STATE OF MICHIGAN

COURT OF APPEALS

EDDY TARZWELL,

Plaintiff,

v

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Defendant/Cross-Plaintiff-Appellee,

and

BLUE CROSS BLUE SHIELD OF MICHIGAN,

Defendant/Cross-Defendant-Appellant.

UNPUBLISHED
June 3, 2008

No. 276381
Wayne Circuit Court
LC No. 05-519994-CK

Before: Servitto, P.J., and Cavanagh and Kelly, JJ.

PER CURIAM.

Defendant/cross-defendant, Blue Cross Blue Shield of Michigan (BC), appeals as of right an order denying its motion for summary disposition, granting defendant/cross-plaintiff State Farm Mutual Automobile Insurance Company's (State Farm) motion for summary disposition, and entering judgment against BC and in favor of State Farm in the amount of $68,128. We reverse and remand.

Plaintiff was involved in a motor vehicle accident. As a result of his extensive injuries, plaintiff was admitted to the inpatient rehabilitation program at the Rehabilitation Institute of Michigan (RIM). Plaintiff was an inpatient at RIM between approximately August 27, 2004, and September 23, 2004, incurring medical expenses of $68,128. At the time of the accident, plaintiff had health insurance with BC and no-fault automobile insurance with State Farm. Pursuant to a coordination provision in the no-fault policy, the medical coverage that State Farm was obligated to provide plaintiff was secondary to the medical coverage to be provided by BC. After both BC and State Farm refused to pay the RIM claim, plaintiff filed suit against both, alleging that one or both entities was responsible for paying the claim. The matter was removed to federal court. Although State Farm claimed that it was BC's obligation to pay the claim as primary insurer, State Farm eventually paid the RIM claim and brought a cross-complaint against BC to recover the money it paid on the claim as plaintiff's subrogee. Thereafter, plaintiff

dismissed with prejudice his claims against both BC and State Farm and the matter was remanded to the circuit court for resolution of State Farm's cross-claim against BC. BC and State Farm both moved for summary disposition and, as previously indicated, the trial court granted summary disposition in favor of State Farm.

BC contends that the trial court erred in denying its motion for summary disposition, granting State Farm's motion for summary disposition, and entering judgment against BC because State Farm had no subrogation rights against BC and, even if it did, there was a genuine issue of material fact regarding how much State Farm was entitled to recover from BC. We agree in part.

This Court reviews a trial court's decision on a motion for summary disposition de novo. *Dressel v Ameribank,* 468 Mich 557, 561; 664 NW2d 151 (2003). A motion brought pursuant to MCR 2.116(C)(10) should be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.[1] *Miller v Purcell*, 246 Mich App 244, 246; 631 NW2d 760 (2001). When the burden of proof at trial would rest on the nonmoving party, the nonmovant may not rest upon mere allegations or denials in the pleadings, but must, by documentary evidence, set forth specific facts showing that there is a genuine issue for trial. *PT Today, Inc v Comm'r of Financial & Ins Services*, 270 Mich App 110, 150; 715 NW2d 398 (2006). A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds could differ. *West v GMC*, 469 Mich 177, 183; 665 NW2d 468 (2003). When deciding a motion for summary disposition, a court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence submitted in the light most favorable to the nonmoving party. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004).

The right to subrogation may arise in various ways, including, by agreement of the parties and via equitable principles. *Citizens Ins Co of America v Buck,* 216 Mich App 217, 225; 548 NW2d 680 (1996). Regardless of how it arises, the controlling general principles are the same. The subrogee, upon paying an obligation owed to the subrogor which is the primary responsibility of a third party, is substituted in the place of the subrogor and thereby attains the same and no greater rights to recover against the third party.[2] *Citizens Ins Co of America v*

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[1] In presenting their arguments, the parties have gone beyond the pleadings. Therefore, their claims should be reviewed under MCR 2.116(C)(10). *Smith v Globe Life Ins Co,* 460 Mich 446, 454-455; 597 NW2d 28 (1999), superseded on other grounds by statute as stated in *McLiechey v Bristol West Ins Co,* 408 F Supp 2d 516 (WD Mich, 2006). Because State Farm opened the door to consideration under (C)(10) by countering BC's motion with evidence outside the pleadings, and by affirmatively moving for summary disposition (which could not have been based on (C)(8) given that State farm is the plaintiff), *Stanke ex rel Isabella Bank and Trust v Stanke,* 480 Mich 927; 740 NW2d 300 (2007), does not preclude review under (C)(10).

