COURT OF APPEALS
DECISION
DATED AND RELEASED

April 3, 1997

NOTICE

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.

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No. 96-1599

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

DORIS HANSON AND MELVIN HANSON,

PLAINTIFFS-APPELLANTS,

v.

KELLY M. SANGERMANO AND STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS,

WISCONSIN PHYSICIANS SERVICE MEDICARE B,

SUBROGEE.

APPEAL from a judgment of the circuit court for Rock County: MICHAEL J. BYRON, Judge. *Affirmed in part; reversed in part and cause remanded.*

Before Dykman, P.J., Vergeront and Roggensack, JJ.

DYKMAN, P.J. Doris and Melvin Hanson appeal from a judgment awarding them damages in a personal injury case against Kelly Sangermano and

State Farm Mutual Insurance Company, Sangermano's insurer. The Hansons argue that the trial court erred by denying their motion for preverdict interest; denying their request for reasonable attorney's fees under § 814.025, STATS.; and granting State Farm's motion to reduce their damages by $2,000 based on State Farm's pretrial settlement of $1,500 with American Family Insurance Company, which had paid $2,000 of the Hansons' medical expenses. We conclude that Sangermano's defense of contributory negligence was frivolous, and therefore the Hansons are entitled to reasonable attorney's fees incurred as a result of Sangermano asserting that defense. We rule on all other issues in favor of Sangermano. We therefore affirm in part, reverse in part, and remand for a determination of reasonable attorney's fees.

BACKGROUND

On December 20, 1991, at approximately 8:00 p.m., Doris and Melvin Hanson were traveling northbound on County Highway T. The road was wet with a little slush. As the Hansons came over a hill, they saw Sangermano's vehicle 600 feet away, approaching from the opposite direction. Both Hansons noticed that Sangermano's vehicle was weaving back and forth between lanes. Mrs. Hanson flashed her bright lights at Sangermano, pulled over to the side of the road and came to nearly a complete stop. When Mrs. Hanson noticed Sangermano's vehicle heading toward her, she accelerated in an attempt to avoid a head-on collision. This maneuver was unsuccessful, and the cars collided. The impact caused personal injury to the Hansons and damage to their vehicle. American Family Insurance Company paid $2,000 of the Hansons' medical expenses pursuant to their automobile insurance policy.

The Hansons filed suit against Sangermano and State Farm, Sangermano's insurer. They included American Family in the action as a subrogee. In their answer, Sangermano and State Farm denied that Sangermano was causally negligent and denied having information sufficient to know the truth of the allegation that the collision aggravated Mrs. Hanson's right knee condition. As affirmative defenses, they alleged that the Hansons were contributorily negligent and failed to mitigate their damages.

Before trial, State Farm paid American Family $1,500 to settle American Family's $2,000 subrogation claim. The trial court dismissed American Family from the suit with prejudice.

At trial, the jury found that the negligence of Sangermano was the sole cause of the accident and awarded Mrs. Hanson damages for past medical expenses, chiropractic expenses, property damage, pain and suffering and past loss of household services. It awarded Mr. Hanson damages for past medical expenses, pain and suffering, property damage and loss of consortium. The Hansons moved the trial court to award them reasonable attorney's fees pursuant to § 814.025, STATS., and preverdict interest on their medical and chiropractic expenses. The court denied this motion. Sangermano and State Farm moved the court to reduce the medical expense award by $2,000 because of State Farm's settlement with American Family. The trial court granted this motion. The Hansons appeal from all three determinations.

PREVERDICT INTEREST

The Hansons argue that the trial court erred in denying their motion for preverdict interest on the jury's award of medical and chiropractic expenses. A party can recover preverdict interest only on damages that are liquidated or

determinable by a reasonably certain standard of measurement. ***Beacon Bowl, Inc. v. Wisconsin Elec. Power Co.***, 176 Wis.2d 740, 776-77, 501 N.W.2d 788, 802 (1993). The question of whether a party is entitled to preverdict interest is a question of law that we review without deference to the trial court. ***Id.*** at 776, 501 N.W.2d at 802.

