

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1999 MTWCC 64

WCC No. 9902-8165

STATE COMPENSATION INSURANCE FUND

Petitioner/Insurer for

ANDERSON LOGGING COMPANY, INCORPORATED

Employer

vs.

LOWELL McMILLAN

Respondent/Claimant.

ORDER DENYING MOTION FOR SUMMARY JUDGMENT

¶1 This action is brought by the State Compensation Insurance Fund (State Fund) to establish and enforce a subrogation interest in a \$2,619,477 third-party recovery. The claimant, who is the respondent herein, moves for summary judgment, alleging that the subrogation claim is time-barred and if not time-barred then barred by the doctrine of laches.

Facts

¶2 The following facts are taken from the parties' briefs and exhibits. They are uncontroverted.

¶3 On July 13, 1987, claimant suffered an industrial injury in the course and scope of his employment with Anderson Logging Co., Inc. (Anderson Logging).

¶4 At the time of claimant's industrial injury, Anderson Logging was insured by the State Fund.

¶5 Claimant filed a claim for compensation and the State Fund accepted liability for his claim. The State Fund has paid claimant substantial compensation and medical benefits.

¶6 Claimant filed a third-party claim against the United States Forest Service on account of his accident. The claim was filed under the Federal Tort Claims Act and was eventually litigated in the United States District Court of Montana. After a bench trial the District Court (the Honorable Charles Lovell) issued Findings of Fact, Conclusions of Law and Order on

May 3, 1995, finding that claimant's total damages were \$4,762,686. However, the Court reduced the award to \$2,619,477 based on a finding that the claimant was 45% negligent.

¶17 The State Fund was aware of the District Court decision by at least August 18, 1995.

¶18 The Forest Service appealed and claimant cross-appealed from the District Court judgment. *McMillan v. United States*, 112 F.3rd 1040, 1041 (1997).

¶19 On May 2, 1997, the United States Court of Appeals for the Ninth Circuit affirmed the District Court decision. *Id.*

¶110 The judgment, without interest, was paid sometime after September 29, 1997, and prior to September 14, 1998. The Court is not informed as to the exact date of payment. See Exhibits B and C to petitioner's brief in opposition to motion for summary judgment. An appeal regarding the payment of interest on the judgment is presently pending in the United States Court of Appeals for the Ninth Circuit. *Id.*, Exhibit D.

¶111 The petition in the present case was filed February 19, 1999.

Summary Judgment Standards

¶112 Summary judgment may be granted only where uncontroverted, material facts require, as a matter of law, judgment for the moving party. ARM 24.5.329(2); *Schelske v. Creative Nail Design, Inc.*, 280 Mont. 476, 482, 933 P.2d 799, 802 (1997). It is appropriate where the statute of limitations is raised as an affirmative defense and uncontroverted facts show that the claim or action is time-barred. *Boles v. Simonton*, 242 Mont. 394, 398, 791 P.2d 755, 757 (1990).

Discussion

¶113 The State Fund's right to subrogation is governed by section 39-71-414, MCA (1985), which was the subrogation statute in effect on the date of the claimant's injury.⁽¹⁾ The section provides:

39-71-414. Subrogation. (1) If an action is prosecuted as provided for in 39-71-412 or 39-71-413 and except as otherwise provided in this section, the insurer is entitled to subrogation for all compensation and benefits paid or to be paid under the Workers' Compensation Act. The insurer's right of subrogation is a first lien on the claim, judgment, or recovery.

(2) (a) If the injured employee intends to institute the third party action, he shall give the insurer reasonable notice of his intention to institute the action.

(b) The injured employee may request that the insurer pay a proportionate share of the reasonable cost of the action, including attorneys' fees.

(c) The insurer may elect not to participate in the cost of the action. If this election is made, the insurer waives 50% of its subrogation rights granted by this section.

(d) If the injured employee or the employee's personal representative institutes the action, the employee is entitled to at least one-third of the amount recovered by judgment or settlement less a proportionate share of reasonable costs, including attorneys' fees, if the amount of recovery is insufficient to provide the employee with that amount after payment of subrogation.

(3) If an injured employee refuses or fails to institute the third party action within 1 year from the date of injury, the insurer may institute the action in the name of the employee and for the employee's benefit or that of the employee's personal representative. If the insurer institutes the action, it shall pay to the employee any amount received by judgment or settlement which is in excess of the amounts paid or to be paid under the Workers' Compensation Act after the insurer's reasonable costs, including attorneys' fees for prosecuting the action, have been deducted from the recovery.

(4) An insurer may enter into compromise agreements in settlement of subrogation rights.

