COURT OF APPEALS
DECISION
DATED AND FILED

April 11, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP1487 **Cir. Ct. No. 2009CV4173**

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

MARK K. PALKOWSKI AND MARY A. PALKOWSKI,

SUBROGOR/ASSIGNOR PLAINTIFFS,

CPL AMERICAN INSURANCE SPECIALISTS, INC. AND UTICA MUTUAL INSURANCE COMPANY,

PLAINTIFFS-APPELLANTS,

V.

ACUITY A MUTUAL INSURANCE COMPANY,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Waukesha County: RALPH M. RAMIREZ, Judge. *Affirmed*.

Before Brown, C.J., Reilly and Gundrum, JJ.

¶1 PER CURIAM. CPL American Insurance Specialists, Inc., an insurance agency, and Utica Mutual Insurance Company, CPL's errors-and-omissions (E&O) insurer, appeal from an order dismissing their claim against Acuity, A Mutual Insurance Company, for reformation of an insurance contract CPL sold to Mark K. and Mary A. Palkowski. While this case presents a variation on the theme of ***Scheideler v. Smith & Associates, Inc.***, 206 Wis. 2d 480, 557 N.W.2d 445 (Ct. App. 1996), we conclude that ***Scheideler*** still controls. Once the Palkowskis accepted payment "in full settlement of all claims," they had no remaining rights to assign to CPL, Utica or anyone else. We therefore affirm.

¶2 The facts are undisputed. The Palkowskis applied for a policy of homeowner's insurance with Acuity through its authorized agent, CPL, and CPL insurance agent Francis Orval (collectively, CPL). The Palkowskis asked CPL to duplicate the water or sewer backup/overflow coverage they had had through their former insurer. CPL neglected to communicate that request to Acuity. The policy Acuity actually issued contained an exclusion for "[w]ater which backs up through sewer or drains or which overflows from a sump." Neither the Palkowskis nor CPL read the initial policy or any of the annual renewals.

¶3 While their Acuity policy was in effect, heavy rains led to flooding in the Palkowskis' basement, causing $26,500 in damages. Acuity denied the claim based on the exclusion. The backup/overflow coverage the Palkowskis had requested would have covered the damages. Acuity likely would have written that coverage if it had been requested and paid for.

¶4 The Palkowskis turned to CPL for payment due to its failure to procure the requested coverage. CPL and Utica adjusted the loss and made an initial payment of $15,000 to the Palkowskis followed by a final settlement sum of

$11,500 shortly thereafter. With each of the partial settlement payments, the Palkowskis signed a subrogation receipt indicating that they received the payment "in full settlement of all claims" and assigned all "the rights, claims and interest" they may have had against Acuity to CPL and Utica.

¶5 Based on the Palkowskis' assignment of claims, CPL and Utica sued Acuity seeking to reform the policy to include the backup/overflow coverage. Acuity moved for summary judgment on the basis that, by accepting a settlement, the Palkowskis elected their remedy and, under ***Scheideler***, had no remaining rights to assign to CPL and Utica. *See* ***id.*** at 489. Acuity also argued that it would be entitled to indemnification for CPL's negligence, even if the policy was reformed. The court denied Acuity's motion, finding that issues of fact remained as to whether (1) the bifurcated payment allowed the Palkowskis to assign their subrogation rights to CPL and Utica and (2) Acuity certainly would have provided backup/overflow coverage to the Palkowskis.

¶6 CPL and Utica followed with their own motion for summary judgment, arguing that mutual mistake warranted reformation of the policy. *See* ***Trible v. Tower Ins. Co.***, 43 Wis. 2d 172, 182, 168 N.W.2d 148 (1969). Acuity opposed CPL and Utica's motion, arguing that CPL and Utica had no standing to bring a reformation or subrogation claim because, having elected the remedy of payment "in full settlement of all claims," the Palkowskis had no reformation claim to assign, and that an issue of fact remained as to the certainty of whether Acuity would have written the desired coverage. Acuity also renewed its own motion for summary judgment. The court concluded that ***Scheideler*** governed and granted Acuity's motion. It also denied CPL and Utica's motion, and therefore did not reach their reformation argument. CPL and Utica appeal.

