NO. COA10-1282
NORTH CAROLINA COURT OF APPEALS

Filed: 16 August 2011

GROUP HEALTH PLAN FOR EMPLOYEES OF BARNHILL CONTRACTING COMPANY,
Plaintiff-Appellant,

v.

Edgecombe County
No. 09 CVD 559

INTEGON NATIONAL INSURANCE COMPANY,
Defendant/Third-Party
Plaintiff-Appellee,

v.

G. WAYNE HARDEE and CHARLES HARDEE,
Third-Party Defendants.

Appeal by Plaintiff from judgment entered 4 August 2010 by Judge Anthony W. Brown in District Court, Edgecombe County.

Heard in the Court of Appeals 26 April 2011.

*Harris & Hilton, P.A., by Nelson G. Harris, for Plaintiff-Appellant.*

*Battle, Winslow, Scott & Wiley, P.A., by M. Greg Crumpler, for Defendant/Third-Party Plaintiff-Appellee.*

*No brief for Third-Party Defendants.*

McGEE, Judge.

Group Health Plan for Employees of Barnhill Contracting Company (Plaintiff) filed a complaint against Integon National Insurance Company (Integon Insurance) on 6 May 2009. Plaintiff brought its action in conversion and alleged in its complaint that Integon Insurance wrongfully paid settlement proceeds to William Evans, III and Margaret Evans (the Evans children), who are dependents of William Evans, Plaintiff's insured. Plaintiff alleged in its complaint that it had a subrogation lien on the settlement proceeds that Integon Insurance paid to the Evans children as a result of the settlement of claims arising from an automobile collision between the Evans children and Integon Insurance's insured, Larry Tedrow (Mr. Tedrow). Plaintiff also alleged that Integon Insurance was aware of Plaintiff's subrogation lien when it paid the settlement proceeds to the Evans children.

Integon Insurance filed an answer dated 20 August 2009, arguing, *inter alia*, that Plaintiff was governed by the Employee Retirement Income Security Act (ERISA) and therefore Plaintiff's state law claim was preempted by the provisions of ERISA. Integon Insurance then filed a third-party complaint against Third-Party Defendants G. Wayne Hardee and Charles Hardee, attorneys for the Evans children. In its third-party complaint, Integon Insurance alleged an indemnity claim against Third-Party

Defendants. All parties filed motions for summary judgment. In a judgment entered 4 August 2010, the trial court granted summary judgment in favor of Integon Insurance as to Plaintiff's complaint, and in favor of Third-Party Defendants as to Integon Insurance's third-party complaint. Plaintiff appeals the trial court's 4 August 2010 judgment.

The facts of this case are undisputed. William Evans, the Evans children, and Mr. Tedrow were involved in a motor vehicle collision on or about 24 March 2006. Plaintiff, as insurer for the Evans children, paid medical expenses in the amount of approximately $2,503.00 for William Evans, III and $6,039.36 for Margaret Evans. Plaintiff, by letters to Integon Insurance dated 31 July 2006 and 10 August 2006, provided notice of the subrogation claims it asserted as to any recovery awarded to the Evans children. In November 2006, the Evans children retained Third-Party Defendants to represent them in pursuing their personal injury claims against Mr. Tedrow. The Evans children executed releases of all their claims against Mr. Tedrow on 29 June 2007 and 17 October 2008. Integon Insurance paid the settlement proceeds to Third-Party Defendants, who, in turn, disbursed funds from their trust account to William Evans, III on or about 10 July 2007, and to Margaret Evans on or about 17 October 2008. No settlement proceeds were paid to Plaintiff.

