STATE OF MICHIGAN

COURT OF APPEALS

COVENANT MEDICAL CENTER, INC,

Plaintiff-Appellee,

v

FARM BUREAU MUTUAL INSURANCE COMPANY OF MICHIGAN,

Defendant-Appellant.

UNPUBLISHED
November 24, 2020

No. 350645
Saginaw Circuit Court
LC No. 16-031504-NF

Before: MARKEY, P.J., and METER and GADOLA, JJ.

PER CURIAM.

Defendant, Farm Bureau Mutual Insurance Company of Michigan, appeals as of right the trial court's order denying its motion for summary disposition under MCR 2.116(C)(8) and (10), granting the motion for summary disposition of plaintiff, Covenant Medical Center, Inc, under MCR 2.116(C)(10), and ordering defendant to pay plaintiff $53,223.55. We vacate the trial court's order and remand for further proceedings consistent with this opinion.

I. FACTS

This dispute arises from plaintiff's claim that it is entitled to double damages from defendant under §1395y of the Medicare Secondary Payer Act (MSPA), 42 USC 1395y. Plaintiff claims that defendant failed to timely pay plaintiff for medical expenses incurred by defendant's insured, and also failed to reimburse Blue Cross Blue Shield of Michigan (BCBSM) for certain amounts BCBSM paid plaintiff on behalf of defendant's insured.

On November 19, 2015, Nancy Hutchinson fell and was injured while trying to enter her vehicle. Hutchinson was attempting to drive to the emergency room to seek medical care for complications from a surgical procedure she had undergone days earlier. After her fall, she was hospitalized at plaintiff's facility where she received medical treatment. While initially hospitalized at plaintiff's facility from November 19, 2015 to December 2, 2015, Hutchinson received medical treatment both for an infection related to Hutchinson's prior surgical procedure and for the injuries resulting from her fall.

At the time of her fall, Hutchinson had a policy of no-fault insurance issued by defendant. She also was covered by a Medicare Advantage Plan through BCBSM. The history of plaintiff's billing for Hutchinson's medical care is not disputed, but is somewhat convoluted. According to plaintiff, initially plaintiff billed BCBSM[1] for Hutchinson's medical care. Included in this amount was $6,294.81 for Hutchinson's medical care on or about November 19, 2015, which defendant asserts was related to complications from her earlier surgery and was not related to her fall; on December 23, 2015, BCBSM paid this amount to plaintiff.

According to defendant, on April 4, 2016, plaintiff provided defendant with an itemized bill related to Hutchinson's care indicating that BCBSM had paid certain charges. On April 26, 2016, BCBSM sent defendant a subrogation letter indicating that it had paid plaintiff $46,948.24 for Hutchinson's treatment between November 19, 2015 and March 29, 2016, as a result of the motor vehicle incident and requested reimbursement from defendant. On June 22, 2016, defendant responded to BCBSM and advised that it was investigating the matter. On October 12, 2016, BCBSM notified defendant that BCBSM had paid plaintiff $48,237.76 on behalf of Hutchinson. According to defendant, there was significant overlap between this bill and the charges identified in the April 26, 2016 letter. In November 2016, defendant paid BCBSM $40,807.82, for services provided to Hutchinson from November 19, 2015 through December 2, 2015.

Meanwhile, on or about August 15, 2016, plaintiff billed defendant $53,464.35 for Hutchinson's medical treatment from November 20, 2015 to December 2, 2015. According to defendant, on or about November 11, 2016, it issued an Explanation of Review stating that it had determined that all but $240.80 of the billed amount was compensable under the no-fault act. On January 3, 2017, defendant paid plaintiff $53,223.55 (the amount billed minus $240.80).

