

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

1999 MTWCC 23

WCC No. 9710-7850

ROYAL INSURANCE COMPANY

Petitioner

vs.

EARL W. ROADARMEL and DONALD E. WHITE

Respondents.

ORDER GRANTING SUMMARY JUDGMENT

Summary: Insurance Company wants to recover \$63,864.79 as its subrogation interest in the \$3000,000.00 third-party judgment received by claimant and his attorney. Claimant argues the action for recovery is barred by the applicable statute of limitations.

Held: The actions for recovery is timely where the applicable statute of limitations is the five or eight year period specified by section 27-2-202, MCA, for actions on a contract.

Note: The WCC was reversed on this conclusion in [Royal Ins. Co. v. Earl W. Roadarmel and Donald E. White](#), 2000 MT 259, 301 Mont. 508, 11 P.3d 105.

Topics:

Constitutions, Statutes, Regulations and Rules: Montana Code: section 27-2-202. WCC held this statute established the limitations period for an action to enforce an insurer's subrogation interest in a third-party recovery had by a claimant

Note: The WCC was reversed on this conclusion in [Royal Ins. Co. v. Earl W. Roadarmel and Donald E. White](#), 2000 MT 259, 301 Mont. 508, 11 P.3d 105.

¶1 The present action is brought by Royal Insurance Company (Royal) to recover \$63,864.79 in payment of its subrogation interest in a \$300,000.00 third-party judgment recovered by respondent Earl Roadarmel (Earl). Earl's attorney, Mr. Donald E. White (White), is named as a co-respondent to the claim.

¶2 Both Royal and the respondents have moved for summary judgment. The motions have been fully briefed and none of the parties has asked for oral argument. The cross-motions are therefore deemed submitted for decision.⁽¹⁾

Facts

¶13 The facts are not in dispute. They are set out in the briefs and in the attachments to the parties' briefs.⁽²⁾

¶14 The salient facts are as follows:

1. Earl suffered an industrial injury as a result of a work-related exposure to the chemical toluene. The exposure occurred between September 18, 1986 and December 1987. *Roadarmel v. Acme Concrete Co.*, 237 Mont. 163, 772 P.2d 1259 (1989).
2. Earl filed a claim for compensation. The claim was denied. He then petitioned the Workers' Compensation Court (WCC), which held that he had in fact suffered an industrial injury. On April 25, 1989, the Supreme Court affirmed that determination. *Id.*
3. In June 1989 the parties entered into a full and final compromise settlement. (Exs. C and H to petitioner's motion.) The settlement was approved by the Department of Labor and Industry on July 24, 1989. (Ex. J to petitioner's motion; Ex. 2 to respondent's motion.) It provided that Royal pay claimant \$74,750, but "fully reserved" Royal's subrogation interest in any third-party claim. (*Id.*, Ex. C to petitioner's motion.)
4. In conjunction with the negotiation of the full and final compromise settlement, the parties also reached an agreement concerning Royal's participation in a third-party action against the manufacturer and distributor of the toluene. Through written correspondence of their attorneys, they confirmed their agreement.
5. On June 2, 1989, Mr. White wrote to Royal's attorney, Mr. James G. Edmiston (Edmiston), to confirm the terms of the full and final compromise settlement. In his letter, White also addressed subrogation, writing:

We would also agree to your client, Royal Insurance Company's participation in the action against Exxon and Great Western Chemical with the \$5,000 cost advancement.

(Ex. E to Petitioner's Motion.)

6. On June 6, 1989, Edmiston replied, writing in relevant part:

The insurer accepts your offer to fully participate in the third party action against Exxon and Great Western Chemical by paying a \$5,000.00 cost advancement. No other cost advancements will be required of Royal Insurance in order to fully participate. Royal's subrogation interest will then be calculated pursuant to the formula set forth by the Montana Supreme Court in Tuttle v. Argonaut Ins. Co., 580

P.2d 1379 (Mont. 1978). I have enclosed a copy of this excerpted from Norm Grosfield's "Red Book" on Montana Workers' Compensation law.

Royal Insurance is sending me a check for \$5,000.00 payable to Earl Roadarmel and yourself, which I will forward onto you when I receive it.

(Ex. F to Petitioner's Motion.)

7. Thereafter, Edmiston forwarded Royal's check for \$5,000 to White. On July 6, 1989, White wrote to Edmiston to acknowledge receipt of the check and confirm the subrogation agreement. (Ex. M to Petitioner's Motion.) The check was cashed.

