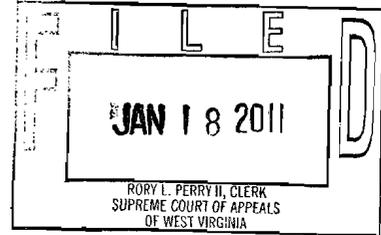


BEFORE THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DANNY FISCHER and
BRITTANEY FISCHER,

Appellants, Plaintiffs below,



v.

NO. 35677

SWVA, INC., in its capacity as Plan Administrator
and Sponsor of the SWVA, Inc. Employee Health Care Plan,
and SWVA, INC. EMPLOYEE HEALTH CARE PLAN,

Appellees, Defendants below.

BRIEF OF APPELLANTS DANNY FISCHER AND BRITTANEY FISCHER

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KIND OF PROCEEDING AND NATURE OF THE RULINGS BELOW

This proceeding is an appeal by Appellants Danny Fischer and Brittaney Fischer (collectively "Fischer" or "the Appellants"), Plaintiffs below, from an order of the Circuit Court of Cabell County entered on January 6, 2010.

In its order, the circuit court granted the renewed motion for summary judgment of Defendants SWVA, Inc. and SWVA, Inc. Employee Health Care Plan (collectively "SWVA" or "the Appellees") on the grounds that Fischer did not file suit to challenge SWVA's denial of benefits within the time provided by SWVA's Plan. In so holding, the court rejected Fischer's argument that the Plan cannot cause the limitations period to begin before the claim has accrued.

On September 9, 2010, the Court granted Fischer's petition for appeal. Fischer submits this brief in accordance with the Court's Order of December 14, 2010, which acknowledged receipt of the record from the Circuit Clerk of Cabell County and established the briefing schedule.

STATEMENT OF FACTS

Brittaney Fischer's injuries and claim for benefits through the Plan

On January 26, 2006, Brittaney Fischer, a minor, suffered extensive, permanent injuries when Steven Vanperson, the driver of the vehicle in which she was a passenger, lost control of the vehicle.¹ She was transported by helicopter to The Ohio State University

¹ Complaint at ¶ 22.

Hospital in Columbus, Ohio and ultimately received treatment from several providers there and in Huntington, West Virginia.² She incurred medical bills of nearly \$250,000, almost all of which remain unpaid.

Brittaney's father, Danny Fischer, is a member of the United Steel Workers of America ("USWA") and has health insurance coverage through the USWA's collective-bargaining agreement with SWVA, Inc., which is governed by SWVA's Plan.

The Plan's requirement of third-party liability information

Fischer submitted the claims to the Plan for payment, but in 2006, the Plan's administrator advised that before consider paying the claims, Fischer would need to provide certain information, such as the name and address of the driver of the vehicle, the name and address of the driver's insurance company, and a copy of any police report.³ Thereafter, Fischer retained counsel and submitted additional documentation to the Plan and asked that it reconsider the denial.⁴

Under the terms of the Plan, SWVA required proof that there was no third-party automobile liability coverage.⁵ This was effectively a proof-of-loss requirement, which must be satisfied before the claim could accrue. Before that issue was resolved, neither Fischer

² *Id* at ¶¶ 23-24.

³ SWVA0204 (The administrative record has been Bates-stamped as SWVA0001-0448. Citations will be to each document's Bates number).

⁴ SWVA0205-0206.

⁵ SWVA0068-0070.

nor the Plan could know how the claim should be adjudicated.

Although Fischer had obtained legal counsel, the status of the third-party liability coverage remained uncertain. It appeared that Vanperson, the tortfeasor, had very limited coverage. The Plan's counsel advised Fischer that the assets of the liable third party could not be determined with certainty without filing a lawsuit.⁶ (Fischer later retained counsel in Ohio to file a civil action against Vanperson in the Court of Common Pleas of Ross County, Ohio in order to ensure that Fischer recovered all applicable policy proceeds, which amounted to \$25,000, consisting of Vanperson's automobile liability coverage in the amount of \$12,500, Ohio's statutory minimum limits of coverage, and Fischer's own underinsured coverage in the amount of \$12,500.⁷)

On August 29, 2007, Fischer's new counsel contacted SWVA's counsel and advised that the deadline that the Plan sought to impose needed to be extended so that Fischer was not in the position of having to comply with a claim limitations period before his claim had accrued.⁸

SWVA's reversal of position

In response, on August 31, 2007, SWVA reopened the administrative record, *i.e.*,

⁶ SWVA0227-0230.

