COURT OF APPEALS
DECISION
DATED AND RELEASED

April 1, 1997

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.

NOTICE

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No. 96-0784

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

Shirley A. Smedema,

Plaintiff-Appellant,

v.

Milwaukee Guardian Insurance Company,
Patricia A. Dienberg and
James F. Dienberg,

Defendants-Respondents.

APPEAL from an order of the circuit court for Milwaukee County: LOUISE M. TESMER, Judge. *Affirmed*.

Before Fine, Schudson and Curley, JJ.

PER CURIAM. Shirley A. Smedema appeals from the trial court's court order dismissing her claims against Milwaukee Guardian Insurance Company, Patricia A. Dienberg, and James F. Dienberg. We affirm.

I.

This case arises out of an automobile accident between a car driven by Shirley Smedema's husband and one driven by Patricia A. Dienberg. Mrs. Smedema's husband died in the accident, and she was injured. Patricia A. Dienberg's daughter-in-law, also named Patricia, was a passenger in the Dienberg car and was also injured.

Smedema served upon the defendants an offer of settlement under § 807.01, STATS., offering to settle the case for $200,000 plus costs. The Milwaukee Guardian policy insuring the Dienbergs had a single-limit liability of $200,000. Although the Dienbergs' daughter-in-law Patricia was also a potential claimant for that $200,000 as the result of her injuries, Smedema insisted that she, Smedema, was entitled to the entire $200,000, and, in a letter to the defendants' attorney, Smedema's lawyer suggested payment of that amount to Smedema "without asking [Smedema] to release" the Dienbergs. The letter proposed that the policy-limit payment of $200,000 "would in effect be considered an advanced payment agreement pending the verdict." This proposal was premised upon Smedema's then-pending claim against the Dienbergs' daughter-in-law, who was alleged to be causally negligent in connection with the accident despite her passenger status.[1] The claim against the daughter-in-law and her insurance carrier (not Milwaukee Guardian) was dismissed by stipulation several months later. Smedema's proposal that she receive the entire $200,000 was rejected. The defendants' attorney wrote to Smedema's attorney:

> As you know, there are more claimants that [*sic*] just your client seeking our policy limits of $200,000/$200,000. While we may consider tendering our limits into the court, we certainly cannot discriminate between competing claims. Our information indicates that the

[1] Smedema's lawyer explained: "If I fail to establish your insured's [*sic*] daughter-in-law as a joint tortfeasor I will, at that time, have my client execute a general release in favor of your insured's [*sic*] without any supplementary payment by them--or require [Milwaukee Guardian] to pay any additional money."

> claimant Patricia Dienberg also has significant injuries.

If you can come up with a plan between yourself and the attorney

> for Patricia Dienberg as to how the funds can be distributed between the claimants in exchange for a full release of Milwaukee [Guardian] Insurance and its insured, we would be more than happy to settle all aspects of this claim.

The case settled, and Smedema's lawyer notified the court that it "will not need to be tried." The parties agreed that the $200,000 Milwaukee Guardian policy limit was to be split between Smedema and the Dienbergs' daughter-in-law, with Smedema receiving $165,000, and the daughter-in-law receiving $35,000.[2] The defendants also agreed that Smedema's total damages were $750,000.[3]

Despite the settlement, Smedema sought to have judgment entered against the defendants for $750,000. Such an order for judgment was signed but later vacated by the trial court. Additionally, Smedema obtained a court-trial date to pursue her claims against James Dienberg. Before that date, however, protection on behalf of the Dienbergs was sought from the Bankruptcy Court *via* Chapter 7, which entered an automatic stay of all

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[2] The agreement reserved to Smedema, as phrased in a letter sent by the defendants' attorney to Smedema's attorney memorializing the agreement, the "right to argue that [Smedema] is entitled to additional money from [Milwaukee Guardian], above and beyond the $200,000 policy limits."

[3] Presumably this was to be a "made whole" figure so as to cut off the rights of any party who might seek subrogation payments from Smedema to recoup monies paid to her as a consequence of the accident and her resulting injuries. *See* ***Rimes v. State Farm Mut. Auto. Ins. Co.***, 106 Wis.2d 263, 275, 316 N.W.2d 348, 354-355 (1982). Thus, Smedema's lawyer wrote to the trial court in the letter that told the court that the case had been settled: "We have also agreed to stipulate to the fact that $750,000, is a fair and reasonable damage figure for [Smedema's] various damage claims, including subrogation claims." Smedema's complaint named State Farm Mutual Automobile Insurance Company and WEA Insurance Corporation as parties who may have subrogation rights under § 803.03(2), STATS. [erroneously cited in the complaint as § "803.02(3)"]. The complaint alleged that State Farm and WEA Insurance paid, "[a]s a result of this accident, certain medical, hospital and funeral bills," and sought "a determination of the subrogation rights of" State Farm and WEA Insurance.

proceedings against them, and, ultimately, a discharge in bankruptcy from that court. Following the discharge granted to the Dienbergs, the trial court dismissed Smedema's claims against them. Subsequently, the trial court also dismissed Smedema's claims against Milwaukee Guardian (as well as again against the Dienbergs). Smedema appeals from that order.

