

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 27, 2001

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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

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

Appeal No. 01-1316-FT

Cir. Ct. No. 00 CV 164

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

**CAPITOL INDEMNITY CORPORATION, A WISCONSIN
CORPORATION,**

PLAINTIFF-RESPONDENT,

V.

DANIEL W. NOLAN AND NANCY J. NOLAN,

DEFENDANTS,

WESTERN SURETY COMPANY, A FOREIGN CORPORATION,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Shawano County
County: EARL W. SCHMIDT, Judge. *Affirmed.*

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

¶1 PETERSON, J. Western Surety Company appeals a summary judgment ordering Western to pay \$13,200 for contribution to Capitol Indemnity

Corporation.¹ Western argues that: (1) the terms of its indemnity bond between Western and its principal were not met; (2) Capitol and Western are not liable for the same obligation; and (3) Capitol did not pay more than its fair share. We disagree and affirm the judgment.

BACKGROUND

¶2 Daniel and Nancy Nolan, livestock dealers, were required by federal law to obtain a bond covering their livestock transactions. The Nolans obtained a \$20,000 general bond from Western. The terms of the bond required all claims against the bond to be filed within sixty days of the date of the transaction on which the claim was based.

¶3 The Nolans also obtained a \$50,000 bond from Capitol. However, unlike Western's bond, Capitol's bond specifically named Equity Cooperative Livestock Association as obligee.

¶4 In 1997, the Nolans purchased livestock from Equity in the amount of \$41,780.38. They defaulted on payment. Equity presented a claim for payment to Capitol. Pursuant to its bond agreement with Nolan, Capitol paid Equity's claim in full.

¶5 On August 9, 2000, Capitol filed suit against the Nolans and Western.² Capitol sought contribution under Western's bond. Western and

¹ This is an expedited appeal under WIS. STAT. RULE 809.17.

² Capitol argued that Western was liable for approximately \$16,000 based on a five to two split. However, Western had already made a payment to another claimant under its bond for \$6,800. Capitol then sought the remaining \$13,200 on the bond.

Capitol both moved for summary judgment. The circuit court concluded that Capitol had an equitable claim for contribution and ordered Western to pay \$13,200 in contribution. This appeal followed.

STANDARD OF REVIEW

¶6 Whether summary judgment was appropriately granted presents a question of law that we review independently of the circuit court. *Fortier v. Flambeau Plastics Co.*, 164 Wis. 2d 639, 651-52, 476 N.W.2d 593 (Ct. App. 1991). Where both parties move for summary judgment, the case is put in a posture where the parties waive their right to a full trial of the facts and permit the circuit court to decide the legal issue. *Duhamel v. Duhamel*, 154 Wis. 2d 258, 262, 453 N.W.2d 149 (Ct. App. 1989).

DISCUSSION

I. SIXTY-DAY TIME LIMIT

¶7 Western argues that it is not liable to pay any claim for recovery on its bond because the claim was not filed within the sixty-day time limit as required by Western's bond. Western contends that Capitol, as Equity's assignee, obtained only the rights Equity possessed at the time of the assignment. Because Equity did not file a claim under Western's bond within sixty days, Western asserts that Capitol cannot now file a claim under the bond.

¶8 The right of contribution is separate and distinct from an underlying claim, whether that underlying claim is based on contract or tort. *State Farm Mut. Auto. Ins. Co. v. Schara*, 56 Wis. 2d 262, 266, 201 N.W.2d 758 (1972). In *Bushnell v. Bushnell*, 77 Wis. 435, 46 N.W. 442 (1890), our supreme court discussed the nature of the right of contribution. The court held that a claim for

contribution accrued at the time one of the sureties discharged a common liability by making a payment. *Id.* at 437.

¶9 The *Bushnell* court determined the time within which a person paying more than his or her fair share of the liability must commence an action. To make this determination, the court looked not to the nature of the underlying surety agreement, but to the nature of the transaction that occurred when one person, liable for a common obligation, paid more than that person's share. *Id.* The overpayment of a common liability is an action at law arising from equity. *Id.* "It is a legal action to recover money paid to the use of the defendant, and stands upon the same footing as any other action founded upon an implied contract." *Id.* at 438.

¶10 The *Bushnell* court held that the recovery for contribution is based "upon an implied contract for money paid to the defendants' use" *Id.* The court then applied the existing statute of limitation, which provided that a claim on an implied contract must be brought within six years. *Id.*

¶11 *Bushnell* stands for the proposition that the payment of more than a fair share gives rise to an implied contract enforceable against others who have not paid their share. Since an implied contract arises independently of the underlying transaction and without any agreement between the parties, the action is one arising by operation of law to rectify an inequity. *Schara*, 56 Wis. 2d at 267.

