COURT OF APPEALS
DECISION
DATED AND RELEASED

FEBRUARY 4, 1997

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(1), STATS.

NOTICE

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No. 96-0390

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

HMO OF WISCONSIN,

Plaintiff-Appellant,

v.

SHANE T. HANDLEY,

Defendant-Respondent,

HERITAGE INSURANCE COMPANY,

Defendant.

APPEAL from a judgment of the circuit court for Eau Claire County: ERIC J. WAHL, Judge. *Affirmed.*

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

PER CURIAM. HMO of Wisconsin appeals a judgment dismissing its subrogation claims against Shane Handley and Heritage Insurance Company. It argues that (1) the trial court erroneously exercised its discretion when it denied HMO's request to produce additional evidence after it completed its case; (2) sufficient evidence supported its claim; and (3)

subrogation is required to prevent unjust enrichment. We reject these arguments and affirm the judgment.

In August 1993, Handley, an eighteen-year-old, was injured in a two-vehicle accident. His mother's employer's health insurer, HMO, paid $11,017.08 in medical bills as of February 1995. However, HMO never formally notified Handley of its subrogation provisions in the policy.

While HMO was paying the medical bills, Handley, unrepresented by legal counsel, settled his claim against the other driver, Thad Migawa, and his insurer, Heritage, for $41,500. They stipulated that Migawa was 90% at fault and Handley was 10% at fault. This settlement did not include HMO. Handley was aware that HMO was paying the medical bills. When Handley asked who would pay HMO, Heritage answered that Handley did not have to worry about it.

HMO brought this action to enforce its subrogation rights under the policy. Handley's amended answer denied that HMO had subrogation rights. During opening statements, his counsel defined the issue as whether HMO had subrogation rights under the specific language of the policy and stated that "in particular our position is that Mr. Handley is not a member under the terms of that policy so as to be under the obligations that [counsel for HMO] indicates he is." At the trial to the court, HMO presented no testimony, but relied on its requests for admissions. Handley had admitted that HMO made payments pursuant to its policy, which contained a subrogation clause.[1]

After HMO rested, Handley moved to dismiss. Handley admitted that HMO made payments pursuant to the policy and that the policy contains a subrogation clause, but "in no way did we make an admission that, in fact, that created a valid subrogation claim against Mr. Handley ...."

Handley argued that because he was a dependent, and not a member, HMO's subrogation rights under the policy do not apply to him. The

[1] The trial court asked: "So with this you rest?", To which HMO replied: "I do, Your Honor."

portion of the policy admitted stated that "upon providing ... Benefits under this Agreement, *HMO* [of Wisconsin] *shall be subrogated to Member's rights* of recovery from any third party." (Emphasis added.) HMO's trial exhibits failed to include a definitions page of its policy showing who was a "member" subject to subrogation.

After Handley's motion to dismiss, HMO offered into evidence a copy of the definitions page of the policy defining a member as an eligible employee and any eligible dependent or any individual subscriber and any individual dependents who have been enrolled in the plan. The court rejected the evidence on the ground that it was not made part of the admissions and there was no testimony that the two-page certified copy was part of the policy in question.

HMO then made an offer of proof that the document defined a member as an eligible employee and any eligible dependent and offered what it characterized as "rebuttal" evidence in the form of the two-page exhibit. Handley objected on the ground that rebuttal was inappropriate because the defense never offered any evidence.

The trial court agreed and concluded that absent evidence that Handley was a member, HMO failed to prove the necessary elements of its claim. The trial court granted Heritage's and Handley's motions to dismiss pursuant to § 807.17(1), STATS. HMO appeals.

HMO argues that the trial court erroneously refused its rebuttal evidence consisting of the copy of the policy definitions page. It argues that "prior to the defense's motion to dismiss, the specific issue of whether Mr. Handley was a 'member' had not been raised." It contends that because the issue whether Handley was a member was a new matter, HMO was entitled to rebuttal. We disagree.

