

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2014 CA 1248

FARMERS INSURANCE EXCHANGE

VERSUS

JOSEPH SHOWS AND
BLUE CROSS AND BLUE SHIELD OF TEXAS, INC.

Judgment Rendered: JUN 05 2015

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APPEALED FROM THE NINETEENTH JUDICIAL DISTRICT COURT
IN AND FOR THE PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA
DOCKET NUMBER C616320, DIVISION 23

HONORABLE WILLIAM MORVANT, JUDGE

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BEFORE: McDONALD, CRAIN, AND HOLDRIDGE, JJ.

5/11
Holdridge, J. concurs. I agree that the matter should be remanded and agree with the
reasons of J. Crain and further writes to state that the mover may re-use
Crain, J. concurs and assigns reasons his motion for Summary Judgment.

McDONALD, J.

In this concursus proceeding, a member of an employee health benefits plan appeals a summary judgment in favor of the plan's claims administrator. In granting the summary judgment, the trial court determined the claims administrator proved its entitlement to insurance proceeds deposited into the court's registry over the adverse claim of the plan member. For the following reasons, we reverse and remand.

FACTUAL AND PROCEDURAL BACKGROUND

In 2010, Joseph Shows was injured in an automobile accident. Allstate Insurance Company, the at-fault driver's liability insurer, paid Mr. Shows its bodily injury policy limit of \$25,000. Additionally, Farmers Insurance Exchange (Farmers), Mr. Shows' uninsured/underinsured motorist (UM) insurer, paid him \$63,933.34 of his \$100,000 UM policy limit. In 2012, Farmers filed a concursus petition, naming Mr. Shows and Blue Cross and Blue Shield of Texas, Inc. (BCBSTX) as defendants. Farmers sought to deposit \$36,066.66, the remaining balance of Mr. Shows' UM policy limit, into the registry of the court and alleged that this amount was adversely claimed by Mr. Shows and BCBSTX. The trial court signed an order accepting the concursus deposit, subject to further proceedings.

BCBSTX answered Farmers' concursus petition, identifying itself as the claims administrator of a health benefits plan furnished by Trimac Transportation, Inc. (Trimac plan) to its employees and alleging that Mr. Shows was a member of the Trimac plan. BCBSTX also alleged that it had paid \$71,564.52 in medical expenses for treatment of injuries Mr. Shows sustained in the 2010 accident. According to BCBSTX, under the terms of the Trimac plan, it was entitled to the entire amount of the concursus deposit as reimbursement for those medical expense payments, in preference to Mr. Shows. Mr. Shows also answered, alleging that his damages resulting from the 2010 accident far exceeded the combined amount of the Allstate and Farmers policy limits and that

BCBSTX's claim to the concursus deposit was precluded, because he had not yet "been made whole."¹

In due course, BCBSTX filed a motion seeking a summary judgment declaring its entitlement to the entire concursus deposit. [R58] According to BCBSTX, the provisions of the Trimac plan dealing with the right to recovery by subrogation or reimbursement entitled it to the concursus deposit, even if Mr. Shows had not fully recovered his damages. In support of its motion, BCBSTX filed the affidavit of Karie Kath, a BCBSTX supervisor, who identified two attached exhibits as: (1) a copy of the Trimac plan, which she described as "a true and correct copy of the plan's Summary Plan Description [(SPD)] in effect on and after" Mr. Shows' 2010 accident; and, (2) an itemized list of bills submitted to the Trimac plan for Mr. Shows' medical treatment and showing that \$71,137.60 had been paid.

In opposition, Mr. Shows argued that BCBSTX was not entitled to summary judgment, because its submission of the SPD, containing the purported right to recovery provisions upon which it relied, was insufficient to prove the actual terms of the Trimac plan itself. Citing **CIGNA Corp. v. Amara**, 131 S.Ct. 1866, 179 L.Ed.2d 843 (2011), Mr. Shows argued BCBSTX was required to submit the actual Trimac plan, as it represented the best evidence of any purported rights and obligations between the parties.

The trial court held a hearing, and on June 9, 2014, signed a judgment in favor of BCBSTX, ordering the clerk of court to disburse the concursus funds to BCBSTX, and dismissing Farmers' concursus action. In oral reasons for judgment, the trial court indicated that: Mr. Shows' interpreted the **Amara** case too broadly; BCBSTX's submission of the SPD was sufficient to prove its rights under the Trimac plan; BCBSTX's right to reimbursement was "spelled out very plainly" in the SPD; and no evidence had been submitted to show that the SPD was inaccurate.

¹ The "make whole" doctrine is an insurance principle which mandates that, in the absence of a contrary agreement, an insurance company may not enforce its subrogation rights until the insured has been fully compensated for his injuries, i.e., until he is "made whole." **Roberts v. Richard**, 99-259 (La. App. 3 Cir. 7/28/99), 743 So.2d 731, 733, writ denied, 99-2527 (La. 11/19/99), 749 So.2d 677.

