IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE

FILED

June 25, 1998

Cecil Crowson, Jr.
Appellate Court Clerk

PAULA M. YORK and BRIAN YORK,	)	SEVIER CIRCUIT
Plaintiffs/Appellees	)	NO. 3A01-9801-CV-00033
v.	)	HON. RICHARD R. VANCE JUDGE
SEVIER COUNTY AMBULANCE AUTHORITY, ET AL, and BLUE CROSS/BLUE SHIELD of TENNESSEE,	)	
Defendants/Appellants	)	REVERSED

Daniel M. Gass, Knoxville, for Appellants.

Richard T. Wallace, Sevierville, and Stephen J. Cox, Knoxville, for Appellees.

O P I N I O N

INMAN, Senior Judge

I

Paula York and her son, Brian York, age 9, were injured in a collision on November 4, 1994 in which Ms. York's automobile was struck from behind by a Sevier County Ambulance. She sustained severe injuries and Brian sustained a traumatic arthrotomy of the left knee, a broken left femur, permanent scarring of his legs and psychological injuries. They filed suit against Sevier County Ambulance Authority on June 22, 1995.

Each plaintiff was awarded $130,000.00 by way of agreed, approved judgment.

Brian York was covered by a policy of insurance with Blue Cross and Blue Shield ("BCBS"), which had paid his medical expenses of $19,149.97. The Authority withheld this sum and separately deposited it with the court. An amended complaint was filed adding BCBS as a defendant to determine whether its medical payments were subrogable.

The trial court determined that Brian York was not "made whole" by the judgment of $130,000.00 and therefore BCBS was "not entitled to subrogation in any amount and should take nothing."

BCBS appeals, insisting that it is contractually entitled to recovery under either the "reimbursement provision" of its policy, which authorizes recovery regardless of whether Brian York was made whole, or in the alternative, under the "subrogation provision" of the policy, because Brian York *was* made whole.

We find that BCBS is entitled to enforce its recovery under the "right to reimbursement" clause of its contract with York. The issue of whether Brian York was made whole is moot.

II

The contract of insurance between BCBS and Paula York for her son provides, as pertinent:

> RIGHT OF RECOVERY AND REIMBURSEMENT
>
> Recovery and reimbursement is another method used to prevent duplicate payments. It works this way:
>
> 1. We assume your legal rights to the recovery of any payments for medical expenses paid by us where your injury or illness resulted from the action or fault of another person. Blue Cross and Blue Shield of Tennessee has the right to recover amounts equal to our payments by suit, settlement or otherwise from the injured party's own insurance or from the person who caused the illness or injury, from his or her insurance company, or any other source, such as uninsured motorist coverage.
> 2. You must give us information and assistance and sign necessary papers. If this is not done or you settle any claim without our written consent, we will be entitled to recover from you all payments for medical expenses made by us, plus reasonable and

necessary attorney fees and court costs we incur in trying to recover such payments.

3. In addition, you agree to reimburse us up to the amount we have provided from any money you (or a member of your family) recover from any source. You will be responsible for reimbursing us the amount of money recovered through judgment or settlement from your own insurance or from the third party (or his insurance), up to the amount of benefits provided by us. This right to reimbursement comes first, even if you have not been paid for all of your claim for damages against the third-party or if the payment(s) you receive are for (or are described as for) other damages, such as personal injuries or other health care expenses or if the member recovering the money is a minor.

Paragraph (1) is a standard insurer's subrogation clause which allows BCBS to succeed to the rights of Brian York to the extent that BCBS has paid medical benefits under its policy. *Castleman Construction Company v. Pennington,* 432 S.W.2d 669, 674 (Tenn. 1968). It is well established that this clause is limited by Tennessee's "made whole" doctrine, which provides that an insurer cannot recover under the terms of a subrogation clause unless the insured is made whole. *Wimberly v. American Casualty Company,* 584 S.W.2d 200 (Tenn. 1979).

Paragraph (3) of the contract establishes a much broader "right of reimbursement." Under this clause, the insurer has a right to be reimbursed from "any money" received by the Plaintiffs from any source, regardless of whether they have been made whole. The trial court held that, despite paragraph (3) of the contract, Tennessee law requires that an injured must be "made whole" before he is required to reimburse an insurer and this is "an equitable principle that you can't contract away."

BCBS argues that a policy of insurance which has both a reimbursement clause and a subrogation clause permits the insurer who is unable to recover under the subrogation clause because the insured has not been made whole to nevertheless recover under the reimbursement clause without the application of

the "made whole" doctrine when the language in the contract is clear, citing *Marshall v. Employers Health Ins. Co.*, 927 F.Supp. 1068 (M.D. Tenn.1996) and *Wal-Mart Associates Group Health Plan v. Mary White and Lewis Garrison*, 22 TAM 36-45 (W.D. Tenn. 1997).

Marshall, supra, involved a recovery by Employers' Health Insurance Company of funds paid to the insured by a beneficiary of an Employee Retirement Income Security (ERISA) plan, who recovered judgment in state court from a third-party tort-feasor but was not made whole by the judgment. Employers' Health Insurance Company sought recovery under a reimbursement provision which, like the contract before us, provided for such reimbursement regardless of whether the insured was made whole. In allowing the insurer to recover, the court held:

> "(1) Tennessee's subrogation law, including the make whole doctrine, is preempted by ERISA; under federal common law, in the absence of a clear contractual provision to the contrary, an insured must be made whole before an insurer can enforce its right of subrogation under ERISA. Since the subrogation provision in this case does not clearly provide to the contrary, the make whole doctrine applies to the Defendant's right of subrogation; and (3) the ERISA plan in this case contains a right of reimbursement that is independent of the right of subrogation and the make whole doctrine. Accordingly, under the right of reimbursement provision, Defendant is entitled to reimbursement of the medical expenses it paid on behalf of Plaintiffs."

Wal-Mart, supra, another district court ERISA case, again enforced a "right to reimbursement" clause under federal common law.

This court has recently rendered a decision in an ERISA case in which Judge Koch, applying federal common law, held that "ERISA does not regulate the substantive content of employee benefit plans . . . thus, it neither requires nor bars subrogation or reimbursement clauses, and it does not otherwise regulate the content of these clauses." In that case, we upheld the enforcement

of the insurer's right to reimbursement under the terms of its contract. *Wood v. Prosser,* (No. 01A01-9510-CV-00468, Nashville, June 11, 1997).

While we do not feel constrained to apply federal common law under the ERISA statutes in the case at Bar, we think Judge Koch's reasoning in *Wood* is particularly appropo:

> "The unambiguous plan language is controlling and must be enforced as written. The courts should not invoke the common-law rules of construction to 'overturn carefully crafted plan provisions.' They should likewise decline to torture the plan language to reach a particular result that the contracting parties never intended or imagined, or to ignore the plan language in order to provide coverage for which no premium has been paid . . . clauses such as the one at issue in this case should be given effect unless they violate public policy or are invalid for some other reason of general contract law . . . . we perceive no [public] policy basis for invalidating [the clause]. [citations omitted]

The judgment is reversed and the case is remanded with instructions to enter an order directing the clerk of the court to pay over the $19,149.97 plus accrued interest now in the clerk's hands to BCBS. Costs of this appeal are taxed against the appellees.

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William H. Inman, Senior Judge

CONCUR:

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Houston M. Goddard, Presiding Judge

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Charles D. Susano, Jr., Judge