

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

LIBERTY MUTUAL, as subrogee of )  
THE MEDICAL CENTER OF )  
DELAWARE, INC., )

Plaintiffs, )

v. )

BARBARA MCCRACKEN, RAYMOND )  
MCCRACKEN and AMERICAN )  
STERILIZER COMPANY, a/k/a )  
AMSCO, CORP., a/k/a AMSCO, a/k/a )  
AMSCO INTERNATIONAL, INC., a/k/a )  
STERIS INTERNATIONAL, INC., )

Defendants. )

C.A. No. 99C-12-057 SCD

**O R D E R**

Date Submitted: July 26, 2001  
Date Decided: August 21, 2001

*Upon Motion to Dismiss -- GRANTED*

Raymond W. Cobb, Esquire, Wilmington, DE.

Raymond J. Otlowski, Esquire, Wilmington, DE.

**DEL PESCO, J.**

This 16<sup>th</sup> day of August 2001, upon consideration of defendant's motion to dismiss, it appears that:

(1) This action was commenced on December 7, 1999. It seeks to assert a claim for reimbursement of workers' compensation benefits paid to the defendant, Barbara McCracken ("McCracken") pursuant to 19 *Del. C.* § 2363(e).<sup>1</sup> It also asserts a claim for conversion.

(2) McCracken sustained an injury on October 14, 1987 while working at The Medical Center of Delaware in the decontamination unit cleaning instruments. The Industrial Accident Board ("IAB") concluded in an opinion resolving issues related to workers' compensation benefits<sup>2</sup> that the accident occurred when McCracken's hand was caught in a sterilizer. McCracken claimed to have sustained injuries to her lower back and to her cervical back when she attempted to free herself from the sterilizer. Plaintiff, Liberty Mutual Insurance Company ("Liberty Mutual"), the workers' compensation insurance carrier for the hospital, denied that McCracken's injury to her cervical area and subsequent surgery were accident-related and argued that her lower back pain, though accident-related, was minor in nature. The IAB concurred with Liberty Mutual's position. The order of the IAB became final and Liberty Mutual paid McCracken \$11,832.04 for medical bills and \$22,676.13 in wage loss and permanent impairment benefits.

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<sup>1</sup> 19 *Del. C.* § 2363 (e) provides in relevant part:

In an action to enforce the liability of a third party, the plaintiff may recover any amount which the employee ... would be entitled to recover in an action in tort. Any recovery against the third party for damages resulting from personal injuries or death only, after deducting expenses of recovery, shall first reimburse the employer or its workers' compensation insurance carrier for any amounts paid or payable under the Workers' Compensation Act to date of recovery, and the balance forthwith shall be paid to the employee ... and shall be treated as an advance payment by the employer on account of any future payment of compensation benefits . . .

(3) In October 1989, McCracken filed a third-party liability suit against American Stellis, the manufacturer of the sterilizer. In the complaint, McCracken asserted that the negligence of the manufacturer was the proximate cause of her accident and resulting injuries, primarily the cervical injury. During the course of the third-party lawsuit, Liberty Mutual advised McCracken that under 19 *Del. C.* § 2363, they had a priority lien against any recovery McCracken might receive as a result of her third-party action.

(4) In December 1994, McCracken settled her case against American Stellis for \$105,000. In December 1999, Liberty Mutual attempted to enforce its priority lien claim and recover from McCracken the amount paid to her under her workers' compensation claim.

(5) McCracken denies that she has an obligation to reimburse her employer for the benefits paid as workers compensation because: the statute of limitations has run on the claim for reimbursement; and, her claim against the American Sterilizer Company, et al., filed in the Delaware Superior Court, New Castle County, C.A. No. 89C-OC-120 ("the tort action") was for different injuries than those compensated by her employer.

(6) The parties have not provided me with a copy of the release signed by the plaintiff in connection with the tort action. Court records demonstrate that the third-party action was dismissed in December 1994 after the trial date was continued to permit a mediation. Counsel agree that the case was settled and the proceeds were paid prior to formal dismissal of the tort action.

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<sup>2</sup> *Barbara McCracken v. Medical Center of Delaware, Industrial Accident Board of the State of Delaware, New Castle County*, hearing No. 852176, March 18, 1991.

(7) The employers' right to seek reimbursement pursuant to statute is a statutorily created right of subrogation, susceptible to a statute of limitations defense. Here the employer does not deny that it was aware of the third-party claim. It does not deny that it demanded reimbursement. It does not explain the delay in pursuing a claim, nor does it allege any fraud or misrepresentation as to the disposition of the claim.

(8) The tort action, and the termination of that action are recorded in public records available for public perusal.

(9) The statute of limitations on the statutory right of subrogation and/or the conversion claim is three years pursuant to 10 *Del.C.* § 8106.<sup>3</sup> Therefore, this action is dismissed as untimely.

**IT IS SO ORDERED.**

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Susan C. Del Pesco, Judge

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<sup>3</sup> The statute provides in relevant part: "...no action based on a statute ... shall be brought after the expiration of 3 years from the accruing of the cause of action...."