COURT OF APPEALS
DECISION
DATED AND FILED

March 3, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-1869

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

CAROL J. SALSBURY,

PLAINTIFF-APPELLANT,

v.

MICHAEL R. MILLER, FARMLAND MUTUAL INSURANCE COMPANY AND AMERICAN FAMILY MUTUAL INSURANCE COMPANY,

DEFENDANTS,

JEROME FOODS, INC.,

DEFENDANT-RESPONDENT.

APPEAL from an order and a judgment of the circuit court for Barron County: JAMES C. EATON, Judge. *Affirmed.*

Before Cane, P.J., Myse and Hoover, JJ.

HOOVER, J. Carol Salsbury's employer, Jerome Foods, Inc., paid medical expenses and disability benefits on her behalf under its self-funded Employment Retirement Income Security Act[1] (ERISA) health care plan (plan[2]). Salsbury commenced a personal injury action to recover damages, in which she joined Jerome, the plan's administrator, because of its potential subrogation interest. Jerome moved for summary judgment on its assertion that it was authorized to construe the plan and, under its interpretation, its subrogation interest took priority over Salsbury's damage claims. Salsbury appeals the summary judgment awarding Jerome its subrogation rights in full,[3] together with the trial court's grant of attorney fees and its order denying Salsbury's motion to reconsider based upon the plan administrator's alleged breach of fiduciary responsibility. Salsbury charges on appeal that the trial court erred both when it ruled that the plan conferred upon its administrator the authority to interpret it and that the administrator's construction that the plan stood first in line to receive any personal injury award was reasonable. She also claims that where, as here, the plan administrator does not seek full subrogation from every plan participant, it breaches its fiduciary duty to those from whom it does. Finally, Salsbury asserts that the plan's provision for attorney fees is unconscionable.

We conclude that the subrogation clause is ambiguous, and that the plan grants the administrator the authority to interpret ambiguous plan terms. We further hold that the administrator's construction designating its subrogation

[1] 29 U.S.C. §§ 1001-1461 (1985).

[2] Jerome maintains both a medical and a disability plan. The provisions material to this case are the same. We therefore simply refer to "the plan" for convenience.

[3] Jerome's plans paid $67,233.54 in medical expenses and $5,781.41 in short-term disability.

interest as primary to the participant's right to injury damages is reasonable, any conflict of interest notwithstanding. Finally, we conclude that it was not unconscionable to award attorney fees to Jerome where it prevailed on its counterclaim.

The material facts are not in dispute. Salsbury was seriously injured in an automobile collision. At the time of the accident she participated in Jerome's ERISA[4] health and short-term disability plan. Greg Gleichert was both Jerome's executive vice-president and the person to whom Jerome delegated its plan administration duties. While Jerome presented contradictory positions on the issue, it appears ultimately undisputed that Gleichert would occasionally waive what he interpreted as the plan's requirement that its subrogation claim be satisfied in full prior to the participant sharing in a recovery. In Salsbury's case, however, he took the position that the plan would stand first in line to receive any compensation paid to Salsbury as a result of her injury claim.

In Wisconsin, an insurer who pays health benefits on behalf of an insured is not entitled to subrogation unless the insured has first been fully compensated--"made whole"--for his or her injuries. ***Rimes v. State Farm Mut. Auto. Ins. Co.***, 106 Wis.2d 263, 272, 316 N.W.2d 348, 353 (1982). ERISA, however, preempts state regulation of ERISA plans' subrogation rights.[5] ***FMC Corp. v. Holliday***, 498 U.S. 52, 61 (1990). ERISA is a federal plan that regulates the administration, disclosure and reporting of benefit plans to ensure that

[4] 29 U.S.C. § 1144 (1985).

