NOT DESIGNATED FOR PUBLICATION

No. 112,292

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

ANDREW HENSON,
Appellee,

and

BELGER CARTAGE SERVICE, INC.,
Appellant,

v.

RONALD DAVIS, M.D.,
Appellee.

MEMORANDUM OPINION

Appeal from Sedgwick District Court; MARK A. VINING, judge. Opinion filed October 16, 2015. Affirmed.

Patrick J. Murphy and *Ryan D. Weltz*, of Wallace, Saunders, Austin, Brown & Enochs, Chartered, of Wichita, for appellant.

Blake A. Shuart, of Hutton & Hutton Law Firm, L.L.C., of Wichita, for appellee Andrew Henson.

Before MALONE, C.J., LEBEN, J., and HEBERT, S.J.

LEBEN, J.: Andrew Henson was badly injured at work when he was pinned between a printing press and a large crate. Accordingly, his employer, Belger Cartage Service, Inc., had to pay for his medical treatment and provide disability compensation under the Workers Compensation Act.

Henson believed the first doctor who treated him committed medical malpractice, and he sued the doctor. A jury agreed with Henson and awarded substantial damages.

After trial, Belger Cartage asked that the district court give it credit in the amount of the remainder of the lawsuit recovery against future medical expenses it might otherwise be required to pay for Henson's continued treatment. The district court denied that request, and Belger Cartage has appealed to this court. Based on our Supreme Court's ruling in *Wishon v. Cossman*, 268 Kan. 99, Syl. ¶ 2, 991 P.2d 415 (1999), we conclude that the district court ruled correctly.

Henson did not seek recovery in his medical-malpractice case for any future medical expenses, so the jury did not award him any. Yet Belger Cartage seeks a credit against those very expenses through its lien rights under K.S.A. 44-504(b). Our Supreme Court said in *Wishon* that an employer's interest under K.S.A. 44-504(b) applies "only to the extent that the worker's recovery duplicates compensation and medical expenses paid by the employer under the Workers Compensation Act." 268 Kan. 99, Syl. ¶ 2. Because Henson did not get any money in the lawsuit for future medical expenses and medical expenses are the only future costs Belger Cartage might have to pay, Belger Cartage is not entitled to any credit based on the malpractice recovery.

FACTUAL AND PROCEDURAL BACKGROUND

To answer the limited question at issue in this appeal, we need only sketch an outline of the background facts in the case.

Henson had been helping load a printing press while a coworker was driving a forklift to move a large crate. The forklift driver went too fast, causing the crate to slide in Henson's direction and pinning him against the printing press. Henson was knocked

out and woke up lying on the ground struggling to breathe. Coworkers loaded him into a pickup truck to take him to a hospital emergency room, but a Belger Cartage manager redirected them to a nearby clinic. A doctor at that clinic treated Henson that day and for several days afterward, returning Henson to work. See *Henson v. Belger Cartage Service, Inc.*, 2011 WL 5341314, at *2-3 (Kan. Work. Comp. App. Bd. 2011).

Later, Henson was hospitalized, underwent surgery, and had a pacemaker implanted. Although he went back to work, he was restricted to lifting no more than 15 pounds; Henson was eventually laid off and did not work again.

Henson recovered damages for his injuries in two proceedings. The first was a workers-compensation case to determine what his employer should pay for his on-the-job injuries. In that case, Belger Cartage paid Henson $125,000 in disability benefits; it also paid medical expenses costing $192,000. The second case was a medical-malpractice case for negligence, as Henson believed the negligence of the initial treating doctor had caused him harm. There, Henson recovered $735,900, a portion of which represented loss-of-consortium damages. Loss-of-consortium damages were awarded to compensate Henson's wife for the loss of household services from Henson, and they are not compensable under the Workers Compensation Act. See K.S.A. 2014 Supp. 23-2605; *Fisher v. State Farm Mut. Auto. Ins. Co.*, 264 Kan. 111, 123, 955 P.2d 622 (1998). Henson did not ask the jury to award any damages for future medical expenses.

