IN THE COURT OF APPEALS OF IOWA

No. 7-492 / 06-1644
Filed September 19, 2007

ROLLINS CORPORATION, d/b/a ORKIN PEST CONTROL,
Plaintiff-Appellant,

vs.

DAVID GUESSFORD, PRISCILLA GUESSFORD, and STATE FARM AUTOMOBILE INSURANCE COMPANY,
Defendants-Appellees.

Appeal from the Iowa District Court for Polk County, Douglas F. Staskal, Judge.

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

Timothy W. Wegman and Joseph M. Barron of Peddicord, Wharton, Spencer & Hook, L.L.P., Des Moines, for appellant.

Jon A. Vasey of Elverson, Vasey & Peterson, L.L.P., Des Moines, for appellee.

Considered by Sackett, C.J., and Vogel and Miller, JJ.

VOGEL, J.

Rollins Corporation, d/b/a Orkin Pest Control, (Rollins) appeals from an order by the district court granting summary judgment in favor of the defendants, David and Priscilla Guessford and State Farm Insurance Company. Because we agree that summary judgment is proper as a matter of law, we affirm.

Catherine Newquist was injured in a car accident in April 2002 while in the course of her employment with Rollins. The other vehicle involved was driven by Priscilla Guessford, owned by David Guessford, and insured by State Farm. Rollins paid Newquist $59,221 in various workers' compensation benefits stemming from the injuries she suffered in the accident. Newquist eventually retained counsel to pursue a personal injury claim against the Guessfords and State Farm, which resulted in a settlement before suit was filed. In September 2003, Newquist released the Guessfords from any further liability. She did not indemnify Rollins for the workers' compensation benefits it had paid to her.

Rollins filed suit[1] in April 2004. In Count I, it sought from Newquist, David and Priscilla Guessford, and State Farm, indemnification of the workers' compensation benefits already paid to Newquist. In Count II, it sought from Newquist the amount of workers' compensation benefits she had already received, alleging double recovery, under a theory of unjust enrichment. In Count III, it sought from State Farm and David Guessford recovery of the

[1] Rollins's case against Newquist proceeded to trial in September 2006. The appeal on the summary judgment ruling is thus timely under Iowa Rule of Appellate Procedure 6.5(3), as the appeal was taken within the time for an appeal from the judgment finally disposing of the case as to remaining parties or issues. *See Estate of Countryman v. Farmers Co-op. Ass'n*, 679 N.W.2d 598, 601 (Iowa 2004).

workers' compensation benefits paid to Newquist, asserting rights of subrogation under Iowa Code section 85.22 (2003).

Upon the Guessfords' and State Farm's motion for summary judgment, the district court found that because Rollins did not consent to the settlement agreement under section 85.22(3), "the settlement agreement between Newquist and the Guessfords does not in and of itself preclude Rollins's exercise of its subrogation rights under § 85.22." However, the court also found that Rollins had not complied with the notice procedures under section 85.22(2) to create a right of subrogation as of the time suit was filed in April 2004. The court therefore dismissed that portion of Rollins's suit but noted that Rollins's right of subrogation may ripen in the future should it undertake to follow the steps in section 85.22(2) to create such a right. Rollins appeals.

Our review of a ruling on a motion for summary judgment is for correction of errors at law. Iowa R. App. P. 6.4. Under Iowa Rule of Civil Procedure 1.981(3), summary judgment is appropriate only when no genuine issue of material fact exists and the moving party is entitled to a judgment as a matter of law. In ruling upon a motion for summary judgment, the court considers "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any." Iowa R. Civ. P. 1.981(3). "No fact question exists if the only dispute concerns the legal consequences flowing from undisputed facts." *McNertney v. Kahler*, 710 N.W.2d 209, 210 (Iowa 2006) (citing *Estate of Beck v. Engene*, 557 N.W.2d 270, 271 (Iowa 1996)). We therefore examine the record before the district court in deciding whether the court correctly applied the law. *Id.*