[2] Where, like here, an insurance provider pays expenses on behalf of its insured pursuant to an insurance contract, it is doing so out of obligation. *Auto-Owners Ins Co v Amoco Production Co,* 468 Mich 53, 59-60; 658 NW2d 460 (2003). This is true even if the insurer's obligation was only secondary to another carrier's. See, e.g., *Auto Club Ins Ass'n v New York Life Ins Co*, 440

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American Community Mut Ins Co, 197 Mich App 707, 709-710; 495 NW2d 798 (1992). Payment of the subrogated debt is a prerequisite to attaining subrogation rights, and payment defines those rights and fixes the amount the subrogee can claim pursuant to those rights. *Morrow v Shah*, 181 Mich App 742, 749; 450 NW2d 96 (1989). The nature of the claim asserted by the subrogee is determined by the nature of the claim that the subrogor would have had. *Auto-Owner's Ins Co, supra* at 59.

Here, State Farm's subrogation rights are provided for by its contract with plaintiff.[3] State Farm's right to subrogation entitles it to stand in the shoes of plaintiff and recoup from BC any benefits that State Farm paid on behalf of plaintiff and that BC was contractually obligated to pay as the primary insurer. BC's argument that State Farm has no rights against it because Plaintiff dismissed his claims against BC is without merit. By the time plaintiff dismissed his claims against BC, State Farm was already standing in the shoes of plaintiff because State Farm had already paid the RIM claim on plaintiff's behalf.[4] At the moment that State Farm paid the claim, State Farm became subrogated to plaintiff's rights and plaintiff had no ability to sign away State Farm's rights. *State Auto Ins Co v Velazquez*, 266 Mich App 726, 731-732; 703 NW2d 223 (2005) (holding that because the plaintiff-subrogee-insurer paid benefits to its insured before the insured signed a release relieving the third-party from liability, the "plaintiff was already standing in 'the shoes of the subrogor' insured with regard to the paid benefits and [the] plaintiff's insured no longer had the ability to sign away [the] plaintiff's rights in this regard"). Accordingly, State Farm is entitled to recoup from BC any benefits that State Farm paid on behalf of plaintiff and that BC was contractually obligated to pay as primary insurer in relation to the RIM claim.[5]

Although the trial court correctly determined that State Farm's subrogation rights remained intact after the dismissal, it erred in entering judgment in favor of State Farm in the amount of $68,128 without first determining that there was coverage under the BC policy in that amount and for such purposes. The issue of whether the RIM claim was actually covered under the BC policy was never resolved by the lower court. Although BC argued that there was no coverage, and State Farm argued that there was coverage, plaintiff dismissed his claims against BC in the federal court before the court could reach the coverage issue. Neither side's arguments were fleshed out enough to allow this Court to make a determination as a matter of law regarding if and to what extent there is coverage. Therefore, a remand is in order to allow the lower court

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Mich 126; 485 NW2d 695 (1992).

[3] The resolution of this issue is the same regardless of whether recovery is pursued via equitable subrogation or subrogation based on contract.

[4] Although the exact date of payment is unknown, State Farm maintains that it did pay the entire claim before plaintiff dismissed his claims against BC. BC presents no evidence to the contrary.

[5] Because plaintiff did not formally assign his rights under the BC contract to State Farm until *after* State Farm's subrogation rights were in place, BC's argument that plaintiff's assignment automatically terminated his rights under the contract need not be reached.

to resolve the issue of whether and to what extent the BC policy provides coverage for the RIM expenses.[6]

We reverse the trial court's January 31, 2007, order denying BC's motion for summary disposition, granting State Farm's motion for summary disposition, and entering judgment against BC and in favor of State Farm in the amount of $68,128. This case is remanded to the Wayne Circuit Court for resolution of the issue of whether and to what extent the BC policy provides coverage for plaintiff's RIM medical expenses. BC is directed to pay State Farm the amount, if any, of the RIM claim that is determined to be covered under the BC policy. If no portion of the claim is covered under the BC policy, State Farm is not entitled to recover any amount from BC. We do not retain jurisdiction.

/s/ Deborah A. Servitto
/s/ Mark J. Cavanagh
/s/ Kirsten Frank Kelly

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[6] ERISA expressly preempts state law that "relates to" an employee benefit plan. 29 USC 1144(a). Therefore, as a general rule, federal courts have exclusive subject-matter jurisdiction over ERISA claims. *Townsend v Brown Corp of Ionia, Inc,* 206 Mich App 257, 260-261; 521 NW2d 16 (1994). However, ERISA contains a jurisdictional provision that does carve out exceptions to this general rule, providing concurrent jurisdiction for state and federal courts over certain types of ERISA claims. 29 USC 1132(e)(1). One of these exceptions provides that a state court has concurrent jurisdiction over an action that is brought pursuant to 29 USC 1132(a)(1)(B) to recover benefits due to a participant or beneficiary under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan. Because State Farm (as plaintiff's subrogee/beneficiary) seeks to recover benefits under the terms of the plan, it appears that the state court would have jurisdiction to determine whether and to what extent the RIM expenses are covered benefits.