Smedema claims that the trial court erred in the following respects: 1) in dismissing her claims against the Dienbergs; 2) in not allowing Smedema to recover interest and costs against Milwaukee Guardian under § 807.01, STATS.; 3) in not permitting recovery against Milwaukee Guardian in excess of the policy limits; 4) in not requiring Milwaukee Guardian to pay pre-judgment interest and costs; and, 5) in not permitting Smedema to recover against Milwaukee Guardian her costs and disbursements under RULE 814.04(2) & (4), STATS. Although split into five parts, Smedema's contentions on this appeal revolve around her arguments that, irrespective of her settlement for $165,000, she is entitled to pre-judgment interest and double costs under RULE 807.01, and ordinary costs under RULES 814.01 & 814.04, STATS.

II.

1. *Costs and interest under RULE 807.01, STATS.*

Smedema claims a right to, as phrased in her brief on this appeal, "proceed against the Dienbergs and reduce the Stipulation of liability and damages to a judgment for the purpose of recovering against them and seeking recovery against [Milwaukee Guardian] for pre-judgment interest and double costs" under RULE 807.01, STATS.[4] Section 524(1) of the Bankruptcy Act, 11 U.S.C. § 524(1), makes void "any judgment at any time obtained, to the extent that such judgment is a determination of the personal liability of the debtor with respect to the debt discharged." It also bars "the commencement or continuation of an action ... to ... recover ... any such debt as a personal liability of the debtor." Thus, the trial court correctly dismissed Smedema's claims against the Dienbergs insofar as her action sought to impose personal liability on them. The bankruptcy discharge did not, however, affect Smedema's right to recover against Milwaukee Guardian. *See* ***Green v. Welsh***, 956 F.2d 30, 33–35 (2d Cir. 1992) ("§ 524 permits a plaintiff to proceed against a discharged debtor solely to recover from the debtor's insurer").

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[4] RULE 807.01, STATS., provides:

> **Settlement offers. (1)** After issue is joined but at least 20 days before the trial, the defendant may serve upon the plaintiff a written offer to allow judgment to be taken against the defendant for the sum, or property, or to the effect therein specified, with costs. If the plaintiff accepts the offer and serves notice thereof in writing, before trial and within 10 days after receipt of the offer, the plaintiff may file the offer, with proof of service of the notice of acceptance, and the clerk must thereupon enter judgment accordingly. If notice of acceptance is not given, the offer cannot be given as evidence nor mentioned on the trial. If the offer of judgment is not accepted and the plaintiff fails to recover a more favorable judgment, the plaintiff shall not recover costs but defendant shall recover costs to be computed on the demand of the complaint.
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> **(2)** After issue is joined but at least 20 days before trial, the defendant may serve upon the plaintiff a written offer that if the defendant fails in

Although Smedema would have been able to proceed against the Dienbergs in order to recover from Milwaukee Guardian, her claim against Milwaukee Guardian has been extinguished by the settlement and payment. Smedema has not pointed to anything in the record, other than rhetoric and contention, that supports her position that Milwaukee Guardian agreed to the entry of judgment against it for $750,000; the record is quite clear to the contrary—Milwaukee Guardian objected at every step of the way to Smedema's attempts to turn Milwaukee Guardian's agreement that $750,000 was Smedema's "made whole" figure under ***Rimes v. State Farm Mut. Auto. Ins.***

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> the defense the damages be assessed at a specified sum. If the plaintiff accepts the offer and serves notice thereof in writing before trial and within 10 days after receipt of the offer and prevails upon the trial, either party may file proof of service of the offer and acceptance and the damages will be assessed accordingly. If notice of acceptance is not given, the offer cannot be given as evidence nor mentioned on the trial. If the offer is not accepted and if damages assessed in favor of the plaintiff do not exceed the damages offered, neither party shall recover costs.
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> **(3)** After issue is joined but at least 20 days before trial, the plaintiff may serve upon the defendant a written offer of settlement for the sum, or property, or to the effect therein specified, with costs. If the defendant accepts the offer and serves notice thereof in writing, before trial and within 10 days after receipt of the offer, the defendant may file the offer, with proof of service of the notice of acceptance, with the clerk of court. If notice of acceptance is not given, the offer cannot be given as evidence nor mentioned on the trial. If the offer of settlement is not accepted and the plaintiff recovers a more favorable judgment, the plaintiff shall recover double the amount of the taxable costs.
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> **(4)** If there is an offer of settlement by a party under this section which is not accepted and the party recovers a judgment which is greater than or equal to the amount specified in the offer of settlement, the party is entitled to interest at the annual rate of 12% on the amount recovered from the date of the offer of settlement until the amount is paid. Interest under this section is in lieu of interest computed under ss. 814.04 (4) and 815.05 (8).
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> **(5)** Subsections (1) to (4) apply to offers which may be made by any party to any other party who demands a judgment or setoff against the offering party.

