

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2021 MTWCC 8

WCC No. 2020-5103

BRADY HOGAN

Petitioner

vs.

FEDERATED MUTUAL INSURANCE COMPANY

Respondent/Insurer.

ORDER DENYING PETITIONER'S MOTION TO ENTER JUDGMENT

Summary: Petitioner moves for entry of final judgment, asserting that this Court has ruled that Respondent's subrogation lien is invalid. He argues that this was the only issue in this case or, in the alternative, that this Court's ruling is dispositive. Respondent points out that this Court did not rule that its subrogation lien was invalid; instead, this Court expressly ruled that Respondent has a right of subrogation, which is a lien against Petitioner's tort recovery, and that it may exercise its right when Petitioner is made whole. Respondent contends that this Court cannot enter final judgment because the parties' made-whole claims are still pending before this Court. Petitioner counters that this Court does not have jurisdiction over the made-whole claims, alleging that they did not mediate their dispute as to whether he has been made whole. He also argues that the made-whole claims do not present a justiciable controversy.

Held: This Court denied Petitioner's Motion to Enter Judgment. In its summary judgment order, this Court expressly ruled that Respondent has a right of subrogation and that it can exercise its right when Petitioner is made whole. The parties' made-whole claims are still pending before this Court and present a justiciable controversy because Respondent asserts that Petitioner has been made whole and that it can exercise its right of subrogation against his third-party claim. This Court has jurisdiction over the parties' made-whole claims because they mediated the issue of whether Petitioner has been made whole.

¶ 1 Petitioner Brady Hogan moves this Court for an order entering final judgment. Citing this Court's *Order Granting in Part and Denying in Part Petitioner's Motion for*

Summary Judgment,¹ Hogan contends that this Court ruled that Respondent Federated Mutual Insurance Company's (Federated Mutual) subrogation lien is invalid. Hogan asserts that there are no other claims because the "sole issue placed before the Court in [his] *Petition*"² is whether Federated Mutual's subrogation lien is valid under Montana law. In the alternative, Hogan argues that this Court's ruling that Federated Mutual's subrogation lien is invalid is dispositive. Thus, he contends that this Court must enter final judgment.

¶ 2 Federated Mutual opposes Hogan's motion. It points out that this Court expressly ruled that it has a right of subrogation under § 39-71-414(1), MCA, and that it can exercise its right when Hogan is made whole. Federated Mutual asserts that Hogan's claim that he has not been made whole and its counterclaim on that issue are still pending before this Court and scheduled for trial. Thus, it argues that this Court cannot enter final judgment.

¶ 3 For two reasons, Federated Mutual is correct that the parties' made-whole claims are still before this Court.

¶ 4 *First*, there is no merit to Hogan's contention that the sole issue before this Court is whether Federated Mutual's subrogation lien is valid under Montana law. In his *Petition for Hearing*, Hogan asserts — as his first claim — that Federated Mutual cannot exercise its right of subrogation because he has not been made whole.³ Hogan then asserts — "alternatively" — that Federated Mutual's subrogation lien is invalid on the grounds that § 39-71-414(1) and (6), MCA, are unconstitutional.⁴ In its response, Federated Mutual asserts that these subsections are constitutional and that it "has a right to subrogation against Petitioner's third party settlement as a first lien on his recovery pursuant to § 39-71-414(1), MCA."⁵ Federated Mutual also asserts, as a counterclaim, that it can presently exercise its right of subrogation because Hogan has been made whole.⁶ Therefore, the pleadings establish that the claims before this Court are: (1) Hogan's claim that Federated Mutual may not exercise its right of subrogation because he has not been made whole; (2) Hogan's alternative claim that Federated Mutual's subrogation lien is invalid; and (3) Federated Mutual's counterclaim that it can exercise its right of subrogation because Hogan has been made whole.

¹ 2021 MTWCC 6, Docket Item No. 74.

² *Reply in Supp. of Mot. To Enter J.*, Docket Item No. 77 at 1.

³ *Pet. for Hr'g*, Docket Item No. 1, ¶¶ 16, 17, 19, 20.

⁴ *Id.*, ¶ 22.

⁵ *Federated Mut. Ins. Co.'s Resp. to Pet.*, Docket Item No. 6, ¶ I.A.

⁶ *Id.*, ¶ I.D. Although Federated Mutual did not expressly designate its contention that it can exercise its right of subrogation as a counterclaim, it is evident that it intended to plead a counterclaim. Thus, this Court treats its Response to Petition as a counterclaim under M.R.Civ.P. 8(c)(2), which states: "If a party mistakenly designates a defense as a counterclaim, or a counterclaim as a defense, the court must, if justice requires, treat the pleading as though it were correctly designated, and may impose terms for doing so."