Before receiving the payment from defendant, however, plaintiff initiated this lawsuit by filing its complaint on November 18, 2016; plaintiff served the complaint upon defendant on January 6, 2017. Plaintiff's complaint alleged that defendant had breached its contract with Hutchinson by failing to promptly pay plaintiff under the no-fault act for her medical care. Plaintiff also alleged that defendant had failed under the MSPA to provide primary payment, and as a result Medicare made conditional payments to plaintiff on behalf of Hutchinson for medical services for her injuries related to the motor vehicle incident. Plaintiff alleged that it therefore was entitled to recover double damages from defendant under the MSPA.

Defendant moved for summary disposition under MCR 2.116(C)(8) and (10) of Count I of plaintiff's complaint alleging breach of contract. The trial court granted defendant partial summary disposition, determining that dismissal of Count I was warranted in light of *Covenant Med Ctr, Inc v State Farm Mut Auto Ins Co*, 500 Mich 191; 895 NW2d 490 (2017).

Thereafter, both parties moved for summary disposition of Count II of plaintiff's complaint. Plaintiff moved for summary disposition under MCR 2.116(C)(9) and (10), contending that there was no genuine issue of material fact that plaintiff was entitled to an additional payment

[1] BCBSM is not a party to this appeal. The Medicare Secondary Payer Act permits private parties to sue primary payers for failure to reimburse Medicare for conditional payments made on the primary payer's behalf. See 42 USC 1395y(b)(3)(A).

of $53,464.35 as double damages because defendant had failed to provide primary payment or reimbursement under the MSPA. Defendant moved for summary disposition under MCR 2.116(C)(8) and (10), contending that it had paid plaintiff all of the charges related to Hutchinson's injuries from her fall, and had reimbursed BCBSM for all payments that it made to plaintiff that were related to Hutchinson's accident. Defendant also contended that plaintiff lacked standing to pursue the claim.

The trial court granted plaintiff's motion in part, finding that plaintiff had standing to pursue the claim under the MSPA, that defendant is a primary plan under the MSPA, and that defendant had conceded that it was obligated to pay plaintiff's charges in the amount of $53,223.55 by paying that amount to plaintiff. The trial court found that a question of fact existed, however, regarding whether defendant had failed to provide primary payment or appropriate reimbursement under the MSPA that would entitle plaintiff to double damages under the MSPA.

The parties thereafter renewed their motions for summary disposition. Plaintiff contended that there was no genuine issue that defendant had failed timely to make the primary payment to plaintiff and also had failed to reimburse BCBSM in the amount of $6,294.81. Defendant contended that plaintiff had not demonstrated that defendant failed to pay for any amount that was compensable, failed to establish that defendant's failure to pay plaintiff prompted BCBSM's payment, and further failed to establish that BCBSM's payment to plaintiff was a conditional payment under the MSPA.

The trial court denied defendant's renewed motion for summary disposition and granted plaintiff's renewed motion for summary disposition under MCR 2.116(C)(10).[2] Under the double damages provision of the MSPA, the trial court awarded plaintiff damages in the amount of $53,233.55.[3] The trial court reasoned that because Hutchinson was injured while getting into her car, defendant as the no-fault insurer for Hutchinson was obligated to reimburse plaintiff for Hutchinson's medical expenses. Defendant now appeals to this Court.

II. ANALYSIS

A. STANDARD OF REVIEW

This Court reviews de novo a trial court's decision to grant or deny summary disposition. *Johnson v Vanderkooi*, 502 Mich 751, 761; 918 NW2d 785 (2018). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of a claim. *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 160; 934 NW2d 665 (2019). When reviewing an order granting summary disposition under MCR 2.116(C)(10), this Court considers all documentary evidence

[2] The trial court did not specify under which section of MCR 2.116(C) it granted plaintiff summary disposition. Because the parties relied on documentary evidence to support their arguments, however, this Court reviews the motion as granted under MCR 2.116(C)(10). *In re Miltenberger Estate*, 275 Mich App 47, 50; 737 NW2d 513 (2007).

