COURT OF APPEALS
DECISION
DATED AND FILED

November 21, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP3052 **Cir. Ct. No. 2004CV1643**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

MARY WILSON,

PLAINTIFF-APPELLANT,

V.

HOLLY TRISCO, JOHN JENSEN, BY SPECIAL ADMINISTRATOR OF HIS ESTATE, MICHAEL SANGER, AMERICAN FAMILY MUTUAL INSURANCE COMPANY AND CNA INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS,

COVENANT HEALTH CARE SYSTEMS, INC.,

DEFENDANT.

APPEAL from judgments and orders of the circuit court for Milwaukee County: RICHARD J. SANKOVITZ, Judge. *Affirmed.*

Before Wedemeyer, P.J., Curley and Kessler, JJ.

¶1 KESSLER, J. Mary Wilson appeals from two judgments and two orders[1] granting John Jensen and his insurer, American Family Mutual Insurance Company, taxable costs because the jury verdict rendered at trial was less in amount than the statutory offer of judgment which Jensen served on Wilson prior to trial. Wilson is also appealing the trial court's denial of her request for double costs and fees based upon a statutory offer of settlement which she served on Jensen and American Family prior to trial. Finally, Wilson appeals the trial court's denial of her request for sanctions against all defendants based on their denial of requests for admissions.

¶2 Because we conclude that Jensen and American Family's offer of judgment was valid and enforceable, and further conclude that Wilson's offer of settlement was ambiguous and, therefore, invalid and unenforceable, we affirm that portion of the judgment. Because we also conclude that the trial court correctly denied Wilson's motion for sanctions regarding the defendants' answers to Wilson's requests for admission, we affirm that portion of the orders and judgments as well.

BACKGROUND

¶3 On February 10, 2001, Wilson was injured in an automobile accident in which the two individual defendants, Jensen and Holly Trisco, collided, with Trisco then colliding with Wilson, who was stopped at the intersection. Both Jensen and Trisco denied liability for the accident; each asserting that he or she

[1] In her initial Notice of Appeal, Wilson appealed from the November 3, 2005 order for entry of judgment and a December 2, 2005 judgment. In her amended notice of appeal, she restated the above and additionally appealed from a December 14, 2005 order and a December 30, 2005 judgment.

"had the green light." Wilson commenced this lawsuit against Jensen and Trisco to recover damages for the injuries she sustained in the accident. In her complaint, Wilson claimed she suffered a permanent injury as a result of the accident. Wilson subsequently amended her complaint to add Jensen's insurer, American Family, and Trisco's insurer, CNA Insurance Company. Wilson then filed a second amended complaint, naming her medical care provider, Covenant Healthcare Systems, Inc., as an involuntary defendant.

¶4 On March 22, 2004, shortly after filing her amended complaint, Wilson served requests for admissions upon the defendants. Defendants timely responded to the March 22, 2004 requests for admissions. The two sets of the requests for admissions were identical. The requests for admissions included admissions as to liability and admissions as to the extent of Wilson's injuries. Both Jensen and Trisco denied the requests for admissions as to liability and damages. Wilson never requested a supplementation to the defendants' responses to the requests for admissions, nor did Wilson ever move the trial court to determine the sufficiency of the defendants' answers or objections prior to filing her post-verdict motions.

¶5 On April 20, 2005, American Family filed and served an offer of judgment on Wilson on behalf of Jensen and itself as Jensen's insurer. The offer of judgment was for $10,000.00, plus costs. Wilson did not accept American Family's offer.

¶6 On June 3, 2005, Wilson moved the trial court for a declaratory judgment to limit Covenant's subrogation rights to payments it made on or after January 1, 2003. On June 27, 2005, the trial court denied Wilson's motion, ordering:

> If the plaintiff and the defendants settle their claims and Covenant is not a party to the settlement, the entire settlement sum is subject to Covenant's subrogated claim and may not be earmarked or segmented to defeat Covenant's claim; Covenant's claim to the settlement sum would be in dispute and a trial might be necessary to resolve any factual issues as to how much of the settlement would be paid to Covenant (including the factual issue whether any of the services rendered by Covenant related to injuries to the plaintiff that may have existed before the collision that gives rise to this case).

