

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

March 9, 2000

Cornelia G. Clark  
Acting 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 WIS. STAT. § 808.10 and RULE 809.62.

**No. 99-2728-FT**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**PATRICIA MARSHALL SCALES,**

**PLAINTIFF-RESPONDENT,**

**IOWA COUNTY DEPARTMENT OF SOCIAL SERVICES,**

**PLAINTIFF,**

**V.**

**WAL-MART STORES, INC.,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Iowa County:  
WILLIAM D. DYKE, Judge. *Affirmed.*

Before Vergeront, Roggensack and Deininger, JJ.

¶1 PER CURIAM. Wal-Mart appeals from a judgment awarding Patricia Scales damages and costs arising from a slip-and-fall case. Wal-Mart claims the trial court erred in taxing costs against it because the amount recovered

by Scales at trial was less than the amount Wal-Mart had proposed in a settlement offer. We affirm on the basis that the settlement offer was invalid.

## BACKGROUND

¶2 Scales incurred injury and medical expenses after she tripped and fell over a bucket that had been collecting leaking rain water in an aisle at Wal-Mart. The Iowa County Department of Social Services paid some of Scales' resulting medical and pharmacy bills under a medical assistance program. After Scales filed suit, Wal-Mart proposed a settlement in the following terms:

Pursuant to Sec. 807.01, *Stats.*, the defendant, Wal-Mart Stores, Inc. offers to allow judgment to be taken against it and in favor of Patricia Marshall Scales in the above-captioned matter in the amount of three thousand and no/100 dollars (\$3,000) *inclusive of costs and disbursements*, if this offer is accepted within 10 days of receipt. Because the Iowa County Department of Social Services has a claim for reimbursement of benefits paid to and/or on behalf of Patricia Marshall Scales and said claims are indivisible and governed by § 49.89, *Wis. Stats.*, this offer includes any and all of Iowa County Department of Social Services' claim for benefits paid to or on behalf of Patricia Marshall Scales.

(Emphasis added.)

¶3 Scales refused the settlement offer and the case proceeded to trial. The jury awarded Scales \$3,000 for pain and suffering, \$240 for medical bills and \$599 for chiropractic bills, reduced by 40% for contributory negligence, resulting in net damages of \$2,404.40. The trial court awarded Scales \$1,236.15 in costs, denied Wal-Mart's counter-motion for costs and entered judgment in the amount of \$3,539.55.

## STANDARD OF REVIEW

¶4 We review the validity of a statutory settlement offer de novo. *See Staehler v. Beuthin*, 206 Wis. 2d 610, 624, 557 N.W.2d 487 (Ct. App. 1996).

## ANALYSIS

¶5 WISCONSIN STAT. § 807.01(1) (1997-98)<sup>1</sup> allows a defendant to “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 rejects the settlement offer, but “fails to recover a more favorable judgment,” the defendant, and not the plaintiff, shall be entitled to costs. *Id.* However, a settlement offer that is ambiguous or does not comply with § 807.01 is invalid. *See Prosser v. Leuck*, 225 Wis. 2d 126, 136-37, 592 N.W.2d 178 (1999).

¶6 The parties dispute whether Wal-Mart’s offer was sufficient to allow Scales to fully and fairly evaluate settling the claim in light of the subrogation interest of the Iowa County Department of Social Services. However, we see a more fundamental problem with the settlement offer.

¶7 The offer proposed to settle Scales’ claim for \$3,000 “inclusive of costs.” However, we have concluded the statutory term “with costs” means in addition to costs, and thus, any settlement offer must be compared to the judgment “exclusive of any costs.” *See Stahl v. Sentry Ins.*, 180 Wis. 2d 299, 307, 509 N.W.2d 320 (Ct. App. 1993); *Northridge Co. v. W.R. Grace & Co.*, 205 Wis.

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<sup>1</sup> All references to the Wisconsin Statutes are to the 1997-98 version.

2d 267, 290, 556 N.W.2d 345 (Ct. App. 1996). Since Wal-Mart's settlement offer did not specify what portion of the \$3,000 was intended to compensate Scales on the merits of her claim, it was ambiguous and not valid.

*By the Court.*—Judgment affirmed.

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

