

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 27, 2015

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2014AP1375

Cir. Ct. No. 2012CV13871

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

DOLIAN HOXHA,

PLAINTIFF-APPELLANT,

ALLSTATE PROPERTY AND CASUALTY INSURANCE COMPANY,

SUBROGATED-INVOLUNTARY-PLAINTIFF-RESPONDENT,

WISCONSIN PIPE TRADES HEALTH FUND,

SUBROGATED-INVOLUNTARY-PLAINTIFF,

V.

**AMERICAN FAMILY MUTUAL INSURANCE COMPANY AND WENDY P.
HARDY,**

DEFENDANTS.

APPEAL from an order of the circuit court for Milwaukee County:
DAVID A. HANSHER, Judge. *Reversed and cause remanded for further
proceedings.*

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 PER CURIAM. Dolian Hoxha appeals a nonfinal order granting a motion to stay the proceedings in his personal injury case pending his pursuit of a worker’s compensation claim.¹ We reverse the order and remand for further proceedings.

BACKGROUND

¶2 In 2010, Hoxha was involved in an accident while driving his own vehicle as he was delivering food for his brother’s pizzeria. He claims that he injured his back in the accident and suffered over \$300,000 in damages. At the time of the accident, Hoxha was potentially covered by two Allstate Property and Casualty Insurance Company policies that were issued for his two personal vehicles. Both of those policies included underinsured motorist coverage of \$100,000.

¶3 In 2012, Hoxha filed this lawsuit against the other driver and her insurance company, American Family Mutual Insurance Company.² After discovery was completed, American Family offered its policy limits of \$100,000.

¶4 In 2013, Hoxha notified the pizzeria’s worker’s compensation carrier about the accident.³ On December 13, 2013, that carrier wrote Hoxha’s counsel a

¹ We granted the petition for leave to appeal the nonfinal order on July 18, 2014.

² Allstate was named a subrogated involuntary plaintiff in the action.

³ Hoxha’s counsel told the circuit court that Hoxha did not initially contact the worker’s compensation carrier because the pizzeria “is owned by his brother and he had reservations about making an insurance claim against his brother’s business.”

letter explaining that in its opinion, “the problem with his back is not related to any incident at work” and, therefore, the carrier was denying payment of Hoxha’s medical expenses.

¶5 Hoxha’s counsel notified counsel for Allstate that the worker’s compensation carrier had denied Hoxha’s claim. Hoxha’s counsel also indicated that Hoxha planned to pursue a worker’s compensation claim. However, as of May 2014, Hoxha had not yet requested a hearing on that claim.

¶6 In February 2014, Allstate moved to stay the circuit court action—including proceedings concerning Hoxha’s entitlement to underinsured motorist benefits from Allstate—“until Hoxha’s entitlement to work-related [worker’s compensation] benefits has been resolved by the Department of Workforce Development.” Allstate asserted that “[a] determination as to whether Hoxha is entitled to worker’s compensation benefits and what benefits he is entitled to recover is necessary in order to evaluate what damages he may be entitled to recover under the terms of the underinsured motorist coverage provided by his automobile insurance policy with Allstate.” Citing *Bires v. City of Mauston*, 151 Wis. 2d 892, 447 N.W.2d 100 (Ct. App. 1989), Allstate said that the “primary jurisdiction rule” and WIS. STAT. § 102.16 (2013-14)⁴ require “that a determination on an employee’s entitlement to worker’s compensation benefits must be made by the Department of Workforce Development before being heard in circuit court.” Allstate continued:

According to the *Bires* court, all civil proceedings should be stayed while the Department of Workforce Development

⁴ All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

makes its determination regarding worker's compensation benefits....

For those reasons, Hoxha's entitlement to worker's compensation benefits must be made by the Department of Workforce Development before he can proceed with his claim against Allstate in this Court.

(Paragraph numbering omitted.)

