



In the Missouri Court of Appeals Western District

MARY PIERCE,	)	
Respondent-Appellant,	)	WD83234
v.	)	Consolidated with WD83259
	)	
MO-KAN SHEET METAL WORKERS	)	FILED: November 10, 2020
WELFARE FUND,	)	
Appellant-Respondent.	)	

APPEAL FROM THE CIRCUIT COURT OF CASS COUNTY THE HONORABLE WILLIAM B. COLLINS, JUDGE

**BEFORE DIVISION TWO: LISA WHITE HARDWICK, PRESIDING JUDGE,
THOMAS H. NEWTON AND KAREN KING MITCHELL, JUDGES**

Mo-Kan, an ERISA benefit plan administrator, appeals from the circuit court's judgment declaring that Mo-Kan has no right to reimbursement from the civil judgment of a beneficiary, Mary Pierce. Mo-Kan contends that the court erroneously applied the law by declaring that Mo-Kan's Summary Plan Description was not an enforceable Plan Document and that Missouri law applied over federal law. Pierce cross-appeals, contending that the court abused its discretion in declining to impose civil penalties and attorney's fees against Mo-Kan under 29 U.S.C. § 1132(c)(1) and (g)(1), and 29 C.F.R. § 2575.502c-1. For reasons explained herein, we reverse and remand, in part, and affirm, in part.

FACTUAL AND PROCEDURAL HISTORY

Pierce was involved in an automobile accident on March 13, 2016. A passenger in the other vehicle died as a result of the accident. On September 13, 2017, the parents of the deceased initiated a wrongful death suit against Pierce and the Missouri Highways and Transportation Commission (“MHTC”). Pierce filed a crossclaim against the MHTC for personal injuries sustained in the accident.

Pierce is a beneficiary of Mo-Kan’s ERISA benefit plan. Since the automobile accident, Mo-Kan has paid approximately \$105,000 in medical benefits on Pierce’s behalf. On March 19, 2018, Pierce sent a letter to Mo-Kan requesting various plan administration documents. She asked again on November 29, 2018. The parties corresponded, but Mo-Kan declined to produce any documents.

On January 23, 2019, Pierce filed a motion for an order to show cause with the circuit court. In her motion, she sought an order declaring that Mo-Kan would have no right to reimbursement from any judgment in Pierce’s favor on her crossclaim against the MHTC. Pierce also sought an order for Mo-Kan to produce the documents requested and to impose civil penalties and attorney’s fees under 29 U.S.C. § 1132(c)(1), § 1132(g)(1), and 29 C.F.R. § 2575.502c-1. The court granted the show cause order and set the case for hearing.

The court heard arguments on April 23, June 3, and September 16, 2019. On November 12, 2019, the court issued an order declaring that Mo-Kan had no subrogation claim. It further ordered Mo-Kan to produce some, but not all, of the

documents requested. The court did not require Mo-Kan to pay penalties or attorney's fees. Mo-Kan filed this appeal, and Pierce subsequently cross-appealed.

STANDARD OF REVIEW

"The judgment of the trial court in a court-tried civil case will be sustained 'unless there is no substantial evidence to support it, unless it is against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies the law.'" *Swallow Tail, LLC v. Mo. Dep't of Conservation*, 522 S.W.3d 309, 314 (Mo. App. 2017) (quoting *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976)). "A claim that the judgment erroneously declares or applies the law . . . involves review of the propriety of the trial court's construction and application of the law." *Pearson v. Koster*, 367 S.W.3d 36, 43 (Mo. banc 2012). "This Court applies *de novo* review to questions of law decided in court-tried cases." *Id.*

ANALYSIS

In its sole point, Mo-Kan contends that the court erred in finding that it had no subrogation claim. The court based its decision on two grounds: (1) the subrogation provision in the Summary Plan Description was not an enforceable term in a Plan Document, and (2) Missouri law applied to bar any subrogation claim. In addition to the two grounds upon which the court's decision was based, Pierce argues that the Summary Plan Description does not meet the statutory requirements for a Plan Document under 29 U.S.C. § 1102(b). Pierce also

contends that subrogation would violate the plan's anti-inurement provision and would breach Mo-Kan's fiduciary duty to her.

