STATE OF MICHIGAN

COURT OF APPEALS

ANTOINE LEE, Plaintiff-Appellee,	UNPUBLISHED August 28, 2012
v	No. 303217 Wayne Circuit Court
FARMERS INSURANCE EXCHANGE, Defendant-Appellant.	LC No. 09-020438-NF

Before: RONAYNE KRAUSE, P.J., and SAAD and BORRELLO, JJ.

PER CURIAM.

Defendant, Farmers Insurance Exchange, appeals the trial court's order that granted summary disposition to plaintiff, Antoine Lee. For the reasons set forth in this opinion, we affirm.

FACTS AND PROCEEDINGS

The parties do not dispute the material facts of this case. On March 2, 1978, plaintiff sustained serious injuries as a passenger in a vehicle involved in an accident. Because plaintiff had no insurance, and no other no-fault insurance applied to him, coverage for plaintiff's no-fault benefits was assigned to defendant, Farmers Insurance Exchange, through Michigan's Assigned Claims Facility. After the accident, plaintiff also received Medicare coverage to pay for his medical expenses. For many years, defendant also paid plaintiff amounts equal to his incurred medical expenses as part of his personal injury protection (PIP) benefits.

Recently, defendant declined to pay plaintiff for the incurred medical expenses that were already covered by Medicare. On August 18, 2009, plaintiff filed a complaint to recover these PIP benefits from defendant.[1] According to plaintiff, defendant failed to pay for medical expenses he incurred at Triumph Hospital between April 14, 2008 and May 14, 2008, at Harper Hospital between April 10, 2009 to April 22, 2009, and at Harper Hospital between January 7, 2009 to January 29, 2009. Plaintiff also claimed that defendant failed to pay various other

[1] Plaintiff also alleged that defendant is obligated to pay other expenses under the no-fault act. The parties settled those issues during the litigation and they are not raised on appeal.

incurred medical expenses in smaller amounts. Defendant does not dispute that plaintiff incurred those medical expenses as a result of the 1978 motor vehicle accident. Rather, defendant argues that all of the bills from those medical treatments were submitted to and paid by Medicare, and plaintiff should not receive a "windfall" of duplicate PIP payments when his medical expenses have already been paid. Defendant characterizes this as permitting plaintiff to "double-dip" from both Medicare and the assigned claims facility. Plaintiff takes the position that these medical expenses are allowable no-fault expenses that defendant is obligated to pay under the no-fault act, regardless whether his medical bills were paid by Medicare.

The parties filed motions for summary disposition and the trial court ruled that, as a matter of law, defendant must pay plaintiff the amount of his incurred medical expenses as PIP benefits, notwithstanding his Medicare coverage. Specifically, the court ruled that defendant must pay plaintiff $105,191.75 for the medical expenses incurred at Triumph Hospital, Harper Hospital, and facilities, plus interest. Pursuant to MCL 500.3148, the trial court also ordered defendant to pay $49,992.21 for plaintiff's attorney fees and $1,437.17 in costs. The parties agreed to stay execution of the judgment until defendant exhausts its appellate remedies.

I. DISCUSSION

A. STANDARDS OF REVIEW

Plaintiff moved for partial summary disposition pursuant to MCR 2.116(C)(9) and (C)(10). "This Court reviews de novo a trial court's decision on a motion for summary disposition." *Hastings Mut Ins Co v Safety King, Inc*, 286 Mich App 287, 291; 778 NW2d 275 (2009). As this Court explained in *Payne v Farm Bureau Ins*, 263 Mich App 521, 525; 688 NW2d 327 (2004):

> A motion for summary disposition pursuant to MCR 2.116(C)(9) tests the sufficiency of the defendant's pleadings, and is appropriately granted where the defendant has failed to state a valid defense to a claim. *Slater v Ann Arbor Public Schools Bd of Ed*, 250 Mich App 419, 425-426; 648 NW2d 205 (2002). A defense to a claim is invalid for the purposes of MCR 2.116(C)(9) "when the defendant's pleadings are so clearly untenable that as a matter of law no factual development could possibly deny the plaintiff's right to recovery." *Id.* A motion for summary disposition brought under MCR 2.116(C)(10) tests the factual sufficiency of the plaintiff's complaint. *Morris & Doherty, PC v Lockwood*, 259 Mich App 38, 42; 672 NW2d 884 (2003) (citation omitted). A motion for summary disposition is appropriately granted under MCR 2.116(C)(10) when, viewed in the light most favorable to the nonmoving party, the submitted evidence fails to establish a genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999) (citations omitted).

