# In the Missouri Court of Appeals
# Eastern District

DIVISION ONE

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| JODIE NEVILS, | ) ED98538 |
| | ) |
| Plaintiff/Appellant, | ) Appeal from the Circuit Court |
| | ) of St. Louis County |
| v. | ) |
| | ) |
| GROUP HEALTH PLAN, INC. and | ) Honorable Thea A. Sherry |
| ACS RECOVERY SERVICES, INC., | ) |
| | ) |
| Defendants/Respondents. | ) Filed: December 26, 2012 |

## Introduction

Jodie Nevils (Appellant) appeals from the trial court's summary judgment in favor of Group Health Plan, Inc. (GHP) and ACS Recovery Services, Inc. (ACS) (collectively Respondents) on Appellant's petition alleging violation of the Missouri Merchandising Practices Act (MMPA); unjust enrichment; conversion, and seeking injunctive relief. We affirm.

## Factual and Procedural Background

On November 2, 2006, Appellant, a federal employee, was injured in an automobile accident. As a federal employee, Appellant had medical coverage through a federal employee health benefit plan carried by GHP. GHP paid Appellant's medical bills resulting from the treatment of his injuries. Appellant subsequently sued the third party tortfeasor responsible for the accident, and recovered a settlement. GHP, through

its agent ACS, asserted a lien against Appellant's settlement in the amount of $6,592.24, seeking reimbursement or subrogation for its payment of Appellant's medical bills resulting from the accident. Appellant remitted the $6,592.24 to GHP in satisfaction of the asserted lien, and then on February 9, 2011, filed a class action petition for damages on behalf of himself and others similarly situated against GHP alleging violation of the MMPA; unjust enrichment; conversion; and seeking injunctive relief, all based on the underlying premise that Missouri law does not permit the subrogation of tort claims. GHP filed a Notice of Removal to federal court, asserting that federal question jurisdiction existed under 28 U.S.C. Section 1331, because the federal government's interest in enforcing its contracts conflicted with Missouri anti-subrogation law.

Appellant moved to remand to state court. The United States District Court for the Eastern District of Missouri remanded the case to the trial court, finding no need for federal jurisdiction because Missouri law "presently does not appear to conflict with the operation of the OPM-GHP Contract." OPM is the federal government's Office of Personnel Management, which contracted with GHP for GHP to act as the health insurance carrier for federal employees' health care benefits. The federal court based its decision on this Court's statement that Missouri's anti-subrogation rule is preempted by the Federal Employee Health Benefits Act (FEHBA), 5 U.S.C. Sections 8901-8914, in Buatte v. Gencare Health Sys., Inc., 939 S.W.2d 440, 442 (Mo.App. E.D. 1996). See Nevils v. Group Health Plan, Inc., 2011 WL 8144366 at *6 (E.D. Mo., June 15, 2011) ("Missouri state law prohibiting subrogation is preempted by the FEHBA.").

On remand, ACS intervened in the action, and on October 31, 2011, Appellant amended his petition to include ACS as a defendant. Respondents filed motions for

summary judgment based on Buatte and FEHBA's preemption clause, 5 U.S.C. Section 8902(m)(1). The trial court granted the motions for the reasons stated by Respondents. This appeal follows.

## Point on Appeal

In his point on appeal, Appellant contends the trial court erred in granting Respondents summary judgment because FEHBA does not expressly preempt Missouri's anti-subrogation rule, in that asserted rights to subrogation and reimbursement of medical bill payments do not relate to the "nature, provision or extent of coverage or benefits."

## Standard of Review

This Court's standard of review for an appeal of the trial court's entry of summary judgment is *de novo*. ITT Commercial Fin. Corp. v. Mid-America Marine Supply Corp., 854 S.W.2d 371, 376 (Mo.banc 1993). We review the record in the light most favorable to the party against whom judgment was entered. Id. Any facts set forth by affidavit or otherwise in support of a party's motion are taken as true unless contradicted by the non-moving party's response to the summary judgment motion. Id. All reasonable inferences are drawn in favor of the non-movant. Id. After reviewing the evidence in this manner, this Court will only affirm the trial court's entry of summary judgment if the moving party establishes that there is no genuine issue as to the material facts and the movant is entitled to judgment as a matter of law. Goerlitz v. City of Maryville, 333 S.W.3d 450, 452 (Mo.banc 2011).