(5) If the amount of compensation and other benefits payable under the Workers' Compensation Act have not been fully determined at the time the employee, the employee's heirs or personal representatives, or the insurer have settled in any manner the action as provided for in this section, the division shall determine what proportion of the settlement shall be allocated under subrogation. The division's determination may be appealed to the workers' compensation judge.

¶14 This section, and it alone, governs the insurer's subrogation rights. Whatever subrogation right existed prior to the enactment of the section, the statute must be followed. See section 1-1-108, MCA; ⁽²⁾ *Corwin v. Bieswanger*, 126 Mont. 337, 340-41, 251 P.2d 252, 253-54 (1952).

I. Statute of Limitations

¶15 Claimant argues that any subrogation interest the State Fund may have had under the section is time-barred. His statute of limitations argument is straightforward, as follows:

(1) The applicable statute of limitations is the two-year limitation for causes of action created by statute (§ 27-2-211(1), MCA); and

(2) The State Fund's subrogation claim accrued on May 3, 1995, when the District Court issued its decision.

Based on these two legal propositions, and the fact that the current action was not commenced until February 19, 1999, claimant concludes that the State Fund's subrogation claim is time-barred.

¶16 The State Fund does not disagree as to the date its action was commenced or as to the other dates and occurrences set out in the Court's statement of facts. However, it disagrees both as to the applicable limitations period and as to the date the action accrued. Both matters raise issues of law.

¶17 In the recent case of *Royal Ins. Co. v. Roadarmel*, 1999 MTWCC 23, this Court held that the applicable statute of limitations with respect to a workers' compensation insurer's subrogation claim is the period within which "an action can be brought upon the principal obligation." *Id.* at 10. That holding was based on section 71-3-122, MCA, which provides:

A lien is extinguished by the lapse of the time within which, under the provisions of Title 27, an action can be brought upon the principal obligation.

Section 71-3-122, MCA, is applicable to liens in general. There is no other, more specific statute governing the duration of the lien specified by section 39-71-414, MCA, hence I concluded that the lien endures only as long as the principal obligation underlying the lien. In *Roadarmel*, I found that the underlying obligation was an agreement (contract) with respect to the insurer's subrogation interest and applied the five-year statute of limitations with respect to oral contracts. I did not consider what the underlying obligation is in absence of the contract, or what statute of limitations applies to such obligation.

¶18 In *Roadarmel* the parties tendered two alternative statutes of limitations - the two year statute for actions based on statutory liability and the five/eight year statute applicable to contract actions. Both parties agreed, or at least did not disagree, that the limitations period began upon claimant's actual receipt of payment discharging the judgment against the third-party tortfeasor.

¶19 The present case has a more complex legal texture. There is no alleged contract regarding subrogation and the parties disagree on the basic limitations period. They also disagree as to the date on which the limitations period began running. Claimant disputes that the statute commences running only upon payment of the judgment. *Roadarmel* is therefore not determinative of the present arguments.

¶20 In this case, the limitations period for liens, which relies upon the limitations period applicable to the underlying "principal obligation," is no help at all. Liens typically arise with respect to agreements to furnish services or goods, hence there is an underlying contractual claim independent of the lien. Subrogation has been characterized as an "equitable lien," *Allstate Ins. Co. v. Reitler*, 192 Mont. 351, 355, 628 P.2d 667, 669 (1981), however, the lien does not spring from any underlying agreement or obligation as between the parties, rather it is a creature of equity and in this case a creature of statute. Hence, there is no underlying obligation other than the obligation created in section 39-71-414. Any attempt to apply the lien limitations period of section 71-3-122, MCA, requires a determination of what limitations period applies in the first place to the subrogation

interest created in section 39-71-414. I therefore conclude and hold that the limitations period applicable in the present case must be determined independently of section 71-3-122 and must be based solely on 39-71-414.⁽³⁾

¶21 Claimant urges the adoption of the two-year statute of limitations provided in section 27-2-211(1), MCA, which provides in relevant part:

27-2-211. Actions to enforce penalty or forfeiture or other statutory liability. (1) Within 2 years is the period prescribed for the commencement of an action upon:

(a) a statute for a penalty or forfeiture when the action is given to an individual or to an individual and the state, except when the statute imposing it prescribes a different limitation;

...

¶22 The State Fund disagrees that the section applies. Relying upon *Abell v. Bishop*, 86 Mont. 478, 284 P.2d 525 (1930), a case cited in a footnote to the *Roadarmel* decision (footnote 4 at 6), the State Fund argues that its right to subrogation is an equitable right preexisting the enactment of section 39-71-414, MCA, therefore section 27-2-211(1), MCA, is inapplicable. *Abell* held that the limitations period for a "liability created by statute" applies only to "a liability which would not exist but for the statute," hence it does not apply to a statute which "gives a right which existed theretofore and merely increases the damages by adding a penalty." *Id.* at 491, 284 P.2d at 528.

