

STATE OF MICHIGAN
COURT OF APPEALS

MARY LOU EMERY and ELMER EMERY,

Plaintiffs/Counter-Defendants/Appellees,

v

AUTO CLUB INSURANCE ASSOCIATION,

Defendant-Appellee,

and

DOW CHEMICAL EMPLOYEE'S HEALTH CARE PLAN,

Defendant/Counter-Plaintiff/Third-Party Plaintiff/Appellant

v

JENNIFER PAULTANIS,

Third-Party Defendant/Appellee.

Before: Markey, P.J., and Bandstra and Markman, JJ.

PER CURIAM.

Defendant Dow Chemical Employee's Health Care Plan appeals by right from the trial court's order granting summary disposition pursuant to MCR 2.116(C)(8) in favor of plaintiffs Mary Lou Emery and Elmer Emery, third-party defendant Jennifer Paultanis, and defendant Auto Club Insurance Association (ACIA), plaintiffs' no-fault insurer. We affirm.

Defendant Dow Chemical Employee's Health Plan is a self-funded health care plan organized pursuant to the Employee Retirement Income Security Act, or ERISA, 29 USC 1001 *et seq.* The Dow Plan paid \$10,838.91 in medical benefits to plaintiff Mary Lou Emery after she was injured in a two-car automobile accident. Plaintiffs subsequently initiated a negligence cause of action against third-party

defendant Paultanis, the driver of the other involved vehicle, pursuant to the no-fault act, MCL 500.3101 *et seq.*; MSA 24.13101 *et seq.* When the Dow Plan asserted its right to subrogation under the plan in the event that plaintiffs prevailed in the negligence action against Paultanis, plaintiffs filed the instant declaratory judgment and interpleader action, pursuant to MCR 3.603. The Dow Plan subsequently filed a countercomplaint against plaintiffs and a third-party complaint against Paultanis in the declaratory judgment action.

The Dow Plan contains a subrogation provision in its summary plan description that states as follows:

The Plan has the right of subrogation, which means that, if you or your covered dependents are victims of accidental sickness or injury caused by another party and you submit your medical bills to the Plan for payment, the Plan is authorized to sue or share in the lawsuit with you against the responsible party for recover of benefits paid by the Plan.

If the Plan pays for services and you or your dependents have a right to recover damages from any person or organization, the Plan will have a subrogation interest in the amount of any benefits paid, to the recovery rights of you or dependents.

The Plan's right to recover benefits paid shall take precedence over any right that you or your covered dependents have to recover damages or insurance proceeds from another party for the injury or sickness.

If you or your covered dependents have recovered money for damages or from a settlement, some or all of which is used to pay for medical expenses, and the Plan has not received a portion to offset claims paid or to be paid by the Plan, the Plan reserves the right to deny payment of otherwise payable claims up to the amount you or your covered dependent received from the damages or settlement award.

Upon request of the Plan, you or your dependents must execute and deliver to this Plan an assignment and other instruments that may be required, and do whatever else is necessary to secure such rights for the Plan. [Emphasis added.]

The trial court found that the Dow Plan could not recover pursuant to the Plan's subrogation provision an amount equal to the medical benefits it paid plaintiffs because plaintiffs had no right of recovery for medical damages from the third-party tortfeasor, citing the no-fault act, MCL 500.3135; MSA 24.13135. Specifically, the trial court held:

I've read the federal cases; they're interesting. Mr. Hoehn has struck on the core of how I read those cases.

Fons [v Hotel Employees International Union, 1991 WL 340288 (E.D. Mich, 1991)] is probably as close a fact scenario as we have here, and I certainly take note of those cases and take note of the rationale of decisions in federal court dealing with these

issues, but what I come to is that what I'm being asked to do in this case, now that I have the [Dow] plan in front of me, is to look at that language of that plan and make a judgment on what it says in regard to the rights of subrogation that the company, or the plan—pardon me—is by their agreement designing. What are the rights that are here.