8. The third-party action against Exxon was settled for \$7,500. (Petitioner's Motion at 2).

9. The third-party action against Great Western was tried to a jury in July 1991 and on July 16, 1991, the jury awarded Earl the sum of \$250,000 and his wife the sum of \$50,000. (Ex. 4 to Petitioner's Motion.)

10. The judgment against Great Western was finally paid and satisfied on January 26, 1994. (*Id.*) The total amount paid to Earl and his wife, with costs and accumulated interest, was \$332,450. (*Id.*) The check for that amount was payable jointly to Earl, his wife, and White. (*Id.*)

11. On February 18, 1994, White wrote to Edmiston to inform him of the payment of the judgment. (*Id.*) In the letter, White informed Edmiston that total costs for the action were \$29,967 and that his attorney fee was 40%. (*Id.*) He requested Edmiston to inform him of the amount due Royal on account of its subrogation interest and the manner in which the amount was calculated. (*Id.*)

12. On April 7, 1994, Edmiston sent White his calculations of Royal's subrogation interest. (Ex. R to Petitioner's Motion.) The worksheet showed \$66,631.46 owing and provided that \$61,631.46 of that amount be paid from the amounts recovered in the third-party action and the remaining amount be recovered by a reduction in future biweekly benefits still due Earl under the full and final compromise settlement. (*Id.*)

13. White did not reply and Edmiston wrote him again on October 3, 1994:

Would you please write informing me as to the status of Royal Insurance's subrogation interest. If I do not hear something soon, the insurer has instructed me to file for a determination of their subrogation interest with the Department of Labor and Industry.

(Ex. S to Petitioner's Motion.)

14. Meanwhile, as of February 18, 1994, the same day he wrote Edmiston requesting the amount of Royal's subrogation interest, White disbursed the entire proceeds received from Great Western and Exxon to Earl and his wife, except for the attorney fees and costs. Exhibit Q to respondent's motion shows the total amount received from Exxon and Great Western as \$345,950.64, including the \$300,000.00 judgment, interest, and previous payments of \$7,500.00 by Exxon and \$6,000.00 by Great Western. Respondents' Response to Petitioner's First Discovery Requests, which are attached to Respondent's Motion, reflect the following disbursements to Earl and his wife:

01/26/94 \$ 30,000 To Kathleen Roadarmel

01/26/94 \$110,000 To Earl

02/18/94 \$ 57,800 To Earl

TOTAL \$197,800

That left \$148,150.64 in White's hands. Costs advanced by White were \$29,967.00 and his attorney fee was \$125,400.00 (40% x \$313,500.00 received from the judgment and prior payments). Thus, the amount due White was \$155,367.00, which is more than his retainage. Unless White intended to waive part of his fees and/or costs, nothing was left over for payment of Royal's subrogation interest.

15. According to paragraph 12 of Royal's statement of uncontroverted facts, on March 11, 1997, Royal filed a petition with the Department of Labor and Industry seeking a determination of its subrogation interest, however, the petition was later dismissed and mediation sought. (Petitioner's Motion at 2.)

16. The present petition was filed October 14, 1997.

17. Royal now calculates the amount due for its subrogation interest as \$63,864.79, which it says is somewhat less than the original calculation because medical payments are less than originally calculated. (Petitioner's Motion at 2.) Royal's motion for summary judgment asks for judgment in that amount. (*Id.* at 4.)

18. In their reply brief, the respondents do not contest the amount due; their sole defense is that the claim is barred by statutes of limitations. Respondent's [Sic] Reply Brief to Petitioner's Motion for Summary Judgement.

Discussion

¶15 The amount sought by Royal in satisfaction of its subrogation interest is not disputed by respondents. The sole defenses offered up by them in response to Royal's summary judgment motion, and in support of their own summary judgment motion, are the three year statute of limitations prescribed by section 27-2-211(1)(c), MCA, which governs

actions for liabilities created by statute, and the three year limitations prescribed by section 72-34-511, MCA, for breaches of trust.