Co., 106 Wis.2d 263, 275, 316 N.W.2d 348, 355 (1982), *see* footnote 3, *supra*, into some sort of a confession of judgment.

RULE 807.01, STATS., only penalizes a defendant who does not settle on terms proposed by a plaintiff if the "plaintiff recovers a more favorable judgment" than that set out in the rejected settlement offer, RULE 807.01(3), STATS., and if the plaintiff "recovers a judgment which is greater than or equal to the amount specified in the offer of settlement," RULE 807.01(4), STATS. This did not happen here. Moreover, Smedema's offer of settlement addressed to the Dienbergs and Milwaukee Guardian seeking the policy limits of $200,000 for herself ignored the claims by the Dienbergs' daughter-in-law. Thus, Milwaukee Guardian was in no position to evaluate the settlement offer without separate input from its insureds, the Dienbergs, who might be liable for claims of their daughter-in-law that were not encompassed by Smedema's offer. Under these circumstances, the settlement offer was ineffective to trigger RULE 807.01, STATS. *See* ***Testa v. Farmers Ins. Exch.***, 164 Wis.2d 296, 303–304, 474 N.W.2d 776, 779 (Ct. App. 1991) (offer of settlement to insurance company that exceeded policy limits ineffective to invoke costs and interest provisions of RULE 807.01).

2. *Costs under RULES 814.01 & 814.04, STATS.*

Smedema claims entitlement to costs under RULES 814.01 & 814.04, STATS., because she got a "recovery."[5] She did not get a "recovery"; she settled

[5] RULE 814.01(1), STATS., provides:

> **Costs allowed to plaintiff. (1)** Except as otherwise provided in this chapter, costs shall be allowed of course to the plaintiff upon a recovery.

RULE 814.04, STATS., provides, as material here:

> **Items of costs.** ... [W]hen allowed costs shall be as follows:
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> **(1)** ATTORNEY FEES. (a) When the amount recovered or the value of the property involved is $1,000 or over, attorney fees shall be $100; when it is less than $1,000 and is $500 or over, $50; when it is less than $500 and is $200 or over, $25; and when it is less than $200, $15.
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> ....

the case for $165,000. Smedema points to no authority, and we have found none, that permits a plaintiff to get costs under RULES 814.01 and 814.04, STATS., when the "recovery" is pursuant to a settlement, unless, of course, the

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> **(2)** DISBURSEMENTS. All the necessary disbursements and fees allowed by law; the compensation of referees; a reasonable disbursement for the service of process or other papers in an action when the same are served by a person authorized by law other than an officer, but the item may not exceed the authorized sheriff's fee for the same service; amounts actually paid out for certified copies of papers and records in any public office; postage, telegraphing, telephoning and express; depositions including copies; plats and photographs, not exceeding $50 for each item; an expert witness fee not exceeding $100 for each expert who testifies, exclusive of the standard witness fee and mileage which shall also be taxed for each expert; and in actions relating to or affecting the title to lands, the cost of procuring an abstract of title to the lands. Guardian ad litem fees shall not be taxed as a cost or disbursement.
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> **(4)** INTEREST ON VERDICT. Except as provided in s. 807.01 (4), if the judgment is for the recovery of money, interest at the rate of 12% per year from the time of verdict, decision or report until judgment is entered shall be computed by the clerk and added to the costs.

settlement agreement so provides. Thus, Smedema's reliance on a provision of the Milwaukee Guardian policy that promises to pay "[i]nterest or damages awarded in any suit we defend accruing after judgment is entered and before we have paid, offered to pay or deposited in court that portion of the judgment which is not more than our limit of liability" is misplaced. This clause makes Milwaukee Guardian liable for interest that accrues between the time judgment is entered and the time that the judgment is either paid, offered to be paid, or deposited with the court. Milwaukee Guardian and Smedema agreed to settle her claim for $165,000. Smedema has received the $165,000 settlement. She is entitled to no more.

By the Court.—Order affirmed.

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