IN THE COURT OF APPEALS OF IOWA

No. 0-594 / 99-1368
Filed January 24, 2001

IN RE THE ESTATE OF DAVID BOYD,
Deceased,-Appellee/Cross-Appellant,

ESTATE OF BERTA BOYD,
Deceased,
Appellant,
vs.

GEORGE NORMAN and OLD REPUBLIC SURETY CO.,
Appellees.

FILED
JAN 24 2001
CLERK SUPREME COURT

Appeal from the Iowa District Court for Lee County, John G. Linn, Judge.

Uninsured motorist insurer, on behalf of the estate of insured killed in a car accident, appeals a district court order overruling insurer's motion for judgment against the administrator of the tortfeasor's estate and the administrator's surety. **AFFIRMED.**

James A. Pugh of Morain, Burlingame & Pugh, P.L.C., West Des Moines, for appellant.

Benjamin B. Ullem and Richard J. Kirschman of Whitfield & Eddy, P.L.C., Des Moines, for appellees.

Considered by Zimmer, P.J., and Hecht and Vaitheswaran, JJ. Miller, J. takes no part.

ZIMMER, P.J.

Farm Bureau as the uninsured motorist insurer, on behalf of the estate of an insured killed in a car accident, appeals a district court order overruling its motion for judgment against George Norman, the administrator of the tortfeasor's estate, and Norman's surety. Farm Bureau argues the district court erred in concluding it had not preserved its ability to pursue the claim against the tortfeasor's estate. It asserts it is entitled to recoup assets improperly distributed by Norman from the tortfeasor's estate. We affirm.

David and Berta Boyd, husband and wife, both died in a one-car accident on July 8, 1990. David had been drinking earlier in the evening and was driving when the accident occurred. Both died intestate and were survived by one minor son, Jazzber. Their automobile was insured by Farm Bureau Mutual Insurance. Not long after the accident, Berta's estate was opened, along with a conservatorship for Jazzber. Robert Johnson III acted as attorney both for Berta's estate and for Jazzber's conservator. On August 6, 1990, David's estate was opened for administration. George Norman was eventually named administrator of David's estate. Old Republic Surety Company filed a court officer's bond of $10,000 on behalf of Norman. Notices to creditors of David's estate were published in a local newspaper on August 10 and 17, 1990. On March 29, 1991, Norman filed a probate report showing David's estate had a net worth of $49,049. On May 28, 1993, Norman distributed the $49,049 from David's estate to Jazzber's conservator without prior judicial authorization.

Meanwhile, on September 5, 1991, attorney Johnson, on behalf of Jazzber's conservatorship and Berta's estate, filed a wrongful death suit against

David's estate and his insurer, Farm Bureau. On September 25, Farm Bureau filed an answer that asserted various defenses, including its subrogation rights to any recovery by Berta's estate from David's estate. The wrongful death case was ultimately submitted to the district court on two stipulations. In the first stipulation, all parties agreed to the following: Berta's estate suffered $300,000 in damages; David's estate was legally liable for the damages; the Farm Bureau policy provided $100,000 in applicable uninsured motorist (UM) benefits; and David's estate would be treated as uninsured for the purposes of the lawsuit. In a supplemental stipulation, the parties agreed to the following facts: the four-month period for filing claims in David's estate expired December 17, 1990; the wrongful death suit was filed against Farm Bureau on September 5, 1991; Farm Bureau did not file a claim in the estate of David Boyd; and Farm Bureau did not file suit against David's estate to enforce its subrogation rights or make a cross-claim against David's estate in the wrongful death suit. On March 4, 1994, the court entered judgment against David's estate in favor of Berta's estate for $300,000. The court also concluded that Berta's estate could collect $100,000 from Farm Bureau, but Farm Bureau's liability was offset by Jazzber's settlement with a dramshop and the May 1993 probate distribution to him, amounts that exceeded $100,000. The district court dismissed Farm Bureau from the suit.

The case was appealed to the Iowa Supreme Court. *See Fort Madison Bank & Trust Co. v. Farm Bureau Mut. Ins. Co.*, 543 N.W.2d 591 (Iowa 1996). The supreme court reversed the district court, concluding that the other amounts recovered were not to be offset against Farm Bureau's liability under the uninsured motorist policy. *See id.* The supreme court found for Berta's estate

against Farm Bureau in the amount of $100,000 plus interest. *Id.* In September of 1996, after more wrangling between Farm Bureau and Berta's estate, the district court concluded there had been an accord and satisfaction of Farm Bureau's liability after Berta's estate cashed a check from the insurer. That order was affirmed on appeal and Berta's estate acknowledged satisfaction in October of 1998.

