

STATE OF MICHIGAN
COURT OF APPEALS

VHS OF MICHIGAN, INC., doing business as
DETROIT MEDICAL CENTER,

Plaintiff-Appellant,

v

FARM BUREAU MUTUAL INSURANCE
COMPANY OF MICHIGAN,

Defendant-Appellee.

UNPUBLISHED
November 27, 2018

No. 341176
Wayne Circuit Court
LC No. 17-005149-NF

Before: O'BRIEN, P.J., and TUKEL and LETICA, JJ.

PER CURIAM.

Plaintiff appeals as of right an order granting defendant's motion for summary disposition, arguing that the trial court erred because plaintiff obtained valid and enforceable assignments from its patient, Tiana Bailey. Plaintiff also argues that the trial court erred by failing to address plaintiff's request for leave to file an amended complaint because the requested amendment did not introduce new substantive information and would have only clarified "the basis of its standing due to a recent and unexpected change in the law that occurred during the course of litigation." We affirm.

Defendant moved for summary disposition pursuant to MCR 2.116(C)(8) and (10). In ruling on the motion, the trial court considered material outside the pleadings, which is improper when considering a motion under MCR 2.116(C)(8). *Jawad A Shah, MD, PC v State Farm Mut Auto Ins Co*, __ Mich App __, __; __ NW2d __ (2018) (Docket No. 340370); slip op at 11-12. The forms upon which plaintiff relied to argue that it had obtained valid and enforceable assignments were attached to its emergency supplemental response to defendant's motion for summary disposition, but were not attached or referred to in a pleading. Accordingly, "this Court must treat the trial court's decision with respect to Subrule (C)(8) as though it were made only pursuant to Subrule (C)(10)." *Van Buren Charter Twp v Visteon Corp*, 319 Mich App 538, 544; 904 NW2d 192 (2017).

This Court reviews a trial court's decision on a motion for summary disposition de novo. *Johnson v Recca*, 492 Mich 169, 173; 821 NW2d 520 (2012). A motion for summary disposition under MCR 2.116(C)(10) should be granted if the evidence submitted by the parties fails to establish a genuine issue of a material fact, and the moving party is entitled to judgment

as a matter of law. *Innovation Ventures v Liquid Mfg*, 499 Mich 491, 507; 885 NW2d 861 (2016). A genuine issue of material fact exists if, after viewing the record in a light most favorable to the nonmoving party, reasonable minds could differ on an issue. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). In evaluating a motion under MCR 2.116(C)(10), the trial court considers affidavits, pleadings, depositions, and other evidence that the parties submitted. *Innovation Ventures*, 499 Mich at 507.

Plaintiff argues that the trial court erroneously granted defendant's motion for summary disposition because it obtained valid and enforceable assignments from Bailey and, therefore, had standing to directly sue defendant. We disagree.

Shortly after plaintiff initiated this action, our Supreme Court decided *Covenant Med Ctr, Inc v State Farm Mut Auto Ins Co*, 500 Mich 191, 195-196; 895 NW2d 490 (2017), which held that healthcare providers do not have an independent statutory cause of action against no-fault insurers for the recovery of personal injury protection benefits under the no-fault act, MCL 500.3101 *et seq*. This rule applies retroactively, *Jawad A Shah, MD*, __ Mich App at __; slip op at 6, but does not alter an insured's ability to "assign his or her right to past or presently due benefits to a healthcare provider," *Covenant*, 500 Mich at 217 n 40. Accordingly, a medical provider may have standing to bring a claim against an insurer to recover no-fault benefits by obtaining a valid and enforceable assignment of rights from the injured person. *Id*.

