IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2021 MTWCC 6

WCC No. 2020-5103

BRADY HOGAN

Petitioner

vs.

FEDERATED MUTUAL INSURANCE COMPANY

Respondent/Insurer.

ORDER GRANTING IN PART AND DENYING IN PART PETITIONER'S MOTION FOR SUMMARY JUDGMENT

Summary: Petitioner moves for summary judgment, asserting that Respondent does not have a right of subrogation against his third-party tort recovery as a matter of law because § 39-71-414, MCA (2017) — the statute governing a workers' compensation insurer's right of subrogation — is unconstitutional and "wholly void." Petitioner interprets § 39-71-414(1), MCA (2017), as allowing an insurer to immediately exercise its right of subrogation against a third-party tort recovery based on the amount of workers' compensation benefits "to be paid" in the future. He argues that this subsection violates his right to due process under Mont. Const. art. II, § 17, because there are too many variables and unknowns for this Court to make a finding of the amount of benefits "to be paid" in the future and because the subsection does not include any procedure by which a claimant could recoup the amount he pays to satisfy the insurer's subrogation lien if the insurer does not ultimately pay that amount of benefits. Petitioner argues that § 39-71-414(6)(a), MCA (2017), is unconstitutional under the second sentence of Mont. Const. art. II, § 16, because it allows a workers' compensation insurer to exercise its right of subrogation before the claimant is made whole. Petitioner also argues that § 39-71-414(6)(a), MCA (2017), violates his right to due process under Mont. Const. art. II, § 17, because it assigns the claimant the burden of proving that the workers' compensation insurer may not exercise its right of subrogation. Respondent asserts that this Court should not address Petitioner's constitutional challenges because they are not ripe and because there is an issue of material fact. In the alternative, Respondent argues that the statute is constitutional.

Held: This Court granted in part and denied in part Petitioner's Motion for Summary Judgment. Petitioner's constitutional challenges are ripe and there is no issue of material fact to the purely legal issues on which Petitioner moved for summary judgment. This Court did not reach the merits of Petitioner's argument that § 39-71-414(1), MCA (2017), is unconstitutional because, as interpreted by the Montana Supreme Court, this subsection does not give a workers' compensation insurer the right to immediately subrogate against a claimant's third-party tort recovery based on the amount of benefits "to be paid" in the future. The Montana Supreme Court has held in many cases that a workers' compensation insurer's right of subrogation is limited by the made whole doctrine, which provides that an insurer cannot exercise its right of subrogation until the claimant has been made whole for his entire loss and any costs of recovery in his third-party tort claim, including attorney fees. This Court ruled that § 39-71-414(6)(a), MCA (2017), is unconstitutional under Mont. Const. art. II, § 16, because its plain language allows an insurer to subrogate before the claimant has been made whole. However, contrary to Petitioner's position, the remedy is not a ruling that Respondent has no right of subrogation as a matter of law. Under established Montana law, Respondent has a right of subrogation under § 39-71-414(1), MCA (2017), and may exercise that right when Petitioner is made whole. This Court did not address the merits of Petitioner's argument that § 39-71-414(6)(a), MCA (2017), is unconstitutional because it assigns him the burden of proof because, having already ruled that this subsection is unconstitutional, this constitutional challenge is now moot.

¶ 1 Petitioner Brady Hogan moves for summary judgment, challenging the constitutionality of § 39-71-414(1) and (6)(a), MCA (2017). Hogan argues that Respondent Federated Mutual Insurance Company (Federated Mutual) does not have a right of subrogation against his third-party tort recovery as a matter of law because these provisions are unconstitutional and "wholly void." Federated Mutual argues that this Court should not address the merits of Hogan's constitutional challenges because they are not yet ripe and because there is an issue of material fact. Alternatively, Federated Mutual argues that § 39-71-414(1) and (6)(a), MCA (2017), are constitutional and that it has a right of subrogation as a matter of law and that it may presently exercise it against Hogan's tort recovery.

¶ 2 For the following reasons, this Court grants in part and denies in part Hogan's Motion for Summary Judgment.

FACTS

¶ 3 On February 25, 2019, Hogan was injured while working for a subcontractor on a construction site. His injury ultimately led to a below-knee amputation.

¶ 4 Federated Mutual insured Hogan's employer under the Workers' Compensation Act (WCA). It accepted liability for Hogan's injury.

¶ 5 Hogan filed a tort action against Highline Partners, Ltd., the general contractor. Highline Partners had liability policies with limits totaling $8 million.

¶ 6 In the spring of 2020, Hogan and Highline Partners, and its liability insurers, reached a settlement agreement under which Hogan accepted $7,875,000 in exchange for a release. Highline Partners' insurers paid the remaining $125,000 of the policy limits to the other person injured in the accident.

¶ 7 From his tort recovery, Hogan paid $2,536,421.41 in attorney fees and approximately $101,000 in costs.

