COURT OF APPEALS
DECISION
DATED AND FILED

September 28, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

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

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. ***See*** **WIS. STAT. § 808.10 and RULE 809.62.**

No. 00-0116

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

COLLEEN KINSEY P/K/A COLLEEN MCCOLLOUGH,

PLAINTIFF-APPELLANT,

V.

PATRICIA MCCOLLOUGH, ILLINOIS FARMERS INSURANCE EXCHANGE, MARTIN J. LURVEY, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, AND HEALTH CARE SERVICE CORPORATION A/K/A BLUE CROSS & BLUE SHIELD/ILL.,

DEFENDANTS,

COUNTY OF WINNEBAGO,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Rock County: JAMES WELKER, Judge. *Affirmed.*

Before Vergeront, Roggensack, Deininger, JJ.

¶1 VERGERONT, J. This appeal concerns the interpretation of a provision in an Illinois county's health care benefit plan (Plan) concerning the employer's right to reimbursement of benefits paid to an employee under the Plan. The trial court decided that the Plan provided for the employer's right of recovery from the settlement in this personal injury action, even though the plaintiff, Colleen Kinsey, had not been made whole. It therefore awarded the amount of the settlement, minus her attorney's fees, to the employer, Winnebago County (Illinois). Kinsey appeals, asserting that, under the applicable federal case law, the Plan language is not sufficient to override the make-whole rule, and, therefore, Winnebago County has no right to recover until Kinsey is made whole. We conclude from the applicable federal law, and our decision in ***Newport News Shipbuilding Co. v. T.H.E. Ins. Co.***, 187 Wis. 2d 364, 523 N.W.2d 270 (Ct. App. 1994), that the reimbursement provision in the Plan may be reasonably interpreted to disclaim the make-whole rule. Given the deferential standard of review that applies based on the provisions of this Plan, we therefore affirm the judgment.

BACKGROUND

¶2 Kinsey was injured in successive collisions with two vehicles in Rock County, Wisconsin, while she was a passenger in a vehicle driven by Patricia McCollough. Both Kinsey and McCollough are Illinois residents, as is the driver of the second vehicle. Kinsey suffered severe injuries and incurred $212,954 in medical expenses. Most of those expenses were paid by her employer, Winnebago County (County), under the terms of its Plan.

¶3 Kinsey filed this action against McCollough, the driver of the second vehicle, and their automobile liability insurers, both Illinois corporations. She also

named the County as a defendant that might assert subrogation rights. Kinsey settled her claims against the two individuals for $142,000, and they and their insurers were dismissed. The only remaining issue in the case was whether the County had the right under the Plan to reimbursement from the settlement to the extent of medical benefits paid on Kinsey's behalf. There was no dispute that the $142,000 settlement was insufficient to compensate Kinsey for her personal injuries, nor were there any other factual disputes. The Plan provision the County relied on for its right to reimbursement states:

> If you or one of your covered dependents are injured by the act or omission of another person and benefits are provided for Covered Services described in this benefit booklet, you agree:
>
> a. to immediately reimburse the Claim Administrator for any payments received, whether by action of law, settlement or otherwise, to the extent that the Claim Administrator has provided benefits to you or your covered dependents; and
>
> b. that the Claim Administrator will have a lien to the extent of benefits provided.

¶4 The trial court made these legal conclusions, which are not disputed by either party on appeal: (1) because the County is a government agency, the Plan does not qualify under the Employee Retirement Income Security Act of 1974 (ERISA); (2) under Wisconsin law, an insurer claiming subrogation rights under a contract may not share in the recovery from a tort-feasor unless the injured party has been made whole, that is, has recovered his or her entire loss. *See* ***Rimes v. State Farm Mut. Auto. Ins. Co.***, 106 Wis. 2d 263, 271, 316 N.W.2d 348 (1982); and (3) under Illinois law, there is no requirement that the injured party must first be made whole before such an insurer may share in the recovery from a tort-feasor. *See* ***Scholtens v. Schneider***, 671 N.E.2d 657, 668 (Ill. 1996).

