STATE OF MICHIGAN

COURT OF APPEALS

CITIZENS INSURANCE COMPANY OF AMERICA,

Plaintiff-Appellant,

v

SARAH MUNTEAN,

Defendant-Appellee.

UNPUBLISHED
July 24, 2014

No. 315770
Wayne Circuit Court
LC No. 11-006911-CK

Before: MARKEY, P.J., and OWENS and FORT HOOD, JJ.

PER CURIAM.

In this automobile no-fault action, plaintiff, Citizens Insurance Company of America, seeks to determine whether it must reimburse defendant, Sarah Muntean, for medical expenses that were initially paid by her employee health plan provider, Oakwood Healthcare, Inc. Medical Plan,[1] but that she now has to repay according to Oakwood's subrogation rights. Plaintiff appeals as of right the trial court's order denying its motion for summary disposition pursuant to MCR 2.116(C)(10), and entering judgment for defendant. We reverse.

Defendant sustained injuries in an automobile accident that occurred on September 18, 2009. At the time of the accident, she was insured under a no-fault automobile insurance policy issued by plaintiff, which provided coordinated benefits pursuant to MCL 500.3109a.[2] The coordinated-benefits provision stated:

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[1] The Oakwood plan is a welfare benefit plan established under the Employee Retirement Income Security Act (ERISA), 29 USC 1001.

[2] MCL 500.3109a provides:

An insurer providing personal protection insurance benefits under this chapter may offer, at appropriately reduced premium rates, deductibles and exclusions reasonably related to other health and accident coverage on the insured. Any deductibles and exclusions offered under this section are subject to prior approval by the commissioner and shall apply only to benefits

B. We do not provide Personal Injury Protection Coverage for:

1. Medical expenses for you or any "family member":

a. To the extent that similar benefits are paid, payable, or required to be paid, under any individual, blanket or group accident or disability insurance, service, benefit, reimbursement or salary continuance plan (excluding Medicare benefits provided by the federal government); and

b. To the extent similar benefits are available to you or any "family member" and for the reason those benefits are foregone, waived, ignored, underutilized or otherwise not accessed; and

c. If Excess Benefits for medical expense is indicated in the Declarations.

If you elect Excess Coverage for medical expenses, any amount payable shall be subject to a $300 deductible. However, any amount payable as medical expenses by any source, other than under the policy, shall be credited toward satisfying this deductible requirement.

Defendant also had medical insurance through her employer under the Oakwood plan, which paid $31,387.72 of defendant's primary medical expenses incurred as a result of her injuries. Plaintiff paid the excess coverage, pursuant to the above provision.

Defendant filed a claim against the at-fault driver for noneconomic damages, and received a settlement. The Oakwood plan contains a provision that allows for reimbursement from defendant if she receives noneconomic damages. Accordingly, the plan asserted a subrogation lien against defendant. As a result, defendant requested that plaintiff honor the lien, claiming that plaintiff is obligated to indemnify defendant against the plan's claim. Plaintiff sought declaratory relief, asking the trial court to find that it is not obligated to indemnify defendant against a subrogation claim asserted by the plan pursuant to *Dunn v DAIIE*, 254 Mich App 256; 657 NW2d 153 (2002). Defendant, however, argued that *Dunn* was wrongly decided and ignored already established precedent of the Michigan Supreme Court in *Sibley v DAIIE*, 431 Mich 164; 427 NW2d 528 (1988). The trial court determined that the distinction between the setoff issue discussed in *Sibley* and the coordination-of-benefits issue discussed in *Dunn*, was "without a difference in terms of the public policy involved," and denied plaintiff's motion, finding that *Sibley* was applicable in this case.

We review de novo a trial court's decision on a motion for summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). "A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Id.* at 119. In reviewing the motion, this Court considers "the pleadings, admissions, and other evidence submitted by the parties in a light most favorable to the nonmoving party." *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). Summary disposition is properly granted "if there is no genuine issue of material

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payable to the person named in the policy, the spouse of the insured, and any relative of either domiciled in the same household.

fact and the moving party is entitled to judgment as a matter of law." *Id.* A genuine issue of material fact exists "when reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party." *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008). Additionally, the interpretation of an insurance contract is a question of law that we review de novo. *Citizens Inc Co v Secura Inc*, 279 Mich App 69, 72; 755 NW2d 563 (2008).

We conclude that the trial court erred by applying *Sibley* to this case. *Sibley* addressed whether benefits recouped by the federal government were still considered "benefits provided" under federal law for purposes of MCL 500.3109(1). The issue here addresses whether benefits recouped by a private health plan were still considered "benefits paid" pursuant to the language of a coordination-of-benefits provision in a no-fault policy that is provided for under MCL 500.3109a. Because *Dunn* directly decided this issue, it applies to this case.

Contrary to defendant's argument, *Dunn* has not been modified or overruled, and thus remains the law in Michigan. The federal cases cited by defendant, *Shields v Gov't Employees Hosp Ass'n Inc*, 450 F3d 643 (CA 6, 2006), overruled on other grounds *Adkins v Wolever*, 554 F3d 650 (CA 6, 2008), and *Glover v Nationwide Mut Fire Ins Co*, 676 F Supp 2d 602 (WD Mich, 2009), which determined that *Dunn* is not good law, are not binding on this Court. See MCR 7.215(J)(1) ("A panel of the Court of Appeals must follow the rule of law established by a prior published decision of the Court of Appeals issued on or after November 1, 1990, that has not been reversed or modified by the Supreme Court, or by a special panel of the Court of Appeals as provided in this rule.").

Further, *Dunn* does not conflict with *Sibley*, as defendant argues. The Court in *Dunn* adopted Judge MARKMAN's dissent in *Yerkovich v AAA*, 231 Mich App 54; 585 NW2d 318 (1998), finding that the *Sibley* rationale is not applicable in the context of coordinated coverage because the insurer cannot be liable for a risk it did not assume. *Dunn*, 254 Mich App at 268-271, quoting *Yerkovich*, 231 Mich App at 68-75 (MARKMAN, J., dissenting). *Dunn* noted that in *Sibley*, the insured did not arrange a lower premium in exchange for workers' compensation benefits. *Dunn*, 254 Mich App at 270. As in *Dunn* and the present case, however, when an insured elects coordinated coverage it pays a reduced premium in exchange, thereby pocketing savings. *Id.* The coordinated coverage only provides for excess medical coverage and is secondary to the insured's medical insurance. *Id.* at 270-271. By requiring the insurer to reimburse the insured for medical expenses that the insured had to repay according to the health plan's subrogation rights, it is as though the insured never elected coordination at all. Thus, the insurer would be paying no-fault benefits that it never charged or received a premium for. This is a risk the insurer did not assume. See *id.* at 271; see also *Yerkovich*, 231 Mich App at 74 (MARKMAN, J., dissenting) (stating that simply because plaintiff is covered by a health plan that has a subrogation clause allowing it to seek reimbursement against a tort recovery for the same injury, "[t]here is no reason why this must absolve plaintiff of the consequences of her election of coordinated benefits for a reduced premium or why the insurer must pay no-fault benefits as though plaintiff had not elected coordination.").

Applying *Dunn* to this case, we conclude that the trial court erred by entering judgment for defendant because defendant chose to receive only excess benefits from plaintiff by electing

coordinated coverage, and thus cannot hold plaintiff liable for a risk it did not assume. *Dunn*, 254 Mich App at 271-272.

Reversed.

/s/ Jane E. Markey
/s/ Donald S. Owens
/s/ Karen M. Fort Hood