STATE OF MICHIGAN

COURT OF APPEALS

JENNIFER M. ATTARD and JEANINE R. DAVIDSON,

Plaintiffs-Appellees,

and

HEALTH ALLIANCE PLAN,

Appellant,

v

THE DETROIT EDISON COMPANY and FORD MOTOR COMPANY,

Defendants.

UNPUBLISHED
December 18, 1998

No. 202960
Wayne Circuit Court
LC No. 95-516201 NI

Before: Markey, P.J., and Sawyer and Talbot, JJ.

PER CURIAM.

Health Alliance Plan (hereinafter "HAP"), appeals by right the trial court's order denying its motion to intervene as a silent plaintiff in this tort action arising out of a one-car accident that severely injured plaintiff Jennifer Attard.. We affirm.

On March 19, 1993, plaintiff Attard was injured when the car in which she was a passenger ran into a telephone pole. HAP, a health maintenance organization providing services to Attard's father's through his employer, paid Attard's medical expenses of more than $80,000 because this health care policy was primary to Attard's father's coordinated no-fault policy through Citizens Insurance, which is not a party to this litigation. Attard subsequently sued defendant Detroit Edison for negligent installation of the telephone pole and defendant Ford Motor Company under a theory of products liability. In January 1997, HAP filed its motion to intervene as a plaintiff pursuant to a subrogation provision in its health care contract. The trial court denied HAP's motion to intervene, finding that HAP was not

entitled to a lien against any

recovery Attard might obtain from defendants, relying on *Great Lakes American Life Ins Co v Citizens Ins Co*, 191 Mich App 589; 479 NW2d 20 (1991), and *Ryan v Ford Motor Co*, 141 Mich App 762; 368 NW2d 266 (1985). HAP argues that the court erred in denying its motion. We disagree.

Whether HAP is entitled to intervene in plaintiff's tort action pursuant to HAP's subrogation contract is a question of law which is reviewed de novo. *Brucker v McKinlay Transport, Inc (On Remand),* 225 Mich App 442, 448; 571 NW2d 548 (1997).

Although both parties begin by arguing whether HAP was an insurer under the no-fault act because it was the primary insurer over Attard's father's no-fault insurer, we believe that this question goes too far. At the outset, we must look to HAP's subrogation contract and HAP's ability to enforce that subrogation agreement.

Subrogation is

> [t]he substitution of one person in the place of another with reference to a lawful claim, demand or right . . . so that he who is substituted succeeds to the rights of the other in relation to the debt or claim, and its rights, remedies, or securities. A legal fiction through which a person who, not as a volunteer or in his own wrong, and in the absence of outstanding and superior equities, pays debt of another, is substituted to all rights and remedies of the other, . . . and the doctrine is broad enough to include every instance in which one party pays the debt for which another is primarily answerable, and which in equity and good conscience should have been discharged by such other." [*Allstate Ins Co v Snarski*, 174 Mich App 148, 154; 435 NW2d 408 (1988), citing Black's Law Dictionary (4th ed) p 1595.]

The subrogee, upon paying an obligation that a third party is responsible for paying to the subrogor, is substituted in a suit in place of the subrogor and thereby attains the same but no greater rights of recovery against the third party. *Citizens Ins Co of America v American Community Mut Ins Co*, 197 Mich App 707, 709-710; 495 NW2d 798 (1992). Payment of the subrogated debt is a prerequisite to attaining subrogation rights, and payment defines those rights and fixes the amount the subrogor can claim pursuant to those rights. *Morrow v Shah*, 181 Mich App 742, 749; 450 NW2d 96 (1989).

If the subrogee/insurer stands in the shoes of the subrogor/insured, it is logical to conclude that the subrogee cannot sue the subrogor to enforce its subrogation rights:

> In most situations, an insurer is not entitled to be subrogated to rights that may exist as a consequence of a liability claim against its own insured – that is, *there is no right of subrogation for an insurer against* either one who is covered as a named insured in relation to the loss at issue, or *any party who is covered as an additional insured in relation to that loss*. Thus, an insurer's subrogation interest usually is limited to rights an insured may have against third persons – that is, persons who are not parties to or

> beneficiaries of the insurance relationship that gives rise to the subrogation claim by an insurer. [Keeton & Widiss, Insurance Law, § 3.10(a)(1), p 221; emphasis added.]

Applying this controlling principle to HAP's motion for intervention and arguments on appeal, we believe that HAP, through its attempted intervention, is seeking reimbursement from Attard, its own insured.

The pertinent subrogation language in HAP's subscriber contract agreement states as follows:

> 1. A Member agrees that whenever the Member has a right to recover for a personal injury, illness or any other medical or psychiatric condition from a third-party, Health Alliance Plan shall be subrogated to and succeed to all of the Member's rights to recover the cost of Covered Services provided or paid for by Health Alliance Plan under this Contract which relate to that personal injury, illness or other medical or psychiatric condition. Health Alliance Plan shall have no obligation to reimburse a Member for expenses (including attorney fees and costs) in recouping such expenses. [Emphasis added.]