## Discussion

Under the Supremacy Clause, state laws and constitutional provisions are preempted and have no effect to the extent they conflict with federal laws. See State ex

rel. Proctor v. Messina, 320 S.W.3d 145, 148 (Mo. banc 2010); Johnson v. State, 366 S.W.3d 11, 26-27 (Mo.banc 2012).

Missouri law, as a matter of public policy, does not allow an insurer to acquire part of the insured's rights against a tortfeasor through the payment of medical expense, either by assignment or subrogation. Buatte, 939 S.W.2d at 441-42; Waye v. Bankers Multiple Line Ins. Co., 796 S.W.2d 660, 661 (Mo.App. W.D. 1990). Insurance policies which attempt to do so are, therefore, invalid under state law. Buatte, 939 S.W.2d at 442. Section 2.5 of OPM's FEHBA contract with GHP, titled "Subrogation" and located under "Benefits," purports to allow GHP to acquire part of an insured's rights against a tortfeasor through the payment of medical expense by subrogation as follows:

> (a) The Carrier [GHP] shall subrogate FEHB[A] claims in the same manner in which it subrogates claims for non-FEHB[A] members, according to the following rules:
> …
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> (2) The Carrier shall subrogate FEHB[A] claims if it is doing business in a State in which subrogation is prohibited, but in which the Carrier subrogates for at least one plan covered under the Employee Retirement Income Security Act of 1974 (ERISA).

Under Section 2.5(a)(2), this subrogation clause is applicable in the instant case because (1) Missouri law prohibits an insurer from subrogation against its own insured, see Benton House, LLC v. Cook & Younts Ins., Inc., 249 S.W.3d 878, 882 (Mo.App. 2008) ("No right of subrogation can arise in favor of an insurer against its own insured, since, by definition, subrogation arises only with respect to rights of the insured against third persons to whom the insurer owes no duty."); and (2) GHP subrogates in Missouri for at least one ERISA plan.

Normally, such a subrogation provision as Section 2.5(a) would be deemed invalid by Missouri courts. However, FEHBA preempts any state law prohibiting subrogation in the manner effected by Respondents against Appellant's settlement award, via the following language:

> The terms of any contract under this chapter which relate to the nature, provision, or extent of coverage or benefits (including payment with respect to benefits) shall supersede and preempt any State or local law, or any regulation issued thereunder, which relates to health insurance or plans.

5 U.S.C. Section 8902(m)(1). The contract between OPM and GHP is a "contract under this chapter." Under the terms of the contract, members who enroll in or accept services under the contract, such as Appellant, are obligated to all of its terms, conditions and provisions. Therefore, the preemption clause pertains to this case, both statutorily under Section 8902(m)(1) and contractually pursuant to the insurance policy.

Appellant maintains the preemption clause, although pertinent to this case, should not be applied here because asserted rights to subrogation and reimbursement of medical bill payments do not relate to the "nature, provision or extent of coverage or benefits." However, this Court has already determined this issue to the contrary:

> Although no Missouri cases have addressed the FEHBA's preemption of inconsistent state law, the FEHBA has been found to preempt state law in other jurisdictions. Those courts have enforced subrogation and reimbursement clauses of health plans where state law would not have permitted the same. In NALC Health Benefit Plan v. Lunsford, 879 F.Supp. 760 (E.D.Mich.1995), a U.S. District Court in Michigan upheld a requirement that enrollees reimburse the plan from any third party proceeds they collected, even though under Michigan law such reimbursement would not have been permissible.
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> Similarly, in Medcenters Health Care v. Ochs, 854 F.Supp. 589 (D.Minn.1993), the insurer sought reimbursement from the insured after the insured had settled with a third party tortfeasor. The Minnesota District Court found that the provisions of the plan permitting such

> recovery preempted Minnesota state law which would not permit reimbursement unless the insured had received a full recovery.
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> We likewise find that Missouri state law prohibiting subrogation is preempted by the FEHBA. The FEHBA requires preemption of state law if it would differ the 'nature or extent of coverage or benefits' offered under the FEHBA authorized plan. In the present case, prohibiting Gencare from seeking reimbursement from its insured would clearly differ the extent of coverage or benefits.

