STATE OF MICHIGAN

COURT OF APPEALS

VITOR DOCAJ,

Plaintiff-Appellee,

and

PAIN CENTER USA, PLLC and INTERVENTIONAL PAIN CENTER,

Intervening Plaintiffs,

v

AMERICAN INTER-FIDELITY EXCHANGE, GREAT AMERICAN ASSURANCE COMPANY, LLOYD'S INSURANCE COMPANY, doing business as LLOYD'S OF LONDON, ALLIED PROPERTY AND CASUALTY INSURANCE COMPANY, and ELIZABETH NUNEZ ,

Defendants,

and

ATLANTIC SPECIALTY INSURANCE COMPANY ,

Intervenor-Appellant.

UNPUBLISHED
April 29, 2021

No. 353355
Wayne Circuit Court
LC No. 17-007187-NF

Before: TUKEL, P.J., and SERVITTO and RICK, JJ.

PER CURIAM.

Atlantic Specialty Insurance Company (Atlantic) appeals by delayed leave granted[1] the trial court's September 18, 2019 order granting plaintiff's motion to strike Atlantic's lien on plaintiff's settlement proceeds. We vacate the trial court's order.

Plaintiff was a semitruck driver. In July 2016, plaintiff was driving a truck for Reliable Transportation Specialists (a trucking company), when he was involved in an accident and incurred injuries. At the time of accident, plaintiff had a no-fault insurance policy issued by Allied Property and Casualty Insurance Company (Allied Property) for two of his personal cars. He also had a "bobtail" insurance policy issued by Great American Assurance Company (Great American) that covered the 2008 International truck he was driving at the time of the accident, and was enrolled in a group occupational accident insurance policy issued by Atlantic. Reliable Transportation Specialists had an insurance policy issued by American Inter-Fidelity Exchange (AIFE) covering its fleet of trucks.

Plaintiff sued Allied, Great American, AIFE, and Lloyd's Insurance Company to recover personal injury protection (PIP) benefits and uninsured motorist benefits. Lloyd's Insurance Company was dismissed pursuant to a stipulation by the parties, and the remaining three insurance companies disputed which among them was first in priority to pay plaintiff's PIP benefits. Eventually, each moved for summary disposition under MCR 2.116(C)(10).

The trial court ruled that Great American was the first in priority to pay plaintiff's PIP benefits. Thereafter, plaintiff, Allied, Great American, and AIFE apparently began negotiating a settlement to determine the amount of PIP benefits plaintiff was entitled to receive.

Meanwhile, Atlantic moved to intervene in the proceedings. Atlantic alleged that it had paid plaintiff approximately $50,000 in medical and wage-loss expenses resulting from his accident. Noting that plaintiff's insurance policy with Atlantic was coordinated, Atlantic argued that it had a right to intervene to protect its right to reimbursement for these expenses. Also, Atlantic argued that it could not count on plaintiff to adequately represent its interests during settlement talks. Plaintiff opposed Atlantic's motion to intervene, arguing that Atlantic's intervention was untimely, and that he would protect Atlantic's interest. The trial court denied Atlantic's motion to intervene.

Several months later, plaintiff settled with Great American, Allied, and AIFE. Great American agreed to pay the overwhelming majority of the agreed upon settlement monies and AIFE agreed to pay a smaller portion. As part of the settlement, plaintiff signed a release agreement, discharging all of his claims against the three insurance companies and agreeing that he would not take possession of the settlement money until he had paid outstanding invoices or liens of other entities that had provided him benefits. In fact, plaintiff specifically agreed that he would use his settlement funds to reimburse Atlantic. After the settlement, the trial court entered

[1] *Docaj v American Inter-Fidelity Exchange*, unpublished order of the Court of Appeals, entered July 9, 2020 (Docket No. 353355).

a final order closing the case, and dismissing plaintiff's claim against Great American with prejudice.

After the trial court entered its final order, Atlantic sent a letter to plaintiff's counsel asserting a lien of approximately $50,000 against plaintiff's settlement proceeds. The letter quoted a provision of Atlantic's policy that entitled it to be reimbursed if an insured had been paid benefits under any other insurance. On the basis of that provision, Atlantic requested plaintiff's counsel not disperse any of the settlement money until he had reimbursed Atlantic.

Plaintiff's counsel responded by moving the trial court to strike the lien asserted by Atlantic. Plaintiff argued that, because he had purchased a coordinated insurance policy from Great American, Great American was not liable for Atlantic's expenses. In response, Atlantic argued that the reimbursement provision in its policy contractually required plaintiff to reimburse Atlantic with his settlement proceeds. Atlantic also noted that plaintiff had stated that he would represent Atlantic's interest during settlement negotiations, which plaintiff had clearly not done.

