

S T A T E O F M I C H I G A N
C O U R T O F A P P E A L S

SENTRY INSURANCE, a mutual company,

Plaintiff-Appellant,

v

UNPUBLISHED

October 22, 1996

CHAMBERS, STEINER, MAZUR, ORNSTEIN &
AMBLIN, P.C., and JOHN I. KITTEL, Jointly and
Severally,

Defendants-Appellees.

No. 185149

LC No. 94-409873 NH

Before: Wahls, P.J., and Cavanagh and J.F. Kowalski,* JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court order that granted summary disposition in favor of defendants pursuant to MCR 2.116(C)(8) and (C)(10). Plaintiff filed a negligence claim alleging that defendants owed a duty to plaintiff, a workers' compensation carrier, to reimburse plaintiff from the settlement proceeds of defendants' client's wrongful death action. The trial court found that defendants did not owe plaintiff a duty as a matter of law. We affirm.

This action stems from defendants' representation of Victor Beekman in tort litigation against Beekman's employer for injuries Beekman suffered when he was exposed to asbestos on the job. During the course of the tort litigation, defendants advised Beekman that he also had a viable workers' compensation claim, but Beekman indicated that he did not want defendants' assistance with any workers' compensation claims. Beekman died while the tort litigation was pending, and the action was converted to one for wrongful death. Beekman and his wife received workers' compensation benefits from plaintiff, Beekman's employer's workers' compensation carrier, both before and after Beekman's death.

During the course of the wrongful death suit, plaintiff sent a letter to defendants advising defendants of plaintiff's lien on any funds recovered in connection with the Beekman litigation. Plaintiff did not intervene in Beekman's suit or file notice of a lien. The wrongful death action subsequently

* Circuit judge, sitting on the Court of Appeals by assignment.

settled and defendants distributed the proceeds to surviving family members in accordance with the lower court's order.

Plaintiff argues that the trial court improperly granted summary disposition in defendants' favor and that it should have granted summary disposition for plaintiff. We disagree. In reviewing a grant of summary disposition pursuant to MCR 2.116(C)(10), this Court must give the benefit of reasonable doubt to the nonmovant and determine whether a record might be developed which will leave open an issue upon which reasonable minds could differ. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 617-618; 537 NW2d 185 (1995).

Plaintiff argues that defendants owed plaintiff a duty to reimburse plaintiff from the settlement proceeds before paying the remaining balance to the Beekmans. In support of its argument, plaintiff advances four theories for imposing such a duty on defendants, the Beekmans' attorneys. We will treat each theory separately.

Plaintiff's main argument is that MCL 418.827(5); MSA 17.237(827)(5), imposes a fiduciary duty upon an injured employee's attorney to ensure that the compensation carrier is reimbursed from proceeds recovered in a third party tort action before the proceeds are distributed to the injured employee or his dependents. That statute provides:

In an action to enforce the liability of a third party, the plaintiff may recover any amount which the employee or his or her dependents or personal representative 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 carrier for any amounts paid or payable under this act to date of recovery and the balance shall immediately be paid to the employee or his or her dependents or personal representative and shall be treated as an advance payment by the employer on account of any future payments of compensation benefits.

The primary goal of judicial interpretation of statutes is to ascertain and give effect to the intent of the Legislature. *In re Schnell*, 214 Mich App 304, 309; 543 NW2d 11 (1995). The first criterion in determining intent is the specific language of the statute. *House Speaker v State Administrative Bd*, 441 Mich 547, 567; 495 NW2d 539 (1993). The Legislature is presumed to have intended the meaning it plainly expressed. *Frasier v Model Coverall Service, Inc*, 182 Mich App 741, 744; 453 NW2d 301 (1990).

The language of MCL 418.827(5); MSA 17.237(827)(5), clearly does not impose a duty on a claimant's attorney to ensure that the compensation carrier is reimbursed from the proceeds of a third party action. The statute provides that the carrier is entitled reimbursement, but the statute is unambiguous in that it does not impose a duty on the claimant's attorney to ensure that the carrier gets its money. Michigan law provides a compensation carrier with three ways to assert its right to reimbursement for benefits paid:

First, by filing its own action, as subrogee of the injured employee, against the third party tortfeasor, as expressly authorized in sections (1) and (3); *Second*, by filing a motion to intervene in the injured employee's suit against the third party tortfeasor as expressly authorized by the last line of subsection (1); and , *Third*, by a judicially created cause of action established by this Court in *Ohio Farmer's Ins Co v Neff*, 112 Mich App 53; 315 NW2d 553 (1981). [*Travelers Ins Co v S & H Tire Co*, 134 Mich 214, 222; 351 NW2d 279 (1984).]

