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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 1-136 / 90-1334

DONNA RITZ and **DIANE BRYSON,**

Plaintiffs-Appellants,

383

vs.

GARY BRODERSON, UNKNOWN DRIVER OF THE BRODERSON VEHICLE,

Defendants,

and

AMERICAN FAMILY MUTUAL INSURANCE COMPANY

Defendant-Appellee,

and

GENERAL CASUALTY OF WISCONSIN,

Defendants.

Appeal from the Iowa District Court for Muscatine County, Jack L. Burns, Judge.

This is a dispute over $3,009.40. American Family had advanced this sum to pay plaintiffs' medical claims following an auto accident. Plaintiffs sued American Family. American Family brought a pretrial motion for adjudication of law points in which the court found American Family would have a $3009.40 set-off against any recovery plaintiff's might have against American Family. After the jury found for American Family on plaintiffs' claim, American Family demanded return of the money. Plaintiffs refused and filed a "motion for clarification of

judgment." The district court entertained the "motion" and found that counsel had an agreement that American Family's subrogation interest would be protected and that the money should be remitted. On appeal, plaintiffs believe that the district court erred because American Family's subrogation claim was a compulsory counterclaim which had not been waived by plaintiffs. They argue that the subrogation claim is barred by claim preclusion because it was adjudicated to be only a set-off against recovery by a prior court ruling. **DECISION OF DISTRICT COURT VACATED.**

Walter Conlon of Metcalf, Conlon & Siering, Muscatine, for appellants.

John D. Stonebraker of McDonald, Stonebraker & Cepican, P.C., Davenport, for appellee.

Considered by Oxberger, C.J., and Donielson and Sackett, JJ.

DONIELSON, J.

A May 2, 1987, automobile accident led to the present dispute. In that accident, an automobile owned by Gary Broderson struck another automobile owned by Kevin Harmon. Gary Broderson was insured by General Casualty of Wisconsin (General Casualty). Kevin Harmon was insured by American Family Mutual Insurance Company (American Family).

Diane Bryson was the driver of Harmon's automobile at the time of the accident. Donna Ritz was a passenger in that automobile. Both Bryson and Ritz incurred medical expenses claimed to have arisen from the accident. American Family paid $3,009.40 toward the medical expenses. Under its policy, American Family was subrogated to any recovery Bryson and Ritz might obtain against a third party.

Bryson and Ritz, plaintiffs, brought a personal injury action against Broderson. They also sued both insurance companies under their medical, uninsured motorist and underinsured motorist coverages. Before trial, but after American Family had made its payments to the plaintiffs, General Casualty paid the plaintiffs $15,875 to settle the claims against it and its insured, Broderson. The claims remaining against American Family proceeded to trial. On June 9, 1990, a jury found for American Family on all claims. Judgment was entered. No appeal was taken.

The issues presented in this appeal arise from the pretrial actions and proceedings taken by the plaintiffs

and American Family. The disputes center on the $3,009.40 paid by American Family to the plaintiffs, various letters counsel mailed to each other prior to trial, and the effect of American Family's failure to file a counterclaim.

At no time did American Family file a counterclaim for subrogation. Rather, American Family successfully sought a pretrial ruling which provided a setoff of its subrogation interests against any recovery the plaintiffs might obtain at trial.

On March 16, 1990, in its motion to adjudicate law points, American Family asked the court to rule as a matter of law that it had subrogation rights in the amount of $3,009.40. Plaintiffs objected to such a determination on the grounds that in the underlying action no counterclaim had been filed by American Family against the plaintiffs. American Family's counsel then indicated that no affirmative judgment was sought on the subrogation claim; but rather, American Family sought only a set off. The district court ruled in American Family's favor. The court ruled that American Family would be entitled to a $3,009.40 set off against any recovery the plaintiffs might have.

However, the jury found that plaintiffs were not entitled to recover against American Family. Judgment was entered on this verdict on June 9, 1990. When American Family asked for the return of payments it had made to the plaintiffs prior to trial, the plaintiffs refused to remit the sum. After unsuccessful negotiations, the plaintiffs

filed a motion requesting that the court clarify its judgment on the adjudication of law points motion. This "motion for clarification of judgment" was filed on June 26, 1990.

Claimants asserted that because there was no recovery, there could be no set-off. Claimants argued that had American Family desired to preserve its right to seek subrogation, it should have filed a counterclaim against the claimants. American Family argued that, in neglecting to file a counterclaim, it had relied on a bargain struck between the parties evidenced by a series of letters written by counsel. In one such letter, claimants' counsel indicated, "I am protecting your [American Family] subrogation claim". The disputed money had been placed in a money market account by plaintiffs' counsel. The court found that the correspondence between counsel constituted a subrogation agreement to hold the money in escrow until it was determined which party was entitled to the funds. The court also rejected the notion that American Family had to file a counterclaim to protect its interests.

On appeal, claimants argue that American Family's subrogation claim is barred by the compulsory counterclaim provisions of Iowa Rule of Civil Procedure 29. They also argue that American Family's reliance upon what it believed to be a waiver by the claimants of the requirements of Rule 29 was misplaced.

I. Appellate Jurisdiction. The question of whether the court has jurisdiction to hear an appeal may be raised on motion of the reviewing court at any stage of the proceedings. Sulzberger Excavating, Inc. v. Glass, 351 N.W.2d 188, 191 (Iowa App. 1984). We can assume jurisdiction only if the trial court had jurisdiction. Danish Book World, Inc. v. Board of Adjustment, 447 N.W.2d 558, 559 (Iowa App. 1989). Subject matter jurisdiction cannot be conferred on the district court by waiver, estoppel or consent. Walles v. International Brotherhood of Electrical Workers, 252 N.W.2d 701, 710 (Iowa), cert. denied, 434 U.S. 856 (1977).

In this case, the court had neither a filed action before it nor a statutory duty to perform. See Central Life Insurance Co. v. Aetna Casualty & Surety Co., 466 N.W.2d 257, 262 (Iowa 1991). "A civil action is commenced by filing a petition with the court." Iowa R. Civ. P. 48. The plaintiffs/appellants in this case filed a "motion for clarification of judgment." We do not know what this is. We do know a motion "is not a pleading." Iowa R. Civ. P. 109. Even were we to treat claimants' motion as a petition, the instrument does not state whether it is at law or in equity. A petition must do so. Iowa R. Civ. P. 70. Thus, in attempting to address the issues raised, we would be unable to determine our scope of review. Iowa R. App. P. 4.

While Iowa Code Chapter 678 provides a method by which the district court may otherwise gain jurisdiction, the requirements under this chapter were not met. See Iowa Code ch. 678 (1991). Under chapter 678, "[p]arties to a question in difference, which might be the subject of a civil action, may, without action, present an agreed statement of the facts to any court having jurisdiction of the subject matter." Iowa Code § 678.1 (1991). "It must be shown by affidavit that the controversy is real, and that the proceeding is in good faith to determine the rights of the parties thereto." Iowa Code § 678.2 (1991). The parties to the instant appeal complied with neither of these required procedures.

Any argument that the claimant's "motion to clarify" was a motion to enlarge or amend pursuant to Iowa Rule of Civil Procedure 179(b) is misplaced. The time for filing a Rule 179(b) motion had elapsed when the "motion to clarify" was filed, thus depriving the district court of jurisdiction to hear such a motion. The "motion to clarify" was filed seventeen days after judgment had been entered in the preceding case.

Therefore, because the district court lacked jurisdiction to address these issues, we vacate its decision. The costs of these proceedings are taxed to the appellants.

DECISION OF THE DISTRICT COURT VACATED.