COURT OF APPEALS DECISION DATED AND RELEASED

June 26, 1997

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, 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. 96-3218

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

GORDON A. GERKE AND PAMELA GERKE,

PLAINTIFFS-APPELLANTS,

V.

JASON R. COYIER, ROBERT L. BACHNER, RURAL MUTUAL INSURANCE COMPANY,

DEFENDANTS,

WISCONSIN CARPENTERS' HEALTH FUND,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Iowa County: JAMES P. FIEDLER, Judge. *Affirmed.*

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

ROGGENSACK, J. Gordon and Pamela Gerke appeal a subrogation judgment which awarded the Wisconsin Carpenters' Health Fund (WCHF) $12,074.73 plus interest from Gerkes' recovery against several third-party tortfeasors, for medical and disability payments which WCHF made after Gordon's motorcycle accident. The Gerkes contend that WCHF's subrogation right does not ripen until they are made whole and that the amount of any subrogation right to proceeds from the judgment should have been reduced by the percentage of Gordon's contributory negligence. However, we conclude that WCHF's contractual priority of payment as set forth in the employee benefit plan was sufficient to afford WCHF full reimbursement and to preempt any Wisconsin or federal common law to the contrary. The judgment of the trial court is therefore affirmed.

BACKGROUND

Gordon Gerke was injured when his motorcycle struck Jason Coyier's tractor. At the time of the accident, Gerke was a participating member of WCHF, a self-funded employee benefit plan within the meaning of the Employment Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001-1461. The plan provided in relevant part:

> **4.18 Subrogation Procedures.**
>
> (a) Whenever the Wisconsin Carpenters Health Fund has been or is providing hospital, medical, dental, vision, or disability benefits ("Benefits"), as a result of the occurrence of any injury, sickness, or death which results in a possible recovery of indemnity from another party (third-party) including an insurer, the Fund may make a claim or maintain an action in tort against the third party.
>
> (b) By virtue of accepting such Benefits … the Participant … assigns to the Fund the right to make a claim

> against the third-party to the extent of the amount of such Benefits.
>
> …
>
> (e) The Participant … may make a claim against a third-party or commence an action against a third-party and shall join the other as provided under Section 803.3 of the Wisconsin Statutes….
>
> (f) The proceeds from any settlement or judgment in any claim made against a third-party shall be allocated as follows:
>
> > (1) A sum sufficient to fully reimburse the Fund for all Benefits advanced shall be paid to the Fund.
> >
> > (2) Any remainder less reasonable attorneys' fees and a pro rata share of costs of prosecution shall be paid to the Participant….
>
> (g) The aforesaid allocation of proceeds shall be made in the order enumerated regardless of whether the Fund Participant … has been wholly compensated for the damages arising from the injury, sickness, or death….

Pursuant to the plan, WCHF paid $10,744.90 for Gerke's medical expenses and $1,329.83 as disability payments.

Gerkes eventually filed suit against Coyier, his employer Robert Bachner, and the Rural Mutual Insurance Company. They later amended the complaint to include WCHF. After a two-day trial, the jury returned a verdict of $53,102.17[1] in Gerkes' favor, but it also found Gordon fifty percent negligent for his injuries. Pursuant to Wisconsin's contributory negligence statute, the damages were reduced to $26,551.09. WCHF brought a motion after verdict, requesting

[1] The award included $11,097.37 for health care expenses, $7,004.80 in lost wages, and $35,000 for pain and suffering.

reimbursement of its subrogation claim out of Gerkes' award. The court granted judgment to WCHF for its full claim of $12,074.73, plus twelve percent statutory interest from the date of the verdict.

DISCUSSION

Standard of Review.

Unless an ERISA plan specifically grants discretion to its administrator to construe ambiguous provisions of the plan, we will independently interpret ambiguous plan terms in order to give effect to the plan. ***Schultz v. NEPCO Employees Mut. Benefit Ass'n, Inc.***, 190 Wis.2d 742, 749, 528 N.W.2d 441, 444 (Ct. App. 1994). WCHF has not argued that it has discretion to interpret its plan; therefore, we review the terms of the plan *de novo*. ***Firestone Tire & Rubber Co. v. Bruch***, 489 U.S. 101, 114 (1989).

ERISA Preemption.

