COURT OF APPEALS
DECISION
DATED AND FILED

December 16, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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* § 808.10 and RULE 809.62, STATS.

No. 97-0686

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

ROBERT PROSSER,

PLAINTIFF-APPELLANT-CROSS-RESPONDENT,

v.

RICHARD A. LEUCK AND CEDARBURG MUTUAL INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS-CROSS-APPELLANTS.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Barron County: EDWARD R. BRUNNER, Judge. *Reversed and cause remanded.*

Before Cane, P.J., Myse and Hoover, JJ.

HOOVER, J. Robert Prosser appeals a judgment denying him interest and double costs pursuant to a § 807.01, STATS.,[1] settlement offer. Prosser asserts that the court erred both by determining that the accumulation of interest provided by § 807.01(3) was tolled when the court stayed the underlying proceedings and by refusing him double costs provided by § 807.01(4). Cedarburg Mutual Insurance Company cross-appeals, contending that Prosser did not make a valid settlement offer under § 807.01 because it was ambiguous as to whether it released the insured from liability.[2] We conclude that Prosser's settlement offer was indeed materially ambiguous, and therefore invalid.[3] Thus, Prosser is not entitled to preverdict interest or double costs under § 807.01. We therefore reverse and remand for entry of judgment consistent with this decision.

While the relevant facts are undisputed, the procedural history of this case is somewhat extensive. On July 5, 1992, Richard Leuck, then fourteen years old, started a fire that destroyed Prosser's warehouse. Prosser brought a negligence action against Leuck and Cedarburg, which had issued a $100,000 liability insurance policy to Leuck's parents. The policy contained an exclusion for intentional conduct.

On October 13, 1993, Prosser served a settlement offer on Cedarburg for $99,750 plus costs. Cedarburg did not respond to the offer. Instead it questioned coverage because Leuck admitted to intentionally starting the fire

[1] All references to § 807.01, STATS., are to the 1993-94 version.

[2] The trial court's written judgment did not address whether the offer was ambiguous.

[3] We therefore do not address Cedarburg's alternative argument that if Prosser did make a valid offer, he is not entitled to interest because Cedarburg offered its policy limits when coverage was established.

and intending to cause some damage. Over eight months after receiving the offer, Cedarburg filed a motion to bifurcate the coverage issue from the liability and damage questions. It also moved to stay the underlying proceedings until the coverage issue could be decided. The motions were granted.

A jury resolved the coverage issue against Cedarburg. The trial court, however, ordered judgment notwithstanding the verdict for Cedarburg. Prosser appealed, and this court reversed and entered judgment in his favor. On November 14, 1995, the supreme court denied Cedarburg's petition for review.

On November 30, 1995, Cedarburg tendered its policy limits of $100,000 plus appeal costs to Prosser, who refused to accept the tender. Instead, Prosser filed a motion for summary judgment and double costs and interest pursuant to §§ 807.01(3) and (4), STATS. Thereafter, the parties stipulated that judgment would be taken against Cedarburg for the policy limits, but that the issues of interest and double costs remained to be adjudicated.

After a hearing, the trial court issued a written decision concluding that the accumulation of interest under § 807.01, STATS., was tolled between the dates the proceedings were stayed to determine coverage to the supreme court's review denial. The court, however, determined that Prosser was entitled to interest from the date of the settlement offer, October 13, 1993, until the date the trial court stayed the proceedings, June 30, 1994,[4] and again from the date the supreme court denied the petition to review, November 14, 1995, until the date Cedarburg

[4] The record indicates that the trial court stayed and bifurcated proceedings at a hearing on August 19, 1994. Cedarburg's motion to stay and bifurcate proceedings is dated June 30, 1994, and was filed July 12, 1994.

tendered its policy limits, November 30, 1995. The court denied Prosser double costs, ruling that his costs were primarily associated with the coverage issue.

We now turn to Cedarburg's dispositive argument. Cedarburg contends that Prosser did not make a valid settlement offer under § 807.01, STATS., because the offer was so ambiguous as to be invalid. The offer proposed to "dismiss *this pending litigation* and the entirety of *defendant's* liability." (Emphasis added.) Cedarburg asserts that the settlement offer made it unclear whether accepting it released both Cedarburg and the insured from liability, or only Cedarburg, thus leaving the insurance company open to a possible bad faith claim. *See* ***Cue v. Carthage College***, 179 Wis.2d 175, 179, 507 N.W.2d 109, 111 (Ct. App. 1993). Prosser points out that the offer was addressed only to Cedarburg, and contends it was clear his offer was to dismiss only Cedarburg from the litigation.

