

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 10, 2003

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 02-1969
STATE OF WISCONSIN**

Cir. Ct. No. 00-CV-498

**IN COURT OF APPEALS
DISTRICT II**

**MATTHEW KULBISKI AND ESTATE OF
KATHLEEN KULBISKI,**

PLAINTIFFS-RESPONDENTS,

v.

**MICHAEL DEMARCO AND STATE FARM MUTUAL
AUTOMOBILE INSURANCE COMPANY,**

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Kenosha County:
S. MICHAEL WILK, Judge. *Affirmed.*

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

¶1 PER CURIAM. Michael DeMarco and State Farm Mutual Automobile Insurance Company (hereafter DeMarco) appeal from a judgment awarding damages to Matthew Kulbiski and the Estate of Kathleen Kulbiski. On

appeal, DeMarco argues that Matthew Kulbiski's settlement with other parties released him from liability as well. DeMarco also argues that the judgment in favor of Matthew Kulbiski should be reduced by the amount paid by other parties to settle Kulbiski's bodily injury claim. We disagree on both fronts, and we affirm the judgment.

¶2 The facts are undisputed. A vehicle driven by DeMarco's son, Brian DeMarco, rear-ended the Kulbiskis' vehicle. Matthew Kulbiski was injured; Kathleen Kulbiski ultimately died of her injuries. Brian's parents, Michael DeMarco and Patricia Despotovich, sponsored Brian's driver's license under WIS. STAT. § 343.15(2)(b) (1997-98).¹ Despotovich owned the vehicle involved in the accident. Sentry Insurance insured Brian and Despotovich. Matthew Kulbiski sued Brian and his parents on his own behalf and on behalf of Kathleen Kulbiski's estate. Matthew Kulbiski also sued Michael DeMarco's insurer, State Farm.

¶3 Prior to trial, Sentry paid its policy limits of \$100,000 to Kathleen Kulbiski's estate for Kathleen Kulbiski's wrongful death and \$100,000 to Matthew Kulbiski for his bodily injury claim. In exchange for these payments, Matthew Kulbiski executed settlement documents as an individual and as the authorized representative of the estate. The settlement documents contained a release, indemnification of the settling parties, and a reservation of rights against Michael DeMarco. The case proceeded to trial on the Estate's wrongful death claim and Matthew Kulbiski's emotional distress claim. The jury awarded the Estate \$300,000 for Kathleen Kulbiski's pain and suffering. The jury also

¹ The accident occurred on January 14, 1998.

awarded Matthew Kulbiski \$350,000 for the loss of Kathleen Kulbiski's society and companionship.

¶4 At motions after verdict, the circuit court reduced the Estate's recovery by the \$100,000 paid to the Estate by Sentry.² Post-verdict Michael DeMarco argued that Matthew Kulbiski's bodily injury claim settlement operated as a complete release of DeMarco's liability or, in the alternative, the damages awarded for loss of society should be reduced by the \$100,000 settlement payment Matthew Kulbiski received for his bodily injury claim. The circuit court rejected both of DeMarco's arguments, and DeMarco appeals.

¶5 We first address Matthew Kulbiski's argument that Michael DeMarco waived his claim that the release benefits him because DeMarco did not plead the release as an affirmative defense via an amended answer. DeMarco disagrees.

¶6 The record does not support Kulbiski's waiver argument. Kulbiski suggested in the circuit court that the meaning of the release could be decided after trial, and Kulbiski did not object when DeMarco raised the import of the release via postverdict motion. WISCONSIN STAT. § 802.09(2) (2001-02) provides that if issues not raised in the pleadings are tried by the parties, such issues are "treated in all respects as if they had been raised in the pleadings." We reject the waiver argument because Kulbiski suggested addressing the release after the trial, did not object on waiver grounds when the release was addressed on postverdict motions, and § 802.09(2) treats the release issue as if it had been raised in the pleadings.

² The Estate did not cross-appeal to challenge this reduction in the jury verdict.

¶7 We turn to the meaning of the release contained in the settlement of Kulbiski's and the Estate's claims. A settlement agreement is subject to the rules of contract construction. See *Fleming v. Threshermen's Mut. Ins. Co.*, 131 Wis.2d 123, 132, 388 N.W.2d 908 (1986). When a contract is plain and unambiguous, we construe it as it stands. *Keller v. Keller*, 214 Wis. 2d 32, 37, 571 N.W.2d 182 (Ct. App. 1997).

¶8 The settlement documents contain identical terms. The first paragraph, entitled "Partial Release," states that the plaintiff "release[s], acquit[s] and forever discharge[s] Brian M. DeMarco, Patricia Despotovich and Sentry Insurance ... from all liability [to the plaintiff resulting from the accident].... [The plaintiff] expressly reserve[s] my right to proceed against any others who may be liable [to me] for injuries, losses and damages, including, but not limited to, Michael DeMarco and State Farm Mutual Automobile Insurance Company, in excess of the \$100,000 deemed paid herein." Kulbiski and the Estate also agreed not to sue Brian, Despotovich or Sentry, but expressly reserved the right to sue DeMarco. The release states that it releases only Brian, Despotovich and Sentry and reserves any claims against DeMarco.

¶9 DeMarco contends that the release relieves him of liability. The release requires Kulbiski and the Estate to indemnify and hold harmless Brian, Despotovich and Sentry. Because DeMarco has a contribution or indemnification claim against Brian, DeMarco argues that Kulbiski and the Estate effectively released their claims against him. We disagree with this analysis and hold that it is contrary to *Swanigan v. State Farm Insurance Co.*, 99 Wis. 2d 179, 299 N.W.2d 234 (1980).

