

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2004 MTWCC 61

WCC No. 2002-0493

MONTANA STATE FUND

Petitioner

**IN RE: The Workers' Compensation Benefits of
TUCKER NOONKESTER**

and

TUCKER NOONKESTER

Petitioner

vs.

MONTANA STATE FUND

Respondent/Insurer for

C&S CONSTRUCTION, INCORPORATED

Employer.

DECISION AND ORDER REGARDING JURISDICTION

Appealed to Supreme Court 10/12/04
Affirmed 07/25/06

Summary: The claimant was injured in an automobile accident while traveling from his home to a job several miles away. At the time of the accident, he was only fourteen and a half years old. His father filed a workers' compensation claim on his behalf, which was accepted by the State Fund. The State Fund paid benefits but petitioned the Court for directions concerning payment of permanent partial disability benefits due upon claimant's reaching maximum medical improvement. This Court appointed a guardian *ad litem* for claimant and after further investigation, the guardian *ad litem* determined that claimant may not have been in the course and scope of employment and may be entitled to substantial tort damages payable ultimately by the employer's liability insurer. At that point, the guardian *ad litem* filed a superceding

petition on claimant's behalf alleging that he was not in the course and scope of employment and that his accident was therefore not covered by workers' compensation insurance. In effect, the petition repudiated the claim filed by claimant's father on his behalf.

Held: If the claimant can repudiate the claim filed on his behalf by his father, there is no justiciable controversy since the claimant will be free to pursue a tort action. After analyzing the statutes and case law, the Court concludes that the actions of the claimant's father did not bind the claimant and that the claimant may repudiate them and pursue a tort claim.

Topics:

Courts: Justiciability. A petition alleging that the claimant was not injured in the course and scope of employment, and is therefore not entitled to workers' compensation benefits, is not justiciable even as a request for declaratory judgment.

Minors. A parent who has not been appointed the minor's legal guardian cannot waive the minor's potential tort remedies by seeking and obtaining workers' compensation benefits on his behalf. Where a parent has sought and obtained workers' compensation benefits, the minor may repudiate the claim upon becoming an adult.

Declaratory Judgment: Case and Controversy. A petition alleging that the claimant was not injured in the course and scope of employment, and is therefore not entitled to workers' compensation benefits, is not justiciable even as a request for declaratory judgment.

¶1 On August 9, 2000, Tucker Noonkester (Tucker) suffered serious head injuries in an automobile accident while traveling from Huntley, Montana, to a job in Forsyth, Montana. At the time of the accident, Tucker was fourteen and a half years old. His older brother was driving. (See Ex. 1.)

¶2 The job in Forsyth was for C&S Construction, Incorporated (C&S), which was installing a sprinkler system on a golf course. Tucker's father was part owner of C&S.

¶3 The Noonkester brothers had worked the previous day and returned to their home in Huntley, Montana, the previous evening in a company truck. The same truck was involved in the accident.

¶4 After the accident, Tucker's father – Grant Noonkester – filed a written claim for workers' compensation on Tucker's behalf. (Ex. 1.) The Montana State Fund (State Fund), which insured C&S, accepted liability for the claim and thereafter paid indemnity and medical benefits.

¶5 The present action was triggered by the State Fund's determination that it owed

substantial permanent partial disability (PPD) benefits to the claimant. On January 15, 2002, it petitioned the Workers' Compensation Court for direction as to the manner of payment. In light of Tucker's minority, it asked the Court to appoint a guardian *ad litem* to assist in the determination.

¶6 On February 4, 2002, I appointed Mr. James G. Edmiston guardian *ad litem* for Tucker. Mr. Edmiston has extensive experience in workers' compensation matters and has appeared before this Court on numerous occasions. He is an extremely competent and thorough attorney.

¶7 Mr. Edmiston accepted the appointment and thereafter commenced an investigation into the accident. Pending completion of his investigation, he requested the State Fund to hold further payments in abeyance. (Status Report to Court filed April 16, 2002.)

¶8 In the course of his investigation, Mr. Edmiston determined that there was a possible third-party claim against C&S's liability insurer based on alleged negligence of Tucker's brother who was driving the C&S truck with permission. He employed another attorney – Mr. David R. Paoli – to look into that possibility. Communications with the parties, as reflected in the Court file, indicate C&S's liability insurer was involved, a demand was made upon the insurer, and witness statements taken.

¶9 Following a thorough investigation, on February 2, 2004, Mr. Edmiston, as guardian *ad litem*, filed a petition on behalf of Tucker. That petition was consolidated with the State Fund's petition.

¶10 Tucker's February 2, 2004 petition alleges that he was **not** in the course and scope of his employment at the time of his accident. In effect, it repudiates the claim for compensation filed on his behalf by his father.

¶11 This matter proceeded to trial in Billings on April 21, 2004. At that time, I noted that Tucker had reached eighteen years of age and was no longer a minor. Thus, Mr. Edmiston's role as guardian *ad litem* had expired. Tucker, however, indicated his desire to have Mr. Edmiston continue to represent him as his attorney. In light of Tucker's express wish, and Mr. Edmiston's familiarity with the case, I found no reason that the request should not be honored. Mr. Edmiston's role at this point is therefore that of attorney for Tucker.

¶12 I further questioned whether justiciable controversy existed in light of Tucker's express allegation that he was **not** injured in the course and scope of his employment. I noted that his claim had been submitted by his father as his parent. I ascertained from counsel that Tucker's father had never been appointed his legal guardian. Based on my legal research prior to commencing the trial, I expressed my initial opinion that Tucker is free to repudiate the claim, in which case there is no case or controversy. My colloquy with counsel has been transcribed.

¶13 In light of my preliminary determination, I determined that it would be pointless to

proceed with trial. However, since none of the parties involved had considered the matters I laid out, I provided them with an opportunity to provide legal briefs as to whether there is a justiciable case and controversy. They have since done so. I now determine that if Tucker persists in his repudiation of his claim, there is no justiciable controversy.

Discussion

¶14 Courts have jurisdiction only over real cases and controversies. They do not resolve hypothetical questions or give advisory opinions. *Huttinga v. Pringle*, 205 Mont. 482, 491, 668 P.2d 1068, 1073 (1983). In his petition to this Court, Tucker alleges that he was not in the course and scope of his employment when injured. In effect, he repudiates the workers' compensation claim filed by his father on his behalf.

¶15 My initial view of this matter, and still my view, is that if Tucker is not bound by his father's actions, and can repudiate the claim, then there is no controversy to adjudicate. As I have held in prior cases, a worker cannot be compelled to seek workers' compensation benefits. Indeed, I have consistently rejected attempts by insurers to force claimants to file or pursue workers' compensation claims. *American Home Assurance Co. v. Bry*, 2004 MTWCC 18; *Liberty Northwest Insurance Corp. v. Behr*, 1998 MTWCC 56; *Champion International Corp. v. Brennan*, 1995 MTWCC 46; *Lumbermens Mutual Casualty Co. v. Mares*, 1997 MTWCC 51. Moreover, a declaratory judgment action cannot be used where the claim or action may be pursued directly.

¶16 In *Mares* I held:

A declaratory judgment was never intended "to provide a substitute for other regular actions." *In re Dewar*, 169 Mont. at 444. Its primary purpose is "to determine the meaning of a law or a contract and to adjudicate the rights of the parties therein, but not to determine controversial issues of fact" *Raynes v. City of Great Falls*, 215 Mont. 114, 121, 696 P.2d 423 (1985); accord *Remington v. Department of Corrections*, 255 Mont. 480, 483, 844 P.2d 50 (1992). The Montana Supreme Court has adopted the general rule from C.J.S. on declaratory judgments in *State ex rel. Industrial Ind. Co. v. District Court*, 169 Mont. 10, 14, 544 P.2d 438 (1975). It said "ordinarily a court will refuse a declaratory judgment which can be made only after a judicial investigation of disputed facts, especially where the disputed questions of fact will be the subject of judicial investigation in a regular action." (Quoting 26 C.J.S. Declaratory Judgments, section 16, page 81.)

Lumbermens Mutual Casualty Co. v. Mares, 1997 MTWCC 51 at 2-3, emphasis added. My decisions in *Mares*, *Behr*, and *Brennan* involved declaratory actions brought by insurers. This case is different in that the original petition was filed by the insurer but superseded by Tucker's petition. However, Tucker's petition amounts to a request for declaratory judgment since he is not seeking benefits. The same principles I laid out in the cited cases therefore apply in

determining the justiciability of his petition. If Tucker can repudiate his claim and pursue a tort action, then a declaratory judgment action in this Court is non-justiciable since it involves factual issues that are more appropriately pursued in either a tort action or by ratifying the workers' compensation claim.

¶17 The critical question is therefore whether Tucker is bound by the action of his father in submitting the claim in this case and accepting benefits on his behalf. Posed a different way, can he repudiate the claim?

¶18 Whether Tucker is bound by the actions of his father in pursuing and accepting workers' compensation benefits on his behalf is a question of law. The answer to the question is determined by the legal status of Tucker's father. As noted earlier, he acted as Tucker's parent but was never appointed Tucker's legal guardian.

¶19 Section 39-71-742, MCA (1999), addresses payment of workers' compensation benefits to minor claimants. It provides in relevant part:

39-71-742. Who may receive payment. (1) Where payment is due to a child under 18 years of age or to a person adjudged incompetent, the same shall be made to the parent or to the duly appointed guardian, as the case may be, and the written receipt of such parent or guardian shall acquit the employer, the insurer, or department, as the case may be, of further liability.

The section addresses only whom is to receive benefits on behalf of a minor, not whom can pursue a claim on the minor's behalf.

¶20 I must therefore turn to other, general statutes governing minors. Section 27-1-511, MCA (1999), provides:

27-1-511. Right of minor to bring civil action or other proceeding. A minor may enforce his rights by civil action or other legal proceedings in the same manner as a person of full age except that a guardian must conduct the same.

Section 40-1-202, MCA, contains a redundant, identical provision.

¶21 The decision in *Maloney v. Schandelmier*, 65 Mont. 531, 212 P. 493, makes it clear that the actions of a parent who has not been appointed legal guardian for the minor, do not bind the minor, at least where the minor is sued. In that case, an action was brought against a minor who was served with a summons. The minor gave the summons to his father, who retained an attorney. The attorney failed to timely respond to the summons and the minor was defaulted. The district court set aside the default because the minor did not have a guardian as required by law. The Supreme Court affirmed, pointing out "that no legal right of parentage or of natural guardianship will enable one to act for an infant without an appointment as guardian" 65

Mont. at 535, 212 P.2d at 494.

¶22 Section 27-1-512, MCA (1999), seems to conflict with sections 27-1-511 and 40-1-202, MCA, providing:

Either parent may maintain an action for the injury to a minor child and a guardian for injury to a ward when such injury is caused by the wrongful act or neglect of another. Such action may be maintained against the person causing the injury or, if such person be employed by another person who is responsible for his conduct, also against such other person.

This section, however, has been construed as authorizing parents to bring actions on their own behalf for damages they suffer from injury to a child, *LaTray v. Mannix Electric Co.*, 148 Mont. 303, 419 P.2d 744 (1966); accord, *Chavez v. United States*, 192 F. Supp. 263, 270 (D.C. Mont. 1961) (holding that R.C.M. 1947, § 93-2809, which was recodified in section 27-1-512, MCA, creates a cause of action in favor of the parents while a separate section governed the cause of action of the minor). The section has never been construed or applied as dispensing with the requirement for appointment of a legal guardian to pursue the personal damages of the child.

¶23 Yet another potentially relevant provision is Rule 17(c), Mont. R. Civ. P., which provides:

Whenever an infant or incompetent person has a representative, such as a general guardian, or other like fiduciary, the representative may sue or defend on behalf of the infant or incompetent person. An infant or incompetent person who does not have a duly appointed representative may sue by a next friend or by a guardian ad litem. The court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person, or in any case where the court deems it expedient a guardian ad litem may be appointed to represent an infant or incompetent person, even though the infant or incompetent person may have a general guardian and may have appeared by that general guardian.

The second sentence of the section allows a “next friend” to sue on behalf of a minor if the minor has no appointed guardian. “Next friend” simply means a “person who appears in a lawsuit to act for the benefit of an incompetent or minor plaintiff, but who is not a party to the lawsuit and is not appointed as a guardian.” *Black’s Law Dictionary* (8th Ed.). Typically, a “next friend” is a parent.

