COURT OF APPEALS
DECISION
DATED AND FILED

September 21, 2010

A. John Voelker
Acting Clerk of Court of Appeals

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.

Appeal No. 2009AP2013 **Cir. Ct. No. 2005CV330**

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

AUTUMN L. WORDEN, A MINOR, BY HER GUARDIAN AD LITEM, DAVID P. LOWE, CHARLES G. WORDEN AND NANCY J. WORDEN,

PLAINTIFFS-RESPONDENTS,

SECURITY HEALTH PLAN OF WISCONSIN, INC.,

INVOLUNTARY-PLAINTIFF-APPELLANT,

ONEIDA COUNTY DEPARTMENT OF SOCIAL SERVICES,

INVOLUNTARY-PLAINTIFF,

V.

DEBRA A. STOCKWELL, M.D., MINISTRY HEALTH CARE, INC., MINISTRY MEDICAL GROUP, INC., SACRED HEART - ST. MARY'S HOSPITALS, INC., PHYSICIANS INSURANCE COMPANY OF WISCONSIN, INC., SHANMUGHAM VADIVELU, M.D., NORTHWOODS ANESTHESIA SERVICES, S.C., THE MEDICAL PROTECTIVE COMPANY AND INJURED PATIENTS AND FAMILIES COMPENSATION FUND,

DEFENDANTS.

APPEAL from a judgment of the circuit court for Oneida County: DOUGLAS T. FOX, Judge. *Affirmed*.

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Security Health Plan of Wisconsin, Inc., appeals that part of a judgment awarding Autumn Worden attorneys' fees and costs from subrogated medical expenses that had been awarded to Security during Worden's medical malpractice trial. Security argues the court erred by applying the common fund doctrine to the facts of this case. Alternatively, Security argues Worden has either waived or is estopped from seeking attorneys' fees under the common fund doctrine. We reject these arguments and affirm the judgment.

BACKGROUND

¶2 Security was named as an involuntary plaintiff in Worden's underlying medical malpractice suit because of past medical expenses it paid on her behalf. Security filed an answer and subrogation cross-claim with respect to the medical expenses, and elected representation by its own counsel pursuant to WIS. STAT. § 803.03(2)(b)1.a.[1] At a subsequent motion hearing, Security's counsel requested that the parties stipulate to the amount of Security's health lien and that Security need not participate in the trial. The following exchange occurred:

> [Counsel]: I just represent a subrogated carrier … and we have got a $167,000 lien, I believe. I really don't want to have to come to the final pretrial or certainly participate in the trial. You are going to have plenty of lawyers the way it is.

[1] All references to the Wisconsin Statutes are to the 2007-08 version.

> [Court]: The fewer lawyers the better, so if you are asking to be excused, by all means.
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> [Counsel]: Well, I need a stipulation out of the parties, Judge. I sent it around in June, and two of the lawyers signed it; one or two of them said they would sign it if everybody else signed it. It just would recognize the lien of Security Health Plan, and I sent along a copy of an itemized statement that provides the date, the description of the service, the provider, and the amount paid.
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> Nobody cares about subrogated carriers, and I don't either when I am one of the real lawyers in a case, but I just don't want to have to—I just don't think there is any dispute, and I would like to get an agreement, and maybe if the Court could indicate that if anybody objects they should make an objection, if not my lien will be recognized or something. Otherwise I'm forced to participate in this trial, Judge, and again, you don't need more lawyers there.
>
> [Court]: Let's find that out now. Is there anyone who has any dispute relating to [Security]'s lien?