[3] The parties agree that defendant paid plaintiff $53,223.55 in January 2017. The trial court's order that defendant pay plaintiff an additional $53,223.55 is an imposition of double damages.

submitted by the parties in the light most favorable to the nonmoving party. *Id.* Summary disposition under MCR 2.116(C)(10) is warranted when there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. *Id.* "A genuine issue of material fact exists when the record leaves open an issue upon which reasonable minds might differ." *Johnson*, 502 Mich at 761 (quotation marks and citations omitted). We also review de novo the application of statutes. *Cox v Hartman*, 322 Mich App 292, 298; 911 NW2d 219 (2017).

B. MEDICARE SECONDARY PAYER ACT

Defendant contends that the trial court erred by granting plaintiff's motion for summary disposition because defendant did not fail to make primary payment to plaintiff or to reimburse BCBSM within the meaning of the MPSA.

The parties do not dispute that Hutchinson was insured under a policy of no-fault insurance issued by defendant. Michigan's no-fault act requires automobile insurers to provide personal protection insurance (PIP) benefits for certain injuries related to a motor vehicle. *Kemp v Farm Bureau Gen Ins Co of Mich*, 500 Mich 245, 252; 901 NW2d 534 (2017). Under the act, "an insurer is liable to pay benefits for accidental bodily injury arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle, subject to the provisions of this chapter." MCL 500.3105(1). Generally, injuries involving a parked vehicle do not involve the use of a vehicle as a motor vehicle, see *Stewart v Michigan*, 471 Mich 692, 698; 692 NW2d 376 (2004), and therefore are excluded from coverage unless one of the statutory exceptions of MCL 500.3106(1) applies. *Kemp*, 500 Mich at 252. In this case, the parties do not dispute that Hutchinson's injuries from her fall occurred while she was entering her vehicle, and therefore fit within the statutory exception to the parked vehicle exclusion for an injury that "was sustained by a person while occupying, entering into, or alighting from the vehicle," MCL 500.3106(1)(c), and that her injuries meet the other factors for coverage. See *Kemp*, 500 Mich at 253 (claimant must demonstrate that the conduct fits a statutory exception of MCL 500.3106(1), that the injury arose from the use of a motor vehicle as a motor vehicle, and that the injury had a sufficient causal relationship to the vehicle).

The parties also do not dispute that Hutchinson also was covered by a Medicare Advantage Plan[4] through BCBSM. Under the MSPA, private insurers are the primary payers and Medicare is the secondary payer. 42 USC 1395y; *MSPA Claims 1, LLC v Kingsway Amigo Ins Co*, 950 F3d 764, 767 (CA 11, 2020).[5] Specifically, 42 USC 1395y "allocates to automobile insurers the

[4] In 1997, Congress created "Medicare Part C, or the 'Medicare Advantage' program," which "created Medicare Advantage Organizations—private insurance companies that provide Medicare benefits in exchange for fixed fees from the Centers for Medicare and Medicaid Services." *MSPA Claims 1, LLC v Kingsway Amigo Ins Co*, 950 F3d 764, 767-768 (CA 11, 2020) (citation omitted). Medicare Advantage organizations are permitted to sue under the MSPA under the private cause of action provision to recover from a primary plan. In this case, the parties do not dispute that BCBSM is a Medicare Advantage organization.

[5] Although state courts are bound by decisions of the United States Supreme Court construing federal law, there is no similar obligation with respect to decisions of the lower federal courts,

primary burden of paying the medical expense, arising out of automobile accidents, of persons covered by the Medicare program." *John Hancock Prop & Cas Ins Cos v Blue Cross & Blue Shield of Mich*, 437 Mich 368, 373; 471 NW2d 541 (1991).

