Nebraska Supreme Court Online Library
www.nebraska.gov/apps-courts-epub/
11/04/2026 04:51 AM CST

WALENTINE, O'TOOLE, MCQUILLAN & GORDON, L.L.P., APPELLANT, V. MIDWEST NEUROSURGERY, P.C., APPELLEE.

825 N.W.2d 425

Filed January 18, 2013. No. S-12-377.

1. **Motions to Dismiss: Appeal and Error.** A district court's grant of a motion to dismiss is reviewed de novo.
2. **Motions to Dismiss: Pleadings: Appeal and Error.** When reviewing an order dismissing a complaint, the appellate court accepts as true all facts which are well pled and the proper and reasonable inferences of law and fact which may be drawn therefrom, but not the plaintiff's conclusion.
3. **Attorney Fees: Equity.** The common fund doctrine provides that an attorney who renders services in recovering or preserving a fund, in which a number of persons are interested, may in equity be allowed his compensation out of the whole fund, only where his services are rendered on behalf of, and are a benefit to, the common fund.

Appeal from the District Court for Douglas County: KIMBERLY MILLER PANKONIN, Judge. Affirmed.

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

Richard D. Vroman and Brenda K. Smith, of Koley Jessen, P.C., L.L.O., for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, MCCORMACK, and CASSEL, JJ.

HEAVICAN, C.J.

INTRODUCTION

The law firm of Walentine, O'Toole, McQuillan & Gordon, L.L.P. (Walentine), filed a complaint seeking attorney fees from Midwest Neurosurgery, P.C. (Midwest), under the common fund doctrine. Midwest filed a motion to dismiss, which was granted. Walentine appeals.

FACTUAL BACKGROUND

Walentine represented Alan Thompson in a workers' compensation action against Thompson's employer. Following a trial, Thompson was awarded compensation, including medical expenses incurred by Thompson with Midwest, in the amount

of $33,011.20. Thompson's employer paid the sums owed to Midwest per the award.

Subsequently, Walentine filed a complaint against Midwest asserting that under the common fund doctrine, Walentine was entitled to an attorney fee from Midwest. Midwest filed a motion to dismiss under Neb. Ct. R. Pldg. § 6-1112(b)(2), asserting that Walentine's complaint was barred by Neb. Rev. Stat. § 48-125 (Cum. Supp. 2012). Following a hearing, the district court dismissed Walentine's complaint. Walentine appeals. We affirm.

ASSIGNMENTS OF ERROR

On appeal, Walentine assigns, restated and consolidated, that the district court erred in (1) applying § 48-125, a statute dealing with the Workers' Compensation Court, to an action in the district court, and (2) finding that Walentine was not permitted to recover attorney fees from Midwest under the common fund doctrine.

STANDARD OF REVIEW

[1,2] A district court's grant of a motion to dismiss is reviewed de novo.[1] When reviewing an order dismissing a complaint, the appellate court accepts as true all facts which are well pled and the proper and reasonable inferences of law and fact which may be drawn therefrom, but not the plaintiff's conclusion.[2]

ANALYSIS

On appeal, Walentine argues generally that it was entitled to attorney fees from Midwest under the common fund doctrine and that § 48-125 has no application, because this was not an action brought in the Workers' Compensation Court.

[3] The common fund doctrine provides:

> "'An attorney who renders services in recovering or preserving a fund, in which a number of persons are interested, may in equity be allowed his compensation out of

---

[1] See *Central Neb. Pub. Power v. Jeffrey Lake Dev.*, 282 Neb. 762, 810 N.W.2d 144 (2011).

[2] See *id.*

> the whole fund, only where his services are rendered on behalf of, and are a benefit to, the common fund.'"[3]

Walentine argues that this doctrine is applicable in this case because it was through its representation of Thompson before the Workers' Compensation Court that an award was entered allowing Midwest recovery on the amounts owed by Thompson.

Midwest, however, argues that the common fund doctrine does not provide relief to Walentine in this situation, and instead contends that Walentine is not entitled to fees as a result of § 48-125(2)(a). That subsection provides:

> Whenever the employer refuses payment of compensation or medical payments subject to section 48-120, or when the employer neglects to pay compensation for thirty days after injury or neglects to pay medical payments subject to such section after thirty days' notice has been given of the obligation for medical payments, and proceedings are held before the compensation court, a reasonable attorney's fee shall be allowed the employee by the compensation court in all cases when the employee receives an award. *Attorney's fees allowed shall not be deducted from the amounts ordered to be paid for medical services nor shall attorney's fees be charged to the medical providers.*

(Emphasis supplied.)