¶ 8 Federated Mutual has paid approximately $650,000 in workers' compensation benefits.

¶ 9 Federated Mutual has asserted a right of subrogation against Hogan's tort recovery under § 39-71-414, MCA (2017).

¶ 10 On April 8, 2020, Hogan's attorney sent an email to Federated Mutual's attorney, stating, "Please notify us exactly how much money your client wants us to set aside in order to satisfy the lien your client is choosing to assert against Brady Hogan's third-party recovery."

¶ 11 Federated Mutual's attorney responded with an email stating, "I think $500,000 will be sufficient and it is something we can discuss at MMI if Mr. Hogan is interested in resolving his claim."

¶ 12 Pursuant to Federated Mutual's asserted subrogation lien, Hogan's attorney has placed $500,000 from Hogan's tort recovery into his IOLTA account.

¶ 13 In his Petition for Hearing, Hogan asserts that Federated Mutual does not have a right of subrogation under Montana law because § 39-71-414(1) and (6)(a), MCA (2017), are unconstitutional. Thus, Hogan alleges that Federated Mutual's asserted subrogation lien is invalid. In the alternative, Hogan asserts that Federated Mutual cannot exercise its right of subrogation because he has not been made whole.

LAW AND ANALYSIS

¶ 14 This case is governed by the 2017 version of the Montana WCA because that was the law in effect at the time of Hogan's industrial injury.[1]

[1] *Ford v. Sentry Cas. Co*., 2012 MT 156, ¶ 32, 365 Mont. 405, 282 P.3d 687 (citation omitted); § 1-2-201, MCA.

¶ 15 To prevail on a motion for summary judgment, the moving party must meet its initial burden of showing the "absence of a genuine issue of material fact and entitlement to judgment as a matter of law."[2] "[If] the moving party meets its initial burden to show the absence of a genuine issue of fact and entitlement to judgment, the burden shifts to the party opposing summary judgment either to show a triable issue of fact or to show why the undisputed facts do not entitle the moving party to judgment."[3]

Issue 1: Are Hogan's constitutional challenges to § 39-71-414(1) and (6)(a), MCA (2017), ripe?

¶ 16 The Montana Supreme Court recently explained:

> To be a justiciable controversy, a case must be ripe, meaning it must present an actual, present controversy. "The basic purpose of the ripeness requirement is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." Thus, "[r]ipeness is predicated on the central perception that courts should not render decisions absent a genuine need to resolve a real dispute; hence, cases are unripe when the parties only point to hypothetical, speculative, or illusory disputes as opposed to actual, concrete conflicts."[4]

¶ 17 Federated Mutual asserts that Hogan's constitutional challenges to § 39-71-414(1) and (6)(a), MCA (2017), are not ripe on the grounds that the statute has not yet been applied to deprive Hogan of any legal interest. Because this Court is to "avoid constitutional issues whenever possible,"[5] Federated Mutual maintains that this Court must first hold the trial and make the findings necessary to decide whether it may exercise its right of subrogation. If this Court decides that Federated Mutual may exercise its right of subrogation, Federated Mutual asserts that Hogan's constitutional challenges will then be ripe and that this Court can circle back and decide whether § 39-71-414(1) and (6)(a), MCA (2017), are constitutional, thereby deciding whether it has a right of subrogation under Montana law.

¶ 18 However, Hogan's constitutional challenges to both subsections are ripe because they present actual, present controversies. Hogan's challenge to § 39-71-414(1), MCA (2017), presents an actual, present controversy because Federated Mutual is currently using this statute to deprive him the use of $500,000 from his tort recovery. In asserting that it can presently exercise its right of subrogation against Hogan's tort recovery under § 39-71-414(1), MCA (2017), which provides that an insurer's right of subrogation is a

---

[2] *Begger v. Mont. Health Network WC Ins. Trust*, 2019 MTWCC 7, ¶ 15 (citations omitted).

[3] *Richardson v. Indem. Ins. Co. of N. Am.*, 2018 MTWCC 16, ¶ 24 (alteration added) (citation omitted), *aff'd*, 2019 MT 160, 396 Mont. 325, 444 P.3d 1019.

[4] *BNSF Ry. Co. v. Eddy*, 2020 MT 59, ¶ 54, 399 Mont. 180, 459 P.3d 857 (internal citations omitted).

[5] *Weidow v. Uninsured Employers' Fund*, 2010 MT 292, ¶ 22, 359 Mont. 77, 246 P.3d 704 (citation omitted).

"first lien" on the recovery, Federated Mutual has encumbered $500,000 of Hogan's tort recovery and demanded that Hogan's attorney not release that money to Hogan. Hogan maintains that Federated Mutual does not have a right of subrogation and that its subrogation lien is therefore invalid because § 39-71-414(1) MCA (2017), is unconstitutional. Thus, Hogan seeks the release of the $500,000. Because there is an actual, present controversy over whether Federated Mutual can currently deprive Hogan of $500,000 from his tort recovery under § 39-71-414(1), MCA (2017), Hogan's constitutional challenge to that subsection is ripe.

