STATE OF MICHIGAN

COURT OF APPEALS

RETHA KILBURN and RAMONA PRIME, as Co-Guardians for RODNEY GRANT, a Legally Incapacitated Person, Plaintiffs-Appellants,	UNPUBLISHED March 29, 2007
v	No. 272379 Oakland Circuit Court
PROGRESSIVE MICHIGAN INSURANCE COMPANY a/k/a PROGRESSIVE CASUALTY INSURANCE COMPANY, Defendant-Appellee.	LC No. 2005-071050-NF

Before: Owens, P.J., and Neff and White, JJ.

PER CURIAM.

Plaintiff appeals as of right from the circuit court order granting defendant summary disposition under MCR 2.116(C)(10) in this first party no-fault insurance case. We reverse.

The facts are undisputed. As the result of an automobile accident on August 21, 1975, Rodney Grant, at the time nineteen years old, suffered paraplegia and other catastrophic injuries necessitating 24-hour supervision and extensive care. Grant lived with his parents at the time and, as a resident relative, was covered under his parents' uncoordinated no-fault insurance policy issued by defendant Progressive Michigan Insurance Company. Grant qualified for Social Security Disability benefits and, eventually, Medicare. Because Grant was injured before the Medicare Secondary Payer (MSP) provision of the Omnibus Budget Reconciliation Act of 1980, 42 USC § 1395y(b)(2)(a),[1] took effect, Grant's no-fault insurance carrier was not automatically deemed to be the primary payor, and Medicare has paid most of his accident-related medical expenses since 1975.

[1] The MSP, § 1395y(b), amended the Social Security Act's Medicare provisions to eliminate the possibility of a set-off of Medicare benefits paid on behalf of an individual injured in an auto accident by dictating that Medicare may never be the primary payor for accident related medical expenses. The MSP applies to those injured after December 5, 1980, see Michigan Insurance Commissioner Bulletin 83-04, and thus does not apply to plaintiff in the instant case.

After defendant denied a request made on Grant's behalf for payment of his accident-related expenses, Grant, through his guardians, filed the instant suit on December 8, 2005. Pursuant to stipulation of the parties, the circuit court entered an order of dismissal that barred plaintiff from recovering any PIP benefits for losses incurred prior to December 9, 2004, and dismissed such claims with prejudice. The circuit court also entered a stipulated order of partial dismissal of plaintiff's claims for home modifications, without prejudice.

Defendant sought summary disposition, asserting that Medicare benefits paid to Grant constituted government benefits provided as a result of the same accident for which no-fault benefits are payable, and served the same purpose as no-fault benefits. Therefore, defendant argued, MCL 500.3109(1) provides for a mandatory set-off of those Medicare benefits from PIP benefits otherwise payable, and defendant was thus responsible only for expenses Medicare had specifically denied.

The circuit court granted defendant's motion.[2] This appeal ensued.

A

We review the circuit court's grant of summary disposition de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). A motion under MCR 2.116(C)(10) tests the factual support for a claim. The pleadings, depositions, affidavits and other documentary evidence submitted are considered in a light most favorable to the nonmoving party. *Id.* at 120. "Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law." *Id.*

Section 3109 of the No Fault Act, MCL 500.3101 *et seq.*, took effect in 1973 and provides in pertinent part:

> Sec. 3109. (1) Benefits provided or required to be provided under the laws of any state or the federal government shall be subtracted from the personal protection insurance benefits otherwise payable for the injury. [MCL 500.3109(1).]

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[2] The circuit court's very brief remarks were:

> I think I have the simple problem that I don't think that that was the intent of the legislature in the enacting of the 3109, the 500.3109 to allow for a double-dipping, especially under the circumstances of this case.
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> Although I would be, you know, if I were making legislation I would say it should, but I do not think it does. So I'm going to grant the defendant's motion.
>
> I tell you very candidly, I do not think if I were to do the opposite, it would survive our courts as they exist today. Thank you.

In 1974, the Legislature amended the No Fault Act by enacting MCL 500.3109a, which provides:

> Sec. 3109a. An insurer providing personal protection insurance benefits shall offer, at appropriately reduced premium rates, deductibles and exclusions reasonably related to *other health and accident coverage* on the insured. The deductibles and exclusions required to be offered by this section shall be subject to prior approval by the commissioner and shall apply only to benefits payable to the person named in the policy, the spouse of the insured and any relative of either domiciled in the same household. [Emphasis added.]

