If this opinion indicates that it is "FOR PUBLICATION," it is subject to revision until final publication in the Michigan Appeals Reports.

STATE OF MICHIGAN

COURT OF APPEALS

ESURANCE PROPERTY & CASUALTY INSURANCE COMPANY, Plaintiff-Appellant,	UNPUBLISHED October 17, 2019
v	No. 344715 Wayne Circuit Court LC No. 17-016798-NF
MICHIGAN ASSIGNED CLAIMS PLAN and MICHIGAN AUTOMOBILE INSURANCE PLACEMENT FACILITY, Defendants-Appellees.	

Before: METER, P.J., and O'BRIEN and SWARTZLE, JJ.

PER CURIAM.

After Roshaun Edwards (Roshaun) was seriously injured in an automobile accident, plaintiff, Esurance Property & Casualty Insurance Company, paid approximately $571,000 in personal injury protection (PIP) benefits for Roshaun's medical bills. Esurance then discovered that the insurance policy covering the vehicle had been procured through fraud, and obtained an order voiding the policy *ab initio*. Plaintiff sued defendants, the Michigan Assigned Claims Plan (MACP) and Michigan Automobile Insurance Placement Facility (MAIPF), seeking to have defendants reimburse plaintiff for the benefits plaintiff mistakenly paid under a theory of equitable subrogation. The circuit court granted summary disposition to defendants under MCR 2.116(C)(8), ruling that equitable subrogation was not available to plaintiff. Plaintiff appeals as of right. We affirm.

I. FACTS AND PROCEDURAL HISTORY

Roshaun was seriously injured on January 10, 2016, while driving a 2015 Dodge Challenger that was titled to and registered by Anthony Robert White II in Michigan. The vehicle was covered by a Colorado insurance policy issued by plaintiff to Luana Edwards-White (Luana). Luana obtained the policy by representing to plaintiff that she owned the Dodge Challenger, and that it would be garaged in Colorado. Roshaun did not have his own vehicle or insurance policy. After the accident, Roshaun sought PIP benefits from plaintiff under the

Colorado policy, and also applied for benefits from the MAIPF. Because plaintiff paid PIP benefits to Roshaun, the MAIPF did not assign an insurer to handle Roshaun's claim.

After it paid about $571,000 in PIP benefits, plaintiff discovered that Luana had lied in her application for insurance. Plaintiff obtained an order rescinding its policy and declaring the policy void *ab initio* in a suit to which defendants were not parties. Plaintiff then filed the instant suit, in which it asserts a claim of equitable subrogation, and asks for an order requiring defendants to reimburse plaintiff for the PIP benefits it paid to Roshaun. Defendants filed a motion for summary disposition under MCR 2.116(C)(8), arguing that there was no legal basis for an equitable subrogation claim against them. Defendants explained that the no-fault act, MCL 500.3101 *et seq*., contemplates rights of reimbursement and indemnification in a variety of circumstances, but not in this one. In response, plaintiff argued that the lack of statutory authority for its claim was not dispositive. According to plaintiff, Roshaun could seek recovery from defendants because he timely applied for benefits through the MAIPF and had no applicable no-fault policy. Plaintiff contended that because it paid Roshaun's medical bills, it could use the doctrine of equitable subrogation to step into Roshaun's shoes and pursue a claim against defendants.

The circuit court ruled that because the no-fault act contains some provisions contemplating reimbursement and indemnification, but nothing covering the circumstances here, the maxim *expressio unius est exclusio alterius* (the expression of one thing is the exclusion of another), see *Detroit City Council v Detroit Mayor*, 283 Mich App 442, 456; 770 NW2d 117 (2009), required the conclusion that equitable subrogation was not available to plaintiff. The instant appeal followed.

