

IN THE COURT OF APPEALS OF IOWA

No. 0-895 / 10-1016
Filed February 9, 2011

WILLEY, O'BRIEN, L.C.,
Plaintiff-Appellant,

vs.

**UNION INSURANCE COMPANY OF
PROVIDENCE and WEST BEND
MUTUAL INSURANCE COMPANY,**
Defendants-Appellees.

Appeal from the Iowa District Court for Linn County, Mitchell E. Turner,
Judge.

The plaintiff appeals from the district court's order granting summary
judgment in favor of the defendants. **AFFIRMED.**

David A. O'Brien of Willey, O'Brien, L.C., Cedar Rapids, for appellant.

David L. Baker, Cedar Rapids, and Matthew G. Novak of Pickens, Barnes
& Abernathy, Cedar Rapids, for appellee Union Insurance Company of
Providence.

Brenda K. Wallrichs and James P. Craig of Lederer, Weston & Craig,
P.L.C., Cedar Rapids, for appellee West Bend Mutual Insurance Company.

Heard by Vogel, P.J., and Doyle and Tabor, JJ.

VOGEL, P.J.

The plaintiff, Willey, O'Brien, L.C. (Willey), appeals from the district court's order granting summary judgment in favor of the defendants, Union Insurance Company of Providence (Union) and West Bend Mutual Insurance Company (West Bend). On appeal, Willey asserts that its attorney's lien should have been enforced. Because we find that Willey's client was not "due any funds" in a settlement, the lien was ineffective. We affirm.

I. Procedural Background.

On July 11, 2003, Dr. Winthrop Risk was killed in a motor vehicle accident, in which he was the passenger in a vehicle driven by his wife, Alice Risk. At the time of the accident, Alice was employed as the office manager in Winthrop's medical practice and they were traveling to a medical conference. Alice received workers' compensation benefits as Winthrop's surviving spouse, which were paid by Winthrop's professional medical corporation's workers' compensation insurer, Union.

On July 11, 2005, the administrator of Winthrop's estate (the Estate), filed a wrongful death action against Alice. The administrator was represented by Willey, and Alice's defense was provided by her liability insurer, West Bend.¹

On November 29, 2005, Union filed a notice of workers' compensation lien.² On May 5, 2006, Union moved to intervene seeking to recover the workers' compensation benefits it paid from any recovery the estate may collect from

¹ The administrator of the estate was Winthrop's son, Winthrop S. Risk II, M.D. The suit was filed by Darin H. Luneckas of Luneckas & Newhouse, P.C., who withdrew shortly thereafter and Willey assumed representation of the administrator for the estate.

² The parties have not provided our court with the record from the underlying wrongful death action, including the notice of workers' compensation lien.

Alice/West Bend. The district court granted Union's motion on May 23, 2006. See *Mata v. Clarion Farmers Elevator Co-op.*, 380 N.W.2d 425, 427 (Iowa 1986) ("Ordinarily an employer's insurance carrier which has paid worker's compensation has a right to intervene in the employee's damage action against a third party.").

On December 5, 2006, Willey filed a notice of attorney's lien for its representation of the Estate in the suit against Alice. It stated that it had a lien for the amount of one-third of the total recovery in the suit based upon a contingency fee agreement to pursue a wrongful death claim on behalf of the Estate and a loss of consortium claim on behalf of Winthrop's son, or in the alternative a minimum sum of \$27,240. The following day on December 6, 2006, the Estate dismissed with prejudice its action against Alice. On December 11, 2006, Union filed an application to set aside the dismissal with prejudice and a motion to substitute parties. The motion (1) asserted that the dismissal was not effective without its approval as an intervenor; (2) asserted Union had subrogation rights, including the right to maintain an action against Alice as the responsible third party who was liable for causing the accident and resulting damages; and (3) requested that it be substituted as the plaintiff in the action. See Iowa Code § 85.22 (2005) (providing for subrogation for workers' compensation benefits paid). The motion also stated, "The Dismissal with Prejudice of the individual claim asserted on behalf of Plaintiff Winthrop S. Risk II, M.D. is not affected by this Application."

