COURT OF APPEALS
DECISION
DATED AND FILED

July 22, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-2315 **Cir. Ct. No. 01-CV-126**

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

VICKI LYONS, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF TANNA LYONS AND GERALD LYONS, AND CHARLES BABCOCK,

PLAINTIFFS,

ANDREW SEMPF, LARRY SEMPF, AND KATHY SEMPF, PARENTS OF ANDREW SEMPF,

PLAINTIFFS-APPELLANTS,

STOP LOSS INTERNATIONAL, AND CORPORATE BENEFIT SERVICES OF AMERICA, INC.,

SUBROGATED PARTIES-
INTERVENING PLAINTIFFS-RESPONDENTS,

V.

DUNN COUNTY AND WISCONSIN COUNTY MUTUAL INSURANCE COMPANY,

DEFENDANTS.

APPEAL from a judgment and an order of the circuit court for Dunn County: ROD W. SMELTZER, Judge. *Reversed*.

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 HOOVER, P.J. Andrew, Larry, and Kathy Sempf appeal a judgment granting Corporate Benefit Services of America, Inc., a $180,095.01 subrogation interest. The Sempfs contend that the circuit court lacked jurisdiction to hear the case based on the federal ERISA law[1] or, alternatively, that CBSA is not a proper party to the action and could not be granted any subrogation interest because it made no payments on Andrew's behalf. CBSA contends, contrary to its position in the circuit court, that it is seeking a state remedy under contract law in state court. We conclude that CBSA's subrogation interest, if any, is precluded by the ***Rimes*** "made-whole" doctrine and we therefore reverse the judgment. *See* ***Rimes v. State Farm Mut. Auto. Ins. Co.***, 106 Wis. 2d 263, 272, 316 N.W.2d 348 (1982).

Background

¶2 Andrew Sempf was a passenger in a car that hit a tree. As a result of the accident, Andrew suffered multiple injuries, including a splenectomy and a traumatic brain injury resulting in cognitive impairment. A minor at the time, Andrew was a beneficiary of Kathy's ERISA insurance plan, titled the "St. Croix Tribal Council Employee Benefit Plan" (St. Croix). The plan paid for some of Andrew's medical expenses.

[1] The Employee Retirement Income Security Act of 1974 is codified in 29 U.S.C. §§ 1001-1461.

¶3 Andrew eventually settled with the driver's insurance company for policy limits of $225,000. The agreement was approved in a Polk County minor settlement proceeding. The Sempfs then filed this case against Dunn County, contending the County was negligent by maintaining a tree too close to the roadway.

¶4 CBSA, as the plan's "contract administrator," moved to intervene. The court approved the intervention and CBSA cross-claimed against the Sempfs.[2] CBSA alleged that St. Croix had paid over $180,000 on Andrew's behalf and that CBSA had a subrogation right. It sought a judgment for damages. The St. Croix Tribal Council, as the plan administrator, was never joined.

¶5 CBSA then moved for declaratory and summary judgment, asking for reimbursement and claiming that ERISA preempted application of the ***Rimes*** "made whole" doctrine. It partially based its motion on a "subrogation rights" form Kathy signed.

¶6 The Sempfs filed an amended answer and counterclaim, alleging that only the federal courts could hear a plan's action brought against a beneficiary under the ERISA laws. They argued that the state court has concurrent jurisdiction with federal courts only when the beneficiary brings the claim against the plan, or if the plan and the beneficiary are both claiming against a third party. The Sempfs also contended that the subrogation agreement was void, that CBSA had breached any agreement by nonpayment, and that ***Rimes*** applied.

[2] Stop Loss International also moved to intervene. Although it is captioned with CBSA, Stop Loss was ultimately dismissed from the case as an improperly named party.