The trial court granted plaintiff's motion to strike Atlantic's lien. Thereafter, plaintiff's counsel prepared an order for the trial court to sign. In it, plaintiff's counsel wrote that Atlantic "is primary for payment of health and accident benefits." The trial court entered plaintiff's proposed order and Atlantic moved to strike the order the same day. According to Atlantic, plaintiff never sent the proposed order to Atlantic for approval and plaintiff e-filed the proposed order, directly contravening MCR 2.602(B)(3).[2] Atlantic further argued that the order did not accurately reflect the trial court's decision: the trial court had held that Atlantic did not have a lien on plaintiff's settlement proceeds but it never suggested that Atlantic was "primary for payment of health and accident benefits."

In a very brief hearing on Atlantic's motion to strike the order, the trial court found that the order complied with the court's ruling. It did not address Atlantic's motion for reconsideration. Atlantic thereafter filed a delayed application for leave to appeal, which we granted. *Docaj v American Inter-Fidelity Exchange*, unpublished order of the Court of Appeals, entered July 9, 2020 (Docket No. 353355).

On appeal, Atlantic first argues that it was deprived of procedural due process because it had no notice that its liability for paying plaintiff's PIP benefits was at issue and because it had no meaningful opportunity to be heard on this issue. We agree.

"Whether due process has been afforded is a constitutional issue that is reviewed de novo." *Elba Twp v Gratiot Co Drain Comm'r*, 493 Mich 265, 277-278; 831 NW2d 204 (2013) (citation omitted). Likewise, questions involving the proper interpretation of a contract or the legal effect

[2] If one of the parties proposes an order, MCR 2.602(B) requires that party to send the proposed order to the opposing party to give the opposing party an opportunity to object to the proposed order's accuracy or completeness. MCR 2.602(B); see, e.g., *Zaiter v Riverfront Complex, Ltd*, 463 Mich 544, 547; 620 NW2d 646 (2001).

of a contractual clause are also reviewed de novo. *McDonald v Farm Bureau Ins Co*, 480 Mich 191, 197; 747 NW2d 811 (2008).

The United States Constitution and the Michigan Constitution forbid the government from depriving a person of life, liberty, or property without due process of law. US Const, Am XIV; Const 1963, art 1, § 17; *Hinky Dinky Supermarket, Inc v Dep't of Community Health*, 261 Mich App 604, 605-606; 683 NW2d 759 (2004). Michigan courts and the United States Supreme Court have interpreted the phrase "due process of law" to have both a procedural and a substantive component. See *Mettler Walloon, LLC v Melrose Twp*, 281 Mich App 184, 197; 761 NW2d 293 (2008); *Washington v Glucksberg*, 521 US 702, 719; 117 S Ct 2258; 138 L Ed 2d 772 (1997). Generally speaking, the procedural component requires the government to provide a fair process to persons before depriving them of life, liberty, or property; and the substantive component requires the government to have some rational reason for depriving persons of life, liberty, or property. *Mettler Walloon, LLC*, 281 Mich App at 197.

When considering a procedural due process claim, this Court applies a two-step inquiry. *Hinky Dinky Supermarket, Inc*, 261 Mich App at 606. First, this Court considers "whether a liberty or property interest exists which the state has interfered with." *Id*. Second, this Court considers "whether the procedures attendant upon the deprivation were constitutionally sufficient." *Id*.

In this case, little effort is required to settle the first step in our inquiry. The trial court clearly interfered with a property interest of Atlantic. The trial court entered an order stating Atlantic was the primary insurer for payment of plaintiff's health and accident benefits, thereby depriving Atlantic of the opportunity to recover the $50,000 it had already paid to plaintiff, and rendering Atlantic liable to pay all of plaintiff's health and accident expenses accrued thereafter. The second step, whether the procedures attendant upon the deprivation of Atlantic's property interest were constitutionally sufficient, requires more detailed examination.

At its core, procedural due process requires judicial proceedings to be fundamentally fair. *In re Estate of Adams*, 257 Mich App 230, 233-234; 667 NW2d 904 (2003), citing *Lassiter v Dep't of Social Servs of Durham Co*, 452 US 18, 24; 101 S Ct 2153; 68 L Ed 2d 640 (1981). For judicial proceedings to be considered fundamentally fair, at the very least, a party must have notice of the nature of the proceedings against him or her and a meaningful opportunity to be heard. *Hinky Dinky Supermarket, Inc*, 261 Mich App at 606, quoting *Cummings v Wayne Co*, 210 Mich App 249, 253; 533 NW2d 13 (1995) (citation omitted); see also *Mullane v Central Hanover Bank & Trust Co*, 339 US 306, 313; 70 S Ct 652; 94 L Ed 865 (1950). In this case, Atlantic was afforded neither notice nor a meaningful opportunity to be heard.

First, at no point was Atlantic provided notice of the nature of the proceedings against it. From Atlantic's perspective, the postjudgment proceeding below was solely about whether Atlantic had a claim to reimbursement from plaintiff's settlement proceeds. Atlantic had no reason to believe that the proceeding was actually one to determine whether it was liable to pay any or all of plaintiff's PIP benefits. Indeed, by the time Atlantic asserted a lien, the trial court had already ruled that Great American was first in order of priority to pay—this was a settled issue. Also, neither plaintiff nor the trial court did anything to notify Atlantic of the true nature of the postjudgment proceeding. In his motion to strike Atlantic's lien, plaintiff simply asked the trial

court to rule that Atlantic had no claim to any of his settlement proceeds. However, after obtaining a ruling in his favor, plaintiff included language into a proposed order stating that Atlantic "is primary for payment of health and accident benefits."