¶ 19 Hogan's challenge to § 39-71-414(6)(a), MCA (2017), presents an actual, present controversy because the parties disagree over the formula this Court is to use to determine whether Federated Mutual may exercise its right of subrogation. As set forth below, the formula in § 39-71-414(6)(a), MCA (2017), differs from the formula the Montana Supreme Court has set forth to decide if a claimant has been made whole, as the subsection does not include a claimant's costs of recovery, including attorney fees, as an element of the formula.[6] Hogan asserts that the formula in § 39-71-414(6)(a), MCA (2017), is unconstitutional under Mont. Const. art. II, § 16, because it allows an insurer to exercise its right of subrogation before the claimant is made whole. Federated Mutual argues, *inter alia*, that the formula in § 39-71-414(6)(a), MCA (2017), is constitutional. Thus, this Court must decide Hogan's constitutional challenge to § 39-71-414(6)(a), MCA (2017), to determine which formula to use to decide whether Federated Mutual may exercise its right of subrogation. Hogan's constitutional challenge to § 39-71-414(6)(a), MCA (2017), is therefore ripe.

¶ 20 In sum, because both Hogan's constitutional challenges present actual, present controversies, they are ripe.

Issue 2: Is there an issue of material fact?

¶ 21 Federated Mutual asserts that this Court cannot rule upon Hogan's constitutional challenges because there is an issue of material fact as to the amount of Hogan's damages or "entire loss," which is an issue of fact.[7] Here again, Federated Mutual argues that this Court must first hold the trial and make the findings of fact necessary to decide whether it may exercise its right of subrogation. Federated Mutual argues that if this Court decides that it may exercise its right of subrogation, it can then circle back and decide the legal issue of whether it has a right of subrogation under Montana law. However, the amount of Hogan's damages or "entire loss" is not a material fact to the purely legal issues

[6] *Compare* § 39-71-414(6)(a), MCA (2017), *with Zacher v. Am. Ins. Co*., 243 Mont. 226, 231, 794 P.2d 335, 338 (1990).

[7] *Ness v. Anaconda Minerals. Co.,* 279 Mont. 472, 481, 929 P.2d 205, 211 (1996).

on which Hogan has moved for summary judgment because this Court can decide these legal issues without finding the amount of Hogan's damages or entire loss.[8]

¶ 22 Thus, there is no issue of material fact on the legal issues on which Hogan has moved for summary judgment.

Issue 3: Does § 39-71-414(1), MCA (2017), violate Hogan's right to due process under Mont. Const. art. II, § 17, by allowing an insurer to exercise its right of subrogation based on the amount of workers' compensation benefits "to be paid" in the future?

¶ 23 Section 39-71-412, MCA (2017), gives a claimant the right to bring a tort claim against a negligent third party who caused his injury.

¶ 24 Section 39-71-414(1), MCA (2017), gives a workers' compensation insurer the right of subrogation against a claimant's third-party tort recovery. It states:

> If an action is prosecuted as provided for in 39-71-412 . . . and except as otherwise provided in this section, the insurer is entitled to subrogation for all compensation and benefits paid or to be paid under the Workers' Compensation Act. The insurer's right of subrogation is a first lien on the claim, judgment, or recovery.

¶ 25 Hogan argues that § 39-71-414(1), MCA (2017), violates his right to due process under Mont. Const. art. II, § 17. Hogan interprets the phrase "to be paid" to mean that a workers' compensation insurer may immediately subrogate against a claimant's third-party tort recovery for future benefits, "which have not yet been paid and may never be used." That is, under Hogan's statutory interpretation, if this Court finds that Hogan will be made whole in the future, Hogan will have to immediately pay Federated Mutual from his tort recovery to satisfy Federated Mutual's lien on the amount of benefits "to be paid" after the point at which he is made whole. Hogan argues that this subsection violates his right to due process because there are too many variables and unknowns for this Court to make an accurate finding of the amount of benefits "to be paid" in the future. He also argues that this subsection violates his right to due process because it "contains no safeguard to ensure a subrogating insurer return to an injured worker sums taken in anticipation of future benefits which are ultimately not paid out." He urges this Court to adopt the reasoning of *Holeton v. Crouse Cartage Co.*,[9] in which the Supreme Court of

---

[8] *See Letica Land Co. v. Anaconda-Deer Lodge Cnty.*, 2019 MT 30, ¶ 7, 394 Mont. 218, 435 P.3d 634 (stating, "A material fact is one involving the elements of the cause of action or defense at issue to such an extent that it requires resolution of the issue by a trier of fact.") (citation omitted).

[9] 748 N.E.2d 1111 (2001).