This case also involves the interpretation of various statutes. "Issues of statutory interpretation are questions of law that [the Court of Appeals] reviews de novo." *Krohn v Home-Owners Ins Co*, 490 Mich 145, 155; 802 NW2d 281 (2011).

B. ANALYSIS

As discussed, since the accident in 1978, plaintiff has received Medicare coverage for his medical bills. Because no insurance policy covered plaintiff, defendant, as the assigned claims facility insurer, has also paid plaintiff no-fault PIP benefits for his incurred medical expenses. Thus, while most no-fault benefit recipients would use PIP benefits to cover medical bills, in this case, plaintiff's medical bills are paid by Medicare and plaintiff also receives checks from defendant for the cash value of the same medical expenses covered by Medicare. Defendant characterizes this as impermissible "double-dipping." It does appear that plaintiff may be receiving duplicative compensation. However, the Legislature has, specifically permitted recipients of assigned-claims no-fault benefits to receive duplicative compensation from Medicare by making the assigned-claims payment structure partially uncoordinated as to Medicare. Whether or not that is a wise policy choice, the trial court correctly ruled that defendant may not set off the Medicare payments.

Because plaintiff's accident occurred in 1978, it preceded the congressional enactment of the Medicare Secondary Payer provision of the Omnibus Budget Reconciliation Act of 1980, 42 USC 1395y(b)(2)(a), which prevents Medicare from acting as the primary payer for auto accident injuries.[2] The statute only applies to accidents that occurred after December 5, 1980. 42 CFR § 411.50. Thus, had plaintiff's accident occurred after December 5, 1980, defendant would be the primary payer for plaintiff's medical expenses pursuant to the Assigned Claims Facility statute, MCL 500.3171, *et seq*.

There is no dispute that plaintiff, who had no applicable no-fault coverage, would ordinarily be entitled to PIP benefits from defendant through the assigned claims plan.[3] Indeed,

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[2] The Medicare Secondary Payer provision in 42 USC 1395y(b) provides, in part:

> (2) Medicare secondary payer
>
> (A) In general
>
> Payment under this subchapter may not be made, except as provided in subparagraph (B), with respect to any item or service to the extent that--
>
> (i) payment has been made, or can reasonably be expected to be made, with respect to the item or service as required under paragraph (1), or
>
> (ii) payment has been made or can reasonably be expected to be made under . . . no fault insurance.
>
> In this subsection, the term "primary plan" means . . . no fault insurance, to the extent that clause (ii) applies.

[3] As our Supreme Court explained in *Thompson v DAIIE*, 418 Mich 610, 623; 344 NW2d 764 (1984):

defendant paid plaintiff PIP benefits for nearly three decades. Defendant now takes the position that it should no longer pay those PIP benefits, and presumably should never have paid those benefits, because plaintiff's medical expenses covered by Medicare should be subject to offset under MCL 500.3109(1), which provides: "Benefits provided or required to be provided under the laws of any state or the federal government shall be subtracted from the personal protection insurance benefits otherwise payable for the injury."

We need not address whether any offset would be appropriate under MCL 500.3109(1), however, because that statute, and the case law addressing that statute, contemplates a payee receiving benefits pursuant to some kind of *purchased* no-fault insurance policy. See *O'Donnell v State Farm Mut Auto Ins*, 404 Mich 524; 273 NW2d 829 (1979); *Jarosz v DAIIE*, 418 Mich 565; 345 NW2d 563 (1984); and *Crowley v DAIIE*, 428 Mich 270; 407 NW2d 372 (1987).

> No-fault benefits are payable when there is no insurance; this is accomplished through the assigned claims facility, which provides benefits when an owner or driver is not insured or cannot be identified. That facility provides a means of requiring persons who in fact contribute to the no-fault system to pay for those who do not, and functions like the Second Injury Fund by assessing all automobile insurers for the cost.

Plaintiff qualified for PIP benefits through the assigned claims facility pursuant to MCL 500.3172(1), which provides, in part:

> A person entitled to a claim because of accidental bodily injury arising out of the ownership, operation, maintenance, or use of a motor vehicle as a motor vehicle in this state may obtain personal protection insurance benefits through an assigned claims plan if no personal protection insurance is applicable to the injury, no personal protection insurance applicable to the injury can be identified, the personal protection insurance applicable to the injury cannot be ascertained because of a dispute between 2 or more automobile insurers concerning their obligation to provide coverage or the equitable distribution of the loss, or the only identifiable personal protection insurance applicable to the injury is, because of financial inability of 1 or more insurers to fulfill their obligations, inadequate to provide benefits up to the maximum prescribed.