A hearing was held, during which no one appeared on behalf of the Estate. On February 2, 2007, the district court found that under *Mata*, 380

N.W.2d at 428, the dismissal with prejudice qualified as a “settlement” under Iowa Code section 85.22. Further,

It is also clear under section 85.22 that Union had a right or mechanism for bringing an independent cause of action against this Defendant for the recovery of its benefits paid to her as the surviving spouse of the decedent. The key question will be whether Alice M. Risk was operating within the course of her employment when the accident occurred. If she was operating in the course of her employment, chapter 85.22 bars recovery for Union. If Mrs. Risk was not operating within the scope of her employment, Union would have a viable claim for indemnity.

This is a cause of action for indemnity. Union was allowed to intervene pursuant to Iowa Court Rule 1.407(2) because of the language in Iowa Code section 85.22.

Because this is an action grounded in indemnity, it is debatable whether the second part of the Union motion is the appropriate remedy. The alternatives would be that the dismissal is set aside, the action reinstated and Union being permitted to pursue the cause of action in the name of the original Plaintiff. The second alternative is for Union to become a named party and Plaintiff as Union’s motion requests. The third alternative would be to include Union as an allegedly indemnified party as a third party Plaintiff in this case with both original parties involved in the action. The court is not prepared at this time to choose among those three alternatives because the original Plaintiff has had no opportunity to be heard on this issue and the parties may be able to settle that issue without further litigation.

Therefore, the district court set aside the dismissal with prejudice and reinstated the cause of action, specifying that any party could petition the court to determine whether the intervener (Union) shall become the plaintiff of record or stand in the place of the original plaintiff.

Litigation continued between Union and Alice, represented and defended by West Bend, during which the Estate took no further action to pursue its claim against Alice. A hearing was held on whether Alice was acting within the scope and course of her employment at the time of the accident. On August 1, 2007,

the district court determined that Alice was not acting as the officer manager, but as a spouse at the time of the accident.

Alice then filed a motion for summary judgment, asserting Union did not have a right to subrogation under section 85.22 because Alice as the surviving spouse was the beneficiary of the workers' compensation benefits. The district court granted the motion and dismissed the suit,³ and Union appealed. On appeal, this court found (1) Alice was receiving workers' compensation benefits as the surviving spouse, but was not immune from suit as a third-party tortfeasor under section 85.22; and (2) this operation of section 85.22 was not contrary to public policy. *Estate of Risk v. Risk*, No. 08-1573 (Iowa Ct. App. May 29, 2009). Therefore, Union did have a right to subrogation under section 85.22 and the grant of summary judgment in favor of Alice was reversed. *Id.* While further review was pending, Union and Alice/West Bend reached an agreement whereby West Bend paid \$250,000 (which was Alice's policy limit) to Union to settle Alice's workers' compensation claim in full. On August 17, 2009, Union filed a dismissal of its petition for intervention in the wrongful death action.

On September 15, 2009, Willey filed a petition for foreclosure of attorney's lien and damages, naming Union and West Bend as defendants. Willey asserted that the settlement proceeds should not have been distributed without honoring its attorney's lien and sought damages for the failure to do so, including punitive damages. Union and West Bend answered and raised several affirmative

³ Union filed a motion to amend or enlarge pursuant to Iowa Rule of Civil Procedure 1.904(2). Union asserted that the court correctly found the Estate was no longer pursuing a claim against Alice for her negligence, but claimed that Union retained the same status as the Estate for purposes of subrogation and had a valid subrogation claim. Alice resisted, but agreed that "the Estate dropped its claim."

defenses. Willey filed a partial motion for summary judgment, seeking judgment on its petition except for punitive damages. Union and West Bend also filed motions for summary judgment. A hearing was held on May 5, 2010. On June 14, 2010, the district court issued its ruling. The court found,

It is undisputed that Plaintiff's client, the Estate, did not receive any funds in the settlement. The statutes and case law governing attorney's liens are clear in stating that in order to be successful with respect to lien filing, the funds must be due to the client. Because there are no funds due to Plaintiff's client, there is no basis for Plaintiff to obtain the funds sought via the lien filing.