Mr. Shows appeals from the adverse judgment, asserting five assignments of error. Because we find merit to his argument regarding the sufficiency of BCBSTX's summary judgment evidence, and reverse the judgment on that basis, we pretermitt discussion of his remaining assignments of error.

DISCUSSION

The summary judgment procedure is designed to secure the just, speedy, and inexpensive determination of every action, except those disallowed by LSA-C.C.P. art. 969; the procedure is favored and shall be construed to accomplish these ends. LSA-C.C.P. art. 966(A)(2). Summary judgment shall be rendered in favor of the movant if the pleadings, depositions, answers to interrogatories, and admissions, together with the affidavits, if any, admitted for purposes of the motion, show there is no genuine issue as to material fact, and that the mover is entitled to judgment as a matter of law. See LSA-C.C.P. art. 966(B)(2).² An appellate court reviews a trial court's decision to grant a summary judgment de novo, using the same criteria that govern the trial court's consideration of whether summary judgment is appropriate. **In re Succession of Beard**, 13-1717 (La. App. 1 Cir. 6/6/14), 147 So.3d 753, 759-60.

On a motion for summary judgment, the initial burden of proof remains on the movant to make a prima facie showing that the motion should be granted. See LSA-C.C.P. art. 966(C)(2); **Jones v. Estate of Santiago**, 03-1424 (La. 4/14/04), 870 So.2d 1002, 1006. It is only after the movant has properly supported his motion and carried his initial burden of proof, that the burden shifts to the non-movant to produce factual support sufficient to establish that he will be able to satisfy his evidentiary burden of proof at trial. LSA-C.C.P. art. 966(C)(2); **Louisiana Safety Ass'n of Timbermen–Self Insurers Fund v. LIGA**, 09-0023 (La. 6/26/09), 17 So.3d 350, 354; **Bunge North America, Inc. v. Board of Commerce and Industry, et al.**, 07-

² The summary judgment in this case was signed on June 9, 2014; thus, it is governed by the version of LSA-C.C.P. art. 966 in effect after its amendment by 2013 La. Acts, No. 391, § 1, effective August 1, 2013. See **Ciolino v. First Guar. Bank**, 12-2079, 1280 (La. App. 1 Cir. 10/30/13), 133 So.3d 686, 690 n. 3. Changes implemented by a later amendment to LSA-C.C.P. art. 966 are not implicated in this appeal. See 2014 La. Acts, No. 187, §1, effective August 1, 2014.

1746 (La. App. 1 Cir. 5/2/08), 991 So.2d 511, 531, writ denied, 08-1594 (La. 11/21/08), 996 So.2d 1106. Affidavits that reference and authenticate documents attached thereto in support of a motion for summary judgment can establish a prima facie case that the motion should be granted. **Capital One Bank (USA), NA v. Sanches**, 13-0003 (La. App. 4 Cir. 6/12/13), 119 So.3d 870, 875. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims. LSA-C.E. art. 901(A); **FIA Card Services, N.A. v. Weaver**, 10-1372 (La. 3/15/11), 62 So.3d 709, 718. As the party claiming rights under the Trimac plan, BCBSTX bore the burden of proving those rights. See 17B **C.J.S. Contracts** §925 (2015) (“[T]he burden of proof is on the party seeking to enforce an agreement, or to claim rights under it.”) (Footnotes omitted.)

BCBSTX characterizes the Trimac plan as a health plan governed by the Employment Retirement Income Security Act (ERISA), 29 U.S.C.A 1001, et seq. ERISA requires that a “summary plan description” for an employee benefit plan be furnished to all plan participants and beneficiaries. 29 U.S.C.A. §1022(a).³ Although an SPD may be

³ Under ERISA, 29 U.S.C.A. §1022(b), the summary plan description shall contain the following information:

The name and type of administration of the plan; in the case of a group health plan (as defined in section 1191b(a)(1) of this title), whether a health insurance issuer (as defined in section 1191b(b)(2) of this title) is responsible for the financing or administration (including payment of claims) of the plan and (if so) the name and address of such issuer; the name and address of the person designated as agent for the service of legal process, if such person is not the administrator; the name and address of the administrator; names, titles, and addresses of any trustee or trustees (if they are persons different from the administrator); a description of the relevant provisions of any applicable collective bargaining agreement; the plan's requirements respecting eligibility for participation and benefits; a description of the provisions providing for nonforfeitable pension benefits; circumstances which may result in disqualification, ineligibility, or denial or loss of benefits; the source of financing of the plan and the identity of any organization through which benefits are provided; the date of the end of the plan year and whether the records of the plan are kept on a calendar, policy, or fiscal year basis; the procedures to be followed in presenting claims for benefits under the plan including the office at the Department of Labor through which participants and beneficiaries may seek assistance or information regarding their rights under this chapter and the Health Insurance Portability and Accountability Act of 1996 with respect to health benefits that are offered through a group health plan (as defined in section 1191b(a)(1) of this title), the remedies available under the plan for the redress of claims which are denied in whole or in part (including procedures required under section 1133 of this title), and if the employer so elects for purposes of complying with section 1181(f)(3)(B)(i) of this title, the model notice applicable to the State in which the participants and beneficiaries reside.

