COURT OF APPEALS
DECISION
DATED AND FILED

May 27, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-2636

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

CAROL J. SALSBURY,

PLAINTIFF-RESPONDENT,

v.

MICHAEL R. MILLER AND FARMLAND MUTUAL INSURANCE,

DEFENDANTS-RESPONDENTS,

AMERICAN FAMILY MUTUAL INSURANCE COMPANY,

DEFENDANT,

JEROME FOODS, INC.,

DEFENDANT-APPELLANT.

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

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

PER CURIAM. Jerome Foods, Inc., appeals an order denying its motion for a credit for reimbursement of future medical expenses that it may be required to pay if incurred by Carol Salsbury, a former employee, and denying its request for a determination that Salsbury's defense to its counterclaim was frivolous. Jerome argues that the trial court erroneously (1) concluded that Jerome's ERISA plan was not entitled to reimbursement in the form of a credit against Salsbury's potential future medical expenses and (2) denied its request for sanctions against Salsbury for maintaining a frivolous defense to Jerome's counterclaim. We reject its arguments and affirm the order.

Salsbury, a participant in Jerome's ERISA[1] health and short-term disability plan, was seriously injured in an automobile collision. When Salsbury sought benefits under the plan, she executed a reimbursement agreement at Jerome's request. Salsbury brought suit against the other driver and his insurer. Jerome Foods, included in the lawsuit due to its subrogation interest, alleged payment of $67,233.54 health care expenses and $5,781.41 short-term disability benefits. Jerome brought a counterclaim for reimbursement payments Salsbury received from the other driver and his insurer.

Salsbury settled her claims for $495,000 and executed a release providing that she would release and hold harmless the defendants from any liability and claims. It specified that $90,000 was to be deposited in trust to pay claims asserted by Jerome.

The plan provides:

E. Subrogation

[1] 29 U.S.C. § 1144 (1985).

> 1. Conditions for Benefit Payment
>
> By accepting any Plan payments of benefits … an individual … agrees that the Plan shall be subrogated to all claims, demands, actions and rights of recovery against any third party or any insurer, including Worker's Compensation, to the extent of any and all payments made or to be made hereunder by the Plan. The Plan shall be entitled to commence an action and try or settle any legal actions it deems necessary in the name of and with full cooperation the individual or to intervene in any such actions already commenced by an individual and will be reimbursed by the individual the extent of any amount paid or payable, past or future, from any third party by way of settlement ….
>
> ….
>
> As a condition precedent to the payment of benefits hereunder, the individual shall, upon written request, execute a reimbursement agreement of the form to be provided by the Claim Administrator or its representative.

The trial court granted Jerome's summary judgment on its counterclaim that it was entitled to reimbursement for all benefits paid to or on behalf of Salsbury.[2] The court declined grant Jerome's motion seeking sanctions against Salsbury for an allegedly frivolous defense to its counterclaim. The trial court further concluded that the plan did not give Jerome a right to a credit or reimbursement for payment of future medical expenses.

Jerome claims that it is entitled to reimbursement for future medical expenses. Relying on ***Provident Life & Accident Ins. Co. v. Williams,*** 858 F.Supp. 907, 911 (W. D. Ark. 1994), Jerome argues that reimbursement, while similar to subrogation, is a distinct legal doctrine. In subrogation, collection is sought directly from the tortfeasor. ***Id.*** With reimbursement, repayment is sought

[2] In a previous decision, we affirmed the trial court's summary judgment awarding Jerome its subrogation rights for medical and disability benefits already paid. This is the second appeal arising out of the same trial court case. *See* ***Salsbury v. Miller***, No. 97-1869 unpublished slip op. (March 3, 1998).

from the beneficiary of the plan. ***Id.***[3] Jerome argues that because its "right of subrogation against the tortfeasor defendant has been extinguished by Ms. Salsbury's settlement," it can only look to Salsbury for reimbursement of expenses in the event she seeks benefits for future medical care.

Jerome provides two alternative reasons in support of its contention. First, Jerome contends: "The clear and unambiguous language of the Plan indicates that the beneficiary must reimburse the Plan for future medical expenses that are incurred as a result of the tortfeasor defendant's actions." Second, it argues: "Although the Plans do not specifically require that it receive credit against future medical expenses, the Court, as a matter of equity and practicality, should impose such a credit."

