

IN SUPREME COURT
STATE OF WISCONSIN

BRUCE AND KAREN MULLER, d.b.a.
B&K SPORTS AND LIQUOR,

Plaintiffs-Respondents-
Cross-Appellants-Petitioners,

v.

Appeal No. 2006AP976

SOCIETY INSURANCE,

Defendant-Appellant-
Cross-Respondent,

and

GEORGE JERRICK,
UNITED FIRE AND CASUALTY, and
ROBERT SORENSEN, d.b.a.
COMMUNITY INSURANCE,

Defendants.

Appeal from a Decision of the
Wisconsin Court of Appeals, District III,
Reversing the Judgment of the Circuit Court for
Polk County, the Hon. Robert H. Rasmussen,
Case No. 01-CV-525

**NON-PARTY BRIEF OF
WISCONSIN INSURANCE ALLIANCE,
PROPERTY CASUALTY INSURERS ASSOCIATION
OF AMERICA, CIVIL TRIAL COUNCIL OF
WISCONSIN, AND NATIONAL ASSOCIATION OF
SUBROGATION PROFESSIONALS
Wis. Stat. § (Rule) 809.19(7)**

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INTRODUCTION

The Wisconsin Insurance Alliance (the "WIA"), the Property Casualty Insurers Association of America (the "PCI"), Civil Trial Counsel of Wisconsin ("CTCW"), and the National Association of Subrogation Professionals (the "NASP") (who is regularly represented by Matthiesen, Wickert & Lehrer, S.C.), by their attorneys, Godfrey & Kahn, S.C., submit this non-party brief, pursuant to Wis. Stat. § (Rule) 809.19(7) and the Court's August 15, 2007 Order.

The facts of this case are simple and undisputed. After a fire destroyed the Mullers' sporting goods store, their own property insurer, Society Insurance ("Society"), paid its policy limits, over \$400,000, to the Mullers. The Mullers then sued George Jerrick, an electrical contractor who allegedly caused the fire, and his insurer, United Fire & Casualty ("United"), naming Society as a subrogated defendant pursuant to Wis. Stat. § 803.03(2). United admitted that it insured Mr. Jerrick for the Mullers' claims and that its policy limits were \$1,000,000.

Following a mediation, the Mullers settled with Mr. Jerrick and United for \$120,000 (to go with the funds the Mullers already had received from Society). Enforcing its subrogation rights, Society then settled with Mr. Jerrick and United for \$190,000. The principal issue on appeal is whether the Mullers now may seek additional compensation from Society.

The WIA, the PCI, CTCW, and the NASP have unique perspectives concerning that issue because they represent the interests of a broad spectrum of the insurance industry, including attorneys who represent insurers, and other subrogation professionals in the state of Wisconsin and elsewhere. They ask the Court to hold that the equitable

doctrine of subrogation supports Society in this case and to affirm the decision of the Wisconsin Court of Appeals.

ARGUMENT

The doctrine of subrogation has suffered through a tortuous and often tortured history. *See, e.g., Rimes v. State Farm Mut. Auto. Ins. Co.*, 106 Wis. 2d 263, 272, 316 N.W.2d 348 (1982) (“[O]ne who claims subrogation rights ... is barred from any recovery unless the insured is made whole.”); *but see Blue Cross & Blue Shield United of Wisconsin v. Fireman’s Fund Ins. Co. of Wisconsin*, 140 Wis. 2d 544, 551, 411 N.W.2d 133 (1987) (“made whole” rule not applicable where insured settles first and “the insurer is not directly competing with its insured for a limited set of funds.”); *but see Schulte v. Frazin*, 176 Wis. 2d 622, 500 N.W.2d 305 (1993) (partially overruling *Blue Cross & Blue Shield United*; applying made whole doctrine when insured settles first and settlement funds are not limited); *but see Paulson v. Allstate Ins. Co.*, 2003 WI 99, 263 Wis. 2d 520, 532, 665 N.W.2d 744 (“The circumstances described by Couch and in these Wisconsin cases show that the made whole rule is inapplicable in this case. ... Paulson ... has made no assertion that there was an insufficient pool of money. The specter of an insurer competing with the insured for a limited amount of funds is simply not raised by the facts of this case.”).

