**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**November 22, 2011**

**A. John Voelker**
**Acting Clerk of Court of Appeals**



**Appeal No. 2010AP2435** **Cir. Ct. No. 2008CV662**

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

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**MELISSA L. PETERSON,**

**PLAINTIFF-APPELLANT-CROSS-RESPONDENT,**

**JOHN PETERSON,**

**PLAINTIFF,**

**V.**

**AMERICAN FAMILY MUTUAL INSURANCE COMPANY AND JESSICA JACOBS, NOW KNOWN AS JESSICA POLINSKE,**

**DEFENDANTS-RESPONDENTS-CROSS-APPELLANTS.**

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APPEAL and CROSS-APPEAL from a judgment of the circuit court for St. Croix County: HOWARD W. CAMERON, JR., Judge. *Reversed and cause remanded with directions.*

Before Hoover, P.J., Peterson, J., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Melissa Peterson appeals a judgment awarding her damages after a jury trial in her personal injury action against American Family Mutual Insurance Company and Jessica Jacobs (collectively, American Family). Peterson argues the circuit court erroneously granted American Family an offset equal to the amount of funds Peterson's own insurer, Badger Mutual, already paid to her under Minnesota no-fault automobile insurance law. American Family cross-appeals arguing it was entitled to an additional offset for the funds Badger Mutual paid Peterson to settle her bad faith claim. We agree with Peterson that American Family was not entitled to any offset. Accordingly, we reverse and direct the circuit court to modify the judgment.

## BACKGROUND

¶2 Peterson was injured in an automobile accident in Minnesota. Badger Mutual extended Minnesota no-fault benefits to Peterson, even though the benefits were not afforded under the policy language.[1] Minnesota law requires that automobile liability policies provide a total of $40,000 in no-fault coverage, consisting of $20,000 for medical expenses and $20,000 for other losses, including lost income. *See* MINN. STAT. § 65B.44 (2011). After paying Peterson

[1] American Family observes:

> As a Wisconsin insurer covering a Wisconsin insured, Badger nonetheless complied with Minnesota's no-fault law presumably because Minnesota conditions the privilege to transact business in that state with adherence to the requirement that no-fault benefits be paid whenever an insured is injured in Minnesota, regardless of where the policy was issued.

*See* MINN. STAT. § 65B.44 (2011); ***American Standard Ins. Co. v. Cleveland***, 124 Wis. 2d 258, 263 n.2, 369 N.W.2d 168 (Ct. App. 1985).

$10,769.82 in medical expenses and $7,620.68 in lost wages, Badger Mutual discontinued benefits to Peterson.

¶3 Peterson then sued Badger Mutual, alleging bad faith. Ultimately, Peterson signed a one-way release of all claims against Badger Mutual in exchange for payment of an additional $21,609.50, which was precisely the remaining amount recoverable under the Minnesota no-fault law. In fact, the release expressly stated the payment amount "represents the difference." Thus, Peterson received a total of $40,000 from Badger Mutual.

¶4 Subsequently, in Peterson's action against the other driver, American Family sought an offset for the entire $40,000 Peterson received from Badger Mutual. American Family argued Badger Mutual's subrogation rights had expired under the statute of limitations and Peterson should not receive a double recovery. The circuit court concluded American Family was entitled to an offset for Badger Mutual's initial no-fault payment, but not for the second payment, which was made partially in settlement of the bad faith claim. Following the denial of their respective postverdict motions, Peterson now appeals, and American Family cross-appeals.

## DISCUSSION

¶5 American Family contends Badger Mutual's subrogation rights expired under the applicable statute of limitations. American Family argues that, consistent with ***Lambert v. Wrensch***, 135 Wis. 2d 105, 399 N.W.2d 369 (1987), it is therefore entitled to an offset for all amounts Badger Mutual paid to Peterson. Peterson, on the other hand, argues that pursuant to the more recent decision in ***Jindra v. Diederich Flooring***, 181 Wis. 2d 579, 511 N.W.2d 855 (1994), American Family is not entitled to any offset because, regardless of any

subrogation rights, Badger Mutual retained its alternative contractual right to reimbursement from Peterson.[2] We agree that ***Jindra*** controls.

¶6 In both ***Lambert***, 135 Wis. 2d at 110, and ***Jindra***, 181 Wis. 2d at 592, the plaintiff's insurer's subrogation rights had expired under the statute of limitations. The plaintiff's insurer in both cases also had a contractual right to reimbursement from its insured in the event of a double recovery. *See* ***Jindra***, 181 Wis. 2d at 598; ***Lambert***, 135 Wis. 2d at 116-17. In ***Lambert***, the defendant insurer was allowed an offset for the amount the plaintiff's insurer had paid to its insured, so as to prevent a double recovery by the plaintiff. ***Lambert*** did not consider the effect of the reimbursement clause.[3] In ***Jindra***, however, the defendant insurer was denied an offset because, although the plaintiff's insurer's subrogation rights had expired, the plaintiff's insurer retained its right of

[2] In addition to her reimbursement clause argument, Peterson alternatively argues that: (1) ***Lambert*** is inapplicable because Badger Mutual had waived its subrogation rights before the statute of limitations ran, *see* ***Lambert v. Wrensch***, 135 Wis. 2d 105, 399 N.W.2d 369 (1987), or (2) if Badger Mutual had not so waived its subrogation rights, the lengthier Minnesota statute of limitations applied instead, and claim preclusion would not bar a subsequent suit because Badger Mutual was not a party to this case. Because Peterson's reimbursement clause argument is dispositive, we need not address the others. *See* ***State v. Castillo***, 213 Wis. 2d 488, 492, 570 N.W.2d 44 (1997) (appellate courts not required to address every issue raised when one issue is dispositive).

[3] ***Lambert*** noted the existence of a reimbursement clause, but only in its analysis of whether the insurance contract was an indemnity policy or an investment policy. *See* ***Lambert***, 135 Wis. 2d at 116-17. That inquiry was necessary because, unlike the present case, the policy in ***Lambert*** did not include a subrogation clause. *See* ***id.*** ***Lambert*** involved only equitable subrogation, rather than contractual subrogation. *See* ***id.***

Additionally, we note that ***Lambert*** relied on ***Heifetz v. Johnson***, 61 Wis. 2d 111, 211 N.W.2d 834 (1973). ***Lambert***, 135 Wis. 2d at 118-19. ***Jindra***, however, held ***Heifetz*** was not controlling because, among other things, in that case "[t]here was no mention of a reimbursement clause." ***Jindra v. Diederich Flooring***, 181 Wis. 2d 579, 595, 511 N.W.2d 855 (1994). To the extent ***Lambert*** and ***Jindra*** conflict, we follow the more recent pronouncement in ***Jindra***. *See* ***State v. Clark***, 179 Wis. 2d 484, 493, 507 N.W.2d 172 (Ct. App. 1993) ("When decisions of our supreme court appear to be inconsistent, we follow the court's most recent pronouncement.").

reimbursement from its insured. ***Jindra***, 181 Wis. 2d at 589-90. Therefore, the court reasoned, the plaintiff would not receive a double recovery. It explained:

> There is no problem of double recovery here. When an insurance company relies upon a reimbursement clause, the plaintiff does not collect twice but would still be subject to the reimbursement clause. Should the insurer subsequently waive its reimbursement claim or allow the reimbursement action to lapse, then it is the insurance company which would lose its own money by its own actions. There is no reason why any amount lost in such a situation should not properly remain with the plaintiff.

***Id.*** at 610.

¶7 The ultimate basis for the ***Jindra*** holding, however, was that the defendant insurer had failed to meet its burden of proof. ***Id.*** at 589-90, 604. Specifically, it had to prove that between the plaintiff's insurer's two contractual alternatives for recovery of payments made to its insured, the plaintiff's insurer either had chosen, or was required to choose, subrogation in lieu of reimbursement. *See* ***id.*** at 600-04. The court observed:

> The mere fact that there is a subrogation clause in the contract which *may* cover a given situation does not mean that the clause was invoked.
>
> ....
>
> There is no reason for *imposing* subrogation on a party when that party instead elects to rely upon a reimbursement clause in its policy or an agreement. Were we to bar a reimbursement claim every time a theoretical argument could be made for allowing subrogation, reimbursement clauses would be rendered meaningless.

***Id.*** at 604 n.13, 605 (emphasis added).

¶8 Here, American Family relies solely on Peterson's one-way release of claims against Badger Mutual as proof that Badger Mutual has wholly

disclaimed reliance on its reimbursement clause. American Family asks us to infer, from silence on the issue, that Peterson's release necessarily dissolved Badger Mutual's rights.[4] Badger Mutual, for its part, has not expressly stated any intention to waive its reimbursement clause. In fact, American Family seeks to foreclose Badger Mutual's contractual rights against its insured, without Badger Mutual ever having been made a party to these proceedings.

¶9 To the extent Badger Mutual's intentions regarding its reimbursement rights can be inferred from the language of Peterson's release, it appears most likely that Badger Mutual intends to enforce its reimbursement rights as to the entire $40,000 it paid. The release expressly states that the entire amount Badger Mutual paid represented Minnesota no-fault payments, even though Peterson was also releasing her bad faith claims. Moreover, given that Badger Mutual allowed its subrogation claim to expire without taking any action, it would be peculiar at best to conclude that Badger Mutual opted for subrogation in lieu of reimbursement. Regardless, it was American Family's burden to prove that Badger Mutual chose, or should be compelled, to exercise its right to subrogation in lieu of its right to reimbursement. As explained in ***Jindra***, when considering whether to compel subrogation over reimbursement, the equities favor the plaintiff's insurer—not the tortfeasor's insurer. *See* ***id.*** at 605-06.

[4] We requested additional briefs from the parties regarding the scope of Peterson's release. In American Family's supplemental brief, it further argues that the release must have extinguished Badger Mutual's right to reimbursement because otherwise the agreement to pay Peterson was illusory—that is, Badger Mutual could turn around and demand the money back from Peterson. This argument, however, ignores the release's language expressly identifying the entire payment as Minnesota no-fault proceeds. The agreement to pay was not illusory. If Peterson failed to later recover a double recovery, she would be entitled to keep the funds.

¶10 American Family fails to demonstrate that Badger Mutual chose, or should be compelled, to waive its reimbursement clause in favor of its subrogation clause. Badger Mutual therefore retains its contractual right to reimbursement of payments made to its insured. Consequently, American Family is not entitled to any offset for payments Badger Mutual paid to Peterson. The circuit court shall modify the judgment to remove the offset allowed to American Family.

*By the Court.*—Judgment reversed and cause remanded with directions.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2009-10).