II. DISCUSSION

Plaintiff argues that the trial court was wrong to conclude that equitable subrogation is unavailable, and that it may pursue equitable subrogation against defendants because Roshaun could have sued defendants under MCL 500.3172. While we do not necessarily agree with the trial court's reasoning, we agree with its ultimate conclusion that equitable subrogation is not available to plaintiff.[1]

The trial court granted defendants summary disposition under MCR 2.118(C)(8). This Court reviews de novo a trial court's decision to grant summary disposition. *Kendzierski v Macomb County*, 503 Mich 296, 302; 931 NW2d 604 (2019). In *Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999), our Supreme Court explained:

> A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant. A motion under MCR 2.116(C)(8) may be granted only where the claims alleged are "so clearly unenforceable as a matter of

[1] This Court will not reverse when the trial court reaches the correct result for an incorrect reason. *Lewis v Farmers Ins Exch*, 315 Mich App 202, 216; 888 NW2d 916 (2016).

> law that no factual development could possibly justify recovery." When deciding a motion brought under this section, a court considers only the pleadings. [Citations omitted.]

To the extent this Court is asked to interpret a statute, questions of statutory interpretation are reviewed de novo. *Badeen v PAR, Inc*, 496 Mich 75, 81; 853 NW2d 303 (2014). This Court also reviews de novo a trial court's decision to apply an equitable doctrine. *Knight v Northpointe Bank*, 300 Mich App 109, 113; 832 NW2d 439 (2013). See also *Auto-Owners Ins Co v Amoco Prod Co*, 468 Mich 53, 57; 658 NW2d 460 (2003).

As this Court explained in *Eller v Metro Indus Contracting, Inc*, 261 Mich App 569, 573-574; 683 NW2d 242 (2004):

> "Equitable subrogation is a flexible, elastic doctrine of equity." *Hartford Accident & Indemnity Co v Used Car Factory, Inc*, 461 Mich 210, 215; 600 NW2d 630 (1999). Its application is to be determined on a case-by-case basis. *Id*. It has been applied to allow a no-fault insurance company to collect worker's compensation benefits from a self-insured employer, *Auto-Owners Ins Co*, *supra* at 55, to allow a surety to assert a contractor's right to payment, *Old Kent Bank–Southeast v Detroit*, 178 Mich App 416, 418, 420-421; 444 NW2d 162 (1989), to allow a security company's insurance carrier to assert a legal malpractice claim against the security company's attorney, *Atlanta Int'l Ins Co v Bell*, 438 Mich 512, 521-524; 475 NW2d 294 (1991), and in other situations. Although caution is indicated, " 'the mere fact that the doctrine of subrogation has not been previously invoked in a particular situation is not a prima facie bar to its applicability.' " *Hartford Accident & Indemnity Co*, *supra* at 216 (citation omitted).
>
> To avoid being a volunteer, a subrogee must be acting to fulfill a legal or equitable duty. *Id*. at 216. Thus, "[w]hen an insurance provider pays expenses on behalf of its insured, it is not doing so as a volunteer." *Auto-Owners Ins Co*, *supra* at 59. This is true even if the insurer's obligation was only secondary to another carrier's, so that it would not have been liable to pay benefits until the policy limits of the primary carrier were exhausted. See *Auto Club Ins Ass'n v New York Life Ins Co*, 440 Mich 126, 128-129, 132-133; 485 NW2d 695 (1992). The rationale is that an insurance company that pays a claim that another insurer may be liable for is "protecting its own interests and not acting as a volunteer . . . [and] [i]s entitled to invoke the doctrine of equitable subrogation." *Auto-Owners Ins Co*, *supra* at 60; see also *Auto Club Ins Ass'n*, *supra* at 132-133. [Alterations in *Eller*.]