And I don't know how I can do that without doing it in the context of the law that the employee is bound by. The plan is authorized to sue or share in a lawsuit with you against the responsible party. That, to me, is the key here.

What is the lawsuit [?] The lawsuit of the party happens to be under no-fault, a third-party claim for non-economic damages under the No-Fault Act. That is the lawsuit that the plan describes, that is the lawsuit that the plan contemplates. It is the lawsuit with you against the responsible party.

To interpret it otherwise, to me, is to destroy the whole concept of what's trying to be accomplished. If the plan wants to accomplish something else, I'm sure that they can devise language that would do it, but this language doesn't.

I read the plan, it says to me that the only way it can be interpreted is that there's no right of reimbursement unless in fact the responsible—or unless in fact the employee has a right of reimbursement for the specific economic damages, the medical that is being sued for, and they don't in Michigan under these circumstances.

And that's how I see it and that, in a nutshell, is my ruling, and it's in favor of the Plaintiff Emerys and against Dow Chemical. There's no question where—I don't think there is any question on any other issues in this case once I cross that bridge.

I

Although neither the trial court's decision from the bench nor the order granting plaintiffs' motion for summary disposition states which court rule forms the basis for the decision, we believe that the trial court granted summary disposition pursuant to MCR 2.116(C)(10).¹ We review de novo the grant of summary disposition pursuant to MCR 2.116(C)(10) and will affirm where, except with regard to the amount of damages, there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994); *Fitch v State Farm Fire and Casualty Co*, 211 Mich App 468, 470-471; 536 NW2d 273 (1995). We must consider the pleadings, affidavits, depositions, admissions, and any other documentary evidence in favor of the nonmoving party and grant the benefit of any reasonable doubt to the opposing party. *Radtke v Everett*, 442 Mich 368, 374; 501 NW2d 155 (1993). The opposing party may not rest upon mere allegations or denials in the pleadings but must, by affidavit or other documentary evidence, set forth specific facts showing that there is a genuine issue for trial. MCR 2.116(G)(4). The court may not make factual findings or weigh credibility in deciding a motion for summary disposition. *Featherly v Teledyne Industries, Inc*, 194 Mich App 352, 357; 486 NW2d

361 (1992). Thus, this Court examines the facts of this case in a light most favorable to plaintiff. *Radtke, supra*; *Manning v Hazel Park*, 202 Mich App 685, 689-690; 509 NW2d 874 (1993).

Contrary to the Dow Plan's assertions, this is not a situation where we review for an abuse of discretion because the Dow Plan² does not contain the same discretionary language found in cases employing this standard. Cf. *Firestone Tire & Rubber Co v Bruch*, 489 US 101, 115; 109 S Ct 948; 103 L Ed 2d 80 (1989); *Fons, supra*, slip op at 5-7.

II

At the outset, we are mindful that “[t]he rights of the Company [with an ERISA health care plan] are limited by the language in the Plan. *US Healthcare, Inc v O’Brien*, 868 F Supp 607 (SDNY, 1994) (ERISA plan’s subrogation rights are limited by the subrogation provision in the plan).” *Western and Southern Life Ins Co v Wall*, 903 F Supp 1155, 1160 (ED Mich 1995). Courts have further applied to ERISA plans the rule of contra proferentem, which states that ambiguities in a plan should be construed against the fund. *Germany v Operating Engineers Trust Fund of Washington DC*, 789 F Supp 1165, 1169 (DDC, 1992). We are also cognizant that the federal district court cases the parties cite to us are not binding or precedential in this Court, although they are instructive, particularly where they address competing issues presented by the interplay between ERISA plans and the Michigan no-fault act.³ Of all the cases presented to us, we find one federal case that both plaintiffs and defendant cite to be most analogous and persuasive.

