IN THE COURT OF APPEALS OF IOWA

No. 8-397 / 97-0686
Filed May 26, 1999

KMART CORPORATION,
Appellee,

vs.

LORRAINE RUTH BANGS,
Appellant.

Appeal from the Iowa District Court for Story County, William Pattinson, Judge.

Lorraine Bangs appeals from the district court's judgment for the plaintiff establishing its indemnification rights for paid worker's compensation benefits after Bangs obtained a judgment against a third-party tortfeasor for damages arising from her work-related injury. **AFFIRMED AS MODIFIED.**

Donald G. Beattie and R. Bradley Skinner of Skinner & Beattie, P.C., Altoona, for appellant.

Thomas J. Logan and Lorraine J. May of Hopkins & Huebner, P.C., Des Moines, for appellee.

Heard by Huitink, P.J., and Streit and Mahan, JJ. Sackett, C.J., takes no part.

STREIT, J.

Lorraine Bangs appeals the trial court's judgment entitling her employer, Kmart, to subrogation rights for workers' compensation benefits paid to Bangs. The court held Kmart was entitled to recoup benefits paid from the economic and non-economic damages Bangs received in a third-party tort claim. Because we find the holdings of our supreme court specifically entitle Kmart to seek indemnification from Bangs' entire award, we affirm. The date and rate of accrual of interest on the award is modified.

I. Background Facts & Proceedings.

Lorraine Bangs was injured while in the course of her employment at the Ames Kmart store. Bangs slipped and fell on an area of the store's floor which was, at the time, being washed and waxed by Pioneer Janitorial of Ames. Bangs made a claim for workers' compensation benefits with Kmart. As of September 23, 1996, she had received $106,023 in medical expenses and weekly compensation payments.

Bangs filed a third-party tort claim against Pioneer Janitorial of Ames, Inc. for damages caused by the injuries she sustained at work. A jury awarded Bangs $241,000 and found Bangs fifty-percent at fault for her injuries. The trial court ordered the verdict increased to reflect the undisputed amount of past medical expenses, resulting in an ultimate verdict to Bangs of $154,917. Pioneer appealed to this court. We affirmed. Our supreme court reversed the decision and remanded for a new trial on November 26, 1997.

On remand, after a new trial, the jury awarded Bangs $69,234 in past medical expenses; $33,882 in past lost wages, $54,167 for future loss of earning capacity; $5000 for past loss of function of mind and body; $10,000 for future loss of function of mind and body; $10,000 for past pain and suffering; and $5000 for future pain and suffering. The jury found Bangs fifty-percent at fault for her injuries. The total of verdict was $187,283, resulting in a recovery of $93,642 for Bangs.

In December 1995, Kmart brought an action to enforce its indemnity and lien rights pursuant to Iowa Code chapter 85. The case proceeded to trial before the court in March 1997. The court acknowledged Kmart's indemnity rights against Bangs' third-party recovery. It also held Kmart's indemnification rights were not reduced by Bangs' comparative fault; Kmart was entitled to indemnification for future compensation benefits paid; and Kmart's indemnification could be drawn from Bangs' entire award—economic and non-economic damages. The court entered a judgment in favor of Kmart in the amount of $70,682.29, with interest on $62,186 accruing after December 29, 1995, when the petition for intervention was filed.

II. The Merits.

Bangs raised three issues on appeal. Of the three, only one remains for our decision.[1]

Bangs contends Kmart should only be indemnified from Bangs' recovery for economic damages and not from non-economic damages. Bangs argues, because she

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[1] Two of the appeal issues raised by Bangs have been withdrawn or conceded as moot at this time.

has never received any benefits from Kmart for pain and suffering or loss of function of mind and body, Kmart should not be able to draw on these damages for reimbursement for workers' compensation benefits paid. She argues to allow Kmart to do so subjects her to a double reduction, once for comparative fault and one to reimburse Kmart.

There does appear to be a disparity in the operation of Iowa Code section 85.22 and our case law regarding an employer's indemnification rights after paying workers' compensation benefits to an injured employee. Chapter 85 allows an injured employee to collect only economic damage, such as lost wages, medical expenses, and cost of transportation. Under our case law, however, an employer is entitled to be reimbursed from non-economic damages recovered in third-party actions. In this way, an employer is entitled to draw reimbursement from a character of funds the employer never paid to the employee.

Bangs argues it is unfair to allow Kmart to take damages awarded for pain and suffering when the workers' compensation benefits do not pay the worker for the pain of an injury. Despite this apparent disparity, Bangs' claim must fail on appeal. Our supreme court has definitively decided this issue in *Sourbier v. State*, 498 N.W.2d 626 (Iowa 1993); *see also Fisher v. Keller Industries, Inc.*, 485 N.W.2d 626 (629 (Iowa 1992)(right of indemnity under this provision is against the worker's entire recovery).

The central dispute in *Sourbier* was whether the State could be indemnified out of an award of damages for pain and suffering and medical expenses not awarded by

the jury in an action Sourbier brought against a third-party. *Id.* at 722. The court noted: "[A]n employer is fully entitled to be reimbursed from third-party recoveries for pain and suffering, even when the portion of an award attributable to pain and suffering is clearly separable from the portion attributable to economic losses." *Id.* (quoting *United States v. Lorenzetti*, 467 U.,S. 167, 178 (1984)). The court held it reasonable to construe the indemnification provision of section 85.22(1) to impose a lien on the amounts recovered for pain and suffering because the employer has the right to bring an action to recover damages from a third party to the same extent the employee does. *Id.* at 724.

Bangs contends our supreme court's holding in *Toomey v. Surgical Services, P.C.*, 558 N.W.3d 166 (1997) should be applied to her case. In *Toomey*, an employee who had been paid workers' compensation benefits brought a third-party medical negligence action against a physician who treated his injury. *Id.* at 166. The workers' compensation carrier intervened, alleging it had a lien on any recovery. *Id.*

Under Iowa Code section 147.136, Toomey was limited to recovery for non-economic damages in his medical malpractice action. *Id.* at 167. The court held the carrier could not enforce their lien under chapter 85 because it would allow the carrier to recoup amounts paid to Toomey for non-economic damages. *Id.* at 168. The court held application of section 147.136 and a chapter 85 lien would subject Toomey to a double reduction; once because Toomey would not be allowed to recover economic

damages from the physician, and once because the carrier would recoup payments made out of Toomey's recovery for noneconomic damages from the physician. *Id.*

We do not find *Toomey* applicable to Bangs' case for two reasons. First, *Toomey* involved two statutes which were in conflict. Bangs' claim does not. Second, a double reduction, like the one present in *Toomey* does not occur in Bangs' case. In *Toomey* one reduction was from the operation of section 147.136 which precluded Toomey from an award of economic damages of any type in his medical malpractice action. Bangs did not have such a limit in her third-party tort action. She was allowed to recover, and did recover, substantial economic damages in her third-party claim. Rather than *Toomey*, the holding of our supreme court in *Sourbier* applies.

Because we find the holdings of our supreme court specifically entitle Kmart to seek indemnification from Bangs' entire award, we affirm the trial court's ruling awarding Kmart $70,682.29. We do, however, amend the trial court's application of interest at the rate of ten percent per annum, simple, accruing from and after December 29, 1995, on $62,100.86 in accordance with our supreme court's holding in *Cincinnati Ins. Co. v. Konicek*, 503 N.W.2d 420 (Iowa 1993). Interest at the rate of five percent per annum, simple, will accrue after Bangs receives the third-party award.

AFFIRMED AS MODIFIED.

No. 97-0686. [8-397] KMART CORP. v. BANGS

Appeal from the Iowa District Court for Story County, William Pattinson, Judge. **AFFIRMED AS MODIFIED.** Heard by Huitink, P.J., and Streit and Mahan, JJ. Opinion by Streit, J. Sackett, C.J., takes no part. (6 pages $2.40)

Lorraine Bangs appeals the trial court's judgment entitling her employer, Kmart, to subrogation rights for workers' compensation benefits paid to Bangs. The court held Kmart was entitled to recoup benefits paid from the economic and non-economic damages Bangs received in a third-party tort claim. Bangs contends Kmart should only be indemnified from Bangs' recovery for economic damages and not from non-economic damages. There does appear to be a disparity in the operation of Iowa Code section 85.22 and our case law regarding an employer's indemnification rights after paying workers' compensation benefits to an injured employee. Chapter 85 allows an injured employee to collect only economic damage, such as lost wages, medical expenses, and cost of transportation. Under our case law, however, an employer is entitled to be reimbursed from non-economic damages recovered in third-party actions. In this way, an employer is entitled to draw reimbursement from a character of funds the employer never paid to the employee. Despite this apparent disparity, Bangs' claim must fail on appeal. Our supreme court has definitively decided this issue in *Sourbier v. State*, 498 N.W.2d 626 (Iowa 1993): "[A]n employer is fully entitled to be reimbursed from third-party recoveries for pain and suffering, even when the portion of an award attributable to pain and suffering is clearly separable from the portion attributable to economic losses." We do not find *Toomey* applicable to Bangs' case.