IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

RICHARD A. SOLOMON,

Appellant,

v.

Case No. 5D18-3920

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY AND STATE FARM FLORIDA INSURANCE COMPANY,

Appellees.
_____/

Opinion filed August 21, 2020

Appeal from the Circuit Court
for Orange County,
Keith A. Carsten, Judge.

Kenneth J. McKenna and Daniel Smith, of Dellecker Wilson King McKenna Ruffier & Sos, Orlando, and Philip M. Burlington, of Burlington & Rockenbach, P.A., West Palm Beach, for Appellant.

DeeAnn J. McLemore and Charles W. Hall, of Banker Lopez Gassler, P.A., St. Petersburg, for Appellees.

EVANDER, C.J.

Richard A. Solomon brought an action against State Farm, his uninsured/underinsured motorist insurance carrier, after suffering injuries from an automobile collision. The jury returned a verdict in favor of Solomon; however, after set-offs against the verdict, judgment was ultimately entered in favor of State Farm. Solomon

raises several issues on appeal, of which we find only one merits discussion. Solomon argues that the trial court erred in treating an advance payment made by State Farm as a set-off to be considered prior to entry of the final judgment. We disagree.

Prior to trial, State Farm tendered a $185,000 advance payment to Solomon with a cover letter stating that this "good faith payment" would "be credited against any final determination of damages." Solomon accepted the payment.

The jury returned a verdict, finding that Solomon's total damages were $286,521.57.[1] Post-trial, the trial court held a hearing to determine the appropriate set-offs to the verdict before entry of final judgment. The parties agreed to two set-offs totaling $141,026.71.[2] After determining that State Farm was also entitled to a set-off for its advance payment, and recognizing that the set-offs combined to exceed the amount awarded by the jury, the trial court entered final judgment in favor of State Farm.

Solomon argues that the verdict should have been reduced only by the agreed-upon set-offs, and then a verdict entered in his favor. Thereafter, the trial court would make its determination as to attorney's fees and costs. According to Solomon, the advance payment made by State Farm would then be utilized as a credit toward the satisfaction of judgment entered in favor of Solomon. State Farm argues that the trial court properly determined that State Farm was entitled to a set-off for the amount it advanced. The caselaw supports State Farm's argument.

[1] The trial court had previously entered a partial summary judgment finding that the underinsured motorist was one hundred percent responsible for the motor vehicle collision.

[2] Based on the amounts set forth in Appellant's proposed final judgment, the trial court presumed there was an additional $10,000 in agreed set-offs.

In *Hamm v. Milton*, 358 So. 2d 121 (Fla. 1st DCA 1978), our sister court addressed a similar situation. Mrs. Hamm was injured in a motor vehicle collision involving a truck owned by the city of Milton, Florida. *Id.* at 122. Mrs. Hamm brought suit against the city for the injuries she sustained, and her husband sued for damages resulting from medical expenses incurred and loss of his wife's services. *Id.* Prior to trial, the city's insurer made a $2,686.64 advance payment to Mrs. Hamm. *Id.* Later, the jury awarded Mrs. Hamm $8,500 and her husband $1,000. *Id.* Prior to entry of judgment, the trial court reduced the verdict amount based on the jury's finding that Mrs. Hamm was fifteen percent responsible for the damages sustained, and then further reduced the verdict amount by the amount previously advanced by the city's insurer. *Id.* In affirming the final judgment, our sister court found that the set-off was appropriate, observing that it would be inequitable to allow plaintiffs to receive double recovery at the expense of the defendant. *Id.* at 122–23.

The West Virginia Supreme Court's decision in *Doe v. Pak*, 784 S.E.2d 328 (W. Va. 2016), is also supportive of State Farm's position. There, the plaintiff was injured in an automobile collision caused by an unknown hit-and-run driver. *Id*. at 329. The plaintiff had uninsured motorist coverage with State Farm. *Id.* State Farm made an advance payment of $30,628.15 to the plaintiff. *Id.* at 329–30. The accompanying cover letter provided, in relevant part:

> Your client's current demand is $100,000.00; which is the policy limit. At this time, it appears we have reached an impasse. I am enclosing our payment for the amount of the initial offer since our last evaluation. The initial offer was $30,628.15 . . . .
>
> *This payment will also be credited against any final determination of damages*.

> This payment should be considered an advance without prejudicing your client's right to receive a higher amount in the future through continued negotiations . . . . This offer or your acceptance thereof, does not waive any defenses, we may have now or in the future, under the policy.

Id. at 330.

The jury returned a verdict of $100,000, exclusive of prejudgment interest. *Id.* In entering final judgment, the trial court refused to credit State Farm's advance payment. *Id.* The West Virginia Supreme Court reversed, concluding "the circuit court clearly erred by failing to reduce the jury's verdict by the $30,628.15 advance payment when it calculated the final judgment."[3] *Id*. at 333. In support of its decision, the court further observed that "[n]ot only does a credit for advance payments protect an insurer from having to pay twice for the same damages, but it also benefits insureds by encouraging expedited payment without resort to trial." *Id*. at 332.

We find the decisions in *Hamm* and *Doe* to be well reasoned. By contrast, we find little reason to support Solomon's argument that the trial court's determination of attorney's fees and costs should be made without consideration of the advance payment made by State Farm. Accepting Solomon's argument would mean that, in this case, Solomon would have the opportunity to recover costs even if the jury verdict had been less than the amount of the advance payment.

AFFIRMED.

HARRIS and SASSO, JJ., concur.

[3] The West Virginia Supreme Court further determined that the prejudgment interest calculated by the trial court was erroneous because the judgment entered against State Farm should have been reduced by the $30,628.15 advance payment. *Id*. at 333.