COURT OF APPEALS
DECISION
DATED AND FILED

February 20, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-1935 **Cir. Ct. No. 00-CV-387**

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

CNA INSURANCE COMPANY,

PLAINTIFF-APPELLANT,

V.

PACE CORPORATION, GRINNELL MANUFACTURING CORPORATION, AND HERITAGE INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Outagamie County: JOHN A. DES JARDINS, Judge. *Affirmed*.

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 CANE, C.J. CNA Insurance Company appeals from a judgment in favor of Pace Corporation, Grinnell Manufacturing Corporation and Heritage Insurance Company. The circuit court granted summary judgment on two grounds: (1) CNA's claim was time barred because the nature of CNA's claim

was actually contribution rather than subrogation; and (2) CNA's claim was barred by the economic loss doctrine. We affirm the judgment on the first ground and decline to address the second.[1]

STATEMENT OF FACTS

¶2 The basic facts are undisputed for the purposes of this review of a summary judgment. This case involves water damage to a newly constructed hotel building owned by Great Lakes Hospitality Corporation. Westra Construction, Incorporated, was the general contractor that built the hotel. Pace, a subcontractor, installed a fire protection system manufactured by Grinnell. Construction of the hotel was completed in the spring of 1996. On November 20, after the hotel opened for business, the fire sprinkler system began to leak and water flooded the hotel, causing significant damage to the structure.

¶3 At the time of the water damage, CNA provided commercial general liability coverage to Westra. Heritage Insurance provided liability insurance to Pace.

¶4 Great Lakes informed Westra of the damage.[2] Ultimately, CNA paid over $50,000 on Westra's behalf, pursuant to its commercial general liability policy. In 2000, CNA filed this action seeking subrogation from Pace, Grinnell and Heritage to recover $50,676 in payments it made to repair the hotel. CNA

[1] *See* ***State v. Blalock***, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989) (cases should be decided on narrowest possible ground).

[2] It is unclear from the record whether Great Lakes demanded that Westra, Pace or both pay for the necessary repairs. However, it is undisputed that Westra and Pace became involved in discussions about who should pay and that CNA ultimately made the payment on Westra's behalf.

alleged claims for negligence, breach of warranty and strict liability against the defendants. CNA's theory was that the flooding that damaged the hotel was caused by Pace's improper installation of the fire detection system, the installation of a defective component or both.

¶5 After conducting discovery, both Grinnell and Pace moved for summary judgment on three grounds: (1) although designated as subrogation, all of CNA's claims were in fact claims for contribution that were untimely under WIS. STAT. § 893.92[3] (except for $700 that was allegedly paid in 1999);[4] (2) CNA's claims for negligence and strict liability were barred by the economic loss doctrine; and (3) CNA's claim for breach of warranty must fail for lack of privity. The circuit court granted summary judgment in the defendants' favor on the first two grounds and dismissed all of CNA's claims. CNA appeals.

STANDARD OF REVIEW

¶6 We review the circuit court's grant of summary judgment de novo. *See* ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). On review, we apply the same standards as did the circuit court. ***Id.***

[3] All statutory references are to the 1999-2000 version unless otherwise noted.

[4] Although CNA's complaint sought $50,676 in liquidated damages, CNA's answers to interrogatories detail payments totaling $54,091. With the exception of two $350 payments made in 1999, all of the payments were made in 1997. In their brief in support of summary judgment, Pace and Grinnell acknowledged that CNA's claim for the $700 it paid in 1999 was not time barred. However, the final judgment ultimately dismissed all claims. On appeal, CNA presents no argument that the $50,676 in damages it originally sought included $700 in payments that must be analyzed separately from the other damages. CNA also does not argue that payments made in 1999 would extend the statute of limitations for all payments. Accordingly, we decline to address whether the circuit court should have denied summary judgment with respect to $700.

WISCONSIN STAT. § 802.08(2) sets forth the standard by which summary judgment motions are to be judged:

> The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

The inferences to be drawn from the underlying facts contained in the moving party's material should be viewed in the light most favorable to the party opposing the motion, and doubts as to the existence of a genuine issue of material fact are resolved against the moving party. ***L.L.N. v. Clauder***, 209 Wis. 2d 674, 684, 563 N.W.2d 434 (1997). The court takes evidentiary facts in the record as true if not contradicted by opposing proof. ***Id.***

DISCUSSION

¶7 At the outset, we note that the parties have framed the issue as one of subrogation versus contribution. CNA asserts that its claims are for subrogation and that they were timely filed within the applicable six-year statute of limitations. *See* WIS. STAT. § 893.52.[5] The parties agree that if CNA's claims are for contribution, as Pace and Grinnell argue, they are barred by the one-year statute of

[5] WISCONSIN STAT. § 893.52 provides: "An action, not arising on contract, to recover damages for an injury to real or personal property shall be commenced within 6 years after the cause of action accrues or be barred, except in the case where a different period is expressly prescribed."

limitations established by WIS. STAT. § 893.92.[6] We conclude that CNA's claims are for contribution and therefore are time barred.[7] *See* WIS. STAT. § 893.92.