[5] We have recognized that "[s]ubrogation provisions of self-funded ERISA plans trump state subrogation rules." ***Newport News Shipbuilding Co. v. T.H.E. Ins. Co***., 187 Wis.2d 364, 371, 523 N.W.2d 270, 272 (Ct. App. 1994).

employees receive promised benefits. *See* ***Pomeroy v. Johns Hopkins Med. Serv.***, 868 F. Supp. 110, 111 (D. Md. 1994). While the federal act preempts state subrogation law, it does not itself address specific subrogation rights. We must therefore consider the terms of the specific plan in question. ***Firestone Tire & Rubber Co. v. Bruch***, 489 U.S. 101, 116-118 (1989). Where a plan does not establish the priority by which a recovery from a third party is to be distributed, or does not authorize the administrator to so construe the plan where such an interpretation is reasonable, the parties "default" to the federal common law "make whole doctrine" patterned after the Wisconsin subrogation rule. ***Schultz v. NEPCO Employees Mut. Benefit Ass'n***, 190 Wis.2d 742, 751, 528 N.W.2d 441, 445 (Ct. App. 1994).

STANDARD OF REVIEW

We must consider several standards of review in this case. First, we apply the well-known standard applicable to a review of the trial court's decision. More critically, however, we must also determine whether the plan administrator's construction of the subrogation clause merits a de novo or a deferential appraisal.

We review a motion for summary judgment using the same methodology as the trial court. *See* ***M & I First Nat'l Bank v. Episcopal Homes Mgmt.***, 195 Wis.2d 485, 496, 536 N.W.2d 175, 182 (Ct. App. 1995). That methodology is well known, and will not be repeated here except to observe that summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *See* ***id***. at 497, 536 N.W.2d at 182. Summary judgment presents a question of law that we review de novo. *See* ***id***.

If the plan specifically grants its administrator authority to construe ambiguous plan provisions, such construction is entitled to deference and will not be disturbed unless it is unreasonable (arbitrary and capricious). ***Sanders v. Scheideler***, 816 F. Supp. 1338, 1342 (W.D. Wis. 1993). Absent such discretion, the court construes the terms of the plan de novo. ***Id***. Thus, we first must determine whether the plan confers upon the administrator the authority to interpret the plan's terms.

ADMINISTRATOR'S DISCRETION TO INTERPRET PLAN

Article VIII of the plan provides in pertinent part:

> **8.3 Plan Administrator's Powers**
>
> Except for what the Plan limits or reserves to another person or entity, the Plan Administrator has the right to exercise, in a uniform and nondiscriminatory manner, discretion in the Plan's operation and administration. Without limiting the generality of this power, the Plan Administrator has discretionary authority to:
>
> ….
>
> C. decide and remedy any ambiguities, inconsistencies, omissions, and other Plan matters;

Jerome claims this language empowers the administrator to interpret the plan. Jerome's plan was the subject of federal litigation[6] when a participant unsuccessfully asserted that she was entitled to the benefit of the federal default "made whole" rule because the administrator did not have the power to interpret the plan and its construction giving the plan's subrogation rights first priority was unreasonable. Jerome now asserts that, "In ***Cutting***, the Seventh Circuit analyzed Jerome's employee benefits plan--one virtually identical to those at issue here--

[6] *See* ***Cutting v. Jerome Foods, Inc.***, 993 F.2d 1293 (7th Cir. 1993).

and concluded that the Plan vested discretion in the Administrator … to interpret the Plan." Although the wording of the plan changed between the ***Cutting*** decision and Salsbury's injury, "inspection of the language of the Plan in effect in the ***Cutting*** decision and that of the Plans' current version reveals no meaningful differences. Both explicitly grant the Administrator the power to interpret the language of the Plans and to determine eligibility." Jerome refers to the two plans as "virtually identical."