Despite this complicated history, certain principles are quite clear.

1. Subrogation is an equitable doctrine that courts flexibly apply to each case based on the factual and procedural history, with guidance from the Legislature and the relevant insurance contracts. *See,*

e.g., Blue Cross & Blue Shield United,
140 Wis. 2d at 550-51.

2. Where the tortfeasor's funds are limited, the insured must be made whole before its insurer may recover based on its subrogation claim. *See, e.g., Rimes*, 106 Wis. 2d at 272. "Made whole," however, may mean different things in different circumstances.
3. Subrogated carriers should not compete with their insureds for limited settlement funds. *See, e.g., Paulson*, 263 Wis. 2d at 532-33.
4. Insureds must name their subrogated insurers as parties to litigation with tortfeasors and their carriers, and the subrogated insurers have the right to actively participate in that litigation. *See* Wis. Stat. § 803.03(2).

In this case, the Court of Appeals was right. It properly applied each of these principles and determined that Society had a right to enforce its subrogation interest, and the Mullers could not seek additional compensation from Society. The Mullers and Society both acted rationally, in good faith, and consistent with the doctrine of subrogation. It would be inequitable to penalize Society for enforcing its rights and providing the Mullers a "do over" on their settlement at Society's expense.

I. THE MULLERS SHOULD ACCEPT THEIR RATIONAL, VOLUNTARY CHOICE TO SETTLE WITH THE TORTFEASOR AND HIS INSURER.

When a fire destroyed their sporting goods store, the Mullers looked first to their own property insurer, Society, and received benefits totaling \$407,378.88. The Mullers did not contend that Society owed more. They believed that their claim was worth more, however, and they pursued an action against Mr. Jerrick, who allegedly caused the fire, and United, his liability carrier. The Mullers could have tried the case against Mr. Jerrick and United and conclusively determined how much they were owed.

Instead, during a non-binding mediation process, the Mullers chose to settle their claims against Mr. Jerrick and United for \$120,000 – making their total recovery in excess of \$527,000. Mr. Jerrick's \$1,000,000 policy limits were far more than sufficient to cover all of the Mullers' damages, with plenty left over to pay Society's subrogation claim.

There is no evidence in the record that the Mullers were coerced into settling with Mr. Jerrick and United nor, despite the Mullers' baseless claims to the contrary, is there any evidence that the defendants would not have paid more to settle with the Mullers. The Mullers' claims are based on pure speculation.¹

The record is clear, however, that the Mullers settled with Mr. Jerrick and United *before* Society finally resolved its subrogation claim. Furthermore, the Mullers did not agree to

¹ Even if the Mullers had some evidence to support those claims, it would not likely be admissible in this case or any related action. *See* Wis. Stat. § 904.085.

indemnify the defendants against Society's subrogation claim. Accordingly, the Mullers had no concern that they could be forced to pay back some of their settlement proceeds.

Apparently, the Mullers are not satisfied with the settlement they negotiated. That is, they don't like the deal they struck, and they believe they are entitled to more. The Mullers argue that they have not been made whole, and they should be able to pursue a claim against Society for additional funds that they voluntarily chose not to seek from the tortfeasor and his insurer. To permit the Mullers to do so simply would not be equitable. If the Mullers were indeed entitled to more money based on their loss, they should have held out for more during the settlement process or they should have tried the case to verdict. They chose neither path.

And their choice was entirely rational given the realities of litigation. By agreeing to what appears to be a favorable settlement with Mr. Jerrick and United, the Mullers avoided any concerns that they may have had about proving Mr. Jerrick's liability and the amount of their own damages. Furthermore, they avoided the cost of further litigation including a trial – costs that they would have had to bear themselves – and they avoided the vagaries inherent in the jury system. Finally, they got their money faster. That is why plaintiffs settle lawsuits, and the fact that they do not always recover 100% of the damages they seek does not mean that they were not "made whole."

