

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 6, 2001

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See Wis. Stat. § 808.10 and RULE 809.62.

**Nos. 00-3376
01-1216**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

NO. 00-3376

MARGARET SMITH,

PLAINTIFF-APPELLANT-CROSS-RESPONDENT,

V.

RICHARD GOLDE, D.C.,

DEFENDANT-RESPONDENT-CROSS-APPELLANT.

01-1216

MARGARET SMITH,

PLAINTIFF-APPELLANT,

V.

RICHARD GOLDE, D.C.,

DEFENDANT-RESPONDENT.

APPEALS and CROSS-APPEAL from judgments of the circuit court for Eau Claire County: JAMES C. EATON, Judge. *Affirmed.*

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

¶1 PER CURIAM. Margaret Smith appeals a judgment and an amended judgment for damages granted by the trial court on remand from this court. The judgments awarded her \$813,200, but Margaret argues that she should have received the amount awarded in the original damages trial and that the trial court improperly denied her double costs and interest under WIS. STAT. § 807.01(3) and (4).¹ Dr. Richard Golde cross-appeals the judgment. He contends that he should have been allowed to present more evidence at the damages trial and that the amount of the damages award was excessive. We reject all the arguments and affirm the trial court's judgments, which are consistent with our instructions on remand.²

BACKGROUND

¶2 Margaret Smith and Richard Golde dated in 1994 and 1995. After the relationship ended, Smith filed a complaint against Golde alleging battery, intentional infliction of emotional distress and conversion. Following abuses in the discovery process by Golde and his attorneys, the trial court entered default

¹ All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

² Smith also argues that Golde owes her interest on the payments he made to her bankruptcy trustee, rather than to her personally, even though she agreed to the arrangement. We agree with Golde that because Smith did not raise this issue in the trial court, she waived any right to do so. *See State v. Holt*, 128 Wis. 2d 110, 124, 382 N.W.2d 679 (Ct. App. 1985). Because the issue was waived, we do not address it here.

judgment against him as a sanction. The court conducted a hearing and awarded damages to Smith, but it did not allow Golde to present evidence.

¶3 Golde appealed, and this court concluded that Golde was denied his right to present evidence at the damages hearing. *Smith v. Golde*, 224 Wis. 2d 518, 521, 592 N.W.2d 267 (Ct. App. 1999). We reversed part of the judgment and remanded to the trial court for a new damages hearing at which Golde would be able to present evidence related to the four offers of proof he preserved at the initial damages hearing. *Id.* at 533.

¶4 On remand, the trial court conducted a new damages hearing. It determined the admissibility of Golde's original four offers of proof and allowed him to present evidence on the admissible portions of the offers. The court reviewed the transcript of the earlier damages hearing and made very specific findings of fact about Golde's offers of proof and the earlier testimony.

¶5 The trial court entered a judgment in Smith's favor and awarded her \$813,200 in damages, with costs and interest to be determined. In an amended judgment, the trial court affirmed the original award, but did not grant her double costs and interest. Smith now appeals the judgment and the amended judgment. Golde cross-appeals from the judgment.

DISCUSSION

I. COSTS AND INTEREST

¶6 Smith argues that she is entitled to double costs and interest under WIS. STAT. § 807.01(3) and (4).³ We disagree. Whether Smith is entitled to double costs and interest requires application of § 807.01(3) and (4). Applying a statute to a set of facts is a question of law we review de novo. *State ex rel. Badke v. Greendale Village Bd.*, 173 Wis. 2d 553, 569, 494 N.W.2d 408 (1993).

¶7 WISCONSIN STAT. § 807.01(3) provides for the assessment of double costs. “If the plaintiff’s settlement offer is not accepted and the judgment is more favorable than the settlement offer, the plaintiff ‘shall’ recover double the amount

³ WISCONSIN STAT. § 807.01(3) and (4) provides:

(3) After issue is joined but at least 20 days before trial, the plaintiff may serve upon the defendant a written offer of settlement for the sum, or property, or to the effect therein specified, with costs. If the defendant accepts the offer and serves notice thereof in writing, before trial and within 10 days after receipt of the offer, the defendant may file the offer, with proof of service of the notice of acceptance, with the clerk of court. If notice of acceptance is not given, the offer cannot be given as evidence nor mentioned on the trial. 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. Interest under this section is in lieu of interest computed under ss. 814.04 (4) and 815.05 (8).

of taxable costs.” *Prosser v. Leuck*, 225 Wis. 2d 126, 151, 592 N.W.2d 178 (1999).

¶8 Under WIS. STAT. § 807.01(4), “if the party making the settlement offer recovers a judgment which is greater than or equal to the settlement amount, that party is entitled to interest on the amount recovered from the date of the offer to when it is paid.” *Prosser*, 225 Wis. 2d at 152. The accrual of interest under § 807.01(4) “is a result triggered by the defendant’s failure to do a particular act—accept the plaintiff’s settlement offer within 10 days after receipt of the offer.” *Prosser*, 225 Wis. 2d at 154.

¶9 Both sections of the statute apply if the plaintiff offered to settle for less than the judgment and the defendant refused. *Id.* at 151, 154. Here, however, the underlying facts do not trigger an award of double costs and interest. In 1997, Smith offered to settle for \$300,000. But that offer was superseded by her later offer to settle for \$1,013,200 after the case was remanded to the trial court in 1999. Smith is not entitled to double costs and interest because the most recent offer of settlement prior to the judgment was greater than the amount of the judgment in her favor. Moreover, we agree with the trial court that the damage award in the previous judgment is not material because this court reversed it and remanded the matter to the trial court.

II. DAMAGES TRIAL PROCEDURE

¶10 Smith argues that this court should reinstate the original trial court judgment, which was reversed in part and remanded. *Smith*, 224 Wis. 2d at 533. The scope and meaning of our own decision is a question of law we decide independently, without deference to the trial court’s decision. *Teigen v. Jelco of Wisconsin, Inc.*, 124 Wis. 2d 1, 5, 367 N.W.2d 806 (1985). The original

judgment was no longer in effect once we partially reversed it. *Smith*, 224 Wis. 2d at 533. Therefore, our remand contemplated a new trial on damages. *Id.*

¶11 In *Smith*, we agreed with Golde that the trial court erred by prohibiting him from presenting evidence at the damages hearing. *Id.* at 521. We noted in footnote 7 that:

The parties do not address ... whether on remand Golde would be confined to those matters raised in his offer of proof before the trial court. We see no reason why Golde should be permitted to take advantage of the passage of time to expand the damages evidence beyond what he claimed he was prepared to prove at the hearing.

Id. at 531. We remanded to permit Golde to exercise his right to present evidence and have a voice in the proceedings. *Id.* at 530-31. We reversed and remanded to allow evidence according to Golde's offer of proof, to the extent such evidence was admissible. *Id.* at 533.

¶12 We review the trial court's determinations on remand under the erroneous exercise of discretion standard. *Bank v. Brandon Apparel Group*, 2001 WI App 159, ¶¶8-9, 632 N.W.2d 107. We will affirm the trial court's exercise of discretion unless it fails to properly apply the law or makes an unreasonable determination under the existing facts and circumstances. *Erbstoesz v. American Cas. Co.*, 169 Wis. 2d 637, 644, 486 N.W.2d 549 (Ct. App. 1992).

¶13 Golde concedes that the trial court could have conducted a trial de novo on remand. He argues, however, that if there is a new trial the court should redo the entire hearing rather than take testimony on Golde's offers of proof and rely on the transcript of the earlier damages hearing for Smith's evidence. We disagree. The trial court properly viewed the mandated new damages hearing as a re-analysis. It had the discretion to decide what proofs to

consider in a damages hearing following a default. *See* WIS. STAT. § 806.02; *Hedtcke v. Sentry Ins. Co.*, 109 Wis. 2d 461, 478-79 n.5, 326 N.W.2d 727 (1982). Here, it decided to review the transcript of the earlier damages hearing only and take evidence on the admissible portions of Golde's offers of proof. The court's course of action was reasonable and it properly applied the law.

III. SCOPE OF GOLDE'S EVIDENCE

¶14 Golde argues on cross-appeal that he should have been allowed to present more evidence at the damages trial. We reject this argument. Whether an appellate court's mandate grants a trial court the authority to make a particular determination is a question of law subject to de novo review. *See Harvest Sav. Bank v. ROI Invests.*, 228 Wis. 2d 733, 737-38, 598 N.W.2d 571 (Ct. App. 1999). Our opinion limited the evidence at the new damages trial to Golde's offers of proof so that he could not benefit from the passage of time and expand the evidence beyond what he was ready to present at the earlier trial. *Smith*, 224 Wis. 2d at 531 n.7. The decision of this court put Golde in the same evidentiary posture he was in at the earlier hearing. *Id.* The trial court properly interpreted our instructions on remand.

IV. WHETHER DAMAGES ARE EXCESSIVE

¶15 Golde also argues on cross-appeal that the damages the trial court awarded were excessive. We conclude that they were not. Findings of fact by the trial court will not be set aside unless clearly erroneous. WIS. STAT. § 805.17(2). Any credible evidence of the damages claimed is sufficient to sustain the fact-finder's award. *Roach v. Keane*, 73 Wis. 2d 524, 539, 243 N.W.2d 508 (1976).

¶16 The trial court explained the reasons for its determination of damages. It found abundant evidence in the record to support Smith's claims, including (1) testimony from other women Golde physically abused; (2) Smith's extensive testimony about her relationship with Golde; (3) medical evidence regarding Smith's injuries; (4) testimony that Golde said "these hands heal by day and beat you by night"; and (5) Golde's indifferent "hedging" testimony. We conclude that there is evidence in the record to sustain the damages award.

¶17 The trial court awarded punitive damages because it found Golde's acts malicious and the result of ill will. The court found that Golde treated Smith with no respect and as though she had no inherent dignity. The court deemed Golde's actions grievous, malicious and "the kind of thing a hate-filled person would do." It also considered Golde's ability to pay based on his net worth when it calculated the punitive damages award. Golde presents no evidence to show that the trial court findings are clearly erroneous.

¶18 The trial court assessed Smith's damages at \$300,000 and awarded her \$500,000 in punitive damages, given Golde's wealth and the totality of the circumstances. With respect to the punitive damages, the court also compared its award to the \$10,000 maximum possible criminal penalty for each of forty to fifty batteries testified to by Smith. The court valued the case at one million dollars. It took into account the taxes Golde would have to pay to liquidate his assets to satisfy the judgment and deemed its award sufficient to make Golde pay the value of the case. Credible evidence sustains the damages award.

By the Court.—Judgments affirmed.

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