Ohio held that a subrogation statute was unconstitutional because it required a claimant to pay the workers' compensation insurer for future benefits he may never receive.[10]

¶ 26 Federated Mutual interprets § 39-71-414(1), MCA (2017), the same way as Hogan, but argues that it is constitutional. It argues that this Court can make a finding as to the amount of benefits "to be paid" in the future, just as the fact-finder in a tort case makes findings of the plaintiff's future damages.[11] Federated Mutual also argues that the statute need not have a "safeguard" because due process does not require "absolute certainty" when deciding future benefits; instead, Montana law requires "reasonable certainty."[12] It relies on case law from other jurisdictions holding that a trial court can find the amount of future benefits to be paid and use that finding to decide subrogation and similar issues.[13] Thus, Federated Mutual asserts that this Court should make a finding of the amount of workers' compensation benefits "to be paid" to Hogan and, if this Court finds that he will be made whole in the future, rule that it has the right to immediately subrogate against his tort recovery in the amount of the benefits "to be paid" after he is made whole.

¶ 27 Notwithstanding, neither Hogan nor Federated Mutual are on the right track because the Montana Supreme Court has not interpreted § 39-71-414(1), MCA, the same way they do. In several cases, the Montana Supreme Court has held that this statute does not give the workers' compensation insurer the right to immediately exercise its right of subrogation against a claimant's third-party recovery based on the amount of benefits "to be paid" in the future; instead, the court has held that an insurer may not exercise its right of subrogation until the claimant is made whole and that it then exercises its right by terminating benefits.

¶ 28 In *Hall v. State Compensation Ins. Fund*,[14] the Montana Supreme Court interpreted the 1981 version of § 39-71-414(1), MCA, which, like the 2017 version, states that the insurer "is entitled to subrogation for all compensation and benefits paid or to be paid under the Workers' Compensation Act." The court applied the made whole doctrine in a workers' compensation claim for the first time, holding that a claimant "is entitled to be made whole for his entire loss and any costs of recovery, including attorney's fees, before

---

[10] *Holeton*, 748 N.E.2d at 1119-21.

[11] *See, e.g.*, MPI2d 25.07 (stating, "Your award should include the reasonable value of necessary care, treatment and services received and those reasonably probable to be required in the future.")

[12] *See Stark v. Circle K Corp.*, 230 Mont. 468, 477-78, 751 P.2d 162, 168 (1988) (holding that "future damages need only be reasonably certain, and not absolutely certain") (citations omitted).

[13] *See, e.g.*, *Wilken v. Int'l Harvester Co*., 363 N.W.2d 763, 767–68 (Minn. 1985) (explaining that workers' compensation benefits to be paid in the future "are no more difficult to weigh in a contribution claim than they are for the trier of fact in a tort action who must make a lump sum award for past, present, and future damages. The contribution award, like the tort verdict, necessarily involves approximations based on reasonable assumptions. True, the employee next year may die or recover, but these uncertainties do not prevent the measurement of a lump sum verdict against the third-party tortfeasor.").

[14] 218 Mont. 180, 708 P.2d 234 (1985).

the insurer can assert its right of legal subrogation against the insured or the tort-feasor."[15] The court succinctly explained, "When claimant is made whole, subrogation begins."[16]

¶ 29 Likewise, in *Zacher v. American Ins. Co.*,[17] the Montana Supreme Court interpreted the 1983 version of § 39-71-414(1), MCA, which, like the 2017 version, states that a workers' compensation insurer has a right of subrogation against "benefits paid or to be paid." The court followed *Hall*[18] and held that when "a workers' compensation claimant recovers against a third party, an insurer has no subrogation rights until a claimant has been made whole for his entire loss and any costs of recovery, including attorney fees."[19] The court then set forth the formula used to calculate whether a claimant has been made whole as follows:

> In determining whether a claimant has been made whole, the amounts received and to be received under the workers' compensation claim shall be added to the amounts otherwise received or to be received from third party claims, and also added to the costs of recovery, including attorney fees; and when that total equals claimant's entire loss, then the insurer shall be entitled to subrogation from all amounts received by the claimant in excess of his entire loss, pursuant to § 39-71-414, MCA (1983).[20]

¶ 30 The Montana Supreme Court reaffirmed that a workers' compensation insurer cannot exercise its right of subrogation until the claimant is made whole in *State Compensation Ins. Fund v. McMillan*.[21] The court stated, "While § 39-71-414, MCA (1985), did not address whether the insurer's right of subrogation began before or after the claimant has been made whole for his injuries, this Court has determined that an insurer is not entitled to exercise its subrogation rights until the claimant has been made whole."[22] The court explained that a workers' compensation insurer exercises its right of subrogation by terminating benefits:

---

[15] *Hall*, 218 Mont. at 183, 708 P.2d at 236 (quoting *Skauge v. Mountain States Telephone and Telegraph Co.*, 172 Mont. 521, 565 P.2d 628 (1977)).

[16] *Hall*, 218 Mont. at 183, 708 P.2d at 237.

[17] 243 Mont. 226, 794 P.2d 335 (1990).