⁷ *Fischer v. Vanperson*, 08-CI-000100, Court of Common Pleas of Ross County, Ohio.

⁸ SWVA0437-0438.

inexplicably reversed its position as to the basis for the original claim denial.⁹ SWVA's new position was that Fischer was required to have filed suit by May 28, 2007. Fischer's counsel provided additional information to SWVA on several occasions after that date (August 31, 2007) to establish that more time would be needed for the Ohio civil action,¹⁰ but SWVA declared that the matter was closed.¹¹ Nonetheless, Fischer continued in good faith to pursue the third-party claim in Ohio. On December 17, 2007, Fischer filed suit in the Circuit Court of Cabell County against SWVA and several medical providers.

Removal to federal court

SWVA removed the action to the United States District Court for the Southern District of West Virginia on the grounds that Fischer's claims against SWVA were governed by the Employee Retirement Income Security Act of 1974 (ERISA), which preempted Fischer's state-law claims against all defendants. However, on May 21, 2008, the district court granted Fischer's motion to remand the action on the grounds that SWVA had failed to follow the removal procedure required by 28 U.S.C. § 1441.

Remand to state court

Following the remand, Fischer dismissed or otherwise resolved his claims against all defendants except for SWVA. The parties had not begun to engage in discovery when, on September 30, 2008, SWVA moved for summary judgment on the grounds that Fischer's

⁹ SWVA0440-0441.

¹⁰ SWVA0442-0443, SWVA0446-0447.

¹¹ SWVA0445, SWVA0448.

action was time-barred under the Plan's limitations period. Fischer responded in opposition that the Plan was an insurance policy under West Virginia law and therefore not governed by ERISA, and specifically pointed out the need for discovery on the issues raised by the motion. Following a hearing on October 14, 2008, the circuit court denied the motion on December 23, 2008 as being premature, and held that it could be renewed at the close of discovery.

Refusal to allow discovery on limitation period issue

After the parties entered a scheduling order on March 30, 2009, Fischer attempted without success to conduct discovery in this action. Fischer served interrogatories and requests for production of documents, but SWVA resisted his efforts on the grounds that the requested discovery was outside the scope of permitted discovery for a claim for benefits under ERISA, and produced only the administrative claim record.

SWVA's renewal of its summary judgment motion

On May 28, 2009, SWVA renewed its motion for summary judgment on the basis that its Plan was self-funded and therefore subject to ERISA, and not West Virginia insurance law, and that Fischer had not submitted his daughter's medical expenses for payment within the time established by the Plan.

Fischer opposed the motion on its merits – to the extent possible – including filing his counsel's affidavit in accordance with W. Va. R. Civ. P. 56(f). And because Fischer had been unable to conduct any discovery in order to defend against SWVA's motion, on July 13, 2009, he moved to compel SWVA to respond to the discovery requests.

At a hearing on July 20, 2009 on the parties' motions, the circuit court denied SWVA's renewed motion for summary judgment and denied Fischer's motion to compel, but permitted Fischer to take the deposition of John O'Connor, SWVA's human resources director and the Plan's named fiduciary, on the limited issue of whether the Plan was self-funded. The court held that Fischer was not entitled otherwise to conduct discovery, even though SWVA operated under a conflict of interest, *i.e.*, SWVA both funded the health insurance and made decisions about participants' eligibility for benefits, which the United States Supreme Court has held to be a proper subject for discovery in an action arising under ERISA.¹²

The court entered an order on July 29 memorializing its rulings at the July 20 hearing, including the limitation on the scope of Mr. O'Connor's deposition. Fischer took Mr. O'Connor's deposition on August 3, 2009.

Fischer's motion to compel and SWVA's renewed motion for summary judgment

Following Mr. O'Connor's deposition, the parties submitted supplemental briefs on their respective motions, and agreed that another hearing was not necessary. On October 2, 2009, the circuit court wrote to the parties' counsel and advised it would grant SWVA's motion for summary judgment "because this is an ERISA claim and federal court is the proper jurisdiction for an ERISA claim." The court directed SWVA's counsel to prepare a proposed order granting SWVA's motion for summary judgment and submit it to Fischer's counsel, as provided by W. V. T. C. R. 24.01. The court did not address Fischer's motion to

¹² *Metropolitan Life Ins. Co. v. Glenn*, 128 S.Ct. 2343, 171 L.Ed.2d 299 (2008).

compel.

SWVA's counsel presented the circuit court with a proposed 13-page order that disregarded the grounds specified by the court in its October 2, 2009 letter, and instead granted the motion on the grounds alleged by SWVA, *i.e.*, the Plan was self-funded and governed by ERISA and Fischer had failed to file suit within the Plan's limitations period. Fischer objected to SWVA's proposed order because it did not accurately reflect the circuit court's rationale for granting SWVA's motion for summary judgment, and submitted a proposed order that granted SWVA's motion on the grounds specified by the court, *i.e.*, that federal court was the proper jurisdiction for this action because it arose under ERISA.

In an order entered on January 6, 2010, the circuit court adopted SWVA's proposed order and granted its motion for summary judgment. On January 15, 2010, Fischer moved to alter or amend the circuit court's order under W. Va. R. Civ. P. 59(e) on the grounds that the order failed to mention, much less address, the reason identified by the court in its October 2, 2009 letter as the basis for its decision to grant SWVA's motion. Fischer withdrew the motion before a hearing was held, however.

ASSIGNMENT OF ERRORS RELIED UPON

- 1. The circuit court erred in approving SWVA's interpretation of its Plan's limitations period in a manner that time-barred Fischer's claim for benefits even before Fischer's cause of action had accrued.**
- 2. Because the circuit court acknowledged that SWVA operated under a conflict of interest – which ordinarily entitles a plaintiff to conduct**

discovery, according to *Metropolitan Life Ins. Co. v. Glenn* – the court erred in refusing to permit discovery regarding the application of SWVA’s limitations period to Fischer’s claim.

POINTS AND AUTHORITIES AND DISCUSSION OF LAW

STANDARD OF REVIEW

The Court reviews *de novo* a circuit court’s entry of summary judgment.¹³ “The circuit court’s function at the summary judgment stage is not to weigh the evidence and determine the truth of the matter, but is to determine whether there is a genuine issue for trial.”¹⁴ Further, the Court “must draw any permissible inference from the underlying facts in the most favorable light to the party opposing the motion.”¹⁵

But summary judgment is appropriate only after the opposing party has had adequate time for discovery,¹⁶ so that a grant of summary judgment before discovery has been completed must be viewed as precipitous.¹⁷

¹³ Syllabus Point 1, *Painter v. Peavy*, 451 S.E.2d 755 (W.Va. 1994).

¹⁴ Syllabus Point 3, *Painter*, 451 S.E.2d 755.

¹⁵ *Williams v. Precision Coil, Inc.*, 459 S.E.2d 329, 336 (W.Va. 1995).

¹⁶ *Pingley v. Huttonsville Public Service Dist.*, 691 S.E.2d 531 (W.Va. 2010).

¹⁷ *Id.*

DISCUSSION OF LAW

1. The limitations period imposed by SWVA cannot begin before Fischer's cause of action accrues.

The underlying issue in SWVA's summary judgment is not its right to establish or impose a limitations period in its Plan, which the Fourth Circuit has approved.¹⁸ Rather, the issue is SWVA's application of its limitations period in such a way that the period begins to run before Fischer's cause of action has accrued.

Although the Plan's language is somewhat awkward, its intent is to require a comparison of the amount recovered by the participant or dependent with the amount of medical expenses in order to determine the amount for which the Plan is responsible. In this case, the amount recovered could not be determined until Fischer filed suit against the tortfeasor in Ohio in order to recover for Brittaney's injuries. While the total recovery was a paltry \$25,000, the Plan required that amount to be ascertained so it could be compared to the medical expenses in order to obtain the amount for which the Plan would be responsible, which, in this case, would be in excess of \$200,000.

Specifically, the Plan provides that "No payment will be made for expenses incurred for injuries received in, or as the result of, an accident for which a third party may be liable."¹⁹ But the Plan contains an important exception, which applies here.

Obviously, it would be unreasonable for the Plan to exclude payment for incidents

¹⁸ *Gayle v. United Parcel Service, Inc.*, 401 F.3d 222 (4th Cir. 2005).

¹⁹ SWVA0068

in which third-party liability yielded less than the amount necessary to pay the beneficiary's medical bills. For that reason, the Plan will pay the difference between the amount recovered from a third party and the medical expenses incurred. The Plan states this exception as follows:

... However, if the third party liability is satisfied in an amount less than the benefits otherwise payable under the policy, the Plan will pay the difference.²⁰

As the Court is aware, the successful recovery of damages from tortfeasors responsible for automobile accidents will often require time to resolve. But according to SWVA's position, which the circuit court adopted, Fischer's ability to present a claim for adjudication would be foreclosed before it could be asserted. SWVA seeks to impose a time limitation before the recoverable damages have been resolved. This is an arbitrary interpretation of the Plan language that is both unreasonable and capricious.

Stated differently, any payment by the Plan is conditioned on the amount, if any, of benefits payable as a result of a third party's liability. Until the extent of the third party's liability, and thus the amount of any benefits due as a result, are known, a participant such as Fischer cannot maintain an action against the Plan.

The Fourth Circuit has addressed this issue in *White v. Sun Life Assurance Co. of Canada*,²¹ and explained that the law does not permit a plan fiduciary to depart from such interpretations of contractual limitation periods. In other words, Fischer's claim cannot

²⁰ *Id.*

²¹ 488 F.3d 240 (4th Cir. 2007).

accrue before the amount of the claim, if any – a complete tort reimbursement would eliminate the claim – is ascertainable. As the court stated in *Sun Life*, “[w]e agree with the district court that ERISA’s remedies framework does not permit a plan to start the clock on a claimant’s cause of action before the claimant may file suit.”²²

The choice of Plan language may have been ill-advised, but the choice was SWVA’s. Plan administrators, who are unfamiliar with the delays and uncertainties of personal injury litigation, may presume a tidy and expeditious reimbursement process, but the fate of litigants often requires traveling a more arduous and lengthy course. In this case, the litigation that enabled Fischer to ascertain the amount of his recovery from the tortfeasor was not concluded before the limitations period expired. Thus, this situation is precisely what the Fourth Circuit in *Sun Life* sought to prevent.

A. Assuming that ERISA governs Fischer’s claims, this appeal presents issues of federal substantive law, which must be adjudicated under state-law procedural rules.

Fischer’s appeal is limited to the circuit court’s summary judgment in SWVA’s favor regarding the limitations period applicable to his claim. Thus, SWVA’s extensive discussion of Fischer’s allegation that SWVA’s Plan was an insurance policy governed by West Virginia insurance law, rather than a self-funded plan governed by ERISA, is unnecessary

Because the federal court remanded this action to the circuit court, state-law

²² *Id.* at 242

procedural rules govern its adjudication. However, ERISA provides that state and federal courts have concurrent jurisdiction of actions such as this one, which seeks to recover benefits due under the terms of a plan.²³

Thus, once the circuit court determined that the Plan was governed by ERISA and not West Virginia insurance law, it was required to apply the substantive law of ERISA to Fischer's claims, even as it applied West Virginia law to the parties' motions. But as the circuit court's October 2, 2009 letter demonstrates, the court doubted whether it had jurisdiction to adjudicate Fischer's claims at all. The court ultimately entered the order submitted by SWVA, and Fischer did not have an opportunity to revisit the court's ruling, so Fischer's appeal necessarily assumes that the circuit court properly had jurisdiction of his action.

Regardless of the applicable substantive law, however, SWVA was not entitled to summary judgment under Rule 56 because Fischer did not have an adequate opportunity to conduct discovery, and because genuine issues of material fact exist regarding the Plan's application of its limitations period to Fischer's claim.

SWVA argued before the circuit court that Fischer was not entitled to conduct discovery because discovery is not typically permitted in claims for benefits under ERISA. As Fischer argued, however, that general prohibition did not apply here because of SWVA's conflict of interest as both the party administering a benefit plan, including making determinations as to eligibility, such as in Fischer's case, and the party funding

²³ 29 U.S.C. § 1132(e)(1).

those same claims. In other words, SWVA has to pay any claim that SWVA determines is eligible for benefits under its Plan.

Further, district and appellate courts have permitted discovery in an ERISA case to explore procedural irregularities, such as SWVA's interpretation of the Plan's requirements for establishing third-party liability where benefits are sought from the Plan. For example, in *Pediatric Special Care, Inc. v. United Med. Res. (UMR)*,²⁴ the district court permitted discovery outside the administrative record in order to address the contents and scope of the administrative record where the insurance company had produced different versions.

And while Fischer disagrees that his discovery was as "wide-ranging" as SWVA claims, Fischer attempted to learn who had been involved in the denial of his claim, as well as their job titles and manner of compensation, and SWVA's decision-making process under the Plan. Contrary to SWVA's assertion, courts have found these topics to be appropriate for discovery.²⁵

Although the order prepared by SWVA and entered by the circuit court, makes no mention of the conflict of interest, it is nevertheless critical to this appeal. The circuit court acknowledged at the hearing on July 20, 2009 that SWVA operated under a conflict of

²⁴ 2011 U.S. Dist. LEXIS 3795 (E.D. Mich. Jan. 14, 2011)

²⁵ Some courts have permitted discovery of "documents about employee compensation criteria or standards . . . for employees involved in that claim." *Hughes v. CUNA Mut. Grp.*, 257 F.R.D. 176, 180-81 (S.D. Ind. 2009); *see also, e.g., Santos v. Quebecor World Long Term Disability Plan*, 254 F.R.D. 643, 650 (E.D. Cal. 2009); *Myers v. Prudential Ins. Co. of Am.*, 581 F. Supp. 2d 904, 914 (E.D. Tenn. 2008).

interest, but disagreed that the conflict entitled Fischer to conduct discovery. Because of the obvious and potentially pernicious effect of an administrator's conflict of interest, the United States Supreme Court held in *Metropolitan Life Ins. Co. v. Glenn*²⁶ that where a company both funds and administers a benefit plan, there exists a conflict of interest that the court must consider in its review of claim denials.²⁷

More importantly, SWVA's statement that *Glenn* did not address the question of discovery is not accurate. For example, in *Denmark v. Liberty Life Ins. Co.*,²⁸ the First Circuit Court of Appeals stated that "The majority opinion in *Glenn* fairly can be read as contemplating some discovery on the issue of whether a structural conflict has morphed into an actual conflict."²⁹

²⁶ 128 S.Ct. 2343, 171 L.Ed.2d 299 (2008).

²⁷ SWVA's dual role here alone fulfills the requirements for finding a conflict under *Glenn*, which the Fourth Circuit in *Champion v. Black & Decker (U.S.) Inc.*, 550 F.3d 360 (4th Cir. 2008), has held must be taken into account together with other factors such as (1) the language of the plan; (2) the purposes and goals of the plan; (3) the adequacy of the materials considered to make the decision and the degree to which they support it; (4) whether the fiduciary's interpretation was consistent with other provisions in the plan and with earlier interpretations of the plan; (5) whether the decision-making process was reasoned and principled; (6) whether the decision was consistent with the procedural and substantive requirements of ERISA; (7) any external standard relevant to the exercise of discretion; and (8) the fiduciary's motives and any conflict of interest it may have.

²⁸ 566 F.3d 1 (1st Cir. 2009).

²⁹ *Id.* at 10. See also *Kalp v. Life Ins. Co. of North America*, 2009 WL 261189 (W. D. Pa. 2009.)

Fischer sought discovery materials specifically directed at the effect of the conflict of interest with a view to the adequacy of materials considered by SWVA, the extent to which the materials support its decision to deny Fischer's claim, whether the process was consistent with SWVA's prior interpretations of its Plan, and the motives of the Plan fiduciaries. Because these were proper subjects for discovery in an ERISA action, the circuit court should have permitted Fischer to proceed and should have compelled SWVA's cooperation.

Fischer provided the circuit court with decisions from several federal courts,³⁰ all of which were decided after *Glenn*, and which permitted discovery into plan interpretation and conflict of interest, the same issues on which Fischer sought discovery before the circuit court. Those decisions, in addition to the authority provided to this Court, demonstrate that the circuit court erred in refusing to permit Fischer to conduct discovery and in granting SWVA's motion for summary judgment.

CONCLUSION

SWVA applied its Plan's limitations period to Fischer's claim in such a way that the period began to run before Fischer had been able to determine the amount of third-party

³⁰ *Mullins v. AT&T Corp.*, 290 Fed.Appx. 642 (4th Cir. 2008); *Marks Constr. Co. v. Huntington Nat. Bank*, 614 F.Supp.2d 700 (N.D.W.Va. 2009); *Magera v. Lincoln Nat. Life Ins. Co.*, 2009 WL 1362936 (M.D. Pa. 2009); *Fowler v. Aetna Life Ins. Co.*, 615 F.Supp.2d 1130 (N.D. Cal. 2009); *Redd v. Brotherhood of Maintenance of Way Employees Div. of Intern. Broth. of Teamsters*, 2009 WL 1543325 (E.D. Mich. 2009); and *Geer v. Hartford Life and Acc. Ins. Co.*, 2009 WL 1620402 (E.D. Mich. 2009).

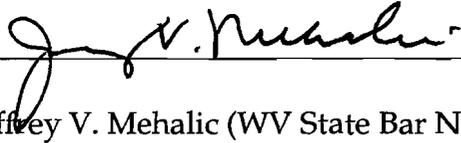
liability coverage available for his daughter's injuries, and thus before his claim under the Plan had accrued. In *White v. Sun Life Assurance Co. of Canada*, the Fourth Circuit rejected the approach taken by SWVA in administering its Plan. Accordingly, the circuit court erred in granting summary judgment in SWVA's favor because genuine issues of material fact existed regarding SWVA's administration of its Plan.

In addition to the factual issues precluding summary judgment in SWVA's favor, Fischer was deprived of an opportunity to conduct discovery in order to obtain evidence to oppose SWVA's claims. As Fischer has explained, because SWVA has a conflict of interest created by its dual roles as the entity both funding and administering a benefits plan, *Metropolitan Life Ins. Co. v. Glenn* entitled Fischer to explore the effect of that conflict of interest on SWVA's application of its limitations period so as to bar his claim.

RELIEF PRAYED FOR

Appellants Danny Fischer and Brittaney Fischer pray that this Honorable Court reverse the January 6, 2010 Order of the Circuit Court of Cabell County, West Virginia, and remand this action to the Circuit Court of Cabell County for further proceedings.

**DANNY FISCHER and
BRITTANEY FISCHER
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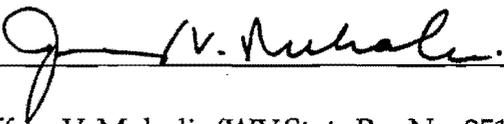
Appellees, Defendants below

CERTIFICATE OF SERVICE

I, Jeffrey V. Mehalic, hereby certify that on this 18th day of January, 2011, I served the foregoing **BRIEF OF APPELLANTS DANNY FISCHER AND BRITTANEY FISCHER** upon the following counsel of record by depositing a true copy thereof in the United States mail, postage prepaid, addressed to them at their last known office addresses as listed below:

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