This question of whether the Hansons may receive preverdict interest on their medical expenses is decided by ***Johnson v. Pearson Agri-Systems, Inc.***, 119 Wis.2d 766, 350 N.W.2d 127 (1984). In ***Johnson***, the plaintiff sought preverdict interest on a jury award consisting of medical expenses, loss of earning capacity, and pain and suffering. ***Id.*** at 769, 350 N.W.2d at 129. First, the court rejected the plaintiff's request for preverdict interest on lost earning capacity and pain and suffering. Then, regarding preverdict interest on medical expenses that had been stipulated to by the parties, the supreme court stated:

> Medical expenses may be the sort of determined or determinable loss for which a party can usually receive pre-verdict interest under the rules previously established by this court, assuming there is no challenge to the reasonableness of the charges or necessity for treatment. We decline to single out this type of damage for allowance of pre-verdict interest where such claim is coupled with non-liquidable claims such as is the case here. It would run counter to the purpose of the settlement offer statute sec. 807.01(4), Stats., by allowing pre-verdict interest even though no settlement offer had been made.

Id. at 781, 350 N.W.2d at 135.

Here, the Hansons' medical damages were also coupled with non-liquidable claims, as the jury's verdict included damages for pain and suffering, loss of household services and loss of consortium. Under ***Johnson***, preverdict interest is not recoverable for such medical damages because it would discourage

settlement offers under § 807.01(4), STATS.,[1] to award such interest. Therefore, the Hansons cannot recover preverdict interest on the award of medical damages.

REASONABLE ATTORNEY FEES UNDER § 814.025, STATS.

The Hansons argue that they are entitled to reasonable attorney's fees under § 814.025, STATS.[2] Specifically, the Hansons argue that Sangermano's denial of liability for the aggravation of Mrs. Hanson's right knee condition and Sangermano's affirmative defenses of contributory negligence and failure to mitigate damages were frivolous under § 814.025(3)(a) and (b). Determinations under both paragraph (a) and (b) involve mixed questions of law and fact. ***Stern v. Thompson & Coates, Ltd.***, 185 Wis.2d 220, 236, 241, 517 N.W.2d 658, 664, 666 (1994). Determining what the attorney did, thought, said, knew and should have known involves questions of fact, and such findings by the trial court will not be upset unless clearly erroneous. ***Id.*** The ultimate conclusion of whether the facts fulfill the legal standard of frivilousness, however, is a question of law that we review *de novo*. ***Id.***

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[1] Section 807.01(4), STATS., provides:

> 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).

[2] Section 814.025(1), STATS., provides: "(1) If … a … defense … commenced, used or continued by a defendant is found, at any time during the proceedings or upon judgment, to be frivolous by the court, the court shall award to the successful party costs determined under s. 814.04 and reasonable attorney fees."

Under § 814.025(3)(a), STATS., a defense is frivolous when "commenced, used or continued in bad faith, solely for purposes of harassing or maliciously injuring another." We use a subjective standard to analyze claims under § 814.025(3)(a). ***Stern***, 185 Wis.2d at 235-36, 517 N.W.2d at 663. We must determine the attorney's state of mind and whether his actions were deliberate or impliedly intentional with regard to harassment or malicious injury. ***Id.*** at 236, 517 N.W.2d at 663-64. Because the inquiry is subjective and not generally susceptible to direct proof, the attorney's state of mind must be inferred from his acts and statements in view of the surrounding circumstances. ***Id.*** at 236-37, 517 N.W.2d at 664.

We do not agree that any of Sangermano's defenses were used solely for the purpose of harassment or malicious injury. A finding of frivolousness under § 814.025(3)(a), STATS., "typically would require a finding of bad faith based upon some statements and actions, including, for example, threats." ***Id.*** at 239-40, 517 N.W.2d at 665. The record does not contain evidence of any actions or statements of Sangermano's attorney which indicate that the challenged defenses were continued in bad faith.