¶6 Section 39-71-414, MCA, provides for subrogation in cases where a claimant obtains damages against a third-party tortfeasor in connection with his or her work-related injury. Since the right of subrogation is governed by statute, respondents argue that the applicable statute of limitations is section 27-2-211(1)(c), MCA, which provides that an action based on "liability created by statute," other than one for a penalty or forfeiture, or relating to public assistance, must be commenced within two years.⁽³⁾

Royal does not disagree that the two year statute of limitations applies to the subrogation actions commenced under section 39-71-414,⁽⁴⁾

rather it argues that the two year period of limitations is inapplicable since the parties entered into a contract regarding subrogation. Therefore, Royal argues, the longer five or eight year statute of limitations for commencing an action based on a contract, § 27-2-202, MCA, applies in this case.⁽⁵⁾

¶7 As evidenced by the exchange of letters between the parties' attorneys, the parties in this case entered into an agreement regarding subrogation. That agreement provided for "full" subrogation in return for Royal's advancement of \$5,000 for costs which might be incurred in the third-party litigation.

¶8 There was consideration for the agreement. Section 39-71-414, MCA (1985), which was effective at the time of Earl's injury, provided in relevant part:

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 attorney 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.

....

The section provides for full subrogation where the insurer agrees to "pay a proportionate share of the reasonable costs of the action." It does not specify any particular share. Here the insurer and claimant entered into an agreement, memorialized in writing, for the insurer

to advance \$5,000 in exchange for full subrogation. In doing so, they agreed that \$5,000 was "a proportionate share of the reasonable costs of the action."

¶9 Where the parties enter into an agreement settling a legal claim, and the agreement is supported by consideration, that agreement constitutes a contract and is enforceable as such. *Heatherington v. Ford Motor Co.*, 257 Mont. 395, 849 P.2d 1039 (1993). I conclude and that the subrogation agreement between Royal and White (acting as Earl's agent) is an enforceable contract.

¶10 Thus, the applicable statute of limitations is the five or eight year period specified by section 27-2-202 for actions on contracts. Since the present petition was brought within five years after Earl's judgment against Great Western was paid, it is timely and Royal is entitled to enforce its subrogation interest.⁽⁶⁾ Since the amount due is not in dispute, Earl is liable to Royal in the sum of \$63,864.79.

II.

¶11 Royal also seeks judgment against White.

¶12 Initially, the Court must determine whether it has jurisdiction over the claim against White. While White has not questioned this Court's jurisdiction, lack of subject matter jurisdiction is never waived, may be raised at any time, and may be raised by the Court *sua sponte* (on its own motion). "It is a well-settled principle of law . . . that lack of subject matter jurisdiction cannot be waived, and may be raised at any stage of a judicial proceeding by a party or *sua sponte* by the Court." *Sage v. Gamble*, 279 Mont. 459, 463, 929 P.2d 822, 824 (1996).

¶13 Royal argues that White is personally liable for its subrogation interest since he was a "constructive trustee" of the third-party funds recovered by Earl. The Court need not address whether it has jurisdiction to impose a constructive trust since the Workers' Compensation Act, section 39-71-414, MCA (1985), creates a lien on the funds. The section provides in relevant part:

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. [Emphasis added.]

While the Workers' Compensation Court is a Court of limited jurisdiction generally extending to disputes involving benefits payable to claimants, § 39-71-2905, MCA, and to appeals from workers' compensation and occupational disease determinations of the Department of Labor and Industry, e.g., §§ 39-71-204(3) and -2401, 39-72-612, MCA,

decisions of the Montana Supreme Court hold that the jurisdiction of the WCC extends to issues interwoven with its express jurisdiction.

¶14 Thus, in *State ex rel. Uninsured Employers' Fund v. Hunt*, 191 Mont. 514, 625 P.2d 539 (1981), the Supreme Court held that a petition for declaratory judgment filed by a putative employer which the Uninsured Employers' Fund (UEF) believed was responsible for benefits it paid to a putative employee was within the jurisdiction of the WCC. The UEF contended that the matter was one for the district court to determine since the dispute was a collection matter against the putative employer. The Supreme Court disagreed, holding:

Although the Workers' Compensation Court is not vested with the full powers of a District Court, it nevertheless has been given broad powers concerning benefits due and payable to claimants under the Act. It has the power to determine which of several parties is liable to pay the Workers' Compensation benefits, or if subrogation is allowable, what apportionment of liability may be made between insurers, and other matters that go beyond the minimum determination of the benefits payable to an employee.

191 Mont. 519, 625 P.2d at 542.

¶15 In a subsequent case, the Supreme Court held that this Court's jurisdiction extends to the enforcement of an attorney lien for fees due on benefits secured by the attorney. *Kelleher Law Office v. State Compensation Ins. Fund*, 213 Mont. 412, 691 P.2d 823 (1984). Referring to its prior decision in *Hunt*, the Court noted:

[T]he jurisdiction of the Workers' Compensation Court goes beyond merely providing a forum for adjudicating workers' claims.

