COURT OF APPEALS DECISION DATED AND RELEASED

October 3, 1995

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

NOTICE

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

No. 95-1648-FT

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

SCOTT A. ROBINSON and
PHYLLIS M. ROBINSON,
his wife,

Plaintiffs-Appellants,

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY,

Plaintiff,

MASSACHUSETTS MUTUAL
LIFE INSURANCE COMPANY,

Plaintiff-Respondent,

v.

STEPHANIE A. VISSERS,
NORBERT L. VISSERS and
AMERICAN STANDARD INSURANCE
COMPANY OF WISCONSIN,

Defendants.

APPEAL from a judgment of the circuit court for Oneida County: MARK A. MANGERSON, Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. Scott A. Robinson and Phyllis M. Robinson appeal a judgment determining that the Massachusetts Mutual Life Insurance Company (MassMutual) was entitled to subrogation rights.[1] The trial court concluded that the ***Rimes***[2] made whole doctrine was inapplicable because the policy was part of an employee benefit plan subject to the federal Employee Retirement Income Security Act of 1974 (ERISA), which preempts state law. The Robinsons contend that the plan was not subject to ERISA because the plan purchased stop-loss coverage. The Robinsons further contend that, even if the plan is subject to ERISA, the language of the policy makes the claim subject to the ***Rimes*** made whole doctrine. Because we conclude that the plan was subject to ERISA and the language of the policy did not subject the claim to the ***Rimes*** made whole doctrine, we affirm the judgment.

The Robinsons were injured in an automobile accident due to the negligence of Stephanie A. Vissers. At the time of the accident, the Robinsons were covered by an employee benefit plan sponsored by Scott Robinson's employer, Marcus Cable Management, Inc. The plan was uninsured; however, Marcus purchased stop-loss coverage from MassMutual for claims exceeding a certain amount. In addition, MassMutual and Marcus entered into an agreement whereby MassMutual provided claim administration and processing services to Marcus.

The Robinsons reached a settlement agreement in their negligence claim against the defendants. MassMutual, as claims administrator, sought reimbursement for health care benefits paid to the Robinsons under the plan. The Robinsons moved the trial court for a ***Rimes*** hearing to determine whether MassMutual was entitled to subrogation, alleging that they had not been made whole by the settlement. The trial court granted MassMutual's motion for summary judgment on the grounds that its subrogation claim was not subject to the ***Rimes*** doctrine because it was an uninsured employee benefit plan governed by ERISA which preempts Wisconsin state law.

[1] This is an expedited appeal under RULE 809.17, STATS.

[2] Under ***Rimes v. State Farm Mut. Auto. Ins. Co.***, 106 Wis.2d 263, 272, 316 N.W.2d 348, 353 (1982), an insurer cannot be subrogated until the insured has been made whole.

We review a grant of summary judgment de novo. ***Dailey v. Secura Ins. Co.***, 164 Wis.2d 624, 628, 476 N.W.2d 299, 300 (Ct. App. 1991). Summary judgment methodology has been set forth numerous times and it need not be repeated here. *See* ***Grams v. Boss***, 97 Wis.2d 332, 338, 294 N.W.2d 473, 476 (1980).

The Robinsons contend that the plan is not governed by ERISA because the plan purchased stop-loss insurance from MassMutual. We disagree. It is settled law that the purchase of stop-loss coverage does not convert a self-funded, uninsured plan to an insured plan for purposes of determining ERISA preemption. ***Ramsey County Medical Ctr. v. Breault***, 189 Wis.2d 269, 277-78, 525 N.W.2d 321, 325 (Ct. App. 1994). When the employee benefit plan is uninsured, ERISA preempts state subrogation laws including the ***Rimes*** made whole doctrine. ***Id.*** Because ERISA applies to this plan and ERISA permits subrogation without regard to the rule of law applicable in the state, we conclude the trial court properly permitted subrogation without regard to the ***Rimes*** made whole doctrine.

The Robinsons further contend that the language of the plan's reimbursement clause requires application of the ***Rimes*** made whole doctrine. The interpretation of an insurance policy presents a question of law that we determine independent from the trial court. ***Allstate Ins. Co. v. Gifford***, 178 Wis.2d 341, 346, 504 N.W.2d 370, 372 (Ct. App. 1993).

The Robinsons quote the language: "[t]he purpose of this provision is to prevent duplication of benefits payable under the group plan." They read the language as a limitation on the subrogation clause and contend that the contract itself would preclude subrogation if they were not made whole by the settlement. We disagree. First, subrogation is provided for under ERISA and because this is an ERISA controlled plan, subrogation would be applicable. Second, the language cited is not a limitation on recovery but an explanation as to the reason subrogation rights are included in the contract. Finally, additional language in the clause states that the covered person agrees "to reimburse the insurer the benefits advanced under the group plan, up to the amount of *any recovery* received from the third party." (Emphasis added.) Accordingly, we conclude that the unambiguous language of the plan does not subject the claim to the ***Rimes*** made whole doctrine.

Because we conclude the plan is governed by ERISA which preempts state law and the language of the plan does not subject the Robinsons' claim to the ***Rimes*** made whole doctrine, we affirm the judgment.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.