Typically, an ERISA benefit plan consists of both a Plan Document, which contains the enforceable terms of the plan, and a Summary Plan Description, which explains the plan's terms. See *Cigna Corp. v. Amara*, 563 U.S. 421, 438 (2011). Terms in a Summary Plan Description, but not a Plan Document, are normally unenforceable. *Id.* The dispute before us arises from language contained in a document labeled as the Summary Plan Description. This language allows Mo-Kan to seek reimbursement, by way of subrogating to the rights of a judgment holder, for prior medical expenses paid:

SECTION 20. RIGHT OF RECOVERY 20-1. WHEN THE FUND HAS A RIGHT OF RECOVERY

The following rule applies to any situation in which the Fund makes full or partial payment to or on behalf of You or Your Eligible Dependent(s) ("Covered Person") who subsequently recovers from any other source additional payments or Benefits in any way related to the Accident, Illness, or treatment for which the Fund made full or partial payment. **Upon any such subsequent recovery by or on behalf of a Covered Person from any person, party, insurance company, firm, corporation, or government agency, by suit, judgment, settlement, compromise, or otherwise, the Fund, with or without the signing of a subrogation agreement, shall be entitled to immediate reimbursement to the full extent of Benefits paid to or behalf of the Covered Person.** The Fund, by payment of any Benefits, is granted a lien on the proceeds of any such recovery. The Fund shall first be reimbursed fully by or on behalf of such Covered Person to the extent of Benefits paid from the monies paid by any person, party, insurance company, firm, corporation, or government agency and the balance of monies, if any, then remaining from such subsequent recovery shall be retained by or on behalf of the covered person.

20-2. OBLIGATION OF COOPERATION

All Covered Persons are obligated to cooperate with the Fund in its efforts to enforce its subrogation rights and to refrain from any action which interferes with those efforts. This duty of cooperation includes (but is not limited to) the obligation to sign a subrogation agreement in the form prescribed by the Fund. No Covered Person shall make any settlement which specifically excludes or attempts to exclude any Benefits paid by the Fund. The Fund shall have the right to take all appropriate actions necessary to enforce its subrogation rights in the event that a Covered Person refuses to sign a subrogation agreement, refuses to reimburse the Fund in accordance with the Fund's rights, or takes any other action inconsistent with the Fund's subrogation rights. In such situations, the Fund's options shall include, without limitation, the right in appropriate cases to deny Benefits to a Covered Person who refuses to sign a subrogation agreement; to institute legal actions to recover sums wrongfully withheld or to obtain other relief; and to offset wrongfully withheld sums against future benefit payments otherwise owed the Covered Person who retains such sums.

20-3. FUND HAS LIEN ON RECOVERY

The Fund's right of recovery shall be a prior lien against any proceeds recovered by the Covered Person, which right shall not be defeated nor reduced by the application of any so-called "Made-Whole Doctrine," "Rimes Doctrine," or any other such doctrine purporting to defeat the Fund's recovery rights by allocating the proceeds exclusively to non-medical expenses damages.

(Emphasis added). The parties agree that Mo-Kan's plan does not include a formal Plan Document that exists separate from the Summary Plan Description. Rather, the Summary Plan Description purports to also function as the Plan Document:

This booklet provides a general description, written in non-technical language, of the import provisions of this Plan as expressed in the insurance contracts and administrative rules and regulation of this Plan. **However, this is not just a summary of the Plan, but the actual Plan document written so that it can be used by Participants and the Trustees in administering the Plan.** All provisions for any insured

benefits are subject to the terms and conditions of the group of policies issued by the Company.

(Emphasis added.)

Nevertheless, the circuit court relied on *Amara* to find that Mo-Kan's Summary Plan Description was not a Plan Document. The United States Supreme Court held in *Amara* that terms located in a Summary Plan Description, but not in the separate Plan Document, were not enforceable. *Id.* In doing so, the Court emphasized that a Summary Plan Description is not a Plan Document. *Id.* Finding that *Amara* applied to the Summary Plan Description, the court in this case determined that Mo-Kan may not enforce the subrogation provisions therein.

Mo-Kan contends that *Amara* is distinguishable from the case before us, and, therefore, does not apply. We agree. *Amara* involved two separate documents—a Summary Plan Description and a Plan Document. It follows that if a Plan Document exists separate from the Summary Plan Description, then the Summary Plan Description cannot physically be the Plan Document. Here, however, we have a single, joint document to consider.

