COURT OF APPEALS
DECISION
DATED AND RELEASED

FEBRUARY 13, 1996

NOTICE

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

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No. 95-0773

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

JANICE L. GELINE, d/b/a
THE CRYSTAL BAR,

Plaintiff-Appellant-Cross Respondent,

v.

AUTO-OWNERS INSURANCE COMPANY,
a foreign corporation,

Defendant,

FIRST OF AMERICA BANK,
UPPER PENINSULA BRANCH - N.A.,

Defendant-Respondent-Cross Appellant,

TOWN OF AURORA,

Intervenor-Defendant Respondent,

APPEAL and CROSS-APPEAL from an order of the circuit court for Florence County: ROBERT A. KENNEDY, Judge. *Affirmed in part; reversed in part and cause remanded.*

Before Cane, P.J., LaRocque and Myse, JJ.

CANE, P.J. Janice Geline and First of America Bank appeal parts of an order settling a lawsuit and distributing settlement proceeds to Geline, the bank and the Town of Aurora. On appeal, Geline raises five issues: (1) whether she can enforce an oral agreement she reached with the bank; (2) whether the bank was improperly added as a payee on the settlement check; (3) whether the town was improperly added as a payee on the settlement check; (4) whether the town should have been permitted to intervene in the action; and (5) whether the trial court's order awarding distribution of the insurance proceeds to the bank and the town is in error. The bank raises two issues in its cross-appeal: (1) whether the trial court properly denied the bank its costs of collection allowed pursuant to the notes executed by Geline; and (2) whether the trial court properly awarded attorney's fees to Geline's attorney from the bank's proceeds.[1]

For the reasons stated in this opinion, we conclude Geline's oral agreement with the bank is not enforceable; the town was properly permitted to intervene in the action; the trial court's distribution order is correct with respect to the town, but must be amended with respect to the bank; the trial court properly denied the bank its costs of collection for the notes; and the trial court unreasonably exercised its discretion when it awarded Geline's attorney a portion of the bank's proceeds. Therefore, we affirm in part, reverse in part, and remand for redistribution of the settlement proceeds in accordance with this opinion.

FACTS

In its decision and final order, the trial court summarized the undisputed facts. In 1992, a fire damaged the Crystal Bar, owned by Geline. At that time, the bar was insured by a fire policy issued by Auto-Owners Insurance Company. The policy provided coverage for the building ($250,000), the

[1] While the parties dispute whether certain proceeds should have been awarded, we note that no party has challenged the trial court's findings on the specific dollar figures claimed by each party, such as $20,587 in costs for Geline's attorney.

content or property therein ($75,000) and for business interruption ($75,000). The policy also provided coverage for debris removal and listed the bank as a mortgagee of the property.

Although Auto-Owners advanced Geline $5,000, it refused to pay additional amounts and Geline filed suit. Geline joined the bank as a party defendant because of its mortgage interest and possible interest in the proceeds, if any, from Auto-Owners. The bank answered the complaint and sought a declaration of its rights pursuant to various notes, security agreements and the mortgage it had with Geline. The bank also claimed it was entitled to payment from Auto-Owners because it was listed as a mortgagee on the insurance policy and because portions of the insured personal property were security for notes from Geline to the bank.

Auto-Owners paid the bank approximately $101,000 in exchange for the bank's full release and discharge of claims against Auto-Owners. In March 1994, the trial court issued a scheduling order that all claims between Auto-Owners and the bank had been settled. Additionally, the trial court ordered that "any issue between the said bank and the plaintiff [Geline] shall now be resolved by this Court, by motion, after a verdict or other resolution of this case. Such issues include outstanding loan balances and costs of collection, if any, by the bank." Geline did not file an objection to this order. The trial court also concluded that the bank need not appear at the rescheduled trial date.

Meanwhile, the town, not yet a party to Geline's lawsuit against Auto-Owners and the bank, commenced an action against Geline, seeking to have the remaining bar structure declared a hazard and removed by the town. The case resulted in a judgment by the town against Geline in the amount of $14,203.38, which included the cost to remove the property, costs and attorney's fees, and interest. As a result of that judgment, the town had a lien on its tax rolls for the property.

In July 1994, Geline's case against Auto-Owners went to a jury trial. Geline testified that she had other creditors and debts incurred besides the bank, including the Internal Revenue Service and the State of Wisconsin Department of Revenue. A mistrial was declared after a juror became ill, and

the trial was rescheduled for January 4, 1995. The IRS filed a notice of levy against Auto-Owners with respect to Geline's property in the sum of $12,143.13.

In the month before the case was scheduled for trial, Geline and Auto-Owners engaged in settlement negotiations. Geline's attorney, Mary Brouillette Barglind, also engaged in settlement discussions with the bank, attempting to settle the bank's claims against Geline on the notes referenced in the trial court's scheduling order of March 1994. According to testimony taken at a subsequent motion hearing, Barglind and the bank's loan loss specialist, Joseph Havican, had a telephone conversation on December 29 during which they agreed to settle all outstanding loan balances with regard to Geline's account for $15,000. Because the bank subsequently stated it would not abide by the oral agreement, Geline filed a motion as part of these court proceedings to enforce the agreement.

As for settlement negotiations between Geline and Auto-Owners, the record reveals that on December 29, Barglind sent a letter to Auto-Owners' attorney offering to settle all claims for $200,000, with Auto-Owners waiving its right to set off payments it made to the bank. The letter also referenced the IRS levy. In a return letter on December 29, Auto-Owners accepted the settlement.

Although Geline and Auto-Owners appeared to have reached a settlement, a dispute arose when Auto-Owners informed Barglind that it intended to include the bank as a payee on the settlement check issued to Geline. Additionally, Auto-Owners' attorney spoke with Barglind on the phone and informed her that because it had received notice of the town's $14,000 claim against Geline, it also intended to add the town as a payee on Geline's settlement check. Auto-Owners moved to enforce its settlement with Geline.

Before the hearing on Geline's and Auto-Owners' motions, Auto-Owners issued a check for $159,538.73, naming Geline, Barglind, the bank and the town as payees. Auto-Owners, in a letter accompanying the check, stated it would be sending the IRS a check for $12,154.13 and the Wisconsin DOR a check for $28,318.14.

At the January 10 hearing, the trial court concluded Geline's oral agreement with the bank to settle the bank's claims against her was enforceable and granted Geline's motion. Additionally, Geline did not oppose Auto-Owners' motion to enforce their settlement and, instead, agreed to go through with the $200,000 settlement.

Following the hearing, Geline filed a motion to require the bank to sign the settlement check on which it was named a payee, or to order Auto-Owners to reissue the draft without naming the bank as a payee. Geline also moved to have Auto-Owners reissue the check without the town as a payee. The bank moved the court for reconsideration of its order enforcing the bank's oral agreement with Geline. Meanwhile, the town moved the trial court for an order allowing it to intervene in the case, which the trial court granted.

On January 27, the trial court heard argument on Geline's and the bank's motions. Ultimately, the trial court vacated its earlier order enforcing the bank's $15,000 oral agreement with Geline. The trial court also denied Geline's motion to have the settlement check reissued without the town or the bank listed as payees. The trial court's final decision and order required Geline to return the settlement draft of $159,538.73 to Auto-Owners. Auto-Owners was ordered to issue the following checks:

IRS $ 12,143.12	
Clerk of Courts for Florence County[2]	28,318.14
Barglind's trust account, for Geline's costs	20,587.00
Town of Aurora	9,459.45
First of America Bank	31,452.23
Geline and Barglind	98,040.05
TOTAL	$200,000.00

It is this order that Geline and the bank appeal.

[2] The DOR at one time claimed it was entitled to settlement proceeds. The parties agreed to have the clerk of court hold the contested amount pending the resolution of a case between the DOR and Geline. No party on appeal disputes giving this money to the clerk of court.

WHETHER GELINE CAN ENFORCE THE ORAL AGREEMENT WITH THE BANK

Geline's first issue is whether the oral agreement her attorney reached with the bank should be enforced. At the first hearing, the trial court held the oral agreement was enforceable. However, the trial court reversed its earlier ruling after the bank filed a motion for reconsideration, concluding the agreement could not be enforced because the agreement did not satisfy § 807.05, STATS. Geline argues the trial court's second ruling should be reversed because there "was no legal authority upon which to bring a motion for reconsideration." We disagree. There is no reason why a trial court, having concluded that a prior nonfinal ruling in a pending case is wrong, cannot correct that error by reconsideration. ***Fritsche v. Ford Motor Credit Co.***, 171 Wis.2d 280, 295, 491 N.W.2d 119, 124 (Ct. App. 1992). Therefore, we reject Geline's claim that the trial court lacked authority to reconsider its earlier ruling.

Geline also argues § 807.05, STATS., does not apply. Section 807.05 provides:

> **Stipulations.** No agreement, stipulation, or consent between the parties or their attorneys, in respect to the proceedings in an action or special proceeding shall be binding unless made in court or during a proceeding conducted under ss. 807.13 or 967.08 and entered in the minutes or recorded by the reporter, or made in writing and subscribed by the party to be bound thereby or the party's attorney.

Whether § 807.05, STATS., is applicable to this case is a mixed question of fact and law. The trial court's factual findings will only be reversed if they are clearly erroneous; we then apply the statute to the facts independently of the trial court's determinations. ***DOR v. Exxon Corp.***, 90 Wis.2d 700, 713, 281 N.W.2d 94, 101 (1979).

The trial court concluded there was no enforceable settlement because the requirements § 807.05, STATS., had not been satisfied for the

following reason: there was nothing in writing subscribed to by the parties or their attorneys, or any agreement made on the record in court between the bank and Geline. Neither party disputes these findings. However, Geline argues that § 807.05 is inapplicable because the compromise of the bank's security interests had nothing to do with the action before the court. Alternatively, Geline argues that even if § 807.05 is applicable, there is an exception to the statute when the stipulation is relied upon and acted on by any of the parties.

Our analysis of the record and the trial court's findings leads us to conclude the bank's security interests were part of the litigation pending before the court and, therefore, § 807.05, STATS., is applicable. First, Geline through her amended complaint alleged the bank was a proper party, thereby making the bank a party to the action.

Second, the bank in its answer and cross-claim against Auto-Owners referenced in several paragraphs not only Geline's mortgage with the bank, but also the security agreements it held with Geline. For instance, the bank affirmatively alleged that Geline's ownership interest in insured real and personal property is subject to indebtedness and security interests issued to the bank. Additionally, in answer to Geline's allegation that she was entitled to $400,000 from Auto-Owners, the bank affirmatively alleged that a portion of the monies due are payable to the bank, pursuant to documents evidencing Geline's indebtedness and security interests granted to the bank.

Third, in its March 1994 scheduling order, the trial court recognized that even though the bank had settled its claims against Auto-Owners, there were still issues between the bank and Geline that would be "resolved by this Court, by motion, after a verdict or other resolution of this case. Such issues include outstanding loan balances and costs of collection, if any, by the bank." Geline did not object to the order. Additionally, we note there was never an order or judgment dismissing the bank from these proceedings.

Finally, Geline's actions evidence her belief that the bank remained a party and that the notes the bank had with Geline were also part of the litigation. When the bank indicated it would not abide by the oral agreement for $15,000, Geline filed a motion to enforce the agreement with the trial court, using the same case number as her original suit against Auto-

Owners and the bank. The subsequent hearing addressed not only Geline's motion, but also Auto-Owners' motion to enforce its settlement with Geline. Geline's efforts, as well as the record, indicate the bank was a party and that the bank notes were part of the litigation, at the very least to the extent they would be referenced when the trial court declared the bank's rights after a trial or settlement. Therefore, we conclude § 807.05, STATS., applies.

Geline argues that even if § 807.05, STATS., applies, there is an exception to the statute when the stipulation is relied upon and acted on by any of the parties. As a general rule, appellate courts will not review issues raised for the first time on appeal. ***Bank One, Appleton, NA v. Reynolds***, 176 Wis.2d 218, 222, 500 N.W.2d 337, 339 (Ct. App. 1993). Absent evidence in the record to the contrary, we will not presume that Geline made this argument to the trial court. *See* ***Preuss v. Preuss***, 195 Wis.2d 95, 105, 536 N.W.2d 101, 105 (Ct. App. 1995). Geline does not provide a record cite; this court need not sift the record. *See* ***Keplin v. Hardware Mut. Casualty Co.***, 24 Wis.2d 319, 324, 129 N.W.2d 321, 323 (1964); § 809.19(1), STATS. Therefore, we will not address this argument on appeal.

Because § 807.05, STATS., applies, and because Geline does not dispute the trial court's finding that this statute was not satisfied, we conclude the oral agreement between Geline and the bank is not enforceable.

WHETHER THE BANK AND THE TOWN SHOULD HAVE BEEN NAMED AS JOINT PAYEES ON THE SETTLEMENT CHECK

In motions following the first hearing, Geline moved to require the bank to sign the $159,538.73 settlement check on which it was listed as a payee. Alternatively, Geline sought to order Auto-Owners to reissue the check without listing the bank as a joint payee. Geline also moved to order Auto-Owners to reissue the check without listing the town as a joint payee. The trial court ultimately denied these motions and ordered Auto-Owners to issue a new, separate check to the bank for $ 31,452.23, and a new, separate check to the town for $ 9,459.45. On appeal, Geline argues the bank and the town were improperly added as joint payees on the first settlement check issued from Auto-Owners. Because the trial court's final order requires Auto-Owners to issue separate checks to the bank and the town, the alleged error is without prejudice to Geline. Instead, the pertinent issue is whether the final order to issue separate checks should be affirmed; we address this issue later in this opinion. Therefore, it is unnecessary to determine whether the bank and the town should have been listed as joint payees on the first settlement check.

WHETHER THE TOWN SHOULD HAVE BEEN PERMITTED TO INTERVENE IN THE ACTION

Geline next argues the town should not have been permitted to intervene in the case. The trial court in its order allowing intervention stated that the town should be a party to the action because Geline had filed a motion that impacts upon the town (*i.e.*, the motion to remove the town from the settlement check). We need not examine whether the trial court reasonably exercised its discretion because, as the town notes, there is no evidence in the record that Geline filed a written objection or made an oral objection or argument against the intervention. *See* ***Poling v. Wisconsin Physicians Serv.***, 120 Wis.2d 603, 610, 357 N.W.2d 293, 297-98 (Ct. App. 1984) (Matters argued for the first time on appeal and not raised in the trial court are deemed waived). We recognize that Geline in her brief states, without citation to the record, "The Court allowed the Intervention over the objection of the Plaintiff-Appellant." However, she does not explain when or how such objection was made and provides no record cite. This court need not sift the record. *See* ***Keplin***, 24 Wis.2d at 324, 129 N.W.2d at 323; § 809.19(1), STATS. Even so, we have looked through the record, and our examination of the record reveals no such objection. Therefore, we will not address Geline's argument that the town should not have been allowed to intervene, because she did not object at the time the trial court granted the town's motion.

WHETHER THE TRIAL COURT'S ORDER AWARDING DISTRIBUTION OF THE INSURANCE PROCEEDS TO THE BANK AND TOWN IS IN ERROR.

Geline's final issue on appeal is whether the trial court erred when it awarded distribution of the insurance proceeds to the bank and the town. We begin by addressing the distribution to the bank. The pertinent issue is whether the bank had any right to settlement proceeds. Geline argues the bank never counterclaimed or took any action against her to collect on its notes. She reasons that because the bank made a full settlement with Auto-Owners, it therefore had no right to claim part of the settlement proceeds in this case.

To analyze the bank's right to share in the settlement proceeds, we begin with examination of the bank's pleadings. In its answer, it did not explicitly denominate a counterclaim against Geline on the notes. However, it

specifically requested "a declaration of rights as between it and the Plaintiff." In its scheduling order, to which Geline did not object, the trial court ordered that "any issue between the said bank and the plaintiff [Geline] shall now be resolved by this Court, by motion, after a verdict or other resolution of this case. Such issues include outstanding loan balances and costs of collection, if any, by the bank." We conclude the bank's answer and the trial court's order gave the bank the right to remain in the case as a party and to request a declaration of its rights against Geline after a verdict or settlement.

But the question remains whether the bank had a right to a monetary award after verdict or settlement. The answer, we conclude, is found implicitly in the procedures invoked by Geline, the bank and the trial court. After Geline reached an oral agreement with the bank, and the bank refused to abide by the agreement, Geline invoked the jurisdiction of the court, seeking, according to her motion to enforce the agreement,

> enforcement of the agreement reached which was to settle all debts and costs due and owing to the First of America Bank for the total sum of Fifteen Thousand ($15,000.00) dollars to be paid from the proceeds of the settlement monies from Auto Owners Insurance Company.

Then, at the hearing on her motion, Geline introduced testimony, and the parties presented their arguments to the trial court. After the trial court ruled in favor of Geline, she had no objection to Auto-Owners' motion to enforce the $200,000 settlement agreement. In fact, when the trial court stated, "Do both parties want [Auto-Owners'] motion granted without me even reading it?" Geline's attorney responded, "Yes, your Honor. Yes, your Honor." This exchange emphasizes that the trial court, the bank and Geline all implicitly agreed to amend the bank's pleading to include a claim for the balance of the notes that could be collected from Geline's settlement proceeds. If issues not raised by the pleadings are tried by implied consent of the parties, they shall be treated in all respects as if they had been raised by the pleadings. Section 802.09(2), STATS.

For these reasons, we conclude the trial court properly awarded the bank a portion of the settlement proceeds. The bank's issues on cross-appeal

as to the proper amount of its award are discussed later in this opinion. Thus, we turn to our consideration of the town's right to settlement proceeds.

We observe that if the town had not been made a party, it would have had no right to the settlement proceeds in this case, absent the filing of a garnishment or other action on its judgment against Geline. However, the facts of this case establish the town's right to share in the settlement proceeds, even though the trial court did not explain in detail its decision to award the town a portion of them. The trial court did find that the town's judgment, which had been granted for costs associated with demolition and debris removal, were costs covered by the insurance policy and that the town was therefore entitled to a portion of the settlement proceeds.

Additionally, the evidence before the trial court included: (1) the town's judgment lien against Geline's real estate; (2) the Auto-Owners insurance policy that provided coverage for debris removal; (3) the town's knowledge of the pending settlement between Geline and Auto-Owners, its intention to immediately file a garnishment action and its inducement not to do so when it was informed by the Auto-Owners' attorney that Geline had agreed to add the town's name to the settlement check; (4) the town's receipt of a fax from Geline's attorney wherein she stated "I understand that the Town of Aurora will be named as a joint payee on the check," and added, "It is our position this was inappropriate and we will be moving the Court to Order the check be reissued without the Township's name upon it if we cannot come to some agreement"; (5) a settlement check including the town as a payee printed and sent to Geline and her attorney via Federal Express on January 6 for receipt on January 7; and (6) Geline's January 13 motion to remove the town from the check.

Under these facts, we conclude it was appropriate for the trial court to conclude, as it implicitly did, that the town had a right to share in the settlement proceeds because: (1) the town's judgment lien was based on costs associated with the demolition and removal of the burned bar, a cost covered by the insurance policy; (2) the town had a valid judgment against Geline which it referenced in its motion to intervene; (3) the town had relied on the statements and actions of Auto-Owners and Geline and therefore did not pursue its garnishment action; (4) Geline consented to have the town placed on the check at least temporarily when her attorney faxed the town an offer to settle; and (5) the town had been permitted to intervene as a party without objection by Geline. Therefore, the trial court's decision to award the town a portion of the settlement proceeds was not error.

WHETHER THE TRIAL COURT PROPERLY DENIED
THE BANK ITS COSTS OF COLLECTION

The bank raises two issues in its cross-appeal. The first is whether the trial court erred when it concluded the bank was not entitled to collection costs. At the first hearing, the trial court observed:

> [A]ll the loans are to be considered and decided on in this lawsuit, cause when the bank negotiated with Miss Barglind, they were considering this unpaid balance, 79,000, not some lesser sum. Okay.
>
> Now part of that amount was 30 some thousand dollars for attorneys fees. Probably that was generated from you, [counsel for bank] following along this fire case.
>
> ....
>
> Now, you say collection procedure. Right. Following this insurance case is not a collection procedure. Mortgage foreclosures are collection procedures. That was not done. Suing on notes, those are collection proceedings. That was not done. So the bank has never taken any action, I guess, on any of their loans or loan documents.

Then, in its written decision, the trial court stated it would not allow attorney fees and disbursements to the bank.

In sum, the trial court denied the bank's request for collection costs and attorney's fees because it concluded the bank's costs were associated with its work on Auto-Owners' claim that it had no duty to pay on the policy. After examining the record, we cannot say the trial court's finding is clearly erroneous and therefore, cannot set it aside. *See* Section 805.17(2), STATS.

WHETHER THE TRIAL COURT PROPERLY AWARDED GELINE ATTORNEY'S FEES FROM THE BANK'S PROCEEDS

The final issue before this court is the bank's cross-appeal regarding the reduction in its proceeds for Geline's attorney's fees. The court found the bank's total claim, less its own attorney's fees, was $47,225.57. The trial court awarded the bank only two-thirds of this amount and instead, gave the remainder to Geline and Geline's attorney for attorney's fees. The trial court explained:

> I would comment that costs and attorney fees come off the top of this settlement. No matter what the bank's claims are. I will be allowing full -- I am talking about Miss Barglind's attorney fees. ...
>
> ....
>
> Attorney fees comes off the top. ... There is an attorney's lien.

On appeal, Geline argues she had a one-third contingency fee agreement with her attorney that created an attorney lien on the settlement proceeds. While we agree that Geline's attorney may have an attorney's lien on Geline's portion of the settlement proceeds, we fail to see how § 757.36, STATS.,[3] would create an attorney's lien on the bank's portion of the proceeds. We agree

[3] Section 757.36, STATS., provides:

> **Lien on proceeds of action to enforce cause of action.** Any person having or claiming a right of action, sounding in tort or for unliquidated damages on contract, may contract with any attorney to prosecute the action and give the attorney a lien upon the cause of action and upon the proceeds or damages derived in any action brought for the enforcement of the cause of action, as security for fees in the conduct of the litigation; when such agreement is made and notice thereof given to the opposite party or his or her attorney, no settlement or adjustment of the action may be valid as against the lien so created, provided the agreement for fees is fair and reasonable. This section shall not be construed as changing the law in respect to champertous contracts.

with the bank: "The Plaintiff's attorney had no fee contract with the bank. Indeed, the bank was required to retain its own attorneys to pursue collection of the proceeds due it under the Notes. There is no evidence or authority supporting the trial court's decision in this regard."

CONCLUSION

In conclusion, we affirm the trial court's order, with one exception. We reverse that portion of the trial court's order that deducted one-third of the bank's $47,225.57 award and gave it instead to Geline and her attorney for attorney's fees. We remand the case so that the trial court can enter an order that Geline and her attorney return $15,773.34 to the bank. Because the town did not cross-appeal to recover its own attorney's fees, which the trial court refused to award, or the one-third of its award the trial court gave Geline, the town is not entitled to an increase in its award.

By the Court.—Order affirmed in part; reversed in part and cause remanded. No costs on appeal.

Not recommended for publication in the official reports.