After the jury verdict in Henson's favor in the medical-malpractice case, Belger Cartage asked to have a lien against the recovery for payments it had already made. Belger Cartage recognized that it had no potential lien or credit against the loss-of-consortium damages. In addition, its potential lien amount was reduced to cover a portion of the attorney fees and costs incurred in the lawsuit. See K.S.A. 44-504(b). After subtracting the loss-of-consortium damages and a portion of the attorney fees and costs, the district court awarded Belger Cartage $216,385.90 from the recovery to reimburse it

for the amounts it had already paid in disability benefits and medical expenses. That award fully reimbursed Belger Cartage for everything it had paid to that date.

Belger Cartage also asked for a credit against any *future* medical expenses it might have to pay. The district court denied that request, which prompted this appeal.

ANALYSIS

Both parties agree that Belger Cartage may yet have to provide medical care made necessary by Henson's on-the-job injury. Our question on appeal is a narrow one: Is Belger Cartage entitled to a credit against these potential future medical expenses?

We have already noted the two points that we find decisive in answering this question: (1) Henson didn't recover a dime for future medical expenses in his lawsuit; and (2) an employer has no right to a credit against sums it pays that don't duplicate money recovered in the underlying lawsuit. The first point is uncontested; the second was clearly set out by our Supreme Court in *Wishon*: "K.S.A. 44-504(b) grants employers subrogation liens on tort recoveries by injured workers only to the extent that the worker's recovery duplicates compensation and medical expenses paid by the employer under the Workers Compensation Act." 268 Kan. 99, Syl. ¶ 2.

Of course, we are required to follow the decisions of our Supreme Court—unless that court has given "some indication that [it] intended to depart from its prior position." *State v. Hall*, 298 Kan. 978, 983, 319 P.3d 506 (2014). That's where Belger Cartage has staked its claim on appeal. Its contentions boil down to this: (1) since *Wishon*, our Supreme Court has changed its method of statutory interpretation and now will ignore a statute's purpose when its language is unambiguous; (2) K.S.A. 44-504(b) unambiguously grants it a credit; and (3) we therefore must apply the unambiguous statutory language rather than the previous directive from *Wishon*.

Let's start with Belger Cartage's first claim—that our Supreme Court's post-*Wishon* statutory-interpretation decisions indicate that *Wishon* is no longer good law. In support of its argument, Belger Cartage cites *Bergstrom v. Spears Manufacturing Co.*, 289 Kan. 605, 214 P.3d 676 (2009), and *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 154 P.3d 494 (2007).

In *Bergstrom*, the court overruled a series of Kansas Court of Appeals decisions that had held that an employee could not obtain work-disability benefits unless the employee put forth a good-faith effort to seek new employment. The statutory provision on work-disability payments said nothing about good-faith efforts to seek employment, and the court refused to "read the statute to add something not readily found in it." 289 Kan. at 608.

In *Casco*, the court overruled one of its own past cases, *Honn v. Elliott*, 132 Kan. 454, 295 P. 719 (1931), which involved how to calculate a worker's disability when the employee suffered a "parallel injury," such as to both hands or both feet. *Honn* had allowed a general-disability award in these cases, rather than the award set for a particular injury. But the *Casco* court found no statutory language that would support that result, 283 Kan. at 524-27, and emphasized that "[a] statute should not be read to add that which is not contained in the language of the statute." 283 Kan. at 521.

To be sure, the *Bergstrom* and *Casco* cases indicate that our Supreme Court has focused more closely on statutory language than intent when interpreting the Workers Compensation Act, and the court in each case expressed an unwillingness to read terms into that Act that weren't there. We note, though, that *Wishon*, a 1999 decision, is not much older than *Casco* (2007) and *Bergstrom* (2009). And the court has restated the basic position of *Wishon*—that a major purpose of K.S.A. 44-504(b) was "'to prevent double recoveries by injured workers'"—as recently as 2007, in an opinion filed several months

after *Casco*. See *Edwards v. Anderson Engineering, Inc.*, 284 Kan. 892, 896-97, 166 P.3d 1047 (2007) (quoting *PMA Group v. Trotter*, 281 Kan. 1344, 1348-49, 135 P.3d 1244 [2006]). If we are to depart from *Wishon*, we must see some indication that the Kansas Supreme Court intends to do so. *Hall*, 298 Kan. at 983.