Under the circumstances of this case, where the Mullers and Society were not competing for limited funds (because Mr. Jerrick's \$1,000,000 policy limits far exceeded the amount necessary to satisfy all claims), and where the Mullers settled first, the process worked as this Court intended. Society should be able to rely on the Mullers' decision to settle, and it should not have to try the Mullers'

claims again. That is fair, and that is consistent with this Court's analysis in *Paulson*. 263 Wis. 2d at 532 ("The specter of an insurer competing with the insured for a limited amount of funds is simply not raised by the facts of this case.")²

II. SOCIETY ALSO ACTED RATIONALLY AND IN GOOD FAITH, AND IT SHOULD BE ABLE TO RELY ON THE SETTLEMENTS REACHED WITH THE DEFENDANTS.

In their briefs to this Court, the Mullers repeatedly challenge the integrity of Society's conduct in this case. *See, e.g.*, Brief of Plaintiffs-Respondents-Cross-Appellants-Petitioners, p. 9 ("disingenuous"; "a stratagem to transcend the made whole doctrine at its insureds' expense"), p. 30 ("Society's efforts to manipulate the chronology of the settlements"), p. 31 ("a tactic explicitly hatched to thwart the *Rimes* doctrine"), p. 50 ("brinksmanship"); Reply Brief of Plaintiffs-Respondents-Cross-Appellants-Petitioners, p. 9

² The result in the Court of Appeals also is consistent with the analysis of courts in other jurisdictions. *See, e.g., Schonau v. GEICO General Ins. Co.*, 903 So. 2d 285, 287 (FL. App. 2005) ("Decisions applying the 'made whole' doctrine essentially hold that where both the insurer and the insured simultaneously attempt to recover all of their damages from a tortfeasor who cannot ... pay the full value of damages, the insured has priority of recovery over the insurer."; citing with approval *Paulson*, 263 Wis. 2d 520; *Allstate Ins. Co. v. Hugh Cole Builder, Inc.*, 71 F. Supp. 2d 1180, 1185-86 (M.D. Ala. 1999) ("The salient feature of the rule described above is that in a contest between the insured and the insurer over a limited recovery pool, the insurer will lose. ... The apparent reason the Supreme Court adopted the made-whole rule was to prevent the insurer from having priority over the insured in a contest over limited funds. Those reasons, however, do not apply in a case where the insured is not seeking – nor is able to seek – additional recovery from alleged wrongdoers.") (citation omitted).

(“Machiavellian tactics employed by Society”). The Mullers’ attempt to villainize Society borders on the absurd. Society did nothing wrong nor evil in this case. It simply acted in a rational, good faith manner by compensating its own insured first, and then protecting its subrogation rights. That is what insurers do.

Soon after the Mullers’ sporting goods store burned down, Society wrote the Mullers a check for over \$400,000, every last dollar owed under the Mullers’ property insurance policy. At that point, Society had a statutory right to actively participate in the Mullers’ lawsuit against the tortfeasor and his insurer. Wis. Stat. § 803.03(2). Subrogated insurers are not required to sit on the sidelines and watch as the insureds prosecute their claims. Rather, subrogated carriers have the right, which Society exercised, to actively participate in all phases of the litigation.

The Mullers, apparently, would have preferred for Society to remain silent during the mediation process. Instead, while the Mullers attempted to resolve their claims, Society did the same with respect to its subrogation claim. Society recognized, however, that the Mullers had the right to go first. Accordingly, Society waited to finally settle its claim until after the Mullers had agreed to a satisfactory settlement with Mr. Jerrick and United. Society has acknowledged all along that it previously had reached a tentative deal with the defendants, pending the outcome of the Mullers’ settlement efforts. Again, that is what insurers do. There simply was nothing wrong with Society attempting to reach a resolution of its subrogation claim while the Mullers did the same with their primary claim. That is an efficient use of resources, consistent with the statutes and case law. There is no evidence that Society’s conduct in any way hampered the Mullers’ ability to settle their claim, limited the amount of their settlement, or otherwise adversely affected them.