¶7 On July 18, 2005, Wilson filed and served on American Family an "Amended Offer of Settlement" (dated July 11, 2005) offering to settle all her claims against all defendants for $10,000.00, but specifically not settling or extinguishing any subrogation claims Covenant may have against the plaintiff or any of the defendants or any rights of contribution Jensen and American Family may assert against Trisco and CNA. Also on July 18, 2005, Wilson filed and served on Covenant an offer of judgment (dated July 11, 2005), offering to settle all subrogation claims Covenant may have against Wilson for the sum of one dollar. Also, on July 18, 2005, Wilson filed and served on American Family another "Amended Offer of Settlement" (dated July 15, 2005) noting that this was a "clarification" based on demands by Jensen and American Family to clarify Wilson's offer of settlement.[2] Neither American Family nor Covenant accepted

[2] Wilson's clarified offer of settlement states:

> Comes now the plaintiff who offers to settle her claims against defendants Sanger, (John Jensen), and American Family Mutual Ins. Co. for $10,000 [w]ith taxable costs and disbursements. This offer is subject to the following corollaries and clarification of the prior offer of settlement dated July 11 [sic] 2005 by reason of demands of counsel for the ~~released~~ defendants Sanger, Jensen and American Family:
>
> 1. That in paying said sum, said defendants may deduct the sum of $250 previously stipulated as costs in this action due said defendants.

(continued)

Wilson's offers of settlement. Covenant was subsequently dismissed from this lawsuit on August 25, 2005, eighteen days prior to trial.

¶8 A trial commenced on September 12, 2005, before a twelve-person jury. The jury returned a verdict, finding Jensen seventy percent negligent and Trisco thirty percent negligent and awarding damages to Wilson in the amount of $10,806.47. Judgment was entered in favor of Wilson and against Trisco and CNA in the amount of $3,241.94, plus taxable costs of $2,135.57 for a total judgment of $5,377.51. Judgment was also entered in favor of Wilson and against Jensen and American Family in the amount of $7,564.53, minus taxable costs of $1,824.10 for a total judgment of $5,740.43.

¶9 In Wilson's motions after verdict, Wilson moved the court for the following: attorney fees and double costs under WIS. STAT. § 807.01 (2003-04) [3] because Wilson received an aggregate award from the jury that was more than the offer of settlement rejected by Jensen; and for attorney fees and costs associated

> 2. That the release plaintiff shall sign in exchange for said payment shall be a full release, not a Pierringer release so as to extinguish plaintiff's claims also, by operation of law, against defendant Trisco, and her insurer CNA. The release operates under the ruling case law and by operation of law to allow said released defendants to continue their cross complaints against Trisco and CNA. Plaintiff will not sign any assignment of rights to any defendant named in this action.
>
> 3. That the release plaintiff shall sign shall specifically exclude any resolution or settlement of the claims of Covenant against plaintiff by counterclaim and against the other defendants by cross complaints, so that said sum offered for settlement herein does not include any subrogation claims.
>
> July 15, 2005

[3] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

with time spent on discovery and procedural matters necessary to prove the facts that were not admitted by the defendants; and for statutory costs against Trisco and CNA.

¶10 On October 31, 2005, the trial court denied Wilson's motion and granted Jensen's motion for costs pursuant to WIS. STAT. § 807.01. Wilson moved for reconsideration. By decision and order dated November 28, 2005, the trial court modified its reasoning for denying Wilson's motion for double costs under § 807.01, but made no other changes to its original conclusion that Wilson's offer of settlement was invalid, that Jensen and American Family's offer of judgment was valid, and that Jensen and American Family were entitled to their costs pursuant to § 807.01. Wilson moved for reconsideration of the modified decision and the trial court denied Wilson's motion. Wilson appealed.

