# STATE OF MICHIGAN

# COURT OF APPEALS

FIRST STEP REHAB INC.,

Plaintiff-Appellant,

v

MEEMIC INSURANCE COMPANY,

Defendant-Appellee.

UNPUBLISHED
November 22, 2022

No. 357708
Oakland Circuit Court
LC No. 2019-175573-NF

Before: GLEICHER, C.J., and SERVITTO and YATES, JJ.

PER CURIAM.

At issue in this case is the priority of no-fault and health insurance policies where the insured elected to coordinate her policies. Discovery issues plagued this case and were not resolved before the circuit court summarily dismissed the plaintiff service provider's suit and later denied its motion for reconsideration. Accordingly, the circuit court could not reliably determine which policy was primary. We vacate the order granting summary disposition and remand for continued proceedings.

## I. BACKGROUND

Kim Brown was injured in a motor vehicle accident on July 29, 2018, while driving a vehicle she insured through MEEMIC Insurance Company. Brown received a discounted rate by coordinating her no-fault benefits with her health insurance coverage. The coordination of benefits (COB) provision of the MEEMIC policy states:

> If the Declarations Page shows Excess Medical Benefits . . ., you or any resident relative must first obtain benefits from any other health or accident insurance or plan prior to making a claim for benefits under this Policy. We will pay Medical Benefits in excess of any valid limitations as to amount or duration of benefits under the other plan. We will pay Medical Benefits for services or accommodations not available from the other plan or insurance only if:
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> a. they are reasonably necessary for the injured person's care, recovery or rehabilitation as required by the Code, and;

b. there is no provider within the other health or accident insurance or plan qualified and competent to render comparable services or accommodations.

At the time of the accident, Brown was covered by a self-funded health benefit plan through her employer—Marriott International. Early in the proceedings, MEEMIC identified Empire Blue Cross Blue Shield (BCBS) as administrator of the plan. The plan is self-funded under the Employee Retirement Income Security Act of 1974 (ERISA), 29 USC 1001 *et seq*. The summary plan description (SPD) states that "[a]ny other plan will be primary if it . . . [i]s a motor vehicle insurance policy." The SPD acknowledges that some states permit individuals to coordinate their motor vehicle insurance policy to make their health plans primary. "If this applies to you, you must submit written proof to Empire [BCBS] that you have designated the PPO as primary."

Following her accident, Brown received physical therapy services from plaintiff First Step Rehab, Inc. Brown assigned her right to obtain payment for these services to First Step. Brown informed First Step that BCBS was her health insurance provider. First Step advised Brown that it did not accept BCBS insurance, but assured Brown that her no-fault insurer would cover the services. First Step submitted its bills to MEEMIC, which denied coverage. MEEMIC indicated that Brown's health benefit plan was primary as Brown had coordinated her benefits, and that Brown chose to treat with a provider outside her healthcare network.

First Step filed suit against MEEMIC seeking reimbursement for the services provided to Brown.[1] MEEMIC sought summary disposition. MEEMIC acknowledged that generally a self-funded ERISA plan is secondary to a no-fault policy even where the insured coordinates benefits. This Marriott SPD, however, permitted the insured to coordinate benefits to make the health coverage primary by making a "designation." According to MEEMIC, Brown coordinated her benefits to make her health insurance primary and then chose a healthcare provider outside of the BCBS network, negating MEEMIC's financial responsibility.

Two weeks later, MEEMIC filed a supplement to its motion. Brown had recently submitted to a deposition in her separate suit and "confirmed that she had coordinated medical benefits and that she knew that they were excess to her primary [BCBS] policy."[2] She further admitted that she knew First Step did not accept BCBS insurance.

Another 10 days later, MEEMIC filed a second supplement to its motion to present email correspondence between Brown's attorney in her separate lawsuit (Steven Zang) and a recovery specialist for BCBS (Andrea Van Der Woude). MEEMIC described that Zang confirmed that Brown "had elected coordinated medical benefits on her auto policy placing her medical coverage secondary to her health insurance." In that email, dated December 20, 2020 (2½ years after the accident), Zang indicated that he was forwarding Brown's MEEMIC declarations page noting that Brown had elected to coordinate benefits. On January 5, 2021, Van Der Woude responded that

[1] Brown filed a separate suit against MEEMIC and BCBS for coverage related to the accident.