The plan previously provided that "[a]ll decisions concerning the *interpretation* or application of this Plan shall be vested in the sole discretion of the Plan Administrator." ***Cutting v. Jerome Foods***, 820 F. Supp. 1146, 1149 (W.D. Wis. 1991) (emphasis added). We agree with Jerome that the plan before the ***Cutting*** court did "explicitly"[7] provide to the administrator the power to interpret. Replacing the critical and dispositive word, "interpretation" with "decide," however, hardly results in "identical" language. "Decide an ambiguity" does not instantly and comfortably parallel the corresponding concepts of construction and interpretation. In fact, none of five references we turned to furnished either "construe" or "interpret" as a synonym for "decide." Yet, whatever the word "decide" connotes, regardless of the precise action upon an ambiguity the word was intended to permit, it appears to us uncontrovertible that the power so conferred permits the administrator, by implication, to construe the plan. The administrator cannot act in *any* way upon an ambiguity in the plan

[7] "Explicitly" is synonymous with clearly, definitely, precisely and unmistakably. *See* ***Perugi v. State***, 104 Wis. 230, 242, 80 N.W. 593, 597 (1899) *overruled on other grounds by* ***Montgomery v. State***, 128 Wis. 183, 107 N.W. 14 (1906). "Explicit" has been defined "as being without vagueness or ambiguity **:** leaving nothing implied **:** or unequivocal." WEBSTER'S THIRD NEW INT'L DICTIONARY 801 (Unabr. 1976).

without making the initial determination that plan language *is* ambiguous.[8] This necessarily requires construction or interpretation of the clause or provision at issue. Thus, we conclude that the language Jerome relied upon goes beyond a mere conferral of authority to control and manage the operation and administration of the plan,[9] and permits the administrator to interpret the plan.

REASONABLENESS OF ADMINISTRATOR'S INTERPRETATION OF SUBROGATION CLAUSE

Having concluded that the administrator is authorized to interpret the plan, we ordinarily would determine whether the subrogation clause is ambiguous and, if so, whether the priority determination was reasonable,[10] giving deference to the administrator's interpretation.[11] Jerome argues, however, that the matter has been decided by the ***Cutting*** court when it construed what was, indeed, an identical subrogation clause, determined it was ambiguous and then held that the administrator's interpretation giving the plan's subrogation interest priority over the participant's was reasonable. The ***Cutting*** court determined that under the deferential standard, the administrator's construction of the subrogation provision as inconsistent with the make-whole rule found sufficient support in the clause[12] so

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[8] This does not mean that the administrator's declaration of an ambiguity is dispositive. It cannot, for example, declare an ambiguity where none exists. Rather, when plan language is in dispute, whether an ambiguity exists is a question of law. *See*, *e.g.,* ***Bollman Hat Co. v. Root***, 112 F.3d 113, 116 (3d Cir. 1997).

[9] ***Michael Reese Hosp. & Med. Ctr. v. Solo Cup Emp. H. Ben. Plan***, 899 F.2d 639 (7th Cir. 1990); *see also* ***Firestone Tire & Rubber Co. v. Bruch***, 489 U.S. 101, 113 (1989).

[10] ***Cutting***, 993 F.2d at 1296 (citing ***Firestone*****,** 489 U.S. at 115).

[11] ***Newport News***, 187 Wis.2d at 372, 523 N.W.2d at 272.

[12] "The plan document does state rather flatly that the plan shall be subrogated to 'all claims' by the covered individual against a third party to the extent of 'any and all payments' made (or to be made) by the plan." ***Cutting***, 993 F.2d at 1299.

as to be not "unreasonable." ***Id***. at 1299. While expressed in the negative, the decision upheld the administrator's interpretation, which it could only do if it was reasonable.[13]

Jerome does not specifically address why we should conclude that Salsbury is subject to a ruling affecting another person in another case arising out of an unrelated incident. We nonetheless agree with Jerome's unadorned proposition that the ***Cutting*** court's reasonableness determination is binding upon Salsbury, even though she was not a party in that case. Wisconsin law has recently recognized the defensive use of issue preclusion against a plaintiff who was not a party in the former action. *See* ***Jensen v. Milwaukee Mut. Ins. Co.***, 204 Wis.2d 231, 236-37, 554 N.W.2d 232, 234 (Ct. App. 1996),[14] where we held that issue preclusion may be used defensively against a plaintiff who was not involved in the prior action as long as the subsequent plaintiff has a "sufficient identity of interest" such that his or her interests are deemed to have been litigated in the prior action. Salsbury was a participant in what for the purposes of this case was essentially the same ERISA plan involving the identical subrogation clause reviewed in ***Cutting***. In both this case and ***Cutting***, the plan participants held third-party claims that were subject to the subrogation clause. As such, both parties had an identity of interest in a construction of that clause consistent with

[13] *See* ***Brown v. Blue Cross & Blue Shield***, 898 F.2d 1556, 1559 (11th Cir. 1990).