The trial court concluded that the doctrine could not be invoked because the no-fault act does not explicitly contemplate it being used in circumstances such as those present here. The trial court relied on the maxim *expressio unius est exclusio alterius* to reach that conclusion. It is true that there are a number of provisions of the no-fault act that address reimbursement or

similar concepts under several distinct factual scenarios, none of which would apply here.[2] But it is a misapplication of the *expressio unius* maxim to conclude that the Legislature must have intended to exclude the type of suit brought by plaintiff because such action is not specified in the no-fault act. The maxim "has force only when the items expressed are members of an associated group or series, justifying the inference that items not mentioned were excluded by deliberate choice, not inadvertence." *Barnhart v Peabody Coal Co*, 537 US 149, 168; 123 S Ct 748; 154 L Ed 2d 653 (2003). Given that the various reimbursement provisions contained in the no-fault act are scattered throughout the act and involve distinct factual scenarios, we cannot presume that those statutes are necessarily exclusive of any and all other similar remedies in all factual scenarios. Doing so would presume that the Legislature deliberately chose not to include a right to equitable subrogation by a no-fault insurer against defendants, which is unwarranted from the text of the no-fault act.

But even if equitable subrogation is not prohibited by the no-fault act under the circumstances here, it is nonetheless unavailable to plaintiff. Plaintiff argues that because it has paid benefits to Roshaun, it may step into Roshaun's shoes and seek to enforce a claim that Roshaun would have for PIP benefits against defendants. The problem is that Roshaun has no claim against defendants to pursue the benefits plaintiff has already paid. When Roshaun was injured, MCL 500.3172(1) allowed a claimant to obtain PIP benefits through the MAIPF in one of four circumstances: (1) "if no personal protection insurance is applicable to the injury," (2) if "no personal protection insurance applicable to the injury can be identified," (3) if "the personal protection insurance applicable to the injury cannot be ascertained because of a dispute between 2 or more automobile insurers concerning their obligation to provide coverage or the equitable distribution of the loss," or (4) if "the only identifiable personal protection insurance applicable to the injury is, because of financial inability of 1 or more insurers to fulfill their obligations, inadequate to provide benefits up to the maximum prescribed." MCL 500.3172(1), as enacted by 2012 PA 204.[3] Plaintiff seems to contend that Roshaun could have claimed benefits through the MAIPF under the first scenario (no applicable no-fault insurance). See MCL 500.3172(1). Yet, when Roshaun applied for benefits from the MAIPF, there *was* an applicable no-fault insurer: plaintiff. Thus, Roshaun had no right to benefits through the MAIPF because none of the four avenues for making a claim through the MAIPF under MCL 500.3172 was open to him.[4]

---

[2] MCL 500.3114(8) allows a no-fault insurer to receive partial recoupment from other no-fault insurers standing in equal priority. MCL 500.3116 provides rights of reimbursement and indemnity to no-fault insurers where a claimant recovers on a tort claim. MCL 500.3146 sets a statute of limitations on claims for reimbursement or indemnity brought under MCL 500.3116. MCL 500.3175(2) allows insurers to whom a claim is assigned by the MAIPF to seek reimbursement and indemnity from third parties. Finally, MCL 500.3177(1) allows no-fault insurers to seek reimbursement from owners of uninsured vehicles.

[3] The no-fault act underwent substantial revisions by way of 2019 PA 22. Currently, the same four circumstances are stated in MCL 500.3172(1)(a)-(d).

[4] Much of plaintiff's brief focuses on whether MCL 500.3174 allows a claimant to sue the MAIPF, or whether that provision contemplates only suit being brought against an insurer to whom a claim is assigned. In other words, plaintiff focuses on whether a suit could ever be

Because a plaintiff seeking equitable subrogation cannot claim rights any greater than are possessed by the subrogor, *Eller*, 261 Mich App at 573, and Roshaun had no claim against defendants, there is no claim for plaintiff to enforce against defendants through equitable subrogation.

In response to this problem, plaintiff points out that the policy it paid benefits to Roshaun under has been rescinded *ab initio*, and when a policy is declared void *ab initio*, "the insurance policy is considered never to have existed." *Bazzi v Sentinel Ins Co*, 502 Mich 390, 408-409; 919 NW2d 20 (2018). "Rescission abrogates a contract and restores the parties to the relative positions that they would have occupied if the contract had never been made." *Id*. at 409. Thus, were this a matter of rescission as between Roshaun and plaintiff, we would have little difficulty agreeing that the matter should be viewed, at least legally speaking, as if no policy ever existed.

