SUPREME COURT OF NEBRASKA

Hauptman, O'Brien, Wolf & Lathrop, P.C. v. Auto-Owners Insurance Company

310 Neb. 147 (2021) · No. S-20-516 · Decided September 17, 2021

SUMMARY

The Nebraska Supreme Court held that Neb. Rev. Stat. § 44-3,128.01 does not preempt or abrogate the common fund doctrine. The court concluded that the statute, which addresses an insurer's subrogation rights for medical payments coverage, is silent regarding attorney fees and does not restrict an attorney's entitlement to a pro rata share of fees from the insurer's recovery. The court affirmed the Nebraska Court of Appeals' judgment affirming summary judgment for the law firm.

CASE DETAILS

COURT	Supreme Court of Nebraska
WRITING FOR THE COURT	Cassel, J.; Heavican, C.J.; Miller-Lerman, J.; Stacy, J.; Funke, J.; Papik, J.; Freudenberg, J.
JURISDICTION	Nebraska
DECIDED	September 17, 2021
DOCKET	S-20-516
DISPOSITION	affirmed
PROCEDURAL POSTURE	The insurer petitioned for further review of a Nebraska Court of Appeals decision affirming summary judgment for the law firm in an action seeking attorney fees under the common fund doctrine.
STANDARD OF REVIEW	For statutory-interpretation and other questions of law, the appellate court reaches an independent conclusion irrespective of the lower court's determination.
PRECEDENTIAL VALUE	Published Nebraska Supreme Court opinion; precedential.
PARTIES	Auto-Owners Insurance Company v. Hauptman, O'Brien, Wolf & Lathrop, P.C.

TOPICS

subrogation · insurance coverage · statutory interpretation · remedies · appellate procedure

PRACTICE AREAS

insurance · insurance coverage · subrogation · attorney fees · statutory interpretation

QUESTIONS PRESENTED

1. Whether Neb. Rev. Stat. § 44-3,128.01 preempts or abrogates the common fund doctrine as applied to an insurer's medical-payments subrogation interest.
2. Whether the law firm was entitled to recover a proportionate attorney fee from the insurer's subrogation recovery.

HOLDINGS

1. Section 44-3,128.01 does not preempt or abrogate the common fund doctrine because its plain language addresses the enforceability and amount of an insurer's medical-payments subrogation right but is silent about attorney fees and does not demonstrate legislative intent to displace the common-law doctrine.
2. When an insurer holding a subrogation right does not participate in the action but accepts the benefit of the recovery, the insurer may be required to bear its proportionate share of the litigation expenses, including attorney fees, under the common fund doctrine.

KEY QUOTATIONS

> *"Because the statutory language is silent as to attorney fees and there is no indication that the Legislature intended to restrict or preclude the common fund doctrine, we conclude that attorney fees are not within the field occupied by the statute."* (149)

> *"Application of these principles leads to the conclusion that the Legislature did not intend to preempt or abrogate the common fund doctrine."* (155)

> *"We do not read § 44-3,128.01 to effect a change in the common law with respect to the common fund doctrine and attorney fees."* (156)

FACTUAL BACKGROUND

Auto-Owners paid $1,000 in medical benefits under an automobile insurance policy issued to Charlyn Imes after she was injured in a motor vehicle accident. Imes retained Hauptman, O'Brien, Wolf & Lathrop, P.C. under a contingent-fee agreement and recovered $48,200 from a negligent third party, including damages for medical expenses. The insurer asserted its subrogation interest and refused the law firm's request to reduce that interest by one-third to account for the firm's efforts in obtaining the recovery.

PROCEDURAL HISTORY

The law firm sued the insurer in county court, seeking a one-third reduction of the insurer's $1,000 medical-payments subrogation interest as attorney fees. Both parties moved for summary judgment; the county court ruled for the law firm, and the district court affirmed. The Nebraska Court of Appeals affirmed, and the Nebraska Supreme Court granted the insurer's petition for further review and affirmed the Court of Appeals.

DISPOSITION

affirmed

CASES CITED

- Walentine, O'Toole v. Midwest Neurosurgery, 285 Neb. 80, 825 N.W.2d 425 (2013)
- United Services Automobile Assn. v. Hills, 172 Neb. 128, 109 N.W.2d 174 (1961)
- Peterson v. Jacobitz, 309 Neb. 486, 961 N.W.2d 258 (2021)
- Eyl v. Ciba-Geigy Corp., 264 Neb. 582, 650 N.W.2d 744 (2002)
- State ex rel. City of Alma v. Furnas Cty. Farms, 266 Neb. 558, 667 N.W.2d 512 (2003)
- Butler County Dairy v. Butler County, 285 Neb. 408, 827 N.W.2d 267 (2013)
- Spear T Ranch v. Knaub, 269 Neb. 177, 691 N.W.2d 116 (2005)
- Beren v. Beren, 349 P.3d 233 (Colo. 2015)
- WSC/2005 LLC v. Trio Ventures, 460 Md. 244, 190 A.3d 255 (2018)
- In re Estate of Hannifin, 311 P.3d 1016 (Utah 2013)
- Sprague v. Ticonic Bank, 307 U.S. 161, 166, 59 S. Ct. 777, 83 L. Ed. 1184 (1939)
- Peterson v. Cisper, 231 Neb. 450, 436 N.W.2d 533 (1989)
- Malone v. City of Omaha, 294 Neb. 516, 883 N.W.2d 320 (2016)
- ML Manager v. Jensen, 287 Neb. 171, 842 N.W.2d 566 (2014)
- In re Trust of Shire, 299 Neb. 25, 907 N.W.2d 263 (2018)
- State ex rel. BH Media Group v. Frakes, 305 Neb. 780, 943 N.W.2d 231 (2020)
- E.M. v. Nebraska Dept. of Health & Human Servs., 306 Neb. 1, 944 N.W.2d 252 (2020)
- Milbank Ins. Co. v. Henry, 232 Neb. 418, 441 N.W.2d 143 (1989)
- Hauptman, O'Brien v. Auto-Owners Ins. Co., 29 Neb. App. 662, 676, 958 N.W.2d 428, 439 (2021)