¶5 The trial court then concluded there was a conflict between Wisconsin law and Illinois law on this point, and applying Wisconsin law to resolve this conflict, *see* ***American Standard Ins. Co. v. Cleveland***, 124 Wis. 2d 258, 263, 369 N.W.2d 168 (1985), the court decided that Illinois law should apply on the subrogation issue.

¶6 The trial court also considered Kinsey's argument that the Plan itself provided for the application of "Illinois federal law." The Plan states: "[t]he Plan shall be construed in accordance with the provisions of the Employee Retirement Income Security Act of 1974, as amended and other applicable federal laws and, to the extent not inconsistent therewith, with the laws of the state of Illinois." The applicable "Illinois federal law," Kinsey argued to the trial court, is ***Hartenbower v. Elec. Specialties Co. Health Benefit Plan***, 977 F. Supp. 875 (N.D. Ill. 1997). ***Hartenbower*** holds, according to Kinsey, that the make-whole rule applies unless a plan expressly states that the medical insurer is subrogated even if the insured is not made whole. The trial court disagreed with Kinsey's application of ***Hartenbower*** to the language in this Plan. The court concluded that the language in the Plan reimbursement provision was unambiguous and gave the County the right to reimbursement without an exception for the situation in which the insured is not made whole.

¶7 Based on these conclusions, the court entered a judgment awarding Winnebago County the settlement proceeds, after deducting the amount owed Kinsey's attorneys.[1]

[1] The court's decision regarding the payment of Kinsey's attorney fees from the settlement proceeds is not at issue on this appeal.

DISCUSSION

¶8 On appeal, Kinsey first contends that the trial court erred in applying Illinois law rather than the law that the parties agreed to apply in the Plan. She then argues, as she did in the trial court, that the Plan requires "applicable Illinois federal law," ***Hartenbower***, to be used to construe the Plan, and that the trial court erred in its reading and application of ***Hartenbower***. The County appears to agree that the choice-of-law provision in the Plan governs, but, in the County's view, the federal case law we are to apply under that provision supports the result reached by the trial court.[2]

¶9 In order to resolve this issue, we must interpret the Plan, and, since the facts are undisputed, this presents a question of law, which we decide independently of the trial court. *See* ***Katze v. Randolph & Scott Mut. Fire Ins. Co.***, 116 Wis. 2d 206, 212, 341 N.W.2d 689 (1984). We consider first the choice-of-law provision in the Plan. We conclude the only reasonable reading of this provision is that, in construing the Plan, we are to apply ERISA and the case law decided under ERISA, and, if there are other applicable federal statutes besides ERISA, we are to apply those statutes and the case law decided under them; we are also to apply the law of the state of Illinois, but only if it is not inconsistent with ERISA, other applicable federal statutes, and the case law decided under them.

¶10 Following the choice-of-law provision, in construing the Plan reimbursement provision, we consider ERISA and the case law decided under

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[2] As the County correctly recognizes, we may affirm an order or judgment of a trial court on a different ground than that relied on by the trial court. *See* ***State v. Patricia A.M.***, 176 Wis. 2d 542, 549, 500 N.W.2d 289 (1993).

ERISA.[3] ERISA itself does not address subrogation rights, but federal courts have developed a common law for use in ERISA cases, and, in particular, have developed a common law concerning subrogation rights. *See* ***Cutting v. Jerome Foods, Inc.***, 993 F.2d 1293, 1296 (7th Cir. 1993), *cert. denied*, 510 U.S. 916 (1993). In ***Cutting***, the court first considered the standard of review courts are to employ in interpreting an ERISA plan. The plan language there provided 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. The court decided that when a plan gives an administrator discretion to interpret the plan, as this language did, courts are to defer to the administrator's interpretation and to reverse only if it is unreasonable. *See* ***id.*** at 1296. The court then discussed the employee's request that it adopt a federal common law rule to the effect that subrogation rights under an ERISA plan are enforceable only after the plan beneficiary has been made whole for the loss giving rise to the claim for benefits. *See* ***id.*** The court observed that "without doubt" the beneficiary of an ERISA plan could, if he or she chose, "sign away his make-whole right." ***Id.*** at 1297. Therefore, the court framed the question presented as whether it should adopt the "interpretive principle" that, when a plan is silent, the court should apply the make-whole rule. *See* ***id.*** at 1297-98.