In January of 1999, Farm Bureau, on behalf of Berta's estate, filed a "Motion for Judgment Against Administrator and Surety" against Norman and his surety. This is the matter currently on appeal. In its motion, Farm Bureau claimed that the May 28, 1993 distribution to Jazzber's conservator from David's estate improperly depleted estate assets, assets that normally would have been available to satisfy the judgment obtained by Berta's estate. Any payment on Berta's estate's judgment would ultimately have reduced Farm Bureau's uninsured coverage obligations. In response, Norman and Johnson disputed the claim. Both asserted the May 28, 1993 probate disbursement was made because the three-year final estate settlement deadline, contained in Iowa Code section 633.473, was approaching. They also pointed out that Farm Bureau never made a claim in David's estate until February 1996, long after the December 17, 1990 deadline for filing claims. Farm Bureau also did not make a cross-claim against David's estate in the wrongful death suit or file a separate action against David's estate.

The district court entered its ruling on the motion for judgment. Although the case was tried in equity, the court treated Farm Bureau's motion as a contested claim in David's estate. The district court concluded Farm Bureau

should have filed a cross-claim against David's estate or filed a claim in the estate to preserve its subrogation rights. Therefore, Farm Bureau was not an interested party at the time of the allegedly improper distribution and could not contest the disbursement to Jazzber's conservator.

Farm Bureau appeals. Farm Bureau claims it need not have filed a claim in the estate or a cross-claim in the tort suit because it is not enforcing its own subrogation claim. Rather, it purports to enforce the remainder of the judgment obtained by Berta's estate against David's estate—the $200,000 not covered by her uninsured motorist policy. This judgment, asserts Farm Bureau, can still be enforced by it and Norman improperly depleted David's estate's assets. On the other hand, Norman asserts that Farm Bureau is in fact trying to enforce its subrogation rights against the tortfeasor, David, which rights the district court found Farm Bureau had not preserved.

I. Scope of Review. The trial court conducted the hearing on this matter in equity. We have frequently held that upon appeal we will consider the case as being in the same forum in which it was tried below. *Jackson Wholesale Florists v. Schappaugh Floral,* 70 N.W.2d 154, 156, 246 Iowa 1189, 1192 (Iowa 1955). However, in its final ruling on Farm Bureau's motion, the trial court treated the case as a contested claim in the estate and, therefore, considered it a law action. Accordingly, we review for the correction of errors of law. *See* Iowa Code § 633.33 (2001). The trial court's findings of fact have the effect of a special verdict which is binding upon us if supported by substantial evidence. *Jackson Wholesale Florists,* 70 N.W.2d at 156, 246 Iowa at 1192.

II. Viability of Farm Bureau's Claim. First, Farm Bureau asserts that its current action is not an effort to establish a contested claim in David's estate. Instead, it argues it was asserting Berta's estate's claim, not its own. Therefore, it was never required to file its own claim against David's estate within the statutory four-month claim period contained in Iowa Code section 633.410. We disagree. Farm Bureau appears to be attempting an end-run around the earlier supreme court decision in this case, which held that Farm Bureau was not entitled to set off from its liability to Berta's estate the distribution made to the heir, Jazzber. This attempt to enforce its own subrogation claim by purporting to assert the remainder of Berta's estate's claim is belied by the fact that Farm Bureau filed its February 16, 1996 "notice of pending claim" in David's estate in its own name. The district court properly characterized Farm Bureau's motion as a claim against David's estate, governed by the claim process contained in Iowa's probate code.

Furthermore, we find substantial evidence supporting the district court's finding that Norman did not improperly distribute estate assets when he made the May 28, 1993 transfer to Jazzber's conservatorship. The distribution was made thirty-three months after the estate was opened. Iowa Code section 633.473 requires estates to be handled within thirty-six months of being opened. Iowa Code section 633.160 makes a fiduciary liable for failure to close an estate within the code's time limits. Farm Bureau suggests Norman acted improperly by failing to obtain a court order before making the distribution. Not only is a court order not required for a personal representative to make a distribution to beneficiaries, there is no specified time schedule within which such distributions may be made.

See In re Estate of Foster, 483 N.W.2d 327, 329 (Iowa 1992). The distribution was made in good faith recognition of an administrator's obligation to timely handle an estate and not for any improper purpose.

We also question Farm Bureau's ability to challenge the disbursement. Iowa Code section 633.122 provides "[t]he acts of the fiduciary without prior approval of court after notice, may be contested by any *interested person* . . ." (emphasis added). At the time of the distribution in May of 1993, Farm Bureau had not established its status as an interested party by timely filing a claim in David's estate. David's estate was opened on August 6, 1990. The second notice to creditors was published on August 17, 1990. Unless a claim against an estate is filed within four months after the date of second publication, Iowa Code section 633.410 forever bars the claim:

> All claims against a decedent's estate, other than charges, whether due or to become due, absolute or contingent, liquidated or unliquidated, founded in contract or otherwise, are forever barred against the estate, the personal representative, and the distributees of the estate, unless filed with the clerk within . . . four months after the date of the second publication of the notice to creditors, ...