The MSPA, however, permits Medicare to make a conditional payment on behalf of a beneficiary when a primary payer has not paid promptly, and then to later seek reimbursement from the primary payer. *MSPA Claims 1, LLC*, 950 F3d at 767. If Medicare makes a conditional payment and the primary insurer refuses to reimburse Medicare, the government can sue the primary plan to recover the payment. 42 USC 1396y(B)(2)(B)(*iii*). The MSPA also provides for a private cause of action, which permits private entities such as a healthcare provider to bring a cause of action against a primary payer that either has not paid the healthcare provider or has failed to reimburse Medicare. 42 USC 1395y(b)(3)(A); *MSPA Claims 1, LLC*, 950 F3d at 767. This private cause of action provides for the successful plaintiff to receive double damages. *Id*. The relevant sections of the MSPA found at 42 USC 1395y(b) provide:

> **(b) Medicare as secondary payer**
>
> **(1) Requirements of group health plans**
>
> *** * ***
>
> **(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 time or service as required under paragraph (1), or
>
> (*ii*) payment has been made or can reasonably be expected to be made under a workmen's compensation law or plan of the United States or a State or under an automobile or liability insurance policy or plan (included a self-insured plan) or **under no fault insurance**.
>
> In this subsection, the term "primary plan" means a group health plan or large group health plan, to the extent that clause (i) applies, and a workmen's compensation law or plan, an automobile or liability insurance policy or plan (including a self-insured plan) **or no fault insurance**, to the extent that clause (ii) applies. An entity that engages in a business, trade, or profession shall be deemed to have a self-insured

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which may be persuasive but are not binding upon state courts. *Abela v General Motors Corp*, 469 Mich 603, 606-607; 677 NW2d 325 (2004). However, because we find the decisions of the federal courts instructive, we will consider federal authority discussing the application of the MSPA.

plan if it carries its own risk (whether by a failure to obtain insurance, or otherwise) in whole or in part.

(B) Conditional payment

(*i*) Authority to make conditional payment

The Secretary may make payment under this subchapter with respect to an item or service **if a primary plan described in subparagraph (A)(*ii*) has not made or cannot reasonably be expected to make payment with respect to such item or service promptly** (as determined in accordance with regulations). Any such payment by the Secretary shall be conditioned on reimbursement to the appropriate Trust Fund in accordance with the succeeding provisions of this subsection.

(*ii*) Repayment required

Subject to paragraph (9), a primary plan, and an entity that receives payment from a primary plan, shall reimburse the appropriate Trust Fund for any payment made by the Secretary under this subchapter with respect to an item or service if it is demonstrated that such primary plan has or had a responsibility to make payment with respect to such item or service. **A primary plan's responsibility for such payment may be demonstrated by a judgment, a payment conditioned upon the recipient's compromise, waiver, or release (whether or not there is a determination or admission of liability) of payment for items or services included in a claim against the primary plan or the primary plan's insured, or by other means.** If reimbursement is not made to the appropriate Trust Fund before the expiration of the 60-day period that begins on the date notice of, or information related to, a primary plan's responsibility for such payment or other information is received, the Secretary may charge interest (beginning with the date on which the notice or other information is received) on the amount of the reimbursement until reimbursement is made (at a rate determined by the Secretary in accordance with regulations of the Secretary of the Treasury applicable to charges for late payments).

* * *

(3) Enforcement

(A) Private cause of action

There is established a private cause of action for damages (which shall be in an amount double the amount otherwise provided) **in the case of a primary plan which fails to provide for primary payment (or appropriate reimbursement) in accordance with paragraphs (1) and (2)(A)**. [Emphasis added.]

To bring a private cause of action under the MSPA, the plaintiff must allege that the primary plan failed to act in accordance with both paragraph (1) and (2)(A) of 42 USC 1395y(b). *Davita, Inc v Marietta Memorial Hosp Employee Health Benefits Plan*, ___ F3d ___, ___ (CA 6,

2020) (Docket No. 19-4039); slip op at 6. Reading the two statutory sections together permits the sections to be read as "Medicare may not pay for any item or service to the extent that the Act requires a primary plan to pay, except that Medicare may conditionally pay for the item or service if the primary plan cannot reasonably be expected to pay promptly." *Id*., quoting *Bio-Med Applications of Tenn, Inc v Central States Southeast & Southwest Areas Health & Welfare Fund*, 656 F3d 277, 285 (CA 6, 2011). "[T]he only way that a primary plan can fail to act in accordance with this provision is by failing to make payments or appropriate reimbursements to a provider and thus triggering the remission of a conditional payment by Medicare." *Davita, Inc*, ___ F3d at ___; slip op at 6.

