

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2013 MTWCC 4

WCC No. 2011-2768

HARTFORD INSURANCE COMPANY OF THE MIDWEST

Petitioner

vs.

MONTANA STATE FUND

Respondent.

IN RE: BRIAN McKIRDY

ORDER GRANTING PETITIONER'S MOTION FOR RECONSIDERATION

Summary: Petitioner moved for reconsideration of this Court's Order which denied Petitioner's cross-motion for summary judgment in part. Petitioner asked the Court to reconsider its determination that Petitioner failed to prove the third element of equitable estoppel regarding its claim against Respondent. Respondent objected to Petitioner's motion for reconsideration.

Held: Petitioner's motion for reconsideration is granted. The Court concluded that Petitioner fulfilled the third element of equitable estoppel. Therefore, the Court further considered Petitioner's arguments regarding the remaining elements of equitable estoppel and determined that Petitioner likewise fulfilled the requirements for the fourth, fifth, and sixth elements. The Court therefore determined that Respondent is equitably estopped from asserting a defense against Petitioner under § 39-71-603(2), MCA.

Topics:

Equity: Equitable Estoppel. After the Court found that Petitioner did not know Respondent intended to raise an affirmative defense under § 39-71-603(2), MCA, at the time Petitioner agreed to pay the claimant's benefits under a reservation of rights, the Court concluded that Petitioner had met the third element of equitable estoppel.

Equity: Equitable Estoppel. The parties agree that when Petitioner began paying the claimant benefits under § 39-71-407(5), MCA, Respondent's decision to mount a defense against liability under § 39-71-603(2), MCA, had not yet seen the light of day. Therefore, at that point in time, the only dispute was which insurer was liable for the claim. Had Petitioner not paid under § 39-71-407(5), MCA, it would have breached its duty. Under these circumstances, whether or not Respondent intended or expected Petitioner to act, it was both natural and probable for Petitioner to do so. Therefore, Petitioner established the fourth element of equitable estoppel.

Equity: Equitable Estoppel. The Court concluded that Petitioner had established the fifth element of equitable estoppel, noting that Petitioner began paying the claimant's benefits under § 39-71-407(5), MCA, in response to Respondent's representation that the only issue of liability was to determine which insurer was liable. Petitioner changed its position for the worse when it relied on Respondent's representation and Respondent later raised an affirmative defense under § 39-71-603(2), MCA.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-603. The Court concluded that Respondent was equitably estopped from raising an affirmative defense under § 39-71-603(2), MCA, after Petitioner relied upon Respondent's representation that the only issue of liability was to determine which insurer was liable, and Petitioner therefore paid the claimant under § 39-71-407(5), MCA.

Constitutions, Statutes, Regulations, and Rules: Montana Code Annotated: 39-71-407. The Court concluded that Respondent was equitably estopped from raising an affirmative defense under § 39-71-603(2), MCA, after Petitioner relied upon Respondent's representation that the only issue of liability was to determine which insurer was liable, and Petitioner therefore paid the claimant under § 39-71-407(5), MCA.

Insurers: Duties. Where there is no dispute that a claim is compensable but the insurers disagree which one is liable for it, the later insurer has a duty to pay benefits under § 39-71-407(5), MCA, unless and until it proves the previous insurer is liable. The first insurer may be equitably estopped from asserting an affirmative notice defense in an action for indemnity if it

initially maintained that the only issue was which of the two insurers was liable and kept silent about its affirmative defense.

¶ 1 Petitioner Hartford Insurance Company of the Midwest (Hartford) moves this Court for reconsideration of its August 1, 2012, Order Denying Respondent's Motion for Summary Judgment and Granting Petitioner's Motion for Summary Judgment in Part (Summary Judgment).¹ Hartford contends that this Court should reconsider the Summary Judgment and conclude either that Respondent Montana State Fund (State Fund) is estopped from asserting a defense against Hartford's claim for reimbursement pursuant to § 39-71-603(2), MCA, or that § 39-71-603(2), MCA, unconstitutionally violates equal protection.² State Fund objects to Hartford's motion for reconsideration, contending that Hartford has not met the elements for equitable estoppel and further arguing that § 39-71-603(2), MCA, is constitutional.³