We recognize that § 48-125(2)(a) is part of the Nebraska Workers' Compensation Act and that Walentine brought this action in district court. But the last sentence of § 48-125(2)(a) plainly states that attorney fees may not be deducted from any amount ordered to be paid for medical services and that medical providers shall not be charged for attorney fees. Walentine cannot do an end run around this prohibition simply by instead filing its action for attorney fees in district court.

Nor is this an unfair result. Under the first part of § 48-125(2)(a), "a reasonable attorney's fee shall be allowed the employee by the compensation court." Thus, Walentine

---

[3] *Kindred v. City of Omaha Emp. Ret. Sys.*, 252 Neb. 658, 662, 564 N.W.2d 592, 595 (1997).

would be entitled to recover from the injured employee's employer an attorney fee for work done on the injured employee's behalf.

Furthermore, policy considerations support this conclusion. If one could recover fees from medical providers in district court, such could provide an incentive for attorneys to file for fees there instead of asking for fees in the Workers' Compensation Court. This would be of particular concern in situations that, for whatever reason, counsel felt the Workers' Compensation Court might not be receptive to its claim, but also where the Workers' Compensation Court declined to award fees or did not award the amount of fees sought by counsel. There is also a concern, as expressed by Midwest, that medical providers would decline to provide services to workers' compensation claimants for fear that the provider would later be hauled into district court by claimant's counsel's demand for fees.

In addition to arguing that § 48-125 is simply inapplicable in its district court action because it is a workers' compensation statute, Walentine also contends that in *Kaiman v. Mercy Midlands Medical & Dental Plan*,[4] the Nebraska Court of Appeals concluded that the common fund doctrine was applicable to situations such as the one presented here and that the district court erred in finding otherwise.

In *Kaiman*, the attorney of an injured employee brought an action in district court for the recovery of attorney fees from his client's health care insurer. The Court of Appeals first noted that there was no reason for the common fund doctrine to not apply. The Court of Appeals then held that because the insurer could not have been made a party in the underlying action in order to obtain fee sharing, fundamental due process required that the insurer, or any other potential fee sharer, should have a forum in which to be heard on whether it should be required to share in the payment of attorney fees. As such, the district court action was permissible.

---

[4] *Kaiman v. Mercy Midlands Medical & Dental Plan*, 1 Neb. App. 148, 491 N.W.2d 356 (1992).

We agree with Walentine that the district court erred insofar as it concluded that *Kaiman* was inapplicable because it was decided prior to the enactment of the last sentence of § 48-125, which the district court stated occurred in 2011. In fact, *Kaiman* was decided on May 19, 1992. And contrary to the district court's decision, the relevant language of § 48-125 was enacted that same year.[5] But we nevertheless find *Kaiman* inapplicable.

While the relevant language of § 48-125 was enacted in 1992, it was not passed with an emergency clause[6] and thus was not effective at the time of the *Kaiman* decision.[7] And there is no indication from the *Kaiman* opinion that the Court of Appeals was aware of this new language when it issued its decision in *Kaiman*. To the extent that *Kaiman* might suggest that the common fund doctrine is available to attorneys' seeking fees from parties providing "medical services" or to "medical providers" as envisioned by § 48-125, it is disapproved.

We conclude that the plain language of the last sentence of § 48-125(2)(a) prohibits the charging of attorney fees against medical providers in Workers' Compensation Court. We decline to apply the common fund doctrine to allow Walentine a fee from Midwest from the district court when it would not be entitled to such a fee from the Workers' Compensation Court. We therefore affirm the decision of the district court dismissing Walentine's complaint.

CONCLUSION

The decision of the district court is affirmed.

AFFIRMED.

MILLER-LERMAN, J., not participating.

---

[5] 1992 Neb. Laws, L.B. 360.

[6] *Id*.

[7] See, Neb. Const. art. III, § 27; Legislative Journal, 92d Leg., 2d Sess. 2242-43 (Apr. 14, 1992).