COURT OF APPEALS
DECISION
DATED AND FILED

February 17, 1998

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. 97-1085

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

SUZANNE BLANK, GUARDIAN AD LITEM FOR MICHAEL F. GRONQUIST, AND ALSO FOR ASA GRONQUIST, ANDREW GRONQUIST AND SARAH GRONQUIST, MINOR CHILDREN OF MICHAEL GRONQUIST,

PLAINTIFFS-APPELLANTS,

V.

USAA PROPERTY & CASUALTY INSURANCE COMPANY,

DEFENDANT-RESPONDENT,

WILLIAM J. ADNEY AND MID AMERICAN MUTUAL LIFE INSURANCE COMPANY,

DEFENDANT.

APPEAL from a judgment of the circuit court for Douglas County: JOSEPH A. McDONALD, Judge. *Affirmed.*

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

PER CURIAM. Suzanne Blank, guardian ad litem for Michael Gronquist and his minor children, appeals an amended judgment revising the amount of interest owed by USAA Property and Casualty Insurance Company. In an earlier appeal, this court determined that the trial court improperly applied § 807.01(4) STATS., to the entire amount of the judgment rather than the portion of liability indemnified by the insurance company. On remand, the trial court recalculated the interest due based on the $100,000 policy limits. Blank argues that a portion of the original judgment was not reversed and that the trial court lacked authority to revise the interest to be awarded on that portion of the judgment. She also argues that the court improperly restricted interest to the $100,000 limit because the insurance contract provides for payment of postjudgment interest by the insurer. We reject these arguments and affirm the amended judgment.

The trial court had authority to recalculate interest on the entire judgment based upon this court's instructions on remand. The sole basis for the trial court's initial award of interest was § 807.01(4), STATS. That statute was applied to every aspect of the interest calculation contained in the initial judgment. When this court concluded that interest under that section does not apply beyond the policy limits, we remanded the matter to the circuit court for recalculation of the interest on the entire judgment. Upon remittitur the trial court properly modified the judgment as instructed by this court. Blank argues extensively that the trial court lacked authority to modify the judgment because the time for modification set out in § 806.07, STATS., had expired. The trial court's authority is not based on that statute. It is based on this court's remand and was authorized by § 808.09, STATS.

We also reject Blank's argument that portions of the initial judgment were based on § 814.04(4), STATS., and that those portions were not reversed by this court. This court's decision required recalculation of all interest due because the trial court improperly applied § 807.01(4), STATS., to all parts of the verdict. The application of ch. 814 was not reviewed in this court's initial decision because it was not applied by the trial court.

Blank next argues that the insurance policy provides for payment of postverdict interest on the entire verdict. An insurance company may, by contract, agree to pay postverdict interest on behalf of its insured above the limits of liability specified in the policy. *See* ***McPhee v. American Motorists Ins. Co.***, 57 Wis.2d 669, 672-73, 205 N.W.2d 152, 155 (1973). The insurance policy provides:

> In addition to our limit of liability, we will pay on behalf of a covered person:
>
> 3. Interest accruing after a Judgment is entered in any suit we defend. Our duty to pay interest ends when we offer to pay that part of the Judgment which does not exceed our limit of liability for this coverage.

The insurance contract was modified by an amendment that provides:

> We will pay damages for bodily injury or property damage for which any covered person becomes legally responsible because of an auto accident. We will settle or defend, as we consider appropriate, any claim or suit asking for damages which are payable under the terms of this policy. In addition to our limit of liability, we will pay all defense costs we incur.

Neither the initial policy nor the amendment compels USAA to pay interest on the verdict in excess of the liability limits in this case. USAA agreed to pay the policy limit before trial and tendered the policy limit before the judgment was entered. The policy provides that USAA's duty to pay interest ends when it

offers to pay that part of the judgment which does not exceed its limit of liability. Therefore, its prejudgment payment of the policy limit, under the unambiguous terms of the insurance contract, relieves it of any obligation to pay interest on the verdict in excess of the policy limits.

Blank argues that similar insurance policy language has been construed to create an obligation by the insurance company to pay prejudgment interest. In ***McPhee***, the policy obligated the insurer to pay "all interest accruing after entry of such part of such judgment as does not exceed the judgment until [the company] has paid ... such part of such judgment as does not exceed the limit of the company's liability thereon." The court construed "all interest" to mean interest on the entire amount of the judgment, not interest on the amount of the policy limits. The USAA policy differs in that it not only limits its obligation to pay interest to sums accruing after judgment is entered and terminating upon an offer to pay the policy limit, it also contains an amendatory endorsement that obligates USAA to pay:

> Prejudgment interest awarded against the covered person on that portion of the judgment we pay. Provided that, in any case in which we have made an offer to pay the applicable limit of liability and the judgment exceeds the applicable limit, we will not pay any prejudgment interest based on that period of time after the offer."

The amendatory endorsement cannot be construed as a contract to assume responsibility for prejudgment interest in excess of the policy limit after USAA has made an offer to pay the limit of liability. USAA offered to pay the policy limits before the lawsuit was even commenced. The differences between the USAA insurance policy and the policy in ***McPhee*** rendered the holding in ***McPhee*** inapposite.

Blank also cites ***Weimer v. Country Mut. Ins. Co.***, 211 Wis.2d 845, 864-65, 565 N.W.2d 595, 603-04 (Ct. App. 1997), *petition for review* granted, for the proposition that the language of the Country Mutual policy is similar to USAA's policy and has been construed to require the insurer to pay the interest of its insured. The Country Mutual policy promised to pay "all interest accruing after entry of judgment in a suit we defend. Our duty to pay interest ends when we pay or tender our limit of liability." This court interpreted "tender" to require either an actual proffer of money or an actual deposit of money with a third party. Country Mutual merely offered to pay, and that does not constitute a "tender" of its limit of liability. Here, the USAA policy required only that it make an "offer to pay." In addition, USAA did "tender" its policy limits and Blank accepted the payment before the judgment was entered.

The amendment to the contract that requires USAA to pay all defense costs it incurs cannot be construed to require it to pay additional interest. Interest on verdicts is not an element of costs. *See* ***Nichols v. USF&G Co.***, 13 Wis.2d 491, 500,109 N.W.2d 131 136 (1961).

By the Court.—Judgment affirmed.

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