Procedural History

¶ 2 In the underlying Summary Judgment, State Fund moved for judgment in its favor, contending that Hartford should not prevail in its indemnification claim against State Fund for benefits Hartford paid to claimant Brian McKirdy. State Fund contended that McKirdy suffered from an occupational disease. Alternatively, State Fund contended that if McKirdy suffered from an industrial injury, State Fund should be entitled to summary judgment because McKirdy failed to provide notice to State Fund within 30 days as required by § 39-71-603, MCA. Hartford objected to State Fund's motion and filed a cross-motion, contending that McKirdy suffered from an industrial injury while State Fund was the insurer at risk, and contending that State Fund should indemnify Hartford for benefits it paid to McKirdy.⁴

¶ 3 After considering the facts and arguments, I concluded that McKirdy had suffered an industrial injury while State Fund was the insurer at risk.⁵ After considering Hartford's equitable estoppel argument, I concluded that Hartford had not met the third

¹ *Hartford*, 2012 MTWCC 28.

² Petitioner's Motion for Reconsideration and Brief in Support (Opening Brief), Docket Item No. 38.

³ Montana State Fund's Brief in Opposition to Motion for Reconsideration (Response Brief), Docket Item No. 39.

⁴ *Hartford*, ¶ 1.

⁵ *Hartford*, ¶¶ 20-21.

element of equitable estoppel and I therefore concluded that Hartford had not proven that State Fund should be equitably estopped from refusing to indemnify it.⁶

Analysis and Decision

¶ 4 As noted above, Hartford requests reconsideration of the Summary Judgment on two grounds: Hartford argues that it meets the elements of equitable estoppel, or alternatively, Hartford argues that § 39-71-603(2), MCA, is unconstitutional.

¶ 5 As I noted in the Summary Judgment,⁷ in *Selley v. Liberty Northwest Ins. Corp.*, the Montana Supreme Court stated:

As a general matter, estoppel arises when a party through its acts, conduct, or acquiescence, has caused another party in good faith to change its position for the worse. . . .

[S]ix elements are necessary in order to establish an equitable estoppel claim: (1) the existence of conduct, acts, language, or silence amounting to a representation or concealment of material facts; (2) the party estopped must have knowledge of these facts at the time of the representation or concealment, or the circumstances must be such that knowledge is necessarily imputed to that party; (3) the truth concerning these facts must be unknown to the other party at the time it was acted upon; (4) the conduct must be done with the intention or expectation that it will be acted upon by the other party, or have occurred under circumstances showing it to be both natural and probable that it will be acted upon; (5) the conduct must be relied upon by the other party and lead that party to act; and (6) the other party must in fact act upon the conduct in such a manner as to change its position for the worse. A party must establish all six elements before the doctrine can be invoked. Equitable estoppel must be established by clear and convincing evidence.⁸

¶ 6 The court further noted that wrongdoing is not necessary to invoke equitable estoppel. It explained:

⁶ *Hartford*, ¶ 35.

⁷ See *Hartford*, ¶¶ 30-31.

⁸ *Selley*, 2000 MT 76, ¶¶ 9-10, 299 Mont. 127, 998 P.2d 156. (Citations omitted.)

Classically, the function of the doctrine of equitable estoppel is the prevention of fraud, actual or constructive. However, this does not imply that the party sought to be estopped must have possessed an actual intent to deceive, defraud or mislead the other party at the inception of the transaction.⁹

The court noted that in modern usage, equitable estoppel is invoked to prevent an inequitable result.¹⁰

¶ 7 In my Summary Judgment, I concluded that Hartford had proven the first and second elements of equitable estoppel.¹¹ Regarding the first element, I found that State Fund's silence regarding its potential affirmative defense under § 39-71-603(2), MCA, concealed from Hartford the fact that State Fund intended to defend this claim under an affirmative defense.¹² Regarding the second element, I found that State Fund had actual knowledge of the existence of this potential affirmative defense.¹³ However, I further concluded that Hartford had not met the third element of equitable estoppel. Since a party must establish all six elements in order to establish an equitable estoppel, I determined that Hartford had failed to establish that State Fund is equitably estopped from denying indemnification to Hartford and I declined to reach the fourth, fifth, and sixth elements of equitable estoppel.¹⁴

¶ 8 Hartford now asks that I reconsider its arguments regarding the third element of equitable estoppel. To fulfill the third element of equitable estoppel, Hartford must establish that the truth concerning these facts must be unknown to it at the time it was acted upon.¹⁵ In its cross-motion, Hartford argued that it could establish this element because neither McKirdy nor his supervisor Joe Needles knew that McKirdy needed to report his industrial injury directly to State Fund within 30 days under § 39-71-603(2), MCA.¹⁶ I concluded in the Summary Judgment that this did not meet the third element

⁹ *Selley*, ¶ 12. (Citations omitted.)

