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JEFFREY STERNER, APPELLEE, V. AMERICAN FAMILY INSURANCE COMPANY, APPELLANT.

805 N.W.2d 696

Filed November 15, 2011. No. A-10-1074.

1. **Workers' Compensation: Judgments: Appeal and Error.** Distribution of the proceeds of a judgment or settlement under Neb. Rev. Stat. § 48-118.04 (Reissue 2010) is left to the trial court's discretion and is reviewed by an appellate court for an abuse of that discretion.
2. **Judges: Words and Phrases.** A judicial abuse of discretion requires that the reasons or rulings of a trial judge be clearly untenable, unfairly depriving a litigant of a substantial right and a just result.
3. **Workers' Compensation: Employer and Employee: Insurance.** Neb. Rev. Stat. § 48-118.04 (Reissue 2010) provides that third-party settlements are void unless agreed to in writing by the employee and employer, or its insurer.
4. **Workers' Compensation: Subrogation.** Using a "made whole" formulation or establishing a higher priority for a worker's recovery than for an employer's subrogation interest in a third-party claim is fundamentally flawed, and a division of the funds based thereupon would be untenable and an abuse of discretion.
5. **Workers' Compensation: Subrogation: Wages: Attorney Fees: Costs.** When an employer has a subrogation interest in the recovery in a worker's third-party claim, the party bringing the claim is entitled to deduct a reasonable sum for attorney fees and costs, but not for unreimbursed wages, from any amount recovered.
6. **Appeal and Error.** Plain error is error plainly evident from the record and of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process.

Appeal from the District Court for Douglas County: W. MARK ASHFORD, Judge. Reversed and remanded for further proceedings.

Richard L. Walentine, Justin L. Griner, and Betty Egan, of Walentine, O'Toole, McQuillan & Gordon, for appellant.

Terry M. Anderson and Melany S. O'Brien, of Hauptman, O'Brien, Wolf & Lathrop, P.C., for appellee.

INBODY, Chief Judge, and SIEVERS and MOORE, Judges.

SIEVERS, Judge.

Jeffrey Sterner was injured in the scope and course of his employment as a property loss adjuster for American Family Insurance Company (American Family) on February 6, 2008,

when he was attacked by a homeowner's pit bull dog. In his workers' compensation claim, he claimed injury to both his left and right shoulders, but was awarded benefits for the left shoulder only. Sterner pursued a third-party tort claim against the homeowner, which was ultimately settled for $80,000 with American Family's consent. Thereafter, this case was filed in the district court for Douglas County to determine the "fair and equitable" division of those settlement proceeds between Sterner and American Family's subrogation interest for workers' compensation benefits paid to Sterner. The district court found that American Family was entitled to an "equitable subrogation in the amount of $0.00." American Family has now appealed that decision to this court.

FACTUAL AND PROCEDURAL BACKGROUND

Sterner was employed by American Family as a home property adjuster. On February 6, 2008, as Sterner was approaching the front door of a residence in the course of his job, a pit bull dog came around the front of the house, rushing at him and growling. Sterner partially blocked the dog's leap at him with a clipboard, but he slipped on the snow, fell, and landed on his left shoulder. The dog was at the "end of its chain" and therefore was not able to pursue Sterner, and he was not bitten. There is no dispute that Sterner sustained an injury to his left rotator cuff from the fall, which eventually resulted in surgical intervention and time off from work. Sterner's attending physician, Dr. Darren Keiser, assigned an 8-percent impairment of the left upper extremity. Sterner's weekly wage entitled him to the maximum allowable compensation benefit of $644 per week. All benefits for the left shoulder were voluntarily paid by American Family.

Because Sterner also claimed that his right shoulder was injured in this incident, he filed suit against American Family in the Nebraska Workers' Compensation Court. The matter was tried on November 20, 2009, and the workers' compensation trial judge rendered his decision on December 18. The trial judge found the left shoulder injury to be compensable, found that all allowable benefits had been paid, and then extensively

discussed the claim of injury sustained to the right shoulder. The judge found that the right shoulder condition did not arise out of and in the course of Sterner's employment and denied benefits. No appeal was filed from that decision.