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[3] The parties have not brought to our attention "other applicable federal laws," nor have either argued that we need look to Illinois law after applying the ERISA case law to this Plan. Therefore, we consider only case law decided under ERISA. Also, because the parties have focused on the ERISA case law in the Seventh Circuit, and because cases of the Seventh Circuit Court of Appeals interpreting a federal statute are binding on federal district courts in that circuit, *see* ***Newport News Shipbuilding Co. v. T.H.E. Ins. Co.***, 187 Wis. 2d 364, 372 n.3, 523 N.W.2d 270 (Ct. App. 1994), we confine our analysis of federal case law under ERISA to that of the Seventh Circuit.

¶11 However, the court found no need to answer this question because of the particular plan language at issue coupled with the standard of review. *See* ***id.*** at 1298-99. The plan in ***Cutting*** stated 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." ***Id.*** at 1299. The court concluded that it was not unreasonable to interpret this language as disclaiming the make-whole rule, and, because the plan gave the administrator the discretion to interpret the plan, that interpretation should be affirmed. *See* ***id.***

¶12 In ***Newport News***, 187 Wis. 2d at 370-71, this court applied ***Cutting*** in construing an ERISA plan that provided:

> 10.6 Subrogation. By accepting Coverage under this Plan, each Covered Person agreed [sic] that if he or she receives any benefits under this Plan or any other Company benefit arising out of any injury, illness or condition for which he may assert a claim to recovery against another person, then:
>
> (a) The Company shall be subrogated to the Covered Person's rights or recovery and is entitled to reimbursement from the responsible person to the extent of benefits payable under this Plan or any other Company benefit; and,
>
> (b) The Covered Person will reimburse the Plan Administrator to the extent of, but not exceeding, any payment received in settlement or satisfaction of a judgment on any such claim.

¶13 As in this case, it was undisputed in ***Newport News*** that the injured party was not made whole by the settlement agreement, and the issue was whether the employer was nonetheless entitled to reimbursement from the settlement

proceeds for medical benefits paid under the plan. As in this case, we turned to federal common law:[4]

> Insofar as the federal common law is concerned, the right of the plan beneficiary to be made whole before the plan can recoup its payments 'exists only when the parties are silent.' [***Cutting***], 993 F.2d at 1927. The Plan here is not 'silent.' Rather, Newport News' ERISA plan vests discretion to interpret the plan in a 'Benefits Committee of not less than three persons' appointed by the company's board of directors … [and] the benefits committee's good faith interpretation of the plan is 'final and conclusive.'

Newport News, 187 Wis. 2d at 371.

¶14 We then followed ***Cutting*** in applying a deferential standard of review to the committee's interpretation, and concluded that, given the competing policy interests involved, we could not conclude that the committee was unreasonable in interpreting the plan language as disclaiming an obligation to make the beneficiary whole. *See* ***Newport News***, 187 Wis. 2d at 272-73.

¶15 The Plan in this case contains provisions giving discretion to an administrator to interpret the Plan similar to those in ***Cutting*** and ***Newport News***:

> The Plan is administered by a "Plan Administrator" named by the Employer…. The Plan Administrator shall have the power, right and duty to interpret the Plan and may … adopt rules with respect to the administration of the Plan and the determination and distribution of benefits under the Plan which are consistent with the provisions of the Plan…. Any decision made by the Plan Administrator or an Employee of an Employer in good faith in connection with the administration of the Plan or the Plan Administrator's

[4] We first observed that subrogation provisions in self-funded ERISA plans trump state subrogation rules, and thus we did not apply Wisconsin case law. *See* ***Newport News***, 187 Wis. 2d at 371.

> responsibilities under the Plan shall be conclusive on all persons.

Therefore, applying ***Cutting***, we may not reverse the Plan administrator's interpretation of the reimbursement provision unless it is unreasonable. Comparing the language of this Plan's reimbursement provision to that in both ***Cutting*** and ***Newport News***, we cannot say that it is unreasonable to interpret it as disclaiming an obligation to make Kinsey whole. Indeed, we conclude that the language in this Plan's reimbursement provision, by the use of the word "immediately" before reimburse and by the lien provision, provides an even firmer basis for this interpretation than did the language in ***Cutting*** and in ***Newport News***.