¶ 5 *Second*, there is no merit to Hogan’s assertion that this Court “has determined the issue before it by ruling the \$500,000 ‘lien’ asserted by Federated [Mutual] against Hogan’s third-party recovery is invalid.”⁷ In fact, this Court ruled against Hogan on his claim that Federated Mutual’s subrogation lien is invalid. In its *Order Granting in Part and Denying in Part Petitioner’s Motion for Summary Judgment*, this Court rejected Hogan’s constitutional challenge to § 39-71-414(1), MCA, which gives an insurer a right of subrogation in a claimant’s tort recovery and states, in relevant part, “The insurer’s right of subrogation is a first lien on the claim, judgment, or recovery.”⁸ Although this Court ruled that § 39-71-414(6), MCA, was unconstitutional, this Court rejected Hogan’s argument that the remedy is a ruling that Federated Mutual does not have a right of subrogation.⁹ This Court stated, “Federated Mutual has a right of subrogation under § 39-71-414(1), MCA (2017), and may exercise that right when Hogan is made whole.”¹⁰ Plainly, this Court did **not** rule that Federated Mutual’s subrogation lien on any portion of Hogan’s tort recovery was “invalid.” Instead, this Court expressly ruled that Federated Mutual has a right of subrogation against Hogan’s tort recovery under § 39-71-414(1), MCA (2017).

¶ 6 Although Federated Mutual has a subrogation lien against Hogan’s tort recovery, this Court also ruled that, under established Montana law, Federated Mutual cannot exercise its right until Hogan is made whole.¹¹ This Court explained:

[I]f Hogan is made whole in the future, it is at that future point that Federated Mutual may then exercise its right of subrogation by terminating Hogan’s benefits. Hogan will have to reimburse Federated Mutual out of his tort recovery only if this Court finds that he has already been made whole and has received an amount in excess of his entire loss plus his costs of recovery, including attorney fees.¹²

Because “[t]he issue of whether a claimant has been made whole is a question of fact,”¹³ this Court stated that it will hold the trial and make the findings necessary to decide

⁷ *Reply in Supp. of Mot. to Enter J.*, Docket Item No. 77 at 3. Hogan asserts that Federated Mutual’s lien is for \$500,000 because, in response to an email from Hogan’s attorney asking how much of Hogan’s third-party recovery should be set aside to satisfy Federated Mutual’s lien, Federated Mutual’s attorney stated, “I think \$500,000 will be sufficient” (*Unopposed Mot. to Transfer Funds*, Docket Item No. 40 at 1).

⁸ *Order Granting in Part and Den. in Part Petr’s Mot. for Summ. J.*, 2021 MTWCC 6, Docket Item No. 74, ¶¶ 27-32 (citations omitted).

⁹ *Id.*, ¶ 44.

¹⁰ *Id.*

¹¹ *Id.*, ¶¶ 28-32, 41, 44 (citations omitted).

¹² *Id.*, ¶ 32.

¹³ *Ness v. Anaconda Minerals Co.*, 279 Mont. 472, 481, 929 P.2d 205, 211 (1996).

whether Hogan has been made whole,¹⁴ thereby deciding Hogan's made-whole claim and Federated Mutual's made-whole counterclaim, which are still pending before this Court. Unless there are grounds to do so under M.R.Civ.P. 54(b), this Court cannot enter final judgment when there are pending claims.¹⁵ This Court agrees with Federated Mutual that, under M.R.Civ.P. 54(b), this Court does not have grounds to enter final judgment on Hogan's claim that Federated Mutual's subrogation lien is invalid.¹⁶

¶ 7 For the first time in his *Reply in Support of Motion to Enter Judgment*, Hogan makes two additional arguments in support of his position that the parties' made-whole claims are not properly before this Court. Nevertheless, neither argument has merit.

¶ 8 Hogan first argues that this Court does not have jurisdiction over the parties' made-whole claims, alleging that they did not mediate their dispute over whether he has been made whole.¹⁷ However, this allegation is patently false. The *Mediation Report and Recommendation*, which Hogan attached to his *Reply in Support of Motion to Enter Judgment*,¹⁸ conclusively proves that they mediated the issue of whether he has been made whole. It states, in relevant part:

[Hogan's attorney] began the conference by stating the insurer's lien is not supported factually or legally based on the "made whole" doctrine which is Constitutionally based. He referenced [the] Montana Supreme Court Decision, ***Oberson v. Federated Mutual Ins. Co.***, 2005 MT 329, in support of his position. He requested the insurer waive [its] rights to subrogation because Mr. Hogan has not been made whole as required by law.¹⁹

The *Mediation Report and Recommendation* also states, "[Federated Mutual's attorney] said the insurer's position is [that] Mr. Hogan has been made whole by his third-party

¹⁴ *Order Granting in Part and Den. in Part Petr's Mot. for Summ. J.*, 2021 MTWCC 6, Docket Item No. 74, ¶ 44.

