STATE OF MICHIGAN

COURT OF APPEALS

AUTO CLUB INSURANCE ASSOCIATION, Assignee of the MICHIGAN DEPARTMENT OF STATE ASSIGNED CLAIMS FACILITY,

Plaintiff-Appellee,

v

CITIZENS INSURANCE COMPANY,

Defendant/Cross-Plaintiff-Appellee/Cross-Appellant,

and

ALLSTATE INSURANCE COMPANY,

Defendant/Cross-Defendant-Appellant/Cross-Appellee,

and

DETROIT MEDICAL CENTER and LAKELAND CENTER,

Defendants-Appellees.

UNPUBLISHED
September 15, 2009

No. 283866
Wayne Circuit Court
LC No. 05-519586-NF

Before: O'Connell, P.J., and Talbot and Stephens, JJ.

PER CURIAM.

In this insurance priority dispute, defendant Allstate Insurance Company ("Allstate") appeals as of right from the trial court's judgment declaring it first in priority for the payment of no-fault personal injury protection ("PIP") benefits on behalf of Jerome Crutcher-Bey, and requiring it to reimburse plaintiff Auto Club Insurance Association ("ACIA") for benefits and penalty interest that ACIA previously paid to defendants Detroit Medical Center ("DMC") and Lakeland Center ("Lakeland"). We affirm in part, reverse in part, and remand for further proceedings.

This action arises from a July 4, 2003, automobile accident in which Jerome Crutcher-Bey suffered a severe brain injury while riding as a passenger in a stolen automobile. Crutcher-Bey's mother, Valrice King, applied to the Michigan Assigned Claims Facility ("MACF") for no-fault PIP benefits, asserting that Crutcher-Bey was not covered under any applicable insurance. The MACF claim was assigned to ACIA. ACIA thereafter brought this declaratory action alleging that either Citizens Insurance Company ("Citizens"), the insurer of the vehicle involved in the accident, or Allstate, which provided no-fault coverage to Crutcher-Bey's brother-in-law, Nathanial Lindsay, with whom Crutcher-Bey allegedly resided, were liable for Crutcher-Bey's no-fault benefits.

In a prior appeal in a related case brought by defendants DMC and Lakeland against Citizens and ACIA, which was later consolidated with this case, this Court held that the trial court properly determined that Crutcher-Bey was not excluded from receiving no-fault benefits under MCL 500.3113(a), but that the trial court erred in summarily dismissing ACIA and declaring Citizens liable for the payment of Crutcher-Bey's no-fault benefits. *Detroit Medical Ctr v Citizens Ins Co (On Reconsideration)*, unpublished opinion per curiam of the Court of Appeals, entered June 28, 2007 (Docket No. 266444). This Court held that ACIA, as the assigned claims insurer, was responsible for paying Crutcher-Bey's no-fault benefits, subject to its right to seek reimbursement from either Citizens or Allstate. *Id.*, slip op at 5-6. This Court remanded the case "for further proceedings in keeping with the statutory provisions for payment of an assigned claim." *Id.*, slip op at 5-6.

On remand, after the prior case was consolidated with this case, Allstate and Citizens both moved for summary disposition, each arguing that the other insurer was higher in order of priority for the payment of PIP benefits. The trial court concluded that there was a question of fact whether Crutcher-Bey was residing with Lindsay on the date of the accident and denied the parties' motions. Thereafter, the trial court held an evidentiary hearing to resolve the issue of Crutcher-Bey's residency at the time of the accident. None of the parties objected to this procedure. Following the hearing, the trial court determined that Crutcher-Bey was a resident of Lindsay's household at the time of the accident and, accordingly, held that Allstate was first in priority for the payment of PIP benefits. The court later issued an order requiring that Allstate reimburse ACIA in the amount of $1,331,948.05, which included the amount of both PIP benefits and penalty interest that ACIA had previously paid to defendants DMC and Lakeland. Allstate now appeals.

I. Statute of Limitations

Allstate first argues that the trial court erroneously denied its motion for summary disposition under MCR 2.116(C)(7), based on the statute of limitations. We disagree.

