IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1999 MTWCC 19

WCC No. 9809-8068

KAREN RILEY

Petitioner

vs.

W.R. GRACE & COMPANY, Employer, and

TRANSPORTATION INSURANCE COMPANY, Insurer

Respondents.

ORDER DENYING SUMMARY JUDGMENT

Summary: Claimant, spouse of decedent, filed petition for attorneys fees relating to earlier case litigating whether insurer was entitled to offset amounts from future death benefits relating to lump-sum settlement made prior to decedent's death and relating to social security benefits received by spouse. Claimant had made request for attorneys fees in prior case but that request had not been ruled upon by Court. Insurer moved for summary judgment on present claim for attorneys fees, arguing res judicata.

Held: Defense of res judicata rejected where the attorney fees request was not determined in the prior action. Although res judicata can sometimes bar litigation of claims which "could and should have been" litigated in a prior action, the issue of attorneys fees was not a question which was necessarily brought or resolved in the prior action, nor was it impliedly covered by the Court's findings and judgment.

Topics:

> **Defenses: Res Judicata.** Claimant, spouse of decedent, filed petition for attorneys fees relating to earlier case litigating whether insurer was entitled to offset amounts from future death benefits relating to lump-sum settlement made prior to decedent's death and relating to social security benefits received by spouse. Claimant had made request for attorneys fees in prior case but that request had not been ruled upon by Court. Insurer moved for summary judgment on present claim for attorneys fees, arguing res judicata. Defense of res judicata rejected where the attorney fees request was not determined in the prior action. Although res judicata can sometimes bar litigation of claims which "could and should have been" litigated

in a prior action, the issue of attorneys fees was not a question which was necessarily brought or resolved in the prior action, nor was it impliedly covered by the Court's findings and judgment.

¶1 This is an action for attorney fees based on this Court's prior declaratory judgment in *W.R. Grace & Company and Transportation Ins. Co. v. Karen Riley,* WCC No. 9709-7824. Transportation alleges that the prior judgment precludes Riley's current claim for attorney fees. It moves for summary judgment dismissing her petition.

Factual Background

¶2 The prior action was commenced by Transportation on September 10, 1997. (Petition for Declaratory Judgment, *W.R. Grace & Company and Transportation Ins. Co. v. Karen Riley,* WCC No. 9709-7824.) The petition alleged that Karen's husband, Donald, contracted an occupational disease while working for W.R. Grace, which Transportation insured, and that in 1993 Donald entered into a full and final compromise settlement of his claim. (*Id*.) Under the settlement, Transportation paid Donald $85,000 in a lump sum. (*Id*.) On February 26, 1997, Donald died. Thereafter, Transportation commenced paying Karen $299 weekly, representing her "full, unreduced weekly rate." (*Id.*, ¶ 6.) However, Transportation believed it was entitled to offset those benefits by that portion of the $85,000 which was attributable to periods of time after Donald's death and by social security payments made to Karen on account of Donald's death. (*Id.*, ¶ 7.) It sought a declaratory judgment as to its entitlement to the offsets. (*Id.*, Prayers.)

¶3 Upon the filing of the Petition for Declaratory Judgment, the Court issued a scheduling order requiring Karen to respond, further requiring that the parties enter into and file an agreed statement of facts, and setting a briefing schedule. (Order Setting Briefing Schedule on Petition for Declaratory Judgment (September 11, 1997).)

¶4 On October 1, 1997, the Court received and filed Karen's Notice of Representation and Response to Petition for Declaratory Judgment (Response). In her Response, Karen admitted that Donald had received the $85,000 settlement but disputed that Transportation was entitled to an offset for any portion of the settlement or for social security benefits. She requested that the Court determine the amount of weekly benefits due her **and** award her "costs and attorney fees." (Response, Prayer 2.)

¶5 Thereafter, the parties filed an Agreed Statement of Facts (October 23, 1997) and proceeded with briefing of the issues raised by the petition. Neither party briefed Karen's attorney fee request.

¶6 On March 23, 1998, the Court entered a Declaratory Judgment finding that Transportation is entitled to offset those portions of its settlement with Donald which are attributable to the period of time after Donald's death but is not entitled to an offset for

social security benefits. The Court did not consider Karen's request for attorney fees, indeed I entirely overlooked the request.

¶7 On May 29, 1998, the Declaratory Judgment was certified as final for purposes of appeal. (Certification of Judgment.) On September 30, 1998, the Court received and filed the present petition for attorney fees.

Discussion

¶8 Transportation argues that the present petition is barred by the doctrine of *res judicata*. It contends that all four elements required for the application of the doctrine are met.

> The following four elements must be satisfied in order to apply the doctrine of res judicata: (1) the parties or their privies must be the same; (2) the subject matter of the action must be the same; (3) the issues must be the same and relate to the same subject matter; and (4) the capacities of the persons must be the same in reference to the subject matter and to the issues.

Parini v. Missoula County High School, Dist. No. 1, 284 Mont. 14, 23, 944 P.2d 199, 204, (1997).

