

STATE OF MICHIGAN
COURT OF APPEALS

HENRIK BERDEL,

Plaintiff-Appellee,

v

PROGRESSIVE MICHIGAN INSURANCE
COMPANY,

Defendant-Appellant.

UNPUBLISHED
October 25, 2011

No. 302954
Sanilac Circuit Court
LC No. 10-33416 CK

Before: FORT HOOD, P.J., and HOEKSTRA and METER, JJ.

PER CURIAM.

Defendant appeals as of right the trial court's opinion and order denying its motion for summary disposition and granting plaintiff's motion for summary disposition. We vacate the trial court's decision because this controversy was not ripe for adjudication.

On October 13, 2009, plaintiff sustained a serious elbow fracture in an automobile accident. Plaintiff was a passenger in a vehicle that collided with another vehicle when the other vehicle turned in front of the vehicle plaintiff was in without warning. At the time of the accident, plaintiff carried a health insurance policy with a German company, Central Krankenversicherung AG ("Central"), and a coordinated or excess no-fault insurance policy with defendant, Progressive Michigan Insurance Company. Following the accident, Central paid about \$75,000 in medical bills and related expenses that were incurred as a result of the accident. Plaintiff filed a separate tort claim against the driver of the other vehicle involved in the accident, seeking noneconomic damages. Central notified plaintiff that it would seek reimbursement for the medical expenses it paid from any recovery plaintiff received from the other driver pursuant to German law. On January 8, 2010, plaintiff filed a complaint alleging that defendant breached the excess medical benefits policy when it refused to make payments that plaintiff alleged were required under the policy. After Central notified plaintiff of its intent to seek reimbursement from any recovery plaintiff obtained from the other driver, plaintiff amended his complaint against defendant to seek reimbursement from defendant in the event that plaintiff had to reimburse Central. Plaintiff and defendant settled all the issues except the issue regarding whether defendant would have to reimburse plaintiff in the event that plaintiff recovered in tort and was required to reimburse Central from that recovery.

The parties filed cross-motions for summary disposition addressing this issue. The trial court granted plaintiff's motion for summary disposition, denied defendant's motion for summary disposition, and entered a declaratory judgment in plaintiff's favor. The trial court concluded that "in the event plaintiff is required to reimburse his health insurance carrier from his tort recovery for any amounts paid . . . [defendant] must reimburse plaintiff the same amount.

Defendant argues that the trial court erred when it granted plaintiff's motion for summary disposition and entered a declaratory judgment because the trial court followed federal law instead of binding Michigan law. Defendant maintains that it should not be required to reimburse plaintiff in the event that plaintiff has to reimburse his medical insurer, Central, from any tort recovery plaintiff may have.

While the parties did not raise the issue of ripeness below or on appeal, we perceive that ripeness is an issue based on the facts and circumstances in this case. It is appropriate for this Court to consider whether the issue is ripe for adjudication sua sponte because ripeness is a justiciability issue that limits a court's authority to exercise its judicial power. *City of Huntington Woods v Detroit*, 279 Mich App 603, 615-616; 761 NW2d 127 (2008).

The doctrine of ripeness focuses on the timing of an action, and is "designed to prevent the adjudication of hypothetical or contingent claims before an actual injury has been sustained." *Id.* (quotation and citation omitted). "A claim is not ripe if it rests upon contingent future events that may not occur as anticipated, or may not occur at all." *Citizens Protecting Mich's Constitution v Secretary of State*, 280 Mich App 273, 282; 761 NW2d 210 (2008). When considering whether we may properly exercise judicial power to decide an issue, "the most critical element" is the "requirement of a genuine case or controversy between the parties, one in which there is a real, not a hypothetical, dispute." *City of Huntington Woods*, 279 Mich App at 615 (quotation and citation omitted). The instant appeal considers the trial court's entry of a declaratory judgment. While declaratory relief permits courts to address issues before actual injuries or losses have developed, a "condition precedent to invoke declaratory relief is the requirement that an actual controversy exist." *AFSCME Council 25 v State Employees Retirement Sys*, __ Mich App __; __ NW2d __ (Docket Nos. 302959, 302960, 302961, 302962, issued August 25, 2011), slip op at 5. Declaratory relief may not be issued based on hypothetical questions. *Id.* slip op at 4.

Here, the trial court decided an indemnification claim that was not ripe because it rested on two contingent future events: (1) that plaintiff would recover from the allegedly negligent driver in tort, and (2) that plaintiff would be required to reimburse the primary insurer out of his tort recovery. There is no indication in the record that plaintiff has or will recover in tort, or that the primary insurer has or will recover any money obtained by plaintiff as a result of the tort lawsuit. Thus, the claim rests upon two contingent future events that are also contingent upon each other, i.e. plaintiff's primary insurer will not attempt to obtain reimbursement if plaintiff does not recover in tort. Declaratory relief was not appropriate because there is no actual controversy, the entire claim is premised on the idea that defendant hypothetically might have to reimburse plaintiff if a future contingent event occurs. Because the only issue addressed by the trial court was contingent on future events that may not occur as anticipated or at all, the issue was not ripe for adjudication and the trial court should not have granted declaratory relief.

Because we conclude that the issue is not ripe for adjudication, we need not reach the question of whether the trial court properly determined defendant would be required to reimburse plaintiff in the event that plaintiff is required to reimburse Central.

Vacated and remanded for dismissal without prejudice.

/s/ Karen M. Fort Hood

/s/ Joel P. Hoekstra

/s/ Patrick M. Meter