In *Wall, supra* at 1157, the plaintiff, a self-funded ERISA plan, filed suit against Wall to recover \$21,053.52 in medical benefits that the plan paid to Wall, who was the plaintiff’s employee, after Wall was injured in a two-car automobile collision. Wall also had no-fault insurance through AAA of Michigan. Wall sued the other vehicle’s driver and recovered \$100,000 in settlement of her personal injury claims. *Id.* Pursuant to its subrogation policy within the plan, the plaintiff filed suit to recover the medical expense benefits it paid to Wall. *Id.*

With respect to a coordination of benefits issue not relevant here,⁴ the *Wall* court first determined that ERISA preempted the application of the Michigan no-fault act to this action because the act “relate[s] to” any employee benefit plan, and both the United States Supreme Court and the Sixth Circuit Court of Appeals have held that ERISA preempts application of state insurance law to a self-funded ERISA plan. *Wall, supra* at 1158, citing 29 USC §1144(a); *FMC Corp v Holliday*, 498 US 52, 58-61; 111 S Ct 403; 112 L Ed 2d 356 (1990); *Lincoln Mutual Casualty Co v Lectron Products, Inc, Employee Health Benefits Plan*, 970 F2d 206, 209-210 (CA 6, 1992). Accordingly, the court found that ERISA preempted the application of the no-fault act to the lawsuit. *Wall, supra.*

The court did not end there its analysis of the subrogation issue, however. Rather, it went on to look at the plan language, particularly its subrogation language, which provided:

Subrogation – In the event of any payment of medical or disability benefits under this Plan, the Employer shall to the extent of such payment, be subrogated to all rights of recovery of the individual receiving such benefits under this Plan against any insurance

carriers or any third party(ies) [sic] *who may be liable for expenses paid under the plan.* Any Covered Person claiming benefits under the Plan shall execute and deliver such instruments as may be required and do whatever else is necessary to secure such rights to the Employer. [*Wall, supra* at 1159-1160; emphasis added.]

The court distinguished the case before it from *Fons, supra*, where the plan language was reviewed under an arbitrary and capricious standard, because the *Fons* plan granted the plan's administrators discretion in interpreting plan terms. The trial court found that plaintiff's plan did not employ similar language.⁵ *Wall, supra*.

More importantly, however, the trial court in *Wall* noted that the plaintiff's plan, unlike the plan in *Fons*, contained limiting language within its subrogation provision:

The subrogation provision in *Fons* did not limit the plan's subrogation to expenses for which the plan was liable. The rights of the Company are limited by the language of the plan. . . . In *Fons*, the ERISA plan stated that it was subrogated to the participant's right "to recover said amounts as damages from another person or insurance carriers." The language in the *Fons* case merely limited the ERISA plan's recovery to the monetary amount it paid to the participant. In the instant case, the Plan limits its subrogation rights to situations where the participant recovers from a third party who "may be liable for expenses under the Plan." The plan does not define the parties who will be considered liable for expenses under the Plan. *Although ERISA preempts state insurance law in this action, the court interprets the clause "who may be liable for expense paid under the Plan" as incorporating the specific portion of state law defining the parties who are liable for expenses paid under the Plan.* If the Plan had simply stated that the employer was subrogated to all rights of recovery against any third party or insurance carrier and not included the limiting language of "who may be liable for expenses paid under the Plan," the court would not have looked to state law because the terms of the Plan would preempt state law. Because the Plan did include the limiting language, the court must look to state law to determine whether [the other driver] was liable for expenses under the plan. *Because [the other driver] was not liable for medical expenses under Michigan law, the Company cannot recover its medical benefits from Wall's \$100,000 with [the other driver's] insurer.* [*Wall, supra* at 1160; emphasis added.]

The court held that the plaintiff's subrogation provision did not entitle the plan to recover the medical expenses it paid on Wall's behalf from the \$100,000 award Wall recovered from the other driver's no-fault insurer. *Wall, supra* at 1160-1161.