The Eighth Circuit has recently affirmed these all-in-one Plan Documents notwithstanding *Amara*. See *MBI Energy Servs v. Hoch*, 929 F.3d 506, 510-11 (8th Cir. 2019). The court in *Hoch* held that a reimbursement provision in a similar all-in-one document was an enforceable term of the Plan Document itself. *Id.* In reaching its conclusion, the Eighth Circuit distinguished *Amara* on the basis that *Amara* did not discuss whether a Summary Plan Description can also function as

the Plan Document when no external Plan Document exists. While not binding, federal law is persuasive, especially when interpreting federal statutes that grant concurrent jurisdiction in both state and federal court. *Courtright v. O'Reilly Auto.*, 604 S.W.3d 694, 702-03 (Mo. App. 2020). Absent a demonstration of law to the contrary, we see no reason to reject the reasoning in *Hoch*. Here, the plan in question has clearly established a single document as both the Summary Plan Description and the Plan Document. Consistent with *Hoch*, we hold that the Summary Plan Description is the Plan Document, and we reverse the circuit court's finding to the contrary.

Mo-Kan next contends that the court erred in applying Missouri law to bar subrogation. Under the plan's terms:

The Plan is governed by and subject to ERISA and any other applicable federal law. If ERISA or another federal law does not apply, the Plan is governed by and subject to the laws of the State of Missouri. If federal law conflicts with any state law, then such federal law shall govern. If any provision of the Plan conflicts with such law, the Plan shall automatically be amended solely as required to comply with such state or federal law.

The parties agree that the ERISA statutes do not address subrogation. The court interpreted this to mean that federal law does not apply, which thus triggers Missouri law to fill the gap. Our courts do not allow subrogation in personal injury cases. *See Hays v. Mo. Highways & Transp. Comm'n*, 62 S.W.3d 538, 540 (Mo. App. 2001).

The circuit court's analysis should not have ended so quickly, however. The plan states that Missouri law shall apply only if ERISA or "another federal law"

does not apply. We agree that ERISA lacks specific guidance on subrogation, but it provides in 29 USCA 1132(a)(3) that a fiduciary can seek “appropriate equitable relief.” *See Admin. Comm. of Wal-Mart Stores, Inc. Assoc.’s Health & Welfare Plan v. Shank*, 500 F.3d 834, 836-39 (8th Cir. 2007). A court shall determine the scope of “appropriate equitable relief” involving an ERISA plan through the clear language of that plan. *Id.* The clear language of the Plan Document before us provides a right to subrogate. The parties do not dispute these terms. Having determined that the terms appear on a Plan Document, we deem subrogation “appropriate equitable relief” under § 1132(a)(3). Therefore, Missouri law need not apply. We find that ERISA controls, and the circuit court erred in applying Missouri law.

Relying on Rule 84.04(f)’s provision allowing her to include additional arguments in support of the judgment that Mo-Kan did not raise in its points relied on, Pierce contends that subrogation would be a violation of the plan’s anti-inurement provision. The provision states:

[T]he assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purpose of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan.

Pierce argues that, because employers pay into the plan, any reimbursement Mo-Kan receives must inure to their benefit via lower payments in the future. This argument is premature. While briefly raised before the circuit court, the court purposefully has not yet considered the issue. Further, Pierce offers no more than

a conclusory allegation to support her contention that reimbursement would benefit the plan's employers over the beneficiaries. Indeed, Pierce acknowledges that she does not know to whom the benefit of reimbursement would inure.

Next, Pierce argues that Mo-Kan's Summary Plan Description does not meet the statutory requirements for a Plan Document. Under 29 U.S.C. § 1102(b), a plan must:

- (1) provide a procedure for establishing and carrying out a funding policy and method consistent with the objectives of the plan and the requirements of this subchapter,
- (2) describe any procedure under the plan for allocation of responsibilities for the operation and administration of the plan (including any procedure described in section 1105(c)(1) of this title),
- (3) provide a procedure for amending such plan and for identifying the persons who have the authority to amend the plan, and
- (4) specify the basis on which payments are made to and from the plan.

Pierce argues that the plan does not satisfy elements one and four because it does not expressly state the funding policy procedure and the basis upon which payments are made. Rather, to satisfy these elements, the plan references two external documents, a Collective Bargaining Agreement and a Schedule of Health Benefits. Pierce contends that because these documents are not affixed to the Plan Document directly, the plan fails. Federal courts allow incorporation by reference, however. *See Wilson v. Moog Auto., Inc. Pension Plan and Trust for U.A.W. Emps*, 193 F.3d 1004, 1008 (8th Cir. 1999). Furthermore, Pierce does not

allege that these documents lack the relevant information. She alleges only that information does not appear on the Plan Document itself.

