automobile accident are not equivalent to no-fault benefits and, thus, the provisions of the no-fault act do not apply to such an insurer.

The facts and issue to be resolved in the present case render the proffered contradiction meaningless. Auto Club addressed the singular question of which statute of limitations period was applicable to the facts of that case, nothing more. This issue is not before us. Moreover, in Auto Club, unlike Great Lakes and the present case, § 3116 of the no-fault act was of no consequence. Contrary to defendant's position, the Supreme Court in Auto Club did not overrule or modify the Great Lakes decision. In fact, no mention of Great Lakes was made in the Auto Club decision. Therefore, this

Court's holding in Great Lakes is applicable to the present case and the principle of law set forth in Auto Club is inapposite.

Pursuant to Great Lakes, we conclude that the trial court properly decided that defendant was precluded from obtaining reimbursement for the medical costs paid on behalf of plaintiffs. Under Pennsylvania no-fault law, plaintiffs could not recover medical or economic expenses in their third-party tort action against Gonczarow in that state. See 75 Pa Const Stat § 1722. Again, defendant may be entitled to reimbursement only if plaintiffs received a third-party tort recovery representing the medical expenses that defendant already paid. Great Lakes, supra. This did not occur in the present case since by law plaintiffs were precluded from recovering the costs of their medical expenses in a third-party tort action.

Additionally, and notwithstanding the fact that plaintiffs were legally precluded from recovering their medical costs in the third-party tort action, where a settlement is silent, this Court will presume that a third-party tort settlement represented noneconomic damages. See Keys v Travelers Ins Co, 124 Mich App 602, 605; 335 NW2d 100 (1983). In resolving the impending third-party action against Gonczarow, plaintiffs and Hawkeye did not execute a settlement agreement. Instead, Hawkeye issued two checks to plaintiffs and defendant totalling $29,716.44 for "[f]ull and final settlement of all claims against Anthony T. Gonczarow." The remainder of the settlement funds were given to plaintiffs. In Bialochowski v Cross Concrete Pumping Co, Inc, 141 Mich App 315, 318-319; 367 NW2d 381 (1985), reversed in part on other grounds 428 Mich 219 (1987), this Court also indicated that similar language, silent as to an economic or noneconomic basis for the settlement award, would be presumed to be compensation for noneconomic losses. We so find in the instant case. Therefore, defendant could not obtain reimbursement since the settlement proceeds represented a settlement for expenses other than those medical expenses provided by defendant. Great Lakes, supra.

We also reject defendant's assertion that extrinsic evidence supports the conclusion that a portion of plaintiffs recovery was for economic damages. Defendant suggests that the two settlement drafts issued by Hawkeye to it and plaintiffs in an amount exactly totalling the costs of the previously paid medical bills indicates that Hawkeye in fact compensated plaintiffs for economic damages. It is clear from the record, however, that Hawkeye separated out this amount only due to defendant's imposition of a lien on this portion of the entire settlement. It is not unusual for insurance companies to list the names of both the opposing party and that party's insurer on settlement drafts, leaving those entities to divide or fight for the spoils while protecting the insurers from further litigation.

Plaintiffs were entitled to judgment as a matter of law. Asher, supra; Great Lakes, supra.

Affirmed.

/s/ Harold Hood
/s/ Michael J. Kelly
/s/ Stephen Miller