Second, Atlantic had no meaningful opportunity to be heard. Without proper notice, Atlantic could not really have a meaningful opportunity to be heard. See *Mullane*, 339 US at 314 ("This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest."). Without knowing that its liability to pay plaintiff's benefits was at issue, Atlantic had no meaningful opportunity to contest its liability. And because Atlantic was denied the opportunity to participate in this case, it missed out on discovery. As a result, Atlantic had no access to the evidence against it—namely the entirety of Great American's insurance policy. Finally, even after the trial court declared Atlantic to be the primary insurer for plaintiff's benefits, Atlantic still had no meaningful opportunity to be heard. The trial court dismissed Atlantic's motion to strike the trial court's order without explanation, and the trial court ignored Atlantic's motion for reconsideration. On the whole, the trial court deprived Atlantic of procedural due process.

Atlantic next argues that the trial court violated its substantive due-process rights because the trial court arbitrarily disregarded the terms of Atlantic's insurance policy. Again, we agree.

"The courts of this state have adhered to an interpretation of [MCL 500.3109a] that requires a finding that a no-fault insurer is secondarily liable for insurance coverage where there is any other form of health care coverage and where the insurers both sought to escape liability through the use of competing coordination-of-benefits clauses." *Auto Club Ins Ass'n v Frederick & Herrud, Inc*, 443 Mich 358, 383-384; 505 NW2d 820 (1993). Stated differently, when a no-fault insurer and another type of insurer each claim to be secondarily liable, and both of their policies contain coordination-of-benefit provisions that the court cannot reconcile, Michigan law holds that the no-fault insurer is secondarily liable; the other insurer is primarily liable. This rule comes into play only when a no-fault insurer and another type of insurer are actually disputing which is primarily liable. See, e.g., *Fed Kemper Ins Co v Health Ins Admin, Inc*, 424 Mich 537, 544-550; 383 NW2d 590 (1986), overruled in part on other grounds by *Auto Club Ins Ass'n*, 443 Mich at 390 (applying this rule to resolve a conflict between two irreconcilable coordination-of-benefit clauses).

The trial court erred by applying this rule here to disregard Atlantic's insurance policy. As mentioned above, by the time Atlantic joined this case, the dispute as to which of plaintiff's insurance companies was primary had been resolved: the trial court determined that Great American was plaintiff's primary insurer. Great American never contended that Atlantic was the primary insurer, in fact, plaintiff opposed Atlantic's motion to intervene. In the settlement agreement, Great American agreed that plaintiff should use the settlement proceeds to pay Atlantic back. Absent any dispute as to primary liability, this rule had no application. The trial court could not suddenly declare Atlantic the primary insurer simply because both Atlantic's policy and Great American's policy had coordination-of-benefits clauses. In short, the trial court had no legal basis for disregarding the terms of Atlantic's policy.

By disregarding the terms of Atlantic's policy without a legal basis for doing so, the trial court again deprived Atlantic of property without due process of law. "Michigan courts have

acknowledged that the essence of a substantive due process claim is the arbitrary deprivation of liberty or property interests." *Mettler Walloon, LLC*, 281 Mich App at 201, citing *Landon Holdings, Inc v Grattan Twp*, 257 Mich App 154, 176; 667 NW2d 93 (2003). "In the context of government actions, a substantive due process violation is established only when the governmental conduct [is] so arbitrary and capricious as to shock the conscience." *AFT Mich v Michigan*, 303 Mich App 651, 674; 846 NW2d 583 (2014), aff'd 497 Mich 197 (2015), quoting *Bonner v City of Brighton*, 298 Mich App 693, 705-706; 828 NW2d 408 (2012), rev'd on other grounds 495 Mich 209 (2014). Without a valid legal basis for disregarding the terms of Atlantic's insurance policy, the trial court here acted arbitrarily. And considering that the trial court imposed liability on a nonparty to this litigation, the trial court's action shocks the conscience. The trial court acted inconsistently with the rule of law and so violated Atlantic's constitutional right to substantive due process.

In sum, Atlantic was deprived of property without due process of law. For this reason, we vacate the trial court's order. Atlantic argues that remand to the trial court is unnecessary because the parties are currently litigating Atlantic's liability in federal court, and we agree. After this Court reverses or vacates a trial court's order, this Court is not required to remand to the trial court. "This Court may [] 'enter any judgment or order or grant further or different relief as the case may require[.]' " *Attorney Gen v Bd of State Canvassers*, 318 Mich App 242, 248; 896 NW2d 485 (2016). To redress Atlantic's injury here, we need only vacate the trial court's order.

Vacated.

/s/ Jonathan Tukel
/s/ Deborah A. Servitto
/s/ Michelle M. Rick