COURT OF APPEALS
DECISION
DATED AND FILED

August 3, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2009AP1558 **Cir. Ct. No. 2008CV16**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

JOHN R. STEFFENS,

PLAINTIFF-APPELLANT,

V.

BLUECROSS BLUESHIELD OF ILLINOIS,

DEFENDANT-RESPONDENT,

V.

WESLEY D. DISHNO, AIG NATIONAL INSURANCE COMPANY, INC., BLUECROSS BLUESHIELD OF WISCONSIN AND THE FARMERS AUTOMOBILE INSURANCE ASSOCIATION,

DEFENDANTS.

APPEAL from a judgment of the circuit court for Outagamie County: DEE R. DYER, Judge. *Reversed and cause remanded.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PETERSON, J. John Steffens appeals a judgment declaring he must reimburse BlueCross BlueShield of Illinois (BlueCross) for benefits it paid for his back surgery. Steffens initially claimed he needed the surgery because he was injured in an automobile accident, but, after he received a settlement, he claimed the accident was unrelated to his need for surgery. The circuit court held that Steffens was judicially estopped from arguing the surgery and accident were unrelated and declared that BlueCross was therefore entitled to reimbursement. We conclude: (1) the circuit court improperly applied the doctrine of judicial estoppel; and (2) to be entitled to reimbursement, BlueCross must first prove what amount, if any, of the expenses it paid were incurred as a result of the accident. Because BlueCross did not do so, we reverse and remand.

BACKGROUND

¶2 On June 29, 2005, Steffens was injured in an automobile accident. On January 2, 2008, he sued the driver and the driver's insurer, AIG National Insurance Company, Inc. Steffens' complaint also named BlueCross as a party that might have subrogation rights because it paid some of his medical bills from the accident under an employer-funded health care plan.

¶3 In interrogatories, Steffens claimed BlueCross's payments totaled $64,751.40, the bulk of which were for expenses he incurred for surgery on his lower back in May 2007. AIG hired Dr. William Monacci to examine Steffens. Monacci concluded Steffens' back surgery was necessitated by a long-standing degenerative low back condition, not the accident. Steffens, in turn, named his back surgeon on his witness list.

¶4 In January 2009, Steffens settled with AIG for $100,000, the policy limit. One month later, Steffens amended his interrogatories to omit his previous assertion his surgery was related to the accident. He revised his estimate of what BlueCross paid in accident-related medical bills accordingly, from $64,751.40 to $1,741.50.

¶5 BlueCross moved for a declaratory judgment that Steffens was obligated, under the health care plan's terms, to reimburse it for the expense of his surgery. Steffens countered that BlueCross's right to reimbursement depended on proving the surgery was related to the accident.

¶6 The circuit court held that Steffens was judicially estopped from claiming the surgery was unrelated to the accident because, until he obtained the settlement, he had asserted the surgery was related. The court concluded that Steffens was bound by his representation that BlueCross spent $64,751.40 on accident-related expenses, and that BlueCross was therefore entitled to a declaration the plan required Steffens to reimburse it in that amount.

DISCUSSION

¶7 This appeal presents two issues: (1) whether the circuit court properly estopped Steffens from arguing his surgery was unrelated to the accident; and (2) whether BlueCross must prove the benefits it paid were related to the accident. Whether the elements of judicial estoppel are present, and whether an insurer's subrogation rights limit a plaintiff's right to recovery, are questions of law we review independently. ***Olson v. Darlington Mut. Ins. Co.***, 2006 WI App 204, ¶3, 296 Wis. 2d 716, 723 N.W.2d 713; ***Paulson v. Allstate Ins. Co.***, 2003 WI 99, ¶19, 263 Wis. 2d 520, 665 N.W.2d 774.

1. Judicial Estoppel

¶8 BlueCross argues Steffens may not now claim his surgery was unrelated to his accident because he asserted—in his complaint, interrogatories, and other documents filed with the court—that it was, changing his position only after he obtained a settlement. The circuit court agreed and concluded that Steffens was judicially estopped from changing his position.

¶9 Judicial estoppel is intended "to protect against a litigant from playing 'fast and loose with the courts.'" ***State v. Petty***, 201 Wis. 2d 337, 347, 548 N.W.2d 817 (1996). Courts may apply it when: (1) a litigant assumes a position that is clearly inconsistent with a position it assumed in an earlier judicial proceeding; (2) the facts at issue are the same in both cases; and (3) the party to be estopped has convinced the first court to adopt its position. ***Harrison v. LIRC***, 187 Wis. 2d 491, 497, 523 N.W.2d 138 (Ct. App. 1994). While there is no dispute Steffens assumed contradictory positions in this case, he never convinced any court to adopt his position that the surgery was related to the accident. Therefore, the third element of judicial estoppel is not met.