¶7 Our review of summary judgments is de novo; we apply the same methodology as the trial court and consider the legal issues independently, without deference to the trial court's decision. ***Krug v. Zeuske***, 199 Wis. 2d 406, 411, 544 N.W.2d 618 (Ct. App. 1996). Where, as here, both sides move for summary judgment "we generally consider the facts to be stipulated, leaving only questions of law for resolution." *See* ***id.*** A motion for summary judgment must be granted when there is no genuine issue of material fact, and the movants are entitled to judgment as a matter of law. *See* WIS. STAT. § 802.08(2) (2009-10).[1]

¶8 CPL and Utica contend the trial court wrongly applied ***Scheideler***; Acuity contends ***Scheideler*** directs the result. A review of ***Scheideler*** and the election-of-remedies doctrine on which it turned therefore is in order.[2]

¶9 ***Scheideler*** involved a motor vehicle accident where the liable party had insufficient insurance to cover all the damages sustained by Rebecca Scheideler and her four children. ***Scheideler***, 206 Wis. 2d at 483. The Scheideler family had had underinsured motorist coverage under their policy with General Casualty until their agent mistakenly deleted it. ***Id.*** General Casualty denied the claim due to there being no UIM coverage. ***Id.*** The Scheidelers sued General Casualty and the agent. ***Id.*** General Casualty entered into a partial settlement agreement with the Scheidelers paying them $200,000—the most they would have

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless noted.

[2] Although they do not reassert the position here, CPL and Utica argued to the trial court that ***Scheideler v. Smith & Associates, Inc.***, 206 Wis. 2d 480, 557 N.W.2d 445 (Ct. App. 1996), was merely persuasive authority, as it was decided by the District IV court of appeals and this case arose in a county within District II's geographic area. The court of appeals is a single court, however, so that a published decision by one district of the court of appeals is binding on the other districts. ***In re Court of Appeals of Wis.***, 82 Wis. 2d 369, 371, 263 N.W.2d 149 (1978). We note this matter only to clarify a point we still see made with some regularity.

received had their UIM coverage not been erroneously deleted—in exchange for a dismissal of all claims against General Casualty except a bad faith claim, a covenant not to sue except on the bad faith claim, and an assignment to General Casualty of the Scheidelers' claims against the agent. ***Id.*** at 482-83.

¶10 This court held that the settlement with General Casualty constituted an election of remedies and barred the Scheidelers from pursuing their claims against the agent. ***Id.*** at 492. The equitable election-of-remedies doctrine provides that a plaintiff is entitled to choose among available remedies so long as he or she is not unjustly enriched, the defendant is not misled and the result is not otherwise inequitable or res judicata applies. *See* ***Appleton Chinese Food Serv., Inc. v. Murken Ins., Inc.***, 185 Wis. 2d 791, 807, 519 N.W.2d 674 (Ct. App. 1994). The doctrine's underlying purpose is to prevent double recovery. ***Id.***[3]

¶11 We explained in ***Scheideler*** that when an agent errs in procuring coverage, the insured either can seek reformation of the policy to correct the mistake or sue the agent for negligence and breach of contract for failing to obtain the insurance requested. ***Scheideler***, 206 Wis. 2d at 486-87. Thus, because the Scheidelers elected to receive from General Casualty the maximum they otherwise would have been entitled to, they no longer had any claims for relief against their agent and, therefore, nothing to assign to General Casualty. ***Id.*** at 483, 489.

[3] We recognize that the election-of-remedies doctrine does not find broad favor. *See* ***Tuchalski v. Moczynski***, 152 Wis. 2d 517, 520, 449 N.W.2d 292 (Ct. App. 1989). Its recent application in ***Scheideler*** demonstrates, however, that it remains viable in Wisconsin. Even if we were so inclined, we could not ignore the ***Scheideler*** holding. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997) (holding that only the supreme court has the authority to overrule, modify or withdraw language from an appellate court opinion).