[2] The circuit court and the parties incorrectly described the policy throughout the proceedings. Brown is actually covered by a Marriott self-funded plan that is administered by BCBS.

the "auto insurance is secondary," and "that the self-funded ERISA plan continued to have a first priority right of reimbursement."

First Step retorted that Brown's BCBS coverage is provided through a self-funded ERISA plan, which is secondary to a no-fault policy under federal law. MEEMIC had not supplied written proof that Brown complied with the condition precedent for the coordination of benefits before her accident. Indeed, Brown attested in an affidavit that she had *not* notified BCBS before her accident that she had designated it as primary in her MEEMIC policy.

The circuit court granted MEEMIC's motion for summary disposition and dismissed First Step's complaint in its entirety, concluding that the Marriott self-funded plan was primary. The court noted that Brown had opted to coordinate her no-fault policy with her health insurance. The court reasoned that the language of the self-funded ERISA Marriott SPD permitted Brown to designate her health insurance as primary and she had done so.

> Here, the attorney representing Ms. Brown in her own lawsuit for PIP benefits [Zang] sent an email on December 19, 2020 to the "recovery specialist" handling [BCBS's] lien in that lawsuit [Van Der Woude], and the email included express notice that the [BCBS] plan had been designated as primary. The "recovery specialist" sent a response on January 5, 2021 stating, "Auto insurance is secondary and claims were paid correctly. Per the self-funded ERISA document we would still have first priority right of reimbursement." . . . Thus, [BCBS] confirmed that it is primary for payment of medical benefits. Because Ms. Brown must seek payment from [BCBS], [First Step], as assignee, must also seek payment from [BCBS].

Ultimately, the court ruled:

> [MEEMIC] is entitled to summary disposition pursuant to MCR 2.116(C)(10). Even viewing the evidence in the light most favorable to [First Step], there is no genuine issue of material fact for trial. The unambiguous language in the self-funded ERISA plan allows Ms. Brown to designate the [BCBS] plan as primary upon written proof, which she has provided. Thus, [BCBS] is primarily responsible for payment of medical benefits. The fact that [First Step] has chosen not to accept payment from [BCBS] is irrelevant.

First Step sought reconsideration of the circuit court's ruling. First Step challenged MEEMIC's failure to authenticate the email chain it presented in support of its position that Brown had notified BCBS of her coordination election. After learning the email chain was used in the current action, Zang notified MEEMIC that the insurer had "misrepresented" his position: "[I]t is my position with [sic] the [BCBS] plan is secondary to MEEMIC for the payment of auto related treatment. I do believe that [BCBS] maintains a lien and a right of reimbursement for any other payments made out of order." Further, Zang's email was not intended as "written proof" to BCBS of the coordination election. After detailing the law and the relevant language in both the BCBS and MEEMIC policies, First Step argued, "[T]he only issue for This Court to decide is whether Kim Brown complied with the mandated language: 'If this applies to you, you must submit written proof to Empire [BCBS] that you have designated the PPO as primary.' " First Step contended

that the circuit court made a palpable error in deeming Zang's email in Brown's separate lawsuit as the express notice required in the Marriott SPD. Most importantly, the email was not sent until more than two years *after* the accident, and therefore did not satisfy the condition *precedent* for coordinating benefits. And the court disregarded Brown's affidavit stating that she never notified BCBS that she had opted to coordinate her no-fault and health insurance policies.

MEEMIC countered that BCBS had admitted through Van Der Woude and at the urging of Brown's attorney that Brown had coordinated her coverage and that her self-funded health benefit plan was primary. MEEMIC contended that First Step was bound by its assignor's admission. MEEMIC further noted that Brown's affidavit attesting that she never notified BCBS that she had coordinated her no-fault benefits improperly contradicted her attorney's earlier statements and her own deposition testimony.