This case involves the application of law to undisputed facts. This court must decide questions of law independently without deference to the decisions of the trial court. ***Ball v. District No. 4, Area Bd.***, 117 Wis.2d 529, 537, 345 N.W.2d 389, 394 (1984). It is the obligation of the party making the offer of settlement to do so in clear and unambiguous terms. ***Stan's Lumber, Inc. v. Fleming***, 196 Wis.2d 554, 576, 538 N.W.2d 849, 858 (Ct. App. 1995). Any ambiguity in the offer of settlement is construed against the drafter. ***Id.*** The offeree must be able to fully and fairly evaluate the offer from his own independent perspective. ***Testa v. Farmers Ins. Exch.,*** 164 Wis.2d 296, 302, 474 N.W.2d 776, 779 (Ct. App. 1991).

We conclude that the offer of settlement was indeed ambiguous. While the phrase "this pending litigation" suggests that both the insurer and

insured would be released from liability, other facts call this interpretation into question. The offer was addressed only to Cedarburg. The second part of the phrase, proposing to dismiss "defendant's" liability, is singular. Thus, read as a whole, the phrase does not clearly indicate with whom Prosser intended to settle the case. As a consequence, Cedarburg was unable to determine from the offer the amount necessary to settle the case. "We read sec. 807.01, Stats., to require that if an offer to settle the case is made, it must state with clarity the sum it will take to settle the case." ***Cue***, 179 Wis.2d at 179, 507 N.W.2d at 111.

The offer's ambiguity as to whether the entire litigation would be dismissed also prevented an evaluation of Cedarburg's collateral exposure. Specifically, Cedarburg could not determine from the offer whether it would still owe a duty to defend its insured. *See* ***id***. For these two reasons, the ambiguity is material and fatal.

While it seems logical and even desirable for an insurance company to take reasonable steps to resolve ambiguities in settlement proposals, neither § 807.01, STATS., nor case law appear to place any burden on the recipient to do so. For example, in ***Stan's Lumber***, the court concluded that an offer of settlement was ambiguous because the recipient was unsure whether the offer settled the entire claim, or just that portion of the claim that had not yet gone to judgment. ***Id***. at 576, 538 N.W.2d at 858. The court reached this conclusion without requiring the offeree to demonstrate an affirmative attempt to confirm the offer's purpose. *See* ***id.*** Similarly, where a party made multiple settlement offers to multiple defendants for $100,000 but it was unclear as to the total sum the party wanted in order to settle, the court found the offer of settlement ambiguous. ***Cue***, 179 Wis.2d at 179-80, 507 N.W.2d at 111. Again, the court did not require the

offerees to demonstrate an affirmative investigation to resolve the ambiguity. *See* ***id.***

The Wisconsin Rules of Civil Procedure are forward-looking. ***Schmidt v. Schmidt***, 212 Wis.2d 405, 412, 569 N.W.2d 74, 78 (Ct. App. 1997). Their underlying purpose is to move litigation to resolution and they should be construed to secure just, speedy and inexpensive determinations. ***Id***. at 412-13, 569 N.W.2d at 78. Section 807.01, STATS., was intended to promote these goals by encouraging settlement. *See* ***White v. General Cas. Co.***, 118 Wis.2d 433, 438, 348 N.W.2d 614, 617 (Ct. App. 1984). We are concerned, however, that the developing body of case law construing § 807.01 runs contrary to these purposes. Rather than promoting speedy resolution of an action, cumulatively these cases render settlement offers a minefield of hypertechnicalities. We see no reason why a recipient should not be required to make reasonable inquiries concerning perceived ambiguities, so that a minor error, easily corrected, does not compromise a settlement offer's utility.[5] This court, however, has never implied, let alone imposed, such an obligation upon the recipient of an allegedly ambiguous offer. We are not at liberty to depart from the precedent established by this court. "The constitutional and statutory provisions clearly set forth the mandate that the Court of Appeals function as a single court under a chief judge and not function as four separate courts." ***Cook v. Cook***, 208 Wis.2d 166, 186, 560 N.W.2d 246, 254 (1997) (quoting ***In re Court of Appeals***, 82 Wis.2d 369, 371, 263 N.W.2d 149, 150 (1978)). Officially published opinions of the court of appeals shall have statewide precedential effect. Section 752.41(2), STATS. We are therefore bound

[5] This is especially true in a case such as this, where Cedarburg's failure to respond was likely more a function of what it perceived as a meritorious policy defense than an ambiguity easily resolved by one earnestly disposed toward serious consideration of the offer.

by our prior decisions, which place the onus of drafting clear, precise settlement offers on those making the offer.

In conclusion, the terms of Prosser's offer of settlement were ambiguous as to whom it proposed to dismiss from the lawsuit. Cedarburg was therefore unable both to determine the amount required to settle the case and determine whether its duty to defend would survive the proffered settlement. This renders the offer invalid, making preverdict interest or double costs under § 807.01, STATS., inappropriate.

By the Court.—Judgment reversed and cause remanded.

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