

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

MARCH 25, 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

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-3259-FT

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

**Maurice Schirmacher and Janet
Schirmacher,**

Plaintiffs-Appellants,

v.

**Threshermen's Mutual Insurance
Company, n/k/a Society Insurance, a
Mutual Company,**

Defendant-Respondent.

APPEAL from a judgment of the circuit court for Eau Claire County:
PAUL J. LENZ, Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

CANE, P.J. Maurice and Janet Schirmacher appeal a judgment denying their motion against Threshermen's Mutual Insurance Company¹ for double taxable costs

¹ Although Threshermen's is now known as Society Insurance, this opinion will refer to the insurance company as Threshermen's.

pursuant to § 807.01(3), STATS., and interest pursuant to § 807.01(4), STATS., and dismissing their complaint.² The Schirmachers argue that double costs and interest are appropriate because the verdict exceeded their settlement offer. Threshermen's argues that because the Schirmachers' offer of settlement was not made to them, and the defendants to whom the offer was made were dismissed from the lawsuit prior to trial, the Schirmachers are not entitled to collect double costs and interest. We agree with Threshermen's and affirm the judgment.

This appeal arises from the Schirmachers' negligence action against Mark and Joni Zich, Threshermen's, and Chippewa County for personal injuries sustained by Maurice Schirmacher when the Zichs' pig caused the scaffolding on which he was working to collapse. Threshermen's provided liability insurance coverage to the Zichs as their homeowner's insurer. Chippewa County was Maurice Schirmacher's medical insurer and was joined as a subrogated payor of certain medical bills incurred by Schirmacher.

On July 17, 1995, the Schirmachers made a formal settlement offer to the Zichs in the amount of \$100,000.00, together with costs, as follows: "Pursuant to Wis. Stat. § 807.01(3), Plaintiff, Maurice Schirmacher, hereby makes a formal offer of settlement to Defendants Mark A. Zich and Joni H. Zich in the sum of One Hundred Thousand Dollars (\$100,000.00), together with the costs of this action." The Zichs did not accept the offer.

By stipulation, Threshermen's paid the county's subrogated interest in the sum of \$12,183.96, and the county was dismissed from the action with prejudice. The parties also stipulated that Maurice Schirmacher's total past medical expenses were

² This is an expedited appeal under RULE 809.17, STATS.

\$12,512.85, and the court would insert that figure in the verdict. As the result of the stipulation the Schirmachers could only recover an additional \$328.89 from the defendants for medical expenses.

On the morning of trial, the court granted the Schirmachers' motion to dismiss the Zichs from the lawsuit. Because liability was admitted, the case proceeded against Threshermen's on the issue of damages. Including the stipulated \$12,512.85 for past medical expenses, the jury returned a verdict for the Schirmachers in the amount of \$116,935.57. On August 22, 1996, the Schirmachers moved for double costs and interest, pursuant to § 807.01(3) and (4), STATS., because the jury's damages award exceeded their \$100,000 settlement offer to the Zichs. The court held a hearing and denied the motion. The Schirmachers now appeal the judgment.

The sole issue on appeal is whether the Schirmachers' settlement offer was sufficient to invoke the double costs and interest provisions of § 807.01, STATS. This is a question of law we review de novo. See *Testa v. Farmers Ins. Exch.*, 164 Wis.2d 296, 300, 474 N.W.2d 776, 778 (Ct. App. 1991). In relevant part, the statute provides the following:

807.01 Settlement offers. ...

(3) ... 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.

(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.

The purpose of the statute is to encourage pretrial settlement, to avoid delays, and to impose double costs and interest against the party who improvidently refuses an offer of

settlement. See *Blank v. USAA Prop. & Cas. Ins. Co.*, 200 Wis.2d 270, 279, 546 N.W.2d 512, 516 (Ct. App. 1996).

The Schirmachers rely on *Testa* and *Ritt v. Dental Care Assocs.*, 199 Wis.2d 48, 543 N.W.2d 852 (Ct. App. 1995), to support their argument. In *Testa*, we decided the plaintiff's aggregate settlement offer to two jointly and severally liable principal defendants and their insurer was sufficient to trigger the provisions of § 807.01(3) and (4), STATS., against the insurer because the insurer was the only party with an interest in the offer of settlement, and as the "offeree" it had the opportunity to fully and fairly evaluate the offer. *Testa*, 164 Wis.2d at 304-05, 474 N.W.2d at 779-80.

In *Ritt*, an issue was whether the plaintiff's offer of settlement met the requirements of § 807.01(3), STATS., because it contained only one offer to three aligned defendants and a subrogated defendant. *Id.* at 74-75, 543 N.W.2d at 862. Because the offer did not permit the three aligned defendants to fully and fairly evaluate their exposure, the court decided that the offer was not valid under § 807.01(3), STATS. *Id.* at 78, 543 N.W.2d at 864.

The facts of *Testa* and *Ritt* are distinguishable. Whereas the defendant insurer in *Testa* and the subrogated defendant in *Ritt* were one of several parties to whom plaintiffs directed their settlement offers, the Schirmachers did not name Threshermen's in their settlement offer. Instead, the Schirmachers made the settlement offer only to the Zichs, whom they successfully moved to dismiss from the lawsuit on the morning of trial. The Schirmachers were the offerors and the Zichs were the offerees. We are not persuaded by the Schirmachers' argument that Threshermen's was the offeree because the settlement offer was within its policy limits and it had the ability to settle or continue to defend the case. We decline to extend *Testa* to cover the facts of this case.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