used as evidence of an employee benefit plan's terms, ERISA does not expressly address the consequences when there is a material disparity between the terms of the plan and the terms of the SPD. Gilsinger, D.J., **Showing of Reliance on or Prejudice from Summary Plan Description (SPD) by Party Seeking to Enforce Terms of SPD in Preference to Terms of Plan**, 31 ALR Fed. 2d 363, §2 (orig. pub'd. 2008). However, in **Amara**, the Court held that terms of an SPD cannot be enforced over conflicting terms of the employee benefit plan itself under ERISA §502(a)(1)(B). See Lipker v. AK Steel Corp., 698 F.3d 923, 931 n. 4 (C.A. 6 (KY) 2012). Per **Amara**, if there is a conflict, the plan language controls over the SPD. **Id.**

In this case, we need not decide whether the actual Trimac SPD may be used as evidence of the Trimac plan itself, because, based on our de novo review of the evidence, we find that BCBSTX has not carried its initial burden of proving that the document it submitted as the Trimac SPD is indeed such. In her affidavit, Ms. Kath states that the "copy of the Trimac Transportation health plan attached hereto as Exhibit 'A-[2]' is a true and correct copy of the plan's Summary Plan Description in effect on and after" Mr. Shows' 2010 accident. Although the referenced document plainly deals with health care coverage, and contains much of the information required of an SPD as defined by ERISA (see footnote 3, supra), we note several inconsistencies as to whether it is the Trimac SPD. First, the apparent title page of the document, as it appears in the record, identifies the document as Trimac's "Managed Health Care Prescription Drug Program," not as an SPD of Trimac's employee benefit or health plan. [R82] Next, the "INTRODUCTION" section of the document refers to the document as a "Benefit Booklet," not as an SPD, and we find no other provision that defines "Benefit Booklet." [R89] Finally, and most notably, the "GENERAL PROVISIONS" section of the document contains an express provision stating, "This Benefit Booklet is **not** a Summary Plan Description." (Emphasis added.)

Given these inconsistencies, we find that Ms. Kath's affidavit does not accurately establish that the document labeled Exhibit A-2 is a "true and correct copy" of the Trimac SPD; rather, these inconsistencies create genuine issues of material fact as to

whether Exhibit A-2 constitutes an SPD under ERISA. Thus, we conclude there is insufficient evidence to support a finding that the exhibit is what BCBSTX claims it to be, and BCBSTX has not carried its initial burden of proving its entitlement to summary judgment in this case. See LSA-C.E. art. 901(A); LSA-C.C.P. art. 966(C)(2)(A); **Louisiana Safety Ass'n of Timbermen-Self Insurers Fund**, 17 So.3d at 354. Cf. **Adams v. Arceneaux**, 00-1440 (La. App. 1 Cir. 6/22/01), 809 So.2d 190, 195, writ not considered, 01-2559 (La. 12/7/01), 802 So.2d 640 (because nothing in the record called the authenticity of the policy in question, appellate court found that the uncertified policy filed with the insurer's motion for summary judgment was properly considered by the trial court); also see **Hayne v. Woodridge Condominiums, Inc.**, 06-923 (La. App. 5 Cir. 4/11/07), 957 So.2d 804, 807-08 (appellate court's de novo review of motion for summary judgment, attached insurance policy, and entire record, revealed no evidence or other reason to doubt the authenticity of the insurance policy, even though it was an uncertified copy).

CONCLUSION

For the foregoing reasons, we reverse the June 9, 2014 judgment and remand this case to the trial court for further proceedings consistent with this opinion. Costs of this appeal are assessed to Blue Cross and Blue Shield of Texas, Inc.

REVERSED AND REMANDED.

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 **CRAIN, J., concurring in the result.**

In her affidavit, Karie Kath attests that the document is a true and correct copy of the SPD. The affidavit was not challenged. *See* La. Code Civ. Pro. art. 967. Thus, I disagree that there is a material issue of fact as to whether Exhibit A-2 is the SPD. However, I concur in reversing the judgment of the trial court and remanding for further proceedings because I believe that a factual issue remains as to the amount of attorney fees owed on the concursus amount. I believe the remand should be limited to the attorney fee determination.