¶8 Subrogation rests on the equitable principle that one, other than a volunteer, who pays for the wrong of another should be permitted to look to the wrongdoer to the extent that it has paid a debt or demand that should have been paid by the wrongdoer. ***Conant v. Physicians Plus Med. Group, Inc.***, 229 Wis. 2d 271, 284, 600 N.W.2d 21 (Ct. App. 1999). It permits those who pay a claim that in equity should have been satisfied by another to recover that payment from the person or entity primarily liable. ***General Accident Ins. Co. v. Schoendorf & Sorgi***, 202 Wis. 2d 98, 107, 549 N.W.2d 429 (1996). Equitable relief such as subrogation is generally withheld from those who are themselves guilty of wrongful conduct. *See* 73 AM.JUR.2D *Subrogation* § 16 (2001). "[T]he one asserting the right to subrogation cannot profit from his own wrong; he must, himself, be without fault." ***Id.***

¶9 In contrast, a common liability to the same party is a prerequisite to a contribution claim. *See* ***Rendler v. Markos***, 154 Wis. 2d 420, 433-34, 453 N.W.2d 202 (Ct. App. 1990). The right to contribution arises when one party has paid more than its just proportion of a joint liability. ***Matthies v. Positive Safety***

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[6] WISCONSIN STAT. § 893.92 provides: "An action for contribution based on tort, if the right of contribution does not arise out of a prior judgment allocating the comparative negligence between the parties, shall be commenced within one year after the cause of action accrues or be barred."

[7] None of the parties suggests that WIS. STAT. § 893.92 would be inapplicable to contribution claims based solely or partly on contract, even though § 893.92 explicitly refers only to tort claims. Accordingly, for purposes of this opinion, we will assume that the one-year statute of limitations found in § 893.92 applies to CNA's contribution claim, regardless of whether the underlying liability is grounded in tort, contract or both.

Mfg. Co., 2001 WI 82, ¶12, 244 Wis. 2d 720, 628 N.W.2d 842. Although actions for contribution generally arise out of tort, they can also arise out of contract. *See* ***State Farm Mut. Auto. Ins. Co. v. Schara***, 56 Wis. 2d 262, 266, 201 N.W.2d 758 (1972). ***Schara*** explained that a claim for contribution depends

> not one whit upon the nature of the origin of liability. It is enough that joint liability from whatever source exist. …
>
> All contribution claims have in common the characteristic that the party having a right against another also liable has discharged more than his share of the liability. It is the bearing of a greater share of a common liability than is justified, and not the source of the underlying liability, that characterizes a [claim] for contribution.

Id.

¶10 As a general contractor, Westra was potentially liable to Great Lakes under tort and contract theories for property damage resulting from a breach of the construction contract that was allegedly caused by Pace's negligence. *See* ***Brooks v. Hayes***, 133 Wis. 2d 228, 249-50, 395 N.W.2d 167 (1986). Generally, when there are facts that may give rise to actions in both contract and tort, the plaintiff chooses the theory to pursue. *See* ***id.*** at 246.

¶11 Applying these general rules to this case, Great Lakes could have filed suit against Westra under either contract or tort theory. Westra, as a potentially liable party, could have sought contribution from the other potentially liable parties: Pace and Grinnell. Here, however, Great Lakes never filed suit against Westra because CNA paid Great Lakes on Westra's behalf. Although it is CNA that seeks reimbursement for payments it made to Great Lakes, the end result is the same: reimbursement is sought on behalf of one party that paid more

than its just proportion of a common liability.[8] *See* ***id.*** Because Pace and Grinnell share a common liability with Westra, the payment sought from them is properly characterized as contribution.

¶12 CNA disagrees, arguing that its claims against Pace, Grinnell and Heritage are based on subrogation. CNA contends that Westra is not a wrongdoer because there is undisputed evidence that the damage to the hotel was caused by the negligence of Pace, Grinnell or both. CNA further asserts that it paid Great Lakes for the defendants' wrongs because it was obligated to do so pursuant to the "products-completed operations hazard" coverage in its liability policy, which provides coverage for faulty workmanship by a subcontractor without regard to the fault of the general contractor.

¶13 CNA suggests that Westra is not liable to Great Lakes unless it actively installed or manufactured the sprinkler system. We disagree. Westra, as general contractor, shares a common liability with Pace and Grinnell. *See* ***id.*** at 249-50. Because Westra is legally liable for the property damage, any claim Westra has against Pace and Grinnell cannot be based on subrogation. *See* ***Conant***, 229 Wis. 2d at 284 (one who pays for the wrong of another should be permitted to look to the wrongdoer to the extent that he has paid a debt or demand which should have been paid by the wrongdoer). In contrast, if CNA had instead insured Great Lakes, which was not liable for damage to its own hotel, and had

[8] No one disputes that CNA, as a liability insurer, was entitled to step into Westra's shoes and pursue claims against Pace and Grinnell. *See* ***Houlihan v. ABC Ins. Co.***, 198 Wis. 2d 133, 146, 542 N.W.2d 178 (Ct. App. 1995) (liability insurers agree by contract to step into the shoes of their insureds). At issue is whether CNA's claim is one for contribution or subrogation.

made payments to repair the hotel, it could seek payment from Westra, Pace and Grinnell under a subrogation theory. *See* ***id.***

¶14 CNA's payments pursuant to its commercial general liability policy were payments to Great Lakes for Westra's liability.[9] Because CNA paid on Westra's behalf "more than its just proportion of a joint liability," CNA has a right to seek contribution from Pace and Grinnell. *See* ***Matthies***, 2001 WI 82 at ¶12. However, because CNA failed to file its claim for contribution within one year, its claim is time barred. *See* WIS. STAT. § 893.92. We affirm the circuit court's grant of summary judgment in Pace and Grinnell's favor.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

[9] The commercial general liability policy provided coverage for sums that Westra became "legally obligated to pay as damages" because of bodily injury or property damage.