¶7 Hoxha opposed the motion to stay the proceedings. Hoxha argued that "Allstate's reliance on *Bires* ... for the proposition that staying the current proceedings is mandatory, subject to the outcome of the worker's compensation claim, is misplaced" because *Bires* involved "an allegation that the employee's exclusive remedy was found under the Worker's Compensation Statutes." Hoxha asserted that because he had not sued the pizzeria and was not seeking anything except worker's compensation benefits from the pizzeria, "there is no question raised as to the exclusivity of [his] remedy against his employer and its insurer." Hoxha concluded: "No statutory law or case law prohibits [Hoxha] from suing a third party tortfeasor, or his [underinsured motorist coverage insurance] carrier for tort[i]ously causing his injuries."

¶8 Allstate filed a reply brief in which it provided additional argument concerning its position. It stated:

Hoxha is prohibited from double recovering elements of his claim, like medical expenses or past and future loss of earning capacity, from a workers' compensation insurer and under his underinsured motorist coverage by at least three provisions contained in the underinsured motorist provision of his Allstate policy....

....

... [B]efore any determination can be made as to what damages are recoverable under the terms of the underinsured motorist coverage, a determination must be made as to what amounts, if any, must be paid by the

workers' compensation carrier.... As set forth in the Motion to Stay, the Department of Workforce Development must make that determination.

¶9 The circuit court heard brief oral argument on Allstate's motion before granting Hoxha's request to file a sur-reply brief. At a subsequent hearing, the circuit court summarized its view of Allstate's motion, stating: "I think the file reflects, that we should stay it until the Department of Workforce Development determines whether the plaintiff's entitled to work[er]'s compensation benefits as a result of the accident. If it does, then I think [WIS. STAT. §] 102.29 comes into play." The circuit court heard brief argument from Hoxha and then stated:

It looks to me [that] the plaintiff is stalling this case. You control how quickly the workers' compensation case got filed. If you want to take all the time in the world ... so be it. But I ... think Allstate has been proceeding[] in good faith.

I'm not going to even hear Allstate's arguments. I'm going to grant the motion for a stay. The court will allow [Hoxha] to finalize the settlement with American Family, and I'll allow you to amend your pleadings to a breach of contract claim against Allstate.

¶10 The circuit court's oral decision did not address Allstate's arguments concerning the applicability of its policy provisions concerning worker's compensation benefits or offer any other reasons for granting the stay. The subsequent written order simply noted that Allstate's motion to stay the proceedings was granted. Hoxha petitioned this court for leave to appeal from the nonfinal order and we granted the petition. This appeal follows.

DISCUSSION

¶11 At the outset, we note that the parties disagree as to the applicable standard of review. Hoxha argues that we should analyze the circuit court's order

de novo, because “the interpretation of an insurance contract and the legal effect of a reducing clause in an insurance contract present questions of law.” See ***Badger Mut. Ins. Co. v. Schmitz***, 2002 WI 98, ¶50, 255 Wis. 2d 61, 647 N.W.2d 223 (“The construction or interpretation of an insurance policy presents a question of law to which we apply *de novo* review.”) (italics added). Allstate argues that whether to issue a stay order is a discretionary determination and that this court should not disturb that order “if it is a reasonable conclusion based upon a consideration of the appropriate law and facts of record.”

¶12 The challenge presented in this case is that the circuit court did not explicitly state the reasoning for its order, so we cannot say what role its interpretation of the insurance contract at issue—which would present a question of law—played in the circuit court’s analysis. However, as Hoxha acknowledged in its circuit court brief, a circuit court’s decision to stay proceedings to allow an administrative agency to act is a discretionary decision. See ***Wisconsin Collectors Ass’n, Inc. v. Thorp Fin. Corp.***, 32 Wis. 2d 36, 44-45, 145 N.W.2d 33 (1966). We will analyze the circuit court’s order as a discretionary decision.

¶13 In ***LeMere v. LeMere***, 2003 WI 67, 262 Wis. 2d 426, 663 N.W.2d 789, our supreme court summarized the legal standards that apply to our review of discretionary decisions:

“[A] discretionary determination must be the product of a rational mental process by which the facts of record and law relied upon are stated and are considered together for the purpose of achieving a reasoned and reasonable determination.” A circuit court’s discretionary decision is upheld as long as the court “examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach.”