WCHF is not an ordinary health insurer. It is a self-funded ERISA plan. The United States Supreme Court has held that the federal scheme in ERISA preempts state regulation of subrogation rights belonging to self-funded ERISA plans. ***FMC Corp. v. Holliday***, 498 U.S. 52, 61 (1990); 29 U.S.C. §§ 1144(a), (b)(2)(A), and (b)(2)(B). Wisconsin courts have recognized that "subrogation 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). However, in cases where an ERISA benefit plan fails to designate priority rules for third-party payments, federal common law requires the plan participant to be fully compensated before medical payments can be recovered by the plan. ***Sanders v. Scheideler,*** 816 F.Supp. 1338, 1347 (W.D.Wis.

1993), aff'd by unpublished order, 25 F.3d 1053 (7th Cir. 1994); ***Schultz***, 190 Wis.2d at 747, 528 N.W.2d at 443. Since ERISA itself does not address specific subrogation rights, we must decide this case with reference to WCHF's plan language. *See* ***Firestone Tire***, 489 U.S. at 116-18.

Gerkes argue that the plan language is not specific enough to preempt the common law make whole remedy of ***Rimes v. State Farm Mut. Auto. Ins. Co.***, 106 Wis.2d 263, 272, 316 N.W.2d 348, 353 (1982), and similar federal common law. *See* ***Sanders***, 816 F.Supp. at 1347. They contend the plan lacks the requisite specificity because it sets forth no right to reimbursement from the recipient of the benefits, but only from third-party tortfeasors. However, our *de novo* review of the plan leads us to conclude otherwise.

The WCHF plan permits the plan participant (Gordon), a dependent recipient of benefits, or the plan itself to make a claim against a potentially responsible third-party. And in regard to the disposition of any recovery from such a claim, regardless of who brings the claim, the plan provides,

> The proceeds from any settlement or judgment in any claim made against a third-party shall be allocated as follows: … A sum sufficient to fully reimburse the Fund for Benefits advanced shall be paid to the Fund.… regardless of whether the Fund Participant has been wholly compensated for the damages arising from the injury…."

We conclude that this provision does not limit the priority of WCHF's right of repayment to circumstances in which the plan itself brings a claim, but instead it establishes that the first priority for the allocation of third-party payments is to be given to WCHF, even if the plan participant or dependent beneficiary brings the claim and even if he/she has not been made whole. Therefore, we conclude the

plan is sufficiently specific to preempt application of any make whole doctrine and WCHF's recovery is not limited in that regard.

Gerkes next argue that even if make whole doctrines are preempted, state contributory negligence law should not be. Therefore, because Gordon was found fifty percent at fault for the accident, WCHF's recovery should be reduced to fifty percent of the payments it made. They cite to Wisconsin case law which provides that a subrogated insurer generally "may recover that percentage of [its] payments attributable to the tortfeasor's negligence" when its own insured bears partial responsibility for his injuries. ***Sorge v. National Car Rental System, Inc.***, 182 Wis.2d 52, 63, 512 N.W.2d 505, 509 (1994). However, ***Sorge*** did not involve an ERISA plan. Additionally, we have already addressed this precise question in ***Newport News.*** There the tortfeasors' insurer argued that Newport News, as successor to the rights of its plan beneficiaries, must establish the defendants' negligence as a condition precedent to recoupment of payments made, because the extent of the tortfeasors' negligence was a limitation on Newport News' right to recoup payments it had made for medical expenses. In rejecting that insurer's contributory negligence argument, we pointed out that the plan has a contractual right to reimbursement from the beneficiaries which cannot be limited by the tort of its insured or of a third-party. ***Newport News***, 187 Wis.2d at 374, 523 N.W.2d at 273. So too, WCHF's right is contractual and contained within the plan. As we review the plan's language, we conclude there is no support therein for any limitation on the contractual right of WCHF to be fully repaid from the judgment Gerkes obtained, prior to Gerkes receiving any payment.

CONCLUSION

WCHF has contractual priority to recover the full amount of payments the plan made for Gordon's medical expenses and disability loss, from the judgment Gerkes won from third-party tortfeasors. The judgment was not required to be sufficient to make Gerkes whole before WCHF had the right to be reimbursed, and Gordon's contributory negligence does not limit WCHF's right of subrogation. The trial court properly awarded WCHF $12,074.73, plus interest.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.