[14] Ordinarily, due process contemplates an opportunity to be heard. ***Parklane Hosiery Co. v. Shore***, 439 U.S. 322, 327 n.7 (1979). An exception to this requirement is where there is a "sufficient identity of interest" between the unsuccessful litigant in a previous suit and a subsequent party so that the latter's interests were essentially litigated. *See* ***In re Mayonia M.M.***, 202 Wis.2d 461, 468, 551 N.W.2d 31, 35 (Ct. App. 1996). The ***Jensen*** court employed issue preclusion to foreclose a passenger's injury suit against a defendant who had previously been found not liable in a suit maintained by the driver, who was also the passenger's husband. ***Id***. at 234, 554 N.W.2d at 233. The court concluded that there was sufficient identity of interest between the interests of the husband/driver and the wife/passenger to warrant preclusion. ***Id***.

the federal common law "made-whole" default rule.[15] Were we to ignore this commonality of interest and substitute our judgment for the federal court's, the subrogation clause would, theoretically and undesirably, be subject to as many interpretations as there are participants with third-party claims. We therefore agree that Jerome's interpretation is binding on Salsbury and other similarly situated participants. The analysis would ordinarily end here, but for Salsbury's claims that Jerome breached its fiduciary duty and that a conflict of interest affects the standard of review, implying that it should be de novo, or at least approach that standard.

FIDUCIARY DUTY

Salsbury asserts two breaches of fiduciary duty. She contends that Jerome's insistence on receiving priority in some cases but not others treats some participants preferentially. This, she argues, constitutes a breach of fiduciary duty. Jerome counters that, to protect the plan's and participants' interests, it must exercise the discretion conferred upon it by the plan to decide when to pursue subrogation claims and when litigation risks and costs render it counterproductive to seek full reimbursement. The administrator considers such factors, when applicable, as whether a participant has signed a reimbursement agreement, the subrogation claim is de minimus on its face or in relation to the cost of collection, and the risks associated with the participant's third-party claim.

[15] Both cases present the same question of law, without significant differences in the nature of the proceedings, and involve the same burden of persuasion on the issue in question. These mutual factors suggest that application of issue preclusion is not fundamentally unfair. *See* ***Teacher Retire. v. Badger XVI***, 205 Wis.2d 532, 551, 556 N.W.2d 415, 423 (Ct. App. 1996).

We note that the plan does require the administrator to exercise discretion "in a uniform and nondiscriminatory manner." However, we do not view the circumstance complained of as a breach of this charge or of a fiduciary duty. The record reflects that plan administration includes consideration of each potential subrogation claim on a case-by-case basis. Salsbury offered no summary judgment proof to dispute this. It is self-evident that where discretion is vested in the administrator, using applicable factors from a range of reasonable considerations does not violate the uniformity requirement. Similarly, as long as no group of participants is arbitrarily singled out for different treatment under the plan, the administrator's exercise of discretion is not discriminatory. Salsbury has shown no such group-specific preference.

Salsbury also claims that Gleichert violated the fiduciary duties of a plan administrator because he had given conflicting statements under oath regarding enforcement of the plan's priority to receive injury awards distributions. Jerome and Gleichert "insisted" they had consistently enforced the subrogation provision regardless whether the recovery made the participant whole, yet Gleichert testified at a deposition that the plan does not always seek out full reimbursement. Salsbury does not develop, and we do not independently appreciate, why conflicting summary judgment evidence given by the plan administrator constitutes a breach of fiduciary duty. More importantly, she does not provide authority to suggest how such a breach would affect the standard of review. We nonetheless assume that a breach of fiduciary duty would be treated in the same manner as a conventional conflict of interest, which is an issue we next address.