Id., ¶13 (citations omitted; brackets in *LaMere*). “To find that the court improperly exercised its discretion, we ‘must find either that the circuit court has not exercised discretion or that it has exercised discretion on the basis of an error of law or irrelevant or impermissible factors.’” *Tina B. v. Richard H.*, 2014 WI App 123, ¶45, 359 Wis. 2d 204, 857 N.W.2d 432 (citation omitted).

¶14 Applying those standards, we conclude that the circuit court erroneously exercised its discretion when it granted Allstate’s motion to stay the proceedings pending the resolution of any worker compensation’s claim that Hoxha may choose to pursue with the Department of Workforce Development. While the circuit court did not give a full explanation of its reasoning, we read its comments as relying on WIS. STAT. § 102.29 and Allstate’s argument concerning *Bires*—which was the main argument Allstate advanced in its motion—in support of its decision to grant the stay. We conclude, as a matter of law, that neither *Bires* nor § 102.29 required the circuit court to grant the motion to stay the proceedings. Thus, because the circuit court’s decision was based on an error of law, it improperly exercised its discretion. See *Tina B.*, 359 Wis. 2d 204, ¶45.

¶15 At issue in *Bires* was whether worker’s compensation was the exclusive remedy for a fireman who also sued the city, the fire department, the fire chief, and various fire department employees for negligence. See *id.*, 151 Wis. 2d at 894. *Bires* recognized that pursuant to the applicable worker’s compensation statute, WIS. STAT. § 102.16, the issue of whether the fireman’s injury fell within the Worker’s Compensation Act was an issue to be determined by the administrative agency. *Bires*, 151 Wis. 2d at 894-95. *Bires* further held: “When enforcement of a claim requires resolution of issues within the special competence of an administrative agency, the judicial process should be suspended pending referral of the issue to the administrative agency.” *Id.* at 895.

¶16 The facts in Hoxha’s case are markedly different. Hoxha is not seeking to recover anything but worker’s compensation benefits from his employer. The action before the circuit court does not involve a claim against Hoxha’s employer or the employer’s insurer. Thus, *Bires*’s instruction that the circuit court judicial process should be stayed pending the administrative agency’s determination of whether the employee can recover anything except worker’s compensation benefits from his employer is not applicable here. The holding of *Bires* does not require that a stay be imposed in this case. Thus, to the extent the circuit court was relying on its interpretation of *Bires* to support its conclusion that a stay was required—as Allstate urged it to do—we conclude the circuit court’s conclusion was based on an error of law.

¶17 Similarly, WIS. STAT. § 102.29 does not require that a stay be imposed in this case. That statute establishes that employees may maintain third-party tort claims and provides a formula by which worker’s compensation insurers can recover from third-party tortfeasors. However, uninsured and underinsured motorist proceeds are not subject to the formula in § 102.29 because the employee’s claim is based on contract, rather than tort. *See Berna-Mork v. Jones*, 174 Wis. 2d 645, 651, 498 N.W.2d 221 (1993) (“[U]nder sec. 102.29(1), Stats., an employer or compensation insurer has no right to subrogation against uninsured motorist benefits available to the employee because an action for uninsured motorist benefits is based on contract not tort.”). Thus, to the extent the circuit court was relying on its interpretation of § 102.29 to support its conclusion that a stay was required, we conclude its conclusion was based on an error of law.⁵

⁵ On appeal, Allstate does not assert that WIS. STAT. § 102.29 provided a legal basis for granting the motion to stay the proceedings.

¶18 In summary, we conclude that the circuit court erroneously exercised its discretion when it granted Allstate’s motion to stay the proceedings pending the resolution of any worker’s compensation claim that Hoxha may choose to pursue with the Department of Workforce Development, because the circuit court erroneously concluded that such a stay was required by *Bires* and WIS. STAT. § 102.29. On that basis, we reverse the order and remand the case for further proceedings. We do not consider the other issues addressed by the parties on appeal, such as the applicability of particular insurance contract provisions. The circuit court has not yet analyzed those arguments and they are more properly addressed for the first time by the circuit court.

By the Court.—Order reversed and cause remanded for further proceedings.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

