COURT OF APPEALS
DECISION
DATED AND RELEASED

August 7, 1997

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.

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

No. 96-1786

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

RANDY DUNCAN, JACKIE DUNCAN, LEAH JO DUNCAN, TIFFANY LEE DUNCAN, STEPHANIE LEE DUNCAN AND RANDY DUNCAN, JR., BY THEIR GUARDIAN AD LITEM, ANDRIAN SCHOONE,

PLAINTIFFS-APPELLANTS,

V.

KENNETH GILLINGHAM, DODGEVILLE MUTUAL INS. CO.,

DEFENDANTS,

RICHLAND COUNTY,

PLAINTIFF-RESPONDENT.

APPEAL from an order of the circuit court for Richland County: KENT C. HOUCK, Judge. *Affirmed.*

Before Vergeront, Roggensack and Deininger, JJ.

PER CURIAM. Randy Duncan and several family members appeal from an order awarding Richland County $43,119.98 out of the proceeds of a settlement on Duncan's personal injury claim. The trial court allowed the County's subrogation claim despite its failure to timely appear in the action or timely pursue its joinder options under § 803.03(2)(b), STATS. The issues are whether the trial court properly exercised its discretion when it allowed the claim nevertheless, and whether it properly refused to reduce the award by a proportional amount of the costs and fees Duncan incurred in litigating his claim. We conclude that the trial court properly exercised its discretion by allowing the County's subrogation claim, and that the Duncans are not entitled to a contribution toward their fees or costs. We therefore affirm.

BACKGROUND

After Duncan's injury in 1994, he received $43,119.98 worth of medical treatment at the County's expense under the public assistance provisions of ch. 49, STATS. Early in 1995, the County informed Duncan that it would assert its statutory subrogation rights, under § 49.65(4), STATS., 1993-94, if he pursued a personal injury claim. In May 1995, Duncan commenced an action against his alleged tort feasor, Kenneth Gillingham, and against Gillingham's insurer. Duncan also named Richland County as a defendant on the basis of its subrogation interest.

The County did not answer the complaint. Nor did it appear at a scheduling conference in July 1995. Several days later, however, counsel for the County wrote Duncan's counsel a letter in which the County again asserted its subrogation rights and asked Duncan's counsel if he would agree to represent the County's interest in the matter. The letter concluded "in the event that agreement

cannot be reached, then I will bring a motion seeking an order authorizing the County to participate in this action only to the limited extent necessary to present its claims. I would appreciate hearing from you on this point."

Counsel never responded and the County took no further action in the matter. In February 1996, Duncan settled his claim against Gillingham and Gillingham's insurer, for $500,000. Also in February, Duncan moved to dismiss Richland County's claims. In March 1996, Richland County finally moved for an order changing it from a defendant to a plaintiff in the matter, and for an order allowing it to participate in the action as a plaintiff.

The court denied Duncan's motion and granted the County's motion. Because Duncan had already settled, and acknowledged the County's statutory subrogation right, the only issue remaining was division of the settlement proceeds. The trial court denied Duncan's request to assess his fees and costs proportionally against the County, and awarded the County the full amount of its subrogated claim.

DISCUSSION

A party joined pursuant to the joinder statute, § 803.03, STATS., must timely choose whether to participate in the prosecution of the action, agree to have the party causing the joinder represent its interests, or move to dismiss. Section 803.03(2)(b), STATS.; ***Radloff v. General Cas. Co.***, 147 Wis.2d 14, 20, 432 N.W.2d 597, 599 (Ct. App. 1988). Whether to deny the subrogation claim of a party failing to timely exercise its joinder option is discretionary. ***Id***. at 16, 432 N.W.2d at 597. The trial court properly exercises its discretion if it articulates its reasoning, relies on facts of record and the correct legal standards, and reaches a

reasonable result. ***Hartung v. Hartung***, 102 Wis.2d 58, 66, 306 N.W.2d 16, 20 (1981).

The trial court properly allowed the County's claim despite its inaction during the proceeding and failure to timely comply with § 803.03(2)(b), STATS. In allowing the claim, the court considered the County's early indication that it intended to pursue its claim, that Duncan's counsel had contributed to the delay by failing to respond to the County's proposal for a representation agreement, and that Duncan had improperly joined the County as a defendant rather than as a plaintiff. These were reasonable factors to balance against the County's untimely motion and the trial court adequately explained its reliance on them to reach a reasonable result.

The trial court properly refused to reduce the County's award by a proportionate share of Duncan's costs in the action. Section 49.65(4), STATS., 1993-94, provided that when the County has a subrogation right against a recovering plaintiff, "reasonable costs of collection including attorney's fees shall be deducted first. The amount of assistance granted … shall be deducted next and the remainder shall be paid to the public assistance recipient."[1] We have held that this language, in a "clear, unambiguous and preemptory" manner, exempts the subrogated assistance provider from a contribution to costs. ***DeHaven v. Dan-Co Coop.***, 128 Wis.2d 472, 477-78, 383 N.W.2d 509, 512 (Ct. App. 1986). We are bound by that precedent.

[1] Section 49.65(5), STATS., 1993-94, has been renumbered § 49.89(5), STATS.

CONCLUSION

Because the provisions of § 49.65(5), STATS., are "clear, unambiguous and preemptory," and have been declared so by this court, the County requests a frivolousness award against Duncan for arguing to the contrary. RULE 809.25(3), STATS., authorizes costs and fees for frivolous appeals. It does not authorize costs and fees for individual arguments in a brief that are frivolous. ***Nichols v. Bennett***, 190 Wis.2d 360, 365 n.2, 526 N.W.2d 831, 834 (Ct. App. 1994), *aff'd*, 199 Wis.2d 268, 544 N.W.2d 428 (1996). We decline to make a RULE 809.25(3) award.

By the Court.—Order affirmed.

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