Kaiser Foundation Health Plan, Inc., Respondent V. Laura Brice, Et Ano, Appellants

2022 | Cited 0 times | Court of Appeals of Washington | May 31, 2022

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

KAISER FOUNDATION HEALTH PLAN, INC., d/b/a KAISER FOUNDATION HEALTH PLAN, f/k/a GROUP HEALTH COOPERATIVE,

Respondent,

v.

LAURA BRICE and JOHN DOE BRICE, and the marital community comprised thereof,

Appellants. No. 82498-8-I

DIVISION ONE

PUBLISHED OPINION

SMITH, A.C.J. Laura Brice suffered complications from a negligent tooth extraction that led to permanent disabilities. Her follow-up medical care was covered by Medicare as administered by Kaiser Foundation Health Plan, a Medicare Advantage Organization (MAO). Brice eventually settled with the dentist for $1,427,870, and Kaiser charged Brice $190,747.13 for reimbursement of the medical services it had covered. Brice disputed the amount of one of these items where Kaiser paid more than the hospital had billed. Kaiser brought a declaratory judgment action to enforce its reimbursement right, and the court granted summary judgment for Kaiser. Brice appealed, contending that Kaiser

was only entitled to reimbursement for the amounts it had been billed and that

to share the

attorney fees and costs incurred in obtaining the settlement. Because Kaiser settlement covered these costs, and because attorney fee sharing is not required

when an insurance company must file suit to obtain its reimbursement because

the insured party opposes its recovery, we affirm.

FACTS

In July 2013, Laura Brice suffered complications from a tooth extraction

that led to facial and neck disfigurement and permanent disabilities. Brice

incurred extensive medical bills for follow-up care, which were covered by

Kaiser. 1

In June 2016, Brice sued the dentists involved in the tooth extraction for

medical negligence. The parties engaged in discovery, hiring experts and

conducting deposi ly

retained lawyer, David Balint, sent a letter to Kaiser informing it of the personal

injury suit. In anticipation of settlement negotiations, he requested a ledger

ursement interests. Kaiser sent a log showing

$192,637.99. This included $113,387.18 that Kaiser had paid for stay at

Virginia Mason Medical Center from November 3 to November 7, 2014, for which

Virginia Mason had only charged $50,088.86. Balint responded, requesting that

Kaiser reduce its reimbursement claim to represent the amount billed. Kaiser

1 At the time Brice enrolled in her insurance, it was provided by Group Health Cooperative, which is now part of Kaiser. declined to do so, explaining that the payment was based on its contractual

arrangement with Virginia Mason and based on Medicare rules and procedures.

On February 22, 2018, Brice settled with one of the dentists for

$1,427,870. The settlement agreement provided that Brice would satisfy and be

solely res the settlement. On October 17, 2018, Balint informed Kaiser that the case had

interest. In September 2019, Balint sent a trust check for $25,000 to Kaiser

based on his valuation of what the disputed charge should have been.

On January 23, 2020, Kaiser sued for declaratory relief regarding its right

to be reimbursed in the amount of the medical expenses it had paid. Brice

answered with affirmative defenses and a counterclaim, asserting that Brice had

Kaiser was violating the Washington

Consumer Protection Act. The parties filed cross motions for summary

judgment, and the court granted summary judgment to Kaiser, declaring that

Kaiser had a right to be reimbursed in the amount of $165,747.13, the amount

full

$190,747.13 that Kaiser paid.

Brice appeals.

BACKGROUND

Medicare is federal health insurance program primarily benefitting those

65 years of age and older Parra v. PacifiCare of Arizona, Inc., 715 F.3d 1146, 1152 (9th Cir. 2013) secondary

expenses third- liability insurance policy or plan. 2

Parra, 715 F.3d at 1152 (quoting 42 U.S.C. § 1395y(b)(2)(A)). Medicare may

pay for such expenses anyway has not made or cannot

reasonably be expectedpromptly conditioned on reimbursement 42 U.S.C. § 1395y(b)(2)(B)(i). The

responsibility to reimburse Medicare a primary plan[ ] and an

entity that receives payment from a primary plan 42 U.S.C. § 1395y(b)(2)(B)(ii).

In 1997, Congress enacted Medicare Part C, providing for Medicare

Advantage plans Parra, 715 F.3d at 1152 Part C allows eligible participants

to opt out of traditional Medicare and instead obtain various benefits through

MAOs, which receive a fixed payment from the United States for each enrollee Parra, 715 F.3d at 1152; 42 U.S.C. §§ 1395w-21, 1395w-23. Like Medicare,

MAOs may seek reimbursement for secondary payments they make toward

medical services for which a primary plan is responsible. 42 U.S.C. § 1395w-

22(a)(4).

All payments to providers of services must be based on the reasonable

cost of services covered under Medicare and related to the care of beneficiaries 2

Moreover, a]n entity that engages in a business, trade, or profession shall be deemed to have a self-insured plan if it carries its own risk (whether by a failure to obtain insurance, or otherwise) in whole or in part 42 U.S.C. § 1395y(b)(2)(A). This means potential tortfeasors like the dentists in this case are considered primary payers regardless of their insured status. 42 C.F.R. § 413.9. explicitly delegates to the Secretary [of

Health and Human Services] the authority to develop regulatory methods for the

estimation of reasonable costs Good Samaritan Hosp. v. Shalala, 508 U.S.

402, 418, 113 S. Ct. 2151, 124 L. Ed. 2d 368 (1993). To achieve this pricing

establishes a

classification of inpatient hospital discharges by Diagnosis-Related Groups appropriate weighting factor 42 C.F.R. § 412.60.

ANALYSIS

Brice contends that the court erred by granting summary judgment for

Kaiser. Specifically, she contends that the court could not properly consider a

declaration filed by Kaiser with its reply memorandum on summary judgment;

that Kaiser

by a proportionate amount of the attorney fees and costs Brice incurred to obtain

the settlement funds. We address each issue in turn.

Standard of Review

Summary judgment is appropriate where there is no genuine issue as to

any material fact, so the moving party is entitled to judgment as a matter of law Meyers v. Ferndale Sch. Dist. We

view the facts and reasonable inferences in the light most favorable to the

nonmoving party Meyers, 197 Wn.2d at 287. We review rulings on summary judgment and issues of statutory interpretation de novo Am. Legion Post

No. , 164 Wn.2d 570, 584, 192 P.3d 306 (2008). Contract

interpretation is a question of law for the court when it is unnecessary to rely on

extrinsic evidence Wash. State Major League Baseball Stadium Pub. Facilities

Dist. v. Huber, Hunt & Nichols-Kiewit Const. Co., 176 Wn.2d 502, 517, 296 P.3d

821 (2013).

Reply Declaration of Pamela Henley

As a threshold issue, Brice contends that we should disregard the

judgment. Brice challenges this declaration on the grounds that Henley did not

certify that it was based on her personal knowledge and that the declaration

raised new issues that were not in strict rebuttal. 3 We are not persuaded.

With respect to the personal knowledge issue, Brice is presumably relying

on CR 56(e), affidavits shall be made on personal

knowledge, shall set forth such facts as would be admissible in evidence, and

shall show affirmatively that the affiant is competent to testify to the matters

stated therein 3

court, and so we need not consider this assignment of error under RAP 2.5(a). Nonetheless, we exercise our discretion to do so. Brice also did not raise this issue in her assignments of error or in a separate section of her brief, but instead addressed it in her facts section. Although this violates RAP 10.3(a) and (g), we exercise our discretion despite one or more technical flaws in Rules of Appellate Procedure issues are clearly argued and the respondent is not prejudiced. State v. Olson,

126 Wn.2d 315, 323, 893 P.2d 629 (1995). based upon [her] own personal knowled records 4 monitor[ed] the medical

expenses paid by Kaiser on behalf of Defendant Brice for medical services

arising from [the tooth extraction,] evaluate[d] ight to obtain

reimbursement for those payments from the proceeds of settlement . . . , and

[sought] reimbursement for the medical expenses Kaiser paid on Defendant

demonstrate competence to testify about the information shared in her reply declaration, which

Medicare pricer tool used by Kaiser, and a copy of the completed priced claim for

ce cites no case indicating that a declarant must repeat

statements about her personal knowledge in a follow-up declaration, and given

construed and administered to secure the just,

speedy, and inexpensive determination of every action we are not persuaded

that this was required. CR 1.

Moreover, Brice is incorrect that Kaiser could not submit new evidence

along with its summary judgment reply. Brice relies on cases indicating that a

party cannot raise new issues on rebuttal, White v. Kent Med. Ctr., Inc., PS, 61

Wn. App. 163, 168, 810 P.2d 4 (1991), but Kaiser did not raise new issues.

Instead, Kaiser provided additional evidence to support an argument it had

4 Statements in a declaration based on a review of business records satisfy the personal knowledge requirement of CR 56(e) if the declaration satisfies the business records statute, RCW 5.45.020 Barkley v. GreenPoint Mortg. Funding, Inc., 190 Wn. App. 58, 67, 358 P.3d 1204 (2015). already raised: that it was entitled to reimbursement for the full amount it paid on

Until a formal order granting or denying the motion for summary

judgment is entered, a party may file affidavits to assist the court in determining

the existence of an issue of material fact Cofer v. Pierce County, 8 Wn. App.

258, 261, 505 P.2d 476 (1973).

Accordingly, we consider all the evidence considered by the superior

Value of Reimbursable Medical Expenses

Brice claims that the trial court erred by concluding that Kaiser had the

value of the medical expenses. 5 We disagree.

42 U.S.C. § 1395w-22(a)(4) provides, Notwithstanding any other provision of law, a [Medicare Advantage 6] organization may (in the case of the provision of items

5 from proceeds that the insured collects . . . from the party at-fault from the party at-fault. Winters v. State Farm Mut. Auto. Ins. Co., 144 Wn.2d

869, 875-76, 31 P.3d 1164 (2001). Medicare plan permit Kaiser to recover from a tortfeasor or from proceeds Brice collected from a tortfeasor, this distinction is not at issue in this case. 6 The current Part C Medicare Advantage program was formerly known When Congress made revisions to the program and changed the name in 2003,

it Social Security Act shall be deemed a reference to the Medicare Advantage

Humana Med. Plan, Inc. v. Reale, 180 So. 3d 195, 199 n.3 (Fla. Dist. Ct. App. 2015) (quoting and services to an individual under a [Medicare Advantage] plan under circumstances in which payment . . . is made secondary pursuant to section 1395y(b)(2) of this title) charge . . . , in accordance with the charges allowed under a law, plan, or policy[7] described in such section (A) the insurance carrier, employer, or other entity which under such law, plan, or policy is to pay for the provision of such services, or (B) such individual to the extent that the individual has been paid under such law, plan, or policy for such services.

The medicare regulations also provide that [i]f a Medicare enrollee

receives from an [MAO] covered services that are also covered . . . under any

liability insurance policy or plan, . . . the [MAO] may bill . . . . [t]he Medicare

enrollee, to the extent that he or she has been paid by the carrier . . . for covered

medical expenses. 42 CFR § 422.108(d) (emphasis added).

any

incurred medical expenses that have been paid by Medicare have either already

(Emphasis

added.)

ely responsible for any

and all . . . rights of subrogation, including those of the Kaiser Permanente

Medicare Prescription Drug, Improvement, and Modernization Act of 2003, P.L. 108 173, 117 Stat. 2066). 7 This language appears to refer to insurance policy or plan . . . or no fault insurance 42 U.S.C. § 1395y(b)(2). Brice was paid by the primary plan to the ful any incurred medical

expenses we conclude that under 42 U.S.C. § 1395w-22(a)(4),

Kaiser is entitled to reimbursement for the full value of the medical expenses it

incurred.

Furthermore, the outcome agreement is the same.

[Kaiser] for all benefits provided, from any amounts [Brice] received . . . on

account of such injury . .

injury led to a settlement with a third party, Kaiser had the right to recover its

of the

expenses incurred asks us to 8

and contends that the

amount Virginia Mason billed for the November 2014 inpatient stay was the

actual value of those services. But the Medicare Act defines the monetary worth

reasonable compensation

equivalent for such services 42 U.S.C. § 1395xx(a)(2)(B) (discussing payments

8 amount of a commodity, service, or medium of

something WEBSTER S THIRD NEW INTERNATIONAL DICTIONARY 2530 (2002). for certain services paid on a reasonable cost basis); see also id. at

1395xx(a)(1)(A)

services under Medicare Part B); 42 CFR § 405.501 Medicare

42 U.S.C. § 1395ww(a)(1)(A)(i) (providing limits on

when Secretary may recognize operating costs of inpatient hospital services as

reasonable

compensation scheme, the value of the expenses and the amount incurred are

equal.

Brice contends that, because she only had the right to recover any money

from the dentist under Washington law,

reasonable

value See, e.g., Hayes v. Wieber Enters., Inc., 105

Wn. App. 611, 615- Plaintiffs in negligence cases are permitted

to recover the reasonable value of the medical services they receive, not the total

of all bills paid

billed by Virginia Mason for her November 2014 stay wer

argument fails for multiple reasons. First, the federal reimbursement statute

n]otwithstanding any other

provision of law 9 42 U.S.C. § 1395w-22(a)(4). The accompanying regulation

9 Under the preemption doctrine, states are deemed powerless to apply their own law due to restraints deliberately imposed by federal legislation Alverado v. Wash. Pub. Power Supply Sys., 111 Wn.2d 424, 430-31, 759 P.2d

427 (1988). make supersede[s] any State laws, regulations, contract

requirements, or other standards that would otherwise apply to [Medicare

Advantage]

Federal law and the [Medicare secondary payer] regulations to bill . . . for

services for which Medicare is not the primary payer 42 CFR § 422.108(f).