[18] *Zacher*, 243 Mont. at 229-30, 794 P.2d at 337-38. This Court notes that in *Zacher*, the Montana Supreme Court overruled *Hall* to the extent it could be interpreted as "contain[ing] requirements which may be interpreted as adding to the foregoing holding." *Zacher*, 243 Mont. at 231, 794 P.2d at 338. However, the Montana Supreme Court stated that its decision did not "modify" *Hall* and that "the holding in *Hall* on the equitable subrogation theory should be upheld." *Id*.

[19] *Zacher*, 243 Mont. at 231, 794 P.2d at 338.

[20] *Id*.

[21] 2001 MT 168, 306 Mont. 155, 31 P.3d 347.

[22] *McMillan*, ¶ 7 (citing *Zacher*, 243 Mont. at 231, 794 P.2d at 338; *Ness*, 279 Mont. at 480, 929 P.2d at 210).

> When McMillan has recovered the amount of his entire loss of $4.7 million plus costs of recovery, [State Fund] may properly assert its subrogation interest. At that time, State Fund's obligation to pay lifetime medical benefits will cease, and McMillan will pay any continuing medical expenses from his third party recovery or other resources.[23]

¶ 31 In *Francetich v. State Compensation Mutual Ins. Fund*, the Montana Supreme Court held that the second sentence of Mont. Const. art. II, § 16, guarantees a claimant's right to fully recover from a third-party tort claim — i.e., to be made whole — before the workers' compensation insurer can exercise its right of subrogation.[24] Indeed, the court overruled *Brandner v. Travelers Ins. Co*.,[25] "[t]o the extent" that *Brandner* "might be interpreted as allowing for subrogation prior to the injured employee receiving full compensation."[26]

¶ 32 Therefore, under well-established Montana law, the phrase "to be paid" in § 39-71-414(1), MCA (2017), does not give Federated Mutual the right to immediately exercise its right of subrogation against Hogan's tort recovery based on the amount of benefits "to be paid" in the future; instead, as the Montana Supreme Court made clear in *Hall*, *Zacher*, *McMillan*, and *Francetich*, an insurer such as Federated Mutual cannot exercise its right of subrogation until the claimant is made whole. Under the Montana Supreme Court's holding in *McMillan*, if Hogan is made whole in the future, it is at that future point that Federated Mutual may then exercise its right of subrogation by terminating Hogan's benefits. Hogan will have to reimburse Federated Mutual out of his tort recovery only if this Court finds that he has already been made whole and has received an amount in excess of his entire loss plus his costs of recovery, including attorney fees. Because § 39-71-414(1), MCA (2017), does not allow an insurer the right to immediately subrogate on a third-party tort recovery based on the amount of benefits "to be paid" in the future, this Court will not address the hypothetical question of whether a statute that allowed an insurer to immediately exercise its right of subrogation based on the amount of benefits

---

[23] *McMillan*, ¶ 15. *See also Ness*, 279 Mont. at 481-82, 929 P.2d at 211 (reasoning, "The issue of whether a claimant has been made whole is a question of fact. Even Anaconda's own expert admits that Ness in fact has not been made whole to date. Accordingly, the Workers' Compensation Court did not err in refusing to grant Anaconda the right to a subrogation interest in Ness's settlement with Caterpillar.").

[24] 252 Mont. 215, 224, 827 P.2d 1279, 1285 (1992).

[25] 179 Mont. 208, 587 P.2d 933 (1978).

[26] *Francetich*, 252 Mont. at 222, 827 P.2d at 1284. *See also Oberson v. Federated Mut. Ins. Co*., 2005 MT 329, ¶ 14, 330 Mont. 1, 126 P.3d 459 (stating, "This Court has consistently interpreted the language of Article II, Section 16 as precluding the subrogation of a tort award until the damaged party fully recovers."); *Moreau v. Transp. Ins. Co.*, 2018 MT 1, ¶ 18, 408 P.3d 538, 390 Mont. 102 (explaining, "the made whole concept can be applicable when an injured worker recovers damages from a third-party tortfeasor on a tort claim for personal injury, outside of the workers' compensation system. In that situation, the workers' compensation insurer that has paid benefits to the injured worker arising out of the same incident may not subrogate against the tort damages recovered by the worker until the worker has been made whole as to his tort claim.") (citations omitted).

"to be paid" in the future would violate a claimant's right to due process under Mont. Const. art. II, § 17.[27]

¶ 33 Accordingly, on this issue, Hogan's summary judgment motion is **denied**.

Issue 4: Does § 39-71-414(6)(a), MCA (2017), violate Hogan's right to full legal redress under Mont. Const. art. II, § 16?

¶ 34 The second sentence of Mont. Const. art. II, § 16, states: "No person shall be deprived of this full legal redress for injury incurred in employment for which another person may be liable except as to fellow employees and his immediate employer who hired him if such immediate employer provides coverage under the Workmen's Compensation Laws of this state."

