

IN THE COURT OF APPEALS OF IOWA

No. 9-197 / 08-1573
Filed May 29, 2009

THE ESTATE OF WINTHROP S. RISK, M.D.,
Plaintiff,

vs.

ALICE M. RISK,
Defendant.

UNION INSURANCE COMPANY OF PROVIDENCE,
Plaintiff/Intervenor-Appellant,

vs.

ALICE M. RISK,
Defendant-Appellee.

Appeal from the Iowa District Court for Linn County, Marsha A. Bergan,
Judge.

An insurance company appeals the district court's grant of summary
judgment to defendant on its subrogation claim. **REVERSED AND REMANDED.**

Matthew G. Novak and Thad J. Collins of Pickens, Barnes & Abernathy,
Cedar Rapids, for appellant.

David L. Riley of McCoy, Riley, Shea & Bevel, P.L.C., Waterloo, for
appellee.

David A. O'Brien of Willey, O'Brien, P.C., Cedar Rapids, for plaintiff estate.

Considered by Vaitheswaran, P.J., and Eisenhauer, J., and Huitink, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2009).

PER CURIAM

I. Background Facts & Proceedings

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.¹ They were driving to a medical conference at the time of the accident. Alice was employed as the office manager in her husband's medical practice. She received workers' compensation benefits as the surviving spouse under Iowa Code sections 85.31(1)(a) and 85.43 (2003).

Risk's estate (estate) filed an action against Alice on July 11, 2005, alleging her negligence caused Risk's death. The workers' compensation insurer for the medical practice, Union Insurance Company of Providence (insurer), filed a motion to intervene claiming that under section 85.22 (2005) it had a right of subrogation for the benefits paid. The district court ruled that under Iowa Rule of Civil Procedure 1.407, the insurer should be permitted to intervene in the case.

On December 6, 2006, the estate dismissed with prejudice its action against Alice. The insurer filed an application to set aside the dismissal and motioned to substitute parties. The district court determined that the dismissal with prejudice should be set aside.²

The case then proceeded to a hearing on the issue of whether Alice was acting within the scope and course of her employment at the time of the accident. She claimed that she and her husband were co-employees, and that the estate

¹ There was liability coverage on the vehicle through West Bend Mutual Insurance Company.

² Although the dismissal with prejudice has been set aside, the estate has taken no further action to pursue its claims against Alice.

could recover only if there was a finding that she had engaged in gross negligence. See Iowa Code § 85.20(2). The district court determined that Alice was not acting as the office manager at the time of the accident, but was acting as a spouse. The court concluded she was not acting within the scope of her employment, and the plaintiff was not required to show gross negligence.

Alice filed a motion for summary judgment, claiming the insurer did not have a right to subrogation under section 85.22. The statute provides that when an injured employee fails to bring an action against a third-party tortfeasor “the insurer shall be subrogated to the rights of the employee to maintain the action against such third party, and may recover damages for the injury to the same extent that the employee might.” Iowa Code § 85.22(2). Alice asserted that she was not in the position of a third party under the terms of the statute because she was receiving workers’ compensation benefits as a surviving spouse and was actually in the position of the injured employee.

The district court granted the motion for summary judgment. The court concluded that allowing a workers’ compensation insurer to recover from a surviving spouse the very benefits it was paying her as a surviving spouse was contrary to public policy. The court determined Alice had taken the place of her husband, the injured employee. Under the court’s ruling, the case was dismissed. The insurer appealed the court’s grant of summary judgment to Alice.

II. Standard of Review

We review the district court’s ruling on a motion for summary judgment for the correction of errors at law. See Iowa R. App. P. 6.4. Summary judgment is

appropriate only when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Iowa R. Civ. P. 1.981(3); *Kistler v. City of Perry*, 719 N.W.2d 804, 805 (Iowa 2006). A court should view the record in the light most favorable to the non-moving party. *Kern v. Palmer Coll. of Chiropractic*, 757 N.W.2d 651, 657 (Iowa 2008). In determining whether there is a genuine issue of material fact, the court affords the non-moving party every legitimate inference the record will bear. *Id.*

III. Merits

The insurer contends the district court improperly granted summary judgment to Alice. It asserts that it has a valid subrogation claim under section 85.22. The applicable portions of section 85.22 provide:

When an employee receives an injury . . . and which injury . . . is caused under circumstances creating a legal liability in some person, other than the employee's employer or any employee of such employer as provided in section 85.20 to pay damages, the employee . . . or, in the case of death, the employee's legal representative may also maintain an action against such third party for damages. . . .

