

STATE OF MICHIGAN
COURT OF APPEALS

MICHIGAN HEAD & SPINE INSTITUTE, PC,

Plaintiff-Appellant,

v

ESSURANCE PROPERTY & CASUALTY
INSURANCE COMPANY,

Defendant-Appellee.

UNPUBLISHED
September 18, 2018

No. 340807
Oakland Circuit Court
LC No. 2017-157083-NF

Before: SWARTZLE, P.J., and JANSEN and O'BRIEN, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting summary disposition to defendant and denying plaintiff's motion to amend its complaint. We affirm in part, vacate in part, and remand for further proceedings consistent with this opinion.

I. BACKGROUND

Plaintiff allegedly provided medical treatment to 17 patients for whom defendant was the highest-priority first-party no-fault insurer responsible for paying personal-injury-protection (PIP) benefits for injuries arising out of motor vehicle accidents. Plaintiff asserts that defendant has refused to provide full payment of the outstanding medical expenses owed to plaintiff for these 17 patients. Plaintiff filed this action seeking to recover the outstanding medical expenses along with no-fault penalty interest and attorney fees.

Defendant moved for summary disposition arguing that medical providers such as plaintiff lack an independent statutory cause of action against a no-fault insurer such as defendant in light of *Covenant Med Ctr, Inc v State Farm Mut Auto Ins Co*, 500 Mich 191; 895 NW2d 490 (2017). Plaintiff then moved to amend its complaint to assert claims under assignment-of-benefits and third-party-beneficiary theories. The trial court granted summary disposition to defendant under MCR 2.116(C)(8) and denied plaintiff's motion to amend the complaint. The trial court reasoned that amendment would be futile because defendant's policy contained an anti-assignment clause and that defendant was not a third-party-beneficiary to the contract because the policy did not evidence an intent to benefit plaintiff.

This appeal followed.

II. ANALYSIS

Defendant Was Entitled to Summary Disposition Under Covenant. A trial court's decision on a motion for summary disposition is reviewed de novo. *Dell v Citizens Ins Co of America*, 312 Mich App 734, 739; 880 NW2d 280 (2015). "A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint." *Id.*

In *Covenant*, 500 Mich at 195-196, 217-218, our Supreme Court held that healthcare providers lack an independent statutory cause of action against no-fault insurers to recover PIP benefits. This Court has concluded that the holding in *Covenant* applies retroactively to pending cases. *Bronson Healthcare Group, Inc v Mich Assigned Claims Plan*, ___ Mich App ___, ___; ___ NW2d ___ (2018) (Docket No. 336088); slip op at 2, citing *W A Foote Mem Hosp v Mich Assigned Claims Plan*, 321 Mich App 159, 196; 909 NW2d 38 (2017).¹ The present case was pending in the trial court when *Covenant* was decided. Thus, *Covenant* applies to bar plaintiff's independent action against defendant for the recovery of PIP benefits owed to defendant's insureds. Summary disposition was therefore appropriate on plaintiff's independent statutory claim.

Plaintiff's Motion to Amend. "The grant or denial of leave to amend pleadings is within the trial court's discretion." *Jawad A Shah, MD, PC v State Farm Mut Auto Ins Co*, ___ Mich App ___, ___; ___ NW2d ___ (2018) (Docket No. 340370); slip op at 13 (cleaned up). "This Court reviews for an abuse of discretion a trial court's denial of a motion to amend a complaint." *Tierney v Univ of Mich Regents*, 257 Mich App 681, 687; 669 NW2d 575 (2003). "[A]n abuse of discretion occurs only when the trial court's decision is outside the range of reasonable and principled outcomes." *In re Kostin*, 278 Mich App 47, 51; 748 NW2d 583 (2008). "A trial court necessarily abuses its discretion when it makes an error of law." *Shah*, ___ Mich App at ___; slip op at 14 (cleaned up).

"If a trial court grants summary disposition pursuant to MCR 2.116(C)(8), (C)(9), or (C)(10), the court must give the parties an opportunity to amend their pleadings pursuant to MCR 2.118, unless the amendment would be futile." *Id.* (cleaned up); see also MCR 2.116(I)(5). "An amendment is futile if it merely restates the allegations already made or adds allegations that still fail to state a claim." *Id.* (cleaned up). "Under MCR 2.118(A)(2), a party may amend a pleading by leave of the court and such leave shall be freely given when justice so requires." *Id.* (cleaned up). "Amendment is generally a matter of right rather than grace" and "should ordinarily be denied only for particularized reasons, including undue delay, bad faith or dilatory motive, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party, or futility." *Id.* at ___; slip op at 13 (cleaned up).