First Step responded that it had been trying all along to secure documentation from BCBS to explicitly determine whether Brown had notified the plan administrator in writing as required by the Marriott SPD's COB provision. It presented a letter from Katrina Ramos, Third Party Liability Operations Supervisor for HMS, which "represent[ed] Marriott International" in relation to Brown's reimbursement action. Ramos stated that the Marriott plan was a self-funded ERISA plan with "first priority right of full reimbursement" that "is enforceable as a matter of well-settled federal law." Any no-fault policy would be primary over the self-funded plan to pay for medical services arising from the accident, the letter continued. In a May 27, 2021 email, Ramos attached "the 2018 Platinum language," which "was the correct one in effect at the time of [Brown's] accident."[3] First Step thereby created a new wrinkle in the lawsuit—the existence of a new, "correct" health coverage policy. However, First Step did not actually present a copy of that newly discovered health policy with its motion. First Step also quoted an email from Van Der Woude, indicating that BCBS was "fighting that [it was] prime," and asserted its right to first recovery as "the car insurance should have paid" the medical bills "as prime and the health insurance did in error."

MEEMIC complained that First Step had filed its supplemental pleadings outside of the briefing schedule and improperly introduced "yet more emails and a brand new [BCBS] policy." This was too little too late, MEEMIC argued, as neither First Step nor Brown ever claimed that the plan relied on before and throughout these proceedings was not her health benefit plan.

At the hearing on First Step's reconsideration motion, MEEMIC challenged First Step's repeated belated production of evidence. MEEMIC cited Brown's affidavit stating that she never notified BCBS that she had coordinated her policies, presented only after she testified that she had coordinated her policies at her deposition. MEEMIC emphasized that First Step first presented Zang's email stating that the BCBS policy was primary and then later an email renouncing that position. Only when First Step filed its motion for reconsideration did it suddenly try to find the "actual" health care policy that applied to Brown's healthcare coverage, MEEMIC argued.

The circuit court took the matter under advisement and ultimately denied the motion for reconsideration. The court first noted that it was not required to consider "the new evidence cited

[3] "Prime" refers to an Anthem policy, also known as an "Empire" policy.

by" First Step, specifically Brown's affidavit stating that she never notified BCBS that she coordinated her policies, the letter from Zang recanting his previous position that BCBS was primary, and the letter from Ramos suddenly stating that the parties had relied on the wrong health benefit plan. The court continued that First Step "had ample time to obtain and compile evidence before the Court ruled on the original motion." For example, First Step had ample notice that MEEMIC was relying on the earlier email from Zang stating that BCBS had the necessary written proof to be deemed primary and could have sought clarification of that email before the circuit court decided the summary disposition motion. Moreover, Brown submitted to her deposition on January 12, 2021, and yet First Step waited until March 22 to secure her affidavit. Based on the scheduling order, First Step had nearly two months to compile its evidence. "Thus, the Court [] exercise[ed] its discretion to decline to consider new legal theories or evidence that could have been presented when the motion was originally decided."

Even if the circuit court could consider the evidence, it reasoned, that evidence did not demonstrate that the court palpably erred or that correction of any error would require a different outcome:

> Ms. Brown's affidavit states that she never told BCBS or submitted written proof to BCBS that she had designated the [BCBS] plan as primary.[4] Whether or not she personally provided written proof is irrelevant in light of the email from her attorney which unequivocally served as written notice on her behalf.
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> [First Step] argues that the written proof requirement was a condition precedent to making the [BCBS] plan primary, and it was not satisfied here because the December 19, 2020 email from Mr. Zang was sent long after the claim arose. [First Step] asserts that sending written proof after the accident defeats the purpose of the written proof requirement, which is to shield the [BCBS] plan from unanticipated claims. The problem is that [First Step] has not cited any language in the [BCBS] plan which indicates *when* the written proof must be given, or that it is a condition precedent to designating the [BCBS] plan as primary, and the Court has not found any such language in the document.
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> The April 6, 2021 email from Mr. Zang in which he attempts to recant his December 19, 2020 email is not persuasive. In the April 6 email, Mr. Zang now claims that he never intended to designate the [BCBS] plan as primary, and he never had authority to make such a designation on behalf of Ms. Brown. He further states that nothing in the December 19 email should be deemed as written proof to [BCBS] that Ms. Brown was designating the [BCBS] plan as primary. However, his statements in the December 19 email were very clear:
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> "I'm attaching a copy of the declaration pages to Ms. Brown's auto insurance policy. It to [sic] has been highlighted to show that my client elected to have her no-fault automobile insurance coverage excess or secondary as it relates to payment of medical bills.
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> Pursuant to page 47 of the [BCBS] [SPD], you, on behalf of the plan have received written proof that the [BCBS] health plan has been designated as primary."