DISCUSSION

WISCONSIN STAT. § 807.01:[4] *Offers of Settlement and Judgment*

[4] WISCONSIN STAT. § 807.01 states in pertinent part:

> **(1)** After issue is joined but at least 20 days before the trial, the defendant may serve upon the plaintiff a written offer to allow judgment to be taken against the defendant for the sum, or property, or to the effect therein specified, with costs. If the plaintiff accepts the offer and serves notice thereof in writing, before trial and within 10 days after receipt of the offer, the plaintiff may file the offer, with proof of service of the notice of acceptance, and the clerk must thereupon enter judgment accordingly. If notice of acceptance is not given, the offer cannot be given as evidence nor mentioned on the trial. If the offer of judgment is not accepted and the plaintiff fails to recover a more favorable judgment, the plaintiff shall not recover costs but defendant shall recover costs to be computed on the demand of the complaint.
>
> ….

(continued)

¶11 We review the validity of a statutory settlement offer *de novo*. ***Staehler v. Beuthin***, 206 Wis. 2d 610, 624, 557 N.W.2d 487 (Ct. App. 1996). We decide questions of law independently, but may benefit from the lower court's analysis. ***Meyer v. School Dist. of Colby***, 226 Wis. 2d 704, 708, 595 N.W.2d 339 (1999). "At common law, parties were required to bear their own costs. Wisconsin Stat. § 807.01 is a cost-shifting statute and therefore is a statute in derogation of the common law. Statutes in derogation of the common law must be strictly construed." ***DeWitt Ross & Stevens, S.C. v. Galaxy Gaming & Racing, Ltd. P'ship.***, 2004 WI 92, ¶30, 273 Wis. 2d 577, 682 N.W.2d 839. Courts have strictly construed § 807.01. ***DeWitt***, 273 Wis. 2d 577, ¶31.

> **(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).
>
> **(5)** Subsections (1) to (4) apply to offers which may be made by any party to any other party who demands a judgment or setoff against the offering party.

¶12 Courts employ a three-step methodology when analyzing offers of judgment and offers of settlement to determine whether "an offering party is entitled to the remedies of WIS. STAT. § 807.01." ***Pachowitz v. LeDoux***, 2003 WI App 120, ¶43, 265 Wis. 2d 631, 666 N.W.2d 88 (reviewing relevant case and statutory law). This methodology requires that:

> (1) The court must first determine if the offer was sufficient under the standards set out in the case law. This requires the court to assess whether the offer allowed the other party to fully and fairly evaluate the offer from his or her own independent perspective;
>
> (2) If the offer is sufficient … the court next measures the offer against the judgment to determine if the offering party qualifies for the statutory remedies. In the case of an offer of judgment by the defendant, the court inquires whether the plaintiff has failed to recover a more favorable judgment. In the case of an offer of settlement by the plaintiff, the court inquires whether the plaintiff has recovered a more favorable judgment, entitling the plaintiff to double costs under WIS. STAT. § 807.01(3), and whether the plaintiff has recovered a judgment which is equal to or greater than the offer of settlement, entitling the plaintiff to 12% interest on the amount recovered pursuant to § 807.01(4); and
>
> (3) If the offer survives when measured against the judgment, the court must then determine the appropriate remedies allowed by WIS. STAT. § 807.01. In the case of a prevailing offer of judgment by the defendant, the remedy is costs as measured by the demand of the complaint pursuant to subsec. (1). In the case of a prevailing offer of settlement by the plaintiff, the remedy is double costs pursuant to subsec. (3) and 12% interest on the amount recovered pursuant to subsec. (4).

Pachowitz, 265 Wis. 2d 631, ¶43 (internal citations and footnotes omitted). Using the above methodology, we analyze Wilson's offer of settlement and Jensen and American Family's offer of judgment.

a. Wilson's offer of settlement

¶13 Wilson filed and served an offer of settlement on Jensen and American Family on July 18, 2005. The trial court determined that the offer was invalid because it was ambiguous. Wilson argues that the offer of settlement was not ambiguous, and that it was a "global" offer to Jensen to settle the entire case with Wilson, while retaining all counterclaims and cross-claims of the defendants against and among one another. The trial court concluded, after reconsideration:

> The problem with [Wilson's] offer, even in the narrow circumstances of this case, is that it does not provide the offeree or the court with a yardstick to determine whether in fact the plaintiff has "recover[ed] a more favorable judgment" from American Family, the party upon whom the offer was served. Upon receipt of the verdict in this case, the question the statute directs me to ask is whether the plaintiff recovered more from American Family than she offered to settle for with American Family. The total sum the jury awarded was $10,806.47, which exceeds the amount for which the plaintiff agreed to settle, but American Family was obliged to pay only $7,564.53 of that sum after the apportionment of fault. Under traditional measures applied to this comparison between settlement offer and verdict, I would find that Ms. Wilson did not recover a more favorable judgment. But if I compare the verdict to the offer construing the offer as a more-or-less global offer to settle all the claims against the defendant drivers and their insurers, then it might appear that the plaintiff did recover a more favorable judgment.
>
> This anomaly provokes two possible conclusions: One is that Ms. Wilson's offer is ambiguous…. This ambiguity would render the offer unenforceable under *Staehler*.

¶14 We determine whether an offer of settlement or judgment is sufficient, *i.e.*, valid and enforceable, under the first prong of the ***Pachowitz*** methodology. ***Id.***, 265 Wis. 2d 631, ¶39. This inquiry includes an analysis of the language of the offer. ***See id.***, ¶48. The party making the offer of settlement, or judgment, has the obligation to use clear and unambiguous terms. ***Stan's Lumber,***

Inc. v. Fleming, 196 Wis. 2d 554, 576, 538 N.W.2d 849 (Ct. App. 1995). "Any ambiguity in the offer of settlement is construed against the drafter. The terms of the offer must allow the offeree an opportunity to reasonably evaluate his or her exposure." ***Id.*** (citations omitted). That is,

> [t]he standard for determining the validity of an offer of settlement under § 807.01(3), STATS., is whether it allows the offeree to fully and fairly evaluate the offer from his or her own independent perspective. Where the offeree is a defendant, a full and fair evaluation entails the ability to analyze the offer with respect to the offeree's exposure.

Ritt v. Dental Care Assocs., S.C., 199 Wis. 2d 48, 75-76, 543 N.W.2d 852 (Ct. App. 1995) (citing ***Testa v. Farmers Ins. Exch.***, 164 Wis. 2d 296, 302-03, 474 N.W.2d 776 (Ct. App. 1991)).

¶15 "Offers made to multiple defendants or by multiple plaintiffs have, in some instances, been determined to be ambiguous." ***DeWitt***, 273 Wis. 2d 577, ¶34. Consequently, we have rejected offers of settlement made by a single plaintiff to multiple defendants[5] and an offer made by multiple plaintiffs to a single defendant.[6] As we noted in ***Ritt***, "[a] single offer of one aggregate settlement figure to multiple defendant tortfeasors is not valid under § 807.01(3) and (4) STATS., because it does not permit each defendant to evaluate the offer from the perspective of that defendant's assessment of his or her own exposure." ***Ritt***, 199 Wis. 2d at 76 (citations omitted).

[5] ***Wilber v. Fuchs***, 158 Wis. 2d 158, 164-65, 461 N.W.2d 803 (Ct. App. 1990).

[6] ***White v. General Cas. Co. of Wis.***, 118 Wis. 2d 433, 439-40, 348 N.W.2d 614 (Ct. App. 1984).

¶16 In ***Wilber v. Fuchs***, 158 Wis. 2d 158, 461 N.W.2d 803 (Ct. App. 1990), we held that because the offer involved a single settlement amount, and did not individualize the amounts demanded from each defendant, each represented by a different insurer and each adverse to the other, the offer was invalid and did not invoke the provisions of WIS. STAT. § 807.01. ***Wilber***, 158 Wis. 2d at 164-65. Relatedly, in ***Wilber***, we specifically noted that while both the supreme court in ***DeMars v. LaPour***, 123 Wis. 2d 366, 366 N.W.2d 891 (1988), and the court of appeals in ***White v. General Casualty Co. of Wisconsin***, 118 Wis. 2d 433, 348 N.W.2d 614 (Ct. App. 1984), did not condemn offers of settlement simply because they may "force" settlements, "they [did] condemn offers of settlement that *unreasonably* force settlements." ***Wilber***, 158 Wis. 2d at 164 (italics in original; citations omitted). Accordingly, because the defendants in ***Wilber*** were jointly and severally liable, we found that the plaintiff's combined offer was too ambiguous for each defendant to be able to adequately evaluate their independent exposure, and concluded:

> Thus, a plaintiff's offer of settlement may properly be said to "force" a settlement when the defendant's motivation to settle results from an opportunity to fairly assess the offer in light of the *particular* claim made against that defendant. This opportunity is not afforded by a single aggregate offer to an individual defendant which offers to settle all claims against multiple defendants who are alleged to be negligent in varying ways and degrees.... A defendant who spurns an offer of settlement should pay the sanctions of the statute when he or she errs in evaluating the claim against himself or herself—not others.

Id. at 164 (italics in original; footnote omitted).

¶17 This is also the circumstance in the present case. Because Wilson sought to include all defendants' liability in an offer of settlement to one defendant, Jensen and his insurer, Jensen was required to evaluate not only his

own position, but also that of the other defendants in the case. Accordingly, under our decision in ***Wilber***, Jensen should not "pay the sanctions of [WIS. STAT. § 807.01] when he … errs in evaluating the claim against … others." ***Wilber***, 158 Wis. 2d at 164. Because Wilson's offer of settlement required Jensen and his insurer to evaluate not just Wilson's claim against them, but also her claim against Trisco and CNA, as well as any subrogation claim Covenant may have, Wilson's offer of settlement would unreasonably force defendants to settle because of the uncertainty of the claims associated with adverse co-defendants.

¶18 Courts also, when evaluating whether an offer of settlement is ambiguous, and therefore, unenforceable, "look to the language of the statute to interpret and apply its express provisions." ***DeWitt***, 273 Wis. 2d 577, ¶35. In ***DeWitt***, the court addressed an offer of settlement wherein the plaintiff sought to impose a requirement that payment occur within fifteen days of acceptance of the offer. ***Id.***, ¶23. The court considered the issue as follows:

> We note that there is nothing in the language of Wis. Stat. § 807.01 that authorizes conditions on payment like the 15-day payment provision here. Therefore, in strictly construing the express terms of the section, we determine that the condition may not be imposed.
>
> This determination is consistent with the statutory scheme. Wisconsin Stat. § 807.01(3) provides in part: "If the offer of settlement is not accepted and the plaintiff recovers a more favorable judgment, the plaintiff shall recover double the amount of taxable costs." The payment condition set forth in the DeWitt offer of settlement was "payment … to be made within 15 days of acceptance of this offer." Because a judge could not enter a judgment ordering payment within 15 days, DeWitt is unable to meet the Wis. Stat. § 807.01(3) requirement of obtaining a "more favorable judgment."

DeWitt, 273 Wis. 2d 577, ¶¶36-37 (omission in original). The supreme court noted: "[i]f parties cannot know whether a given offer of settlement will be found

valid without engaging in post-trial litigation, the statute will not encourage early and certain settlement." ***Id.***, ¶40. The court went on, concluding:

> [T]he test for whether a given provision may be included in a valid settlement offer is not whether the provision is "reasonable," but rather whether the provision specifies a remedy that could be imposed by the court. This test obviates any inquiry into reasonableness and also facilitates judicial comparison of the offer to the judgment eventually obtained at trial.

Id., ¶42 (footnote omitted). In the present case, the trial court noted that Wilson's offer of settlement provided no "yardstick" by which an offeree or a court could compare the settlement offer to a subsequent judgment. Notably, under WIS. STAT. § 895.045, Wisconsin's contributory negligence statute, only if a tortfeasor is found to be fifty-one or more percent liable is that tortfeasor jointly and severally liable to the plaintiff for the entire amount of the judgment. Because Jensen and Trisco each maintained that they had the green light, either could have been less than fifty-one percent negligent, and thus not jointly and severally liable for the entire judgment. Consequently, neither defendant could determine from the offer whether it was evaluating only its own exposure or evaluating exposure of both defendants. This uncertainty made Wilson's offer of settlement ambiguous and, therefore, invalid for purposes of imposing attorney fees and double costs under WIS. STAT. § 807.01. *See* ***Staehler***, 206 Wis. 2d at 625 ("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.").