Applying *Wall* to the instant case, we note the Dow Plan language suggesting that its subrogation interest only applies "if you or your covered dependents have recovered money for damages or from a settlement, some or all of which is used to pay for medical expenses . . ." [emphasis added] While other portions of the subrogation provision might suggest a broader subrogation right, under the rule of contra proferentem, we conclude that the Dow Plan can only seek recovery from

plaintiffs to the extent that plaintiffs recover damages for medical expenses. Because, under MCL 500.3135; MSA 24.13135, plaintiffs are precluded from pursuing third party defendant Paultanis in a negligence action to recover economic damages, including medical expenses, the Dow Plan has no subrogation right as to the proceeds from that action. Simply put, the limitations on plaintiffs' right to recovery constitute a limitation on Dow Plan's right to subrogation because of the terms of the Dow Plan. The Dow Plan's subrogation clause permits the plan to step into the plaintiffs' shoes, but only as to the recovery of medical expenses. Plaintiffs can only file a third-party recovery action against Paultanis for noneconomic damages, which do not include medical expenses. They have no right to file a first-party action for those expenses, so the Dow Plan's ability to claim subrogation is likewise limited.

This result is consistent with several cases that defendant Dow Plan cites which reiterate that the purpose of ERISA is to maintain the interest of employees in their benefit plans and protect employees' rights, and that subrogation provisions within those plans are meant only to prevent unjust enrichment to an employee. See *Nachwalter v Christie*, 805 F2d 956, 960, 962 (CA 11, 1986); *Germany, supra* at 1171; *Auto Club Ins Ass'n v Frederick & Herrud, Inc (After Remand)*, 443 Mich 358, 373-374; 505 NW2d 820 (1993). The Dow Plan acknowledges that should we permit it to recover the benefits it has paid from any noneconomic damages plaintiffs receive from Paultanis, plaintiffs would end up paying for their own medical expenses despite the fact that they have purchased two insurance policies to cover these costs. This scenario neither protects plaintiffs' rights nor prevents unjust enrichment. It penalizes the insured and permits the Dow Plan to pay nothing in the long run, which makes its benefits illusory. Indeed, if we accept the Dow Plan's position, we would devalue attempts to recover noneconomic damages in these cases and undermine MCL 500.3135; MSA 24.13135. There would be less incentive to seek recovery of noneconomic damages if those damages would have to be used to reimburse the party who paid economic damages according to a benefits contract.

III

The Dow Plan would have this Court spin its wheels through the morass of federal preemption issues when it is unnecessary to do so. The Dow Plan's argument is superficially alluring: because plaintiffs are barred by § 3135 of the no-fault act from recovering economic damages from Paultanis, the Dow Plan argues that ERISA preempts the no fault act, and defendant wins. This analysis goes too far and gives no recognition to *Wall, supra*. As the subrogee, the Dow Plan stands in plaintiffs' shoes. The Dow Plan's subrogation provision makes clear that its right to recovery of benefits is dependent on the plan beneficiary's recovery of benefits from responsible third parties. Unlike the medical malpractice statute in *Electro-Mechanical Corp v Ogan*, 9 F3d 445, 448-449 (CA 6, 1993), nothing in the Michigan no-fault act affirmatively limits the Dow Plan's ability to recover benefits. Indeed, the Dow Plan's reliance on *Electro-Mechanical* is misplaced because the statute in that case affirmatively stated that in a medical malpractice case, a tort plaintiff was prohibited from suing a third-party tortfeasor for economic losses only when such losses were paid or indemnified by insurance that the plaintiff's employer provided, i.e., an ERISA plan. *Id.* Under those facts, it is undeniable that Tennessee's medical malpractice statute had a direct effect on and related to the self-funded ERISA plan at issue and was, therefore, preempted. *Id.* at 449-451.

Contrary to the Dow Plan's assertions, the Michigan no-fault act does not have the same affirmative impact on the Plan's right to recovery as the Tennessee medical malpractice statute. The act merely spells out what benefits plaintiffs may and may not recover from responsible third parties, thereby defining the "lawsuit" that the Dow Plan is entitled to join in for purposes of subrogation. *Wall, supra*. Accordingly, even if federal (ERISA) law preempts the no-fault act, which we are not concluding here, this Court has the authority to determine plaintiff's right to recovery, and, in doing so, establish limitations of the Dow Plan's subrogation rights.

