IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1999 MTWCC 48

WCC No. 9710-7850

ROYAL INSURANCE COMPANY

Petitioner

vs.

EARL W. ROADARMEL AND DONALD E. WHITE

Respondents.

ORDER DENYING MOTION FOR RECONSIDERATION

Summary: Respondents sought reconsideration of summary judgment ruling finding them liable to insurer. In their briefs on summary judgment and in response to insurer's motion for summary judgment, they did not contest insurer's alleged undisputed facts.

Held: Where respondents and cross-movants for summary judgment did not contest statement of facts offered by other party, they cannot do so on motion for reconsideration of ruling. Nor can they reargue the merits of the motion.

Topics:

Procedure: Post-Trial Proceedings: Motion for Reconsideration. Where respondents and cross-movants for summary judgment did not contest statement of facts offered by other party, they cannot do so on motion for reconsideration of ruling. Nor can they reargue the merits of the motion.

Summary Judgment: Disputed Facts. Where respondents and cross-movants for summary judgment did not contest statement of facts offered by other party, they cannot do so on motion for reconsideration of ruling. Nor can they reargue the merits of the motion.

Summary Judgment: Motion for Summary Judgment. Where respondents and cross-movants for summary judgment did not contest statement of facts offered by other party, they cannot do so on motion for reconsideration of ruling. Nor can they reargue the merits of the motion.

¶1 Respondents seek reconsideration of this Court's summary judgment finding them jointly and severally liable to petitioner, Royal Insurance Company, in the sum of $63,864.79. The motion is **denied**.

Background

¶2 Petitioner, Royal Insurance Company, brought this action to enforce a subrogation interest in a $250,000.00 third-party recovery by claimant. It sought $66,631.46 from claimant, Earl W. Roadarmel, and his attorney, Donald E. White.

¶3 Respondents moved for summary judgment, asserting that subrogation was time barred. (Respondent's Joint Motion/brief for Summary Judgment, mailed July 16, 1998 and filed July 17, 1998.) Almost simultaneously, Royal filed its own motion for summary judgment on the merits of its claim, asserting that it had entered into a contract with claimant providing for a $5,000 advance in return for full subrogation. (Petitioner's Motion for Summary Judgment and Supporting Brief, mailed July 20, 1998 and filed July 20, 1998.) Thereafter, each party submitted one additional brief, both filed July 27, 1998.

¶4 Respondents' second brief was entitled Respondent's Reply Brief to Petitioner's Motion for Summary Judgment. Despite its caption, it did not respond to the merits of the subrogation claim but merely reiterated the statute of limitations defense. Respondents **did not** contest the statement of facts set forth by Royal in its motion for summary judgment, rather they stated:

> What does seem to be clear now is that the facts in this case are uncontested. It is a question of law for the Court to make a determination based upon the uncontested facts.

(Id. at 1.)

¶5 Royal's second brief was entitled Petitioner's Reply Brief in Support of Motion for Summary Judgment. It replied to the respondents' statute of limitations argument and elaborated on its argument that Mr. White, as well as Mr. Roadarmel, is liable for its subrogation interest. Royal did not challenge any of the uncontested facts set forth in respondents' motion for summary judgment, acknowledging

> [that] it appears that both parties agree that the facts of this case are uncontested, and that this case presents the court with an issue of law.

(Id. at 1.)

¶6 It was on that basis that the Court considered the motions.

Alleged Errors

¶7 Respondents list six errors in the Court's decision, as follows:

1. The Courts Statement of Facts is in error. Specifically, on Page 3, ¶ 8 of the Courts Statement of Facts the Court wrongfully states that Exxon Corporation had settled the matter before trial. In fact, the case was tried against both Exxon and Great Western.

2. The Court is in error on Page 4, Fact No. 14. When the check for $57,800.00 was sent to *Mr. Roadarmel* he was advised to hold the monies in a separate interest bearing account until the question of subrogation could be determined. (See Affidavit of attorney).

3. The applicable statute of limitations in this matter before the Court is § 27-2-211 MCA, the statute whereby a liability created by statute must be brought within two years. It is clear that the subrogation right in question § 39-71-414 MCA, is in fact a liability created by statute. There is no question but that the liability in this case is based entirely upon the subrogation statute. The action to enforce this statute must be brought within two years.

4. The action pending before the Court is not an action based upon a contract. The essential elements necessary to find a contract, specifically, the element of free consent and/or a contract negotiated at arms length are lacking. The statute in question, 39-71-414, is mandatory creating the statutory right of subrogation as to the Petitioner Insurance Company in this matter. The injured employee has absolutely no right under the statute to bargain, negotiate, or decline the subrogation. Since there is no freedom of choice there is no ability to contract and the statute of limitations relevant to contracts is inapplicable.

5. There remains a question of fact as to whether the Claimant here was made whole under Montana law. The Claimants position has always been that he was not made whole as a result of the third party action. The insurance carrier's right of subrogation can only be invoked once the Claimant has been made whole and that issue remains a question of fact under any set of circumstances.

6. The Court created a new theory of recovery based on a lien rather than the theory of trust plead and briefed by the Insurance Company.

Discussion

I.