¶7 Responding specifically to CBSA's motion, the Sempfs reiterated their claim that an ERISA plan cannot maintain a separate state court action against its own beneficiary. They also challenged CBSA's standing under 29 U.S.C. § 1132 to bring a claim on behalf of the plan, arguing that CBSA was not St. Croix's fiduciary. The Sempfs also argued that if there were any subrogation claim, it must be limited to the $75,000 actually paid by the plan.[3]

¶8 The circuit court then held three hearings. At the first hearing, it granted CBSA's motion for summary judgment, issuing an order incorporating the following conclusions:

> 2. That the St. Croix Tribal Council Employee Benefits Plan has a subrogation interest with respect to the [Sempfs] ….
>
> 3. That the … Plan is a self-funded ERISA plan and therefore Wisconsin's "made whole" doctrine is preempted;
>
> 4. The … Plan has a right of first recovery ….
>
> 5. The court has subject matter jurisdiction ….
>
> 6. That … [CBSA is a] proper part[y] to this action;
>
> 7. The … [the Sempfs] and [CBSA] stipulate that … Andrew Sempf[] has not been made whole.

¶9 At the second hearing, the Sempfs argued that CBSA's subrogation interest was zero because it had paid nothing. Only St. Croix made medical payments, but it was not a party to the action. CBSA agreed it had not paid anything, but contended "it's my understanding that under ERISA, [the] fiduciary … of the plan has to make this claim. … I think the claim is with the fiduciary that represents the plan."

[3] The $75,000 was apparently paid through St. Croix; it was not paid by CBSA itself.

¶10 At the third hearing, CBSA asked for a subrogation lien, which was denied because there is no basis for such a lien. Instead, the court granted CBSA an order for a $180,095.01 "subrogation interest." The court issued a judgment codifying that order and incorporating the earlier summary judgment order. The Sempfs appeal.

Discussion

¶11 We review a circuit court's decision to grant summary judgment de novo, using the same methodology as the circuit court. ***Policemen's Annuity & Benefit Fund v. City of Milwaukee***, 2001 WI App 144, ¶9, 246 Wis. 2d 200, 630 N.W.2d 236. That method is well known and need not be repeated here.

CBSA's Status

¶12 Whether CBSA is a fiduciary of the St. Croix plan is a question of fact. *See* ***Winslow v. Winslow***, 257 Wis. 393, 397, 43 N.W.2d 496 (1950). In the circuit court, CBSA contended it was a fiduciary with the right to bring the subrogation claim on behalf of St. Croix. The Sempfs' initial appellate argument assumes CBSA's circuit court position to be true. They challenge the circuit court's jurisdiction if CBSA is a party, claiming that under 29 U.S.C. § 1132, a fiduciary may only bring an action against a plan beneficiary in federal court.

¶13 CBSA expresses surprise that the Sempfs use its circuit court argument for appellate purposes. Instead, CBSA now argues to us that it is *not* a

fiduciary of St. Croix.[4] CBSA's factual concession that it is not a fiduciary therefore renders the factual matter undisputed.

¶14 CBSA's concession makes its nonfiduciary status an undisputed fact that undermines several of the circuit court's rulings. However, if facts are undisputed, all that remains is a question of law that this court reviews de novo. ***GMAC Mort. Corp. v. Gisvold***, 215 Wis. 2d 459, 470, 572 N.W.2d 466 (1998).

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[4] The Sempfs protest this position because it is directly opposite CBSA's circuit court position and ask us to apply the judicial estoppel rule. Judicial estoppel is an equitable doctrine that "precludes a party from asserting a position in a legal proceeding and then subsequently asserting an inconsistent position." ***Salveson v. Douglas County***, 2001 WI 100, ¶37, 245 Wis. 2d 497, 630 N.W.2d 182 (citation omitted). In Wisconsin, the doctrine is used to prevent litigants from playing "fast and loose with the judicial system." ***Id.*** (citation omitted).

Three elements are required before we can invoke judicial estoppel: "(1) the later position must be clearly inconsistent with the earlier position, (2) the facts at issue should be the same in both cases, and (3) and the party to be estopped must have convinced the first court to adopt its position." ***Id.***, ¶38.