First, the burden was on HMO to introduce evidence to show that the subrogation clause applied to Handley. *See* ***Jindra v. Diederich Flooring***, 181 Wis.2d 579, 599, 511 N.W.2d 855, 862 (1994). The issue whether Handley was a "member" within the meaning of the policy was a matter to be presented in

HMO's case-in-chief and was specifically identified as such by Handley's counsel at opening statements.

After HMO rested, Handley and Heritage offered no evidence but moved to dismiss pursuant to § 805.17(1), STATS., on the ground that HMO failed to show a right to relief. In an action tried to the court without a jury, after the plaintiff has presented its evidence, a dismissal under § 805.17(1) operates as an adjudication upon the merits. *See* ***Household Utils. v. Andrews,*** 71 Wis.2d 17, 25, 236 N.W.2d 663, 667 (1976). Because rebuttal evidence is only appropriate when there is evidence offered in defense, *see* ***Pophal v. Siverhus,*** 168 Wis.2d 533, 555, 484 N.W.2d 555, 563 (Ct. App. 1992), the trial court did not err when it refused HMO's "rebuttal" evidence.

Although HMO describes its motion as one to allow rebuttal evidence, its substance sought to reopen HMO's case-in-chief. A motion to reopen for the purpose of introducing portions of the HMO policy is addressed to trial court discretion. *See* ***Catura v. Romanofsky,*** 268 Wis. 11, 16, 66 N.W.2d 693, 695 (1954). A litigant has no strict right to reopen a case for the purpose of introducing additional evidence, but the discretion of the trial court rests upon general rules of equity and justice. ***In re Estate of Javornik,*** 35 Wis.2d 741, 746, 151 N.W.2d 721, 723 (1967).

HMO argues that "[i]n the interest of justice, Judge Wahl should have demanded a properly certified copy of the definitions page before dismissing this action" because failure to do so leaves an issue unresolved. We disagree. Equity does not dictate that the court reopen the case and allow recovery here. HMO acknowledged that it never sent any notice to Handley that it would seek reimbursement for the medical bills. Handley's awareness that he was covered by his mother's insurance, and that it was paying the medical bills, does not translate to a recognition that HMO's subrogation rights would be asserted against his settlement with Heritage, absent a notice to this effect. We conclude that the trial court did not erroneously exercise its discretion when it refused to reopen HMO's case-in-chief to shore up its lack of proof brought to light by defendants' motions to dismiss.

Next, HMO argues that it presented sufficient evidence of its subrogation against Handley, even without proof that Handley was within the

definition of a member against whom subrogation may be asserted. It argues that the undisputed facts that the policy contained a subrogation clause, that Handley settled his personal injury claim without including HMO, that HMO paid his medical bills under the policy with Handley's knowledge, and that HMO has not been reimbursed for the sums paid provide sufficient evidence of a valid subrogation claim. We disagree.

There are two types of subrogation: contractual subrogation and equitable subrogation. ***Jindra***, 181 Wis.2d at 601, 511 N.W.2d at 862. "Clearly, the mere fact that there may be a subrogation clause somewhere in the contract does not mean that all payments made by the insurer to its insured must invoke the subrogation clause to the exclusion of all applicable provisions." ***Id.*** at 602, 511 N.W.2d at 862.

Absent sufficient proof of necessary contractual provisions, the policy and circumstances must be analyzed to determine whether there is a basis for equitable subrogation. ***Id.*** at 604, 511 N.W.2d at 863. "As an equitable doctrine, subrogation is a 'device adopted or invented by equity to compel the ultimate discharge of a debt or obligation by him who in good conscience ought to pay it.'" ***Id.*** at 605, 511 N.W.2d at 862 (quoting ***Leonard v. Bottomley***, 210 Wis. 411, 417, 245 N.W. 849, 851 (1933)). As we previously concluded, under the facts presented, equity does not demand the court allow recovery against Handley here. *See* ***State v. Gilles***, 173 Wis.2d 101, 115, 496 N.W.2d 133, 139 (Ct. App. 1992).

Finally, we decline to address HMO's unjust enrichment claim because it was not raised in the trial court.

By the Court.—Judgment affirmed.

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