Both the Mullers and Society acted reasonably and in good faith throughout the litigation, making counseled choices to settle their claims for amounts they considered satisfactory, but less than the maximum that they could have recovered at trial. If either had been unhappy with the settlement, they could have continued negotiating or tried the case to verdict. They both chose to settle. This Court should not, in essence, undo those settlements and force Society to try a case the Mullers chose not to try.

**III. AFFIRMING THE COURT OF APPEALS
DECISION WOULD PROMOTE GOOD PUBLIC
POLICY.**

The settlement in this case played out precisely as it should have. Mr. Jerrick and his insurer had plenty of funds available to pay the Mullers and Society. During a mediation, the Mullers voluntarily settled first. By doing so, they avoided the costs and uncertainties of litigation, and they got their money faster. Society actively participated in the mediation and acted diligently to resolve its subrogation claim *after* the Mullers already had settled their claims. Society also accepted an amount less than the full value of its claim, also to avoid the cost and uncertainty of continued litigation. That's where the story should have ended. If this Court affirms the Court of Appeals decision, it will promote that rational, efficient process in litigation involving subrogation claims.

A contrary decision by this Court, on the other hand, could create poor incentives for litigants. For example, it could lead to subrogated carriers abandoning their claims. Society had no obligation to expend its resources to enforce its subrogation claim. If Society knew ahead of time that, despite following what it believed to be the appropriate process for a subrogated carrier, it would be forced to

disgorge its settlement proceeds, it may have chosen the simpler, less expensive route and simply abandoned its subrogation claim. Given that the Mullers, apparently, believe that they may be entitled to the entire \$190,000 that Society received from Mr. Jerrick and United, that would have been a rational choice were the law of subrogation not as the Court of Appeals has held. Why should the Mullers, who voluntarily accepted a favorable settlement, benefit from Society's diligent efforts to enforce its subrogation claim? A decision against Society could lead to that bad public policy.

Furthermore, reversing the Court of Appeals decision likely would lead to additional litigation between subrogated insurers and their insureds, trying whether the insureds negotiated a good deal. That would be bad public policy. Settlement is supposed to conserve resources and avoid wasteful litigation. If the Mullers succeed in this case, the result will be just the opposite.

CONCLUSION

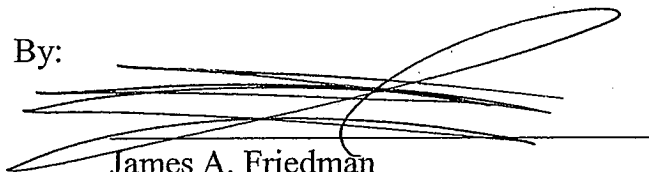
For the reasons stated above and based on the entire record in this case, the Wisconsin Insurance Alliance, the Property Casualty Insurers Association of America, Civil Trial Counsel of Wisconsin, and the National Association of Subrogation Professionals urge the Court to affirm the decision of the Court of Appeals.

Dated this 31st day of August, 2007.

Respectfully submitted,

GODFREY & KAHN, S.C.

By:

A handwritten signature in black ink, appearing to be "James A. Friedman", written over a horizontal line.

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State Bar No. 1020756

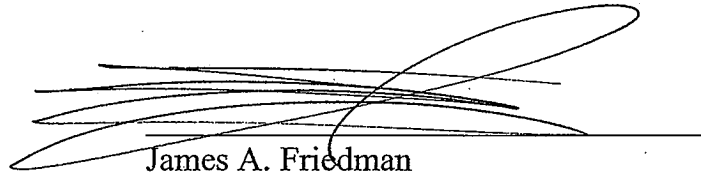
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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in section 809.19(8)(b) and (c), Stats., for an amicus brief produced with a proportional font. The length of this brief is 2,420 words.

Dated: August 31, 2007.



James A. Friedman

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