STATE OF MICHIGAN

COURT OF APPEALS

INSIGHT INSTITUTE OF NEUROSURGERY & NEUROSCIENCE, Plaintiff-Appellant,	UNPUBLISHED March 21, 2019
v	No. 340702 Wayne Circuit Court
STATE FARM MUTUAL AUTOMOBILE INSURANCE CO, Defendant-Appellee.	LC No. 16-005469-NF

Before: MURRAY, C.J., and GADOLA and TUKEL, JJ.

PER CURIAM.

Plaintiff Insight Institute of Neurosurgery & Neuroscience appeals as of right the trial court's order granting defendant State Farm Mutual Automobile Insurance Company's motion for summary disposition, and denying its own motion for leave to file an amended complaint. We affirm.

I. BACKGROUND AND PROCEDURAL HISTORY

In this action for no-fault benefits, plaintiff filed suit on April 29, 2016, seeking payment from defendant for medical care provided to Michael Stone arising out of an automobile accident. On May 25, 2017, while plaintiff's case remained pending in the trial court, the Michigan Supreme Court issued its opinion in *Covenant Med Ctr, Inc v State Farm Mut Auto Ins Co*, 500 Mich 191, 196; 895 NW2d 490 (2017), holding that healthcare providers lack standing to bring a direct cause of action for personal protection insurance (PIP) benefits against insurers

under the no-fault act, MCL 500.3101 *et seq*. As a result, defendant moved for summary disposition pursuant MCR 2.116(C)(8),[1] asserting that *Covenant* barred plaintiff's claim.

In response, plaintiff both challenged the retroactive application of the Supreme Court's decision in *Covenant*, and requested leave to amend its complaint so as to avoid dismissal on the basis of assignments from Stone for the no-fault benefits owed.[2] Plaintiff also filed a separate motion for leave to amend its complaint, to which it attached a proposed amended complaint stating, "INSIGHT brings this lawsuit based upon Michael Stone's assignments to INSIGHT of his rights to collect incurred no-fault benefits . . . ."

Addressing plaintiff's request to amend, defendant argued that Stone never assigned any rights to plaintiff, as plaintiff was neither listed in the assignments attached to plaintiff's pleadings,[3] nor a registered corporation or assumed name of the entities listed. Further, it asserted that the antiassignment clause in the applicable insurance policy prohibited the assignment of Stone's right to PIP benefits.

Ultimately, the trial court applied the Supreme Court's holding in *Covenant* to grant summary disposition, and denied, as futile, plaintiff's motion for leave to file a first amended complaint.

II. ANALYSIS

A. SUMMARY DISPOSITION

Plaintiff first argues that the trial court erred when it applied the holding in *Covenant* to dismiss its claim.

The trial court concluded that plaintiff's complaint failed to state a claim for which relief could be granted, MCR 2.116(C)(8).[4] We review summary disposition decisions de novo. *Jawad A Shah, MD, PC v State Farm Mut Auto Ins Co*, 324 Mich App 182, 205-206; 920 NW2d 148 (2018). "A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant." *Id*. at 206 (quotation marks and citation omitted).

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[1] The motion itself listed both MCR 2.116(C)(7) and (8) as grounds for summary disposition, but defendant's brief in support of the motion referenced only MCR 2.116(C)(8), the appropriate ground for summary disposition in this case.

[2] Plaintiff also raised a third-party beneficiary argument, which it has abandoned on appeal.

[3] Plaintiff attached, to its summary disposition response and motion to amend, seven separate assignments from Stone to various entities.

[4] MCR 2.116(C)(8) allows for summary disposition where "[t]he opposing party has failed to state a claim on which relief can be granted." MCR 2.116(C)(8).

> A motion under MCR 2.116(C)(8) may be granted only where the claims alleged are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. When deciding a motion brought under this section, a court considers only the pleadings. [*Id*. (quotation marks and citation omitted).][5]

We also review de novo whether a decision applies retroactively. *WA Foote Mem Hosp v Mich Assigned Claims Plan*, 321 Mich App 159, 168; 909 NW2d 38 (2017).

As this Court has held that *Covenant* applies retroactively, *WA Foote*, 321 Mich App at 196; *Shah*, 324 Mich App at 195-196, and we must follow the rule of law established by prior published decisions of this Court, MCR 7.215(J)(1), we hold that the trial court did not err when it granted summary disposition of plaintiff's complaint.

B. AMENDMENT BASED ON ASSIGNMENT

Plaintiff also challenges the trial court's denial of its motion for leave to file an amended complaint based on assignment.

"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," *Shah*, 324 Mich App at 209 (quotation marks and citation omitted), and "[t]he grant or denial of leave to amend pleadings is within the trial court's discretion," *id*. at 207 (quotation marks and citation omitted).

MCL 500.3143 prohibits the assignment of future potential no-fault benefits, but in *Covenant*, 500 Mich at 217 n 40, the Supreme Court stated that its holding was "not intended to alter an insured's ability to assign his or her right to past or presently due benefits to a healthcare provider." It was on this basis that plaintiff moved for leave to amend its complaint and continue its cause of action against defendant.