HAP also asserts that it has an absolute right to intervene in Attard's tort action against defendants pursuant to MCL 550.1401(6); MSA 24.660(401)(6), which states:

> A health care corporation shall have the right to status as a party in interest, whether by intervention or otherwise, in any judicial, quasi-judicial, or administrative agency proceeding in this state for the purpose of enforcing any rights it may have for reimbursement of payments made or advanced for health care services on behalf of 1 or more of its subscribers or members.

First, we believe that MCL 550.1401(6); MSA 24.660(401)(6) provides HAP with the procedural mechanism for intervening, but it does not provide HAP with a substantive basis for recovery upon intervention. Rather, as Attard's subrogee, HAP must be able to assert its own cause of action against defendants on Attard's behalf in order to stand in her shoes and represent her claims against defendants. Neither HAP's motion for intervention nor its brief in support states any cause of action against defendants; they merely reiterate the existence of the subrogation agreement and its right to intervene.

Second, a close examination of HAP's subrogation language reveals that HAP has a "right to recover the cost of Covered Services provided or paid for by Health Alliance Plan under this Contract" as a result of personal injury to Attard. [Emphasis added.] HAP apparently paid for Attard's medical expenses, i.e., "covered services," as a result of the coordination of benefits provision contained in Attard's father's no-fault policy that made HAP the primary insurer. This is the coverage that her father contracted to receive from HAP. Now, when Attard sues not to recover her medical expenses but to recover non-economic damages from a fractured pelvis, concussion, traumatic brain injury, past and present embarrassment and humiliation, outrage, present and future pain and suffering, contusions, abrasions, and shock to her nervous system, HAP wishes to seize from any award she receives an

amount equal to the medical payments it contractually agreed to provide. We find this to be an untenable position.

By obtaining coverage for her out-of-pocket economic expenses from HAP and receiving noneconomic damages from defendants, Attard is neither double-dipping nor being overcompensated for the injuries she suffered. The tort claims constitute the only potential remedy for making plaintiff whole again.

It is illogical and inequitable for HAP to claim reimbursement out of her separate and distinct tort recoveries that include nothing for medical expenses. Indeed, this scenario would exemplify the illusory nature of the bargain that HAP and Attard's father entered into should HAP prevail. HAP's attempted subrogation against its own insured would leave Attard less than whole, and possibly with nothing except physical and emotional scars, should her $80,000 medical bills exceed the amount of her tort settlement against defendants.

If pursuant to the agreement HAP can stand in Attard's shoes and sue defendants for her noneconomic damages, it should have filed its own action as her subrogee against defendants. HAP, however, did not do so because it does not have standing to pursue this claim on her behalf. HAP has no cause of action against defendants. Therefore, HAP has no right to recover any damages that defendants pay to Attard arising from their negligent conduct.

Although HAP's subrogation agreement also purports to give it a lien against Attard's recovery, we believe that the lien language cannot give HAP a recovery right that it could not otherwise assert as a subrogee. This paragraph of HAP's subscriber contract states:

> 8. A Member hereby grants Health Alliance Plan a lien against the proceeds of any recovery by or on behalf of the Member from any third party, regardless of whether such recovery is by way of judgment or verdict in a civil action or as a result of arbitration, mediation, settlement, or remedy provided by statute or regulation or otherwise. *Such lien shall extend to any and all amounts recovered by or on behalf of the Member regardless of the designation, categorization or allocation of amounts so recovered to losses or damages other than Covered Services provided or paid for under this Contract*, and regardless of whether the amount recovered is less than, equal to or in excess of the total loss to or damage of the Member. [Emphasis added.]

This provision does not specify that the member's recovery need be related to the event giving rise to the covered services or that the third party be responsible for the member's personal injuries. Rather, this provision gives HAP carte blanche the right to be repaid *by its own insured* for any covered services that it provides. Again, we find this position contrary to the general principles underlying subrogation and in contravention not only of the principles underlying the no-fault act but also of HAP's contractual obligations to provide medical coverage to Attard.

In *Ryan, supra* at 765, this Court refused to uphold a worker's compensation provider's lien against the proceeds that an injured employee recovered pursuant to a products liability claim against Ford Motor Company. While Ryan was performing routine maintenance on a car on the employer's premises, the car's transmission shifted from park into reverse, and the car ran over him. *Id*. Liberty Mutual, the worker's compensation provider which was also Ryan's no-fault provider, intervened in Ryan's products liability action as a unnamed party plaintiff. After Ryan settled with Ford for $75,000, Liberty Mutual moved to recover the $4,503 it paid in worker's compensation benefits pursuant to the lien. The trial court found that Liberty Mutual had no interest in the proceeds and denied the lien. *Id.*

