

STATE OF MICHIGAN
COURT OF APPEALS

ALLSTATE INSURANCE COMPANY,

Plaintiff-Appellee,

v

BLUE CARE NETWORK-GREAT LAKES,
a/k/a BCN, GREAT LAKES,

Defendant/Third-Party Plaintiff-
Appellant,

v.

AMERICAN STATES INSURANCE COMPANY
and the ESTATE OF SUSAN O'NEAL,

Third-Party Defendants-Appellees.

Before: Doctoroff, C.J., and Wahls and Smolenski, JJ.

PER CURIAM.

Defendant and third-party plaintiff Blue Care Network-Great Lakes (BCN), a health maintenance organization, appeals as of right three orders granting summary disposition pursuant to MCR 2.116(C)(10)¹ to plaintiff Allstate Insurance Company, to third-party defendant Estate of Susan O'Neal (the estate), and to third-party defendant American States Insurance Company, respectively. We affirm.

This case concerns which party is liable to pay the medical expenses of Susan O'Neal (the decedent), a Michigan resident who was killed in Ohio in March, 1992, when the automobile in which she was a passenger collided with another vehicle. In Michigan, the decedent had health care coverage as a member of BCN. As relevant to the issues between BCN and Allstate, BCN's plan provided, in relevant part, that "[b]enefits under this Certificate exclude services and treatment for any automobile

related injury to the extent that benefits are paid or payable under any automobile or no-fault automobile policy” The decedent was also insured in Michigan under a policy of no-fault insurance issued by Allstate in which she had elected to coordinate pursuant to § 3109a of the no-fault act, MCL 500.3109a; MSA 24.13109(1), the payment of no-fault personal protection insurance benefits with other benefits that were “paid, payable or required to be provided to or on behalf of the named insured” under “other health and accident coverage.”

In Michigan, the decedent’s husband, Douglas O’Neal, was appointed the personal representative of the decedent’s estate. The decedent’s husband hired an Ohio attorney to pursue a wrongful death action under Ohio law against the driver of the other vehicle and that driver’s estate (the driver of the other vehicle was also killed in the collision). In October, 1992, the Kent County Probate Court entered an order granting “[t]he Petition of the personal representative, Douglas M. O’Neal for approval of the wrongful death settlement in the amount of \$50,000” Subsequently, the decedent’s husband, in his capacity as an individual, as the decedent’s surviving spouse and as the estate’s personal representative, signed a document (the release) discharging the other driver, the other driver’s estate and the other driver’s insurer, American, from liability in exchange for \$50,000 (the per person limit of American’s policy that covered the other driver). The release specifically provided that the \$50,000 was only for the decedent’s wrongful death and constituted recovery for the mental anguish of the decedent’s husband.

BCN refused to pay medical expenses incurred by the decedent before her death. Allstate ultimately paid these expenses. Allstate then brought a complaint against BCN for reimbursement. BCN brought a third-party complaint against the estate and American, claiming that if it was required to reimburse Allstate, then it was entitled to reimbursement from the estate and American pursuant to the contractual subrogation clause and other language in its plan.

Allstate, the estate and American thereafter moved for summary disposition. In particular, the estate and American argued that BCN was not entitled to reimbursement out of the proceeds received pursuant to the release because the release was obtained on a claim premised on the Ohio wrongful death statute and medical expenses were not recoverable as a matter of law in a wrongful death action in Ohio. Specifically, the estate noted that Ohio Rev Code 2125.02² (the Ohio wrongful death statute) provided that an action for wrongful death shall be brought in the name of the personal representative of the decedent for the exclusive benefit of, among others, the surviving spouse. The Ohio wrongful death statute further provided that the compensatory damages awarded in an action for wrongful death may include damages for the loss of the decedent’s support, services and society, the decedent’s heirs’ prospective loss of inheritance, the mental anguish incurred by, among others, the surviving spouse, and funeral and burial expenses. The estate and American also contended that BCN had no right of reimbursement because no medical expenses had, in fact, been recovered where the release was intended to specifically limit the recovery to mental anguish.

BCN responded that Ohio Rev Code 2317.45³ provided for an adjustment for “collateral benefits” in “tort actions” (the Ohio collateral benefits statute) This statute defined “tort action” to mean a civil action for damages for death to a person. This statute also defined “collateral benefits” to include

benefits from a health insurance program that a decedent or other beneficiary in a wrongful death action has received as a result of death. This statute provided that a plaintiff entitled to an award of compensatory damages in a “tort action” must disclose all relevant collateral benefits, and that the trial court must subtract these collateral benefits from the plaintiff’s damages before the entry of a judgment. BCN contended that even assuming that the estate’s argument that medical expenses were not recoverable in an Ohio wrongful death action was correct, that, as evidenced by the Ohio collateral benefits statute, the estate could have filed a “tort action” to recover the decedent’s medical expenses. BCN further contended that the estate’s attempt to preclude it from exercising its contractual right of subrogation was in direct violation of the plan’s requirements that a member not prejudice or compromise this contractual right.⁴

Following oral argument, the trial court granted Allstate’s motion on the ground that Michigan law, not Ohio law as contended by BCN, controlled the relevant issues between Allstate and BCN, and that under Michigan law BCN was primarily liable for the decedent’s medical expenses. The trial court granted summary disposition in favor of the estate and American on the ground that medical expenses were not recoverable under the Ohio wrongful death statute.