CBSA claims its appellate position is not irreconcilably inconsistent with its circuit court position. It contends that its counsel, when representing to the circuit court that CBSA was St. Croix's fiduciary, "at the time undoubtedly believed it was a credible and necessary step to take, in order to establish CBSA's right to subrogation in a state court action." CBSA fails, however, to adequately explain why its position in the circuit court is not binding on it now, nor does it explain how its position on any issue would be revealed to the circuit court except through counsel.

The questions at issue on appeal are the same as those in the circuit court: whether CBSA was St. Croix's fiduciary, a matter resolved by CBSA's concession in its response brief, and whether it is entitled to a subrogation interest.

CBSA argues that it obtained no benefit from its position in the circuit court. Even assuming the benefit question is a proper consideration under the judicial estoppel doctrine, CBSA's purported fiduciary status is arguably the only thing that kept CBSA in this case and the only thing the circuit court relied on in granting CBSA's summary judgment motion.

Ultimately, despite CBSA's contention that there is no evidence it attempted to "'coldly manipulate' the judicial process," the record conclusively shows that all three judicial estoppel elements have been fulfilled. Therefore, we conclude that judicial estoppel is an equally dispositive alternate basis for us to reverse the judgment.

State v. Federal Law

¶15 29 U.S.C. § 1132(a) governs who may bring an ERISA action: the Secretary of Labor, a plan participant, a plan beneficiary, a plan fiduciary, or a state. If CBSA is not a fiduciary, it would have no standing to bring an action based on terms of an ERISA plan. Thus, CBSA cannot recover based on any subrogation rights contained in the plan and concedes as much.

¶16 CBSA argues that even though it cannot bring an ERISA claim, it has a state contract claim based on a subrogation agreement Kathy signed. We will assume, but not decide, that a state contract claim exists.[5] Even so, CBSA cannot recover anything it allegedly paid on Andrew's behalf.[6]

¶17 In Wisconsin, "one who claims subrogation rights … is barred from any recovery unless the insured is made whole." ***Rimes***, 106 Wis. 2d at 272. This doctrine applies as long as it is not preempted by ERISA. ***Ramsey Cty. Med. Ctr. v. Breault***, 189 Wis. 2d 269, 273-74, 525 N.W.2d 321 (Ct. App. 1994).

¶18 In its sur-reply brief, CBSA specifically argues that "CBSA's subrogation interests are not preempted by federal ERISA law." Rather, it argues that it is pursuing a state subrogation claim. The Sempfs argue that if this is so,

[5] If no state contract claim exists, there would be no remaining avenue of recovery because recovery under the plan itself, and therefore federal law, is impossible for a nonfiduciary. Having said this, it is clear even from CBSA's own citation to the plan and subrogation agreement that any subrogation right belongs to the Plan; that is, to St. Croix. CBSA never attempts to explain to this court why, as the contract administrator that never paid benefits to Andrew from its own resources, it is nevertheless entitled to subrogation. In fact, its only explanation to the circuit court was premised on the fiduciary status CBSA now rejects.

[6] We consider this argument even though the record appears to indicate CBSA admitted it paid nothing.

then because Andrew was not made whole, under ***Rimes*** CBSA cannot pursue its subrogation claim. CBSA ignores this argument, and arguments not refuted are deemed admitted. ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979). Thus, we apply the ***Rimes*** doctrine. The circuit court specifically found that the Sempfs were not made whole.[7] Therefore, even if CBSA had a basis for claiming subrogation, it has no right to recover.

By the Court.—Judgment and order reversed.

Not recommended for publication in the official reports.

[7] CBSA moved for relief from the order containing that finding. The resulting order dismissed Stop Loss, ordered the Sempfs to disclose discovery materials, and denied CBSA's request for an injunction. Nothing in the order indicates the finding regarding Andrew was disturbed.