The evidence shows that because of the left shoulder injury, Sterner missed 4½ weeks of work, and that he returned to limited duty work on July 23, 2008. His lifting was restricted, and he was not to climb ladders. With respect to the right shoulder, Sterner's claim was that he was required to work beyond the restrictions to his left arm, which led to an "'overuse'" injury to his right shoulder, culminating in a right rotator cuff tear and remedial surgery on January 2, 2009.

Sterner's orthopedic surgeon, Dr. Keiser, issued his opinion dated October 2, 2008, that because Sterner had no problems with his right shoulder since a prior injury and rotator cuff repair thereto in 1991, the right rotator cuff tear was a "direct result" of Sterner's overuse of that extremity because of his left shoulder injury. The evidence is that Sterner first reported right shoulder symptoms during the first week of August 2008. The compensation court trial judge said that he had searched Sterner's medical records but found no mention of his suffering pain or injury to his right arm while shutting his van door with his right hand or while reaching with his right arm to secure a laptop in his vehicle with a bungee cord. These were two incidents that Sterner eventually recounted and claimed were a cause of increased pain in the right shoulder in addition to his generalized overuse claim.

The trial judge also recounted that Sterner was examined for American Family by Dr. Dean Wampler, who issued a report dated February 4, 2009, that noted the history given by Sterner of noticing right shoulder pain shortly after returning to work on July 23, 2008. The trial judge quoted from Dr. Wampler's report, which stated as follows:

> The pathology in . . . Sterner's right shoulder is substantial. He has acromioclavicular joint arthritis, subacromial bursitis, a partial thickness tendon tear and a full-thickness tendon tear. All these findings can be explained by progression of degenerative joint disease. Many rotator cuff tears are the end effect of chronic subacromial

> impingement of the tendons between an arthritic AC joint . . . .

The Workers' Compensation Court trial judge also noted that Sterner's job did not involve the sort of intensive labor normally seen by the court in overuse injuries to an opposing member of the body. The court cited that Sterner was using a 2½-pound laptop, a light clipboard, and a tape measure as the tools of his trade. The court also noted that there was no evidence of the repetitive-type movements that are typically seen in instances of cumulative trauma.

In the end, the Workers' Compensation Court trial judge found in favor of American Family on the claim for an on-the-job injury to the right shoulder. The judge found the report of Dr. Wampler stating that Sterner's right rotator cuff injury was due to the effects of the natural progressive degenerative joint disease more persuasive than the overuse syndrome advocated by Dr. Keiser. Therefore, the compensation court denied any benefits for the right shoulder injury.

DISTRICT COURT ACTION AND DECISION

Following the $80,000 settlement of Sterner's claim against the homeowner, an application for division of settlement proceeds was filed by American Family in the district court for Douglas County pursuant to Neb. Rev. Stat. § 48-118.04 (Reissue 2010). American Family alleged that it had paid to or on behalf of Sterner the sum of $35,313 as benefits under the Nebraska Workers' Compensation Act as a result of Sterner's accident of February 6, 2008; that Sterner's action against the homeowner had been settled for $80,000; that American Family had consented to said settlement; and that American Family claimed a subrogation interest and lien in the sum of $35,313 in the settlement proceeds. American Family alleged that it could not agree on a division of the settlement proceeds with Sterner and, therefore, requested that the court, pursuant to § 48-118.04, determine a fair and equitable division of such proceeds.

A hearing was held on July 16, 2010, in the district court. Ten exhibits were offered and received into evidence by

agreement of the parties, one of which was a joint stipulation setting forth a number of uncontroverted facts. The parties stipulated that Sterner's average weekly wage was $1,104.63; how the accident happened; and that American Family admitted liability for the injury to Sterner's left shoulder but denied that any injury to his right shoulder had occurred in the accident of February 6, 2008. The parties stipulated that as a result of the condition in Sterner's right shoulder, the sum of $43,438 in medical expenses was incurred as well as $16,132.32 in lost wages, for a total of $59,570. The parties agreed that $5,832.44 in gross lost wages was attributable to the left shoulder injury. With respect to the left shoulder, it was agreed that American Family had paid $21,145.10 in medical expenses, $2,576 in temporary total disability, and $11,592 for permanent partial impairment, for a total of $35,313.10. With respect to attorney fees, the parties stipulated that the sum of $22,802.66 was paid to Sterner's attorney for fees and that $1,395.92 was paid for costs.