Pierce's next argument, that Mo-Kan would breach a fiduciary duty to plan beneficiaries if reimbursed, is equally conclusory. She contends that Mo-Kan would not use the reimbursement for the sole benefit of plan participants and beneficiaries. Pierce merely speculates how Mo-Kan might use the reimbursed funds without identifying law or fact to support her contentions *under the circumstances of this case*. We decline to develop arguments on behalf of the parties. *Emmons v. Emmons*, 310 S.W.3d 718, 724 (Mo. App. 2010); *Carlisle v. Rainbow Connection, Inc.*, 300 S.W.3d 583, 585-86 (Mo. App. 2009). We grant Mo-Kan's point on appeal and reverse the portion of the judgment finding Mo-Kan's subrogation claim unenforceable. The cause is remanded for further proceedings in this regard.

In Pierce's sole point in her cross-appeal, she contends the circuit court abused its discretion in declining to award her penalties and attorney's fees under 29 U.S.C. § 1132(c)(1) and (g)(1), and 29 C.F.R. § 2575.502c-1. Granting penalties and attorney's fees rests in the circuit court's discretion. *Geissal ex rel. Estate of Geissal v. Moore Med. Corp.*, 338 F.3d 926, 933-35 (8th Cir. 2003). We review for an abuse of discretion. *Id.* Such abuse occurs when the court's ruling is clearly against the logic of the circumstances and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration. *State v. White*, 81 S.W.3d 561, 567 (Mo. App 2002). Rulings made within the circuit court's

discretion are presumed correct; thus, the appellant has the burden of showing an abuse of discretion. *Id.*

Pierce argues that the court abused its discretion in misapplying several factors enumerated in *Lawrence v. Westerhaus*, 749 F.2d 494, 496 (8th Cir. 1984).

The factors include:

- (1) the degree of the opposing parties' culpability or bad faith;
- (2) the ability of the opposing parties to satisfy an award of attorneys' fees;
- (3) whether an award of attorneys' fees against the opposing parties could deter other persons acting under similar circumstances;
- (4) whether the parties requesting attorneys' fees sought to benefit all participants and beneficiaries of an ERISA plan or to resolve a significant legal question regarding ERISA itself; and
- (5) the relative merits of the parties' positions. *Id.*

These factors are intended as guidelines for granting attorney's fees, and are not dispositive. *Martin v. Ark. Blue Cross & Blue Shield*, 299 F.3d 966, 971-72 (8th Cir. 2002). Pierce further argues that Mo-Kan's alleged bad faith warrants penalties. We disagree with both arguments.

Pierce relies on conclusory allegations and fails to demonstrate where in record the court abused its discretion by way of acting arbitrarily or lacking consideration. Indeed, the record reveals that the court heard significant argument on the matter and was well apprised of the issues. The court declined to extend penalties and fees because the dispute over the records was merely "normal litigation over subrogation." This finding is supported by the record.

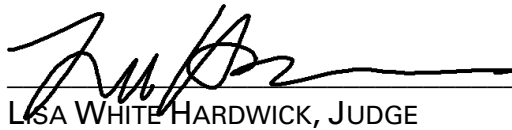
Mo-Kan contended that some requested documents involved privileged material and some requests for production were overly vague or over-inclusive. Additionally, after hearing argument, the court ordered Mo-Kan to produce only a portion of the records requested, which supports the legitimacy of each parties' grounds for argument. The court also noted the difficulty of the dispute as "confusing at best." Moreover, the court's finding of normal litigation comes with the necessary implication that the parties acted appropriately under the circumstances, that both parties' claims had merit, and that imposing attorney's fees would not dissuade future wrongdoing. This satisfies three of the five *Westerhaus* factors.

Pierce's arguments regarding Mo-Kan's alleged bad faith are equally conclusory. Pierce argues at length about Mo-Kan's conduct, but neither via the record nor her arguments before us does she allege that the circuit court failed to consider Mo-Kan's conduct. The record reveals that the court considered Mo-Kan's conduct after hearing argument on the matter. The court found it "obvious" that Mo-Kan's conduct was no more than mere litigation on a difficult issue. As explained above, that comes with the necessary implication that Mo-Kan acted in a manner appropriate to the circumstances. Moreover, Pierce's arguments rely on the premise that failing to produce relevant documents is, by itself, an act in bad faith. We disagree. Mo-Kan contends that the production of documents often involves additional considerations, including confidentiality and proper identification. The court, in its sound discretion, ostensibly agreed. Without a

greater showing of how the court acted arbitrarily, Pierce has not met her burden to demonstrate an abuse of discretion that shocks our sense of justice and shows a lack of careful consideration. We decline Pierce's point and affirm the judgment's denial of her request for penalties and attorney's fees.

CONCLUSION

The judgment is affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion.



LISA WHITE HARDWICK, JUDGE

ALL CONCUR.