COURT OF APPEALS
DECISION
DATED AND FILED

September 9, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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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.

No. 96-2213

STATE OF WISCONSIN — IN COURT OF APPEALS
DISTRICT II

KENNETH NEIMAN AS SUCCESSOR IN INTEREST TO
STRIPE-N-SEAL CORPORATION,

PLAINTIFF-RESPONDENT-
CROSS-APPELLANT,

V.

THUNDER PALLET, INC., AND PENNSYLVANIA
LUMBERMENS MUTUAL INSURANCE COMPANY,

DEFENDANTS-APPELLANTS-
CROSS-RESPONDENTS,

AMERICAN FAMILY MUTUAL INSURANCE COMPANY AND
AMERICAN STANDARD INSURANCE COMPANY,

DEFENDANTS-CROSS-RESPONDENTS.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Waukesha County: ROBERT G. MAWDSLEY, Judge. *Affirmed in part and reversed in part.*

Before Snyder, P.J., Nettesheim and Anderson, JJ.

PER CURIAM. Thunder Pallet, Inc. and its insurer, Pennsylvania Lumbermens Mutual Insurance Company (Thunder Pallet), appeal from a judgment in favor of Stripe-N-Seal Corporation and Kenneth Neiman (SNS). Thunder Pallet argues that based on an offer of settlement it was entitled to its costs, and that interest should not have been awarded on costs or a sanction imposed earlier in the action. SNS cross-appeals to challenge the jury's verdict and the recovery by American Family Mutual Insurance Company and American Standard Insurance Company (American Family) of their subrogation claim as SNS's insurers. We conclude that there was no authority for interest to be awarded on the taxed costs and reverse that portion of the judgment. We affirm the remaining portions of the judgment.

An incinerator fire at Thunder Pallet damaged and destroyed SNS vehicles parked on an adjacent property. SNS sought to recover from Thunder Pallet the damages for the loss and destruction of materials and vehicles and profits lost because of a cessation of business occasioned by the damages to its vehicles. American Family was named a defendant because of its subrogated interest for payments made to SNS for property damage.

Thunder Pallet made an offer of settlement to SNS of $200,000, plus costs. The offer was not accepted. The December 16, 1994 jury verdict awarded damages of $90,059.58 and found that Thunder Pallet was 75% causally negligent. No damages were awarded for lost profits.

On motions after verdict, Thunder Pallet sought an award of its statutory costs and disbursements based on the rejection of its offer of settlement.[1] *See* § 807.01(1), STATS. Judgment was entered in favor of American Family for $60,176.62, representing 75% of the $80,235.50 payment to SNS. SNS got a judgment for $7368.06, plus costs of $11,293.43 with interest from the date of the verdict.

Thunder Pallet first argues that the trial court erred in concluding that its offer of settlement did not trigger the shifting of costs under § 807.01(1), STATS., because it did not make reference to American Family's claim. Whether an offer of settlement is effective under § 807.01 is a question of law which we determine independently of the trial court. *See* ***Staehler v. Beuthin***, 206 Wis.2d 610, 624, 557 N.W.2d 487, 492 (Ct. App. 1996). "The validity of an offer of settlement under § 807.01, STATS., depends on whether it allows the offeree to fully and fairly evaluate the offer from his or her own perspective. It is the obligation of the party making the offer to do so in clear and unambiguous terms, with any ambiguity in the offer being construed against the drafter." ***Id.*** at 624-25, 557 N.W.2d at 492 (citations omitted).

Thunder Pallet's offer did not make any reference to whether American Family's claim would be paid out of the settlement proceeds. "To avoid ambiguity, the offer must indicate whether the subrogated claim would be satisfied from the settlement proceeds." ***Id.*** at 625, 557 N.W.2d at 493. It is not enough that the subrogated parties had a direct cause of action against Thunder Pallet and that their damages had already been stipulated. SNS was still left with uncertainty

[1] Thunder Pallet contends that the award of its taxable costs would have exceeded any recovery by SNS.

as to its obligation to compensate its insurer for payments made. Thunder Pallet's offer was not clear enough to permit SNS to evaluate it. The offer was not sufficient to trigger § 807.01(1), STATS.

We next consider whether interest was chargeable on the costs awarded to SNS. SNS's bill of costs was filed on April 23, 1996. Not until its order of June 25, 1996, did the trial court resolve whether SNS or Thunder Pallet would be entitled to an award of costs. The order for judgment prepared by the trial court awarded 12% interest on the taxable costs from December 16, 1994, the date of the verdict.