CONFLICT OF INTEREST

In her reply brief, Salsbury asserts that Gleichert's positions as both executive vice president[16] of the fiduciary and as the one to whom Jerome delegated plan administration responsibilities creates a conflict of interest. She perceives that "The Supreme Court in ***Firestone*** has indicated that the concept of 'reasonable basis' must be modified consistent with the plan fiduciary's conflict of interest," relying on language in ***Brown v. Blue Cross & Blue Shield***, 898 F.2d 1556, 1559 (11th Cir. 1990). We agree with Salsbury's view that Gleichert's interests as plan administrator and company vice-president appear to conflict. Although Jerome asserts that Gleichert's exercise of discretion concerning when to waive its full subrogation interests is guided by his fiduciary duty to protect the plan and its participants, this representation rings hollow inside an unfunded plan. Plan claims are ultimately paid from the corporate accounts for which Gleichert is responsible as treasurer and financial officer.[17]

We do not, however, agree that Salsbury, in relying on ***Brown***, correctly perceives the ***Firestone*** court's treatment of the conflict issue. In ***Firestone***, the court of appeals held that courts should review benefit denials under the de novo rather than arbitrary and capricious standard of review where the employer is itself the administrator and fiduciary of an unfunded plan. It

[16] Gleichert's duties as plan administrator arise out of his capacity as head of human resources. He is, however, also responsible for Jerome's businesses in Mexico and Poland, its commodity or industrial meat sales division, and all of Jerome's administrative functions, such as finance, accounting, risk management and information systems. Further, he is in charge of "corporate logistics activities," including production scheduling, raw material procurements and distribution of finished products throughout the world. He manages the company's public relations and public affairs. He is on the board of directors and is Jerome's secretary and treasurer.

[17] "The plan is unfunded, with the result that every penny paid out in plan benefits comes out of the company's coffers …." ***Cutting***, 993 F.2d at 1295. The ***Cutting*** court assumes a conflict of interest inherent in an unfunded employer-administered plan. *See* ***id***. at 1296.

reasoned that deference is unwarranted where the employer's impartiality is thus compromised. ***Id***. at 107-08. The Supreme Court arrived at the same applicable standard of review, but in reliance on principles of trust law, not on concerns of impartiality. Consistent with trust law principles, however, the de novo standard does *not* apply where the plan gives the administrator or fiduciary discretionary authority to construe the terms of the plan.

> Because we do not rest our decision on the concern for impartiality that guided the Court of Appeals, we need not distinguish between types of plans or focus on the motivations of plan administrators and fiduciaries. Thus, for purposes of actions under [the ERISA civil suit provision], the *de novo* standard of review applies regardless of whether the plan at issue is funded or unfunded and regardless of whether the administrator or fiduciary is operating under a possible or actual conflict of interest. Of course, if a benefit plan gives discretion to an administrator or fiduciary who is operating under a conflict of interest, that conflict must be weighed as a 'facto[r] in determining whether there is an abuse of discretion.'

Id. at 115 (citations omitted).

In ***Brown***, the court acknowledged that the arbitrary and capricious standard applied to an administrator's authorized interpretation of the plan. ***Id***. at 1563. It then explained that "the application of the standard is shaped by the circumstances of the inherent conflict of interest." ***Id***. It went on, then, to posit that when plan administrators "have a serious conflict of interest, the proper deference to give may be slight, even zero …." ***Id***. at 1564 (quoting ***Van Boxel v. Journal Co. Emp. Pen. Trust***, 836 F.2d 1048, 1052 (7th Cir. 1987)). ***Firestone***, however, expressly states that where the administrator has authority to interpret an ambiguous subrogation clause, a conflict of interest does not result in a de novo review of the clause but, rather, affects the analysis of whether the administrator

abused his discretion when he interpreted the subrogation clause to afford the plan first priority over third-party recoveries. ***Id***. at 957. The ***Brown*** court's conclusion that a conflict could reduce what is a deferential review to one that is effectively de novo finds no support in and, indeed, goes well beyond the language in ***Firestone.***