In its complaint, Plaintiff alleged the following:

> 9. On or about March 24, 2006, William Evans III and Margaret Evans were injured in an automobile accident that was the result of the negligence of Larry Tedrow, a third party. As a direct and proximate result of that accident, William[] Evans III and Margaret Evans were injured and incurred medical expenses, with respect to which Plaintiff expended the sum of $2,503.00 for treatment of the injuries of William Evans III, and the sum of $6,039.36 for treatment of the injuries of Margaret Evans.
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> . . . .
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> 14. Defendant had actual notice and was aware of Plaintiff's subrogation claims, with respect to potential recoveries by William Evans, III and Margaret Evans, against Larry Tedrow.
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> 15. On some date after it had notice of Plaintiff's claims, Defendant settled William Evans, III's claims against Larry Tedrow. At the time of settlement of William Evans, III's claims against Larry Tedrow, an identifiable *res* (namely the agreed settlement proceeds) was created to which contractual, equitable and other liens could attach, which *res* was in Defendant's possession.
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> 16. On information and belief, shortly after execution of documents settling William Evans, III's claims, Defendant paid the proceeds of that settlement to William Evans, III. Despite actual knowledge of Plaintiff's claims, Defendant did not make any payment to Plaintiff with respect to those claims.
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> 17. On some date after it had notice of Plaintiff's claims, Defendant settled Margaret Evans' claims against Larry Tedrow.

At the time of settlement of Margaret Evans' claims against Larry Tedrow, an identifiable *res* (namely the agreed settlement proceeds) was created to which contractual, equitable and other liens could attach, which *res* was in Defendant's possession.

18. On information and belief, shortly after execution of documents, settling Margaret Evans' claims, Defendant paid the proceeds of that settlement to Margaret Evans. Despite actual knowledge of Plaintiff's claims, Defendant did not make any payment to Plaintiff with respect to those claims.

19. On the date that William Evans, III settled his claims against Larry Tedrow, an identifiable *res* was created with respect to which Plaintiff had an equitable subrogation lien, up to the amount that it paid for medical treatment of William Evans, III's injuries.

20. On the date that Margaret Evans settled her claims against Larry Tedrow, an identifiable *res* was created with respect to which Plaintiff had an equitable subrogation lien, up to the amount that it paid for medical treatment of Margaret Evans' injuries.

21. By operation of law, and by operation of the terms of its contract with William Evans, Plaintiff was, at the time of the settlement with William Evans III and Margaret Evans, the true owner of a chose in action and subrogation claims against Larry Tedrow, for the amount of money it had paid for medical expenses for William Evans III and Margaret Evans, and, at the time of settlement, had an immediate possessory interest and equitable subrogation lien on the funds reserved by Defendant for payment of the damages related to the accident.

22. Defendant was aware of the possessory

> interest and equitable subrogation liens of Plaintiff and interfered with and frustrated that interest, without the consent of Plaintiff, thereby depriving Plaintiff of its property without lawful justification.
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> 23. Defendant's delivery to William Evans III and Margaret Evans, of the funds on which Plaintiff had an equitable subrogation interest, in return for releases from those individuals, constitutes a conversion up to the amounts it paid for medical treatment of William Evans, III and Margaret Evans' injuries.
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> 24. Plaintiff claims as presently due and owing of Defendant, as damages resulting from the described conversion, an amount, less than $10,000.00, to be shown by proof at trial, with interest thereon at the legal rate until paid in full, plus the costs of this action.
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> 25. Plaintiff is otherwise entitled to recover from Defendant, as a result of its payment to William Evans, III and Margaret Evans of the money on which it had an equitable subrogation lien, an amount, less than $10,000.00, to be shown by proof at trial, with interest thereon at the legal rate until paid in full, plus the costs of this action.
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> 26. Plaintiff claims as presently due and owing of Defendant, as compensation for damages suffered by Plaintiff, an amount, less than $10,000.00, to be shown by proof at trial, with interest thereon at the legal rate until paid in full, plus the costs of this action.

Plaintiff argues the trial court erred in granting summary judgment in favor of Integon Insurance, and instead should have granted Plaintiff's motion for summary judgment. Among the

arguments before the trial court was a contention by Integon Insurance that Plaintiff's claims were governed by the provisions of ERISA and therefore were preempted by federal law. We note that the trial court's judgment granting summary judgment to Integon Insurance does not specify the grounds on which summary judgment was based. Plaintiff contends that, though it is an entity governed by ERISA, the provisions of ERISA do not preempt its equity claims based in state law. However, because Plaintiff failed to properly assert any claims based in state law upon which a motion for summary judgment could be granted, we do not reach the question of preemption.