¶16 Kinsey's argument to the contrary is based on ***Hartenbower***. The court in ***Hartenbower*** read ***Cutting*** to leave open the question whether the make-whole rule should be the "default provision" when no language in the plan clearly excludes it, and it answered this question in the affirmative. ***Hartenbower***, 977 F. Supp. at 882-83. It then interpreted the plan language at issue there—"if the Plan has made any payments, it has the right to recover up to the value of the payments from third parties responsible for injuring the Plan participant." ***Id.*** at 883. The court decided that this language did not specifically disclaim the make-whole rule because it did not state that the plan had "the right of first reimbursement" or the "right to reimbursement even if the plan participant is not made whole." It therefore concluded that the beneficiary was entitled to be made whole. ***Id.*** On this basis, the court denied the plan's motion for summary judgment.

¶17 The plan in ***Hartenbower*** gave the administrator the final authority for interpreting the plan. Apparently the court concluded that it need not defer to the administrator's interpretation because it had already decided the plan was "silent" and had adopted the make-whole rule as a default provisions. *See* ***id.*** at

883. Nevertheless, in an alternative analysis, the court concluded that, even if were to defer to the plan administrator, there were disputed facts concerning whether the administrator had acted in an arbitrary and capricious manner with respect to this particular claim. *See* ***id.*** at 884-85. This was an alternative ground on which the court denied summary judgment in favor of the plan. *See* ***id.*** at 885.

¶18 We have difficulty in reconciling the first part of the ***Hartenbower*** court's analysis with ***Cutting***: the ***Hartenbower*** court appears to apply a default make-whole rule despite plan language that, under the analysis in ***Cutting***, could reasonably be interpreted to disclaim the make-whole rule. In any event, we are not persuaded that ***Hartenbower*** requires a reversal of the administrator's interpretation of this Plan for two reasons. First, as we have already noted, the language in this Plan provides a firmer basis than that in ***Cutting*** for the conclusion that the language can be reasonably read to disclaim the make-whole rule, and, for the same reason, it provides a firmer basis than the plan language in ***Hartenbower***. Second, we are bound by our decision in ***Newport News***. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 190-91, 560 N.W.2d 246 (1997). We are satisfied that our interpretation and application of ***Cutting*** in ***Newport News*** requires a conclusion in this case that it is not unreasonable to interpret the reimbursement provision to disclaim the make-whole rule.[5]

[5] After the briefing was completed on this appeal, Kinsey brought to our attention a recent decision of the Seventh Circuit Court of Appeals, ***Wal-Mart Stores v. Wells***, 213 F. 3d 398 (7th Cir. 2000). Kinsey contends this case supports an argument that the Plan language conferring authority on the administrator does not confer discretion relating to financial aspects of the Plan, and, therefore, we need not defer to the Plan administrator's interpretation of the reimbursement provision. We disagree.

(continued)

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

Wal-Mart addresses the question whether the plan should contribute a pro rata share of the beneficiary's attorney fees, since they were incurred for the plan's benefit as well as her own. Although some language, taken out of context, could be read to support Kinsey's position, ***Wal-Mart*** does not modify or overrule ***Cutting***. Since ***Cutting***, unlike ***Wal-Mart***, addresses the issue of the make-whole rule, we decline to read isolated language in ***Wal-Mart*** as implying a modification or overruling of ***Cutting***. Moreover, the plan language in ***Wal-Mart*** gave the administrator discretion only in the parts of the plan that dealt with benefit determinations. In our case, the Plan administrator has the authority to interpret the Plan not only regarding the determination and distribution of benefits, but also regarding the administration of the Plan; correspondingly, the Plan administrator's decision on the administration of the Plan, as well as on determination and distribution of benefits, if made in good faith, "shall be conclusive." This provision is contained in "Article I—General Provisions" of the Plan, and is not limited to the determination of benefits. This provision is more like the broad authority given the administrator under the plan in ***Cutting***, than it is like the narrower grant of authority in ***Wal-Mart***. It is, indeed, very similar to the authority given the benefits committee in the plan at issue in ***Newport News***, 187 Wis. 2d at 371-72.