¹⁰ *Selley*, ¶ 14.

¹¹ *Hartford*, ¶¶ 32-33.

¹² *Hartford*, ¶ 32.

¹³ *Hartford*, ¶ 33.

¹⁴ *Hartford*, ¶ 34.

¹⁵ *Id.*

¹⁶ Petitioner's Response in Opposition to Respondent's Motion for Summary Judgment and Cross Motion for Summary Judgment and Brief in Support, Docket Item No. 27, at 12.

because, regarding its equitable estoppel argument, Hartford, not McKirdy, is the “other party” to whom State Fund would be estopped.¹⁷ Hartford now argues that the fact that McKirdy was a corporate officer, and thus potentially subject to the reporting requirements of § 39-71-603(2), MCA, was unknown to it and not readily ascertainable as Hartford had no access to its insured’s corporate records and thus had no readily available means of knowing its business structure and the identity of its officers. Hartford argues:

In contrast, this information was both readily available and known to [State Fund], yet [State Fund] kept this information silent. As this Court held, [State Fund] concealed this fact and Hartford did not have constructive knowledge of this fact.¹⁸

¶ 9 In the Summary Judgment, I did not find that State Fund concealed the fact that McKirdy was a corporate officer; I found that State Fund concealed the fact that it intended to raise an affirmative defense to McKirdy’s claim under § 39-71-603(2), MCA.¹⁹ This is an important distinction to understand: McKirdy’s status as a corporate officer is not the fact at issue here. State Fund’s intention to defend against McKirdy’s claim because of his status as a corporate officer is.

¶ 10 However, Hartford further argues that it is undisputed that it did not have actual knowledge that State Fund would assert a notice defense under § 39-71-603(2), MCA.²⁰ While both Hartford and State Fund focus on whether or not Hartford had a reasonable means of ascertaining that McKirdy was a corporate officer, what matters for purposes of this element is not whether McKirdy was a corporate officer, but whether State Fund intended to raise a notice defense under § 39-71-603(2), MCA.

¶ 11 State Fund argues that Hartford failed to exercise reasonable diligence in investigation and in assessing potential liabilities.²¹ As noted in the undisputed facts set forth in the Summary Judgment, when State Fund declined to process McKirdy’s first report of injury, its claims adjuster noted that “the **only** issue regarding McKirdy’s claim

¹⁷ *Hartford*, ¶ 34.

¹⁸ Opening Brief at 5.

¹⁹ *See Hartford*, ¶ 32.

²⁰ Opening Brief at 5.

²¹ Response Brief at 3.

was whether State Fund or Hartford should process the claim.”²² State Fund later denied McKirdy’s claim again on the grounds that his condition was an occupational disease and that Hartford was the insurer at the time of McKirdy’s last injurious exposure.²³ No facts have been presented to this Court which suggest anything other than what Hartford asserts: that it was unaware State Fund intended to defend this claim under § 39-71-603(2), MCA. Since Hartford was unaware that State Fund intended to raise such a defense at the time that Hartford began paying McKirdy benefits under § 39-71-407(5), MCA, Hartford has established that the truth concerning these facts was unknown to it at the time it was acted upon. More specifically, Hartford has established that it did not know that State Fund intended to raise an affirmative defense under § 39-71-603(2), MCA, at the time that Hartford agreed to pay McKirdy’s benefits under a reservation of rights. Therefore, I conclude upon reconsideration that Hartford has met the third element of equitable estoppel.