This Court reviews de novo a trial court's decision on a motion for summary disposition under MCR 2.116(C)(7). *Holmes v Michigan Capital Medical Ctr*, 242 Mich App 703, 706; 620 NW2d 319 (2000). In determining whether a party is entitled to summary disposition under MCR 2.116(C)(7), a court must consider the pleadings and any affidavits or other documentary evidence filed by the parties. *Patterson v Kleiman*, 447 Mich 429, 433-434; 526 NW2d 879 (1994); *Terrace Land Dev v Seeligson & Jordan*, 250 Mich App 452, 455; 647 NW2d 524 (2002). If there are no factual disputes and reasonable minds cannot differ regarding the legal

effect of the facts, the decision whether a claim is barred may be decided as a question of law. *Id.*

We disagree with Allstate's argument that this case is governed by the one-year-back rule in MCL 500.3145 for the recovery of PIP benefits. Allstate's argument is premised on its contention that Citizens, as the insurer of the automobile involved in the accident, was originally responsible for the payment of Crutcher-Bey's PIP benefits, unless it could establish the existence of another insurer in higher order of priority for paying those benefits. Allstate further contends that, to the extent that Citizens could establish that Allstate was higher in priority for paying Crutcher-Bey's PIP benefits, it was required to bring a subrogation action against Allstate and, as Crutcher-Bey's subrogee, Citizens would be subject to any defenses that Allstate would have against Crutcher-Bey, including the one-year limitation period in MCL 500.3145. See *Titan Ins Co v North Pointe Ins Co*, 270 Mich App 339, 343-344; 715 NW2d 324 (2006).

The fundamental flaw in Allstate's analysis is that this case does not involve a subrogation action brought by Citizens. Indeed, Citizens has never paid any PIP benefits to Crutcher-Bey and, as such, there is no basis for characterizing it as Crutcher-Bey's subrogee. See *Steinmann v Dillon*, 258 Mich App 149, 153-154; 670 NW2d 249 (2003). Rather, this is an action brought by ACIA against both Citizens and Allstate for reimbursement of the PIP benefits that ACIA had paid on behalf of Crutcher-Bey, as an assigned claims insurer, in accordance with MCL 500.3172 – MCL 500.3177. As such, ACIA's action is governed by MCL 500.3175(3), which provides that an assigned claims insurer's "action to enforce rights to indemnity or reimbursement against a third party shall not be commenced after the later of 2 years after the assignment of the claim to the insurer or 1 year after the date of the last payment to the claimant." The parties do not dispute that ACIA's action was timely filed under this statute. Accordingly, the trial court properly denied Allstate's motion for summary disposition on this basis.

II. Right to a Jury Trial

Allstate next argues that the trial court violated its right to a jury trial when it conducted an evidentiary hearing to resolve the question of Crutcher-Bey's residency, rather than have this issue decided at a jury trial.

Initially, we disagree with Allstate's contention that the evidentiary hearing was conducted in the context of deciding the parties' summary disposition motions. The record clearly reveals that the trial court denied the parties' motions for summary disposition because it found that there was a genuine issue of material fact regarding Crutcher-Bey's residency. We agree, however, that notwithstanding the label "evidentiary hearing," the trial court effectively conducted a bench trial to resolve the residency question.

The record indicates that ACIA filed a jury demand with its complaint, and that Allstate filed a reliance on ACIA's jury demand with its answer. MCR 2.509(A) provides that if a jury has been properly demanded, "trial of all issues so demanded must be by jury," unless "the parties agree otherwise by stipulation in writing or on the record," or the court determines that there is no right to a jury trial on an issue. See also *In re Nestorovski Estate*, 283 Mich App 177, 193; 769 NW2d 720 (2009) (the right to a jury trial may be waived), and MCR 2.508(D)(3) ("[a] demand for trial by jury may not be withdrawn without the consent, expressed in writing or on

the record, of the parties or their attorneys"). None of the parties contend that there was no right to a jury trial to resolve the disputed residency issue. Because the parties properly demanded and preserved their right to a jury trial, we agree with Citizens that it is necessary to decide whether Allstate waived its right to a jury trial by failing to object to the "evidentiary hearing" and by consenting to that procedure through its voluntary participation.

In *Marshall Lasser, PC v George*, 252 Mich App 104, 107-108; 651 NW2d 158 (2002), this Court considered the "on the record" language in MCR 2.508(D)(3) and MCR 2.509(A)(1) and concluded:

> While it could mean that the agreement can be orally entered into the record, the language does not necessarily limit the method of expression to a verbal declaration or exchange. We believe the "on the record" language also encompasses an expression of agreement implied by the conduct of the parties.
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> * * *
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> We hold that, consistent with the court rules, the subsequent waiver of a properly demanded jury trial can be inferred from the conduct of the parties under a "totality of the circumstances" test.

The Court in that case held that the parties waived their right to a jury trial where a default judgment was entered against the defendant, and the parties actively participated in a bench trial on the issue of damages without objection or protest. *Id.* at 107, 109. The Court reasoned:

> Both parties were given notice that the court would be deciding the damage issue. The defendant and the plaintiff's representative were present and both were represented by counsel. There is no indication in the record that plaintiff or defendant ever objected to the bench trial, nor is there any indication that either party proceeded under protest. Under the circumstances of this case, we believe both parties' acquiescence to the bench trial evidenced an agreement to waive the secured right. Plaintiff cannot now be heard to complain about the lack of a jury trial on the issue of damages, when by its own unequivocal conduct it waived this right. [*Id.* at 109 (internal citations omitted).]