¶3 The respective attorneys indicated that although they could not respond at that time, they would inform Security if there were any objections to its lien soon thereafter. The court then stated: "[A]bsent objection let's simply provide that if there is no objection in writing to the lien specifying what the objection is in [counsel]'s hands by this Friday, then, [counsel], you've got your stipulation." Counsel subsequently sent the court a letter memorializing the discussion had between it and counsel and the lack of objections received regarding the lien. The letter stated, in relevant part:

> We discussed the fact that if there was no objection, Security Health Plan's interests would be recognized which would obviate any need for me to appear at the trial. The court advised all counsel that if there were any objections, those should be stated in writing, as well as the basis for any such objections, and delivered to my office no later than Friday, October 24th. No objections were presented to me or my office, and therefore it is my distinct understanding that I will not be required to appear at the time of the trial nor will I be required to present any

> evidence in order to preserve the subrogation interests of my client, Security Health Plan.

¶4 After a twelve-day trial, the jury returned its verdict awarding damages to Worden—including $527,284 for past medical expenses. Because neither Security nor Oneida County, another subrogated involuntary plaintiff, participated in the trial, Worden moved for an order requiring both Security and the county to contribute their pro-rata share of the attorneys' fees and costs for prosecuting Worden's claims. After a hearing, the court applied the common fund doctrine to conclude both Security and the county were responsible for contributing a proportionate share to Worden's costs of collection. This appeal follows.[2]

DISCUSSION

¶5 Security argues the court erred by applying the common fund doctrine to the facts of this case. Whether the common fund doctrine applies to a given set of facts is a question of law. *See* ***Wisconsin Retired Teachers Ass'n v. Employe Trust Funds Bd.***, 207 Wis. 2d 1, 36, 558 N.W.2d 83 (1997). Generally, under the American Rule, each litigant is responsible for his or her own attorney fees. ***Id.*** The common fund doctrine is an exception to that rule. It recognizes that a "litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." ***Boeing Co. v. Van Gemert***, 444 U.S. 472, 478 (1980). This rule is based on the "free rider" problem: that "persons who obtain the benefit of a

[2] Although Oneida County initially appealed the court's ruling, it later voluntarily dismissed its appeal. The trial court's ruling as it applies to the county is, therefore, not an issue in this appeal.

lawsuit without contributing to its cost are unjustly enriched at the successful litigant's expense." ***Wisconsin Retired Teachers Ass'n***, 207 Wis. 2d at 36.

¶6 With these principles in mind, we conclude the common fund doctrine was appropriately applied in this case. Citing ***Ninaus v. State Farm Mutual Automobile Insurance Co.***, 220 Wis. 2d 869, 584 N.W.2d 545 (Ct. App. 1998), the circuit court determined that because Security had not actively participated in the prosecution of Worden's action, it was liable for its pro-rata share of Worden's fees and costs in prosecuting the claim under common law subrogation rules. In ***Ninaus***, this court determined that a one-third reduction for attorneys' fees and costs from the subrogation recovery of an ERISA-governed self-funded health insurer was warranted because the insurer did nothing to participate in the prosecution of the underlying action. ***Id.*** at 888. The ***Ninaus*** court further noted that "[m]ere presence as a party, by virtue of being joined does not constitute participation." ***Id.*** at 887. Like the insurer in ***Ninaus***, Security did not participate in the prosecution of Worden's action, yet it benefited from her efforts at trial.

¶7 Security nevertheless argues ***Ninaus*** is distinguishable because here, the parties stipulated to Security's "non-participation at trial" and to preservation of its subrogation claim. We do not, however, interpret the parties' stipulation as tacit agreement for Security to benefit from Worden's efforts without contributing its fair share to the costs of those efforts. Security was merely excused from having to prove the amount of its subrogated interest at trial.

¶8 Security alternatively argues that by entering into the stipulation, Worden either waived or is estopped from seeking contribution for her attorneys' fees and costs. We disagree. The stipulation was to the amount of Security's

subrogated interest, not to Security's right to recover that amount. Ultimately, were it not for Worden's prosecution of her claims, Security would not have recovered its subrogated interest. We therefore conclude the circuit court properly determined Worden was entitled to contribution for the costs of collection.

By the Court.—Judgment affirmed.

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