¶19 Additionally, Wilson characterized the offer of settlement as one that "globally" settled the case, but only as to Wilson alone, and excluding settlement with Trisco or CNA, and excluding settlement of subrogation claims with Covenant. This complex proposal, excluding the interests of a co-defendant and a

subrogated insurer, does not support Wilson's argument that the offer of settlement she made to Jensen and American Family should be compared to the total judgment resulting from the verdict.

¶20 We conclude that Wilson's offer of settlement was ambiguous and invalid. It failed the first prong of the ***Pachowitz*** methodology. Accordingly, we affirm the trial court's conclusion that Wilson is not entitled to double costs under WIS. STAT. § 807.01.

b. Jensen and American Family's offer of judgment[7]

¶21 American Family, on behalf of itself and Jensen, filed and served an offer of judgment on Wilson on April 19, 2005. Wilson argues that Jensen and American Family's offer of judgment was invalid because Wilson was unable to accept the offer since Covenant's subrogation claim was significantly greater than

[7] Jensen and American Family's offer of judgment stated:

> NOW COMES the defendant, [American Family] … and pursuant to § 807.01(1), Wis. Stats., offers to allow the plaintiff, [Wilson] to take judgment against it for the total sum of $10,000.00, with costs, in resolution of all of the plaintiff's claims and causes of action against [Jensen], deceased and his estate and [American Family] in this action. This offer of judgment should be understood to operate as would a Pierringer release, in that American Family is offering to pay the aforesaid amount to satisfy that portion of the plaintiff, [Wilson's] total cause of action that by jury is apportioned to [Jensen]. This offer specifically includes the subrogated claim of [Covenant], based upon payments to or on behalf of [Wilson]. The plaintiff, [Wilson], must indemnify the defendants, [Jensen], deceased and his estate and [American Family] from such claim or otherwise satisfy that portion of the subrogated claim of [Covenant] that by jury is apportioned to [Jensen], from the amount offered. The extent of the claim asserted by [Covenant] may be determined by contacting its attorney....

the offer of judgment. Wilson argues that under principles of equity, she should not be subjected to statutory sanctions for failing to accept the offer although it was for a larger amount than the judgment she obtained at trial. Wilson further argues that even if this court finds that Jensen and American Family's offer of judgment was valid, because the entire judgment was greater than the $10,000.00 offer of judgment from Jensen and American Family, they are not entitled to an award of costs under WIS. STAT. § 807.01(1).

¶22 American Family and Jensen argue that the offer of judgment was clear and unambiguous; therefore, it was valid and enforceable. Consequently, they argue that they are entitled to the costs described in WIS. STAT. § 807.01(1).

¶23 We first determine "whether the offer allowed the other party to fully and fairly evaluate the offer from his or her own independent perspective." ***Pachowitz***, 265 Wis. 2d 631, ¶43. Wilson does not argue that she was not able to fully and fairly evaluate American Family and Jensen's offer. She argues only that because of Covenant's subrogation rights, she was not able to accept the offer. Our review of the terms of the offer persuades us that the trial court correctly concluded that American Family and Jensen's offer of judgment was clear and unambiguous. The first prong of ***Pachowitz*** is met.

¶24 The second prong of ***Pachowitz*** requires a comparison between the offer and the judgment rendered against the offeror. In this case, Jensen and American Family offered to accept judgment against them in the amount of $10,000.00. The jury verdict resulted in Jensen and American Family's liability of approximately $7,500.00. Wilson argues that the entire judgment against both tortfeasors, Jensen and Trisco, should be the amount against which Jensen's offer is measured. She cites no authority that applies her interpretation in personal

injury actions involving Wisconsin's contributory negligence statute. WISCONSIN STAT. § 895.045, as amended in 1995, states, in pertinent part, that "[a] person found to be causally negligent whose percentage of causal negligence is 51% or more shall be jointly and severally liable for the damages allowed." The comparative negligence statute did not change the offer of judgment statute. Only the actual liability of the offeror, not other sums which he might or might not be required to pay under possible joint liability, are to be measured against the offer. Accordingly, we conclude that the second prong of the ***Pachowitz*** methodology has been met.