BCN first argues that the trial court erred in granting summary disposition in favor of Allstate. Specifically, BCN argues that Allstate only has a right of reimbursement or indemnification against the estate and American pursuant to § 3116 of the no fault act, MCL 500.3116; MSA 24.13116, but that Allstate is precluded from asserting these rights by the alleged collusion between the estate and American in executing a release specifying that recovery was for noneconomic harm. We agree with BCN’s argument to the extent that it appears that Allstate would have no claim for reimbursement or indemnity against the estate or American because the release did not provide for the payment of previously paid medical expenses, but, rather, was specifically for noneconomic harm. See MCL 500.3116; MSA 24.13116; see also *Great Lakes American Life Ins Co v Citizens Ins Co*, 191 Mich App 589, 596; 479 NW2d 20 (1991).

However, as properly found by the trial court, BCN was primarily liable for the decedent’s medical expenses. See *Tousignant v Allstate Ins Co*, 444 Mich 301; 506 NW2d 844 (1993); *Federal Kemper Ins Co, Inc v Health Ins Administration, Inc*, 424 Mich 537; 383 NW2d 590 (1986), overruled in part *Auto Club Ins Ass’n v Frederick & Herrud, Inc (After Remand)*, 443 Mich 358; 505 NW2d 820 (1993);⁵ *Transamerica Ins Co of America v IBA Health & Life Assurance Co*, 190 Mich App 190; 475 NW2d 431 (1991); *Auto-Owners Ins Co v Lacks Industries*, 156 Mich App 837; 402 NW2d 102 (1986). However, Allstate, not BCN, paid the decedent’s medical expenses. Section 3111 of the no fault act, MCL 500.3111; MSA 24.13111, provides that personal protection insurance benefits are payable for accidental bodily injury suffered in an accident occurring out of this state but within the United States or Canada if, at the time of the accident, the injured person was a named insured, the insured’s spouse or a relative of either domiciled in the same household.⁶ See *Rohlman v Hawkeye Ins Co*, 442 Mich 520, 527, n 6; 502 NW2d 310 (1993); *Williams v State Farm Mutual Automobile Ins Co*, 202 Mich App 491, 493; 509 NW2d 821 (1993). Because Allstate paid the medical expenses of its insured, Allstate could maintain a common-law action as subrogee of the estate to recover the benefits due the estate under BCN’s plan. *Auto Club Ins Ass’n v*

New York Life Ins Ass'n, 440 Mich 126, 140; 485 NW2d 695 (1992). We are not persuaded by BCN's arguments that Ohio law, instead of the above-cited Michigan law, applies to the action between Allstate and BCN. Therefore, we conclude that the trial court did not err in granting summary disposition in favor of Allstate. *Quinto v Cross & Peters Co*, 451 Mich 358, 362-363; 547 NW2d 314 (1996).

Next, BCN argues that the trial court erred in granting summary disposition in favor of the estate and American. However, BCN's arguments in this regard are primarily directed at the estate. We note that BCN acknowledges that it is precluded from seeking reimbursement from the estate under the subrogation clause in its plan because the release was specifically limited to a recovery for mental anguish.⁷ Rather, BCN claims that the estate did not make a good faith effort to pursue recovery of the decedent's medical expenses and prejudiced BCN's subrogation rights by limiting the release to mental anguish. BCN claims that this conduct was contrary to the plan's subrogation clause⁸ and thus gave rise to material issues of fact concerning BCN's breach of contract claim. BCN argues that the trial court thus erred in granting summary disposition without considering or responding to BCN's breach of contract claim.⁹

However, at oral argument in this case, counsel for BCN specifically stated that BCN had a breach of contract claim against the estate "because of their conduct in this case in cutting us out of the settlement process." When asked by the court to respond to Ohio case law indicating that medical expenses are not recoverable in an Ohio wrongful death action, counsel for BCN stated that the particular case relied on by the estate and American had been decided before the relevant statute was enacted and was, therefore, not applicable. The trial court granted the estate's and American's motion for summary disposition on the ground that medical expenses are not recoverable in an Ohio wrongful death action. We believe that this express conclusion by the trial court constituted an implicit finding that if a recovery of medical expenses was not possible then the estate did not therefore fail to make a good faith effort to pursue recovery from the liable party or that the estate compromised or prejudiced BCN's subrogation rights contrary to BCN's subrogation clause.¹⁰ Thus, the trial court did consider and respond to BCN's claim of breach of contract against the estate.

BCN argues that under the Ohio collateral benefits statute, medical expenses are recoverable in an Ohio wrongful death action and that the trial court therefore erred in granting summary disposition without considering this statute and the effect it had on BCN's breach of contract claim. However, as noted by the estate, the Ohio collateral benefits statute was declared unconstitutional as to wrongful death actions by the Ohio Court of Common Pleas in 1991. See *Samuels v Coil Bar Corp*, 61 Ohio Misc 2d 407; 579 NE2d 558 (1991); see also *Sorrell v Thevenir*, 69 Ohio 3d 415; 633 NE2d 504 (1994) (declaring the Ohio collateral benefits statute unconstitutional "in toto"). Thus, we find no error.