4. Conduct done with the intention or expectation that it will be acted upon

¶ 12 To fulfill the fourth element of equitable estoppel, Hartford must establish that the conduct must be done with the intention or expectation that it will be acted upon by the other party, or have occurred under circumstances showing it to be both natural and probable that it will be acted upon.²⁴ Hartford argues that it can fulfill this element because State Fund never based its denial of McKirdy’s claim on § 39-71-603(2), MCA, but rather based its denials on allegations that Hartford was the liable insurer. Hartford again notes that State Fund never raised a defense under § 39-71-603(2), MCA, until some nine months after it denied McKirdy’s claim on other grounds, and only in the summary judgment motion it filed against Hartford’s claim for indemnification.²⁵ Hartford argues that State Fund’s representation that the only issue was which insurer was liable led it to act by paying benefits to McKirdy under § 39-71-407(5), MCA.²⁶

¶ 13 In response, State Fund denies that it intended to provoke Hartford into paying McKirdy’s benefits under § 39-71-407(5), MCA. State Fund further asserts that it did not identify that it might have a defense under § 39-71-603(2), MCA, nor was such a defense “made necessary” until State Fund received a letter from McKirdy’s treating physician on May 16, 2011, in which the doctor opined that McKirdy’s condition was

²² *Hartford*, ¶ 9. (Emphasis added.)

²³ *Hartford*, ¶ 15.

²⁴ *Selley*, ¶ 10.

²⁵ Opening Brief at 6.

²⁶ *Id.*

caused by an industrial accident during the time State Fund insured McKirdy's employer.²⁷ In other words, after Hartford relied upon State Fund's representation that it intended to defend itself against McKirdy's claim by asserting that Hartford was the insurer at risk – and after Hartford paid benefits under a reservation of rights because it understood from State Fund that the only possibilities were that either Hartford or State Fund were liable for McKirdy's claim – State Fund decided to defend itself by asserting that although State Fund was the insurer at risk, it had an affirmative defense.

¶ 14 Section § 39-71-407(5), MCA, states:

If there is no dispute that an insurer is liable for an injury but there is a liability dispute between two or more insurers, the insurer for the most recently filed claim shall pay benefits until that insurer proves that another insurer is responsible for paying benefits or until another insurer agrees to pay benefits. If it is later proven that the insurer for the most recently filed claim is not responsible for paying benefits, that insurer must receive reimbursement for benefits paid to the claimant from the insurer proven to be responsible.

¶ 15 In *Cornelius v. Lumbermen's Underwriting Alliance*, I held that where no one disputed that the claimant's condition was work-related, and where two insurers disagreed as to which was liable for the claimant's work-related condition, the latter insurer had a duty to pay benefits under § 39-71-407(5), MCA, unless and until it proved that the previous insurer was liable for those benefits.²⁸ I found the latter insurer to have unreasonably adjusted the claim for disregarding the provisions of § 39-71-407(5), MCA, and held it liable for attorney fees and a penalty pursuant to §§ 39-71-611, -2907, MCA.²⁹

¶ 16 In the present case, the parties agree that when Hartford began paying McKirdy benefits under § 39-71-407(5), MCA, State Fund's decision to mount a defense against liability under § 39-71-603(2), MCA, had not yet seen the light of day. Therefore, at that point in time, the only dispute was which of the insurers was liable for McKirdy's claim. Had Hartford not paid under § 39-71-407(5), MCA, it would have breached its duty and would potentially have exposed itself to liability for unreasonably adjusting McKirdy's claim. Under these circumstances, whether or not State Fund intended or expected

²⁷ Response Brief at 3; see also *Hartford*, ¶ 17.

²⁸ *Cornelius*, 2012 MTWCC 13, ¶ 56.

²⁹ *Cornelius*, ¶ 57 (*reconsideration denied at 2012 MTWCC 29*).

Hartford to act, it is clear that it was both natural and probable for Hartford to do so. I therefore conclude that Hartford has fulfilled this element of equitable estoppel.