Section 814.025(3)(b), STATS., provides that a defense is frivolous if "[t]he party or the party's attorney knew, or should have known, that the … defense … was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law." A claim for attorney fees under § 814.025(3)(b) is reviewed under an objective standard. ***Stern***, 185 Wis.2d at 241, 517 N.W.2d at 666. The test is "whether the attorney knew or should have known that the position taken was frivolous as determined by what a *reasonable attorney* would have known or

should have known under the same or similar circumstances." ***Id.*** (citation omitted).

The Hansons argue that Sangermano's denial of liability for the aggravation of Mrs. Hanson's right knee condition was frivolous under § 814.025(3)(b), STATS. One of Mrs. Hanson's physicians testified at his deposition, however, that he did not believe the accident caused or accelerated the natural progression of Mrs. Hanson's right knee ailment. Therefore, Sangermano had a reasonable basis for denying liability for the aggravation of Mrs. Hanson's right knee condition.

The Hansons argue that this defense was frivolous because Sangermano admitted to aggravating the right knee condition in a response to one of the Hansons' requests for admission. If the Hansons had sought to use the admission at trial, however, Sangermano could have moved to withdraw it. *See* § 804.11(2), STATS. The trial court might have granted the motion. The defense does not become frivolous because Sangermano failed to move for the admission's withdrawal.

We also reject the Hansons' contention that Sangermano's affirmative defense of failure to mitigate damages was frivolous under § 814.025(3)(b), STATS. Although this affirmative defense was asserted in Sangermano's answer, the record does not reveal that she continued to pursue this defense after that point, and a jury instruction on failure to mitigate damages was never requested. It appears from the record that this defense had been abandoned. "A claim is not frivolous simply because a party fails to pursue it." ***Stoll v. Adriansen***, 122 Wis.2d 503, 518, 362 N.W.2d 182, 190 (Ct. App. 1984).

Therefore, we cannot conclude that Sangermano continued or pursued this defense frivolously. *See* ***id.*** at 519, 362 N.W.2d at 190.

We do conclude, however, that Sangermano's defense of contributory negligence was frivolous under § 814.025(3)(b), STATS. The undisputed evidence shows that when Mrs. Hanson came over a hill, she saw Sangermano's vehicle 600 feet away. Mrs. Hanson then drove her vehicle to the side of the road and came to almost a complete stop before Sangermano crossed the center line and struck her. A reasonable attorney should have known that under these facts, no reasonable jury could have found that the Hansons were contributorily negligent.

Sangermano argues that Mrs. Hanson could have honked her horn, activated her emergency flashers, drove into the ditch or drove into a driveway across the road, and therefore could have been contributorily negligent by failing to take these actions. This argument does not persuade us for two reasons. First, the test for contributory negligence is not whether Mrs. Hanson took every action conceivable to avoid the accident; rather, the test is whether she exercised ordinary care to take precautions to avoid injury. *See* WIS J I-CIVIL 1007. "A person is not guilty of negligence in making a choice of conduct if the person has no knowledge that one course of conduct carries a greater hazard than another, provided that such lack of knowledge is not the result of the person's failure to exercise reasonable care." ***Id.*** The alternative actions proposed by Sangermano are not relevant to whether the Hansons exercised *ordinary care* to avoid the collision, and therefore are not relevant to whether the defense was frivolous.

Second, the jury could not have found the Hansons to be contributorily negligent based on the arguments offered by Sangermano. The

defendant, not the plaintiff, has the burden of proof to establish contributory negligence. ***Helmbrecht v. St. Paul Ins. Co.***, 122 Wis.2d 94, 121, 362 N.W.2d 118, 132 (1985). And a jury's finding of negligence cannot be based on speculation and conjecture. ***Jagmin v. Simonds Abrasive Co.***, 61 Wis.2d 60, 66, 211 N.W.2d 810, 813 (1973). Sangermano could not have met her burden of proof by offering these speculative and conjectural arguments to the jury. Because we conclude that this defense is frivolous, we reverse the trial court's determination and remand for the trial court to award the Hansons reasonable attorney's fees incurred as a result of Sangermano asserting this defense.