1. If compensation is paid the employee or dependent . . . the employer's insurer which paid it, shall be indemnified out of the recovery of damages to the extent of the payment so made, . . . and shall have a lien on the claim for such recovery and the judgment thereon for the compensation to which the employer or insurer is liable. . . .

2. In case the employee fails to bring such action within ninety days . . . the insurer shall be subrogated to the rights of the employee to maintain the action against such third party, and may recover damages for the injury to the same extent that the employee might. . . .

Under section 85.22, an insurer who has paid compensation may be subrogated to the rights of an employee to maintain an action against a third-party tortfeasor to recover damages for the injury to the same extent that the

employee might maintain an action. *Armour-Dial, Inc. v. Lodge & Shipley Co.*, 334 N.W.2d 142, 146 (Iowa 1983). The insurer has the right to intervene in an injured employee's tort action against a third party. *Mata v. Clarion Farmers Elev. Coop.*, 380 N.W.2d 425, 427 (Iowa 1986). If the employee, or the employee's estate, fails to bring an action against a third-party tortfeasor, the insurer has the right to maintain an action against the third-party tortfeasor. See *Daniels v. Hi-Way Truck Equip., Inc.*, 505 N.W.2d 485, 487 (Iowa 1993).

"Subrogation is a doctrine that originated in equity to give relief to a person or entity that pays a legal obligation that should have, in good conscience, been satisfied by another." *Allied Mut. Ins. Co. v. Heiken*, 675 N.W.2d 820, 824 (Iowa 2004). An insurer who has paid on a loss becomes subrogated to the insured's right of action against a person responsible for the loss. *Id.*

Alice's argument is that she cannot be liable as a third-party tortfeasor because as the surviving spouse of the employee she stands in the same position as the employee, and the insurer has no right to seek subrogation against the insured. See *id.* ("The insurer has no right of subrogation against the insured."). She relies upon section 85.61(12), which provides that references in chapter 85 to a worker or employee, when the worker or employee is dead, include the worker's or employee's dependents or legal representatives.

We must consider the meaning of section 85.22. "We interpret statutes in light of their evident legislative intent, harmonizing them, if possible, with related statutes." *Forbes v. Hadenfeldt*, 648 N.W.2d 124, 126 (Iowa 2002). We do not limit our examination to individual terms in a statute, but consider the text of a

statute as a whole. *Id.* To determine legislative intent, “we seek a reasonable construction that will serve the purpose of the statute and avoid absurd results.” *Bertrand v. Sioux City Grain Exchange*, 419 N.W.2d 402, 403 (Iowa 1988). Section 85.22 has two purposes—to prevent double recovery by an injured worker and to secure reimbursement for an employer or insurer out of the proceeds of a recovery from a third-party. *Shirley v. Pothast*, 508 N.W.2d 712, 718 (Iowa 1993).

We first note that in *Bertrand*, 419 N.W.2d at 403, the Iowa Supreme Court found that under section 85.22 an insurer may seek indemnification from a surviving spouse for workers’ compensation death benefits paid when the employee’s estate receives damages from a third-party tortfeasor. The surviving spouse paid from her share of a settlement with the third-party tortfeasor an amount to the employer for workers’ compensation benefits she received.³ *Bertrand*, 419 N.W.2d at 403. Although the issue was not raised, there was no finding that the insurer could not recover from the surviving spouse because she was standing in the shoes of the employee. *See id.*

We furthermore note that section 85.22 specifies that the right of subrogation arises when an injury to an employee “is caused under circumstances creating a legal liability against some person, other than the employee’s employer or any employee of such employer as provided in section

³ Where a settlement by a third-party tortfeasor was divided between the surviving spouse and children, under section 85.22 the insurer could recover only the wrongful death benefits paid to the surviving spouse. *Bertrand*, 419 N.W.2d at 404. The insurer’s right to indemnification “extends only to that portion of the wrongful death proceeds actually paid or legally available to the person entitled to receive the workers’ compensation benefits.” *Id.*

85.20.” Thus, the statute sets forth two categories of persons who may not be a third party: (1) employers and (2) co-employees as specified in section 85.20. See *Forbes*, 648 N.W.2d at 127. There is no further statutory limitation, as long as the third party caused the employee’s injury under circumstances creating a legal liability.⁴ *March v. Pekin Ins. Co.*, 465 N.W.2d 852, 854 (Iowa 1991).

