S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

AMERICAN MEDICAL SECURITY, INC., as Subrogee of DEBRA GUILES, Plaintiff-Appellee,	UNPUBLISHED April 23, 1999
v	No. 206300 Wayne Circuit Court
ALLSTATE INSURANCE COMPANY, Defendant-Appellant.	LC No. 96-624567 NF

Before: Hood, P.J., and Holbrook, Jr. and Whitbeck, JJ.

PER CURIAM.

Judgment was entered in favor of plaintiff after the trial court granted plaintiff's motion for summary disposition pursuant to MCR 2.116(C)(10) and denied defendant's motion for summary disposition. Defendant appeals as of right, and we reverse.

This Court reviews decisions on motions for summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion brought pursuant to MCR 2.116(C)(10) is reviewed to determine whether the affidavits, pleadings, depositions, or any other documentary evidence establishes a genuine issue of material fact to warrant a trial. *Id.*

The facts are undisputed. Plaintiff's subrogor, Debra Guiles, was injured in an automobile accident and incurred medical expenses. Guiles was a participant in her employer's welfare benefit plan, which was administered by plaintiff. The health care plan was insured by a group health insurance policy issued by United Wisconsin Life Insurance Company. At the time of the accident, Guiles was also covered by a policy of no-fault automobile insurance issued by defendant. Medical expenses were paid to Guiles under the group health policy. Plaintiff filed this action to recoup those paid medical expenses.

Defendant moved for summary disposition, arguing that the statute of limitations had run prior to plaintiff's filing suit and that pursuant to controlling Michigan law, plaintiff's health coverage was primarily responsible to pay the medical expenses. Plaintiff countered with its own motion for summary disposition, arguing that the Employment Retirement Income Security Act (ERISA), 29 USC 1001 *et*

seq. preempted Michigan law, specifically MCL 500.3109a; MSA 24.13109(1), which makes health insurers primarily responsible for medical expenses when health insurance and no-fault automobile insurance policies are coordinated.

The trial court declined to impose a one-year statute of limitations pursuant to MCL 500.3145(1); MSA 24.13145(1), and instead held that because the action sought a determination of which insurance policy had priority, the action was governed by the six-year statute of limitations for contract disputes generally. We disagree.

Defendant argues that because plaintiff brought this action as subrogee of Guiles, it had no greater rights than Guiles and thus, because a one-year statute of limitations would have applied to Guiles, it applies to plaintiff[1]. Defendant correctly states the general principles. Specifically, a subrogee acquires no greater rights than the subrogor would have had. *Federal Kemper Ins Co v Isaacson,* 145 Mich App 179, 182; 377 NW2d 379 (1985). And, when a plaintiff is contractually subrogated to the rights of its insured, the plaintiff insurer's subrogation action is ordinarily barred by the statute of limitations if the insured's action would be so barred. *Citizens Ins Co of America v American Community Mut Ins Co*, 197 Mich App 707, 710; 495 NW2d 798 (1992).

In *Citizens, supra,* the no-fault insurer sought to recover payments from the defendant medical insurer. The defendant asserted that a three-year statute of limitations barred the claim. The plaintiff argued that a six-year limitation period applied. The trial court agreed with the plaintiff, "ruling that this was a claim for money paid by mistake, a common-law cause of action to which the six-year period applied." *Id.* at 709. This Court held that the plaintiff's claim was not a common-law action for money paid by mistake, but rather was a common-law subrogation action. *Id.* The insured subrogor was bound by a three-year statute of limitations against its medical insurer. Therefore, the subrogee, which was attempting to recover payment from the medical insurer, was similarly held to that period of limitation.