We reject Jerome's first argument that the plain language of the plan requires the beneficiary to reimburse the plan for future medical expenses. Jerome does not dispute that specific language is required to create a right to reimbursement, and that resolution of Jerome's rights to reimbursement depend on the terms of the plan. *See* ***Shell v. Amalgamated Cotton Garment,*** 43 F. 3d 364, 367 (8th Cir. 1994).[4] Interpretation of such a document is generally a de novo review. *See* ***Davis v. Nepco Employees Mut. Benefit Ass'n,*** 51 F.3d 752, 754 (7th Cir. 1995). However, in light of a plan's language empowering the administrator to interpret the plan, we defer to the administrator's interpretation unless it is

[3] ***Provident Life & Accident Ins. Co. v. Williams***, 858 F. Supp. 907, 911 (W. D. Ark. 1994), also states: "As a matter of logic and case law, a party can have one right, but not the other." Jerome does not, however, discuss or elaborate this statement.

[4] ERISA is a federal statutory scheme that regulates the administration of employee benefit plans. ERISA provisions supersede state law insofar as they relate to an employee benefit plan. *See* ***Cutting v. Jerome Foods, Inc.,*** 820 F. Supp. 1146, 1154 (W. D. Wis. 1991), aff'd, 993 F.2d 1293 (7th Cir. 1993).

unreasonable. ***Newport News ShipBuilding v. T.H.E. Ins. Co.,*** 187 Wis.2d 364, 372, 523 N.W.2d 270, 272 (Ct. App. 1994).

We conclude Jerome's interpretation is unreasonable. Jerome contends that its rights to future reimbursement are found in the plan's language providing that it "will be reimbursed by the individual the extent of any amounts paid or payable, past or future, from any third party by way of settlement or in satisfaction of judgment or agreement." We disagree. This language, found in the paragraph entitled "Subrogation," creates nothing more than subrogation rights. It does not create rights to future payments from Salsbury, but simply provides that Jerome has rights to be reimbursed from payments that Salsbury receives by way of past or future settlement, judgment or agreement. Jerome's interpretation to the contrary would be patently unreasonable.

Jerome's interpretation contradicts the plan's plain language. The plan does not, as Jerome suggests, unambiguously create a right for a credit against Salsbury's settlement for reimbursement of future medical expenses Salsbury may incur. Because subrogation rights are no greater than the rights of the injured person, once the injured party settles the claim and extinguishes his own right to further pursue the claim, the rights of the subrogated party are extinguished as well. *See* ***Amalgamated,*** 43 F.3d at 366. Salsbury's rights with respect to the third party tortfeasor have been extinguished by virtue of the settlement. Since the plan's rights are no greater than Salsbury's, the plan's rights to reimbursement for future medical payments are extinguished as well.

Jerome further contends that it is entitled to a credit for future medical expenses because the plan gives it the right to withhold future benefits until the amounts owed the plan are satisfied. This language does not create

additional rights separate and distinct from subrogation. It merely gives Jerome the right to withhold future benefits until the subrogated claim has been paid.

Additionally, Jerome claims that the reimbursement agreement Salsbury signed states that she agrees to reimburse Jerome to the "full extent of any amount paid or payable under the plan, whether past or future, from any third-party recovery." This language merely reiterates the rights created between the plan and the employee and does not expand those rights. We are unpersuaded that the reimbursement agreement creates any right additional to Jerome's subrogation rights in existence in the plan.

Nonetheless, Jerome argues that subrogation and reimbursement rights do not necessarily arise from contract or statute, but have their origins in equity, and as a matter of equity, a credit should be established for future medical benefits. It contends: "The Plan has an equitable interest in the settlement proceeds because the Plan requires that it be reimbursed from any settlement or judgment amount." It contends that "the establishment of a credit actually works benefits for the beneficiary" because the beneficiary had more options on the amount and duration of future medical care, not being strictly bound by the plan's management. It further contends that the establishment of a credit would benefit plan participants by giving plans an incentive to effect quick settlements. Absent the credit, the plans would have no security for reimbursement of expenses. Jerome invites us to consider dicta in ***Davis,*** 51 F.3d at 752, where the court discussed the practicality of giving the benefits plan a credit against future medical expenses.