Earlier this year, in *State v. James*, 301 Kan. 898, 349 P.3d 457 (2015), our Supreme Court summarized its statutory-interpretation rules. The court noted that plain language "is typically determinative of legislative intent" but that statutes also must be construed to avoid unreasonable or absurd results:

> "The fundamental rule of statutory interpretation is that the intent of the legislature is dispositive if it is possible to ascertain that intent. *State v. Looney*, 299 Kan. 903, 906, 327 P.3d 425 (2014). The language of a statute is our primary consideration in ascertaining the intent of the legislature. 299 Kan. at 906. Where such language is plain and unambiguous, it is typically determinative of legislative intent. *State v. O'Connor*, 299 Kan. 819, 822, 326 P.3d 1064 (2014). We must, however, construe statutes to avoid unreasonable or absurd results. *Northern Natural Gas Co. v. ONEOK Field Services Co.*, 296 Kan. 906, 918, 296 P.3d 1106, *cert. denied* 134 S. Ct. 162 (2013)." 301 Kan. at 903.

With these standards in mind, we must determine whether K.S.A. 44-504(b) is so plainly in Belger Cartage's favor that we should depart from *Wishon*, and in doing so we may consider whether that interpretation would lead to unreasonable or absurd results.

K.S.A. 44-504(b) provides employers a subrogation right—the right of a party who pays an obligation to recover from another party who ought to have paid—when the employee sues a third party who was responsible for all or part of the employee's injury. In its first sentence, it provides for a lien against amounts recovered "to the extent of the compensation and medical aid provided by the employer to the date of such recovery." In its fourth sentence, it provides for a credit "against future payments" of either workers-

compensation benefits or "medical aid" if the employee receives a recovery greater than what the employer has paid thus far:

> "*In the event of recovery from such other person by the injured worker or the dependents or personal representatives of a deceased worker by judgment, settlement or otherwise, the employer shall be subrogated to the extent of the compensation and medical aid provided by the employer to the date of such recovery and shall have a lien therefor against the entire amount of such recovery, excluding any recovery, or portion thereof, determined by a court to be loss of consortium or loss of services to a spouse.* The employer shall receive notice of the action, have a right to intervene and may participate in the action. The district court shall determine the extent of participation of the intervenor, including the apportionment of costs and fees. *Whenever any judgment in any such action, settlement or recovery otherwise is recovered by the injured worker or the worker's dependents or personal representative prior to the completion of compensation or medical aid payments, the amount of such judgment, settlement or recovery otherwise actually paid and recovered which is in excess of the amount of compensation and medical aid paid to the date of recovery of such judgment, settlement or recovery otherwise shall be credited against future payments of the compensation or medical aid. . . .*" (Emphasis added.) K.S.A. 44-504(b).

Belger Cartage bases its argument on that fourth sentence, which literally provides that the "amount of [the] judgment" recovered in the lawsuit that "is in excess of the amount of compensation and medical aid paid" to date "shall be credited against future payments of the compensation or medical aid." The judgment was in excess of the amount Belger Cartage had paid, so this language—taken by itself—would suggest Belger Cartage should receive a credit.

But the fourth sentence of K.S.A. 44-504(b), which deals with credits against future payments by the employer, cannot be read in isolation. For example, it contains no exception for loss-of-consortium recoveries; that's found explicitly only in the first sentence, which deals with the employer's lien for payments it made before the

employee's recovery from a third party. Yet even Belger Cartage concedes on appeal that it does not get to take a credit for the amount awarded for loss of consortium.