We review a motion for summary judgment *de novo*, to determine "'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.'" *Craig v. New Hanover Cty. Bd. of Educ.*, 363 N.C. 334, 337, 678 S.E.2d 351, 353-54 (2009) (citation omitted). "A complaint states a claim for conversion when it alleges ownership and an unauthorized assumption or conversion." *State ex rel. Pilard v. Berninger*, 154 N.C. App. 45, 52, 571 S.E.2d 836, 841 (2002). In its complaint, Plaintiff alleged an ownership interest in the settlement proceeds by virtue of a

subrogation lien that arose in equity. Plaintiff also alleged that Integon Insurance's payment of the settlement proceeds to the Evans children was an "unauthorized conversion" of those funds.

However, Plaintiff cites no authority supporting its contention that an equitable subrogation lien is an "ownership" interest which would give rise to a claim for conversion, nor have we found such case law. We note that "[c]onversion is '"an unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of their condition or the exclusion of an owner's rights."'" *Wall v. Colvard, Inc.*, 268 N.C. 43, 49, 149 S.E.2d 559, 564 (1966) (citation omitted). Our Court has held in one instance that a plaintiff, "by proving that it possessed a perfected security interest in the collateral and resulting proceeds, . . . satisfied its burden of demonstrating ownership." *Bartlett Milling Co. v. Walnut Grove Auction & Realty Co.*, 192 N.C. App. 74, 86-87, 665 S.E.2d 478, 489 (2008). However, we note that *Bartlett* involved a lien on the proceeds of the sale of collateral secured under provisions of the Uniform Commercial Code. *Id.* We are not persuaded to treat an alleged "equitable subrogation lien" in the same manner as a

perfected security interest pursuant to the Uniform Commercial Code.

Black's Law Dictionary defines "lien" as "[a] legal right or interest that a creditor has in another's property, lasting [usually] until a debt or duty that it secures is satisfied." Black's Law Dictionary (9th ed. 2009). During oral argument, Plaintiff stated that it had no "conventional lien claim" but was proceeding instead on its sole claim based on equitable subrogation. We must therefore determine whether a "claim" for equitable subrogation can create a sufficient "ownership" interest for the purposes of conversion. For the following reasons, we hold that it does not.

Equitable subrogation is a doctrine whereby "an insurance company, pursuant to the terms of its contract of insurance, indemnifies the insured for loss resulting from a wrongful act of a third person, it is by operation of law subrogated to the extent of such payment to the rights of its insured against the tort-feasor." *Smith v. Pate*, 246 N.C. 63, 67, 97 S.E.2d 457, 460 (1957).

> On the same equitable principles, if the insurer has made payments to the insured for the loss covered by the policy and the insured thereafter recovers for such loss from the tortfeasor, the insurer can recover from the insured the amount it had paid the insured, on the theory that otherwise the insured would be unjustly enriched by having

been paid twice for the same loss.

*Moore v. Insurance Co.*, 54 N.C. App. 669, 670-71, 284 S.E.2d 136, 138 (1981). This Court has stated the following concerning the doctrine of equitable subrogation:

> Equitable subrogation is "a device adopted by equity to compel the ultimate discharge of an obligation by him who in good conscience ought to pay it" and "arises when one person has been compelled to pay a debt which ought to have been paid by another and for which the other was primarily liable." "It is sufficient to invoke the doctrine of subrogation if (1) the obligation of another is paid; (2) 'for the purpose of protecting some real or supposed right or interest of his own.'" Even where there is no express subrogation agreement in an insurance contract, equitable subrogation rights may arise by operation of law. Also, equitable subrogation rights have been recognized in the context of recovering payments for medical benefits, as in uninsured motorists automobile insurance policies.

*In re Declaratory Ruling by N.C. Comm'r of Ins.*, 134 N.C. App. 22, 31-32, 517 S.E.2d 134, 141 (1999) (citations omitted). Our Court has also stated that "[a] tort-feasor may not defeat an insurance carrier's subrogation rights when he has knowledge of the subrogated claim and thereafter secures a consent judgment or release from the injured or damaged party." *State Farm Mut. Auto. Ins. Co. v. Blackwelder*, 103 N.C. App. 656, 658, 406 S.E.2d 301, 302 (1991).