Additionally, it is undisputed that Plaintiff did not make a timely filing of a bill of particulars with the Linn County Clerk of Court. Therefore, the lien is invalid pursuant to Iowa Code section 602.10118.

Because Willey was not entitled to the funds, the court denied the Willey's motion and granted the defendants' motions for summary judgment.

Willey appeals and asserts the district court erred in granting summary judgment in favor of the defendants because the attorney's lien was valid and the lack of a bill of particulars does not defeat the lien. Additionally, Willey asserts that punitive damages should be permitted.

II. Standard of Review.

We review a district court's ruling on a motion for summary judgment for correction of errors at law. Iowa R. App. P. 6.907. Summary judgment should be granted when the entire record demonstrates there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Iowa R. Civ. P. 1.981(3).

Thus, on review, we examine the record before the district court to decide whether any material fact is in dispute, and if not, whether the district court correctly applied the law. In considering the

record, we view the facts in the light most favorable to the party opposing the motion for summary judgment.

Shriver v. City of Okoboji, 567 N.W.2d 397, 400 (Iowa 1997) (internal citations and quotation omitted).

III. Analysis.

Attorney's liens are statutorily based. *In re Lamm's Will*, 252 Iowa 1045, 1050, 109 N.W.2d 708, 712 (1961). Iowa Code section 602.10116 recognizes two general types of attorney's liens: (a) a general or retaining lien and (b) a special or charging lien. *Tri City Equip. Co. v. Modern Real Estate Invs., Ltd.*, 460 N.W.2d 464, 466 (Iowa 1990). Subsections (1) and (2) provide for the general or retaining lien, which operates on any property that belongs to the client and is in the attorney's possession until the client pays for the attorney's fees due. Iowa Code § 602.10116(1), (2); *Tri City Equip. Co.*, 460 N.W.2d at 466 (stating that the general lien requires the claimant-attorney to have possession of the property). Subsections (3) and (4) provide for the special or charging lien, which operates on property in the possession of third-parties and "is the equitable right of an attorney to have fees and costs due him for services in a particular suit secured by the judgment or recovery in such suit." *Tri City Equip. Co.*, 460 N.W.2d at 466; see also Iowa Code § 602.10116(3), (4).

In the present case, a general or retaining lien is not at issue. Rather, Willey asserts it had a valid charging lien pursuant to Iowa Code section 602.10116(3). Subsection (3) provides,

An attorney has a lien for a general balance of compensation
upon

. . . .

3. Money due a client in the hands of the adverse party, or attorney of such party, in an action or proceeding in which the attorney claiming the lien was employed, from the time of giving notice in writing to such adverse party, or attorney of such party, if the money is in the possession or under the control of such attorney, which notice shall state the amount claimed, and, in general terms, for what services.

Iowa Code § 602.10116(3). The dispute lies over whether there was “money due a client.” See *id.* An “attorney may have a lien upon the amount which is ultimately found to be due his client,” this is “funds the attorney’s clients are entitled to collect or hold.” *Lamm*, 252 Iowa at 1052, 109 N.W.2d at 713. Willey argues that any recovery was made on behalf of the Estate, so it is “due” to the Estate. The defendants argue, as the district court found, that no funds were actually due to the Estate and this caused the lien to be ineffective.

In order to determine whether the Estate was due any funds, we must examine Iowa Code section 85.22. This section provides reimbursement to employers/insurers out of an employee’s claim against a third-party tortfeasor. Iowa Code § 85.22; *Mata*, 380 N.W.2d at 428. Subsection (1) is applicable where the employee files suit against a third-party and provides that the employer/insurer “shall be indemnified out of the recovery of damages.” Iowa Code § 85.22(1). If the employee recovers damages, the attorney’s fees are deducted from the recovery, then the employer/insurer’s lien is satisfied, and the employee receives any remaining funds. *Id.* Subsection (2) is applicable when the employee fails to file suit and provides the employer/insurer “shall be subrogated to the rights of the employee to maintain the action against such third party.” *Id.* § 85.22(2). If damages are recovered, the employer/insurer’s lien is

satisfied first and any remaining funds are paid to the employee, out of which the employee's attorney's fees are paid. *Id.*⁴

