**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**September 27, 2005**

**Cornelia G. Clark**
**Clerk of Court of Appeals**



**Appeal No. 2005AP527-FT** **Cir. Ct. No. 2003CV500**

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

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**JEROLD I. GIESIE, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE FOR THE ESTATE OF KAREN A. GIESIE,**

**PLAINTIFFS-RESPONDENTS,**

**V.**

**GENERAL CASUALTY COMPANY OF WISCONSIN,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Eau Claire County: ERIC J. WAHL, Judge. *Reversed.*

Before Cane, C.J., Hoover, P.J., and Lundsten, J.

¶1 PER CURIAM. General Casualty Company of Wisconsin appeals a judgment of the court that denied it a setoff for medical expenses previously paid

to an insured, after the insured was awarded duplicate medical expenses in an arbitration award.[1] The issue on appeal is whether General Casualty may deduct the $10,000 it previously paid in medical expenses from the arbitration award. The trial court concluded that General Casualty could not deduct the payment. We disagree and reverse.

## Background

¶2 This case focuses, in part, on an unreported arbitration proceeding. Although the record is limited, the legally significant facts are undisputed.

¶3 Karen Giesie was involved in an automobile accident and filed a claim for her resulting injuries with her insurer, General Casualty. General Casualty initially paid $10,000 toward her medical expenses pursuant to the medical pay provision of the insurance policy. Some time later, Giesie committed suicide. Subsequently, an arbitration hearing on the payment of benefits was held. Jerold Giese, Karen's husband and personal representative, was awarded $10,006.23 for Karen's medical expenses, $6,927.38 for her lost earnings, and $37,000 for pain and suffering, for a total of $53,933.61.

¶4 General Casualty deducted the $10,000 it had already paid for Karen's medical expenses and another $25,000 paid to Jerold by the tortfeasor's insurer from the arbitration award and paid Jerold a total of $18,933.61. Jerold filed a motion to compel General Casualty to pay an additional $10,000.[2] Jerold

[1] This is an expedited appeal under WIS. STAT. RULE 809.17. All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

[2] Jerold did not challenge the $25,000 deduction.

argued that General Casualty waived its subrogation right to the $10,000 setoff by failing to raise the issue at the arbitration hearing. The court agreed and ordered General Casualty to pay Jerold the $10,000 plus interest. General Casualty did not immediately pay the amount ordered,[3] and Jerold filed a motion for interest on the $18,933.61 that General Casualty had already paid[4] and to again compel General Casualty to pay the $10,000 plus interest. The court entered judgment in favor of Jerold for the amount requested. General Casualty appeals.

## Standard of Review

¶5 Whether General Casualty may deduct the $10,000 it has already paid to Jerold involves the application of law to an undisputed set of facts, which we review without deference to the decision of the lower court. *See* ***Oakley v. Fireman's Fund of Wis.***, 162 Wis. 2d 821, 826, 470 N.W.2d 882 (1991).

## Discussion

¶6 General Casualty contends that it is entitled to a setoff for the $10,000 paid for Karen's medical expenses to prevent a double recovery. Jerold counters that General Casualty waived its subrogation right for the $10,000 by failing to raise the issue of the setoff at the arbitration hearing. We agree with General Casualty. We reverse the court's decision and permit General Casualty to

[3] Jerold contends that General Casualty failed to comply with the court's initial order. Conversely, General Casualty states that it sought clarification on the rate of interest, so it could prepare an appeal.

[4] Jerold did not cash General Casualty's check for $18,933.61 out of concern that doing so would constitute acceptance of the amount and waiver of his right to challenge it.

set off the $10,000 it has already paid for Karen's medical expenses to prevent a double recovery.

¶7 Double recovery for the same loss is contrary to public policy. *See* ***Lagerstrom v. Myrtle Werth Hosp.—Mayo Health Sys.***, 2005 WI 124, ¶35, ___ Wis. 2d ___, 700 N.W.2d 201. "The purpose of subrogation is to prevent a double recovery by the insured" when the insured has already been fully compensated for his or her loss. ***Rimes v. State Farm Mut. Ins. Co.***, 106 Wis. 2d 263, 272, 316 N.W.2d 348 (1982). We recognize that "[t]he insured is to be made whole, but no more than whole." ***Id.***

¶8 Requiring General Casualty to pay the $10,000 again would result in an impermissible double recovery. Both parties agree that General Casualty previously paid for virtually all of Karen's medical expenses. It would be contrary to public policy to allow Jerold to recover for Karen's medical expenses twice. Therefore, we reverse the judgment of the trial court and allow the setoff for the $10,000 already paid. Consequently, Jerold is not entitled to the interest the court awarded on the $18,933.61 as General Casualty timely paid the correct amount.