¶23 *Abell*, however, is inapposite. While the Montana Supreme Court has recognized equitable subrogation with respect to other forms of insurance, e.g., *Skauge v. Mountain States Tel. & Tel. Co.*, 172 Mont. 521, 565 P.2d 628 (1977) (renter's insurance policy covering property damage due to fire), it has not considered whether, nor held that, a workers' compensation insurer has a right to equitable subrogation *absent the statute*. Moreover, the State Fund has not identified what limitation would apply if indeed subrogation had been recognized in absence of the statute.

¶24 I therefore find that the two-year statute of limitations specified by section 27-2-211(1), MCA, applies. However, I must still determine when the two year limitations period commenced running.

¶25 Claimant cites *St. Paul Fire & Marine v. Allstate*, 257 Mont. 47, 847 P.2d 705 (1993) (hereinafter "*Allstate*") as authority for his argument that the limitations period commenced running upon entry of judgment against the United States Forest Service. In *Allstate* one insurer (St. Paul) had paid its insured (Lynn) \$51,461.61 under an underinsured coverage provision in Lynn's automobile policy. St. Paul then sued the tortfeasor (*Glassing*) to recover its payment, alleging that by paying Lynn it was subrogated to Lynn's claim against

Glassing. The district court dismissed for lack of personal jurisdiction over Glassing and St. Paul appealed.⁽⁴⁾

¶26 Claimant in the present case relies on the following paragraph of the Supreme Court decision in *Allstate*:

In this case, St. Paul became substituted for its insured as a matter of law when it paid Ellen Lynn pursuant to its insurance policy with her and is entitled to pursue her right to collect the amount of her judgment against the defendant. However, St. Paul's right to subrogation **arises from the judgment entered in favor of its insured** against the defendant, and that judgment is a result of the defendant's tortious conduct within the State of Montana.

257 Mont., 51, 847 P.2d at 707 (emphasis added). The issue in *Allstate*, however, did not involve the statute of limitations, rather it concerned personal jurisdiction over defendant Glassing. The Court held that Montana had personal jurisdiction over Glassing and remanded to the district court for further proceedings.

¶27 The statute of limitations **was** addressed in a subsequent appeal following the remand in *Allstate*. In *St. Paul Fire & Marine Ins. Co. v. Glassing*, 269 Mont. 76, 887 P.2d 218 (1994) (hereinafter "*Glassing*"), the Supreme Court held that St. Paul's action against Glassing was time barred because it was not commenced within the three-year limitations period applicable to negligence actions. Noting that the insurer's right to subrogation is derivative of the injured party's cause of action against the tortfeasor, the Court held:

Because an insurer's claim is derived from that of the insured, its claim is subject to the same defenses, including the statute of limitations as though the action were sued upon by the insured. Accordingly, St. Paul's claim is derivative of Lynn's claim, and her claim accrued on June 12, 1985, the date of the accident.

269 Mont., 80, 887 P.2d at 221 (citation omitted). The Court went on to note that "we are cited to no authority for the proposition that the principles of subrogation vary with the type of risk insured against." *Id.* The Court expressly rejected the insurer's argument that the limitations period commenced running on the date it's insured obtained judgment against the tortfeasor. It pointed out that the insurer "could have protected its subrogation interest" by timely intervening in the insured's action against the tortfeasor. 269 Mont. at 81-82, 887 P.2d at 221-222. Since the insurer's action was filed more than three years after the accident, it was barred by the three-year statute of limitations applicable to negligence actions.

¶28 If *Glassing* is apposite, the statute of limitations applicable to the State Fund's claim is three years, § 27-2-204(1), MCA; the limitations period commenced running on July 13, 1986 (the date of the accident); and the State Fund's action is 10 years late. But *Glassing*, as well as *Allstate*, are **not** applicable. Both cases involved the insurer's attempt to pursue

it's insured's cause of action against the third-party tortfeasor. The Supreme Court simply held that the subrogated insurer not only inherits its insured's rights against the tortfeasor, it also inherits any impediments to its insured's actions against the tortfeasor. Since St. Paul's insured's action was time-barred, so too its action was time-barred.