> Regardless of whether a right of subrogation arises by operation of law or by contract, the controlling general principles are the same: the subrogee, upon paying an obligation owed to the subrogor as the primary responsibility of a third party, is substituted in the place of the subrogor, thereby attaining the same and no greater rights to recover against the third party.
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> Specifically, the insurer's subrogation action is barred by the statute of limitations if the insured's action would be so barred, unless circumstances would make that result inequitable. No such circumstances exist in this case. The three-year limitation period is a reasonable amount of time. It is, as defendant argued, a mandatory standard contract provision for health insurance policies. MCL 500.3422, 500.3610; MSA 24.13422, 24.13610. It would have barred the insureds' claims for benefits and, consequently, it barred plaintiff's subrogation claims as well. [*Id.* at 709-710 (citations omitted).]

Recently, in *Amerisure Companies v State Farm Mutual Auto Ins Co,* 222 Mich App 97; 564 NW2d 65 (1997), the plaintiff, as subrogee of the injured worker's employer, filed suit against defendant, the injured employee's personal automobile insurer, seeking to recover personal injury protection benefits that it had paid to the injured worker. This Court held that the one-year period of limitation found in § 3145 applied between no-fault insurers for recovery of money mistakenly paid by the secondary insurer. *Id.* at 103. It stated:

> Such actions are ones of subrogation, and, as such, plaintiff acquired no greater rights than [the injured worker] had against defendant. Because [the injured worker's] right against defendant was to maintain a cause of action for payment of personal injury protection benefits, plaintiff's subrogation action squarely falls within the parameters of § 3145 of the no-fault act. [*Id.*]

See also *Home Ins Co v Rosquin,* 90 Mich App 682; 282 NW2d 446 (1979) where the property insurer made payments after an automobile accident caused fire damage to a business, and then, as the subrogee of the business, filed suit against the no-fault insurer for payments on the claim. The claim was barred where it was filed more than one year after the accident. The Court noted that although the result might appear harsh, the statute was plain and the plaintiff was an insurance company, which was presumably aware of the insurance laws of this state. *Id.* at 686. But see *Madden v Employers Ins of Wausau,* 168 Mich App 33; 424 NW2d 21 (1988) which indicates that a different result may be warranted when there are allegations of mistake of material fact and the case is thus not characterized as one of subrogation[2], a concept that was expressly rejected by the *Amerisure* Court.

We determine the nature of plaintiff's claim by looking at the nature of the claim that Guiles would have. *ACIA v New York Life Ins Co,* 440 Mich 126, 135; 485 NW2d 695 (1992). Any action Guiles had against defendant for payment of no-fault benefits was subject to the one year statute of limitations. MCL 500.3145(1); MSA 24.13145(1). Plaintiff, as Guiles' subrogee, was suing defendant to recover personal protection benefits that were owed to Guiles under the no-fault act, and plaintiff had no greater rights against defendant than Guiles would have had. Therefore, we conclude that the statutory one-year statute of limitations is applicable. The automobile accident in which Guiles was injured occurred on August 17, 1993, and this action was not filed until April 29, 1996. Because, the complaint was filed outside of the applicable limitation period stated in MCL 500.3145(1); MSA 24.13145(1), the action is barred.

In so holding, we note that plaintiff cites several cases for the proposition that the statute of limitations is six years. While at first glance, these cases seem to support plaintiff's argument, they are inapposite. In *ACIA, supra*, the subrogee, like the subrogee in *Citizens, supra,* was the no-fault carrier and it was suing defendant medical insurer. The Court indicated that the nature of the suit was to be determined by looking at the nature of the claim the subrogor would have against the defendant insurer. *Id.* at 135. The one year statute of limitations did not apply in that case because a suit brought by the subrogor would have been to enforce the health and accident insurance contract and would not have been an action to recover personal protection benefits under the no-fault act. *Id.* at 137. In other words "[b]ecause a suit brought by . . . the insured, against [the defendant] to enforce its health and accident insurance contract would not be an 'action for recovery of personal protection insurance

benefits payable under [the no-fault act]'", the one-year statute of limitations did not apply. *Id.* The Court in *ACIA* determined that because there was no other statute of limitations directly applicable, the general six-year limitation period applied. *Id.* at 136-137. Here, the one-year statute of limitations set forth in §3145 was directly applicable where the action brought by plaintiff was to recover personal protection benefits owed under the no-fault act.

