COURT OF APPEALS
DECISION
DATED AND RELEASED

August 31, 1995

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62(1), STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 94-0404

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

GWENDOLYN LAWVER,
and MARVIN LAWVER, Husband and Wife,

Plaintiffs-Respondents,

CERTAIN UNDERWRITERS AT INTEREST,
and VENTURE I,

Plaintiffs-Appellants,

v.

MARSHFIELD CLINIC,
and WISCONSIN PATIENTS' COMPENSATION FUND,

Defendants-Respondents.

APPEAL from a judgment of the circuit court for Wood County: JOHN V. FINN, Judge. *Affirmed*.

Before Eich, C.J., Dykman and Vergeront, JJ.

PER CURIAM. Venture I and its stop-loss insurer, Certain Underwriters at Interest, appeal from a judgment allocating all proceeds of a malpractice settlement to Gwendolyn and Marvin Lawver. The issue on appeal concerns Venture I's subrogation claim to those proceeds. We conclude that the trial court properly denied its claim, and we therefore affirm.

Venture I employed Gwendolyn and provided her with medical insurance through an employe benefit plan that qualified as such under the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 (ERISA). The plan provided that "[i]f payment is made for services ... the Company will be subrogated to all rights of recovery which the Covered Person ... may have against another party or liability insurer .... The Covered Person must do whatever is reasonably necessary to secure the Company's rights and will do nothing to damage the Company's rights." The plan also required the insured to repay the company for benefits paid by the plan as a result of medical malpractice.

Allegedly due to malpractice, Gwendolyn incurred $234,000 in medical expenses that Venture I paid under the plan. In March 1992, the Lawvers retained Attorney William Sommerness to pursue their malpractice claim. For several months Sommerness communicated with Venture I's agent about the case, including discussions whether Sommerness would also represent Venture I if the Lawvers commenced suit.

Sommerness commenced the Lawvers' suit in May 1993, naming Venture I and Certain Underwriters as additional plaintiffs. In September 1993, he notified Venture I that he would not represent it, and recommended that it obtain its own counsel. The Lawvers then settled with the defendants for $160,000, and on October 11 moved for an order determining the allocation of the settlement proceeds. Venture I asserts that it first learned of the lawsuit on October 8. After the hearing on the motion, held November 29, the court concluded, pursuant to ***Rimes v. State Farm Mut. Auto. Ins. Co.***, 106 Wis.2d 263, 316 N.W.2d 348 (1982), that the Lawvers were entitled to the entire settlement amount because they were not "made whole" by the settlement.

On appeal, Venture I argues (1) that federal preemption bars the ***Rimes*** "made whole" rule from applying to the subrogation rights of an ERISA

benefit plan, (2) that the trial court caused Gwendolyn to breach her insurance contract with Venture I, (3) that a ***Rimes*** allocation was improper because the defendants received a ***Pierringer*** release (*see* ***Pierringer v. Hoger***, 21 Wis.2d 182, 124 N.W.2d 106 (1963)), (4) that circumstances deprived Venture I of a meaningful opportunity to participate in the lawsuit or settlement, and (5) that the settlement was unreasonably low and reached in bad faith.

Federal law does not bar application of the ***Rimes*** "made whole" rule. Under ***Rimes***, an insurer is not entitled to subrogation out of settlement proceeds unless the insured has been made whole for the loss. ***Rimes***, 106 Wis.2d at 271-72, 316 N.W.2d at 353. In ***Sanders v. Scheideler***, 816 F. Supp. 1338, 1346-47 (W.D. Wis. 1993), *aff'd by unpublished order*, 25 F.3d 1053 (7th Cir. 1994), the court held that where an ERISA benefit plan fails to designate whether the plan or the beneficiary has priority to settlement proceeds, and fails to provide its directors the necessary discretion to construe the plan accordingly, subrogation for medical payments will not be allowed until the insured is made whole. In ***Schultz v. NEPCO Employees Mut. Benefit Assoc., Inc.***, 190 Wis.2d 743, 752-53, 528 N.W.2d 441, 445 (Ct. App. 1994), we adopted the ***Sanders*** rule. That resolves the matter because Venture I's benefit plan failed to designate its priority to the settlement proceeds as required by ***Sanders***, nor does it give its directors discretion to assign that priority.

Gwendolyn did not breach her subrogation contract with Venture I because that contract was not enforceable until she was made whole. As ***Rimes*** points out, whether an insurer claims an equitable or contractual subrogation right makes no difference because the same "made whole" rule applies in either case. ***Rimes***, 106 Wis.2d at 270-71, 316 N.W.2d at 353. As a result, the court's determination that the Lawvers were not made whole effectively nullified Venture I's subrogation contract with Gwendolyn.

The nature of the defendants' release did not prejudice Venture I. It notes that the ***Pierringer*** release preserved the Lawvers' right to sue other potential tortfeasors. However, Venture I fails to explain why that fact works to its disadvantage. If other tortfeasors are ultimately sued and found liable, Venture I can only benefit.

Venture I had sufficient opportunity to protect its interests in the matter. The subrogation interest survives an adverse ***Rimes*** determination only if the plaintiff and tortfeasor settle without involving the subrogated insurer *and* without submitting the issue of the subrogated insurer's rights to the court. ***Schulte v. Frazin***, 176 Wis.2d 622, 635, 500 N.W.2d 305, 310 (1993). Here, Attorney Sommerness advised Venture I weeks before the settlement that it should obtain counsel and have counsel contact him. Venture I can only blame itself for the failure to promptly do so. When Venture I finally learned of the settlement in October it retained counsel, who obtained a six-week delay in the ***Rimes*** hearing. Venture I then sought no further delay and participated in the hearing without objection.

Venture I has not shown why the settlement was unreasonable or reached in bad faith. The trial court made findings of fact that the Lawvers engaged in good faith settlement negotiations and that "considering the cost of litigation, the risks of litigation, including those peculiar to substantiating medical malpractice claims before a jury, and in light of the injuries sustained, the Plaintiffs arrived at a reasonable settlement." We affirm those findings because Venture I does not refer us to any evidence that would prove them clearly erroneous.

By the Court.—Judgment affirmed.

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