¶ 35 In *Francetich*, the Montana Supreme Court addressed whether the 1987 version of § 39-71-414(6)(a), MCA, was constitutional under this clause. Francetich brought a third-party tort claim and recovered the $25,000 in policy limits from the tortfeasor's liability insurer.[28] The workers' compensation insurer asserted that it had a subrogation interest in Francetich's tort recovery under the 1987 version of § 39-71-414(6)(a), MCA,[29] which states:

> The insurer is entitled to full subrogation rights under this section, even though the claimant is able to demonstrate damages in excess of the workers' compensation benefits and third-party recovery combined. The insurer may subrogate against the entire settlement or award of a third party claim brought by the claimant or his personal representative, without regard to the nature of the damages.

The Supreme Court noted that the case presented the same fact pattern as in *Hall* and *Zacher* but explained that the 1987 version of § 39-71-414(6)(a), MCA, "specifically directs that the insurer [has] the right to subrogate even though the injured worker's damages exceed his total recoveries. This specific legislative directive effectively overrules the equitable theories concerning subrogation that this Court relied on in deciding *Hall* and *Zacher*, i.e., that subrogation could not begin until the injured worker had been made whole."[30]

---

[27] *See Havre Daily News, LLC v. City of Havre*, 2006 MT 215, ¶ 19, 333 Mont. 331, 142 P.3d 864 (explaining that Montana's courts "will not act when the legal issue raised is only hypothetical") (citation omitted).

[28] *Francetich*, 252 Mont. at 216, 827 P.2d at 1280.

[29] *Id*.

[30] *Francetich*, 252 Mont. at 223, 827 P.2d at 1285.

¶ 36 The *Francetich* court held that the statute was unconstitutional under Mont. Const. art. II, § 16, because it allowed a workers' compensation insurer to exercise its right of subrogation even though the claimant had not been made whole. The court explained:

> Section 39-71-414(6)(a), MCA, restricts an injured workers' right to obtain a full legal redress against third-party tortfeasors. The second sentence of Article II, Section 16, states this cannot be done. The record of the debate at the Convention is clear that this was the delegates' intent in amending the provision. The second sentence is mandatory, prohibitive, and self-executing and it prohibits depriving an employee of his full legal redress, recoverable under general tort law, against third parties. Finally, as noted above, we recognized and explained this very idea in *Meech* [*v. Hillhaven West, Inc*.[31]].
>
> We hold that § 39-71-414(6)(a), MCA, is unconstitutional in light of the clear and direct language of Article II, Section 16, of the Montana Constitution. We hold that in a case of reasonably clear liability where a claimant is forced to settle for the limits of an insurance policy which, together with claimant's workers' compensation award, do not grant full legal redress under general tort law to the claimant, under workers' compensation laws the insurer is not entitled to subrogation rights under § 39-71-414, MCA.[32]

The court remanded the case so that this Court could find whether Francetich had been made whole under the formula set forth in *Zacher*, and specifically instructed this Court to include Francetich's costs of recovery in his third-party tort claim, including his attorney fees.[33]

¶ 37 In *Connery v. Liberty Northwest Ins. Corp*., the Montana Supreme Court followed *Francetich* and reaffirmed that under Mont. Const. art. II, § 16, the Legislature may not "statutorily abolish the 'made whole' rule [for claimants] by expressly providing insurers with the right to recover the full amount of their subrogation interests regardless of whether a claimant had been made whole for his entire loss."[34] The court addressed § 39-71-416(1), MCA (1995), which states that if a claimant obtained a third-party tort recovery,

---

[31] 238 Mont. 21, 776 P.2d 488 (1989). In *Meech*, the Montana Supreme Court upheld the Wrongful Discharge from Employment Act, holding that Mont. Const. art. II, § 16, did not prohibit the Montana Legislature from abrogating common law causes of action. However, the court held that Mont. Const. art. II, § 16, guaranteed a claimant's right to full legal redress in third-party tort claims. *Meech*, 238 Mont. at 36, 38-41, 776 P.2d at 497-500. Federated Mutual argues that, as interpreted in *Meech*, the full legal redress clause in Mont. Const. art. II, § 16, only protects a claimant's right to full legal redress in a claim "permitted by general tort law." However, this is not an issue in this case because Hogan's tort claim against Highline Partners, Ltd., was permitted by Montana tort law.

[32] *Francetich*, 252 Mont. at 224, 827 P.2d at 1285.

[33] *Id. See also Hall*, 218 Mont. at 183, 708 P.2d at 236-37 (explaining that if claimant is not made whole, he has not achieved full legal redress under Mont. Const. art. II, § 16).