Thus, a review of our case law concerning equitable subrogation reveals that it is not a separate cause of action on its own; rather, equitable subrogation is a mechanism whereby an insurer that pays for the claims of its insured becomes subrogated to the rights of the *insured against the tortfeasor* that caused the injuries. *Moore*, 54 N.C. App. at 670-71, 284 S.E.2d at 138. Thus, the insurer has a right to pursue those causes of action which otherwise would have been brought by the *insured* against the tortfeasor. If the tortfeasor entered into a settlement agreement with the insured and also had notice of the insurer's subrogation rights, that settlement is no defense to the insurer's cause of action against the tortfeasor. *State Farm*, 103 N.C. App. at 658, 406 S.E.2d at 302. In other words, by virtue of equitable subrogation, the claims of the insured become those of the insurer, and the insured no longer has the ability to settle on those claims to the extent that the claims do not exceed the amount the insurer has paid on behalf of the insured.

In the present case, Plaintiff's complaint did not state any claims or present any theory of recovery that could originally have been brought by the Evans children. Plaintiff's sole claim was for Integon Insurance's alleged conversion of funds that were paid in settlement of the Evans children's

claims. Plaintiff's claim is its own claim, rather than one which it is entitled to pursue by virtue of being subrogated to the rights of the Evans children. Because Plaintiff did not state any claims to which it might rightfully have been subrogated to the Evans children, we see no method by which the doctrine of equitable subrogation is applicable in the present case. Plaintiff's argument that the trial court's summary judgment in favor of Defendant should be reversed because Plaintiff has a claim for equitable subrogation is without merit.

Plaintiff asserts in its brief that: "Whether on grounds of conversion or otherwise, payment by an insurance company, with knowledge of a subrogation lien, without holding back funds sufficient to pay the lien, entitles the subrogee to recover directly from the insurance company for the amount paid." However, we first note that Plaintiff's complaint alleged a claim on the ground of conversion, and not on any other grounds, and "'the law does not permit parties to swap horses between courts in order to get a better mount[.]'" *State v. Sharpe*, 344 N.C. 190, 194, 473 S.E.2d 3, 5 (1996) (citation omitted). We further note that the case Plaintiff cites in support of this argument, *Smith v. State Farm Mut. Auto. Ins. Co.*, 157 N.C. App. 596, 580 S.E.2d 46 (2003), *rev'd*, 358 N.C. 725, 599 S.E.2d 905

(2004), is inapposite to the present case because it involved the application of N.C. Gen. Stat. §§ 44-49 and 44-50. Those statutes establish a statutory lien whereby the providers of medical care *are* entitled to a lien on settlement proceeds and may pursue an action to recover those funds. *See* N.C. Gen. Stat. § 44-49 (2009) ("From and after March 26, 1935, there is hereby created a lien upon any sums recovered as damages for personal injury in any civil action in this State. This lien is in favor of any person, corporation, State entity, municipal corporation or county to whom the person so recovering, or the person in whose behalf the recovery has been made, may be indebted for any drugs, medical supplies, ambulance services, services rendered by any physician, dentist, nurse, or hospital, or hospital attention or services rendered in connection with the injury in compensation for which the damages have been recovered."). In the present case, Plaintiff neither alleged nor pursued a lien under N.C.G.S. §§ 44-49 and 44-50.

Summary judgment for Integon Insurance was proper as to Plaintiff's claim for conversion because there was no issue of material fact as to whether Plaintiff had an ownership interest in the settlement proceeds disbursed by Integon Insurance. Because equitable subrogation is not a cause of action on its own, and we have found that Plaintiff's complaint did not allege

any claim to which that doctrine would apply, we affirm the trial court's order granting summary judgment in favor of Integon Insurance.

Affirmed.

Judge THIGPEN concurs.

Judge STROUD concurs in the result only.

Report per Rule 30(e).