5. Conduct relied upon and leading party to act

¶ 17 To fulfill the fifth element of equitable estoppel, Hartford must establish that State Fund's conduct was relied upon by Hartford and led Hartford to act.³⁰ Hartford argues that it has fulfilled this element because, even though State Fund knew that McKirdy was required to report industrial injuries directly to the insurer, State Fund never denied McKirdy's claim on that basis and instead identified whether State Fund or Hartford was the liable insurer as the only issue. Hartford contends that based on this representation, it paid benefits to McKirdy under § 39-71-407(5), MCA.³¹

¶ 18 State Fund responds that at the time Hartford began paying McKirdy benefits under § 39-71-407(5), MCA, State Fund's defense under § 39-71-603(2), MCA, "was not implicated" because State Fund had not yet received the treating physician's opinion letter. State Fund argues that estoppel cannot arise when it occurred at a time when it would be unreasonable to attribute such effect to it.³²

¶ 19 From the facts set forth above, it is clear that when State Fund represented to Hartford that it was denying liability for McKirdy's claim on the basis that State Fund believed Hartford was liable, Hartford relied upon this representation and acted upon it by paying McKirdy benefits under § 39-71-407(5), MCA. I therefore conclude that Hartford has fulfilled this element of equitable estoppel.

6. The other party must change its position for the worse

¶ 20 To fulfill the sixth element of equitable estoppel, Hartford must establish that it acted upon State Fund's conduct in such a manner as to change its position for the worse.³³ Hartford contends that it has met this element because it paid benefits to McKirdy under a reservation of rights and as the case now stands, this Court has held that State Fund was the insurer at risk at the time of McKirdy's industrial injury and therefore Hartford is not liable for the benefits it paid. Hartford argues that if State Fund refuses to indemnify it, Hartford will have to seek reimbursement from McKirdy,

³⁰ *Selley*, ¶ 9.

³¹ Opening Brief at 7.

³² Response Brief at 5 (citing *28 Am.Jur.2nd Estoppel and Waiver*, § 48).

³³ *Selley*, ¶ 9.

expending additional efforts, and possibly not recovering the funds it paid under a reservation of rights.³⁴

¶ 21 State Fund responds that Hartford's position has not changed for the worse and in fact has changed for the better, since it has been established that McKirdy suffered an industrial injury while State Fund was the insurer at risk.³⁵ State Fund misapprehends this element. As stated above, to fulfill this element, Hartford must establish that it acted upon State Fund's conduct in such a manner as to change its position for the worse. The "conduct" at issue is State Fund's representation that the only issue regarding liability for McKirdy's claim was a determination of which insurer was at risk. New facts persuading State Fund to change defense strategies does not somehow obviate the fact that Hartford paid out of its pocket for a claim for which it is not liable. I conclude that when Hartford began paying McKirdy's benefits under § 39-71-407(5), MCA, in response to State Fund's representation that the only issue of liability was to determine which insurer was liable, Hartford changed its position for the worse. Therefore I conclude that Hartford has fulfilled this element of equitable estoppel.

¶ 22 A party must establish all six elements of equitable estoppel before the doctrine can be invoked.³⁶ In the Summary Judgment, I held that Hartford had fulfilled the first two elements.³⁷ Although I further concluded at that time that Hartford had failed to fulfill the third element,³⁸ upon reconsideration, I have concluded that Hartford has fulfilled that element. Since Hartford fulfilled the third element, I have reached the fourth through sixth elements and have concluded that Hartford has fulfilled those elements as well. Since Hartford has established all six elements of equitable estoppel, the doctrine may be invoked. I therefore conclude that State Fund is equitably estopped from using § 39-71-603(2), MCA, to avoid indemnifying Hartford for the benefits it paid to McKirdy under § 39-71-407(5), MCA.

¶ 23 Since I have determined that State Fund is equitably estopped from asserting this defense against Hartford, I do not reach Hartford's constitutional arguments concerning § 39-71-603(2), MCA.

³⁴ Opening Brief at 7-8.

³⁵ Response Brief at 5.

³⁶ *Selley*, ¶ 10.

³⁷ *Hartford*, ¶¶ 32-33. See also "Hollow Victory."

³⁸ *Hartford*, ¶ 34.

ORDER

¶ 24 Petitioner's motion for reconsideration is **GRANTED**.

¶ 25 Pursuant to the Court's Order of November 16, 2012, the parties shall contact the Court within 10 days from the date of this Order to advise how they wish to proceed with the case.

DATED in Helena, Montana, this 11th day of February, 2013.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: Kelly M. Wills
Jeffrey B. Smith
William Dean Blackaby
Submitted: August 27, 2012