

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 4, 2003

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.

**Appeal No. 02-1266
STATE OF WISCONSIN**

Cir. Ct. No. 00-CV-431

**IN COURT OF APPEALS
DISTRICT III**

GINNY BARTH,

PLAINTIFF-RESPONDENT,

UWE BARTH,

PLAINTIFF,

v.

**AMERICAN FAMILY MUTUAL AUTOMOBILE INSURANCE
COMPANY AND RICHARD HERBST,**

DEFENDANTS-APPELLANTS,

**BRETT TINNESAND AND ILLINOIS FARMERS INSURANCE
Co.,**

DEFENDANTS.

APPEAL from a judgment of the circuit court for St. Croix County:
SCOTT NEEDHAM, Judge. *Affirmed.*

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

¶1 PER CURIAM. American Family Mutual Automobile Insurance Company and its insured, Richard Herbst, appeal a judgment awarding Ginny Barth damages for injuries she suffered in a traffic accident. They argue that the trial court erred when it refused to allow them to amend their pleadings to allege a set-off for medical expenses already paid pursuant to the Minnesota no-fault act. Because we conclude that the trial court properly exercised its discretion when it denied the motion to amend the pleadings, we affirm the judgment.¹

¶2 Barth sued Herbst and American Family for injuries she received in a single vehicle accident. American Family paid \$6,536.35 for her medical expenses, but it failed to assert any subrogation or set-off claim in its answers to the complaint. After the time for amendment of pleadings set out in WIS. STAT. § 802.09(1),² and after the time for amending pleadings under the scheduling order, American Family attempted to amend its pleadings to include a subrogation claim one month before trial. The trial court denied the request, finding that it was untimely and that Barth was prejudiced by the delay.

¶3 Whether to grant a motion to amend the pleadings is committed to the trial court's discretion. See *Schneller v. St. Mary's Hosp. Med. Ctr.*, 162 Wis. 2d 296, 301-02, 470 N.W.2d 873 (1991). When reviewing a discretionary decision, this court examines the record for facts that sustain the trial court's

¹ Because we conclude that the trial court properly exercised its discretion when it denied American Family's request to amend the pleadings, we need not determine whether American Family would have been entitled to a set-off if it had been properly pled.

² All references to the Wisconsin Statutes are to the 1999-2000 version.

decision. *See Schauer v. DeNeveu Homeowner's Ass'n*, 194 Wis. 2d 62, 70-71, 533 N.W.2d 4370 (1995).

¶4 The trial court properly exercised its discretion when it refused to allow American Family to amend its pleadings. Barth expended time and money procuring the services of expert witnesses and conducting discovery to prove her past medical expenses. Had she known that American Family would claim the right to recover all of the funds it paid on her past medical expenses, her strategy would have been different. American Family was aware of its earlier payments from the onset. It offers no excuse for its failure to have amended its pleadings within the time set by the scheduling order. There is no point in having rules such as a scheduling order if the trial court is powerless to enforce them.

¶5 Citing *Petry v. St. Paul Fire & Marine Ins. Co.*, 151 Wis. 2d 443, 444 N.W.2d 428 (Ct. App. 1989), American Family argues that its amendment was timely because its right to recovery did not actually exist until Barth received double payment at trial. *Petry* does not support American Family's position that it was not necessary to plead the set-off within the time set by the scheduling order. In *Petry*, the subrogated insurer was not a party to the underlying action and it was not subject to the scheduling order. Were we to accept American Family's argument, an insurance company would never be required to plead subrogation until after trial on the underlying claim. That holding would be inconsistent with WIS. STAT. § 803.03(2), which requires joinder of related claims including subrogation claims.

By the Court.—Judgment affirmed.

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