The district court found that an attorney fee was due Sterner's counsel for representation in the tort case against the homeowner in the amount of $26,666.66 plus $1,395.92, for a total of $28,062.58 (although the court's total was $28,062.87, a math error of 29 cents), from which the court found that "American Family . . . is not entitled to any subrogation interest." The court also found that Sterner missed 19 weeks 4 days of work as a result of the February 6, 2008, incident and had total lost wages of $21,588.05. The court noted that he received temporary total disability payments totaling $2,576 from American Family. Thus, the court found that Sterner had unreimbursed wages of $19,012.05, "from which [American Family] is not entitled to subrogation." The court then concluded that

> [t]he remaining amount of approximately $32,900.00 is the sum from which [American Family] has a claim of subrogation and from which . . . Sterner must be compensated for the severe and permanent physical and emotional injuries that he suffered as a result of this injury, which sum is far less than the overall value of his claim.

No finding in dollars was made of such "overall value" by the court. The court then made a finding that Sterner's injuries

were "serious and permanent in nature from which he continues to have physical and emotional pain and suffering which . . . are likely to continue for the balance of his life expectancy." The court then stated that it was "persuaded by the opinions of [Sterner's] treating physicians and therapists." The district court's final conclusion was that American Family's "subrogation interest is outweighed by the severe and permanent injuries suffered by [Sterner]" and that American Family "is entitled to an equitable subrogation in the amount of $0.00." American Family now appeals.

STANDARD OF REVIEW

[1,2] Distribution of the proceeds of a judgment or settlement under § 48-118.04 is left to the trial court's discretion and is reviewed by an appellate court for an abuse of that discretion. See *Burns v. Nielsen*, 273 Neb. 724, 732 N.W.2d 640 (2007). A judicial abuse of discretion requires that the reasons or rulings of a trial judge be clearly untenable, unfairly depriving a litigant of a substantial right and a just result. *Id.*

ASSIGNMENTS OF ERROR

American Family assigns three errors by the district court: The court erroneously applied a "made whole" analysis when it awarded no part of the tort settlement; the court erred in finding that Sterner had unreimbursed wages in the amount of $19,012.05, from which American Family was not entitled to any subrogation interest; and the court erred in finding that American Family was not entitled to any subrogation interest in the $28,062.58 paid to Sterner's counsel for fees and costs.

ANALYSIS

The broad parameters of the applicable law in this appeal were set down by the Nebraska Supreme Court after taking into consideration the amendment to § 48-118.04 effective July 16, 1994. See 1994 Neb. Laws, L.B. 594. The fundamental change wrought by the amendment was that what had been a dollar-for-dollar subrogation right, see *Jackson v. Branick Indus.*, 254 Neb. 950, 581 N.W.2d 53 (1998), became a "fair and equitable" division of such third-party tort recovery proceeds.

[3] Section 48-118.04 provides that third-party settlements are void unless agreed to in writing by the employee and employer (or its insurer), which is true of the settlement involved here. See *Turco v. Schuning*, 271 Neb. 770, 716 N.W.2d 415 (2006). The Supreme Court in *Turco* held that the amended version of § 48-118.04(2) did not adopt any formula for making the "fair and equitable" division of a third-party settlement, and as a consequence, the *Turco* court held that the trial court erred when it concluded that the worker in that case had to be "made whole" before the subrogated compensation carrier was entitled to any portion of the settlement. The *Turco* court distinguished between statutory subrogation and equitable subrogation, holding that equitable principles apply in the absence of specific contractual or statutory provision, but that § 48-118.04 was such a statutory provision. The *Turco* court held that § 48-118.04 "requires a fair and equitable distribution to be determined by the trial court under the facts of each case." 271 Neb. at 776, 716 N.W.2d at 419.