In addition, section 85.22 provides that once an employee files suit against a third-party liable for the injury, the employee cannot settle the suit without written consent of the employer/insurer or the workers' compensation commissioner. *Mata*, 380 N.W.2d at 428. Our supreme court has also held that a dismissal with prejudice is treated as a settlement under section 85.22 and requires written consent. *Id.* This is to ensure that the employer/insurer's right of reimbursement is protected. *Id.* If an employee was permitted to dismiss with prejudice, the statute of limitations may have run on the subrogation action by the employer/insurer or the employer/insurer may have to overcome a claim-preclusion defense to a subrogation action. *Id.*

In the present case, the parties disagree at to the effect of the Estate's dismissal with prejudice. The Estate asserts that under section 85.22(1) it initiated the suit and the dismissal was not valid, as the case was reinstated. Therefore, any recovery of benefits paid to Union by West Bend, must be paid to the Estate and the attorney's fee lien satisfied before funds are paid to Union. Union asserts that the Estate dismissed its suit and Union exercised its subrogation rights under section 85.22(2)—any recovery must first be paid to satisfy the employer/insurer's lien and as a result, the Estate did not recover any funds.

The Estate did file the wrongful death action against Alice, and had it not done so, the statute of limitations would have expired and Union would not have

⁴ The details of the settlement proceeds are not part of the record on appeal.

received any recovery. Nevertheless, the Estate had the right to dismiss its petition and not pursue its claim. Iowa Rule of Civil Procedure 1.943 provides, “A party may, without order of court, dismiss that party’s own petition . . . at any time up until ten days before the trial is scheduled to begin.” The Estate directed Willey to file a dismissal with prejudice. In such an event, Willey was protected by the fee agreement between it and the Estate. The contingency fee agreement provided that Willey was to receive one-third of “the amount of recovery generated by the attorney” and in the event no recovery was made, Willey “shall receive no fee for services performed under this contract.” However, the agreement also provided for a fee on termination and stated, “If Client(s) terminate Attorney’s employment before conclusion of the case, Client(s) shall pay Attorney a fee based on the fair and reasonable value of the services before termination.” Union and West Bend suggest Willey should have looked to the Estate to recover any fees it incurred in pursuing, then abandoning litigation.

Yet because a dismissal with prejudice is akin to a settlement under section 85.22, the dismissal with prejudice could not be implemented. See *Mata*, 380 N.W.2d at 428. Consequently, Union filed a motion to set aside the dismissal and substitute parties, in which Union was not requesting that the right of the Estate to dismiss its own suit be affected, but was requesting that Union be permitted to maintain the suit as the plaintiff and exercise its subrogation rights under section 85.22(2). In the following ruling, the district court reinstated the suit, but declined to rule that Union was substituted as the plaintiff. Nevertheless, the Estate abandoned its claim and did not participate in any further litigation. Willey acknowledged in its brief that the Estate demonstrated an “unwillingness”

to pursue the claim. In the appeal of the wrongful death suit, our court noted that the *insurer's claim* was permitted against Alice under section 85.22.

Section 85.22 provides that either the employee or employer/insurer that maintained the suit resulting in recovery be compensated first. Although the Estate filed the suit, it then attempted to dismiss the suit and fully abandoned its claim after December 2006. Union pursued the claim and fully litigated the suit against Alice/West Bend, as if it were a subrogation suit under section 85.22(2). We find that under these circumstances, the wrongful death suit proceeded as a subrogation suit under section 85.22(2). Thus, any recovery received must first be paid to Union. No money was payable to the Estate. Because no funds were due to the Estate, the attorney's lien filed by Willey was ineffective. Finally, because we find this was a subrogation suit under section 85.22(2) and the lien was ineffective, we need not address Willey's arguments regarding a bill of particulars or punitive damages. We affirm.

AFFIRMED.