¶10 DeMarco’s argument ignores that the claims against him arise from his liability as a sponsor of Brian’s driver’s license under WIS. STAT. § 343.15(2)(b) (1997-98).

The legislative purpose of the sponsorship statute has been discussed in a number of Wisconsin cases. From the outset in 1928, the statute has required a minor driver to secure an adult sponsor before obtaining a license. The legislature “was concerned with the hazards of negligently operated motor vehicles and with the desirability of imposing liability on a dependable adult who could pay for damages caused by a negligent minor driver.” To “protect the public from damage caused by the negligent operation of vehicles by youthful drivers,” the legislature thought it was important to look for security in persons other than the minor. Parents are generally the people in the best position to have personal knowledge of a minor’s characteristics as well as the opportunity to exercise some degree of control over a minor’s driving. Presumably, parents are in a position to act quickly to withdraw their sponsorship if a minor child shows signs of irresponsibility. They have an incentive to do so because the liability imputed to them is very strict, and there is no limit on the liability imposed.

Reyes v. Greatway Ins. Co., 227 Wis. 2d 357, 371-72, 597 N.W.2d 687 (1999) (citations and quoted sources omitted). In recognition “that a minor’s financial resources will often be insufficient to satisfy fully a claim arising from the minor’s negligence, the legislature has, in sec. 343.15, Stats., provided the injured person with a potential source of payment for damages in addition to the minor or persons liable under the common law.” *Franz v. Brennan*, 150 Wis. 2d 1, 7, 440 N.W.2d 562 (1989).

¶11 In *Swanigan*, the issue “was whether an injured party plaintiff, after releasing a minor by a *Pierringer*-type release, could nevertheless proceed with the action against the sponsor for the collection of the injured plaintiff’s own damages when there was no evidence that the plaintiff intended to release the

sponsor.” *Jackson v. Ozaukee County*, 111 Wis. 2d 462, 468, 331 N.W.2d 338 (1983). The *Swanigan* court held that:

[T]he legislature, as a matter of public policy, devised the sponsorship requirement to make it more likely that there would be just compensation for the injured plaintiff party even though the minor could not completely respond in damages. Hence, we concluded that, where the injured party seeks recovery from the sponsor, the release of the minor does not, *ipso facto*, constitute the release of the sponsor—that to allow the injured party to collect a portion of his damages from a minor by settlement and release and then to proceed against the sponsor gives effect to the legislative purpose in enacting the sponsorship law.

Jackson, 111 Wis. 2d at 468.

¶12 We have the same situation here. The release in this case unambiguously states in numerous places that Matthew Kulbiski reserved his rights against Michael DeMarco. Therefore, because there is no demonstrated intent to release anyone other than the minor, his mother and their insurer, the release did not relieve DeMarco of liability as a sponsor of Brian’s license.

¶13 We reject DeMarco’s attempt to distinguish *Swanigan*. DeMarco largely relies on the fact that he has a contribution claim against Brian,³ whom the jury found was negligent. Kulbiski argues that DeMarco’s liability arises from his sponsorship of Brian’s driver’s license and that permitting him to escape liability undermines the public policy of the sponsorship statute. The sponsorship statute holds a sponsoring parent liable for the acts of a tortfeasor minor child. We question whether a sponsoring parent can circumvent this liability by seeking

³ Although DeMarco alleges that he has a contribution claim against Brian, DeMarco does not clarify the status of the contribution claim.

contribution or indemnification from the child. However, we do not decide this issue because the contribution claim is not before this court. We will not issue an advisory opinion as to whether DeMarco, whose liability arose under the sponsorship statute, has a right of contribution or indemnification against the minor whose driver's license he sponsored. Our holding in this case is restricted to whether the release also discharged DeMarco; we hold that it did not.

¶14 We turn to DeMarco's argument that the loss of society verdict in favor of Matthew Kulbiski should be reduced by the \$100,000 settlement payment he received for his bodily injuries. Matthew Kulbiski released Brian DeMarco, Patricia Despotovich and Sentry from all claims for injuries, losses and damages he sustained in the accident in exchange for \$100,000, Sentry's policy limits. The release further states: "This is a release, credit and satisfaction of and against any and all claims up to, but not exceeding, \$100,000." The release then goes on to provide that Matthew Kulbiski reserved his rights against DeMarco "in excess of the \$100,000 deemed paid herein." DeMarco relies upon this language to argue that he should have a credit for this settlement amount against the judgment entered against him for \$350,000 in damages for Matthew Kulbiski's loss of society and companionship of his wife.

¶15 We conclude that the public policy reasons set forth in *Swanigan* relating to the consequences of a release of a minor for a parent's sponsorship liability, *Jackson*, 111 Wis.2d at 468, apply to DeMarco's argument that his sponsorship liability should be reduced by the minor's settlement payment. We acknowledge that neither party suggests that *Swanigan* is relevant to this argument. However, we may affirm for reasons other than those expressed by the circuit court. See *State v. Rognrud*, 156 Wis. 2d 783, 789, 457 N.W.2d 573 (Ct. App. 1990). An injured party may "collect a portion of his damages from a minor by

settlement and release and then proceed against the sponsor [to give] effect to the legislative purpose in enacting the sponsorship law.” *Jackson*, 111 Wis. 2d at 468. If DeMarco is able to take advantage of Matthew Kulbiski’s settlement with his minor son, he is effectively circumventing his sponsorship liability.⁴

By the Court.—Judgment affirmed.

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

⁴ As we stated earlier, the Estate does not appeal the reduction of its jury award by the \$100,000 settlement amount. Therefore, our holding does not extend to the offset of that settlement amount.