¹⁵ *Satterlee v. Lumberman's Mut. Cas. Co.*, 2007 MT 325, ¶ 14, 340 Mont. 176, 178 P.3d 689.

¹⁶ See, e.g., *In re Marriage of Armstrong*, 2003 MT 277, ¶¶ 7, 9, 13, 317 Mont. 503, 78 P.3d 1203 (stating that M.R.Civ.P. 54(b) is "intended to be used sparingly and only in the 'infrequent harsh case'" and holding that the fact that the determination of the legal issue on appeal may eliminate the need for a trial was not a sufficient basis for certification).

¹⁷ See, e.g., *Preston v. Transp. Ins. Co.*, 2004 MT 339, ¶ 36, 324 Mont. 225, 102 P.3d 527 (holding that under § 39-71-2408(1), MCA, this Court does not have jurisdiction over a dispute until the parties have completed the mandatory mediation process).

¹⁸ This Court does not condone the filing of a *Mediation Report and Recommendation*, as § 39-71-2410(4)(b), MCA, states, "The mediator's report and any of the information or recommendations contained in the report are not admissible as evidence in any action subsequently brought in any court of law." However, Hogan filed it, thereby waiving any objection, and Federated Mutual did not move to strike, which also constitutes a waiver under M.R.Evid. 103(a)(1), which provides that a party must make a "timely objection or motion to strike . . . stating the specific ground of objection." This Court has relied upon the *Mediation Report and Recommendation* for the sole purpose of deciding whether it has jurisdiction under § 39-71-2408(1), MCA.

¹⁹ *Reply in Supp. of Mot. To Enter J.*, Docket Item No. 77, Ex. 1 at 1.

settlement.”²⁰ The parties obviously mediated their dispute over whether Hogan has been made whole; thus, this Court has jurisdiction over the parties’ made-whole claims.

¶ 9 Hogan also argues that the parties’ made-whole claims do not present a justiciable controversy. Hogan points to ¶ 30 of this Court’s *Order Granting in Part and Denying in Part Petitioner’s Motion for Summary Judgment*, in which this Court cited *State Compensation Ins. Fund v. McMillan*²¹ for the proposition that a workers’ compensation insurer exercises its right of subrogation by terminating benefits when the injured worker is made whole. Hogan reasons that because Federated Mutual has not terminated his benefits, it is seeking an advisory opinion as to whether it can do so in the future. However, Hogan ignores Federated Mutual’s allegation that he has already been made whole and its contention that it can therefore exercise its right of subrogation. Hogan also ignores ¶ 32 of this Court’s *Order Granting in Part and Denying in Part Petitioner’s Motion for Summary Judgment*, where, as noted above, this Court explained, “Hogan will have to reimburse Federated Mutual out of his tort recovery . . . if this Court finds that he has already been made whole and has received an amount in excess of his entire loss plus his costs of recovery, including attorney fees.”²² Under established Montana law, the parties’ made-whole claims present a justiciable controversy for this Court to decide.²³

¶ 10 As a final point, this Court is troubled by Hogan’s attorney’s inaccurate representations and lack of candor and warns that any additional transgression will result in sanctions.

¶ 11 For the foregoing reasons, this Court enters the following:

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²⁰ *Id.*, Docket Item No. 77, Ex. 1 at 2.

²¹ 2001 MT 168, 306 Mont. 155, 31 P.3d 347.

²² *Order Granting in Part and Den. in Part Petr’s Mot. for Summ. J.*, 2021 MTWCC 6, Docket Item No. 74, ¶ 32.

²³ See *Francetich v. State Comp. Mut. Ins. Fund*, 252 Mont. 215, 224, 827 P.2d 1279, 1285 (remanding a subrogation case to this Court to “make a factual determination as to whether the claimant’s damages and costs of being made whole exceed his workers’ compensation and third-party recovery combined.”). See also *Ness*, 279 Mont. at 481-82, 929 P.2d at 211 (affirming this Court’s decision that the insurer could not exercise its right of subrogation against the claimant’s tort recovery because the evidence showed that claimant had not been made whole “to date”).

ORDER

¶ 12 Petitioner's Motion to Enter Judgment is **denied**.

DATED this 10th day of May, 2021.

(SEAL)

/s/ DAVID M. SANDLER
JUDGE

c: Lucas J. Foust
Leo S. Ward

Submitted: April 30, 2021