¶24 If I read Rule 17(c) correctly, it conflicts with the guardian requirement set out in sections 27-1-511 and 40-1-202, MCA, at least as to bringing a legal action on behalf of a minor. However, I need not consider that apparent conflict since the question at hand is not the authority of Tucker’s parents to bring a lawsuit on his behalf while he was still a minor, but

rather their authority, as parents, to waive his potential remedies with respect to his accident by seeking and obtaining, without litigation, workers' compensation benefits on his behalf.

¶25 Even if a parent may sue on behalf of a minor child without being appointed legal guardian, the parent cannot compromise, settle, or relinquish a minor's legal rights, at least outside of litigation. That point is made clear in *Estate of Griffin*, 248 Mont. 472, 812 P.2d 1256 (1991), in which the Supreme Court held that an agreement by a minor child's natural mother to sell her interest in her deceased, adoptive father's business, was void since the mother had not been appointed the child's conservator. *Griffin* precludes a parent from contracting away or waiving a minor's rights even if the parent could sue to enforce the rights.

¶26 *Griffin* is consistent with section 40-6-232, MCA (1999), which provides: "The parent, as such, has no control over the property of the child." A right to sue for damages is a property right, falling under the historical legal heading as a "chose in action." A "chose in action" is a "proprietary right in personam, such as a debt owed by another person, a share in a joint-stock company, **or a claim for damages in tort.**" *Black's Law Dictionary* (8th Ed.), emphasis added.

¶27 The rub in this case is that the workers' compensation claim is incompatible with any negligence action. Under the exclusive remedy rule, § 39-71-411, MCA, the acceptance of workers' compensation benefits, if binding on Tucker, bars any negligence claim arising out of the accident. Whether Tucker's parents could have pursued litigation to obtain workers' compensation benefits, or sued their older son for negligence on Tucker's behalf, without being appointed guardians, they did not have the authority to either release or spoil either claim.

¶28 I therefore hold that Tucker is not bound by his father's filing of a claim for workers' compensation benefits or by the State Fund's acceptance of the claim.¹ Having now reached the age of majority, he is free to either repudiate the claim or to ratify his father's actions and accept the benefits. If he repudiates the claim, he must be made aware of the risk he is taking – the risk that a district court may hold that his injury did, in fact, occur in the course and scope of his employment. By that time, any claim for workers' compensation benefits may be time-barred, § 39-71-601, MCA, and he may be left with no remedy whatsoever.

¶29 Because of the consequences of his decision, Tucker should be given an opportunity to consider his options and then make a final election. I grant him thirty days to do so. If within those thirty days he files a statement electing workers' compensation benefits, then that election shall constitute ratification of the workers' compensation claim, in which case the State Fund shall continue to be liable for benefits. If he elects to repudiate the workers' compensation claim, or fails to file an election within the thirty days, then this case shall be dismissed for lack of a justiciable issue.

¹At trial, the State Fund indicated that it stands by its acceptance and is prepared to continue to pay benefits.

ORDER

¶30 The claimant is not legally bound by his father's filing of a workers' compensation claim on his behalf or his father's receipt of workers' compensation benefits on his behalf. His father was not his legal guardian and did not have the legal authority to waive the claimant's right to pursue a tort claim with respect to his accident. The claimant may therefore repudiate the claim. However, if he does so, there is no justiciable controversy and his petition must be dismissed, leaving him to pursue his tort action in district court. If he affirms and ratifies the claim, then the petition must be dismissed as moot since the State Fund has accepted liability for the claim and does not seek to repudiate its acceptance.

¶31 The claimant shall have thirty days from the date of this Order in which to file a written election with the Court stating whether he repudiates or ratifies the workers' compensation claim in this case.

DATED in Helena, Montana, this 27th day of August, 2004.

(SEAL)

\s\ Mike McCarter
JUDGE

c: Mr. James G. Edmiston
Mr. Thomas E. Martello
Mr. Michael P. Heringer
Mr. David R. Paoli
Submitted: June 14, 2004