Marshall Lasser is directly on point with the facts of this case. Allstate had prior notice of the trial court's intention to resolve the residency issue at an "evidentiary hearing," and it fully participated in that hearing without objection or protest. Moreover, it was represented by counsel who was prepared to examine witnesses and present an argument on its behalf. Under the circumstances, Allstate's voluntary acquiescence to that procedure reveals its agreement to waive its right to a jury trial. Accordingly, we reject this claim of error.

III. Penalty Interest and Attorney Fees

Allstate lastly argues that the trial court improperly required it to reimburse ACIA for penalty interest and attorney fees that ACIA paid to DMC and Lakeland.

Initially, the record does not support Allstate's argument that it was ordered to reimburse ACIA for attorney fees paid to DMC and Lakeland under MCL 500.3148. Indeed, in the prior appeal of the related action brought by DMC and Lakeland against ACIA, this Court specifically held that ACIA was not liable for attorney fees under MCL 500.3148(1). *Detroit Medical Ctr*, *supra*, slip op at 7. Furthermore, although the final judgment in this case specifically refers to Allstate's obligation to reimburse ACIA for ACIA's prior payment of PIP benefits and penalty interest to DMC and Lakeland, it does not refer to any prior payment of attorney fees, or to any obligation by Allstate to reimburse ACIA for attorney fees previously paid. Thus, we find no error with respect to the issue of attorney fees.

We agree, however, that the trial court erred in requiring Allstate to reimburse ACIA for penalty interest that was previously incurred and paid by ACIA to DMC and Lakeland. MCL 500.3142 provides as follows with regard to an insurer's liability for interest on overdue payments of PIP benefits:

> (1) Personal protection insurance benefits are payable as loss accrues.
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> (2) Personal protection insurance benefits are overdue if not paid within 30 days after an insurer receives reasonable proof of the fact and of the amount of loss sustained. If reasonable proof is not supplied as to the entire claim, the amount supported by reasonable proof is overdue if not paid within 30 days after the proof is received by the insurer. Any part of the remainder of the claim that is later supported by reasonable proof is overdue if not paid within 30 days after the proof is received by the insurer. For the purpose of calculating the extent to which benefits are overdue, payment shall be treated as made on the date a draft or other valid instrument was placed in the United States mail in a properly addressed, postpaid envelope, or, if not so posted, on the date of delivery.
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> (3) An overdue payment bears simple interest at the rate of 12% per annum.

ACIA's reliance on MCL 500.3172(3)(f) as authorizing the inclusion of its previously paid penalty interest in the reimbursement award is misplaced. Assuming, without deciding, that this statute encompasses reimbursement of penalty interest, it is not applicable to this case, inasmuch as ACIA was assigned the claim because the injured person represented that no PIP insurance was available; the claim did not arise because the obligation to provide PIP benefits could not be ascertained because of a dispute between two or more insurers. Compare MCL 500.3172(1) and (3); see also *Spectrum Health v Grahl*, 270 Mich App 248, 255-256; 715 NW2d 357 (2006).

The resolution of this issue is governed by applicable administrative rules pertaining to the right of an insurer of an assigned claim to seek reimbursement from another insurer. MCL 500.3171 provides that "[t]he secretary of state shall promulgate rules to implement the [assigned claims] facility and plan in accordance with and subject to Act No 306 of the Public Acts of 1969 . . . ." MCL 500.3175(2) provides that these rules "shall include a rule establishing reasonable standards for enforcing rights to indemnity or reimbursement against third parties . . . ." One such rule, 1999 AC, R 11.109 provides, in pertinent part:

> (1) Upon assignment of a claim from the assigned claims facility, the serving insurer shall investigate the claim expeditiously and make prompt payment for loss within the time prescribed by the act.
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> (2) Interest due for late payment of a claim shall be paid by the servicing insurer to which the claim is assigned. *A servicing insurer shall not be reimbursed for the amount of interest paid . . . .* [Emphasis added.]

Accordingly, ACIA was not entitled to be reimbursed for the amount of penalty interest it previously incurred and paid to DMC and Lakeland. We therefore reverse the portion of the trial court's reimbursement order that requires Allstate to reimburse ACIA for the amount of penalty interest paid, and remand for a redetermination of Allstate's reimbursement obligation without consideration of penalty interest.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Peter D. O'Connell
/s/ Michael J. Talbot
/s/ Cynthia Diane Stephens