Section 633.418 describes the form in which such claims must be made. Farm Bureau stipulated that it did not file a claim in David's estate prior to the deadline, which fell on December 17, 1990. It waited until February 6, 1996, to file its claim, which was not in the form required by section 633.418 and was untimely.

Farm Bureau has not demonstrated that it pursued any other options for enforcing its subrogation rights. In lieu of filing a claim in the estate, a party may file a separate action based on the decedent's liability under Iowa Code section 633.415. However, such separate actions must also be filed within the time limits of section 633.410. *See* Iowa Code § 633.415. Farm Bureau contends it

preserved its current claim by asserting its subrogation rights as an affirmative defense in its answer to Berta's wrongful death petition. However, a civil action is commenced by filing a petition with the court. *See* Iowa R. Civ. P. 48; *see also Stalter by Stalter v. Iowa Resources, Inc.*, 467 N.W.2d 586, 588 (Iowa App. 1991) (dismissing codefendant from action where codefendant never filed pleading against other defendant seeking indemnification, either through petition or counterclaim). Farm Bureau did not file a cross-claim against David's estate. David's estate had no means of filing an 'answer' to Farm Bureau's answer. Therefore, it also did not preserve its claim by filing a separate action.

Section 633.410 provides two other means for Farm Bureau to have preserved its claim: "This section does not bar claims for which there is insurance coverage, to the extent of the coverage, . . . or claimants entitled to equitable relief due to peculiar circumstances." Farm Bureau purports to enforce the remainder of Berta's estate's judgment. It points out that her estate's suit was not within the four-month claims period, but David's estate's failed to assert section 633.410 as a bar to that suit. Berta's estate's claim *was* outside the four-month limitation for claims contained in section 633.410. However, David's estate was not required to assert the nonclaim statute against Berta's estate's lawsuit because, to an extent, that claim was covered by insurance. The remainder of her claim not satisfied by insurance, $200,000, is barred. Thus the only remaining alternative to Farm Bureau is to demonstrate peculiar circumstances for failing to file a cross-claim or a claim in the estate within the four-month period.

Peculiar circumstances exist when

> the delay beyond the period fixed by statute for filing claims be so excused and explained as that, when considered in connection with the claim asserted and the condition of the estate, good conscience and fair dealing demand that a hearing on the merits be accorded the claimant.

Evjen v. Brooks, 372 N.W.2d 494, 498 (Iowa 1985) (quoting 176 Iowa 647, 659, 158 N.W. 684, 688 (1916)). The district court properly concluded that Farm Bureau failed to demonstrate 'peculiar circumstances' to excuse the late filing of its claim. Farm Bureau could have easily preserved its subrogation rights by filing a cross-claim against the estate. It did not show any extrinsic circumstances which caused it to delay filing its claim, such as misrepresentations made by a representative of David's estate. Furthermore, in a prior opinion in this case, the Iowa Supreme Court never implied the probate disbursement to Jazzber was improper or that Farm Bureau had any subrogation interest in that distribution.

In fact, in its earlier opinion, the Iowa Supreme Court implied the opposite. The supreme court suggested that Farm Bureau can only recover what Berta's estate could recover. *See Fort Madison Bank & Trust,* 543 N.W.2d at 594 (approving offsets from the insurer's obligations to the insured assuming "the monies sought to be offset by the insurer were received by the party . . . seeking to recover [uninsured motorist] benefits."). The court went on to conclude that Jazzber is a separate legal entity from his mother's estate, any probate disbursements to Jazzber's conservator were solely Jazzber's property, and anything he received could not be offset from Farm Bureau's obligation to Berta's estate. Finally, the supreme court stated that "Berta's estate had no interest in the . . . probate disbursement . . . ." *Id.* at 595-96. It is difficult for us to fault

David's estate's administrator for a distribution that the Iowa Supreme Court suggested was proper.

Farm Bureau claims that is was unable to file a claim in its own name and must pursue this claim in the name of Berta's estate. It is true that under Iowa law, a partially subrogated insurer may not pursue its subrogation claim directly against the tortfeasor at any time absent some inability or unwillingness of the subrogor to pursue the entire claim. *Farm Bureau Mut. Ins. Co. v. Allied Mut. Ins. Co.*, 580 N.W.2d 788, 789 (Iowa 1998). However, in this case, the administrator of Berta's estate indicated that he was unwilling to pursue the remainder of the judgment not covered by insurance ($200,000). Therefore, Farm Bureau was permitted to proceed in its own name directly against the tortfeasor.

In summary, because Farm Bureau failed to file a timely claim in David's estate and failed to file a cross-claim in the wrongful death suit, Farm Bureau is barred from establishing a judgment against Norman and contesting the disbursement.

AFFIRMED.