> In no uncertain terms, Mr. Zang provided written proof that the [BCBS] plan was primary, and he even provided a copy of the declarations page of Ms. Brown's auto policy. In response, Ms. Van Der Woude wrote, "Auto insurance is secondary and claims were paid correctly. Per the self-funded ERISA document we would still have first priority right of reimbursement . . . ."
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> Mr. Zang now claims that the December 19 email was taken out of context, because he and [MEEMIC]'s counsel were attempting to reach a settlement of Ms. Brown's PIP case, and they agreed that Mr. Zang would set out [MEEMIC]'s position to BCBS in hopes that BCBS would withdraw its lien. Even if this explanation is accurate, the Court agrees with [MEEMIC] that Mr. Zang is attempting to argue that the [BCBS] plan is primary for Ms. Brown's claim, but not for her providers' claims, which defies logic. Further, Ms. Van Der Woude's email clearly acknowledges that Ms. Brown's "[a]uto insurance is secondary". The Court is not persuaded by Mr. Zang's attempt to recant his statements.
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> As for the May 27, 2021 letter from Ms. Ramos, the Court is not persuaded that "the Plan" she is referring to is the one that applies to this case. Ms. Ramos does not directly quote from "the Plan" in her letter, so it is unclear if the language is the same as the language in the Plan that the parties have been referring [to] throughout this litigation. At no point prior to June 2, 2021 did [First Step] ever argue, or even hint, that the [BCBS] plan cited by [MEEMIC] in its motion for summary disposition is not the correct plan. [First Step] has not presented "the Plan" to which Ms. Ramos was referring, or a declaration page to establish that it applies here.

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[4] The affidavit does not dispute her prior testimony that she knew her [MEEMIC] policy was coordinated for medical benefits, and she knew that her BCBS PPO was primary for medical benefits.

First Step appeals.

## II. ANALYSIS

We review de novo a lower court's resolution of a summary disposition motion. *Zaher v Miotke*, 300 Mich App 132, 139; 832 NW2d 266 (2013). "A motion under MCR 2.116(C)(10) tests the factual support of a plaintiff's claim" and should be granted when after reviewing "the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party," there remains "no genuine issue regarding any material fact" that could be sent to trial "and the moving party is entitled to judgment as a matter of law." *Id*. (quotation marks and citations omitted). "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 might differ." *Id*. at 139-140 (quotation marks and citation omitted). "The trial court is not permitted to assess credibility, weigh the evidence, or resolve factual disputes, and if material evidence conflicts, it is not appropriate to grant a motion for summary disposition under MCR 2.116(C)(10)." *Pioneer State Mut Ins Co v Dells*, 301 Mich App 368, 377; 836 NW2d 257 (2013).

We review for an abuse of discretion a circuit court's resolution of a motion for reconsideration. *Farm Bureau Ins Co v TNT Equipment, Inc*, 328 Mich App 667, 672; 939 NW2d 738 (2019). To justify granting reconsideration, "[t]he moving party must demonstrate a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error." MCR 2.119(F)(3).

At the time of Brown's accident, MCL 500.3109a, 2012 PA 454, permitted the coordination of health and no-fault policies as follows: "An insurer providing personal protection insurance benefits under this chapter may offer, at appropriately reduced premium rates, deductibles and exclusions reasonably related to other health and accident coverage on the insured." "Under Michigan law, where no-fault coverage and health coverage are coordinated, the health insurer is primarily liable for [the injured party's] medical expenses." *American Med Security, Inc v Allstate Ins Co*, 235 Mich App 301, 304; 597 NW2d 244 (1999), citing *Federal Kemper Ins Co, Inc v Health Ins Admin, Inc*, 424 Mich 537; 383 NW2d 590 (1986).[4] Under federal preemption principles, however, self-funded ERISA health plans are treated much more deferentially. As described in *Auto Club Ins Ass'n v Frederick & Herrud, Inc (After Remand)*, 443 Mich 358, 389-390; 505 NW2d 820 (1993):

> [A]n unambiguous COB clause in an ERISA health and welfare benefit plan must be given its plain meaning despite the existence of a similar clause in a no-fault policy because any conflict created by the requirements of MCL 500.3109a and this Court's interpretation of the statute would have the direct effect of dictating the terms of the ERISA plans. [Citation omitted.]