The reason for this concession is that "appellate courts must consider various provisions of an act in pari materia [Latin for in the same matter] with a view toward reconciling and bringing the provisions into workable harmony if possible." *State v. Keel*, No. 106,096, 2015 WL 5081212, at *10 (Kan. 2015). Here, the first sentence, which applies literally only to the employer's ability to have a lien against the amount of the initial recovery, has an exception for loss-of-consortium recoveries. The fourth sentence, which applies to the employer's credit against future obligations when the employee has recovered *more* than the employer has already paid, does not mention loss of consortium at all.

But both the lien and the credit are merely the means used to enforce the employer's *subrogation* right. So when we read the first and fourth sentences together, as we must, we recognize that neither the employer's lien nor its credit can be used against a loss-of-consortium recovery.

In our case, though, the issue before us is not whether Belger Cartage gets to use its lien or credit against a loss-of-consortium recovery: Belger Cartage agrees it can't. We must consider whether it can use a credit (in the amount of sums Henson recovered in his lawsuit) against future medical expenses, even though Henson's lawsuit recovery didn't include anything for future medical expenses. To determine what the statute is telling us about this question, we must consider what subrogation rights are. The Workers Compensation Act doesn't define the term "subrogation," even though K.S.A. 44-504(b) tells us that the "employer shall be subrogated to the extent of the compensation and medical aid provided by the employer" when the injured employee recovers from someone else.

But subrogation is a term that has an accepted legal meaning. And a Kansas statute directs that when interpreting statutes, technical words or ones that have a "peculiar and appropriate meaning in law[] shall be construed according to their peculiar and appropriate meanings." K.S.A. 2014 Supp. 77-201 *Second*; see *Rose v. Via Christi Health System, Inc.*, 279 Kan. 523, 527, 113 P.3d 241 (2005).

So we now turn our attention to what this legal term's accepted legal meaning is. We will not try to explain everything about subrogation in this opinion, but at its core "'[s]ubrogation' simply means substitution of one person for another." *U.S. Airways v. McCutchen*, 569 U.S. ___, 133 S. Ct. 1537, 1546 n.5, 185 L. Ed. 2d 654 (2013). With respect to Henson's injuries caused by medical malpractice, the treating physician, Dr. Davis, is primarily responsible for paying Henson any damages caused by those injuries. But since we want to make sure that injured workers are promptly and fully treated, the Kansas Workers Compensation Act initially substitutes the employer, Belger Cartage, for Dr. Davis. So the substitute party initially pays but has a subrogation right to be reimbursed by the primarily responsible party.

An essential element of this subrogation relationship in most circumstances is that the party secondarily responsible—but relied upon to make the initial payment—gets reimbursed when the primarily responsible party pays, but *only to the extent that it has contributed to the primary party's payment*, namely when both parties have paid for the same things. That prevents a double recovery by the person to whom the payment was owed—in our case, the injured party, Henson.

This is set out quite clearly in Section 141, the section on subrogation, of the Restatement (First) of Security (1941). To compare its provisions with our case, we must first review the names it uses for the parties:

- a creditor, the party to whom some obligation is due (in our case, the injured party, who is entitled to damages to compensate for the medical malpractice);

- a principal, the party primarily responsible for the obligation (in our case, the doctor who committed medical negligence while treating Henson); and
- a surety, the party secondarily responsible for the obligation (in our case, the employer and its insurance carrier), but with a right of subrogation from the principal.

With that background, we see that the surety's right to reimbursement through subrogation is limited to the portion of the satisfaction of the obligation that it has contributed to: "Where the duty of the principal to the creditor is fully satisfied, the surety *to the extent that he has contributed to this satisfaction* is subrogated . . . to the rights of the creditor against the principal . . . ." (Emphasis added.) Restatement (First) of Security § 141.

In our case, Belger Cartage's payment of *future* medical expenses cannot "contribute to" Dr. Davis' satisfaction of his obligation to Henson because Dr. Davis did not pay *any* sum for future medical expenses. Accordingly, traditional subrogation concepts would not give Belger Cartage any subrogation recovery for future medical expenses.