B

Defendant's motion for summary disposition asserted that the plain language of MCL 500.3109(1) entitled it to a mandatory set-off of Medicare benefits paid to Grant as a matter of law, and that the Medicare benefits did not constitute 'other health and accident coverage' qualifying for an optional set-off within the meaning of MCLA 500.3109a. Defendant's motion asserted that it anticipated that plaintiff would rely on *LeBlanc v State Farm*, 410 Mich 173; 301 NW2d 775 (1981), "as purported support for the notion that the Defendant is not entitled to a set-off, and that the plaintiff is therefore entitled to 'double-dip' by recovering No Fault benefits and Medicare benefits for exactly the same medical expenses." Defendant argued that *LeBlanc* is inapplicable because the plaintiff in that case received Medicare benefits as a result of having reached the age of 65, not on the basis of a disability.

Plaintiff agreed with defendant that Medicare is a "benefit provided by the federal government" under § 3109(1), but argued that pursuant to *LeBlanc, supra,* Medicare also constituted "other health and accident coverage" under § 3109a, and that since the no fault policy at issue is uncoordinated, plaintiff is entitled to the permissive set-off of § 3109a.[3]

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[3] Plaintiff's response and counter-motion for summary disposition asserted that *LeBlanc* held, and subsequent Michigan Supreme Court cases have reiterated, that no-fault insurers are entitled to a setoff of benefits paid by Medicare for the same accident-related injuries if the policy at issue is *coordinated.* Since the policy at issue here is uncoordinated, plaintiff argued, *LeBlanc* applies. Plaintiff noted that defendant cited no authority to support its argument that *LeBlanc* is properly distinguished from the instant case on the basis that the plaintiff in *LeBlanc* was entitled to Medicare based on age rather than on disability, that *LeBlanc* thus applies, and defendant was not entitled to summary disposition.

Defendant's reply brief filed below asserted that, contrary to plaintiff's argument, the Omnibus Reconciliation Act of 1980, 42 USC § 1395(b), has no bearing on the instant case, as it does not apply to injuries occurring before December 5, 1980. Defendant further asserted that nothing in the Omnibus Reconciliation Act suggests that a plaintiff is entitled to make a double recovery for expenses due to auto related injuries, and that, to the contrary, "if Medicare indeed had secondary liability, as the Plaintiff suggests, it would be Medicare rather that the Plaintiff who would have standing to sue for reimbursement of payments it made."

Defendant does not advance this argument on appeal and, in any event, plaintiff agrees with

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We conclude *LeBlanc* is controlling, and that the circuit court thus erred in granting defendant summary disposition. The Supreme Court in *LeBlanc, supra*, stated the issue presented as:

> whether Medicare payments, made on behalf of a qualifying participant to cover expenses incurred as a consequence of an accident for which no-fault benefits are also payable, *must* be set off in accordance with § 3109(1) as benefits provided under the laws of the federal government, or whether such payments *may* be set off under § 3109a as "other health and accident coverage on the insured".

Like the plaintiff in the instant case, the plaintiff in *LeBlanc* was insured under an uncoordinated insurance policy. After suffering injuries as a result of being struck by an automobile, LeBlanc brought suit against the defendant insurer for PIP benefits under his no-fault policy. The circuit court granted the plaintiff summary disposition on the set-off issue. 410 Mich at 188. This Court reversed, concluding that the Medicare payments LeBlanc received were benefits provided under federal law and that the defendant insurer was therefore entitled to the mandatory setoff of § 3109(1). *Id.* The Supreme Court reversed, holding:

> The phrase 'other health and accident coverage' contained in § 3109a contemplates benefits provided to qualified participants under the Medicare program; thus, Medicare benefits may be coordinated with no-fault personal protection insurance benefits at the option of the insured.
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> * * *
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> That participants in the Medicare program qualify for permissive coordination of benefits under § 3109a, rather than for mandatory coordination of benefits under § 3109(1), is forcefully demonstrated by the Legislature's deliberate use of distinct words to describe the items subject to set-off in the two provisions. Section 3109(1), enacted as a portion of the original no-fault act, is clearly addressed to government *benefits*. In a general sense, benefits are those things which promote an individual's welfare, advantage or profit. [Citations omitted.] In contrast to § 3109(1) is the later-enacted § 3109a, which more specifically speaks to other health and accident *coverage*. "Coverage", a word of precise meaning in the insurance industry, refers to protection afforded by an insurance policy, or the sum of the risks assumed by a policy of insurance. [Citations omitted.] . . . .
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> [T]he Legislature's enactment of § 3109a, which is narrowly limited to "coverage" and which is not expressly confined to private forms of such

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defendant that the Omnibus Budget Reconciliation Act of 1980, does not apply to those injured before December 5, 1980.