In *Burns v. Nielsen*, 273 Neb. 724, 731, 732 N.W.2d 640, 648 (2007), the Supreme Court fleshed out its *Turco* decision, further holding:

> We conclude, based on our consideration of the statutory scheme, that the phrase "fair and equitable distribution," as used in § 48-118.04, was not intended to permit the subrogation interest of an employer or workers' compensation insurer to be subject to equitable defenses such as those relied upon by the district court.

The Supreme Court in *Burns v. Nielsen, supra*, therefore, reversed the trial court's judgment, which had used the equitable defenses of unclean hands and estoppel to bar the employer from recovering any of its subrogation interests. While *Turco v. Schuning*, 271 Neb. at 775, 716 N.W.2d at 419, cautions that there is no "exact formula" for a district court to make a "fair and equitable distribution" of a tort settlement between the injured employee and the employer, the court in *Burns v. Nielsen*, 273 Neb. at 735, 732 N.W.2d at 650, said that doing so "simply requires the [district] court to determine a reasonable division of the proceeds among the parties."

It is important to recount that in *Jameson v. Liquid Controls Corp.*, 260 Neb. 489, 618 N.W.2d 637 (2000), the Supreme Court reversed a district court's decision under § 48-118.04(2) that it would be inequitable to allow a workers' compensation insurer to recover its subrogation interest against the portion of a tort settlement representing recovery for pain and suffering and loss of consortium. The court in *Jameson* reasoned that "§ 48-118 does not distinguish between settlement proceeds paid for pain and suffering, medical benefits, or any other category of damages or injury in awarding an insurance company a subrogation interest in the settlement proceeds." 260 Neb. at 505, 618 N.W.2d at 649. With the basic applicable law in place, we now turn to the specific assignments of error.

Did Trial Court Err in Employing "Made Whole" Analysis in Dividing Settlement?

[4] American Family's core argument is that the trial court wrongfully analyzed whether the $80,000 settlement made Sterner whole contrary to *Turco v. Schuning*, 271 Neb. 770, 716 N.W.2d 415 (2006). The crux of this argument derives from the district court's statement in its order that

> $32,900.00 is the sum from which [American Family] has a claim of subrogation and from which . . . Sterner *must* be compensated for the severe and permanent physical and emotional injuries that he suffered as a result of this injury, which sum is far less than the overall value of his claim.

(Emphasis supplied.) The use of the word "must" certainly implies a finding that Sterner has to be fully compensated for his injuries before American Family can receive any of the settlement proceeds. After all, the primary definition of "must" is "to be bound or obliged to by an imperative requirement." Webster's Encyclopedic Unabridged Dictionary of the English Language 944 (1989). That the district court concluded that Sterner had to be first fully compensated seems even more compelling when the wording that Sterner "must be compensated" is juxtaposed with the court's description that American Family "has a claim" against the same amount. Thus, from the above-quoted language of the district court, the district court's

rationale apparently was that American Family merely had a claim, whereas Sterner had to be compensated in full for his injuries. In other words, whether we conclude that the district court used the now-discredited "made whole" formulation or established a higher "priority" for Sterner's recovery than for American Family's subrogation, the district court's rationale is fundamentally flawed, and a division of the funds based thereupon would be untenable and an abuse of discretion.

Did Trial Court Err in Excluding Sum of $19,012.05 Representing Unreimbursed Lost Wages From Settlement Proceeds That Were Available for Satisfaction of American Family's Subrogation Interest?

The exclusion of the amount of Sterner's lost wages, less what he received in temporary total disability payments, so as to reduce the available settlement proceeds from $80,000 to $60,987.95, was not supported by any citation of authority, and we know of none that would support that conclusion. Moreover, doing so clearly runs directly counter to the express holding of *Jameson v. Liquid Controls Corp.*, 260 Neb. 489, 618 N.W.2d 637 (2000), quoted earlier in our analysis. Accordingly, this assignment of error is well taken.

Did Trial Court Err in Finding That American Family Was Not Entitled to Any Subrogation Interest in $28,062.58 That Court Found Was Paid to Sterner's Counsel for Fees and Costs?