We are also unpersuaded that the dicta in *Fons* compels an opposite conclusion. In that case, the plaintiff filed a declaratory judgment action when her self-funded ERISA plan sought to recover medical expenses it paid to the plaintiff as a result of injuries she sustained in an automobile accident, and the plaintiff sued the negligent driver's insurer. Unfortunately, the trial court refused to determine which party to the ERISA health plan misconstrued the plan language. Rather, the court simply determined that the plan trustee did not act in an arbitrary and capricious manner. As we stated above, the Dow Plan does not give its trustees discretionary power to construe the terms of the benefit plan. Accordingly, we are not applying an arbitrary and capricious standard of review here, so the *Fons* court's conclusions are of little meaning here. Only in *dicta* did the trial court in *Fons* state that whether "plaintiff's state law damages are generically labeled non-economic or that the Michigan No-Fault Act precludes subrogation is irrelevant." *Fons, supra*, slip op at 7. The court in *Fons* went on to agree with the defendant's argument that "such an interpretation would essentially allow Michigan law to regulate an ERISA Employment Benefit Plan. ERISA, 29 USC § 1144. Accordingly, to the extent that Michigan law indirectly regulates defendant's plan, Michigan law is preempted." *Fons, supra*. Notably, the court neither explains why this statement presents a logical conclusion nor supports it with citation to authority.

Rather than make bold, unsupported statements such as this, we instead take the path that the *Fons* court refused to follow and interpret the contract language contained in the Dow Plan's summary plan description with the help of *Wall, supra*.

IV

In conclusion, we find that summary disposition was properly granted pursuant to MCR 2.116(C)(10) because no genuine issues of material fact exist, and, as a matter of law, plaintiffs are entitled to judgment against the Dow Plan. The limiting language in the Dow Plan's subrogation provision requires us to look to state law to determine plaintiffs' right to recovery against third-party defendant Paultanis. Because plaintiffs have no right to recovery for medical expenses, the Dow Plan cannot stand in plaintiffs' shoes and recover the amounts they paid to meet those expenses.

Accordingly, we affirm the trial court's order granting summary disposition.

/s/ Jane E. Markey

/s/ Richard A. Bandstra

/s/ Stephen J. Markman

¹ Plaintiffs' motion for summary disposition was submitted pursuant to MCR 2.116(C)(8) and defendant's was based on MCR 2.116(C)(10).

² We note that the only plan in the lower court record or referred to in the parties' briefs is the summary plan description for the Dow Plan. In the absence of the explicit plan language itself, however, we refer to the summary plan description when we reference the Dow Plan.

³ Our Michigan Supreme Court in *Auto Club Ins Ass'n v Frederick & Herrud, Inc (After Remand)*, 443 Mich 358, 373-374; 505 NW2d 820 (1993), observed that ERISA's primary purpose is the protection of employees' pension rights, although it also attempts to regulate employee welfare benefit plans. "The ERISA's regulation of health and welfare benefit plans is, however, much less expansive than its pension-oriented counterparts. The lack of statutory guidance covering health and welfare plans has led to the development of a 'federal common law' intended to supplement the provisions of the ERISA." We therefore believe that review of and reliance on federal cases comprising the federal common law involving ERISA health and welfare plans is merited here.

⁴ The Dow Plan contains a coordination of benefits provision regarding automobile insurance. It states in pertinent part that "[y]our Dow Plan will be secondary, unless the automobile insurance policy states that it is secondary to a group health plan." Plaintiffs' no-fault policy through Auto Club Insurance Association contained a coordination of benefits clause making plaintiffs' health plan primary. The Dow Plan does not challenge this conclusion, but it argues that had plaintiffs purchased a noncoordinated no-fault insurance policy, then the issues in this case would be nonexistent.

⁵ The *Wall* court also noted that the *Fons* court avoided interpreting the plan's language when it held that "[w]ithout determining which party has misconstrued the plan's language, this Court concludes that the trustees' actions were not arbitrary and capricious," citing *Fons, supra*, slip op at 6.