¶10 BlueCross concedes this element is not satisfied. Instead, citing treatises and federal case law, it invites us to construe the settlement as satisfying the third element. BlueCross acknowledges it is unaware of any Wisconsin case authorizing such an application of judicial estoppel, but contends that doing so would nevertheless comport with the doctrine's rationale. Accepting BlueCross's argument would require us to modify Wisconsin's established doctrine of judicial estoppel. Such law development is not the province of this court, but is instead entrusted to our supreme court. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 188-89, 560 N.W.2d 246 (1997). Therefore, we must hold that the circuit court erred when it

concluded Steffens was judicially estopped from claiming his surgery was unrelated to the accident.

2. Whether BlueCross Must Prove the Surgery was Related to the Accident

¶11 Steffens argues that BlueCross must prove that the expenses it paid for his surgery were related to the accident. He contends this follows from the plain language of its plan, which only authorizes reimbursement for expenses arising from accidents for which others may be liable. We agree.

¶12 As relevant here, BlueCross's plan provides:

> If any benefits payable under the Plan to you ... were for expenses incurred as the result of ... an accident ... such that other party or parties may be liable for the payment of expenses and you subsequently obtain a settlement from ... such other parties, you ... are obliged to reimburse the plan.

Under the plan, then, BlueCross may claim reimbursement only for expenses it incurred as a result of an accident for which another may be liable. Here, the parties dispute whether Steffens required back surgery because of the accident. It follows that, to be entitled to reimbursement, BlueCross must establish the expenses it paid were in fact related to Steffens' automobile accident.

¶13 Nevertheless, relying on ***Newport News Shipbuilding Co. v. T.H.E. Insurance Co.***, 187 Wis. 2d 364, 368, 523 N.W.2d 270 (Ct. App. 1994), BlueCross counters that a subrogated insurer need not show causation to be reimbursed from a settlement. In ***Newport News***, however, the issue was whether the tortfeasor's insurer could require proof of liability *after* it agreed to be responsible for compensating subrogated insurers. There, a minor sued a fireworks manufacturer and its liability insurer, T.H.E., after he was injured in a fireworks accident. As part of the settlement, T.H.E. agreed it was responsible for

compensating any subrogated carriers. When Newport News sought reimbursement for medical benefits it paid, T.H.E. argued that "if [Newport News] wants recovery, then [it] is going to have to try this case, bring in the experts, and establish liability ...." ***Id.*** at 369. We held this was unnecessary because T.H.E. had already agreed it would "be responsible for compensating any subrogated carriers for their claims in this matter." In ***Newport News***, then, the issue was whether a subrogated insurer needed to prove liability for which another party assumed responsibility. The issue here, however, is whether the expenses BlueCross paid were in fact related to the event for which Steffens settled.

¶14 BlueCross also argues it is relieved from proving Steffens' surgery was related to his accident because it has the "sole discretion to interpret" the plan. It contends we should therefore defer to its interpretation that the plan requires Steffens to reimburse it for bills he used to leverage his settlement—whether they were related to the accident or not. We disagree.

¶15 While we owe substantial deference to BlueCross's interpretation of the plan, this deference is not "a license [for it] to make arbitrary or capricious decisions ...." *See* ***Cutting v. Jerome Foods, Inc.***, 993 F.2d 1293, 1295 (7th Cir. 1993). Nothing in the plan language authorizes reimbursement for benefits BlueCross paid that were not related to the liability of another. While the tortfeasor's insurer might have factored the possibility it might be found liable for Steffens' surgery into determining whether to settle, the plain terms of BlueCross's plan permit reimbursement only for bills incurred as a result of an accident for which another actually is liable. Therefore, BlueCross's interpretation of the plan as requiring reimbursement, regardless of whether Steffens' surgery was caused by the accident, is unreasonable.

CONCLUSION

¶16 By disposing of BlueCross's claims against Steffens, "the declaratory judgment in this case had the effect of a summary judgment." *See* ***Young v. West Bend Mut. Ins. Co.***, 2008 WI App 147, ¶6, 314 Wis. 2d 246, 758 N.W.2d 196. Summary judgment is appropriate when there is "no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." WIS. STAT. § 802.08(2). For the reasons discussed above, the circuit court erred when it granted summary judgment in favor of BlueCross. Therefore, we reverse and remand to give BlueCross an opportunity to prove it is entitled to reimbursement for Steffens' surgery.

By the Court.—Judgment reversed and cause remanded.

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