[5] American Family argues that the efforts of Sterner's attorney did not benefit it or its workers' compensation carrier, because "[a]ssuming that the parties were reasonable, settlement of [American Family's] subrogation claim and the injury to [Sterner's] left shoulder [claim] likely could have occurred without litigation." Brief for appellant at 17. This argument ignores Sterner's right to be represented and assumes, without any evidentiary support, that the homeowner's insurer would have paid $80,000 to Sterner if he were unrepresented—which is clearly a rather dubious proposition at best. Finally, it ignores Neb. Rev. Stat. § 48-118.02 (Reissue 2010), which

provides that when the employer has a subrogation interest in the recovery in a worker's third-party claim, "[t]he party bringing the claim or prosecuting the suit is entitled to deduct from any amount recovered the reasonable expenses of making such recovery, including a reasonable sum for attorney's fees." Accordingly, the implicit proposition advanced by American Family in this assignment of error that attorney fees and costs incurred by Sterner in gaining the settlement cannot be considered by the trial court in arriving at a fair and equitable division of the settlement is plainly wrong.

[6] That said, we note that the parties stipulated that Sterner's counsel had been paid $22,802.66 for attorney fees and $1,395.92 for costs out of the $80,000. However, the trial court, citing "the terms of a contingent fee agreement," used the sum of $26,666.66 plus costs of $1,395.92 to conclude that there was $28,062.58 from which American Family was not "entitled to any subrogation interest." The problem with this finding is that there is no contingent fee agreement in evidence; plus, the attorney fee subtracted from the gross settlement proceeds by the trial court is materially larger than that set forth in the parties' stipulation. However, American Family does not argue this evidentiary shortcoming as part of its claim that the trial court cannot deduct attorney fees and costs to arrive at a net amount of the settlement that is available for division. Nonetheless, we find that it was plain error for the trial court to exclude from the settlement proceeds available for division an amount for attorney fees that is different from and greater than what the parties stipulated had actually been paid, and it was plain error for the trial court to do so on the basis of a contingent fee agreement that is not in evidence. See *In re Interest of Mainor T. & Estela T.*, 267 Neb. 232, 674 N.W.2d 442 (2004) (plain error is error plainly evident from record and of such nature that to leave it uncorrected would result in damage to integrity, reputation, or fairness of judicial process).

RESOLUTION

All of American Family's assignments of error have merit. Our standard of review is clearly limited. Nonetheless, the district court's decision is flawed on several levels. First, the

court apparently used a "made whole" or "priority" concept as its starting point for making a division of the settlement proceeds. Second, the district court erred in two respects in its determination of the amount that was available for division under § 48-118.04(2): The amount actually available for distribution was $55,801.42 ($80,000 minus $22,802.66 for attorney fees and $1,395.92 for costs), rather than "approximately $32,900.00" as the district court found, because we also find that excluding unreimbursed lost wages is improper in addition to the error regarding attorney fees. Because the district court's finding of the amount available for a "fair and equitable" division of the settlement was substantially wrong, and the lesser amount clearly was a material finding and predicate in the trial court's ultimate decision that American Family would receive nothing from the settlement, we conclude that the district court did not make a "fair and equitable" division of the settlement. This would be true even if the district court did not intend to employ a "made whole" rationale in its distribution—despite the language clearly indicating such rationale. In short, for a number of reasons, the district court's division of the settlement was untenable and an abuse of discretion. Accordingly, we reverse, and remand for further proceedings on the record previously made.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STATE OF NEBRASKA, APPELLEE, V.
JOSE L. ZAMARRON, APPELLANT.
806 N.W.2d 128

Filed November 15, 2011. No. A-11-378.

1. **Statutes: Appeal and Error.** Statutory interpretation is a question of law that an appellate court resolves independently of the court below.
2. **Sentences.** Whether a defendant is entitled to credit for time served is a question of law.
3. **Statutes: Legislature: Intent.** When construing a statute, courts look to give effect to the legislative intent of the enactment.
4. **Statutes.** Courts generally give words in a statute their ordinary meaning.