We conclude that the trial court did not abuse its discretion. In reaching this conclusion, we first reject defendant's argument that the antiassignment clause in the no-fault policy at issue prohibits Stone from making any post-loss assignment of benefits. The clause states, "No assignment of benefits or other transfer of rights is binding upon [State Farm] unless approved by [State Farm]." However, in *Shah*, 324 Mich App at 200, this Court, relying on the Supreme Court's holding in *Roger Williams Ins Co v Carrington*, 43 Mich 252; 5 NW 303 (1880), held that the same antiassignment clause could not be enforced to prevent "an assignment after the loss occurred of an accrued claim to payment . . . because such a prohibition of assignment

[5] Although plaintiff attached the purported assignments to its response to defendant's motion for summary disposition, and defendant attached evidence to its reply brief, we decline to treat the motion as one brought pursuant to MCR 2.116(C)(10) because the attachments related to plaintiff's request for amendment, and there is no indication the trial court took them into consideration when making its determinations.

violates Michigan public policy that is part of our common law as set forth by our Supreme Court."

We see no reason not to apply the holding in *Shah* here, as the circumstances are identical. See *Henry Ford Health Sys v Everest Nat'l Ins Co*, ___ Mich App ___, ___; ___ NW2d ___ (2018) (Docket No. 341563); slip op at 4; MCR 7.215(J)(1). Further, we decline to declare a conflict panel pursuant to MCR 7.215(J)(2) and (3) as defendant requests we do, on the basis that MCL 500.3143 is silent about the assignment of past and present benefits, and that *Roger Williams* has been superseded by modern contract law. The *Shah* Court acknowledged modern contract law which provides that unambiguous contract terms must generally be enforced as written, and still applied *Roger Williams*, stating: "There is no indication that *Roger Williams* or its holding relating to antiassignment clauses has been clearly overruled or superseded. Therefore, if the continued validity of *Roger Williams* is to be called into question, it will have to be by our Supreme Court." *Shah*, 324 Mich App at 196-201.[6]

Nevertheless, we affirm the trial court's decision to deny plaintiff's motion for leave to amend, because there is no evidence in the record before us that Stone assigned his right to recover past or presently due no-fault benefits to plaintiff specifically. Thus, plaintiff lacked standing to amend its complaint on the basis of an assignment.

Of the seven assignments attached to its response to defendant's motion for summary disposition and motion for leave to file an amended complaint, none list plaintiff as an assignee.[7] And, when defendant raised this issue in the trial court, plaintiff introduced no evidence linking itself to the entities listed on the assignments. Instead, plaintiff's counsel simply stated at the motion hearing: "Defense counsel has been on these cases regardless of the plaintiff's attorney involved for some time now. We've had discussions. He's taken depositions. He understands, as do I, that the entities that are named in the specific assignments, which we have seven, are all under Dr. Jawad Shah and Insight."

On appeal, plaintiff asserts that Insight Institute of Neurosurgery & Neuroscience was a de facto assumed name of the seven entities listed on the assignments, so this is simply a misnomer that can be easily corrected, but it failed to raise these arguments or request correction in the trial court. See *Mouzon v Achievable Visions*, 308 Mich App 415, 419; 864 NW2d 606 (2014) ("For an issue to be preserved for appellate review, it must be raised, addressed, and decided by the lower court.") (quotation marks and citation omitted).[8] Further, in support of its

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[6] We note that application for leave to appeal this Court's decision in *Shah* is currently pending in the Michigan Supreme Court.

[7] The assignments, dated June 26, 2017, and signed by Stone, were made to Integrated Hospital Specialists PC, Insight Health & Fitness Center, Insight Pain Management, Jawad A Shah MD PC, Insight Physical Therapy & Neuro Rehab, Insight Radiologists PC, and Insight Healing Center.

[8] We also note that defendant attached, to its reply brief in support of its motion for summary disposition in the trial court, corporate entity details from the Department of Licensing and

argument, plaintiff referenced only the deposition of a person named Ali Madha, with no citation to the record, as evidence that defendant "understood the situation." See MCR 7.212(C)(7) (requiring that arguments made in an appellant's brief "must be supported by specific page references to the transcript, the pleadings, or other document or paper filed with the trial court"). Defendant did attach a small excerpt of Madha's deposition transcript to its reply brief in support of its motion for summary disposition, in which Madha, "vice president of operations," states that plaintiff was the umbrella name for a number of other entities, but this testimony alone fails to demonstrate that plaintiff was an assumed name of any of the entities listed on the assignments, or that Stone intended to assign his rights to plaintiff. See *Burkhardt v Bailey*, 260 Mich App 636, 654-655; 680 NW2d 453 (2004) (stating that for an assignment to be valid, there must be a perfected transaction between parties intended to vest in the assignee a present right). Thus, on the basis of the record before us,[9] we hold that plaintiff failed to obtain an assignment from Stone, and therefore lacked standing to amend its complaint.[10]

Affirmed.

/s/ Christopher M. Murray
/s/ Michael F. Gadola
/s/ Jonathan Tukel

Regulatory Affairs for each of the seven entities granted assignments, none of which list plaintiff as an assumed name.

[9] According to defendant, plaintiff became a registered assumed name of Jawad A Shah, MD, PC in January 2018, after the trial court entered its order denying plaintiff's motion for leave to amend. Thus, that evidence is not in the record before us.

[10] Because we have determined that plaintiff lacked standing to amend its complaint, we need not address whether a complaint based on assignment would relate back to plaintiff's original filing. Nevertheless, we rely on *Shah*, 324 Mich App at 204-205, to hold that a complaint based on assignment would have been a supplemental, rather than an amended pleading, and that, therefore, the one-year-back rule would have applied to bar plaintiff from recovering any benefits for losses incurred more than one year before the date of the assignments.