No. _____

In The
Supreme Court of the United States

NATHAN VERCELLINO,

Petitioner,

v.

OPTUM INSIGHT, INC.; UNITED HEALTHCARE SERVICES, INC.; BOARD OF TRUSTEES OF AMERITAS HOLDING COMPANY HEALTH PLAN; and AMERITAS HOLDING COMPANY HEALTH PLAN,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Eighth Circuit affirmed the district court's grant of Summary Judgment in favor of *Optum Insight, Inc., United Healthcare Services, Inc., and Ameritas Holding Company Health Plan* ("the Plan") holding the plan's language allowed reimbursement for medical expenses paid while the petitioner, Nathan Vercellino, was a minor child, and for which his parents were responsible under Nebraska law. Neither the parents nor the Plan filed a timely lawsuit against the tortfeasor. Because the statute of limitations has run on the parents' claim, the medical expenses are no longer recoverable.

Nathan, now an adult, filed a lawsuit against the tortfeasor for his general damages. The plan sought reimbursement from any recovery made by Nathan in his current suit, for the $600,000.00 in medical expenses paid, although recovery for those medical expenses is time barred and, accordingly, not part of Nathan's current claim for damages.

This case expands the question examined by this Court in *Montanile*: Can an ERISA fiduciary claim an equitable lien for medical expenses paid for the benefit of the parents against a judgment or settlement of their child, who was a minor at the time those benefits accrued, and, as a matter of law, can never recover those medical expenses as damages.

LIST OF PARTIES

The parties are listed in the caption.

STATEMENT OF RELATED CASES

1. *Nathan Vercellino, Plaintiff and Conner Kenney, Intervenor v. Optum Insight, Inc., United Healthcare Services, Inc., Ameritas Holding Company Health Plan,* No. 4:19-CV-3048, U.S. District Court for the District of Nebraska. Judgment entered November 4, 2020.

2. *Nathan Vercellino, Plaintiff and Conner Kenney, Intervenor v. Optum Insight, Inc., United Healthcare Services, Inc., Ameritas Holding Company Health Plan*, No. 20-3524, U.S. Court of Appeals for the Eighth Circuit, Judgment Entered February 14, 2022.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

OPINION BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at ___ F.4th ___ (8th Cir. Feb. 14, 2022). The Eighth Circuit affirmed the decision of the United States District court for the District of Nebraska, reported at 4:19-CV-3048 (D. Neb. Dec. 9, 2020) *See* Appendices A-D.

STATEMENT OF JURISDICTION

This court's jurisdiction is invoked under 28 U.S.C. §1254(1). This is an appeal from the 8th Circuit's opinion, interpreting the contract language of an ERISA plan (Employment Retirement and Income Security Act, 29 U.S.C. §1001 *et seq*.) which was rendered on February 14, 2022.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §1001 *et seq*. ERISA §502(a)(3) 29 U.S.C. §1132 allows for civil enforcement by:

> (3) by a participant, beneficiary or fiduciary
>
> > (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or

(B) to obtain other appropriate equitable relief

(i) to redress such violations or

(ii) to enforce any provisions of this title or the terms of the plan.

STATEMENT OF THE CASE

Nathan Vercellino, whose date of birth is November 3, 1997, suffered serious injuries on July 23, 2013 while a passenger on an ATV operated by Connor Kenney who lost control of the vehicle, causing it to roll over and crash.

Nathan Vercellino has endured just short of 40 surgeries to attempt to repair his right hand that was crushed in the ATV rollover. His right hand is "pretty non-functional. I mean, I've got some use out of my thumb to, you know, hit a space bar with; but everything that I do is with my left hand."

Monica Vercellino, Nathan's mother, had health insurance through her employer, Ameritas. Nathan was a "covered person" under the health insurance plan. His medical expenses related to his hand injury were in excess of one million dollars, and the Plan paid medical benefits in the amount of $595,770.82.

The healthcare plan is an ERISA plan governed by 29 U.S.C. §1001 *et seq*. The Plan, pursuant to its contract with Monica Vercellino, had the right to seek subrogation and/or reimbursement from the tortfeasor by

filing a lawsuit within the applicable statute of limitations for Monica's claim:

> The Plan, may at its option, take necessary and appropriate action and reserve its rights under these subrogation provisions including, but not limited to . . . filing suit in your name, which does not obligate the Plan in any way to pay you part of any recovery the Plan might obtain.

None of the adults in this case, neither Vercellino's mother nor the administrators of the Plan, filed suit to recover the medical expenses within the applicable four-year statute of limitations under Nebraska law. Although the Plan was aware of the potential claim, it never took any action to determine if Monica Vercellino had filed a lawsuit within the applicable statute of limitations. The claims of the parents and the Plan are now time barred, and neither may now seek reimbursement for these expenses.

As an adult, Nathan Vercellino filed suit against the Kenneys in January of 2019 in state court for his general damages, but not for those medical expenses incurred when he was a minor, because the real party in interest, his mother, did not file a timely suit and Nathan does not have a legal right to claim those damages now.

A dispute arose as to whether the Plan had the right to reimbursement from any future recovery Vercellino may obtain for his general damages. Nathan Vercellino filed a declaratory judgment action in state

court which was removed to United States District Court for the District of Nebraska by the Plan on May 22, 2019. The Second Amended Complaint was filed on June 19, 2019. The Answer to the Second Amended Complaint was filed on July 10, 2019. A Motion to Intervene was filed on July 19, 2019 by Connor Kenney. Said Motion to Intervene was granted on July 28, 2019.

The Petitioner filed his Answer and Affirmative Defenses to the Plan's Counterclaim on July 19, 2019. The Plan filed its Answer to the Complaint in Intervention on September 17, 2019. The Petitioner filed a Motion for Summary Judgment on February 11, 2020. The Plan filed a Motion for Summary Judgment on its Counterclaim on February 11, 2020. Intervenor Connor Kenney filed a Brief in Support of Petitioner's Motion for Summary Judgment and in Opposition to the Plan's Motion for Summary Judgment on September 2, 2020. Petitioner filed a Motion for Summary Judgment on September 2, 2020. Petitioner opposed the Plan's Motion for Summary Judgment.

On November 4, 2020, the District Court entered its Memorandum and Order and Judgment finding against Vercellino and in favor of the Plan. The District Court denied the Vercellino's Motion for Summary Judgment and, in granting the Plan's Motion for Summary Judgment, ordered that the Plan have an "equitable lien by agreement (up to the full amount of benefits paid) over any third-party recovery obtained by Nathan Vercellino related to the July 23, 2013 accident for which the plan provided coverage." Further, "the plan is entitled to reimbursement in the full

amount of all benefits paid on Nathan Vercellino's behalf for injuries suffered in the July 23, 2013, accident, without any reduction to account for any claims attorney's fees or costs, 'made whole' defense, or any other equitable or other doctrine Plaintiff asserts to limit or reduce the plan's right of reimbursement."

Vercellino filed a Notice of Appeal to the Eighth Circuit on December 2, 2020, asserting the District Court erred in holding that he was required to reimburse the Plan for monies he had no legal right to recover. The Eighth Circuit, in holding that courts are to enforce the plain language of the plan, held that the right to reimbursement allows the Plan to recover its money from any recovery Nathan makes from the negligent third-party, regardless of whether the medical expenses can be claimed as damages.

REASONS FOR ALLOWANCE OF THE WRIT

United States Court of Appeals for the Eighth Circuit has decided an important question of federal law that has not been, but should be, settled by this Court, and has decided an important federal question in a way that conflicts with relevant decisions of this Court.

ERISA section 502(a)(3) limits plan fiduciaries to filing suits for equitable relief. However, equitable remedies "are as a general rule, directed at some specific thing." *Montanile v. Board of Trustees of Nat. Elevator Industry Health Benefit Plan*, 136 S. Ct. 651 (2016) at 658. In *Montanile*, this Court held that an ERISA

fiduciary may not enforce an equitable lien against a plan beneficiary's general assets because equitable remedies "enforce a right over a particular thing . . . rather than a right to recover a sum of money generally out of the defendant's assets" *Id. Citing* 4 Pomeroy §1234, at 694-695, for the general rule that equitable liens depend on "the notion . . . that the contract creates some right or interest in or over specific property," and are enforceable only if "the decree of the court can lay hold of" that specific property. *Id.* In *Montanile*, the question was what happens when a participant obtains a settlement from a third party, but spends the whole settlement on non-traceable items so that there remained no specific identifiable fund from which to collect.

Nathan was never the real party in interest in the claim for medical expense, as he had no legal right, while a minor, to recover the medical expenses paid by the insurer to benefit his parents. That right of recovery was solely his parents' and the ERISA plan's, neither of whom filed a lawsuit within the applicable statute of limitations. Any fund that could have been created from which to repay the benefits conferred on the parents by the Plan, has now been dissipated by operation of law.

Here, the Petitioner never could have, nor will he ever, recover the medical expenses that the Plan paid, and thus there will never be an identifiable fund containing that specific property, *to wit*: a judgment or settlement based on the $600,000 of medical expenses paid by the plan. Accordingly, any assets in any fund

obtained by Nathan in his claim against the tortfeasor for his general damages are not part of the specific thing to which any equitable lien attaches and are, rather, Nathan's sole property.[1]

Under Nebraska law, when a minor is injured, there are two causes of action: one is owned by the minor for his or her general damages such as pain, suffering, disability, loss of earning capacity, inconvenience and humiliation. *Connelly v. City of Omaha*, 284 Neb. 131, 150 (2012). The other cause of action is for the parents for their loss of consortium and for reasonable and necessary medical expenses paid by the parents for the minor's treatment. *Macku v. Drackett Products Co.*, 216 Neb. 176 (1984). There is no dispute that Monica Vercellino's claim for medical expenses, and thus the Plan's claim, is now time barred by the four-year statute of limitations per Neb. Rev. Stat. §25-208.

The parties agree that the Plan language includes the following language with respect to reimbursement:

> [c]overed persons, including all dependents, agree to transfer to the Plan their rights to make a claim, sue and recover damages when the injury or illness giving rise to the health benefits that occurs through the act or omission of another person. Alternatively, if a

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[1] *See, e.g.*, *Arkansas Dept. of Health and Human Services v. Ahlborn*, 126 S. Ct. 1752 (2006), where this Court recognized that an injured person's cause of action for pain and suffering, lost wages, etc., constitutes "property" which is protected under federal anti-lien statutes. *Id.*, 126 S. Ct. at 1762-65.

> covered person receives any full or partial recovery by way of judgment, settlement or otherwise, from another person or business entity, the covered person agrees to reimburse the Plan, in first priority, for any medical, disability or any other benefits paid by it (i.e. the Plan shall first be reimbursed fully, to the extent of any and all benefits paid by it, from any monies received, with the balance of any retained by the covered person). The obligation to reimburse the Plan, in full, in first priority, exists regardless of whether the judgment or settlement, etc. specifically designates the recovery or a portion thereof as including medical, disability or other expenses.

The Courts below relied upon the above language in upholding the Plan's claim for reimbursement. However, a close look at the language demonstrates that the Plan is not entitled to subrogation or reimbursement here because Nathan has no right of recovery of the specific benefits for which reimbursement is claimed. Specifically, the language above refers to a plan beneficiary transferring "*their rights to make a claim, sue and recover damages,*" meaning that the only rights that the plan has for recovery are those of the beneficiary. Obviously, Vercellino has no right to make a claim, sue, or recover the medical damages arising from his injuries. That right was Monica Vercellino's to exercise, and both she and the Plan waived that right by their inaction.

The plan language is connected to the covered person's ability to recover medical expenses. The language, "if a covered person receives any full or partial

recovery" references the covered person's right to sue and recover medical damages. The language that speaks to " . . . whether the judgment or settlement, etc., specifically designates the recovery or a portion thereof, as including medical, disability or other expenses," simply protects the Plan from a disguised settlement. However, the Plan's stated right to recover is predicated upon a covered person actually having the right to recover damages for the benefits paid out on that person's behalf. In other words, the language assumes that the covered person would be the real party in interest in any claim for recovery of said medical expenses.

The language of the Plan continually contemplates that the covered person, at some point in time, would be the real party in interest. Here, the Plan could neither have forced Vercellino to assert a claim for medical damages nor transfer his rights to the plan, because he was never the real party in interest and had no rights to transfer such claim to the Plan.

I. REVIEW IS WARRANTED TO RESOLVE THE ISSUE OF WHETHER AN ERISA FIDUCIARY CAN ENFORCE AN EQUITABLE LIEN AGAINST A JUDGMENT OR SETTLEMENT OF A MINOR WHO NEVER WAS, NOR NEVER WILL BE, THE REAL PARTY IN INTEREST IN THE CLAIM FOR MEDICAL EXPENSES

In Montanile v. Bd. of Trs. of the Nat'l Elevator Indus. Health Ben. Plan, 136 U.S. 651, this Court

analyzed in detail what equitable relief was available when a plan seeks reimbursement for medical expenses after a plan beneficiary recovers money from a third party. In so doing, this Court re-examined its holdings in *Great-West Life & Annuity Ins. Co. v. Knudsen*, 122 S. Ct. 708 (2002); *Sereboff v. Mid Atlantic Medical Services, Inc.*, 126 S. Ct. 1869 (2006) and *US Airways, Inc. v. McCutchen*, 133 S. Ct. 1537 (2013). ERISA section 502(a)(3) limits plan fiduciaries to filing suits for equitable relief. The consensus from those opinions is that such reimbursement claims were equitable when the plan "sought specifically identifiable funds that were within the possession and control of the beneficiaries – not recovery from the beneficiaries' assets generally." *Sereboff*, 126 S. Ct. 1869.

In *Montanile*, the ERISA plan failed to take any action for reimbursement against Montanile while he was still in possession of the settlement funds. By the time they sought to make a claim, Montanile had already spent the money. This Court found that while the ERISA plan had an equitable claim to the funds while they still existed, and its remedy would have been equitable had it immediately sued while the funds were still intact. Because the funds had been dissipated, the plan had no recourse because recovering from the beneficiary's general assets was a legal remedy not contemplated by section 502(a)(3).

Under the principle that ERISA section 502(a)(3) limits plan fiduciaries to filing suits for equitable relief, the Court reasoned that equitable remedies "are as a general rule, directed at some specific thing."

Montanile v. Board of Trustees of Nat. Elevator Industry Health Benefit Plan, 136 S. Ct. 651 (2016) at 658. Accordingly, the *Montanile* Court held that an ERISA fiduciary may not enforce an equitable lien against a plan beneficiary's general assets because equitable remedies "enforce a right over a particular thing . . . rather than a right to recover a sum of money generally out of the defendant's assets." *Id. Citing* 4 Pomeroy §1234, at 694-695, for the general rule that equitable liens depend on "the notion . . . that the contract creates some right or interest in or over *specific property*," and are enforceable only if "the decree of the court can lay hold of" that specific property. *Id.*

The facts here require this Court to take the analysis a step further. In *Montanile*, the beneficiary dissipated the specific fund subject to the lien, and that complete dissipation eliminated the lien because the ERISA plan could not attach to the beneficiary's general assets instead, because "those assets were not part of the specific thing to which the lien attached." *Id.* 136 S. Ct. 659. Here there was never a "fund" to begin with, nor will there ever be. Said fund has been dissipated by the running of the statute of limitations.

The Plan in this case conceded that it has no right of subrogation but insisted that it is entitled to *reimbursement*, defined by the Plan as follows:

> The right to reimbursement means that if a third party causes or is alleged to have caused a Sickness or Injury for which you receive a settlement, judgment, or other recovery from any third party, you must use those proceeds

> to fully return to the Plan 100% of *any Benefits you received for that Sickness or Injury*. [emphasis supplied]

Monica Vercellino was solely responsible for Nathan's medical expenses when he was a minor child. Therefore, it is she who received the benefits. She had an actionable claim against the tortfeasor, as did the plan, and could have recovered the benefits she received within the four years following Nathan's injuries. Had she done so, there would have been a specific fund from which the Plan could have recovered.

The basic premise of an equitable lien by agreement is that the defendant/beneficiary possesses a fund to which the plaintiff/ERISA plan is entitled. The Plan, per its own contract, is entitled to recover from the beneficiary any benefits that beneficiary actually received. Nathan Vercellino received no benefits from the plan until he turned nineteen and became responsible for payment of his own medical expenses. Certainly, he does not dispute that he must use any settlement funds to reimburse the Plan 100% of benefits he received after the medical bills he incurred became his legal obligation at age 19.

The premise that it was Nathan Vercellino, a child, who received the benefit of the claimed $595,770.82 in medical payments is legally and factually erroneous. He never received any benefits under the Plan until he became legally responsible for payment of the medical expenses. In its simplest terms, it was Nathan's parents, and only Nathan's parents, who were legally

responsible for those medical expenses and, therefore, it was Nathan's parents who received the benefit conferred by the Plan, *to wit:* that the bills were paid by the Plan so that Monica Vercellino could meet her legal obligation to pay for Nathan's medical expenses.

Returning to *Montanile* and its application here, because any fund created by a settlement or judgment in Nathan's case could not, as a matter of law, include any payment for the $600,000 paid by the Plan, and Nathan was not the beneficiary of those dollars in any event, the Plan has no equitable remedy. Indeed, any action for recovery against Nathan would be against his separate property to which the plan should have no claim: his general damages. And instead of a double recovery on Nathan's part, which is the rationalization for subrogation and reimbursement in the first place, his own right to recovery for his physical pain, emotional suffering and permanent disability would be contravened.

Montanile specifically rejected the ERISA plan's argument they should be allowed to enforce equitable liens against a participant's general assets because if they can't, plan members will quickly dissipate a settlement as soon as possible before fiduciaries can sue. The court specifically notes that "plans have developed safeguards against participants' and beneficiaries' efforts to evade reimbursement obligations." *Id.* at 662. The same safeguards were in place in this case, and the Plan simply failed to avail themselves of them, as the ERISA plan did in the *Montanile* case.

Nathan Vercellino asks this court to apply the reasoning in *Montanile* to determine whether, in a case where no medical expenses can be recovered as a matter of law, reimbursement should allowed from a settlement based only upon general damages. If equitable liens depend on the contract creating some right or interest in or over specific property, *to wit*: medical expenses paid and recovered by a beneficiary, should the right to reimbursement be enforceable only if "the decree of the court can lay hold of" that specific property. Here it cannot.

Here the plan beneficiary never could have, nor will he ever, recover the medical expenses that the Plan paid, and thus there will never be an identifiable fund containing that specific property, *to wit*: a judgment or settlement based on the $600,000 of medical expenses paid by the plan. He was not the beneficiary of those funds when they were paid. Accordingly, any assets in any fund obtained by Nathan in his claim against the tortfeasor for his general damages are not part of the specific thing to which any equitable lien attaches and are, rather, Nathan's sole property.

CONCLUSION

For all of the above reasons, Nathan Vercellino respectfully requests that the Supreme Court grant review of this matter.

Respectfully submitted,

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