Here, plaintiff did not obtain an assignment from Bailey in response to defendant's motion for summary disposition and instead relied upon four forms that Bailey executed at or around the time she received treatment. Plaintiff contends that these forms constitute valid and enforceable assignments such that it has standing to pursue a direct cause of action against defendant. Michigan case law has not specifically articulated what elements are necessary to create an assignment. *Burkhardt v Bailey*, 260 Mich App 636, 654; 680 NW2d 453 (2004). Generally, "there must be a perfected transaction between the parties which is intended to vest in the assignee a present right in the thing assigned." *Id.*, quoting *Weston v Dowty*, 163 Mich App 238, 242; 414 NW2d 165 (1987). Even a poorly-drafted written instrument can constitute a valid assignment so long as the assignor's intent to presently transfer "the thing" to the assignee is clearly reflected. *Burkhardt*, 260 Mich App at 654-655 (quotation marks omitted), citing *Hovey v Grand Trunk Western R Co*, 135 Mich 147, 149; 97 NW 398 (1903). However, under MCL 500.3143, an assignment of benefits payable in the future is void, but an assignment for past or presently due benefits is not. *Prof Rehab Assoc v State Farm Mut Auto Ins Co*, 228 Mich App 167, 172; 577 NW2d 909 (1998), citing MCL 500.3143 ("Under the plain language of the statute, 'a right to benefits payable in the future' is distinguishable from a right to past due or presently due benefits."). Therefore, the relevant issue here is whether the purported assignments clearly reflect Bailey's present intent to transfer to plaintiff her right to pursue past or presently due personal protection insurance benefits from defendant. See *Burkhardt*, 260 Mich App at 654-655.

Two of the forms relied upon by plaintiff, entitled "OUTPATIENT GENERAL CONSENT FORM," include a provision providing: "I authorize payment of my insurance benefits to be made directly to the doctor. I agree to pay in full any and all charges not covered by insurance or other benefits. I understand that providers may bill separately." The remaining two forms, entitled "DMC GENERAL CONSENT FOR ADMISSION AND TREATMENT,"

include a provision stating, “I assign and authorize payment to be made directly to the hospital and/or providers of all healthcare benefits otherwise payable to me, but not exceeding the charges for this period of hospitalization.” Neither of these provisions constitute a sufficient assignment for the purpose of establishing plaintiff’s standing in this case. These provisions authorize the direct payment of benefits to plaintiff as contemplated by MCL 500.3112, see *Covenant*, 500 Mich at 208-209, but do not clearly manifest Bailey’s intent to assign to plaintiff her right to pursue benefits by way of litigation. See *Burkhardt*, 260 Mich App at 654-655.

Plaintiff also argues that it is has standing because it is an intended third-party beneficiary to a contract between defendant and PPOM, LLC (PPOM), an entity that, according to plaintiff, “contracts with various health care providers, such as [plaintiff], and various insurer[s], including [defendant], to establish contractual reductions of a medical provider’s charged rate in exchange for prompt payment by the insurer.” Plaintiff’s argument is seemingly based on its own contract with PPOM and defendant’s presumed contract with PPOM, but plaintiff fails to present any evidence of the latter’s existence. Thus, plaintiff’s argument has no merit.

Furthermore, because plaintiff has not established its right to maintain its case against defendant under an assignment or third-party beneficiary theory, the trial court did not abuse its discretion by failing to address plaintiff’s request to file an amended complaint, as any such amendment would have been futile. *PT Today, Inc v Comm’r of Office of Fin & Ins Servs*, 270 Mich App 110, 143; 715 NW2d 398 (2006) (stating that failure to specify reason for denying leave to amend requires reversal unless amendment would be futile).

Affirmed.¹

/s/ Colleen A. O'Brien

/s/ Jonathan Tukel

/s/ Anica Letica

¹ To the extent that plaintiff also argues that the trial court erred by dismissing its case based upon a discovery violation—specifically, Bailey’s failure to appear at several independent medical examinations and an examination under oath—plaintiff misconstrues the basis for the trial court’s ruling. While the court referenced Bailey’s lack of cooperation in investigating the claim and implied that recovery would be “difficult” without her participation, it premised dismissal of plaintiff’s complaint on the insufficiency of the purported assignments and plaintiff’s failure to adequately support its third-party beneficiary theory.