

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 28, 2008

David R. Schanker
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. 2007AP2770

Cir. Ct. No. 2003CV408

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

**KEVIN P. MAHNER, LAUREN MAHNER AND HANNAH MAHNER, BY THEIR
GUARDIAN AD LITEM, MARK P. WENDORFF,**

PLAINTIFFS-APPELLANTS,

GENERAL CASUALTY COMPANY OF WISCONSIN,

PLAINTIFF,

v.

REW MOTORS, INC. AND SENTRY INSURANCE MUTUAL COMPANY,

DEFENDANTS-THIRD-PARTY PLAINTIFFS,

ONEIDA COUNTY DEPARTMENT OF SOCIAL SERVICES,

DEFENDANT,

v.

NEW HOLLAND NORTH AMERICA, INC.,

THIRD-PARTY DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Oneida County:
NEAL A. NIELSEN, III, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Kevin Mahner¹ appeals a summary judgment in favor of New Holland North America, Inc. The key question in this appeal is what rights Mahner has against New Holland under his settlement with the defendant in this case, Rew Motors, Inc. We conclude Mahner acquired only Rew Motors' contribution and indemnification rights, not the right to assert his products liability claim directly against New Holland. We affirm the judgment.²

BACKGROUND

¶2 Mahner filed this suit in December 2003. In his complaint, he alleged he was injured while operating a New Holland skid steer loader with a low profile bucket. Mahner alleged claims for negligence and products liability against Rew Motors, the company that sold the loader Mahner was operating. Mahner did not assert any claims directly against New Holland.

¶3 Rew Motors asserted a third-party complaint against New Holland. In the complaint, Rew Motors repeated a number of allegations in Mahner's

¹ Kevin Mahner's name is also spelled "Keven" in some places in the record. "Kevin" is the spelling in the appellate caption approved by the parties. Mahner's children are also plaintiffs-appellants.

² New Holland has moved for its costs and fees in this appeal, arguing Mahner's appeal is frivolous. *See* WIS. STAT. RULE 809.25(3)(c)2. While we reject Mahner's arguments, we conclude his appeal is not frivolous. We deny the motion.

All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

complaint, including allegations that New Holland negligently designed the loader and that the loader was unreasonably dangerous and defective. The third-party complaint stated that while Rew Motors denied liability to Mahner, if Mahner was successful at trial Rew Motors would have a contribution or indemnification claim against New Holland.

¶4 In July 2007, Mahner settled with Rew Motors.³ The settlement agreement provided that Mahner would dismiss his claims against Rew Motors in exchange for a payment of \$45,000. In addition, Rew Motors agreed to assign Mahner “all rights contained in [its] third-party complaint against New Holland ... based on the strict liability allegation contained in the third-party complaint.”

¶5 New Holland moved for summary judgment, arguing the assignment allowed Mahner to pursue only Rew Motors’ contribution or indemnification claims against New Holland. Mahner disagreed, arguing the assignment allowed him to hold New Holland liable on a products liability theory. The circuit court agreed with New Holland and granted summary judgment.

DISCUSSION

¶6 Whether summary judgment is appropriate is a question of law reviewed without deference to the circuit court. *Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). Summary judgment is appropriate where there are no genuine issues of material fact and the moving party is entitled

³ Prior to the settlement, the circuit court granted Rew Motors and New Holland summary judgment, and we reversed and remanded for further proceedings. See *Mahner v. Rew Motors, Inc.*, No. 2005AP1927, unpublished slip op. ¶1 (WI App Nov. 7, 2006). That appeal is not relevant here.

to judgment as a matter of law. WIS. STAT. § 802.08(2); *Green Spring Farms*, 136 Wis. 2d at 315.

¶7 An assignment transfers existing rights from one party to another. BLACK'S LAW DICTIONARY 128 (8th ed. 2004). Here, the assignment transferred Rew Motors' claims against New Holland to Mahner. The parties agree this included Rew Motors' right to contribution or indemnification for whatever amount Rew Motors paid to Mahner. Mahner argues it also includes a right to recover his own damages directly from New Holland.

¶8 Mahner's argument ignores the two distinct claims here. The first claim is Mahner's products liability claim against Rew Motors. That claim alleged, among other things, that the loader was defective and unreasonably dangerous, and that the defect caused him injury. *See Dippel v. Sciano*, 37 Wis. 2d 443, 460, 155 N.W.2d 55 (1967). That claim would have allowed Mahner to recover his damages from Rew Motors.

¶9 The second claim is Rew Motors' third-party claim against New Holland. That claim stated that if Rew Motors was found liable to Mahner, Rew Motors had the right to recover the amount it paid from New Holland. That claim was a contingent claim—that is, it allowed Rew Motors to recover from New Holland only in the event that Rew Motors actually paid money to Mahner. *See Dixon v. Wisconsin Health Org. Ins. Corp.*, 2000 WI 95, ¶14, 237 Wis. 2d 149, 612 N.W.2d 721.

¶10 However, Mahner never asserted any claim against New Holland directly. As a result, when Mahner settled his claim against Rew Motors, he settled his only claim for damages based on his own injuries. That left only Rew Motors' contingent claim against New Holland. In the settlement, Rew Motors'

damages stemming from the suit were fixed at \$45,000. As a result, Rew Motors' contingent claim asserted a right to recover part or all of the \$45,000 from New Holland.

¶11 When Rew Motors assigned its claim to Mahner, Mahner acquired Rew Motors' contingent claim—that is, its claim for part or all of the \$45,000 Rew Motors paid to settle the suit.⁴ However, an assignment only transfers rights; it does not create them. BLACK'S, *supra*, at 128. While Rew Motors had the right to recover its own damages, it never asserted a claim—nor could it have—for Mahner's damages. The assignment therefore does not give Mahner the right to collect his damages directly from New Holland.

¶12 Mahner argues he is “simply amending the theory of relief to one for money damages.” He relies on *Wussow v. Commercial Mechanisms, Inc.*, 97 Wis. 2d 136, 146, 293 N.W.2d 897 (1980), where the court held, “Whether compensatory damages, special damages, or punitive damages are sought as a matter of remedy or relief is immaterial to the [claim] itself.” However, Mahner is not attempting to amend Rew Motors' third-party complaint to allege a different type of damages. Instead, he is attempting to amend to include *a different party's damages*—his own damages rather than Rew Motors' damages. Nothing in *Wussow* suggests a party may recover damages it never incurred.

¶13 Finally, Mahner argues this result is contrary to public policy encouraging partial settlement. See *Teigen v. Jelco of Wis., Inc.*, 124 Wis. 2d 1, 7, 367 N.W.2d 806 (1985) (partial settlement is desirable because it fosters

⁴ Mahner has not attempted to hold New Holland liable for any part of the \$45,000 on a contribution or indemnification theory.

“effective and expeditious resolution of lawsuits”). However, Mahner’s only claim in this suit was against Rew Motors. When Mahner settled with Rew Motors, he settled his own claims in full. The assigned contingent claim does not transform his full settlement into a partial one.

By the Court.—Judgment affirmed.

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