Buatte, 939 S.W.2d at 442. See also Nevils, 2011 WL 8144366 at *6 ("Although Missouri law prohibits subrogation by an insurer against an insured … the Missouri Court of Appeals has stated that 'Missouri state law prohibiting subrogation is preempted by the FEHBA."). Other jurisdictions have followed Buatte with approval. See, *e.g.*, Thurman v. State Farm Mut. Auto Ins. Co., 598 S.E.2d 448, 451 (Ga. 2004); Aybar v. New Jersey Transit Bus Operations, Inc., 701 A.2d 932, 937 (N.J.Super A.D. 1997), citing Buatte, 939 S.W.2d at 442; NALC, 879 F.Supp. at 763; and Medcenters, 26 F.3d at 867) ("The State presents us with no case dealing with an anti-subrogation provision that holds such a provision is not preempted by FEHBA or ERISA.").

The doctrine of stare decisis directs that, once a court has "laid down a principle of law applicable to a certain state of facts, it [must] adhere to that principle, and apply it to all future cases, where facts are substantially the same; regardless of whether the parties and property are the same." BLACK'S LAW DICTIONARY 1406 (6th ed.1990); Eighty Hundred Clayton Corp. v. Director of Revenue, 111 S.W.3d 409, 412 (Mo.banc 2003). The doctrine of stare decisis promotes security in the law by encouraging adherence to previously decided cases. Independence-Nat. Educ. Ass'n v. Independence Sch. Dist., 223 S.W.3d 131, 137 (Mo.banc 2007); Watts v. Lester E. Cox Medical Centers, 2012 WL 3101657 *10 (Mo.banc 2012).

Appellant maintains that the district court in Nevils suggested that Missouri courts may want to revisit Buatte's holding "in light of subsequent developments of the law, see, e.g., Blue Cross Blue Shield of Illinois v. Cruz, 495 F.3d 510 (7th Cir. 2007) (distinguishing between "benefits" and "financial incident[s]")." Nevils, 2011 WL 8144366 at *6. Cruz, however, is a federal case from the Seventh Circuit, applying Illinois law, and thus has no precedential value in Missouri. Our own precedent compels this Court to reject Appellant's argument on appeal, as the same argument has already been presented to and rejected by this Court in Buatte.

In any event, even after a careful examination of Cruz, we do not find any development sufficient to question our own holding in Buatte or to find that its holding is incorrect. In Cruz, the FEHBA health insurer sued the insured federal employee seeking reimbursement for benefits paid out of the insured's settlement with the tortfeasor causing his injuries. The United States Court of Appeals for the Seventh Circuit held that no federal-question jurisdiction existed in the insurer's suit against the employee, in response to which the employee asserted Illinois' common fund doctrine, which states that the insurer is responsible for a pro rata share of the employee's attorney's fees. The Court found no unique federal interest in whether the state's doctrine controlled over a contrary term of the insurance contract, since the doctrine affected how much of a tort settlement insured could keep, rather than the amount of benefits he was entitled to. Cruz, 495 F.3d at 513. Thus, Cruz's only holding was that no federal jurisdiction existed over the case.[1]

[1] Although the Seventh Circuit distinguished between the word "benefits" as used in FEHBA's subrogation clause and the monies a plaintiff receives from a third-party tortfeasor, which the Court determined to be more appropriately characterized as "financial incidents," this appears to be a distinction without a

