

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

March 28, 1996

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. 94-1946

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

JOHN P. NELSON and JUDITH A. NELSON,

Plaintiffs-Appellants,

v.

**MYLISA GONZALES MUELLER, formerly
MYLISA GONZALES, AMERICAN FAMILY
MUTUAL INSURANCE COMPANY, a Wisconsin
Corporation,**

Defendants,

BELOIT CORPORATION, a Delaware Corporation,

Defendant-Respondent,

**AMERICAN STANDARD INSURANCE COMPANY, a
Wisconsin Corporation,**

Defendant.

APPEAL from a judgment of the circuit court for Rock County:
J. RICHARD LONG, Judge. *Reversed and cause remanded.*

Before Eich, C.J., Gartzke, P.J., and Sundby, J.

PER CURIAM. John and Judith Nelson appeal from a summary judgment awarding \$77,000 to Beloit Corporation on a subrogation claim. The dispositive issue is whether Beloit's claim is enforceable without a "make whole" determination pursuant to *Rimes v. State Farm Mut. Auto. Ins. Co.*, 106 Wis.2d 263, 316 N.W.2d 348 (1982). We conclude that it is not, and therefore reverse.

Beloit employed John Nelson and provided health care and salary continuation coverage to him under an employee benefit plan that qualified as such under the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001-1461 (ERISA). The health care plan provided:

The Beloit self-insured benefit program is automatically assigned the right of action against third parties in any situation in which benefits are paid to employees or their dependents. If you bring a liability claim against any third party, benefits payable under this Plan must be included in the claim, and when the claim is settled you must reimburse the Plan for the benefits provided....

The salary plan provided that Beloit "will reserve the right to seek reimbursement from employees who have received settlement payments from third parties of amounts so received to cover income loss due to injury"

The Nelsons were injured when another driver lost control and struck their automobile. As a result, they received \$77,000 from Beloit in health care and salary benefits. They then sued the alleged tort-feasors and the tort-feasors' insurance companies. In a partial settlement with one insurer, they received \$200,000. Beloit claimed \$77,000 from the proceeds of that settlement and moved for summary judgment. The trial court granted judgment, reasoning that the provisions of the plan quoted above plainly allowed reimbursement. The Nelsons take their appeal from that determination.

The trial court prematurely granted Beloit's subrogation claim. Under *Rimes*, an insurer is not entitled to subrogation out of settlement proceeds unless the insured has been made whole for the loss. 106 Wis.2d at 271-72, 316 N.W.2d at 353. Although ERISA generally preempts state subrogation doctrines, in *Sanders v. Scheideler*, 816 F. Supp. 1338, 1346-47 (W.D. Wis. 1993), *affirmed*, 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 Ass'n, Inc.*, 190 Wis.2d 742, 752-53, 528 N.W.2d 441, 445-46 (Ct. App. 1994), we adopted the *Sanders* rule. That resolves the matter because Beloit's benefit plans failed to designate its priority to the settlement proceeds as required by *Sanders*, and also failed to give its directors discretion to assign that priority.

We therefore reverse and remand the matter for further proceedings. Beloit may recover on its subrogation claim when and if the court determines that the Nelsons are made whole by the amounts they have recovered, or ultimately recover, in their personal injury lawsuit.

By the Court. — Judgment reversed and cause remanded.

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