A treatise states:

As used in provisions of the workers’ compensation acts, permitting an action to be brought against third persons who cause an injury, words designating the persons against whom the action may be maintained are given their usual meaning. Phrases such as “third person,” “third party,” “other person,” or “other party” usually include persons who do not bear the relationship of employer toward the injured employee, or who are not constituted employers by statute.

101 C.J.S. *Workers’ Compensation* § 1665, at 520 (2000) (footnotes omitted). Also, “[i]n some states, a fellow employee of an injured worker is a third party subject to suit, while in other states fellow employees are generally immune from suit for acts committed in the course of their employment.” 82 Am. Jur. 2d *Workers’ Compensation* § 462, at 411 (2003) (footnotes omitted). In general, questions as to who may be a third party arise only in relation to whether the third party is a manifestation of the employer or a co-employee who may not be liable under workers’ compensation law. See 6 *Larson’s Workers’ Compensation Law*, § 110.01 - .08 (2008).

⁴ In 1974, the legislature amended section 85.22 to exclude “any employee of such employer as provided in section 85.20,” as possible third parties who may be subject to suit by an injured employee. *Forbes*, 648 N.W.2d at 126-27. The legislature did not intend to exclude all co-employees, only those who are not liable under section 85.20. *Id.* at 127.

We have found no authority to support Alice's claim that there is no right of subrogation against her for workers' compensation benefits she received as a surviving spouse for damages that may be received against her as a third-party tortfeasor. While under section 85.61(12) Alice may stand in the place of her husband, a deceased employee, as the beneficiary of workers' compensation benefits, this does not also mean that she is immune from suit as a third-party tortfeasor under section 85.22.

We additionally find that the operation of section 85.22 in this case is not contrary to public policy. In considering express public policy, we look to our statutes and our Constitution. *Fitzgerald v. Salsbury Chem., Inc.*, 613 N.W.2d 275, 283 (Iowa 2000). Unwritten public policy comes largely from judicial judgment and public opinion. *Truax v. Ellett*, 234 Iowa 1217, 1230, 15 N.W.2d 361, 367 (1944). Where there are two or more competing public policies, the court must attempt to harmonize them. *Wilson v. IBP, Inc.*, 589 N.W.2d 729, 731 (Iowa 1999); *Skyline Harvestore Sys., Inc. v. Centennial Ins. Co.*, 331 N.W.2d 106, 109 (Iowa 1983).

One of the main purposes of section 85.22 is to prevent double recovery by an injured worker, or the worker's beneficiaries. *Daniels*, 505 N.W.2d at 489; *Liberty Mut. Ins. Co. v. Winter*, 385 N.W.2d 529, 532 (Iowa 1986). There is no inter-spousal immunity in Iowa, so the injured employee or the estate, representing the interests of Dr. Risk, could recover from Alice, or her automobile insurance carrier. See *Shook v. Crabb*, 281 N.W.2d 616, 620 (Iowa 1979) (abrogating inter-spousal immunity). We note that inter-spousal immunity was

abandoned in Iowa in 1979, and there have been no legislative enactments to reinstate it in this statute. If the legislature had intended there to be immunity for a surviving spouse in section 85.22, the statute could have been amended. See *Forbes*, 648 N.W.2d at 127 (noting that if legislature intended to exclude all co-employees as third parties under section 85.22, the language of the statute could be changed). We conclude that because the estate could file a suit against Alice, so may the insurer. See Iowa Code § 85.22(2); *Daniels*, 505 N.W.2d at 487.

The other purpose of the statute is to secure total reimbursement for the employer or insurer out of the proceeds received from third parties. *Shirley*, 508 N.W.2d at 718. This purpose is effectuated by permitting the insurer's claim against Alice as a third-party tortfeasor under section 85.22.

We conclude the district court improperly granted summary judgment to Alice. We reverse the decision of the district court and remand for further proceedings.

REVERSED AND REMANDED.