> "coverage", evinces an intent to provide unique treatment to health and accident insurance, as opposed to other perhaps equally duplicative "benefits".
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> * * *
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> Medicare constitutes "other health and accident coverage" within the meaning of § 3109a of the no-fault act. Thus, payments made to health care providers pursuant to the Medicare program for expenses arising out of the same accident for which no-fault benefits are also payable *may* be subtracted from payable no-fault benefits *at the option of the insured*. Since plaintiff in the instant case did not elect to coordinate his Medicare benefits with his no-fault benefits, payments made on his behalf by the Medicare program may not be subtracted from the no-fault benefits due under the no-fault policy issued to him by defendant. . . .
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> [410 Mich at 187, 203-204, 206-207.][4]

Our Supreme Court has reiterated and applied *LeBlanc*'s holding in subsequent cases, although none is directly on point. *Crowley v Detroit Auto Inter-Ins Exchange*, 428 Mich 270; 407 NW2d 372 (1987);[5] *Tatum v Government Employees Ins Co*, 431 Mich 663; 431 NW2d 391 (1988);[6] *Profit v Citizens Ins Co of America*, 444 Mich 281, 285-286; 506 NW2d 514 (1993);[7]

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[4] See also Logeman, *Michigan No-Fault Automobile Cases: Law and Practice*, 3d ed (2006 Supp), § 4.54, p 4-47:

> By federal statute, Medicare benefits may not be paid with respect to any item or service to the extent payment for that item or service has been made or may reasonably be expected to be made under an auto insurance policy, including a no-fault plan. 42 USC 1395y(b)(2)(A)(ii). The Medicare secondary position to no-fault applies to accidents and injuries that occurred *after* December 5, 1980. 42 CFR 411.50. . . . If the accident occurred *before December 5, 1980, Medicare will pay even if no-fault benefits are payable.* If the no-fault policy is coordinated, then Medicare would be primary. If the no-fault policy is a full policy, both Medicare and the no-fault carrier may pay. *See LeBlanc v State Farm Mut Auto Ins Co*, 410 Mich 173, 301 NW2d 775 (1981). [Emphasis added.]

[5] In *Crowley*, the Court distinguished *LeBlanc* factually, and concluded it need not decide whether military medical benefits are "other health and accident coverage" within meaning of § 3109a because that section applies only to benefits payable to the person named in a no-fault policy, his or her spouse, and any relative of either domiciled in the same household—and this plaintiff did not own an automobile, was single, and was not domiciled in a covered household.

[6] In *Tatum*, the defendant insurer argued that military medical benefits are not "other health and accident coverage" because § 3109a applies only to private health-care benefits. The *Tatum* Court rejected that argument, noting that it had rejected such an argument in *LeBlanc*, and concluded that the mandatory setoff provision of § 3109(1) could not be employed by the

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DeMeglio v Auto Club Ins Assoc, 449 Mich 33, 39-45*;* 534 NW2d 665 (1995).[8] Although various justices have questioned whether the *LeBlanc* Court erred in its analysis, *Profit*, 444 Mich at 288-289, the Court expressly declined to overruled *LeBlanc*. *Profit, supra* at 286, n 5. Because *LeBlanc* continues to govern the application of § 3109(a) to Medicare benefits payable due to injuries that occurred prior to December 5, 1980, the circuit court erred in failing to follow *LeBlanc*,[9] and in granting defendant summary disposition.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Donald S. Owens
/s/ Janet T. Neff
/s/ Helene N. White

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insurer.

[7] In *Profit*, the Court determined that social security disability benefits, as distinguished from Medicare benefits, are not "other health and accident coverage" within the meaning of § 3109(a), and are therefore subject to setoff under § 3109(1).

[8] In *DeMeglio*, the Court discussed the holdings of *LeBlanc*, *Crowley*, *Tatum* and *Profit*, and concluded that § 3109a did not apply to the plaintiff, who was not named in the relevant policy and was not related to anyone named in the policy

[9] Defendant's assertion that *LeBlanc* is inapplicable because the plaintiff in *LeBlanc* was eligible for Medicare based on age, rather than disability is unsupported. Although defendant is correct that the *LeBlanc* Court discussed at some length the Medicare program's applicability to those over age 65, see 410 Mich 197-199, there is nothing in *LeBlanc* to indicate that the Court intended to limit its holding that Medicare participants qualify for permissive coordination of benefits under § 3109a to only those persons that qualify for Medicare by virtue of age. Defendant cites no authority to support this argument and this Court has found none.