¶8 Respondents argue that the Court erred in finding that Exxon settled the claim against it "prior to trial" for $7,500. This finding was taken nearly verbatim from Royal's statement of uncontested facts, specifically fact 7, page 2 of Petitioner's Motion for Summary Judgment and Supporting Brief, which states in relevant part:

7. Earl Roadarmel pursued his third-party action. He settled with Exxon for $7,500 before trial. . . .

> As noted earlier, respondents did not contest this or any other fact set out in Royal's statement of uncontested facts. That alone required the Court to accept the fact as true since Rule 24.5.329(3) of this Court's rules requires the opposing parties to set forth in their opposing brief a statement of genuine issues of fact and "the specific facts the opposing party asserts establish a genuine issue of material fact precluding summary judgment in favor of the moving party."

¶9 Not only did respondents not contest the fact, but they stated in Respondent's Reply Brief to Petitioner's Motion for Summary Judgment that the facts are uncontested. In making that representation to the Court, claimant's attorney was either careless in his review of Royal's statement of facts or did not deem the fact material.

¶10 In any event, the discrepancy identified by respondents is immaterial. A review of the information submitted by respondents and of previously submitted documents shows that the verdict in the third-party action was against both Exxon and Great Western, and that the $7,500 settlement of Exxon's liability occurred on appeal and did not diminish claimant's total jury award and recovery.

II.

¶11 Assignment of error two is similar to the first alleged error. Respondents allege that the Court erred in finding number 14, page 4 of its Order Granting Summary Judgment, with respect to the $57,800 disbursed to Earl. They do not contest the fact of the disbursal but apparently take issue with the Court's statement that "[u]nless White intended to waive part of his fees and/or costs, nothing was left over for payment of Royal's subrogation interest."

¶12 Respondents argue that in disbursing the $57,800 to claimant, White instructed claimant to

> hold these funds separate and apart to determine if there was indeed a subrogation right in the Petitioner Insurance Company that would be enforced by the Court.

(Respondent's Brief in Support of Motion for Reconsideration at 3.) Attorney White's Affidavit (filed April 6, 1999) provides the following explanation in support of the assertion:

> The final check issued to the Claimant of $57,800.00 was issued in a separate amount. Before the check was issued the attorney for Claimant discussed the possible subrogation rights of the Workers' Compensation insurer carrier with Claimant. . . .

> The Claimant was therefore instructed orally and in writing by the attorney to hold a second check issued of $57,800.00 aside in a separate account pending any determination by a court as to dispersal of those proceeds depending upon the establishment of the subrogation right of Royal Insurance. The sum of money in question was quite substantial and Claimant's attorney did see no reason for the Claimant, whom the attorney believed had not been made whole as a result of the third party action, to earn interest on the money in question pending resolution of the action based on the subrogation right claimed by Royal Insurance.

(Id. at 2.) It is curious, but not determinative, that White does not supply the Court with a copy of the letter he says he sent claimant in connection with the disbursement.

¶13 As with the first issue, this factual discrepancy should have been raised in response to Royal's motion for summary judgment. Moreover, even if attorney White disbursed the $57,800.00 on the condition described, his instructions are immaterial and do not change his or claimant's legal duties.

III.

¶14 In their third ground for reconsideration, respondents assert that the Royal's claim is barred by the two-year statute of limitations set out in section 27-2-211, MCA. The Court fully addressed their contention in its original decision. Respondents are simply rearguing their case.

IV.

¶15 In their fourth ground, the respondents argue that the Court erred in finding a contract existed in settlement of Royal's subrogation claim. They assert that "the element of free consent and/or a contract negotiated at arms length are lacking." (Respondent's Brief in Support of Motion for Reconsideration at 2.) The argument has an element of irony, for it was respondents who proposed the agreement in the first place. In any event, there was no element of coercion. Claimant was free to insist on Royal's compliance with the subrogation statute if it wished full subrogation. He was not entitled to $5,000 up-front money. He bargained for the money and cannot now complain that he did not freely and at arms-length get what he sought in the first place.

V.

¶16 In their fifth ground, respondents urge that the Court erred because claimant was not made whole by his collection of the judgment against Great Western. This is the first time they have asserted such argument. They did not do so in correspondence with Royal. They did not do so in their responses to the Royal's petition in this case. They did not do so in the face of Royal's summary judgment motion. It is too late to raise the issue now. Moreover, in the face of a satisfied verdict for claimant's full claim for damages, they were required to

come forward evidence of a material and substantial nature raising a genuine issue of fact. *Cole v. Flathead County*, 236 Mont. 412, 416, 771 P.2d 97, 100 (1989). Instead, they have offered mere, unsupported allegations. I.

¶17 Finally, respondents argue that the Court erred in determining attorney White liable because it considered the lien imposed by statute, § 39-71-414, MCA (1985), in determining White's liability. White argues that the lien issue was not raised by Royal and was therefore improperly considered by the Court. White is wrong. In its amended petition, Royal specifically pleads the lien as one of the grounds for liability. On page two, the amended petition alleges:

> Pursuant to the contract between the parties for full participation in Earl W. Roadarmel's third-party action and pursuant to §39-71-414, MCA, Petitioner had a **first lien** on the settlement proceeds of the third-party action. Respondents breached the contract between the parties and **also violated §39-71-414, MCA, by failing and refusing to honor Petitioner's first lien**. . . . [Emphasis added.]

ORDER

¶18 The motion for reconsideration is **denied**.

DATED in Helena, Montana, this 30th day of July, 1999.

(SEAL)

/s/ Mike McCarter
JUDGE

c: Mr. James G. Edmiston
Mr. Donald E. White
Submitted: April 27, 1999