¶29 The present case does not involve any attempt by an insurer to recover monies from a tortfeasor. Rather, the insurer is seeking to enforce a statutory lien against monies received by the claimant. The causes of action are not the same, nor are the statutes of limitations. *Cf. Transamerican Freight Lines Inc. v. Quimby*, 381 Mich. 149, 160 N.W.2d 865 (Mich. 1968) (workers' compensation insurer was entitled to satisfy its subrogation interest out of third-party settlement proceeds received by a claimant even though the statute of limitations had run against the third party). Indeed, if the insurer's lien expires upon the statute of limitations running against the tortfeasor, all a claimant need do to nullify the lien is to commence his or her action against the tortfeasor, delay prosecution of the action until three years from the date of the industrial accident, then settle or try his claim.

¶30 When, then, does the limitations period applicable to the insurer's lien begin running? Section 27-2-102, MCA, provides guidance. It states, in relevant part:

27-2-102. When action commenced. (1) For the purposes of statutes relating to the time within which an action must be commenced:

(a) a claim or cause of action accrues when all elements of the claim or cause exist or have occurred, the right to maintain an action on the claim or cause is complete, and a court or other agency is authorized to accept jurisdiction of the action;

(b) an action is commenced when the complaint is filed.

(2) Unless otherwise provided by statute, the period of limitation begins when the claim or cause of action accrues. . . .

¶31 The elements of the insurer's subrogation right and lien are set out in section 39-71-414(1), MCA (1985), as quoted earlier. Repeating for purposes of clarity in the present discussion, subsection (1) provides:

If an action is prosecuted as provided for in 39-71-412 or 39-71-413 and except as otherwise provided in this section, the insurer is entitled to subrogation for all compensation and benefits paid or to be paid under the Workers' Compensation Act. The insurer's right of subrogation is a first lien on the **claim, judgment, or recovery**. [Emphasis added.]

The bolded language is critical, for it specifies the subject matter of the lien **and** the point in time the lien attaches. The language does not refer to a singular event, but to three distinguishable legal events which arise at three different times. In iterating three separate legal events, the legislature plainly intended that the lien arise and attach to each of the

three separate events. In using the term recovery, it plainly intended to distinguish between an uncollected judgment and actual receipt of monies. To adopt claimant's assertion that the statute of limitations commenced running upon entry of judgment ignores the statute's express provision creating a lien not only upon the judgment but thereafter upon actual recovery.

¶132 I therefore conclude that claimant's actual receipt of monies due under the judgment triggered a renewal of the lien, and that such renewal constitutes an element of the present cause of action. Since this action was commenced within two years of recovery, it is not time barred.

II. Laches

¶133 As a secondary ground in support of his motion for summary judgment, claimant argues that even if the State Fund's petition is not barred by the statute of limitations, it is barred by the doctrine of laches. The argument is without merit.

¶134 The doctrine of laches is summarized in *Marriage of Hahn and Cladouhos*, 263 Mont. 315, 318, 868 P.2d 599, 601 (1994), as follows:

Section 1-3-218, MCA, provides that "[t]he law protects the vigilant before those who sleep on their rights." Laches is a concept of equity that can apply when a person is negligent in asserting a right, and can apply where there has been an unexplained delay of such duration or character as to render the enforcement of the asserted rights inequitable. *Fillner v. Richland* (1991), 247 Mont. 285, 290, 806 P.2d 537, 540. Each case must be determined on its own unique facts. *Fillner*, 806 P.2d at 540.

When a claim is filed within the time set by the statute of limitations, "the defendant bears the burden to show that extraordinary circumstances exist which require the application of laches." *Id.*, 263 Mont. at 319, 868 P.2d at 601. Claimant has not provided uncontroverted evidence of any extraordinary facts. He has done nothing more than establish the amount of time which has passed between the time the statute commenced running and the date the action was filed. That is not enough.

ORDER

¶135 The motion for summary judgment is **denied**.

DATED in Helena, Montana, this 25th day of October, 1999.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. Curtis E. Larsen
Mr. Thomas E. Martello
Mr. Allan M. McGarvey
Date Submitted: June 21, 1999

1. See *Buckman v. Montana Deaconess Hospital*, 226 Mont. 318, 321, 720 P.2d 380, 382 (1986) (holding that the substantive law in effect at the time of the worker's injury applies to the claim).

2. Section 1-1-108, MCA, provides:

1-1-108. Common Law -- applicability of. In this state there is no common law in any case where the law is declared by statute. But where not so declared, if the same is applicable and of a general nature and not in conflict with the statutes, the common law shall be the law and rule of decision.

3. I do not consider whether this holding is consistent with the holding and rationale in *Roadarmel*.

4. St. Paul also sued Glassing's insurer, Allstate, which provided \$50,000 coverage. That claim was also dismissed. On appeal the dismissal as to Allstate was affirmed. That part of the case is unrelated to the present discussion.