The statute also provides that before a plaintiff can recover under the act's private cause of action provision, the primary plan's obligation to pay must be demonstrated. *MSPA Claims 1*, 950 F 3d at 771. Under the statute, the primary plan's obligation to pay can be demonstrated by "a judgment, a payment conditioned upon the recipient's compromise, waiver, or release (whether or not there is a determination or admission of liability) of payment for items or services included in a claim against the primary plan or the primary plan's insured, or by other means." 42 USC 1395y(b)(2)(B)(*ii*). It has been held, however, that the requirement that a plaintiff demonstrate that the defendant had responsibility for the payment applies only to suits involving tortfeasors, and is superfluous when the obligation arises from a contract because the "other means" referenced in the statute is defined to include a "contractual obligation." 42 CFR 411.22(b)(3); *Bio-Med*, 656 F3d at 291 ("[A]n insurance contract automatically demonstrates a traditional private insurer's responsibility to pay, thereby rendering the "demonstrated responsibility" provision superfluous in such cases"). However, "[t]his does not relieve Plaintiffs of their burden to allege in their complaints, and then subsequently prove with evidence, that Defendants' valid insurance contracts actually render Defendants responsible for primary payment of the expenses Plaintiffs seek to recover. And Defendants may still assert any valid contract defense in arguing against their liability." *MSP Recovery, LLC v Allstate Ins Co*, 835 F3d 1351, 1361 (CA 11, 2016).

To summarize, 42 USC 1395y(b)(2)(B)(*ii*) provides that a primary plan is required to reimburse Medicare for any conditional payment made by Medicare if it is demonstrated that the primary plan is responsible to pay for a particular item or service; a no-fault insurer is a primary plan under this provision of the MSPA, and a contract can be the "other means" by which responsibility is demonstrated. *Davita, Inc*, ___ F3d at ___; slip op at 6. However, a primary plan is required to make primary payment or to reimburse Medicare only to the extent of its contractual obligation. *MSP Recovery, LLC*, 835 F3d at 1361.

Against this backdrop, plaintiff brought this action alleging that defendant is a primary plan under the MSPA obligated to pay plaintiff for Hutchinson's medical expenses for the period of November 19, 2015 through December 2, 2015. Plaintiff alleged that defendant failed to timely pay plaintiff, and also that defendant failed to reimburse BCBSM for a conditional payment paid by BCBSM. Both parties moved for summary disposition under MCR 2.116(C)(10). The trial court found that there was no genuine issue of material fact that defendant was a primary plan under the MSPA. The trial court further found that by paying plaintiff for Hutchinson's medical expenses for the period in question defendant acknowledged its contractual obligation for those expenses. However, the trial court found that there was a genuine issue of material fact whether defendant failed to provide primary payment or appropriate reimbursement within the meaning of the MSPA, and thus there was a genuine issue of material fact regarding whether plaintiff was

entitled to double damages. After further proceedings, however, the trial court granted plaintiff summary disposition and determined that plaintiff was entitled to double damages, but did not specifically find whether defendant failed to provide primary payment or appropriate reimbursement within the meaning of the MSPA.

On appeal, defendant does not dispute that it had a contractual obligation to pay plaintiff or to reimburse BCBSM for amounts paid that were covered under its no-fault policy. Defendant argues, however, that plaintiff is seeking payment from defendant for amounts not within the contractual obligation of its no-fault policy. Specifically, defendant argues that the amount that plaintiff asserts has not been reimbursed to BCBSM is related to Hutchinson's medical care for complications from her earlier surgery and not to her fall-related injuries, and therefore the amount is not compensable under the no-fault policy. In granting plaintiff's renewed summary disposition, however, the trial court did not resolve this issue. The trial court stated:

> [T]here was lots of detail and documentation here. But it also seems to me that, if Farm Bureau is the primary payer, as the no-fault carrier for the insured, based on the fact that the – their insured sustained injuries while getting in or out of her vehicle, then it should be liable to reimburse any other medical benefits providers. And that would include Covenant, as the healthcare provider/treater.
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> So considering that, considering the applicable law, and as that's outlined by the parties, you know, it – the law is what it is. Whether – what its intent was or whether this distorts it, I don't think is up of the Court to decide. And the Court has to look at that law and apply it to the facts that are presented.
>
> And having said that, I will. . . grant Plaintiff's Motion for Summary Disposition

A plaintiff is entitled to summary disposition based upon a private cause of action under the MSPA "when there is no genuine issue of material fact regarding (1) the defendant's status as a primary plan; (2) the defendant's failure to provide for primary payment or appropriate reimbursement; and (3) the damages amount." *Humana Med Plan, Inc v Western Heritage Ins Co*, 832 F3d 1229, 1239 (CA 11, 2016). In this case, the trial court found that defendant was a primary plan and found that the amount of damages in question was $53,223.55, but the trial court did not find that defendant had failed to provide primary payment to plaintiff or appropriate reimbursement to BCBSM. Additionally, the trial court did not determine whether the amount that defendant allegedly failed to reimburse to BCBSM was a compensable amount owed by defendant under the no-fault policy. Simply being a primary plan did not conclusively establish that defendant was responsible for reimbursement of all payments made by Medicare; rather defendant is only responsible to reimburse BCBSM for amounts arising from its obligations under its no-fault policy.

Defendant also challenges on appeal plaintiff's contention that it is entitled to double damages because defendant's payment to plaintiff was not timely. Plaintiff contended before the trial court that although defendant paid plaintiff $53,233.55, plaintiff nonetheless is entitled to double damages because defendant only paid the amount after plaintiff filed this lawsuit. In support of this argument on appeal, plaintiff points to *Estate of McDonald v Indemnity Ins Co of North America*, 46 F Supp 3d 712, 717 (WD Ky, 2014), amended by 107 F Supp 3d 764 (WD Ky,

2015). We disagree that this case supports plaintiff's position that it is entitled to double damages. In *Estate of McDonald*, the defendant insurer denied liability for the claim, did not reimburse Medicare after being ordered to do so by the Worker's Compensation Board, and did not pay the plaintiff until the plaintiff filed suit. *Id*. at 717. By contrast, defendant in this case did not deny liability for plaintiff's claim and reportedly advised plaintiff that it had approved payment for all but $240.80 of the amount billed by plaintiff. Approximately one week later, plaintiff filed its complaint seeking double damages on the basis that defendant had failed to pay.

The MSPA provides for a private cause of action for double damages "in the case of a primary plan which fails to provide for primary payment (or appropriate reimbursement) in accordance with paragraphs (1) and (2)(A)." 42 USC 1395y(b)(3)(A). The MSPA also provides that when a responsible primary plan does not "promptly meet its obligations," Medicare is authorized to pay the entire amount and the primary plan is then obligated to reimburse Medicare. 42 USC 1395y(b)(2)(B); *MSPA Claims 1, LLC v Tenet Florida, Inc*, 918 F3d 1312, 1316 (CA 11, 2019). The statute thus provides for recovery of double damages when a primary payer fails to pay or reimburse, but does not provide for double damages for tardy payment. Upon review of the record in this case, we conclude that the trial court did not resolve whether defendant failed to provide primary payment or appropriate reimbursement under the MSPA, and double damages could not be imposed without such a determination.

We vacate the trial court's order and remand to the trial court for further proceedings consistent with this opinion. On remand, the trial court is directed to determine whether a genuine issue of material fact exists regarding (1) whether the amount allegedly not reimbursed to BCBSM is compensable under defendant's no-fault policy, and (2) whether defendant failed to provide primary payment or appropriate reimbursement under the MSPA. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ Patrick M. Meter
/s/ Michael F. Gadola