We are unpersuaded. In ***Davis,*** 51 F.3d at 754, the Seventh Circuit Court of Appeals stated: "The instant case could have been avoided had the

parties to the original tort suit clearly allocated their settlements." ***Davis*** involved an ERISA plan beneficiary's suit against the plan for payment of medical expenses incurred by the beneficiary after the plan and beneficiary settled separately with the tortfeasor. ***Davis*** noted that "[d]espite effectively owning the Davises' claim against the tortfeasor for all medical expenses, [the plan] claims now that it actually received compensation only for the claim for *past* expenses against the tortfeasor before it unambiguously released the tortfeasor from all liability for *future* medical expenses." ***Id.*** at 756. It concluded that once the ERISA plan had "acknowledged the divergence of its and the Davises' interests by intervening, we believe that Nepco imposed upon itself the duty to protect its own interests adequately." ***Id.*** at 755. ***Davis*** held that if the plan undervalued its claim against the tortfeasor, its mistake does not excuse it from liability for the Davises' medical needs. ***Id.*** at 756.

While ***Davis*** did not directly address the fashioning of an equitable remedy, its reasoning does not militate in favor of doing so. We agree with its rationale that once an ERISA plan intervenes in a beneficiary's personal injury suit against a third party tortfeasor, the plan imposes upon itself a duty to protect its own interests adequately. ***Id.*** at 755. Here, Jerome was joined in Salsbury's lawsuit against the tortfeasor and entered a counterclaim for its subrogated interest. By asserting a counterclaim, Jerome acknowledge the divergence of its interests with its beneficiary. By virtue of its subrogation claim, it had every interest in asserting its claim for all medical expenses. If it did not do so, we decline to fashion a remedy for its omission.

Next, we reject Jerome's claim that it is entitled to sanctions pursuant to § 814.025, STATS. Jerome contends that Salsbury's defense, based upon her resistance to Jerome's subrogated claim for past medical payments, and its claim

for reimbursement for future medical payments, was frivolous as a matter of law. We disagree. A defense or claim is frivolous if an attorney knew or should have known that the claim was without any reasonable basis in law or equity and could not be supported by a good faith argument for the extension, modification or reversal of existing law. ***Id.***

> A finding under this section is based on an objective standard requiring a determination whether the party or attorney knew or should have known that the position taken was frivolous as determined by what a reasonable attorney would have known or should have known under the same or similar circumstances.

Riley v. Lawson, 210 Wis.2d 479, 492, 565 N.W.2d 266, 272 (Ct. App. 1997).

An inquiry under this section involves a mixed question of fact and law. ***Id.*** What a reasonable party would have known is a question of fact, while the determination that the action is frivolous is a question of law. ***In re Marriage of Beaupre v. Airriess,*** 208 Wis.2d 238, 249, 560 N.W.2d 285, 290 (Ct. App. 1997). We review factual questions under the clearly erroneous standard, and conclusions of law we review de novo. ***Id.***

Jerome argues that the identical issues presented in its counterclaim—subrogation and reimbursement rights—were previously addressed in ***Cutting***. Jerome's contention is not accurate. ***Cutting*** addressed the interpretation of the plan's language that "all decisions concerning the interpretation or application of this Plan shall be vested in the sole discretion of the Plan Administrator[.]" ***Id.*** at 1295. In the counterclaim in the suit before us, the plan's language had been changed to: "Without limiting the generality of this power, the Plan Administrator has the discretionary authority to: … decide and

remedy any ambiguities, inconsistencies, omissions, and other Plan matters[.]" ***Salsbury v. Miller,*** No. 97-1869 unpublished slip op., p. 5 (March 3, 1998).

We conclude that the significant alteration of the plan's language provides a reasonable basis for arguing a distinction between the two cases. Because the plan had been amended since ***Cutting*** was decided, the ***Cutting*** decision was not necessarily determinative of subsequent claims.[5] Consequently, Jerome's collateral estoppel argument is unpersuasive. Additionally, because Salsbury prevailed on that portion of Jerome's claim for a credit for reimbursement of future medical expenses, it can hardly be frivolous to resist that portion of Jerome's claim.

By the Court.—Order affirmed.

This opinion will not be published. RULE 809.23(1)(b)5, STATS.

[5] In its reply brief, Jerome argues that Salsbury concedes that the issues in ***Cutting*** and the ones before us are identical. Jerome quotes Salsbury out of context. In Salsbury's next sentence, she explains that the plan's language in the case before us is "completely different" than in ***Cutting***.