¶9 With respect to the third element, "[i]n order to determine that the issues are the same, the fundamental or essential question involved in the second case must have been raised **and determined** in the first case." *Traders State Bank v. Mann,* 258 Mont. 226, 238, 852 P.2d 604, 611 (1993); emphasis added. Plainly, the issue of attorney fees was not addressed in the prior action between these parties, hence the third element was not met.

¶10 However, citing *Traders State Bank* and *Parini*, Transportation argues that the third element was nonetheless met because Karen "could" have raised the issue and in fact did so in her response. (Respondent's Reply to Petitioner's Brief in Opposition to Summary Judgment at 2.) While reaffirming the principle that *res judicata* bars relitigation of a claim that the party "has already had an opportunity to litigate", *Parini* did not involve an application of the doctrine, rather the Supreme Court concluded that the factual issues relevant to the second claim had in fact been litigated and determined in the first action. In *Traders* the Court determined that the issues underlying the claim for relief were different from the issues underlying the claim for relief in the second action, hence the second claim was not barred. The Court also rejected a *res judicata* argument that one of the issues raised in the second action should have been raised as a defense to the claims in the first action and was therefore barred. The Court noted that even though the defense concerned the merits of the relief granted in the prior action, it was unavailable at that time. Neither *Traders* nor *Parini* address whether a claim raised in an answer or response, which is separate and distinct from the relief sought by the plaintiff or petitioner and which is never addressed or determined by the Court, bars a second action based on the claim.

¶11 Karen cites a Washington Supreme Court case which discusses the limits of the "could have been" litigated rule. In *Seattle First National Bank v. Kawachi,* 91 Wa. 2d 223, 588 P.2d 725, 728 (1978), the Court said:

> While it is often said that a judgment is *res judicata* of every matter which could and should have been litigated in the action, this statement must not be understood to mean that a plaintiff must join every cause of action which is joinable when he brings a suit against a given defendant. CR 18(a) permits joinder of claims. It does not require such joinder. And the rule is universal that a judgment upon one cause of action does not bar suit upon another cause which is independent of the cause which was adjudicated. A judgment is res judicata **as to every question which was properly a part of the matter in controversy, but it does not bar litigation of claims which were not in fact adjudicated.** [Emphasis added; citations omitted.]

I have reviewed Montana cases which have invoked the "could have been" litigated rule in contexts which might arguably support Transportation's *res judicata* analysis. Specifically, I have reviewed *Balyeat Law, P.C. v. Hatch,* 284 Mont. 1, 942 P.2d 716, 717 (1997); *Mills v. Lincoln County,* 262 Mont. 283, 864 P.2d 1265 (1993); *Hollister v. Forsythe,* 277 Mont. 23, 27, 918 P.2d 665, 667 (1996); *Loney v. Milodragovich, Dale & Dye, P.C.,* 273 Mont. 506, 905 P.2d 158, 161 (1995); *Greenwood v. Steve Nelson Trucking, Inc.,* 270 Mont. 216, 890 P.2d 765 (1995); *State ex rel. Harlem Irr. Dist. v. Montana Seventeenth Judicial Dist. Court,* 271 Mont. 129, 134, 894 P.2d 943, 946 (1995); *Tisher v. Norwest Capital Management & Trust Co., Inc.,* 260 Mont. 143, 152, 859 P.2d 984, (1993); *Sheffield Ins. Co. v. Lighthouse Properties, Inc.,* 252 Mont. 321, 324, 828 P.2d 1369, 1371 (1992); *Filler v. Richland County,* 247 Mont. 285, 291, 806 P.2d 537, 541 (1991); *Burgess v. State,* 237 Mont. 364, 366, 772 P.2d 1272, 1273 (1989); *Estate of Pegg,* 209 Mont. 71, 79, 680 P.2d 316, 320 (1984); and *Wellman v. Wellman,* 198 Mont. 42, 45, 643 P.2d 573, 575 (1982). None of these decisions are inconsistent with the limitation announced by the Washington Supreme Court. Several involve facts or claims which were in fact litigated in the first action, although a different legal theory may have been asserted. (*Mills, Hollister, State ex. rel Harlem, Sheffield, Filler, Burgess,* and *Pegg.)* Others involved default judgments or settlements which the second actions sought to overturn. (*Blayette, Loney, Greenwood, Tisher,* and *Wellman*.)

¶12 Moreover, in *Missoula Light & Water Co. v. Hughes,* 106 Mont. 355, 77 P.2d 1041 (1938), the Montana Supreme Court held that where a claim in a prior action is proffered in an answer to a complaint but is never addressed by the court, the prior action is not *res judicata* with respect to the claim. 106 Mont. at 374. The court rejected a contention that the prior action impliedly rejected the claim:

> [T]he rule of implied findings is correctly applied only where the right of a party is expressly determined, and not where, as here, his plea of a specific right is not passed upon, but merely ignored.

(*Id.) Missoula Light* has never been overruled.

¶13 I therefore find that under the facts of this case the doctrine of *res judicata* does not bar Karen's claim for attorney fees.

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

¶15 SO ORDERED.

DATED in Helena, Montana, this 3rd day of March, 1999.

(SEAL)

/s/ Mike McCarter
JUDGE

c: Mr. Allan M. McGarvey
Mr. Thomas R. Bostock
Date Submitted: February 19, 1999