This Court has further explained:

> In [*Auto Club Ins Ass'n*, 443 Mich at 388-389], and its companion case, the plans at issue were self-funded plans created pursuant to the ERISA, and the Court carved an exception to the rule of law set out in *Federal Kemper*. It held that the unambiguous [COB] clause found in the ERISA plans must be given their plain meaning despite the clause in the no-fault policy. [*American Med Security, Inc*, 235 Mich App at 304.]

Accordingly, if a self-funded ERISA plan has an unambiguous COB clause, then the no-fault policy will be primary.

However, a self-funded ERISA plan may choose to allow coordination. In *Citizens Ins Co of America v MidMich Health ConnectCare Network Plan*, 449 F3d 688, 696 (CA 6, 2006), the United States Court of Appeals for the Sixth Circuit reasoned:

> [W]hen a traditional insurance policy and a qualified ERISA plan contain conflicting [COB] clauses, the terms of the ERISA plan, including its COB clause must be given full effect. However, in instances when the ERISA plan does not

[4] *Federal Kemper* was overruled in part by *Auto Club Ins Ass'n v Frederick & Herrud, Inc (After Remand)*, 443 Mich 358, 389-390; 505 NW2d 820 (1993).

> expressly disavow coverage for payment of medical benefits otherwise covered under a no-fault policy, the [COB] clauses of each plan are given their full effect, and the ERISA plan is not automatically deemed secondary. [Cleaned up.]

This case should have been a straightforward application of contract language to the facts. However, neither Brown, Marriott, nor BCBS were parties in this matter, leading to discovery issues. Further, discovery in Brown's separate action involving MEEMIC and the Marriott ERISA plan administered by BCBS bled into this action at inopportune times. The result is that neither the circuit court nor this Court were provided the actual language of the Marriott ERISA plan or the Empire BCBS policy. Further, we cannot be certain which BCBS policy actually applied to Brown: Empire BCBS or BCBS Blue. BCBS's position on coverage is unclear. And any errors made in this case might have an impact in Brown's separate lawsuit. Accordingly, we vacate the circuit court's order and remand for further proceedings.

To clarify issues on remand, the circuit court must permit additional discovery. The parties should obtain the complete Marriott plan document and depose an appropriate plan representative to determine the name of the correct healthcare policy applicable at the time of Brown's accident. If the applicable policy includes a COB provision that permits the insured to designate the ERISA plan as primary, the parties should inquire regarding the mechanics of that election procedure. There may be language in the plan or the policy that clarifies the question of when a designation must be made to be effective. The parties also should uncover whether Brown contemporaneously notified BCBS in writing that she had elected coordinated coverage under her MEEMIC policy, or if Zang's December 19, 2020 email was the first notice of Brown's designation. The court must also be cognizant that this case involves a health benefit plan self-funded by Marriott that includes a health insurance policy *administered* by BCBS.

No one has presented a written document from Brown to BCBS contemporaneously notifying BCBS that she coordinated her benefits with her no-fault policy. Although Brown admitted at her deposition that she had coordinated her no-fault and health insurance policies, no one asked her whether she provided written notice to BCBS of coordination. Only in her subsequent affidavit did Brown indicate that she had not provided this written notice to BCBS. In the meantime, MEEMIC presented Zang's email, stating that Brown had coordinated her policies and providing the MEEMIC policy declarations page to BCBS. Further discovery would clarify everyone's position on this issue, including the highly relevant positions of nonparties Brown, Marriott International, and BCBS.

Questioning a plan or BCBS representative, or both, regarding the contractual language is especially vital as we uncovered only one other case nationwide that involved the same COB language included in the Marriott SPD that was presented: *George v Allstate Ins Co*, 329 Mich App 448; 942 NW2d 628 (2019). Unfortunately, interpretation of that designation provision was not at issue in *George*, leaving unanswered the timing question at issue in this case.

We vacate the order granting summary disposition in MEEMIC's favor and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Elizabeth L. Gleicher
/s/ Deborah A. Servitto
/s/ Christopher P. Yates