¹ Our Supreme Court has ordered oral argument on the application to consider the retroactivity of *Covenant*. *W A Foote Mem Hosp v Mich Assigned Claims Plan*, ___ Mich ___; 911 NW2d 470 (2018).

Assignment of Benefits. The trial court concluded that amendment to add an assignment-of-benefits claim to plaintiff's complaint would be futile in light of the anti-assignment clauses in defendant's policies. The trial court reasoned that the anti-assignment clauses did not violate public policy and therefore were entitled to be enforced as-written. We disagree.

In *Covenant*, 500 Mich at 217 n 40, our Supreme Court recognized that an insured may "assign his or her right to past or presently due benefits to a healthcare provider." Thus, in the situation where a health-care provider's independent statutory claim for PIP benefits is summarily dismissed, this Court has held that the provider should be granted leave to amend its complaint to assert a claim under an assignment-of-benefits theory. See *Bronson Healthcare Group*, ___ Mich App at ___; slip op at 3, citing *W A Foote Mem Hosp*, 321 Mich App at 196. Moreover, we held in *Shah*, ___ Mich App at ___; slip op at 9, that an anti-assignment clause in a no-fault policy is unenforceable to prohibit an assignment that occurred after the loss or the accrual of the claim to payment "because such a prohibition of assignment violates Michigan public policy that is part of our common law as set forth by our Supreme Court." Therefore, under *Shah*, the anti-assignment provisions in defendant's policies are void as against public policy and present no obstacle to plaintiff's claim under an assignment-of-benefits theory.

It is therefore necessary to vacate the portion of the trial court's order denying plaintiff's motion to amend the complaint with respect to a claim under an assignment-of-benefits theory. The case is remanded to the trial court to determine whether amendment to assert a claim under an assignment-of-benefits theory is proper in the present case. To the extent that defendant argues on appeal that the claim is otherwise futile, those fact-specific determinations should be decided in the first instance by the trial court rather than by this Court. See generally, *Id.* at ___; slip op at 13 (noting particularized considerations pertinent to the decision whether to allow amendment of a pleading).

Third-party Beneficiary. The trial court also denied plaintiff's motion to add a third-party-beneficiary claim, concluding that plaintiff was not a third-party beneficiary to the policies because plaintiff was not referenced in the policies. We agree.

In *Covenant*, 500 Mich at 217 n 39, our Supreme Court declined to make a "blanket assertion" that "healthcare providers are incidental rather than intended beneficiaries of a contract between the insured and the insurer." The determination would rest "on the specific terms of the contract between the relevant parties." *Id.* The third-party-beneficiary statute, MCL 600.1405, states, in relevant part:

Any person for whose benefit a promise is made by way of contract, as hereinafter defined, has the same right to enforce said promise that he would have had if the said promise had been made directly to him as the promisee.

(1) A promise shall be construed to have been made for the benefit of a person whenever the promisor of said promise had undertaken to give or to do or refrain from doing something directly to or for said person.

"The plain language of this statute reflects that not every person incidentally benefitted by a contractual promise has a right to sue for breach of that promise. Thus, only intended, not

incidental, third-party beneficiaries may sue for a breach of a contractual promise in their favor.” *Schmalfeldt v North Pointe Ins Co*, 469 Mich 422, 427; 670 NW2d 651 (2003) (cleaned up). “A person is a third-party beneficiary of a contract only when that contract establishes that a promisor has undertaken a promise ‘directly’ to or for that person.” *Id.* at 428 (cleaned up). “By using the modifier ‘directly,’ the Legislature intended to assure that contracting parties are clearly aware that the scope of their contractual undertakings encompasses a third party, directly referred to in the contract, before the third party is able to enforce the contract.” *Id.* (cleaned up). The objective form and meaning of the contract itself is used to determine whether a person is an intended third-party beneficiary. *Id.* “A third-party beneficiary may be a member of a class, but the class must be sufficiently described.” *Shay v Aldrich*, 487 Mich 648, 663; 790 NW2d 629 (2010) (cleaned up).

Here, plaintiff has not identified any language in the no-fault insurance policies that directly refers to plaintiff or that sufficiently describes a class of which plaintiff is a member. Thus, plaintiff has not shown that an issue of fact exists regarding whether it was an intended beneficiary of the PIP policies. Hence, the trial court correctly concluded that amendment of the complaint to assert a third-party-beneficiary theory was futile.

Affirmed in part, vacated in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Brock A. Swartzle
/s/ Kathleen Jansen
/s/ Colleen A. O'Brien