¶12 We reject CPL and Utica's claim that the trial court misapplied ***Scheideler*** by "in effect finding that the agent would be unjustly enriched" when the election-of-remedies doctrine applies "only … where the plaintiff could be unjustly enriched." That argument is a bit narrow. It misses the point that CPL and Utica have no standing in their own right to pursue a reformation claim against Acuity. Thus, they have only those rights of recovery that the Palkowskis could assign. Once the Palkowskis accepted the $26,500 from CPL and Utica "in full settlement of all claims," the Palkowskis no longer had the right to seek reformation of the policy and go after Acuity because that would result in a double recovery to them. If the Palkowskis could not pursue a double recovery, neither could their surrogate. Barred claims cannot become viable simply by assigning them. *See* ***Scheideler***, 206 Wis. 2d at 489, 493.

¶13 We also reject CPL and Utica's argument that the election-of-remedies doctrine does not apply because at the time of the first payment the Palkowskis had remaining rights to assign. We agree with Acuity that to accept that argument would require engaging in the legal fiction that the Palkowskis were not fully compensated for their loss.

¶14 CPL and Utica also make much of the fact that in ***Scheideler*** the insurer settled with the insured and sought to recover from the agent, while here the agent settled with the insured and sought to recover from the insurer. The critical fact in each case, however, is that when the insureds accepted a sum of money in full settlement of their claims (except any expressly reserved), the settled claims were extinguished. As in ***Scheideler***, assigning a barred claim here cannot revitalize it.

¶15 CPL and Utica then assert that, even if it applies here, the election-of-remedies doctrine fails because the Palkowskis' election was not informed. It is inequitable to regard an election of rights or remedies as final "unless the party having the right of election was aware, or should have been aware, of all material facts making one option more desirable than the other." ***Gaugert v. Duve***, 217 Wis. 2d 164, 175, 579 N.W.2d 746 (Ct. App.1998). As in their brief in support of their summary judgment motion, CPL and Utica claim that the Palkowskis' allegedly uninformed election stemmed from the "exclusions ambiguity," such that an "overflow," as opposed to a "backup," might have been covered under the existing policy.[4]

¶16 A few things about CPL and Utica's ambiguity argument are perplexing. It really has no place in their reformation claim because the basis for a reformation claim must be that the Acuity policy does not provide backup/overflow coverage. If they thought the policy was ambiguous, we miss why they did not make a breach-of-contract claim. They do not reconcile the alleged ambiguity with the reformation claim they did make by citing authority that reformation is a proper remedy for an ambiguous contract. Finally, we wonder why they would jump in and settle a claim they believe is ambiguous.

¶17 CPL and Utica also assert that ***Peterman v. Midwestern National Insurance Co.***, 177 Wis. 2d 682, 503 N.W.2d 312 (Ct. App. 1993), compels the conclusion that Acuity must bear the loss because, if Acuity would have covered it

[4] Arguing in a brief in support of a summary judgment motion that the policy was ambiguous strikes us as odd. "[S]ummary judgment should not be granted when the contract is ambiguous and the intent of the parties to the contract is in dispute." ***Energy Complexes, Inc. v. Eau Claire Cnty.***, 152 Wis. 2d 453, 466-67, 449 N.W.2d 35 (1989).

in the normal course of business, CPL's negligence did not cause the loss. *See* ***id.*** at 704-05. We are unconvinced. ***Peterman*** is not a choice-of-remedies case and its agency principles have little, if any, utility here.

¶18 CPL and Utica submit as an additional authority this court's recent decision involving ***Scheideler*** and the election-of-remedies doctrine. *See* ***Artisan & Truckers Cas. Co. v. Thorson***, 2012 WI App 17, ___ Wis. 2d ___, ___ N.W.2d ___, *petition for review filed* (WI Feb. 17, 2012) (No. 2011AP2). In ***Artisan & Truckers***, the insured, Thorson, requested that $500,000 in UM/UIM coverage be added to his about-to-expire umbrella policy. *See* ***id.***, ¶¶1-2. Based on information from the insurer, the agent informed Thorson that the requested coverage was in effect and that he could wait to pay until he received his next invoice. *See* ***id.***, ¶¶10-11. The day after Thorson believed his coverage was effective but before he paid the premium, his daughter, a named insured, was seriously injured. *See* ***id.***, ¶12. The insurer denied coverage. *See* ***id.***, ¶3.