¶9 Although we reverse the decision of the court on public policy grounds to prevent a double recovery, we also address Jerold's contention that General Casualty waived any subrogation right to the $10,000. Jerold argues that General Casualty waived its right to subrogation by failing to: (1) present any evidence at the arbitration hearing that it had a right to subrogation; (2) present any evidence at the arbitration hearing that it made any payments for Karen's medical expenses; and (3) file any post-arbitration motion for the court to reduce the arbitration award. We do not agree.

¶10 General Casualty has both a contractual and statutory right to setoff. The contractual right stems from the insurance policy, which both parties agree proscribes double recovery for the same injury. General Casualty also has a statutory right to subrogation, and therefore it follows a right to the setoff. WISCONSIN STAT. § 632.32(4)(b) provides, in pertinent part, that "[u]nder the medical or chiropractic payments coverage, the insurer shall be subrogated to the rights of its insured to the extent of its payments." Therefore, "[w]hen an insurer makes payments to or on behalf of its insured under the medical-payments portion of its policy, it is subrogated to its insured's right to recover 'to the extent of its payments.'" ***Jones v. Aetna Cas. & Surety Co.***, 212 Wis. 2d 165, 167, 567 N.W.2d 904 (Ct. App. 1997) (quoting § 632.32(4)(b)).

¶11 We have previously held that failure to plead a setoff for previously paid medical expenses does not waive the setoff right. ***Id.*** In ***Jones***, Jones was injured in an automobile accident involving an uninsured motorist. ***Id.*** Jones's insurance policy provided both uninsured motorist and medical payments coverage. ***Id.*** Jones made claims for medical expenses under the policy, which his insurance company paid. ***Id.*** Jones sued both the uninsured motorist and his insurance company, and a jury awarded Jones $3,544 for his past medical and hospital expenses and $600 for past pain and suffering. ***Id.*** After the verdict, Jones's insurance company sought a setoff for the $2,633 it had already paid Jones under the medical payments provision. ***Id.*** The trial court denied the setoff due to the insurance company's failure to plead setoff or to file a counterclaim stemming from its subrogation rights. ***Id.*** On appeal, we reversed the court's judgment, stating that WIS. STAT. § 632.32(4)(b) "does not require that an insurer named as a defendant plead setoff or file a counterclaim in order to recover payments it made to or on behalf of its insured." ***Id.*** at 167-68.

¶12 The present case parallels ***Jones***, which admittedly was following a jury verdict. We are also satisfied that similarly General Casualty did not waive its subrogation right by failing to present the issue of the setoff at the arbitration hearing. As in ***Jones***, denying General Casualty its statutory subrogation rights would give Jerold an impermissible windfall. *See* ***id.*** at 168.

¶13 Both parties assume that an arbitration decision is the functional equivalent of a jury verdict. We also make the same assumption for the purpose of our discussion of the waiver issue. Jerold argues, however, that ***Jones*** is distinguishable from the present case because in ***Jones***, the plaintiff never argued that the insurance company waived its subrogation claim. Additionally, Jerold argues that WIS. STAT. § 632.32(4)(b) speaks only in terms of subrogation, and General Casualty's failure to plead subrogation waived it's right to claim the setoff from the arbitration award. We disagree and find ***Jones*** applicable. Although we did not specifically address the issue of waiver in ***Jones***, we held:

> Section 632.32(4)(b), Stats., is plain and unambiguous. When an insurer makes payments to or on behalf of its insured under the medical-payments portion of its policy, it is subrogated to its insured's right to recover "to the extent of its payments." Contrary to Jones's argument and the trial court's holding, the statute does not require that an insurer named as a defendant plead setoff or file a counterclaim in order to recover payments it made to or on behalf of its insured. Subrogation "prevents the insured from recouping a windfall double recovery." ***Cunningham v. Metropolitan Life Ins. Co.,*** 121 Wis.2d 437, 444, 360 N.W.2d 33, 36 (1985). In this case, to deny Aetna its statutory subrogation rights, would give Jones an impermissible windfall.

***Id.*** at 167-68. Since pleading a setoff or filing a counterclaim is not necessary to receive a setoff after a jury verdict, we are also satisfied that failing to take these

actions at an arbitration hearing does not constitute a waiver of right to a setoff. Therefore, ***Jones*** is applicable to the present case.

*By the Court.*—Judgment reversed.

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