The issue is one of statutory interpretation. Section 814.04(4), STATS., is entitled "interest on verdict" and provides for interest on the "recovery of money" at the rate of 12% per year from the time of the verdict. The provision directs interest to be added to the costs. This provision does not provide for interest on costs. *See* ***Blank v. USAA Property & Cas. Ins. Co.***, 200 Wis.2d 270, 281, 546 N.W.2d 512, 516 (Ct. App. 1996) (§ 814.04(4) merely directs the clerk how to compute the interest on the verdict). Unlike the verdict, until costs are taxed the amount due is unknown. We conclude that interest cannot be awarded on costs until they are taxed and made part of the total judgment. We reverse the award of interest from the date of the verdict on the taxable costs.

On February 13, 1995, the trial court ordered Thunder Pallet to pay $6314.92 as a sanction for delays in responding to discovery and giving insufficient discovery responses. The June 25, 1996 judgment required Thunder Pallet to pay 12% interest from the date the sanction was imposed. Thunder Pallet argues that the interest on the amount should only run from the date the judgment was entered. We disagree because unlike costs, the sanction amount was known

to Thunder Pallet and could have been paid anytime while the action remained pending. Moreover, trial courts have broad power to fashion sanctions appropriate to the individual circumstances of each case. *See* ***Hur v. Holler***, 206 Wis.2d 335, 343, 557 N.W.2d 429, 433 (Ct. App. 1996). Interest on the sanction from the date it was imposed is sustainable as part of the sanction.

We turn to SNS's cross-appeal which attacks recovery by American Family. SNS first claims that American Family waived any recovery because it did not seek a jury question on Thunder Pallet's liability to American Family or what specific property damage American Family made payment for. SNS disavows that any concession was made by virtue of the stipulation between American Family and Thunder Pallet that American Family paid SNS $80,235.50. Conceding that it failed to object to the form of the verdict, SNS suggests that this court review the issue in the interests of justice and that the failure to itemize damages in the verdict can be corrected by granting a new trial.[2] *See* § 752.35, STATS.

SNS cannot now complain that American Family failed to prove it's claim. First, SNS brought American Family into the action because of the subrogation interest created in the insurance policy. SNS admitted that American Family made payments and it was aware of American Family's claim. In fact, as determined in this decision, SNS avoided responsibility for costs under § 807.01(1), STATS., because it was not able to evaluate the offer of settlement in light of the subrogated interest of American Family. Second, while SNS was not a

[2] Although SNS mentions § 752.35, STATS., it does not provide further discussion of how the statute applies here. We need not consider arguments broadly stated but not specifically argued. *See* ***Fritz v. McGrath***, 146 Wis.2d 681, 686, 431 N.W.2d 751, 753 (Ct. App. 1988).

party to the stipulation regarding payments made by American Family, it did not object to the stipulation or its effect. At a motion hearing, SNS acknowledged that once there was a finding of liability American Family's "subrogated rights kick in" and that the amount was stipulated. Third, SNS successfully resisted any effort to show at trial that any insurance payments had been made for damage sustained. Finally, SNS approved the single verdict question on property damage, even in the face of Thunder Pallet's request that American Family's damages be separated out in the verdict.

At best, the failure to itemize the damages constitutes an omitted issue under § 805.12(2), STATS.[3] By operation of statute, SNS has waived its right to argue this issue on appeal. *See* ***Davis v. Allstate Ins. Co.***, 101 Wis.2d 1, 11, 303 N.W.2d 596, 601 (1981). The omitted finding is deemed to have been made in conformity with the judgment. *See* ***Badtke v. Badtke***, 122 Wis.2d 730, 735 n.1, 364 N.W.2d 547, 549 (Ct. App. 1985).

SNS argues that the trial court lost authority to award American Family any portion of the verdict because American Family's motion for judgment came after the time for deciding motions after verdict. Even assuming by operation of § 805.16(3), STATS., that motions after verdict were deemed denied,[4]

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[3] Section 805.12(2), STATS., provides:

> When some material issue of ultimate fact not brought to the attention of the trial court but essential to sustain the judgment is omitted from the verdict, the issue shall be deemed determined by the court in conformity with its judgment and the failure to request a finding by the jury on the issue shall be deemed a waiver of jury trial on that issue.

[4] The hearing on motions after verdict was held on the day before the ninety-day deadline expired. The court reporter's transcription notes of the hearing were lost. However, the trial court made a finding that it denied the motions at the hearing.

the trial court still had authority to enter a judgment on the verdict. *See* § 805.14(5)(a), STATS.; § 805.16(3).[5] The verdict was not exclusively SNS's. The legal consequence of the verdict, in light of the complaint and cross-claim, was that American Family was entitled to its subrogated claim. The trial court had authority to enter judgment in accordance with that legal consequence. *See* ***Thomas/Van Dyken Joint Venture v. Van Dyken***, 90 Wis.2d 236, 243, 279 N.W.2d 459, 463 (1979) (jury verdict was only part of the total proceeding where trial court was left to determine parties' rights to proceeds of verdict).

SNS contends that American Family should not have received any portion of the verdict until it was determined whether SNS had been made whole at a ***Rimes*** hearing. In ***Rimes v. State Farm Mut. Auto. Ins. Co.***, 106 Wis.2d 263, 278-79, 316 N.W.2d 348, 356 (1982), the court held that a fact finding hearing is necessary to decide whether a plaintiff has been made whole before a subrogated insurer is allowed to share in settlement proceeds. ***Rimes*** has no application here where the jury has returned a verdict which determines the amount that makes SNS whole. *See* ***id.*** at 275, 316 N.W.2d at 354-55 (the settlement amount, "unless that sum had been arrived at by a jury whose intent was to make the plaintiff

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[5] Section 805.14(5)(a), STATS., provides:

> *Motion for judgment.* A motion for judgment on the verdict is not required. If no motion after verdict is filed within the time period specified in s. 805.16, judgment shall be entered on the verdict at the expiration thereof. If a motion after verdict is timely filed, judgment on the verdict shall be entered upon denial of the motion.

Section 805.16(3), STATS., provides:

> If within 90 days after the verdict is rendered the court does not decide a motion after verdict on the record or the judge, or the clerk at the judge's written direction, does not sign an order deciding the motion, the motion is considered denied and judgment shall be entered on the verdict.

whole," is irrelevant to the determination of whether a plaintiff has been made whole). The jury has performed the function that the trial court would at a ***Rimes*** hearing.[6]

After motions after verdict were heard, SNS filed bankruptcy on May 15, 1995. Eventually Neiman purchased SNS's interest in this action free and clear of any liens. SNS claims that the bankruptcy proceeding discharged American Family's subrogation claim against SNS and cleansed the verdict of any lien in favor of American Family. Therefore, SNS argues, the judgment in favor of American Family ignores and violates bankruptcy court orders.

SNS's argument is based on the premise that American Family's right to recover is only derived through its contractual right with SNS. However, American Family filed a cross-claim against Thunder Pallet. The amount American Family was entitled to recover directly from Thunder Pallet had already been determined and admitted. All that inured to the bankruptcy estate and all that Neiman purchased was SNS's portion of the verdict. *See* ***Trend Mills v. Socher***, 4 B.R. 465, 468 (Bankr. N.J. 1980) (assets of the bankrupt become part of the bankruptcy estate but only to the extent of his or her interest).

SNS claims that the verdict is perverse and defective because it did not itemize each piece of equipment damaged by the fire. The argument is really

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[6] It is particularly true in this case that the verdict is a determination of what makes SNS whole because the jury did not hear about insurance payments SNS received. For this reason, we summarily reject SNS's claim that the trial court should have reduced American Family's recovery by the deductible amounts SNS paid. SNS precluded any mention of insurance payments and no proof of deductibles was made. Further, that SNS paid a deductible amount does not alter the amount American Family paid. The calculation of the judgment comports with ***Sorge v. National Car Rental Sys.***, 182 Wis.2d 52, 512 N.W.2d 505 (1994), and ***Ryan v. Sigmund***, 191 Wis.2d 178, 528 N.W.2d 43 (Ct. App. 1995).

one challenging the sufficiency of the evidence to sustain the jury's verdict. SNS suggests that it was uncontroverted that SNS had sustained property damage of at least $116,780. It faults the trial court for not entering a directed verdict for that amount and not increasing the verdict to conform with the uncontroverted evidence.

If there is any credible evidence to support the jury's finding as to the amount of damages, we will not disturb the finding unless the award is so unreasonably low that it shocks the judicial conscience. *See* ***Brain v. Mann***, 129 Wis.2d 447, 455, 385 N.W.2d 227, 231 (Ct. App. 1986). Where the trial court approves the amount of damages, we will set aside the verdict only if a misuse of discretion is evident. *See* ***id.***