Thus, the Assigned Claims Facility represents the insurer of last priority. *Spencer v Citizens Ins Co*, 239 Mich App 291, 301; 608 NW2d 113 (2000).

Personal protection insurance benefits, commonly called "PIP" benefits, are defined in the Michigan no-fault act pursuant to MCL 500.3107, which states, in part:

> (1) Except as provided in subsection (2), personal protection insurance benefits are payable for the following:
>
> (a) Allowable expenses consisting of all reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery, or rehabilitation.

Some case law has addressed situations in which no offset is required; significantly, however, this was because insurers were required under MCL 500.3109a to provide an option for their paying customers to elect whether or not to coordinate coverage. See *LeBlanc v State Farm Mut Auto Ins Co*, 410 Mich 173, 206-207; 301 NW2d 775 (1981) ("Since plaintiff in the instant case did not elect to coordinate his Medicare benefits with his no-fault benefits, payments made on his behalf by the Medicare program may not be subtracted from the no-fault benefits due under the no-fault policy issued to him by defendant."), cf *Tatum v Gov't Employees Ins Co*, 431 Mich 663, 670-671; 431 NW2d 391 (1988) (the defendant insurer was not entitled to a setoff because the defendant failed to offer the plaintiff the option of a coordinated no-fault policy). Notably, we have not found any published case law applying the offset under MCL 500.3109(1) to benefits paid pursuant to an assigned claim.

It is readily apparent from our Supreme Court's explanations of the above statutes that MCL 500.3109(1) and MCL 500.3109a are intertwined components of a single statutory scheme. In the case at bar, however, it is impossible for MCL 500.3109a to have any bearing: no insurer could have offered plaintiff a coordinated policy because plaintiff had no insurance at all. As our Supreme Court further explained, MCL 500.3109a "only applies to benefits payable to [a] person named in a no-fault policy, [his or her] spouse, and any relative of either domiciled in the same household." *Crowley*, 428 Mich at 278. None of those persons exist here, again given that plaintiff did not have a no-fault policy. Consequently, neither the offset reasoning set forth in *LeBlanc* nor the analysis pertinent to MCL 500.3109(1) applies to this case.

In contrast, MCL 500.3172 specifically applies to personal protection insurance benefits payable through assigned claims plans. MCL 500.3175(1), provides, in relevant part:

> The assignment of claims shall be made according to rules that assure fair allocation of the burden of assigned claims among insurers doing business in this state on a basis reasonably related to the volume of automobile liability and personal protection insurance they write on motor vehicles or of the number of self-insured motor vehicles. An insurer to whom claims have been assigned shall make prompt payment of loss in accordance with this act and is thereupon entitled to reimbursement by the assigned claims facility for the payments and the established loss adjustment cost, together with an amount determined by use of the average annual 90-day United States treasury bill yield rate, as reported by the council of economic advisers as of December 31 of the year for which reimbursement is sought . . . .

Critically, MCL 500.3172(2) states that PIP benefits paid by the assigned claims facility "shall be reduced to the extent that benefits covering the same loss are available from other sources," but further states that Medicare is not one of those "benefit sources." House Legislative Analysis, HB 4322, November 27, 1984, indicates that 1984 PA 426, which added the relevant setoff language in MCL 500.3172(2), granted assigned claims insurers a setoff against other benefits but explicitly contemplated not coordinating benefits with Medicaid or Medicare and making the assigned claims facility benefits primary over those government benefits. This is consistent with the plain language of the statute itself.

We appreciate the dissent's and defendant's frustration with the possible receipt by plaintiff, who had no insurance at the time of his 1978 accident, of more compensation than he has expended, at a cost to both taxpayers and insurance buyers. We further appreciate that this result may also be frustrating to no-fault insureds who might have benefits offset despite having paid for their insurance, while persons who paid nothing receive additional compensation. However anomalous the situation might seem, our Supreme Court has repeatedly instructed that our Court must enforce legislation as written rather than weigh its wisdom. See *O'Donnell*, 404 Mich at 541. Our reading of the applicable statutory law leads us to conclude that the Legislature has specifically permitted recipients of assigned-claims no-fault benefits to receive duplicative compensation from Medicare by making the assigned-claims payment structure partially uncoordinated as to Medicare. In so ruling, we express no opinion on the wisdom of this statutory scheme relative to its value as good or even wise public policy, rather we reach this result in accord with our obligation to enforce legislation as written.

Affirmed.

/s/ Amy Ronayne Krause
/s/ Stephen L. Borrello