¶25 In discussing the ***Pachowitz*** remedy prong, Wilson argues that because Covenant's subrogation claim was greater than the offer by American Family and Jensen, Wilson could not seriously consider the offer. Therefore, under principles of equity, she should not be penalized for not accepting Jensen and American Family's offer of judgment. We disagree. Jensen and American Family's offer of judgment was for only their own liability. Jensen had no obligation to settle the claims Wilson had against Trisco or that Covenant had against the litigation proceeds. Nothing precluded Wilson from negotiating with Covenant in light of Jensen and American Family's offer of judgment. We agree with this assessment by the trial court:

> There are innumerable cases where a plaintiff needs to deal with a subrogation claim, and if I were to hold that the offer of judgment statute doesn't apply in a case where there is a subrogated claim[,] that would render that very useful statute pretty much a dead letter in personal injury cases.
>
> Because American Family's offer of judgment was unambiguous and because the plaintiff was in a position to fully and fairly evaluate it, I find it enforceable. Because the plaintiff's recovery did not meet the offer, in fact because it did not meet or exceed the offer, therefore I find

> that American Family is entitled to its remedy under the statute.

¶26 We agree that Jensen and American Family's offer of judgment was unambiguous and enforceable. The individual liability of Jensen, and his insurer American Family, was less than the amount in their offer of judgment. Consequently, Jensen and American Family are entitled to the remedies set forth in WIS. STAT. § 807.01.

Requests for Admission

¶27 Wilson appeals the trial court's denial of her attorney fees under WIS. STAT. §§ 804.11[8] and 804.12(3)[9] based on her claim that Jensen's and

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[8] WISCONSIN STAT. § 804.11 states:

> **(1)** REQUEST FOR ADMISSION. (a) Except as provided in s. 804.015, a party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of s. 804.01 (2) set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request….
>
> ….
>
> If objection is made, the reasons therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify an answer or deny only a part of the matter of which an admission is requested, the party shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless the party states that he or she had made reasonable inquiry and that the information known or readily obtainable by the party is insufficient to enable the party to admit or deny. A party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request; the party

(continued)

Trisco's denials of Wilson's Requests for Admissions were insufficient and improper. Wilson argues that because the parties had the medical information available to them, they had the ability to admit the requests relating to Wilson's damages. She further argues that the parties' failure to supplement their responses, once Wilson's damages claims were "scaled down," was the direct cause of her additional attorney fees in preparing to examine defendants' expert, Dr. Keane, at trial.

> may, subject to s. 804.12 (3) deny the matter or set forth reasons why the party cannot admit or deny it.
>
> (c) The party who has requested the admissions may move to determine the sufficiency of the answers or objections. Unless the court determines that an objection is justified, it shall order that an answer be served. If the court determines that an answer does not comply with this section, it may order either that the matter is admitted or that an amended answer be served. The court may, in lieu of these orders, determine that final disposition of the request be made at a pretrial conference or at a designated time prior to trial. *Section 804.12 (1) (c)* applies to the award of expenses incurred in relation to the motion.

[9] WISCONSIN STAT. § 804.12 provides:

> **(3)** EXPENSES ON FAILURE TO ADMIT. If a party fails to admit the genuineness of any document or the truth of any matter as requested [in a request for admissions], and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, the requesting party may apply to the court for an order requiring the other party to pay the requesting party the reasonable expenses incurred in the making of that proof, including reasonable attorney fees. The court shall make the order unless it finds that (a) the request was held objectionable pursuant to sub. (1), or (b) the admission sought was of no substantial importance, or (c) the party failing to admit had reasonable ground to believe that he or she might prevail on the matter, or (d) there was other good reason for the failure to admit.

