



OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS

110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688

Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT II

March 18, 2020

To:

Hon. Chad G. Kerkman
Circuit Court Judge
Kenosha County Courthouse, Br. 8
912 56th St.
Kenosha, WI 53140

Rebecca Matoska-Mentink
Clerk of Circuit Court
Kenosha County Courthouse
912 56th St.
Kenosha, WI 53140

Gino M. Alia
Alia, Dumez & McTernan, S.C.
6633 Green Bay Rd.
Kenosha, WI 53142

Ann S. Jacobs
Jacqueline Chada Nuckels
Jacobs Injury Law, S.C.
219 N. Milwaukee St., Ste. 5B
Milwaukee, WI 53202

State Farm Mutual Automobile Ins. Co.
222 S. 84th St.
Lincoln, NE 68510

You are hereby notified that the Court has entered the following opinion and order:

2018AP2249

Steven K. Nega v. State Farm Mutual Automobile Insurance
Company (L.C. #2012CV2507)

Before Reilly, P.J., Gundrum and Davis, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Steven K. Nega appeals from a judgment awarding \$37,909.81 to Nega against State Farm Mutual Automobile Insurance. The judgment included a \$10,000 set-off from a jury verdict, which had the effect of triggering the cost-shifting provision of WIS. STAT. § 807.01(1) (2017-18).¹ Based upon our review of the briefs and the record, as well as the benefit of oral

¹ All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

argument, we conclude, on the factual circumstances presented, that State Farm waived its right to the set-off and this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. We summarily reverse the judgment of the circuit court and remand to the circuit court with directions to award statutory costs to Nega.

Nega was injured in a motor vehicle crash on August 12, 2011. By the time of the jury trial in August 2018, Nega had claimed medical bills and mileage expenses exceeding \$178,000. State Farm, as Nega’s underinsured carrier, allegedly paid over \$10,000 in “med pay” payments under its policy, but the specific medical bills paid under the “med pay” provision could not be identified in the record or by counsel at oral argument.

The tortfeasor’s insurer tendered its \$100,000 policy limit, and, pursuant to *Vogt*,² State Farm, as Nega’s underinsured carrier, authorized Nega to accept the \$100,000 and State Farm released all claims against the tortfeasor and her insurer, including any subrogation claims that State Farm had against the tortfeasor or her insurer. Nega’s claims against the tortfeasor and her insurer were dismissed upon stipulation of all parties, including State Farm.

Nega proceeded thereafter only against State Farm for underinsured motorist benefits. State Farm did not contest the reasonableness of the amount of medical bills asserted by Nega, but it did argue that some of Nega’s injuries were not caused by the accident. State Farm’s medical expert opined that Nega’s shoulder and knee injuries were pre-existing and not caused by the crash.

² *Vogt v. Schroeder*, 129 Wis. 2d 3, 24-26, 383 N.W.2d 876 (1986).

In January 2016, Nega and State Farm attended mediation where a partial settlement of \$117,920.36 was agreed upon and State Farm agreed to waive any claim for a “lien” under the “med pay” portion of its policy.

In April 2016, State Farm served upon Nega an Offer of Judgment pursuant to WIS. STAT. § 807.01(1) for the amount of \$44,363.33, which expressly referenced that State Farm had previously advanced \$117,920.36 to Nega and stated that “[t]his offer of judgment includes all subrogation claims that have been, or may be, asserted in this action.”³ Nega declined the Offer of Judgment and the matter proceeded to a jury trial in August 2018.

At the jury trial, Nega requested over \$178,000 in past health care and mileage expenses. The jury awarded \$150,000 for “[p]ast health care expenses.” The total verdict amounted to \$270,000. Deducting \$100,000 from the tortfeasor’s insurer and \$117,920.36 from the advance payment by State Farm, left a balance to Nega of \$52,079.64. As \$52,079.64 exceeded State Farm’s Offer of Judgment of \$44,363.33, Nega was entitled to statutory costs and State Farm’s formal Offer of Judgment was of no effect.

In motions after verdict, State Farm asserted that its \$10,000 “med pay” was a set-off to the jury’s verdict in addition to the tortfeasor’s \$100,000 payment and State Farm’s partial settlement of \$117,920.36, for a total of \$42,079.64,⁴ thereby making its Offer of Judgment of \$44,363.33 a “more favorable judgment” and entitling State Farm to statutory costs. *See* WIS. STAT. § 807.01(1). The circuit court agreed with State Farm and awarded costs to State Farm in

³ State Farm’s counsel acknowledged at oral argument that as of April 2016 all subrogation claims had been extinguished as a result of the *Vogt* tender.

⁴ $\$270,000 - (\$10,000 + \$100,000 + \$117,920.36) = \$42,079.64$

the amount of \$4,169.83, which had the effect of reducing Nega's judgment to \$37,909.81. Nega appeals the court's grant of the set-off of \$10,000.

Waiver is a voluntary and intentional relinquishment of a known right. *Davies v. J.D. Wilson Co.*, 1 Wis. 2d 443, 466-67, 85 N.W.2d 459 (1957). We conclude, based on the specific facts of this case, that State Farm expressly waived any claim to its \$10,000 "med pay" benefits when it waived its "med pay lien" at the mediation in 2016; when its formal Offer of Judgment included all "subrogation claims"; when it admitted at oral argument that it would not have deducted \$10,000 from the Offer of Judgment had Nega accepted it; and when it informed the court at the final pre-trial that the tortfeasor's payment of \$100,000 and its advance payment of "roughly \$120,000" would be addressed outside of the jury's verdict and did not make any claim that the \$10,000 "med pay" was still in play.

As State Farm waived⁵ any "lien" or "subrogation" rights it had to the "med pay" benefits it may have paid, we reverse and remand for the circuit court to void the set-off awarded to State Farm of \$10,000 and to award statutory costs to Nega.

IT IS ORDERED that the judgment of the circuit court is summarily reversed pursuant to WIS. STAT. RULE 809.21, and the cause is remanded with directions.

⁵ As we reverse on waiver, we need not address plaintiff's alternative arguments. *See State v. Blalock*, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989) (We decide cases on the "narrowest possible ground."). This includes the proper application of a "non-duplication" provision within the State Farm policy. State Farm admits it has the burden of proof on this claim and further concedes that there is no evidence in the record of what it paid under the "med pay" portion of its policy with Nega.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals