

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Arthur M. Hayden and Joy Lynn Hayden, as co-)	Supreme Court
conservators and co-guardians of Todd Lowell)	Case No. 20120337
Hayden, and in their individual capacity and Smith)	
Bakke Porsborg Schweigert & Armstrong,)	
)	
Plaintiffs and Appellants)	
vs.)	
)	
Medcenter One, Inc., Medcenter One)	
Living Centers, Billings Clinic,)	
and Sidney Health Center,)	
)	
Defendants)	
-----)	
Medcenter One, Inc., Medcenter One)	
Living Centers, and Billings Clinic,)	
)	
Appellees)	
)	

APPEAL FROM ORDER ON MOTION FOR SUMMARY JUDGMENT
AND JUDGMENT ENTERED JULY 30, 2012
BY THE HONORABLE THOMAS J. SCHNEIDER,
SOUTH CENTRAL JUDICIAL DISTRICT, BURLEIGH COUNTY, NORTH
DAKOTA,
CIVIL NO. 08-2012-CV-00207

REPLY BRIEF OF APPELLANTS
ARTHUR M. HAYDEN AND JOY LYNN HAYDEN, INDIVIDUALLY,
AND SMITH BAKKE PORSBORG SCHWEIGERT & ARMSTRONG

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RESPONSE TO BILLINGS CLINIC'S STATEMENT OF FACTS

- (1.) The Statement of Facts submitted by appellee Billings Clinic contains several factual inaccuracies. The assertion in paragraph 8 this “case is about the Smith Bakke law firm seeking attorney fees for itself from non-clients” is misleading and not accurate. At issue in this case is whether Billings Clinic (“Billings”) and Medcenter One (“Medcenter”) should be permitted, in equity, to receive the benefits of insurance coverage secured solely as a result of detriments incurred by appellants/plaintiffs Art and Joy Hayden (“Parents”), the parents of Todd Hayden (“Todd”) – detriments Todd’s Parents had no legal obligation to personally incur.
- (2.) The assertion in paragraph 10 that Parents were parties, in their individual capacities, in the federal court ERISA action against Blue Cross Blue Shield of Texas (“BCBSTX”) is incorrect. Parents are only named in the caption of the federal court action in their capacities as Todd’s co-guardians and co-conservators.
- (3.) The assertion in paragraph 12 “[a]ppellants were granted an award of their attorney fees in the federal court action on an hourly basis for the work undertaken since the federal court action was filed and a substantial award of prejudgment interest and a statutory penalty” is not entirely accurate. The alleged substantial award of prejudgment interest was only .19%, the percentage statutorily allowed by federal law for prejudgment interest. Nineteen one-hundredths of one percent cannot be considered substantial prejudgment interest. Although Todd was awarded his attorney’s fees, calculated on an hourly fee basis, plus prejudgment interest, and a statutory penalty for BCBSTX’s delays in providing policy information as required under ERISA, such legal remedies were not awarded to, or even available to, Parents or Smith Bakke, directly. These are not “the

very same attorney's fees Appellants sought in this action".

(4.) Billings is incorrectly asserting, or at least implying in paragraphs 17 and 18, Parents' equitable claims fail as Parents had a legal obligation to incur the detriments at issue in this case in their individual capacities. Appellants deny Parents had any obligation to incur any personal detriments on behalf of Todd, whether individually, or in their capacities as co-guardians and co-conservators.

(5.) Billings also incorrectly asserts in paragraph 22 "[t]he issue of COBRA payments is irrelevant to Billings Clinic." Billings only received payment for its services as a result of the efforts of Parents in the federal court action and after payment of continued insurance premiums under COBRA. Had Parents allowed Todd's policy with BCBSTX to lapse during the federal court litigation, BCBSTX may have taken the position no coverage was available for payment of Billings due to the lapse in the policy – a position which would have been detrimental to Billings.

RESPONSE TO MEDCENTER'S STATEMENT OF FACTS

(6.) Medcenter's assertion in paragraph 11 that the Noridian Mutual Insurance Company Provider Participation Agreement ("Provider Agreement") (Medcenter App. 69) between Noridian and Medcenter applies to BCBSTX is disputed. BCBSTX is not referenced in the Provider Agreement and no evidence has been produced to establish any justification for Medcenter (or Billings for that matter) to accept from BCBSTX less than the gross amounts billed to Todd for the services provided him. The referenced Provider Agreement indicates on its face it is a Provider Agreement for Noridian (BCBSND), and has no application to BCBSTX.

(7.) Medcenter's claim in paragraph 14 it did not "negotiate" or "settle" with

BCBSTX relative to Todd's debt with Medcenter is incorrect. It is not disputed Medcenter accepted over \$239,000 less from BCBSTX than the medical bills charged to Todd.

(8.) Medcenter's assertion in paragraph 17 it had no legal basis to directly sue BCBSTX is irrelevant to the equitable claims before the Court and misses the point. MedCenter had an equitable obligation to reimburse Parents for the detriments they incurred, without obligation to do so, in securing the benefits conferred upon Medcenter.

(9.) The quotation in paragraph 22 to the federal court's statement in the federal case that ERISA provides for the recovery of attorney fees, while true, misses the point. Neither Parents, individually, nor Smith Bakke, had standing to bring a claim against BCBSTX under ERISA. Only the insured, Todd, had such standing. These facts differentiate this case from all cases relied upon by Medcenter and Billings and establish the appropriateness of an equitable remedy for Parents.

ARGUMENT

I. THE TRIAL JUDGE'S RULING WAS PREMATURE

(10.) Medcenter's assertion Parents and Smith Bakke failed to explain to the trial court how additional discovery would have precluded entry of summary judgment is without merit. The Hayden's specifically listed issues of fact which required further discovery in their briefing in opposition to Medcenter's motion for summary judgment (Dkt. #68), reproduced at paragraph 26 of Medcenter's appellate brief. Each of the factual issues listed pertained directly to the issues before the trial court, and would have established Medcenter's and Billings Clinic's knowledge of their obligation to share in the expenses associated with securing payment from BCBSTX, and would have established Medcenter

and Billings were not obligated to accept from BCBSTX less than the full value of the services provided to Todd.

(11.) It should be kept in mind the dispositive motions at issue were served only forty-two days after this action was commenced. Although Medcenter provided responses to the Hayden's written discovery requests, the Haydens should not be required to simply accept as truth the responses provided by Medcenter.

II. THE TRIAL JUDGE'S DISMISSAL OF PARENTS' EQUITABLE CLAIMS WAS BASED UPON A CRITICAL ERROR OF FACT

(12.) Parents dispute Medcenter and Billings never claimed Parents were personally liable for the medical care provided to Todd. As discussed in paragraphs 19, 20 and 21 of Appellant's principal brief, communications between Parents and Medcenter and Billings lead Parents to believe payment for Todd's care was being sought from them, personally. Regardless, both Medcenter and Billings assert the trial court made no finding Parents are personally liable for the debts of Todd. Therefore, all parties are in agreement any such determination by the trial court was in error.

(13.) This is a critical point as the fundamental error underlying the trial judge's dismissal of Parents' equitable claims was the trial judge's imputation of Todd's personal obligation to pay for the care provided him by Billings and Medcenter to Parents. Todd's legal obligations are immaterial to the equitable claims of Parents.

