COURT OF APPEALS
DECISION
DATED AND RELEASED

August 3, 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. 94-1344

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

CLARA C. NELSON and
OLIVER NELSON,

Plaintiffs-Appellants,

v.

CITY OF MAUSTON,
HERITAGE MUTUAL INSURANCE CO.,
and KERRY P. KUWITZKY,

Defendants-Respondents.

APPEAL from a judgment of the circuit court for Juneau County: JOHN W. BRADY, Judge. *Reversed and cause remanded for further proceedings*.

Before Eich, C.J., Gartzke, P.J., and Dykman, J.

PER CURIAM. Clara C. Nelson and Oliver Nelson appeal from a judgment dismissing their complaint. We reverse.

The trial court granted the defendants' motion for summary judgment. Summary-judgment methodology is well established in cases such as ***Grams v. Boss***, 97 Wis.2d 332, 338-39, 294 N.W.2d 473, 476-77 (1980), and need not be repeated. The Nelsons' complaint alleged that Clara was injured when the vehicle she was driving was struck by a vehicle owned by defendant City of Mauston and negligently operated by defendant Kerry P. Kuwitzky. It alleged that defendant Heritage Mutual Insurance Company was the liability insurer for the City. The complaint states a claim. The answer raises issues of fact and law.

The defendants moved for summary judgment on the ground of accord and satisfaction. Their argument was based on Clara's cashing of a check for $1,500 from the insurance company. The rear of the check stated in fine print that "endorsement of this draft constitutes a complete release and settlement of the claim or account stated on the face hereof." The trial court first denied the motion, but subsequently reconsidered and granted it.

The Nelsons argue that this case is more properly governed by the law of release, as set forth in ***Brown v. Hammermill Paper Co.***, 88 Wis.2d 224, 276 N.W.2d 709 (1979). The defendants argue that the law of release is irrelevant because the trial court's decision was based on accord and satisfaction. This argument misses the point. The issue is whether the decision *should* have been based on accord and satisfaction. The defendants further argue that the Nelsons did not argue the law of release in the trial court. However, a review of their brief on the summary-judgment motion shows that they did. The defendants do not otherwise explain why the law of release should not be applied in this case.

We conclude that the law of release is more appropriate than accord and satisfaction. As the trial court noted in its original summary-judgment decision, accord and satisfaction arises primarily in a commercial context. The cases relied on by the trial court, such as ***Flambeau Prods. Corp. v. Honeywell Info. Sys., Inc.***, 116 Wis.2d 95, 341 N.W.2d 655 (1984) and ***Myron Soik & Sons v. Stokely USA***, 175 Wis.2d 456, 498 N.W.2d 897 (Ct. App. 1993), show no indication that they were intended to supplant the law of release as established in ***Brown*** or similar cases. Therefore, we conclude that the trial court erred in granting the defendants' motion for summary judgment.

By the Court.—Judgment reversed and cause remanded for further proceedings.

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