As we have observed, the ***Cutting*** court concluded that the administrator's interpretation was reasonable. The ***Cutting*** court did not, however, factor the apparent conflict of interest into the equation when deferentially determining that the administrator's interpretation of the subrogation clause was reasonable. We are nonetheless satisfied that where the court finds language in the plan that would reasonably support the administrator's interpretation, then that language prevails over any conflicted motive that the administrator may have had in arriving at such an interpretation. This may be especially true where the plan is not trying to avoid extending benefits[18] on behalf of a participant, but is merely seeking to effectuate contractually conferred subrogation rights. We thus conclude that a construction for which a court finds adequate support in the plan's language cannot be the result of an arbitrary and capricious exercise of discretion, even when an apparent conflict of interest is factored in. A different conclusion would seem at odds with the ***Firestone*** decision, which did "not rest … on the concern for impartiality," ***id***. at 115, but on

[18] Salsbury does not claim that she has received less than the full benefits to which she was entitled under the plan.

trust law principles cautioning, under the freedom of parties to contract, against interference with the discretion vested in a trustee.[19]

Cutting held that the administrator's interpretation giving the plan priority over third-party injury awards found support in the plan's language and was therefore reasonable. In the context of construction of plan language, a reasonable construction is the antithesis of an abuse of discretion; they cannot coexist. We therefore hold that the ***Cutting*** court's interpretation survives Salsbury's charge of conflict of interest and, as indicated, applies to her under the doctrine of issue preclusion.

ATTORNEYS' FEES

Article IX of the plan provides in part:

> **9.4 Payment Procedures**
>
> ….
>
> If the Plan institutes legal action against the claimant for failure to fully reimburse the Plan or to honor the Plan's interest in the amount the claimant recovers from a third party, the claimant is also liable for the Plan's costs of collection, including reasonable attorney's fees and court costs.

Salsbury claims that this clause is unconscionable for three reasons. First, she is a high school educated factory worker with no effective bargaining power relative to the terms of the plan. These circumstances notwithstanding, we fail to appreciate why a clause permitting an award of attorney fees is

[19] "Hence, over a century ago we remarked that "[w]hen trustees are in existence, and capable of acting, a court of equity will not interfere to control them in the exercise of a *discretion vested in them by the instrument* under which they act." ***Firestone***, 489 U.S. at 111 (quoting ***Nichols v. Eaton***, 91 U.S. 716, 724-25 (1875) (emphasis in original)).

unconscionable where the employee participates in the health and disability plan, receives benefits thereunder, forces the plan to seek legal redress to protect its rights and then loses the legal battle.

Salsbury next argues that the clause is unconscionable because it chills a participant's ability to challenge the plan's right to subrogation. She interprets the language in question to entitle Jerome to attorney fees whenever it institutes legal action, regardless who ultimately prevails. We reject this argument for two reasons. First, Salsbury's construction of the clause ignores its plain meaning. The claimant is liable for the plan's costs of collection. If the plan is unsuccessful, it does not collect and is therefore not entitled to costs. Second, her interpretation aside, Jerome *has* prevailed and it is thus immaterial to this case what rights it might have against a successful claimant.

CONCLUSION

In sum, Jerome's plan confers upon the administrator the power to interpret the plan's provisions. Jerome's plan was construed to provide its subrogation rights with superior priority. This determination was deemed reasonable in a separate court decision that is binding on Salsbury under the doctrine of issue preclusion. While we believe the circumstances suggest the appearance of a conflict of interest, still, this is merely a factor to consider in determining whether the interpretive discretion the plan confers upon the administrator was abused. Because the subrogation clause's construction was found to be reasonable by the federal court, the administrator did not abuse his discretion, the appearance of conflict notwithstanding. Finally, the attorney fees provision of the plan is not unconscionable and was properly applied where the

participant caused the plan to successfully seek judicial protection of its interests. We therefore affirm the judgment and order of the trial court.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.