III. DISMISSAL OF PARENTS' UNJUST ENRICHMENT CLAIM WAS IN ERROR

(14.) Medcenter and Billings miss the point when they assert they were entitled to be compensated for the care provided to Todd. The issues before this Court do not concern Todd's legal obligations. Instead, at issue are the detriments necessarily incurred by

Parents, personally, to secure the insurance benefits received by Medcenter and Billings. It is not disputed that but for the detriments incurred by Parents neither Medcenter nor Billings would have received the insurance benefits at issue. The fact Parents personal obligation to pay for the attorney's fees was the result of their contractual agreement with Smith Bakke is irrelevant to the equitable claims at issue. As to Parents, the relevant inquiry is whether the circumstances of Medcenter and Billings's receipt and retention of the insurance proceeds from BCBSTX are such that, as between them and Parents (not Todd), it is unjust for them to retain the benefits without paying the costs associated in securing the benefits. See *Ritter, Laber & Assocs., Inc. v. Koch Oil, Inc.*, 2004 ND 117, ¶ 26, 680 N.W.2d 634 ("Even when a person has received a benefit from another, that person is liable only if the circumstances of the receipt or retention are such that, as between the two persons, it is unjust to retain the benefit." (underline added)).

(15.) As discussed at paragraphs 38 through 47 of the Appellants' principal brief, none of the cases relied upon by the trial judge, Medcenter and Billings involved a claim by someone who incurred a detriment, with no obligation to do so, which resulted in a direct benefit to the health care provider, and for which no other legal remedy was available, as in the present case. Parents have no legal recourse against BCBSTX for recovery of attorney's fees, or otherwise have any available remedy at law.

(16.) Medcenter asserts at paragraph 42, for the first time on appeal, Parents and Smith Bakke lack standing to sue Medcenter and Billings due to a lack of any relationship between them. This issue was not presented to the trial judge for determination and has been waived and should not be considered on appeal. See *Judson PTO v. New Salem School Board*, 262 N.W.2d 502, 505 (N.D. 1978)(determining a lack of standing

argument raised for the first time on appeal had been waived pursuant to Rule 12(h), N.D. R. Civ. P. and would not be considered on appeal).

(17.) Medcenter's standing argument is also without merit. Equitable remedies are intended to address situations where there is a lack of a contractual relationship between the parties. While it is true the insurance benefits received by Medcenter and Billings were paid by BCBSTX and not Parents, such misses the point – there would not have been any insurance benefit payments were it not for the detriments incurred by Parents.

IV. DISMISSAL OF PARENTS' QUANTUM MERUIT CLAIM WAS IN ERROR

(18.) Medcenter completely ignores the communications between Parents and Smith Bakke with Medcenter representative, Lori Blees, as early as March 25, 2010, as discussed in paragraphs 19 and 50 of the Appellants' Brief. Blees indicated to Bakke Medcenter would leave the situation between patient and insurance carrier, and would not join in a lawsuit with the Haydens because said lawsuit would likely be a lost cause. Billings was on notice regarding the lawsuit against BCBSTX at least as early as April 1, 2010, when Smith Bakke sent a records request to Billings notifying them of the lawsuit and requesting Todd's medical records. Both Billings and Medcenter had directly submitted claims for payment to BCBSTX and had been denied, both were aware legal expenses were going to be incurred in an effort to secure the insurance benefits, and both decided to free-load off the efforts of Parents.

V. DISMISSAL OF PARENTS' EQUITABLE ESTOPPEL CLAIM WAS IN ERROR

(19.) The trial judge erred in dismissing Parents equitable estoppel claim based upon factual findings for which the only evidence presented was directly opposite. For

example, the trial court concluded “ . . . the Haydens understood, and continue to understand, that they are not primarily responsible for Todd Hayden’s medical bills, . . .” (Hayden App. 210.) This finding of fact is directly contradicted by the affidavit testimony of Joy Hayden wherein Joy Hayden testified “[t]hat because [she] continued to receive medical bills and telephone calls from defendants Billings Clinic [and] Medcenter One . . . and/or their representatives, [she] believed either [she] and/or Todd Hayden would or may be responsible for paying those medical bills, which induced [Joy Hayden] to file a lawsuit in federal court” (Hayden App. 44 at ¶ 3.) In addition, representations were made by Medcenter representative, Lori Blees, which conveyed the impression to the Haydens that a lawsuit against BCBSTX was the only option left in order to ensure the Haydens would not be responsible for Todd Hayden’s medical bills. Lori Blees told plaintiffs a claim or lawsuit was a “lost cause” and Medcenter would not be pursuing a claim against BCBSTX. This conversation, in addition to Parents’ continuous receipt of medical bills and telephone calls from representatives of Billings and Medcenter requesting payment for the care provided to Todd, caused Parents to incur personal liability in retaining legal counsel to secure a reversal of BCBSTX’s wrongful denial of insurance coverage for Todd’s care. At the very least, a genuine question of fact exists as to whether the representations made to the Haydens and their counsel support a claim of equitable estoppel. Equitable estoppel claims are ordinarily questions of fact for a jury to decide. *Rath v. Armour & Co.*, 136 N.W.2d 142, 148 (N.D. 1965).

VI. THE “COMMON FUND” DOCTRINE SHOULD BE APPLIED

(20.) Neither Medcenter nor Billings dispute that by addressing Parents and Smith Bakke’s common fund doctrine claim, the trial judge impliedly allowed the amendment

to the pleadings to add such cause of action. All parties therefore concede the amendment was allowed.

(21.) Medcenter's assertion the common fund doctrine does not apply in a debtor-creditor relationship, and citation to cases involving debtor-creditor relationships, confuse the issue before this Court. At issue is not a claim by Todd, but rather a claim by Parents and Smith Bakke. There is no debtor-creditor relationship between Medcenter and/or Billings with Parents and/or Smith Bakke. Attributing the obligations of Todd to Parents and Smith Bakke was the fundamental error underlying the trial judge's dismissal of the equitable claims, as well as the common fund claim.

(22.) The analysis and application of the common fund doctrine by the Supreme Court of Illinois in *Bishop v. Burgard*, 765 N.E.2d 24 (Ill. 2002) as discussed in paragraphs 59 and 60 of Appellants' principal brief is particularly applicable to the claims of Parents and Smith Bakke in this case, especially considering the absence of any debtor-creditor relationship in either case.

(23.) Although it is true the common fund obtained in the federal court action will benefit many health care providers, as Smith Bakke's services were provided under a contingency fee agreement, it is immaterial that all other benefited parties are not parties to the present action. Medcenter and Billings are only being asked to pay their share of the attorney's fees incurred in securing insurance proceeds to which they were entitled based on such contingency fee percentage.

VII. THE AMOUNT OF BILLINGS' AND MEDCENTER'S UNJUST ENRICHMENT

(24.) An issue to be resolved in the context of Parents' equitable claims is the amount of the enrichment received by Medcenter and Billings as a result of the detriments

incurred by Parents. It is in this context in which the gross billings for Todd's medical care are relevant. Neither Medcenter nor Billings have presented any evidence to establish any contractual obligation on their part to accept from BCBSTX any amount less than the gross amounts billed to Todd for his care. Their unilateral decisions (without the Hayden's input) to accept the lesser amounts from BCBSTX, without any obligation to do so, should not result in a diminishment of the amounts by which they have been enriched as a result of the insurance benefits secured by Parents. This logic applies regardless of whether or not such insurance proceeds were ultimately paid directly to Medcenter One and Billings by BCBSTX.

VIII. CONCLUSION

(25.) Parents request the trial judge's dismissal of their unjust enrichment, quantum meruit and equitable estoppel claims, as well as the common fund doctrine claim of Todd's Parents and Smith Bakke, be reversed, and this matter be remanded to the trial court for completion of discovery and for a jury trial.

Dated this 27th day of November, 2012.

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CERTIFICATE OF SERVICE

(27.) I hereby certify that a true and correct copy of the foregoing **Reply Brief Of Appellants Arthur M. Hayden And Joy Lynn Hayden, Individually, And Smith Bakke Porsborg Schweigert & Armstrong** was on the 27th day of November, 2012, emailed to the following:

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