

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

DECEMBER 19, 1995

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.

NOTICE

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

No. 95-1150-FT

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

COMMUNITY CREDIT PLAN,

Plaintiff-Respondent,

v.

NATIONAL INSURANCE ASSOCIATION,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Milwaukee County: LAURENCE C. GRAM, JR., Judge. *Reversed and cause remanded with directions.*

Before Sullivan, Fine and Schudson, JJ.

PER CURIAM. National Insurance Association (National) appeals from the trial court's summary judgment in favor of Community Credit Plan (Community). National argues that Community waived its claim for subrogation by failing to intervene in the lawsuit between National and its insureds, Cenoria and Richard Golden. Pursuant to this court's order dated May 11, 1995, this case was submitted to the court on the expedited appeals

calendar. See RULE 809.17, STATS. We conclude that Community waived its subrogation rights. Accordingly, we reverse and remand with directions for the trial court to enter summary judgment in favor of National dismissing this action.¹

The Goldens purchased a used automobile from Best Motors, Inc., for \$5795. Community agreed to finance the vehicle. As a condition of the financing, the Goldens were required to purchase liability insurance. They obtained insurance from National. About five months after the car was purchased, it was destroyed in an accident.

The Goldens commenced an action to recover under their insurance policy after rejecting a settlement offer made by National. Community did not assert its subrogation rights in the action between the Goldens and National. The trial court awarded the Goldens \$2900 after a trial to the bench. After obtaining judgment against National, the Goldens attempted to settle with Community for \$1800, the amount of the award remaining after costs and attorney fees were paid. Community rejected the offer, having commenced a separate action against the Goldens for nonpayment on the underlying loan. Community eventually obtained a judgment against the Goldens for the amount remaining due on the loan.

After obtaining judgment against the Goldens, however, Community initiated this action against National seeking the amount National had already paid to the Goldens. The trial court granted summary judgment in favor of Community.

Summary judgment allows controversies to be settled without trial where there are no disputed material facts and only legal issues are presented. *In re Cherokee Park Plat*, 113 Wis.2d 112, 115-16, 334 N.W.2d 580, 582-83 (Ct. App. 1983). On review of a summary judgment order, we employ the same methodology as the trial court. *Green Spring Farms v. Kersten*, 136 Wis.2d 304, 315, 401 N.W.2d 816, 820 (1987). We first examine the pleadings and affidavits

¹ We do not reach the attorney fee issue because we conclude that the trial court's decision must be reversed.

to determine whether a claim for relief has been stated. *Id.* If a claim for relief has been stated, we then determine whether any factual issues exist. *Id.* If there is no genuine issue as to any material fact, and if the moving party is entitled to judgment as a matter of law, we will affirm the trial court order granting summary judgment. *Id.*

National argues that the trial court erred in granting summary judgment in favor of Community. National contends that Community waived its subrogation rights by failing to intervene in the proceedings between National and the Goldens, choosing instead to proceed separately against the Goldens. We agree.

A party who fails to assert its subrogation rights against an insurer, relying instead on a reimbursement clause in its contract with the insured, waives its right to subrogation. *Jindra v. Diederich Flooring*, 181 Wis.2d 579, 596, 511 N.W.2d 855, 859 (1994). In *Jindra*, the supreme court explained that "[o]ne may waive subrogation explicitly in writing, or one may be held to have waived subrogation by conduct." *Id.* The court stated:

If, as here, a party does not bring a subrogation claim because it relies instead upon a reimbursement clause, it will be held to have waived subrogation in favor of the reimbursement action and will be precluded from bringing the subrogation claim in a subsequent action against the tortfeasor. Accordingly, [the tortfeasor] will be obliged to pay full damages, but ... will not be forced to answer twice in damages.

Jindra, 181 Wis.2d at 596-97, 511 N.W.2d at 860.

Like the underinsured motorist insurer in *Jindra*, Community chose to rely on its contract with the Goldens rather than assert its subrogation rights. Where "a party does not bring a subrogation claim because it relies instead upon a reimbursement clause, it will be held to have waived subrogation in favor of the reimbursement action and will be precluded from bringing the subrogation claim in a subsequent action." *Id.* Community waived its right to subrogation by its conduct. Accordingly, the trial court erred as a

matter of law in entering summary judgment in favor of Community. National will "not be forced to answer twice in damages." *Id.*, 181 Wis.2d at 597, 511 N.W.2d at 860. We reverse and remand with directions for the trial court to enter summary judgment in favor of National dismissing the action.

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

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.