BCN argues that the trial court erred in relying on the affidavit of an Ohio attorney stating that medical expenses are not recoverable under the Ohio wrongful death statute. BCN contends that it created a material issue of fact concerning the payment of medical expenses under the Ohio collateral benefits statute where it submitted an opposing affidavit indicating that medical expenses could be pursued in Ohio. However, the facts set forth in an affidavit in support of a motion pursuant to MCR

2.116(C)(10) must be facts that would be admissible as evidence to establish or deny the grounds stated in the motion. *SSC Associates Limited Partnership v General Retirement System of the City of Detroit*, 192 Mich App 360, 364; 480 NW2d 275 (1991). Inadmissible hearsay does not satisfy this requirement. *Id.* In this case, the facts in BCN's affidavit constitute hearsay. Hearsay is generally inadmissible. MRE 802. BCN has proffered no exception under which the hearsay contained in the affidavit would be admissible. Thus, we find no error.

We conclude that the trial court did not commit an error of law in concluding that medical expenses are not recoverable in an Ohio wrongful death action. See Ohio Rev Code 2125.02; see also *Barcus v Union Hosp Ass'n*, 14 Ohio Misc 168; 236 NE2d 232 (1965). Except for its citation to the Ohio collateral benefits statute, BCN has failed to cite any authority pursuant to which the decedent's medical expenses could have been recovered in Ohio. Where there has been no showing that the decedent's medical expenses could have been recovered in Ohio, we further conclude that the trial court did not err in implicitly finding that no question of material fact existed concerning whether the estate breached the subrogation clause in BCN's health plan. *Quinto, supra*. Accordingly, we hold that the trial court did not err in granting summary disposition in favor of the estate and American. *Id.*

Affirmed.

/s/ Martin M. Doctoroff
/s/ Myron H. Wahls
/s/ Michael R. Smolenski

¹ Allstate moved for summary disposition only on the basis of MCR 2.116(C)(10). Although third-party defendants Estate of Susan O'Neal and American States Insurance Company moved for summary disposition on the basis of MCR 2.116(C)(8) and (10), we find that the basis of the trial court's grant of summary disposition in favor of these parties was MCR 2.116(C)(10) because the trial court considered matters outside the pleadings in ruling on the respective motions. See, generally, MCR 2.116.

² See 1995 Ohio HB 350.

³ See 1995 Ohio HB 350.

⁴ The plan provided, in relevant part, as follows:

3.04 SUBROGATION

A. Subrogation means that Health Plan will have the same right as a Member to recover expenses for treatment of an injury or illness for which another person or organization is legally liable, to the extent Health Plan provides services in such situations. Health Plan will be subrogated to the Member's right recovery against the responsible person or organization.

B. The Member agrees, by acceptance of an identification card from Health Plan that, as a condition to receiving benefits and services under this Certificate, the Member will make a good faith effort to pursue recovery from the liable party, and upon collection of any recoveries from any benefits and services provided by Health Plan will reimburse Health Plan. Health Plan shall have a lien for any benefits and services rendered on any such recoveries whether by judgment, settlement, compromise, or reimbursement.

* * *

E. The Member shall not compromise or settle a claim or take any action which would prejudice the rights and interests of Health Plan without Health Plan's prior written consent.

⁵ *Auto Club* overruled *Federal Kemper* to the extent that the relevant health plan is subject to the Employee Retirement Insurance Security Act (ERISA), 29 USC 1001 *et seq.* In this case, BCN's plan was not an ERISA plan.

⁶ Allstate has not specifically alleged or established that the decedent was a "named" insured or a spouse of a named insured under the policy of no-fault insurance. However, Allstate has maintained throughout this litigation that the decedent was insured under its no-fault policy, and that the decedent had opted to coordinate benefits under the no-fault policy. When asked by the trial court at oral argument below why MCL 500.3111; MSA 24.13111 did not apply to this case, BCN did not argue, nor does it argue on appeal, that the decedent did not come within the terms of this statute, but rather argued that the statute was simply inapplicable because the law of the state where the accident occurred controlled this case. Thus, we conclude that no issue of material fact has been raised concerning whether the decedent comes within the terms of this statute.

⁷ BCN's subrogation clause appears to give BCN a right to reimbursement only if a member obtains a recovery that represents medical expenses. Moreover, see *Kitchen v State Farm Ins Co*, 202 Mich App 55, 60; 507 NW2d 781 (1993); *Great Lakes, supra*.

⁸ See note 4, *supra*.

⁹ Although we address the issue raised by BCN, we note that BCN has cited no legal authority for its position that it could pursue a breach of contract claim against the estate of a deceased member because the deceased member's husband entered into a settlement with a tortfeasor that is limited to a recovery for noneconomic harm.

¹⁰ See note 4, *supra*.