Second, while Brice has provided, for the purposes of this case, an expert saying

the amount billed was reasonable, nothing would prevent her from contending to

a jury that the amount Kaiser paid, in accordance with Medicare pricing schemes,

was the reasonable value of her medical expenses. 10 Third, if a jury did award

Brice less than the amount Kaiser paid, Kaiser would only be reimbursed to the

extent that Brice was awarded damages for the medical services under 42

U.S.C. § 1395w-22(a)(4). Because Kaiser can only be reimbursed to the extent

expenses, we

when considered alongside Washington law.

Reduction of Reimbursement for Attorney Fees

Br Again, we find no error.

As an initial matter, Kaiser contends that Brice waived this issue by not

raising it below under RAP 2.5(a). We disagree. Brice discussed this issue at

10 Under Washington law, medical expenses may be reasonable even if the amount paid is different from what is normally charged by providers or paid by insurance. Gerlach v. Cove Apartments, LLC, 196 Wn.2d 111, 124 n.8, 471 P.3d 181 (2020). argument that equitable fee sharing could not take place if Brice opposed

a new issue merely because she

approaches her argument in a different way.

Medicare reduces its recovery to take account of the

cost of procuring the judgment or settlement . . . if (i) Procurement costs are

incurred because the claim is disputed; and (ii) Those costs are borne by the

party against which [Medicare] seeks to recover 42 C.F.R. § 411.37(a)(1).

However, if Medicare must file suit because the party that received payment

opposes [Medicare]'s recovery, the recovery amount is

payment. 42 C.F.R. § 411.37(a)(2), (e). The Eleventh Circuit explained this

ffset an

Humana Med.

Plan, Inc. v. W. Heritage Ins. Co., 832 F.3d 1229, 1240 (11th Cir. 2016). In that

appropriate reimbursement by placing the disputed amount into trust, because

the regulations required the plan to reimburse Medicare directly. Humana, 832

F.3d at 1239-40; see also Cox v. Shalala, No. 6:93CV00436, 1995 WL 638620,

at *5 (M.D.N.C. June 7, 1995) (unpublished), aff'd, 112 F.3d 151 (4th Cir. 1997)

In this case, the Secretary was forced to defend against Plaintiffs' declaratory judgment action and brought a counterclaim for reimbursement. These actions

place this case within the ambit of § 411.37(e)

By contrast, in Estate of Washington v. United States Secretary of Health

and Human Services, because [the beneficiary] only

questioned the amount of reimbursement owed and only instituted a declaratory

judgment action 53 F.3d 1173,

1175 (10th Cir. 1995). initiated a

declaratory judgment action to determine what amount of reimbursement was

appropriate in a case where the benefic covered a portion of her damages. Estate of Washington, 53 F.3d at 1175. In

holding that the declaratory judgment action did not trigger 42 C.F.R.

§ 411.37(e), the court noted t]his result may well have been reached far

earlier, and at far less cost, if the government had been more forthcoming about

Estate of Washington, 53 F.3d at 1176.

Here, we conclude that the special rule under 42 C.F.R. § 411.37(a)(2),

(e) applies. The issue is whether Kaiser had to

opposition to its recovery. Unlike Estate of Washington, in which the beneficiary

proactively sought an answer to its question, here it was Kaiser who had to bring

an action to enforce its right to be reimbursed. Also unlike Estate of Washington,

where the insurer could have avoided litigation by being more forthcoming about

the authority supporting its theory, here it is unclear that Kaiser had better alternatives available to it than bringing suit. Although Brice characterizes herself

opposing ed the

reimbursement interest, despite her admission on appeal that Kaiser is entitled to

at least $78,442.51.

barred by the doctrines of unclean hands and laches and that Kaiser had violated

the CPA, and she only paid Kaiser $25,000 in the two years between settlement

and Kaiser filing suit. We conclude that this case is unlike Estate of Washington.

The court did not err by declining to reduce the reimbursement amount by a proportional share of attorney fees.

We affirm.

WE CONCUR: