COURT OF APPEALS
DECISION
DATED AND FILED

July 17, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-0772-FT **Cir. Ct. No. 00-CV-117**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

ACE FIRE UNDERWRITERS INSURANCE COMPANY,

PLAINTIFF-RESPONDENT,

MEQUON-THIENSVILLE SCHOOL DISTRICT,

INVOLUNTARY-PLAINTIFF-RESPONDENT,

V.

MIRON CONSTRUCTION COMPANY, INC.,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Ozaukee County: JOSEPH D. McCORMACK, Judge. *Affirmed.*

Before Nettesheim, P.J., Brown and Snyder, JJ.

¶1 PER CURIAM. Miron Construction Company, Inc. appeals from the judgment entered against it. It argues on appeal that the waiver of subrogation paragraph of its contract with Mequon-Thiensville School District (MTSD) bars the action brought by MTSD's insurer, Ace Fire Underwriters Insurance Company, for damages. Miron brought a summary judgment motion before the circuit court raising this issue. The circuit court denied the motion and Miron appeals. We affirm the judgment of the circuit court.

¶2 MTSD hired Miron to do some construction work on a high school. During the course of the work, Miron left open and uncovered a section of the school's roof. There was heavy rainfall and the school sustained water damage. MTSD recovered $109,251.77 from its insurer, Ace. Ace then sued Miron to recover this amount on the basis that the damage was caused by Miron's negligence in leaving the open roof uncovered. Miron brought a motion for summary judgment asserting that MTSD and Ace were contractually barred from bringing this action.

¶3 The contract between MTSD and Miron provided, among other things, that they would waive all rights against each other and others for damages caused by fire or other causes of loss to the extent covered by the property insurance that MTSD was to have in effect pursuant to the contract. The insurance policy Ace provided to MTSD contains a recovery rights clause. It states:

> If we pay a claim under this policy, we are entitled, to the extent of our payment, to take over your related rights of recovery from other people and organizations. You have an obligation not to make it harder for us to enforce these rights. You agree to sign any papers, deliver them to us, and do anything else that is necessary to help us exercise our rights.

Miron argues that Ace stands in the shoes of MTSD and is bound by MTSD's waiver of subrogation claims.

¶4 "[I]f the insurer who is seeking subrogation has a policy which 'functionally recites' the preservation of its subrogation rights without any time limitation, such language will prevail over subrogation exclusion language in a conflicting policy." ***Kulekowskis v. Bankers Life & Cas. Co.***, 209 Wis. 2d 324, 333, 563 N.W.2d 533 (Ct. App. 1997) (citing ***Demmer v. Am. Family Mut. Ins. Co.***, 200 Wis. 2d 94, 102-03, 546 N.W.2d 169 (Ct. App. 1996); and ***WEA Ins. Corp. v. Freiheit***, 190 Wis. 2d 111, 120, 527 N.W.2d 363 (Ct. App. 1994)). The circuit court concluded that the language in Ace's policy preserved Ace's rights without limitation. Further, the circuit court noted that the contract between MTSD and Miron did not require MTSD to obtain a waiver of such an agreement with the insurer. The court concluded that the contract between MTSD and Miron did not foreclose Ace's right to recover from Miron. We agree.

¶5 Miron argues that this is a case of first impression and asks us to adopt the law of Minnesota and California and find in its favor. This court, however, is primarily an error-correcting court. ***State ex rel. Swan v. Elections Bd.***, 133 Wis. 2d 87, 94, 394 N.W.2d 732 (1986). We are bound by both the prior decisions of this court, ***Cook v. Cook***, 208 Wis. 2d 166, 190, 560 N.W.2d 246 (1997), and of the supreme court, ***State v. Olsen***, 99 Wis. 2d 572, 583, 299 N.W.2d 632 (Ct. App. 1980). We conclude that the existing law of Wisconsin controls and we need not consider the law of other states. For the reasons stated, we affirm the judgment of the circuit court.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.