In Buatte, this Court stated that prohibiting the insurer from seeking reimbursement for its medical coverage expenditures from its federal employee insured's tort suit proceeds based on Missouri's anti-subrogation rule would clearly affect the extent of coverage or benefits. Id. at 442. Although we did not state, in so many words, that the prohibition against subrogation would only affect "how much of the tort proceeds the insured could keep," rather than affect "how many benefits the insured would receive," the import of our words was the same as the import of the words used in Cruz. In the end, each of the insureds in Buatte and Cruz would be remitting some of his tort claim proceeds to his insurer. In Buatte, such remittitur was based on the insurance contract's subrogation clause's preemptive effect on Missouri's anti-subrogation law; and in Cruz, the reimbursement was based on tort proceeds being classified as incidentals rather than benefits and thus preemption over laws affecting benefits was inapplicable. Because Cruz's holding only concerned whether it had federal question jurisdiction and clearly acknowledged that its insured was not going to be able to retain all of his tort claim proceeds but would have to reimburse some to the insurer due to the insurance contract's subrogation clause, the Seventh Circuit's decision does not affect our holding in Buatte that FEHBA preempts Missouri's anti-subrogation law. Therefore, we find no compelling reason to change course from the general dictates of the doctrine of stare decisis and specifically our holding in Buatte. Med. Shoppe Intern., Inc. v. Dir. Of Revenue, 156 S.W.3d 333, 335 (Mo.banc 2005). A decision of this Court should not be lightly overruled, particularly where the opinion is not clearly erroneous and manifestly

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difference because the Court's ultimate holding did not abrogate FEHBA's preemption of state anti-subrogation law.

wrong. Southwestern Bell Yellow Pages, Inc. v. Director of Revenue, 94 S.W.3d 388, 391 (Mo.banc 2002); Eighty Hundred Clayton Corp., 111 S.W.3d at 412.

Appellant also maintains that the United States Supreme Court has likewise distinguished between benefits and reimbursement in Empire Healthchoice Assurance, Inc. v. McVeigh, 547 U.S. 677, 126 S.Ct. 2121, 2132, 165 L.Ed.2d 131 (2006). As in Cruz, the scenario in Empire involved a New York federal employee insured who had recovered damages for his injuries from a state court tort action. The insurer sought reimbursement from the insured's estate for the medical coverage it had provided the insured. The Empire court's holding was solely that federal question jurisdiction was lacking, in that the case did not arise under federal law nor did it involve issues of federal law that belonged in federal court; rather, the insurer's reimbursement claim was triggered not by the action of any federal department, agency, or service, but by the settlement of the personal injury action launched in state court. Empire, 126 S.Ct. 2121, 2129-2130, 2137 (The United States no doubt has an overwhelming interest in attracting able workers to the federal workforce and in the health and welfare of the federal workers upon whom it relies to carry out its functions, but those interests, we are persuaded, do not warrant turning into a discrete and costly "federal case" an insurer's contract-derived claim to be reimbursed from the proceeds of a federal worker's state-court-initiated tort litigation.). Id. at 2137.

So, here, again, we are presented with the holding of a federal case applying federal law that does not bear upon our conclusion in Buatte, nor does it provide any pertinent or persuasive reasoning that would legitimize a revisit to or reconsideration of Buatte's holding. Rather, the Supreme Court in Empire was merely deciding a

jurisdictional issue, which is not even tangentially related to our determination of preemption in Buatte. For these reasons, we reject Appellant's arguments on the basis of the Empire case as well.

Our holding in Buatte, that FEHBA preempts Missouri's anti-subrogation rule because the insurer's right to reimbursement of medical bill payments relates to the nature, provision or extent of benefits provided by the insurer to its federal employee insureds, remains valid. Appellant has failed to present any compelling reason to consider otherwise. Accordingly, his point on appeal is denied.

## Conclusion

The judgment of the trial court is affirmed.

Sherri B. Sullivan, Judge

Clifford H. Ahrens, P.J., and
Glenn A. Norton, J., concur.