¶28 Jensen and American Family argue that their denials were proper because: (1) Jensen consistently contended that he was not negligent, therefore not liable to Wilson; and (2) the requests relating to Wilson's injury referred back to the complaint which referred to "aggravation of Wilson's prior back condition" and "permanence," neither of which were proven at trial or even litigated because Wilson had no expert testimony. Trisco and CNA argue that: (1) Trisco had reasonable grounds to believe that she was not negligent; (2) she had reasonable grounds to not admit the broad and unsubstantiated requests regarding damages; and (3) the requests required medical expert testimony which made her objections under WIS. STAT. § 804.11(1)(b) appropriate. Trisco and CNA further argue that none of the "situations in which a party ***is*** under a duty to supplement discovery responses" under WIS. STAT. § 804.01(5)(a) – (c) existed in this case. (Bold and italics in original.)

¶29 In enforcing discovery requirements, "[t]he imposition of sanctions pursuant to sec. 804.12, Stats., is discretionary with the trial court." ***Elfelt v. Cooper***, 163 Wis. 2d 484, 498, 471 N.W.2d 303 (Ct. App. 1991), *rev'd on other grounds*, 168 Wis. 2d 1009, 485 N.W.2d 56 (1992) (citation omitted). We review whether discovery sanctions are appropriate under an erroneous exercise of discretion standard. ***Johnson v. Allis-Chalmers Corp.***, 155 Wis. 2d 344, 350, 455 N.W.2d 657 (Ct. App. 1990). "We will not reverse a discretionary determination if the record shows that discretion was in fact exercised and we can perceive a reasonable basis for the trial court's decision." ***Id.*** Underlying the court's discretionary decision are questions of fact and issues of law. *See* ***Michael A.P. v. Solsrud***, 178 Wis. 2d 137, 153, 502 N.W.2d 918 (Ct. App. 1993). "We must uphold the trial court's factual findings unless they are clearly erroneous. Whether, under sec. 804.12(3), those facts require the award of attorney's fees and

costs … is a question of law that we review independently of the trial court." ***Michael A.P.***, 178 Wis. 2d at 148.

¶30 In its oral decision at the October 31, 2005 hearing on Wilson's motions after verdict, the trial court specifically held:

> I deny the plaintiff's request [for attorneys fees and costs for the defendants' failure to admit] for two reasons. First I believe the defendants have reasonable grounds not to admit liability or damages in this case. It was uncertain even at the end of the presentation of the evidence in this case whether either driver was entirely blameless in this accident. If either driver had the green light and was keeping a careful look-out the driver would have been exculpated and held not liable. Nothing in the evidence suggested that it was certain that either driver would in fact be held at fault. I believe, therefore, that either driver – another way of saying that is – both drivers had the right to believe that they might be held blameless in this case, and, therefore, the right to refuse to admit liability.
>
> I draw this conclusion from the statute itself which holds or which provides that I cannot award attorneys fees if, quote, the party failing to admit had reasonable grounds to believe that he or she might prevail on the matter. I'm quoting from section 804.12(3)(c).
>
> Furthermore, as to the damage question the request to admit related to a damage claim that was potentially much broader than the claim on which the jury ultimately found in favor of the plaintiff…. It is clear to me from the jury's answers to the special verdict that the jury found in the plaintiff's favor on a much narrower ground than that on which the plaintiff sought an admission.
>
> ….
>
> As a second and separate reason for denying the attorneys' fees and costs I conclude that it would be unjust to do so in this case.
>
> ….
>
> Section 804.12(1)(c) provides: If the motion is granted the court shall offer opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or

> both of them, to pay the moving party the reasonable expenses incurred in obtaining the order including attorneys fees. And I want to emphasize this last phrase in the sentence, "Unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust."
>
> Given the scope of the claims that the plaintiff was making at the time the requests were served and the [plaintiff's] pursuit of a broad scope injury claim compared with the scope of the claim upon which the jury found in the plaintiff's favor, I find that an admission of the modest scope the defendants should have made at the time those requests to admit were served would not have deterred … [plaintiff] from incurring all of the attorneys fees and all of the expenses that [plaintiff] … attempts to link simply to the defendants' failure to meet those requests to admit.

The trial court's findings are supported by the record. The trial court correctly applied the statutory provisions of WIS. STAT. § 804.12 to its findings of fact. We affirm. *See* ***Allis-Chalmers***, 155 Wis. 2d at 350.

By the Court.—Judgments and orders affirmed.

Not recommended for publication in the official reports.