In *Transamerica Ins Corp v Blue Cross and Blue Shield of Michigan,* 440 Mich 894; 488 NW2d 221 (1992), the Supreme Court issued an order that the plaintiff, as subrogee of its insured, was governed by a six-year period of limitation *consistent with ACIA, supra* (emphasis added). Like *ACIA,* it was not a case where suit was brought to recover personal protection benefits under the no-fault act, and the Court, consistent with *ACIA,* applied the six-year period of limitations to the case, presumably because there was no other applicable limitation period.

Plaintiff also cites to *Citizens Ins Co v Buck,* 216 Mich App 217; 548 NW2d 680 (1996), which, like *ACIA* and *Transamerica,* is not a case for the recovery of personal protection insurance benefits from a no-fault insurer. It is true that the Court in *Buck, supra* at 227, citing to *Transamerica, supra*, stated that "subrogation actions arising under the no-fault regime are subject to the six-year period of limitation." This overgeneralization, however, is not consistent with *ACIA* or the order in *Transamerica*[3]. Neither *ACIA* or *Transamerica,* as discussed above, stand for the universal proposition that all subrogation actions involving a no-fault carrier are subject to a six-year period of limitation. Indeed, our Supreme Court has indicated that we must look at the nature of the claim the subrogor would have to determine the nature of the suit the subrogee has. *ACIA, supra* at 135. And, this Court has indicated that where the insured's action would be barred by a statute of limitations, the insurer's subrogation action is also barred. *Citizens, supra*[4].

On appeal, plaintiff also raises for the first time the argument that it could seek reimbursement from Guiles under a reimbursement provision that "mandates reimbursement from its insured for recovery which could have been received from a no-fault insurance policy." Plaintiff argues that if this action is barred by the one-year period of limitation, and it seeks reimbursement from Guiles, the end result would be that Guiles would pay for her own injury because she would not have recourse against the no-fault carrier. This argument was not raised or decided by the trial court, and is not preserved for our review. *Adam v Sylvan Glynn Golf Course,* 197 Mich App 95, 98; 494 NW2d 791 (1992).

Because we find that the statute of limitations was violated in this case, it is unnecessary to address plaintiff's argument that it was entitled to reimbursement of the money it paid for Guiles' medical expenses arising from the automobile accident.

Reversed and remanded for entry of an order consistent with this opinion. We do not retain jurisdiction.

/s/ Harold Hood
/s/ Donald E. Holbrook, Jr.
/s/ William C. Whitbeck

[1] After benefits were paid to Guiles, her rights were subrogated pursuant to a subrogation clause found in the certificate of insurance issued by United Wisconsin Life Insurance Company.

[2] In this case, there are no allegations that plaintiff paid pursuant to a mistake of material fact.

[3] We also note that *Buck* did not involve a subrogation claim for no-fault benefits as in this case, but rather, it involved a subrogation claim for wrongful death. *Buck, supra* at 220-221. Thus, *Buck* is not controlling in this case.

[4] Plaintiff also cites to *Western and Southern Life Ins Co v Wall,* 903 F Supp 1155 (ED Mich, 1995). In that case, the employer sued the employee to recover medical benefits paid by the self-funded employee welfare benefit plan. The defendant employee had recovered no-fault and liability insurance benefits in addition to the benefits paid to her under her employer's plan. The plan wanted the employee to reimburse it for payments it had made. The court acknowledged that the one-year period of limitation found in MCL 500.3145(1); MSA 24.13145(1) applied to actions by insureds who seek no-fault benefits. The claim in *Wall* was not barred by that provision because it was not an action seeking no-fault benefits, but rather was an action by a benefit provider to recover money from its insured under the terms of its insurance contract. The case is entirely different than the case before this Court.