To be sure, parties may opt for different rules by contract, and our legislature could adopt different rules by statute. But this is the traditional concept of subrogation. And we see no indication in the language of K.S.A. 44-504(b) that our legislature sought a different meaning when it said that the employer was "subrogated" with respect to recoveries the injured worker makes from a third party.

In our view, K.S.A. 44-504(b) is fully consistent with these traditional concepts of subrogation, and *Wishon* is correctly decided. We find no support for Belger Cartage's position that our Supreme Court has indicated that it would overrule *Wishon* if the issue came before it today.

The analysis we've presented thus far resolves the primary question presented in this appeal: Is Belger Cartage entitled to a credit against Henson's potential future medical expenses? The answer is no.

We briefly conclude, though, by responding to three additional arguments Belger Cartage has made on appeal:

- Belger Cartage notes that the statute makes the employer's subrogation *lien* apply to "the entire amount of [the employee's] recovery," except sums for loss of consortium. K.S.A. 44-504(b). It contends that this supports its position that the employer's subrogation *credit* against future payments also should apply to the entire recovery. In support, Belger Cartage cites an unpublished decision from our court, *Harwood v. Feyh*, No. 108,603, 2013 WL 5187637 (Kan. App. 2013) (unpublished opinion), *rev. denied* 299 Kan. 1269 (2014). But the *Harwood* case involved a very different situation and actually shows that the "the entire amount" language serves a very different purpose. As a general proposition, when a person is insured against certain damages, "an insurer is not entitled to subrogation unless the insured has been fully made whole." *Ryder v. State Farm Mut. Auto. Ins. Co.*, 371 Ark. 508, 514, 268 S.W.3d 298 (2007); see also Jerry & Richmond, Understanding Insurance Law § 96[d][1] (5th ed. 2012) ("[T]he insured must be 'made whole' before the insurer enjoys a subrogation right."). But this language ("the entire amount") in K.S.A. 44-504(b) makes clear that Kansas does not follow the made-whole rule with regard to workers-compensation subrogation. And that's what our court ruled in *Harwood*, where the third party's insurance coverage paid less than the employee's actual damages. Even though the employee in *Harwood* had not been "made whole" by the recovered amount, since the employer's subrogation lien applies to "the entire amount" of the recovery, we held that the employer still had subrogation rights against the recovery. *Harwood* does not control here because it dealt with the *amount* of the damages that can be

subrogated; here, the parties dispute the *nature* of the damages that can be subrogated.

- Belger Cartage makes a general reference to the limited nature of its role in the underlying lawsuit, where it was allowed to intervene to protect its subrogation interest. As we understand the comments on this issue presented in its appellate brief, Belger Cartage is responding to the district court's ruling. That court relied primarily on *Wishon* but also noted that Belger Cartage had acquiesced at trial to Henson's decision not to seek future medical expenses: Belger Cartage signed off on a pretrial order in the medical-malpractice case in which Henson chose not to seek damages for future medical expenses and made no objection before trial to Henson's choice. But Belger Cartage does not argue that Henson's failure to seek these damages by itself grants it a subrogation right to the remaining recovery, nor does Belger Cartage claim that objecting to Henson's choice at or before trial would have granted it a subrogation right. Belger Carter simply states that its role at trial was limited, so its failure to object shouldn't be held against it. But whether Belger Carter did or did not object to Henson's choice not to seek future medical expenses is tangential to Belger Carter's actual argument: that the *Wishon* case is no longer good law and its subrogation credit applies against the entire recovery. Belger Cartage closed its discussion of its limited role as an intervenor by saying, "*As has already been demonstrated*, the lack of a recovery for future medical damages in the instant litigation is in no way a bar to Belger Cartage claiming its credit against the lawsuit proceeds for future medical treatment . . . ." (Emphasis added.) We have rejected Belger Cartage's position on this point.
- Finally, Belger Cartage argued that the district court should have required Henson to pay the balance of his recovery into court pending determination of its right to some further portion of those funds. Since Belger Cartage has no further right to those funds, the district court did not err.

We affirm the district court's judgment.