But the matter is made complicated because plaintiff wants to use this legal fiction to subject defendants to its equitable subrogation claim. That is, plaintiff wants to proceed with its equitable subrogation claim against defendant as if the policy never existed.[5] But if plaintiff wishes to proceed against defendants under the premise that there never was an applicable insurance policy, as is pleaded in the complaint, then plaintiff must also be held to that state of affairs. And if that state of affairs applies to plaintiff, then, as will be explained, its claim for equitable subrogation fails as a matter of law.

The heart of a claim of equitable subrogation "rests upon the equitable principle that one who, *in order to protect a security held by him, is compelled to pay a debt for which another is primarily liable*, is entitled to be substituted in the place of and to be vested with the rights of the person to whom such payment is made, without agreement to that effect." *French v Grand Beach Co*, 239 Mich 575, 580; 215 NW 13 (1927) (emphasis added). In other words, equitable subrogation is available only to those who are compelled to pay a debt, not to mere volunteers. *Id*. at 580-581. "To avoid being a volunteer, a subrogee must be acting to fulfill a legal or equitable duty." *Eller*, 261 Mich App at 574. Accordingly, an insurer who pays expenses *on behalf of its insured* is not a mere volunteer. *Id*. "The rationale is that an insurance company that pays a claim that another insurer may be liable for is protecting its own interests and not acting as a volunteer . . . ." *Id*. (quotation marks and citation omitted).

Plaintiff, somewhat understandably, argues that it could not possibly be deemed a mere volunteer. Plaintiff paid nearly $600,000 in benefits, which plaintiff explains was done out of

---

brought against defendants, not whether any such suit would be meritorious. Whether defendants can be sued under MCL 500.3174 is not relevant if there is no possible claim to bring against them in the first place. Thus, MCL 500.3174 is ultimately not relevant, and there is no need for this Court to address the question of who, exactly, may be sued under that statute.

[5] Because defendants were not a party to the rescission action and had no opportunity to defend in that suit, we have doubts whether it would be proper to hold defendants to such a state of affairs. The propriety of doing so, however, does not affect the outcome of this case, so we assume that it was proper for purposes of this opinion.

fear that if it did not, it might become liable for interest and attorney fees down the road. See MCL 500.3142; MCL 500.3148. Plaintiff contends that, on these facts, it was not a mere volunteer because it believed that it was obligated to pay benefits under the policy.

This argument fails, however, because it is predicated on the very state of affairs that plaintiff seeks to disavow in pursuing its equitable subrogation claim. Plaintiff's claim for equitable subrogation is dependent on the view that *the insurance policy never existed*. But if the claim for equitable subrogation proceeds under the premise that the policy never existed, then plaintiff had no obligation to pay PIP benefits on Roshaun's behalf. Without a policy, plaintiff would have paid benefits not to its insured, but to an individual with whom it had no relationship. Without any legal or equitable duty to pay PIP benefits, plaintiff is a mere volunteer—one who accidentally paid nearly $600,000 in PIP benefits. See *Eller*, 261 Mich App at 574. As a mere volunteer, plaintiff cannot seek equitable subrogation.

In the end, there are two ways to look at the problem. Either the equitable subrogation claim must be analyzed under the circumstances that existed when benefits were paid, which was before the policy was rescinded, or it must be looked at through the lens that the policy never existed in the first place. If the policy exists, plaintiff's claim of equitable subrogation fails as a matter of law because Roshaun could not have pursued benefits from defendants under MCL 500.3172(1). If the policy never existed, then plaintiff was a mere volunteer when it paid $571,000 in PIP benefits. In either case, plaintiff's equitable subrogation claim fails as a matter of law.

Affirmed.

/s/ Patrick M. Meter
/s/ Colleen A. O'Brien
/s/ Brock A. Swartzle