Plaintiff did not follow any of the above courses of action. Policy concerns dictate that the burden should be on the carrier to take some action to protect its interest in a third-party tort litigation. A compensation carrier should not be allowed to passively await reimbursement from a claimant's attorney. We decline to hold that the language of MCL 418.827(5); MSA 17.237(827)(5), imposes a fiduciary duty upon an injured employee's attorney to ensure that the compensation carrier is reimbursed from proceeds recovered in a third party tort action before the proceeds are distributed to the injured employee or his dependents.

Second, plaintiff claims that defendants had a duty under Rule 1.15(b) of the Michigan Rules of Professional Conduct to promptly turn over any funds to which plaintiff as a third party was entitled. Rule 1.15(b) of the MRPC provides:

Upon receiving funds or other property in which a client or third person has an interest a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, the lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon the request by the client or third person, shall promptly render a full account regarding such property.

According to the lower court's Order for Distribution of Proceeds, the settlement proceeds which defendants held were to be distributed to defendants and Mrs. Beekman. As officers of the Court, defendants were obligated to follow that court order. As Mrs. Beekman's attorneys, defendants were under a duty to see that Mrs. Beekman received her money pursuant to court order. Defendants would have breached their duty to their client, Mrs. Beekman, to represent her best interests had they violated the court order and distributed the proceeds to plaintiff. Defendants had no relationship with plaintiff. Defendants were under no duty to protect plaintiff's interest. We do not find that the MRPC imposed a duty upon defendants to reimburse plaintiff from the settlement proceeds.

Third, plaintiff claims that the Supreme Court decision in *Transamerican Freight Lines v Quimby*, 381 Mich 149; 160 NW2d 865 (1968), provides authority for extending liability to a claimant's attorney for failure to reimburse a compensation carrier from the proceeds of a tort litigation. In that case, however, the Court found that liability could not be extended to the claimant's attorney even though the attorney was an endorser and a payee of the settlement check. Even though there was some evidence that the claimant's attorney specifically undertook to hold and secure any judgment or settlement procured against a third-party tortfeasor for the benefit of the carrier, the *Quimby* Court still

did not find that the claimant's attorney was liable to the compensation carrier. In the case at bar there is no evidence that defendants undertook to hold the settlement proceeds for plaintiff. We do not find that *Quimby* provides authority for imposing a duty on defendants to reimburse plaintiff from the settlement proceeds.

Plaintiff's final argument is that defendants should be deemed trustees of a constructive trust which held the settlement proceeds for the benefit of plaintiff. Plaintiff argues that defendants' failure to reimburse plaintiff is a breach of defendants' fiduciary duties as trustees. Fraud is the essential element of constructive trusts. *Kent v Klein*, 352 Mich 652, 657; 91 NW2d 11 (1958). Actual fraud is not necessary, but such a constructive trust will arise whenever the circumstances under which property was acquired make it inequitable that it should be retained by him who holds the legal title. *Id.* Plaintiff did not allege fraud or misrepresentation in its complaint. Therefore plaintiff's complaint regarding this theory is fatally deficient. In addition, we find that there was no fraud involved in this case. Defendants rightfully obtained the settlement proceeds, retained title to that portion of the proceeds which equaled their fees, and distributed the remaining settlement proceeds in accord with the circuit court's order. We find that defendants did not owe plaintiff a duty to reimburse plaintiff from Beekman's settlement proceeds. The trial court properly granted summary disposition in favor of defendants.

Plaintiff also argues that the trial court erroneously denied its motion for leave to amend its complaint to add Mrs. Beekman as a defendant. We conclude that this issue is moot because plaintiff filed a separate cause of action against Mrs. Beekman which remains pending. We therefore decline to consider the issue. *Crawford Co v Sec'y of State*, 160 Mich App 88, 93; 408 NW2d 112 (1987).

Defendants contended on appeal, as alternative grounds for affirming the trial court's order of summary disposition, that the circuit court did not have subject matter over the instant case because the Workers' Compensation Bureau had exclusive jurisdiction. We disagree. Questions of workers' compensation, compensation procedure, and the remedy for failure to follow that procedure are statutorily established and are to be determined by the Bureau rather than the circuit court. *Maglaughlin v Liberty Mutual Ins Co*, 82 Mich App 708, 712; 267 NW2d 160 (1978). A circuit court may have concurrent jurisdiction over certain issues, particularly those involving determination of rights arising out of an entirely different relationship than that of employer-employee. *Lulgjuraj v Chrysler Corp*, 185 Mich App 539, 545; 463 NW2d 152 (1990). This case involves a workers' compensation carrier suing a claimant's attorneys on a negligence cause of action. We do not think that the employer-employee relationship is substantially involved to the extent that the Workers' Compensation Bureau had exclusive jurisdiction. The circuit court did have jurisdiction.

Affirmed.

/s/ Myron H. Wahls
/s/ Mark J. Cavanagh
/s/ John F. Kowalski