Rollins argues on appeal that the district court erred when it concluded that no right of subrogation had been created. Section 85.22(2) provides that an employer 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). However, two conditions must be established before subrogation rights arise: (1) a proper demand upon the employee to initiate action and (2) refusal or failure of the employee to take action within ninety days. *Id.* Without the employer's ninety-day demand for the employee to commence suit, there is no subrogation of rights to the employer to maintain the action. *Id.* Rollins does not contest that it did not make a demand on Newquist to initiate action against the Guessfords. It instead apparently misinterprets the district court's ruling to find a duty of the employer to give notice to the third-party tortfeasor. Although Rollins did inform State Farm of the workers' compensation benefits it had already paid, Rollins acknowledges it relied on its correspondence to State Farm and did not serve notice on Newquist to initiate suit. Rollins's misinterpretation of the law does not vitiate the admitted fact that it failed to follow the procedure of section 85.22(2) to establish a right of subrogation.

The focus of the summary judgment ruling was very narrow. It did not preclude Rollins from recovering the benefits it had already paid to Newquist. As no lawsuit was filed by Newquist against the Guessfords and State Farm, no notice was served on Rollins of a pending suit, and therefore, the thirty-day time

frame for Rollins to preserve its lien under section 85.22(1)[2], was not triggered. *See Firstar Bank v. Hawkeye Paving Corp.*, 558 N.W.2d 423, 427 (Iowa 1997) (holding service of original notice is a condition precedent to employer's duty to file a notice of lien.) In fact, on September 20, 2006, judgment was entered in favor of Rollins and against Newquist for $38,211.38 plus interest. Rollins's lien on the proceeds that State Farm paid to Newquist allowed for Rollins to seek indemnification under section 85.22(1). *See also Armour-Dial, Inc.*, 334 N.W.2d at 145 (finding, after a late-filed notice of lien and subsequent settlement between the third-party tortfeasor and employee, employer had indemnification rights "out of the recovery of damages" against the employee, but not against third-party tortfeasor).

We therefore conclude that the district court correctly found as a matter of law that Rollins failed to meet the requirements of 85.22(2) and the Guessfords and State Farm are entitled to summary judgment on the subrogation claim by Rollins. We affirm.[3]

AFFIRMED.

Vogel, J. and Miller, J. concur. Sackett, P.J., concurs in part and dissents in part.

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[2] Iowa Code section 85.22(1) provides in part:

> If compensation is paid the employee . . . the employer . . . 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 . . . . In order to continue and preserve the lien, the employer or insurer shall, within thirty days after receiving notice of such suit from the employee, file, in the office of the clerk of the court, where the action is brought, notice of the lien.

[3] Rollins also argues an equitable estoppel defense on appeal. As this issue was not first raised before and decided by the district court, *Felderman v. City of Maquoketa*, 731 N.W.2d 676, 679 (Iowa 2007), we decline to address it.

SACKETT, C.J. (concurring in part and dissenting in part)

I concur in part and dissent in part.

I agree with the majority that the appeal was timely filed. I also agree the employer is not yet "subrogated to the right of the employee to maintain the action against such third party." That is the right the employer gains after giving notice as provided in Iowa Code section 85.22(2).[4]

I disagree with the majority's conclusion that the dismissal on summary judgment of plaintiff employer's action against Guessfords and State Farm should be affirmed. The statutory lien[5] provided to the employer in section 85.22(1) remains in existence and allows the employer to be indemnified out of the settlement proceeds. This occurs because the condition precedent (the employee supplying the employer with an original notice of suit) that requires the employer to file the lien with the clerk of court to continue and preserve it has never occurred.