[34] 1998 MT 125, ¶ 12, 289 Mont. 94, 960 P.2d 288 (citing *Francetich*, 252 Mont. at 224, 827 P.2d at 1285).

the workers' compensation insurer could reduce benefits by 30%. The court held that this statute was unconstitutional under Mont. Const. art. II, § 16, because it "facially ignores the worker's right to full legal redress."[35] The court explained:

> If an injured worker gets anything, however short of full legal redress, the insurer is entitled to reduce by 30 percent the benefits otherwise payable to the injured worker. The net effect of the statute is to transfer dollars recovered from the third-party tortfeasor back to the insurer. That transfer is plainly contrary to the full legal redress provision.[36]

¶ 38 In 1993, the Montana Legislature amended the first sentence of § 39-71-414(6)(a), MCA, changing the phrase "even though" to "unless."[37] Section 39-71-414(6)(a), MCA (1993-present), states, in relevant part:

> The insurer is entitled to full subrogation rights under this section, unless the claimant is able to demonstrate damages in excess of the workers' compensation benefits and the third-party recovery combined. If the insurer is entitled to subrogation under this section, the insurer may subrogate against the entire settlement or award of a third-party claim brought by the claimant or the claimant's personal representative without regard to the nature of the damages.

¶ 39 Hogan argues that the first sentence of § 39-71-414(6)(a), MCA (2017), is unconstitutional under Mont. Const. art. II, § 16, because, like the 1987 version, it grants a workers' compensation insurer the right to subrogate even if the claimant has not been made whole. Hogan asserts that the 1993 Legislature did not fix the constitutional flaw identified in *Francetich* because it did not include the claimant's costs of recovery, including attorney fees, in the formula to determine whether an insurer may exercise its right of subrogation. Hogan argues that § 39-71-414(6)(a), MCA (2017), is void and is not a basis for Federated Mutual's subrogation lien; thus, he asserts that Federated Mutual has no right of subrogation as a matter of Montana law.

¶ 40 Federated Mutual argues that § 39-71-414(6)(a), MCA (2017), is constitutional and that it grants it a right of subrogation against Hogan's tort recovery. Federated Mutual maintains that this Court must read § 39-71-414, MCA (2017), as a whole and asserts that § 39-71-414(6)(a), MCA (2017), is constitutional because subsection (2)(c) provides that if the insurer does not contribute to the reasonable costs of the third-party action, it waives 50% of its subrogation rights. Federated Mutual argues that this reduction is how the statute "accounts for" the claimant's costs of recovery in his third-party claim, including

---

[35] *Connery*, ¶ 13.

[36] *Id*.

[37] *Compare* § 39-71-414(6)(a), MCA (1987), *with* § 39-71-414(6)(a), MCA (2017).

attorney fees. In the alternative, Federated Mutual argues that because "[t]he Legislature is presumed to act deliberately with full knowledge of existing law on a subject,"[38] the 1993 Legislature must have intended to fix the constitutional flaw identified in *Francetich*. Thus, it asserts that regardless of the subsection's plain language, this Court should rule that § 39-71-414(6)(a), MCA (2017), is constitutional on the grounds that the made whole doctrine is "implicit" in it. As another alternative, Federated Mutual argues that this Court should save § 39-71-414(6)(a), MCA (2017), by "broadly" defining "third-party recovery" to include the costs of obtaining the recovery, including attorney fees.

¶ 41 Hogan is correct that § 39-71-414(6)(a), MCA (2017), is unconstitutional under Mont. Const. art. II, § 16, for the same reason the Montana Supreme Court held that the 1987 version was unconstitutional in *Francetich* and for the same reason the court held that § 39-71-416(1), MCA (1995), was unconstitutional in *Connery*. The formula set forth to calculate whether the insurer may exercise its right of subrogation in § 39-71-414(6)(a), MCA (2017), does not include the claimant's costs of recovery in his third-party claim, including his attorney fees, which is an indispensable part of the formula used to calculate whether the claimant is made whole.[39] Thus, under the plain language of § 39-71-414(6)(a), MCA (2017), a workers' compensation insurer can exercise its right of subrogation even though the claimant has not been made whole. Because § 39-71-414(6)(a), MCA (2017), allows an insurer to subrogate before the claimant is made whole, it is unconstitutional under Mont. Const. art. II, § 16.

¶ 42 There is no merit to Federated Mutual's argument that § 39-71-414(6)(a), MCA (2017), is constitutional because subsection (2)(c) provides that if an insurer does not contribute to the costs of the claimant's third-party claim, it waives 50% of its subrogation rights. Subsection (2)(c) does not "account for" a claimant's costs of recovery, including attorney fees, because there is no mathematical correlation between 50% of a workers' compensation insurer's right of subrogation and a claimant's costs of recovery in a tort claim, including attorney fees. Moreover, even if an insurer's subrogation right is reduced by 50%, subsection (6)(a) still allows it to exercise its remaining 50% right of subrogation even though the claimant is not made whole, in contravention of the claimant's right to full legal redress under Mont. Const. art. II, § 16.