213 Mont. 415, 691 P.2d at 824. The issue in that case involved the enforcement of an attorney fee lien specified in section 37-61-420, MCA. The lien applied to all actions brought by an attorney, not to just workers' compensation actions. The Supreme Court held that the lien applied to workers' compensation benefits recovered through an attorney's efforts and that the WCC has jurisdiction to enforce the lien.

¶16 I conclude that this Court has jurisdiction to enforce the lien created by section 39-71-414(1), MCA.

III.

¶17 Section 39-71-414, MCA, provided White with clear notice of the lien. His disbursement of amounts claimed by Royal -- even while acknowledging Royal's interest in those amounts -- is perplexing. His failure to acknowledge either of Edmiston's letters regarding the amount due Royal was discourteous and unprofessional. In any event, White is subject to the Court's jurisdiction and its power to enforce the lien. Unless Royal's claim against him is barred by a statute of limitations, he is liable for the \$63,864.79 due Royal.

¶18 Section 71-3-122, MCA, specifies the time within which an action to enforce a lien may be brought, providing:

71-3-122. Lien extinguished by statute of limitations. 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.

In this case, I have determined that the principal obligation has not been extinguished, thus the lien is not barred and Royal is entitled to enforce it against White.

JUDGMENT

¶19 1. The Workers' Compensation Court has jurisdiction in this matter.

¶20 2. Respondents, Mr. Earl W. Roadarmel and Mr. Donald E. White shall pay petitioner, Royal Insurance Company, the sum of \$63,864.79. They are jointly and severally liable to pay that amount.

¶21 3. This JUDGMENT is certified as final for purposes of appeal pursuant to ARM 24.5.348.

¶22 4. Any party to this dispute may have 20 days in which to request an amendment reconsideration from this Order Granting Summary Judgment.

DATED in Helena, Montana, this 17th day of March, 1999.

(SEAL)

/s/ Mike McCarter
JUDGE

c: Mr. James G. Edmiston, III
Mr. Earl W. Roadarmel - Certified Mail
Mr. Donald E. White
Submitted: July 27, 1998

1. Failure to request oral argument constitutes a waiver of oral argument. Court Rule ARM 24.5.329(5) provides:

(5) If either party desires a hearing on the motion, a request must be made in writing no later than the time specified for the filing of the last brief. The court will thereupon set a time and place for hearing. If no request for hearing is made, any right to hearing afforded by these rules will be deemed waived. The court may order a hearing on its own motion.

2. ARM 24.5.329(3) provides that a party who contests an uncontested statement of fact set forth by the other party must state that the fact is contested and set forth the specific factual basis for the contest. The rule provides:

(3) Any party filing a motion under this rule shall include in its brief a statement of uncontroverted facts, which shall set forth in full the specific facts on which the party relies in support of the motion. The specific facts shall be set forth in serial fashion and not in narrative form. As to each fact, the statement shall refer to a specific pleading, affidavit, or other document where the fact may be found. Any party opposing a motion filed under this rule shall include in their opposition a brief statement of genuine issues, setting forth the specific facts which the opposing party asserts establish a genuine issue of material fact precluding summary judgment in favor of the moving party.

The parties did not contest facts set forth by the other, therefore they are deemed admitted.

3. Section 27-2-211, MCA, 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:

...

(c) a liability created by statute other than:

(i) a penalty or forfeiture; or

(ii) a statutory debt created by the payment of public assistance.

4. See *Abell v. Bishop*, 86 Mont. 478, 284 P. 525 (1930) ("Liability created by statute" means liability which would not exist but for the statute). Royal, however, has not urged that subrogation existed in absence of section 39-71-414, therefore the Court need not consider whether some other limitation applies.

5. Section 27-2-202, MCA, provides:

27-2-202. Actions based on contract or other obligation. (1) The period prescribed for the commencement of an action upon any contract, obligation, or liability founded upon an instrument in writing is within 8 years.

(2) The period prescribed for the commencement of an action upon a contract, account, or promise not founded on an instrument in writing is within 5 years.

(3) The period prescribed for the commencement of an action upon an obligation or liability, other than a contract, account, or promise, not founded upon an instrument in writing is within 3 years.

6. While it is apparent that the exchange of letters gives rise to a written contract, the Court need not analyze the elements required for finding that a written contract exists since the shorter, five year statute of limitations is satisfied.