The plain purpose of section 85.22 is to prevent double recovery by the injured worker–compensation in a law action as well as workers' compensation for the same injury. *Liberty Mut. Ins. Co. v. Winter*, 385 N.W.2d 529, 532 (Iowa

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[4] In *Armour-Dial, Inc. v. Lodge & Shipley*, 334 N.W.2d 142, 146 (Iowa 1983), the court noted as to subsection 2 the right of subrogation in this case is a creature of statute, and thus does not rely upon the general principles of subrogation. Under Iowa workers' compensation law, subrogation is created specifically in subsection 2.

[5] This too meets a definition of subrogation. *Black's* defines subrogation as:

> (1) The substitution of one party for another whose debt the party pays entitling the paying party to right, remedies or securities that would otherwise belong to the debtor. (2) The equitable remedy by which such substitution takes place. (3) The principle under which an insurer has paid a loss under an insurance policy is entitled to all the rights and remedies belonging to the insured against a third party with respect to any loss covered by the policy.

Black's Law Dictionary 1467 (8th ed. 2004).

1986). By enactment of that section, the legislature has provided the employer with two methods of recovering the amount of benefits paid to an employee: (1) indemnification out of the recovery of damages as set out in subsection 1, and (2) subrogation to the right of the employee to maintain the action against the third party. *Id.* at 531; *Armour-Dial, Inc.*, 334 N.W.2d at 144.

The right for indemnification or subrogation[6] under subsection 1 out of the recovery of damages can be lost by failing to comply with the notice requirements of that section. *See* at 144-45 (finding employer lost lien on settlement proceeds by failing to give a timely notice of the lien after the employer was notified that the employee had filed a suit against the tortfeasor); *Liberty Mut. Ins.*, 385 N.W.2d at 532 (stating "the employer or insurer may lose its lien by failing to give a timely notice of lien pursuant to subsection 85.22(1)."). However, the lien remains unless the employer is given a notice of suit.[7] *See also Firstar Bank v. Hawkeye Paving Corp.*, 558 N.W.2d 423, 427 (Iowa 1997) (finding the employer's lien remained intact despite employer's failure to file a notice of lien where heirs of deceased employee failed to serve a notice of suit

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[6] *See* Black's Law Dictionary 1467 (8th ed. 2004) (defining subrogation).

[7] The applicable part of the statute provides:

> When an employee receives an injury . . . which injury . . . is caused under circumstances creating a legal liability against some person, other than the employee's employer or any employee . . . (1) If compensation is paid the employee . . . under this chapter, the employer by whom the same was paid, or the employer's insurer which paid it, shall be indemnified out of the recovery of damages to the extent of the payment so made, with legal interest, except for such attorney fees . . . *and shall have a lien on the claim for such recovery* . . . . In order *to continue* and preserve the lien, the employer or insurer shall, within thirty days after receiving notice of such suit from the employee, file, in the office of the clerk of the court where the action is brought, notice of the lien.

Iowa Code § 85.22(1).

on the employee which was a condition precedent to the employer's duty to file a notice of lien).

No suit was filed here. No notice of suit was given to the employer and consequently the lien was never lost. The summary judgment dismissing the employer's claim should be reversed and the matter should be remanded for further proceedings.

I have concern that the majority's opinion may increase lawsuits and discourage settlements because the majority's opinion seems to say that for an employer to have a lien on an injured employee's claim against a tortfeasor, the employer must give the employee notice to bring suit. I doubt that this was what the legislature intended. Furthermore, I have concern of the effect the majority opinion will have on the sense of fair dealing among insurers in this state. State Farm, a major insurance company, was advised shortly after the accident happened that the injured party, who was collecting workers' compensation benefits, would probably be owed damages by State Farm and that the employer would be exercising its lien on the proceeds. State Farm failed to honor the notice of lien and to communicate with the employer before settling the claim. And now the majority is utilizing a provision enacted for the benefit of the employee to relieve State Farm of responsibility for complying with the letter and the spirit of the law. The statutory provision for subrogation was not enacted for the benefit of the third-party tortfeasor. *Armour-Dial, Inc.*, 334 N.W.2d at 146.