SNS does not discuss how the trial court may have erroneously exercised its discretion. The trial court's comments when determining that punitive damages would be submitted to the jury do not mean that punitive damages would be awarded or that the compensatory damages were inadequate. That Thunder Pallet and American Family did not dispute certain amounts in their closing arguments does not obligate the jury to award that amount of damages. It was all for the jury to decide within its province to accept or reject any or all of the evidence presented at trial, and to assess the credibility of witnesses and the weight to be given their testimony. *See* ***Hunzinger Constr. Co. v. Granite Resources Corp.***, 196 Wis.2d 327, 337, 538 N.W.2d 804, 808 (Ct. App. 1995); ***Radford v. J.J.B. Enters., Ltd.***, 163 Wis.2d 534, 543, 472 N.W.2d 790, 794 (Ct. App. 1991). SNS has not provided complete transcripts of the three-week jury trial and we are unable to

review the issue raised.[7] *See* ***Fiumefreddo v. McLean***, 174 Wis.2d 10, 27, 496 N.W.2d 226, 232 (Ct. App. 1993) (we will assume that the missing portions of the record support the result); ***State Bank of Hartland v. Arndt***, 129 Wis.2d 411, 423, 385 N.W.2d 219, 225 (Ct. App. 1986) (appellants have the burden to provide an appellate record sufficient to review the issues they raise on appeal).

SNS's contention that there was no basis for a finding of contributory negligence also falls victim to the lack of a complete trial transcript.[8] We acknowledge that the jury probably accepted the fire chief's opinion that the Thunder Pallet incinerator caused the fire. However, that was not the only relevant inquiry. The jury was asked to determine whether SNS was negligent with respect to the safety of its own property. We are unable to review the evidence on this issue and must assume that sufficient evidence was presented to

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[7] The problems associated with the failure to provide a complete transcript is evidenced by the lack of record citations in SNS's brief. For example, SNS states that Neiman testified as to the value of items destroyed by the fire. No record citation is provided and Neiman's testimony cannot be confirmed. SNS cites to depositions given by fire department officials. We cannot confirm if the trial testimony was the same.

[8] SNS argues that the jury's finding that the Thunder Pallet incinerator caused the fire leaves no other possible basis for finding SNS contributorily negligent. In claiming that the defense of contributory negligence was frivolous, SNS cites an unpublished decision of the court of appeals, ***Hanson v. Sangermano,*** No. 96-1599, unpublished slip op. (Wis. Ct. App. Apr. 3, 1997). It is a violation of RULE 809.23(3), STATS., to cite and quote from an unpublished opinion of the court of appeals. Violations of the noncitation rule will not be tolerated. *See* ***Tamminen v. Aetna Cas. & Sur. Co.***, 109 Wis.2d 536, 563, 327 N.W.2d 55, 67 (1982). A $100 penalty is imposed jointly against the attorneys for the cross-appellant, Attorneys Erwin B. Neiman and Anthony R. Varda, and shall be paid to the clerk of the court of appeals within ten days of the date of this opinion. *See* ***Hagen v. Gulrud***, 151 Wis.2d 1, 8, 442 N.W.2d 570, 573 (Ct. App. 1989); RULE 809.83(2), STATS. (Although only Attorney Neiman's name appears on the offending brief, Attorney Varda has appeared as local co-counsel for the cross-appellant since the beginning of this appeal.)

support the jury's verdict.[9] *See* ***Fiumefreddo***, 174 Wis.2d at 27, 496 N.W.2d at 232.

SNS's final claim is that "the trial court continuously abused it's discretion by failing to enforce discovery rules and orders." It appears that SNS is unhappy that the trial court only imposed monetary sanctions against Thunder Pallet for discovery abuses. The issue is not well briefed. SNS fails to recognize that trial courts possess broad discretion in determining appropriate sanctions. *See* ***Hur***, 206 Wis.2d at 343, 557 N.W.2d at 433. It fails to discuss the legal principles applicable to its claim that discovery abuses led to surprise accountant testimony at trial. We will not consider an argument that is inadequately briefed. *See* ***Fryer v. Conant***, 159 Wis.2d 739, 746 n.4, 465 N.W.2d 517, 520 (Ct. App. 1990).

American Family asks that we declare SNS's cross-appeal to be frivolous under RULE 809.25(3), STATS. While it appears that SNS has donned blinders to shun the legal realties, we decline to declare the matter frivolous in its entirety. American Family and Thunder Pallet will, however, recover their costs on the cross-appeal. *See* RULE 809.25(1)(a)1. No costs to any party on Thunder Pallet's appeal.

By the Court.—Judgment affirmed in part and reversed in part.

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

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[9] SNS's argument is confusing. It seems to claim that the trial court should have dismissed a contributory negligence defense before trial. We do not deem the argument fleshed out enough to require consideration of whether SNS's motion for partial summary judgment on the issue of liability should have been granted after the trial court allowed Thunder Pallet to amend its response to SNS's request to admit.