¶12 Here, Capitol's claim for contribution is based on a contract implied at law to rectify the inequity resulting when Capitol paid more than its fair share of the common liability with Western. Therefore, the sixty-day time limit required

by Western's bond is inapplicable. Rather, WIS. STAT. § 893.43, the statute of limitations relating to implied contracts, controls an action for contribution.³ Section 893.43 provides that an action must be commenced within six years where the action is upon any contract, obligation or liability, express or implied. Accordingly, Capitol's claim for contribution is timely because it was brought within six years of its payment to Equity.

¶13 The sixty-day time limit in Western's bond does not apply to Capitol's contribution claim because the claim is separate and independent from a claim against Western as a beneficiary. Had Capitol filed a claim for recovery under Western's bond as an assignee or subrogee of Equity, the sixty-day time limit would have applied.⁴ However, that sixty-day time limit applies only at the contract level against beneficiaries of the bond. Capitol's action is a claim for contribution and is separate from the underlying claim. Therefore, we conclude that the sixty-day time limit in Western's bond does not control.

II. CLAIM FOR CONTRIBUTION

¶14 Western argues that Capitol does not have an independent claim for contribution because: (1) Capitol and Western are not liable for the same obligation; and (2) Capitol did not pay more than its fair share of the obligation.

³ WISCONSIN STAT. § 893.43 reads as follows: "An action upon any contract, obligation or liability, express or implied, including an action to recover fees for professional services, except those mentioned in s. 893.40, shall be commenced within 6 years after the cause of action accrues or be barred."

⁴ After Capitol paid Equity's claim, Equity assigned to Capitol, all of its rights against "all persons, firms and corporations who participated in or benefited from said loss." However, Capitol's contribution claim was not brought pursuant to the assignment, but rather as an equitable claim.

¶15 A claim for contribution may be based on an express contract between the parties or it may arise by operation of law to rectify an inequity resulting when a co-obligor pays more than a fair share of a common obligation. *Kafka v. Pope*, 194 Wis. 2d 234, 242, 533 N.W.2d 491 (1995). Here, it is undisputed that Capitol and Western did not have an express agreement conferring a right of contribution. Therefore, Capitol's right to seek contribution arises by operation of law if two conditions are met: (1) Capitol and Western must be liable for the same obligation; and (2) Capitol must have paid more than its fair share of the obligation. *Id.* at 243 (citations omitted).

A. Common Liability

¶16 Western argues that, unlike its bond, Capitol's bond was issued specifically to protect Equity. Therefore, it claims that the bonds are different and do not bind Capitol and Western to a common liability.

¶17 Capitol and Western signed separate instruments, at different times and for different amounts. However, in order to be bound to a common liability, it is not necessary that the sureties sign the same instrument at the same time and in the same amount. *See id.* at 245 n.8. "[I]t matters not, in a case of a debt, whether the sureties are jointly and severally bound, or only severally; or whether their suretyship arises under the same obligation or instrument, or under divers obligations or instruments, if all the instruments are for the identical debt." *Id.* at 243 (citations omitted).

¶18 Sureties may become liable for the same obligation without communicating or negotiating with each other, and without the knowledge that the other has entered into the relationship. *Id.* at 245. The relationship may arise, although each surety has limited its liability to a portion of the entire amount. The

right to contribution arises even though there might have been other losses as to which one bond alone would have been answerable and as to which no right of contribution would have existed. 74 AM. JUR. 2D *Suretyship* § 206 (1974).

¶19 Here, the Nolans were the principals for Capitol's bond and for Western's bond. Both bonds covered the Nolans' livestock transaction with Equity. Thus, Western's bond would have covered \$20,000 of the Nolans' debt had Equity brought a claim under that bond. It is irrelevant that Capitol's bond covered only Equity. What matters is that both bonds covered Nolan's transaction with Equity. *Kafaka*, 194 Wis. 2d at 245 n.8. Therefore, both bonds were bound to this common liability. We conclude that Capitol and Western were liable for the same obligation.

B. More than a Fair Share of the Obligation

¶20 Last, Western argues that there is no independent claim for contribution because Capitol has not paid more than its fair share of Nolan's debt. Western contends that Capitol had a contractual obligation to pay Equity up to \$50,000 and only paid \$41,780.38. Therefore, according to Western, Capitol cannot argue that it paid more than its fair share when it has not paid more than its contractual obligation. We disagree.

¶21 Capitol and Western are liable for their proportionate share of the obligation. *Id.* at 242. Both Capitol and Western agreed to be bound to a common liability. Capitol paid the entire debt. Therefore, Capitol is entitled to contribution from Western because Western has not paid its proportionate share.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