This Court reiterated that where a worker's compensation carrier provides benefits otherwise payable by the no-fault insurer under the no-fault act's mandatory setoff provision for benefits required to be provided under the laws of this state, MCL 500.3109(1); MSA 24.13109(1), the carrier's reimbursement rights are coextensive with the rights of the no-fault insurer whose liability the carrier replaced. *Id.* at 765-766, citing *Great American Ins Co v Queen*, 410 Mich 73, 87-88; 300 NW2d 895 (1980). Under the no-fault act, the tortfeasor is no longer liable for the insured's economic loss that no-fault benefits cover. *Ryan*, *supra* at 766, citing *Citizens Ins Co of America v Tuttle*, 411 Mich 536, 548-551 n 8; 309 NW2d 174 (1981). Unless one of the limited situations set forth in MCL 500.3116; MSA 24.13116 applies, the insured may not recover damages for which no-fault benefits have been paid. *Ryan, supra* at 767. Moreover, even though nonmotorist tortfeasors are still liable in tort, "the no-fault insurer has no right to reimbursement from an insured's recovery from a nonmotorist tortfeasor whose liability arises outside the ownership or operation of a motor vehicle, despite the possibility of duplicate recoveries from the insurer and the tortfeasor. *Tuttle, supra*, pp 551-554."[1] *Ryan, supra* at 767. Accordingly, this Court affirmed the denial of Liberty Mutual's lien upon finding that Ryan was entitled to worker's compensation benefits in lieu of no-fault benefits without reimbursing Liberty Mutual out of the settlement with the nonmotorist tortfeasor Ford Motor Company. *Id.* at 768-769.

Although *Queen* only references worker's compensation benefits substituting for no-fault benefits, we believe that a health care insurer under a coordinated no-fault policy is in reality providing substitute no-fault benefits. Moreover, the no-fault act actually encourages drivers to coordinate benefits between their health and no-fault insurers. *Auto Club Insurance Ass'n v New York Life Insurance,* 440 Mich 126, 130-131; 485 NW2d 695 (1992); MCL 500.3109a; MSA 24.13109a. Coordinating benefits allows a driver to contract for no-fault insurance at a reduced premium, keeping insurance payments down and eliminating duplicative recovery. *Id.*; *Westfield Cos v GVHP,* 224 Mich App 385, 388; 568 NW2d 854.[2] In both the present situation and in *Ryan*, the no-fault insurer would be responsible for paying the injured motorist's benefits absent either the availability of worker's compensation or health care benefits. The fact that worker's compensation is mandated by state law does not change this result.

We agree with the reasoning in *Ryan* that if the worker's compensation carrier, or HAP in this case, were permitted reimbursement, the injured insured would receive only the settlement amount less the reimbursed compensation benefits, *Id.* at 769, putting Ryan (or Attard) in a "far worse position" than someone injured outside the scope of his employment: *Id.* "A plaintiff injured in the same way as

Claud Ryan in the case at bar, but injured outside the course of his employment, would be entitled to no-fault benefits in addition to any recovery or settlement from the nonmotorist defendants. See *Tuttle, supra.*" *Ryan, supra*. The same rationale applies here; thus, we find no reason for reaching a different result.

In conclusion, we find that without health insurance, Attard would have received the same insurance coverage through her no-fault provider, which could not seek reimbursement from her products liability tort recovery of noneconomic damages against nonmotorist tortfeasors Detroit Edison and Ford. *Tuttle, supra; Ryan, supra.* We find no compelling case law supporting HAP's position that it is entitled to reimbursement from Attard's tort recovery, and we confirm that HAP is not entitled to reimbursement from Attard under the guise of subrogation for a peril or loss that it was contractually obligated to cover. Any other conclusion would eviscerate the benefits of coordinated no-fault coverage and leave the injured motorist in a worse position merely because that motorist made the "mistake" of paying for both primary health insurance and coordinated no-fault insurance. This anomalous result cannot be condoned.

Accordingly, we affirm the trial court's order denying HAP's motion to intervene in Attard's products liability and negligence lawsuit against nonmotorist tortfeasors Detroit Edison and Ford.

We affirm.

/s/ Jane E. Markey
/s/ David H. Sawyer
/s/ Michael J. Talbot

[1] In *Tuttle, supra*, at 552, the Michigan Supreme Court recognized that "[t]he no-fault insurer's right to subtraction or reimbursement is limited by §3116(2) [MCL 500.3116(2); MSA 24.13116(2)] to recoveries from *motorist* tortfeasors or for intentional torts. <u>There is no right to subtraction or reimbursement with respect to a tort recovery from a non-motorist defendant which duplicates personal protection insurance benefits</u>." [Emphasis added.]

[2] HAP's contract with Attard excludes "[i]tems and services provided for injuries received in an accident involving an automobile or other motor vehicle when the Member has an uncoordinated auto policy." Although the record is not clear as to whether Attard's agreement with Citizens was coordinated or uncoordinated, the fact that HAP does not argue it was uncoordinated leads the Court to believe that Attard had coordinated benefits in which HAP would remain primarily liable. *Smith, supra,* 444 Mich 752-755, 758-760.