¶19 The insurer then filed a declaratory judgment action asserting that there was no coverage for the accident; Thorson counterclaimed and filed cross-claims against the agent, seeking coverage or damages. ***Id.***, ¶4. The trial court dissmissed Thorson's claims against the insurer. ***Id.***, ¶5. The agent and its E & O insurer then settled with Thorson for $500,000 in return for an assignment of Thorson's claims against the insurer and umbrella carrier. ***Id.***, ¶13. The trial court granted Progressive's summary judgment motion against the agent based on the election-of-remedies doctrine. ***Id.*** This court reversed, holding that the claims assigned to the agent may proceed because the insurer was bound by its own actions and the actions of its agent, which included not conditioning coverage on advance payment. ***Id.***, ¶16.

¶20 CPL and Utica insist that ***Artisan & Truckers*** favors them because "when an agent suffers damages but was acting within the scope of his or her duty, the agent is entitled to indemnification from the principal," ***id.***, ¶28, which does not pose the danger of double recovery. We disagree with their take on the case. ***Artisan & Truckers*** does not stand for the proposition that an agent always is entitled to indemnification. We permitted the agent there to seek indemnification because she was acting within the scope of her duty when she erred due to the insurer's negligence. The equities are not the same because here it was CPL, the agent, that slipped up.

¶21 More to the point, the agent's settlement with Thorson was not, unlike here, "in full settlement of all claims." Thorson had not recovered on his extra-contractual claims. Permitting him to move forward against the insurer and carrier with only those claims posed no danger of double recovery because we pointedly said he was not entitled to seek $500,000 "coverage" from his insurer. ***Id.***, ¶30. Here, to repeat, the Palkowskis received the full measure of their damages. They used up the right to pursue recovery of those damages. There was no life in the right they assigned to CPL and Utica.

¶22 Like a dog with a bone, CPL and Utica do not let go of the argument that this case cries out for reformation of the insurance contract. The Palkowskis absolutely could have chosen to pursue their reformation claim against Acuity without seeking any recovery from CPL. Had they done so and had they been successful, not a stretch to imagine, Acuity would have had to pay the benefits due under the reformed policy.

¶23 But the Palkowskis made a different choice. The remedy of reformation cannot simultaneously exist and not exist. The election-of-remedies

doctrine requires a litigant to choose a remedy, where the remedies sought are inconsistent with one another. ***Wickenhauser v. Lehtinen***, 2007 WI 82, ¶16, 302 Wis. 2d 41, 734 N.W.2d 855. Just as the Pawlowskis no longer could demand reformation once made whole, nor can those who step into their shoes.

¶24 CPL and Utica's alternative claim for subrogation also fails. Subrogation rests upon principles of equity. *See* ***Ruckel v. Gassner***, 2002 WI 67, ¶¶14, 15, 253 Wis. 2d 280, 646 N.W.2d 11. Equity generally grants that one other than a volunteer who pays for the wrong of another may look to the wrongdoer to the extent he or she has paid. ***Id.***, ¶14. While CPL and Utica perhaps were not volunteers, *see* ***Voge v. Anderson***, 181 Wis. 2d 726, 731, 512 N.W.2d 749 (1994) (stating that a potentially liable *insurer* is not a volunteer if it pays before a determination of liability), Acuity is not transformed into a wrongdoer through its acknowledgement that it had a suitable product it would have written had the product been requested and paid for. On these facts, requiring Acuity to reimburse CPL and Utica would thwart one of the purposes of subrogation: to place the loss on the wrongdoer. *See* ***Cunningham v. Metropolitan Life Ins. Co.***, 121 Wis. 2d 437, 444, 360 N.W.2d 33 (1985).

¶25 Finally, CPL and Utica argue that the trial court's ruling undermines Wisconsin law encouraging settlements. We disagree. The court's ruling simply applied relevant precedent that had the result of placing the cost of the loss on the shoulders of the one most responsible for it.

By the Court.—Order affirmed.

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