OFFSET

The Hansons argue that the trial court erred in granting Sangermano and State Farm a $2,000 offset against the award of medical expenses. The trial court awarded the offset because American Family settled its $2,000 subrogation claim with State Farm for $1,500 before trial. Whether State Farm was entitled to a $2,000 offset is a question of law that we review without deference to the trial court. *See* ***Gurney v. Heritage Mut. Ins. Co.***, 183 Wis.2d 270, 273, 515 N.W.2d 526, 528 (Ct. App. 1994); ***Employers Health Ins. v. General Cas. Co.***, 161 Wis.2d 937, 955-56, 469 N.W.2d 172, 179-80 (1991).

First, the Hansons argue that State Farm should not be entitled to offset the $2,000 because State Farm and American Family reached their settlement before the Hansons had the opportunity to move for a ***Rimes*** hearing. Under ***Rimes v. State Farm Mut. Auto. Ins. Co.***, 106 Wis.2d 263, 271-72, 316 N.W.2d 348, 353 (1982), an insurer is not entitled to subrogation out of settlement proceeds unless the insured has been made whole for the loss. In a ***Rimes*** hearing,

the circuit court holds a post-settlement trial to determine whether the settlement made the insured whole. ***Id.*** at 276-79, 316 N.W.2d at 355-56.

Rimes and its progeny involved situations in which the insured *settled* with the tortfeasor. *See, e.g.*, ***Leonard v. Dusek***, 184 Wis.2d 267, 516 N.W.2d 453 (Ct. App. 1994); ***Sorge v. National Car Rental Sys., Inc.***, 182 Wis.2d 52, 512 N.W.2d 505 (1994); ***Schulte v. Frazin***, 176 Wis.2d 622, 500 N.W.2d 305 (1993). A settlement may or may not make the insured whole. ***Rimes***, 106 Wis.2d at 273, 316 N.W.2d at 354. Therefore, when the parties settle, a hearing is necessary to determine whether the insured has been made whole and whether the insurer is entitled to subrogation.

Here, however, the Hansons did not settle with Sangermano and State Farm; instead, the jury returned a verdict awarding them $56,860 in damages. When the jury returns a verdict, we are "obliged to conclude that the damages found by the jury made the plaintiff whole." *See* ***id.*** at 274, 316 N.W.2d at 354. Because the jury verdict made the Hansons whole, they were not entitled to a ***Rimes*** hearing, and the pretrial settlement between State Farm and American Family did not prejudice them.

Second, the Hansons argue that State Farm should not be entitled to offset the $2,000 by operation of the collateral source rule. Under the collateral source rule, "a personal injury claimant's recovery is not to be reduced by the amount of compensation received from other sources, i.e., sources 'collateral' to the defendant." ***Lambert v. Wrensch,*** 135 Wis.2d 105, 110-11 n.5, 399 N.W.2d 369, 372 (1987). Where subrogation is present, however, the collateral source rule is inapplicable. ***Id.*** at 121, 399 N.W.2d at 376. Because American Family had a subrogation right to the $2,000, the collateral source rule does not apply.

Finally, the Hansons argue that American Family's subrogation claim was extinguished upon its stipulation and dismissal from the lawsuit, and therefore State Farm cannot now attempt to offset the $2,000. The Hansons do not cite any authority in support of this argument, and we generally do not consider arguments unsupported by reference to legal authority. ***State v. Shaffer***, 96 Wis.2d 531, 545-46, 292 N.W.2d 370, 378 (Ct. App. 1980). We find it counterintuitive that a person who, in effect, purchases a claim ends up losing that claim because the claim's seller is no longer a party in a lawsuit. Without authority suggesting that result, we are unwilling to so conclude. We therefore decline to address this argument.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded.

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