¶ 43 Moreover, there is no merit to Federated Mutual's argument that this Court should rule that § 39-71-414(6)(a), MCA (2017), is constitutional, either by declaring that the made whole doctrine is "implicit" in it or by defining "third-party recovery" to include the costs of recovery, including attorney fees. When interpreting a clear and unambiguous

---

[38] *Asurion Servs., LLC v. Mont. Ins. Guar. Ass'n*, 2017 MT 140, ¶ 33, 387 Mont. 483, 396 P.3d 140 (citation omitted).

[39] *Zacher*, 243 Mont. at 231, 794 P.2d at 338.

statute such as § 39-71-414(6)(a), MCA (2017), the plain language controls.[40] This Court does not have authority to declare that an amended statute means something other than what it plainly says, even if the circumstances suggest that the Legislature intended to fix a constitutional flaw.[41] Furthermore, this Court does not have the authority to save a statute by defining a term beyond its plain and ordinary meaning.[42]

¶ 44 Although Hogan is correct that § 39-71-414(6)(a), MCA (2017), is unconstitutional, he is incorrect that the remedy is a ruling that Federated Mutual does not have a right of subrogation as a matter of law. As set forth above, Federated Mutual has a right of subrogation under § 39-71-414(1), MCA (2017), and may exercise that right when Hogan is made whole. Indeed, as set forth above, after ruling that § 39-71-414(6)(a), MCA (1987), was unconstitutional in *Francetich*, the Montana Supreme Court remanded the case to this Court to find whether Francetich had been made whole.[43] The Montana Supreme Court would not have remanded *Francetich* if the insurer did not have a right of subrogation under Montana law. As in *Francetich*, this Court will make a finding as to whether Hogan has been made whole.

¶ 45 Accordingly, on this issue, Hogan's summary judgment motion is **granted in part and denied in part.**

Issue 5: Does § 39-71-414(6)(a), MCA (2017), violate Hogan's right to due process under Mont. Const. art. II, § 17, by assigning him the burden of proof?

¶ 46 Hogan also argues that § 39-71-414(6)(a), MCA (2017), violates his right to due process under Mont. Const. art. II, § 17, because it assigns the burden of proof to claimants. He asserts that a claimant's right to be made whole under Mont. Const. art. II, § 16, is a fundamental right, and argues that due process requires that the workers' compensation insurer have the burden of proving that the claimant has been made whole by clear and convincing evidence before it exercises its right of subrogation. However, having already ruled that § 39-71-414(6)(a), MCA (2017), is unconstitutional because it

---

[40] *See* § 1-2-101, MCA. ("In the construction of a statute, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted."). *See also Moreau v. Transp. Ins. Co*., 2015 MT 5, ¶ 13, 342 P.3d 3, 378 Mont. 10 (stating, "When interpreting a statute, this Court seeks 'to implement the objectives the legislature sought to achieve, and if the legislative intent can be determined from the plain language of the statute, the plain language controls.' ").

[41] *See State v. Johnson*, 2012 MT 101, ¶ 26, 277 P.3d 1232, 365 Mont. 56 (stating, "We adhere to the rule of statutory construction that 'there is no reason for us to engage in a discussion of the legislative history to construe [a] statute when we have determined that the language of the statute is clear and unambiguous on its face.' ") (alteration in original) (citation omitted).

[42] *See Giacomelli v. Scottsdale Ins. Co*., 2009 MT 418, ¶ 18, 221 P.3d 666, 354 Mont. 15 (stating, "When the legislature has not defined a statutory term, we consider the term to have its plain and ordinary meaning.") (citation omitted).

[43] *Francetich*, 252 Mont. at 224, 827 P. 2d at 1285.

allows a workers' compensation insurer to subrogate before the claimant has been made whole in violation of Mont. Const. art. II, § 16, the issue of whether this subsection violates his right to due process under Mont. Const. art. II, § 17, by assigning the claimant the burden of proof is now moot.[44] This Court does not address moot issues.[45]

¶ 47 Accordingly, on this issue, Hogan's summary judgment motion is **denied as moot**.

¶ 48 For the foregoing reasons, this Court enters the following:

ORDER

¶ 49 Hogan's Motion for Summary Judgment is **granted in part** and **denied in part**.

DATED this 9th day of April 2021.

(SEAL)

/s/ DAVID M. SANDLER
JUDGE

c: Lucas J. Foust
Leo S. Ward

Submitted: September 17, 2020

[44] *See Baumgardner v. Pub. Employees' Ret. Bd.*, 2005 MT 199, ¶ 16, 328 Mont. 179, 119 P.3d 77 (rejecting argument that a trial court had to rule upon every constitutional challenge before a judgment was final because, "When the District Court declared H.B. 294 unconstitutional, the other challenges to H.B. 294 were mooted and there was no further need for the court to decide whether H.B. 294 impaired the obligation of contracts in violation of Montana Constitution Article II, Section 31, or whether H.B. 294 violated Montana Constitution Article V, Section 11(3), by containing more than one subject.").

[45] *Berry v. Mid Century Ins. Co.*, 2020 MTWCC 10, ¶ 86.