COURT OF APPEALS
DECISION
DATED AND FILED

February 24, 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. 97-2369-FT

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

VALIANT TISKE AND IDA TISKE,

PLAINTIFFS-RESPONDENTS,

LIBERTY MUTUAL INSURANCE COMPANY,

INVOLUNTARY-PLAINTIFF-APPELLANT,

PRIME CARE HEALTH PLAN, INC.,

INVOLUNTARY-PLAINTIFF-RESPONDENT,

V.

WAL-MART STORES, INC.,

DEFENDANT.

APPEAL from an order of the circuit court for Brown County: RICHARD G. GREENWOOD, Judge. *Affirmed in part; reversed in part, and cause remanded with directions.*

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

CANE, P.J. Liberty Mutual Insurance Company appeals an order approving the distribution of the settlement proceeds in a personal injury action.[1] Liberty seeks a full evidentiary hearing concerning the distribution of the proceeds and a proper application of § 102.29, STATS., formula to the settlement. Because Liberty failed to file with the trial court any objection to the proposed terms of the settlement, it is not entitled to later challenge the amount or terms of the settlement. However, because Valiant and Ida Tiske, the injured parties in the settlement, concede that a correct application of the statutory formula allows Liberty to recover $912.35 more than awarded in the trial court's order for settlement, we affirm in part, reverse in part and remand with directions.

Valiant Tiske, a UPS employee, sustained an injury in the course of his employment when a shopping cart fell on him while he was working at a loading dock of a Wal-Mart store. Liberty paid him $34,708.84 in disability and medical benefits. The Tiskes started an action against Wal-Mart and named Liberty as an involuntary plaintiff because of its disability and medical payments. However, Liberty never made any appearances in the case and did not participate in the settlement negotiations. After the Tiskes settled with Wal-Mart, they petitioned the court for approval of the settlement.

Even though Liberty received a copy of the motion, it did not make its objections known to the trial court. In its approval of the proposed settlement, the trial court awarded to Ida a substantial portion of the settlement which Liberty is not entitled to share under § 102.29, STATS. The first appearance Liberty made

[1] This is an expedited appeal under RULE 809.17, STATS.

in this matter was its motion to set aside the trial court's order approving the settlement. The trial court, relying on ***Elliott v. Employers Mut. Cas. Co.,*** 176 Wis.2d 410, 500 N.W.2d 397 (Ct. App. 1993), denied Liberty's motion based upon its determination that Liberty had waived any objection to the settlement amount or its terms and that its order was consistent with § 102.29.

In ***Elliott,*** Employers Mutual Casualty Company was named a defendant because it had paid certain medical bills for the plaintiff Elliott who had been injured in an employment related motor vehicle accident. Like Liberty in our case, Employers never gave any statutory notice that it wished to join in Elliott's action and did not answer the complaint. Also, like Liberty in our case, Employers did not participate in the settlement negotiations with the tortfeasor. We concluded in ***Elliott*** that because Employers could have participated in the settlement negotiations, but did not, it could not complain about the terms or amount of the settlement. ***Id.*** at 416, 500 N.W.2d at 400. Similarly, because Liberty could have participated, but did not, in the Tiskes' settlement negotiations with the tortfeasor, it cannot later complain about the terms of the settlement.

In ***Herlache v. Blackhawk Collision Repair, Inc.***, 215 Wis.2d 99, 102, 572 N.W.2d 121, 122 (Ct. App. 1997), we recently reviewed a similar issue where the subrogated insurer failed to appear at the hearing for approval of a personal injury settlement, but then later objected to amounts allocated in the settlement. In ***Herlache***, we held:

> Heritage's failure to attend the January 16, 1997, hearing constitutes a waiver of its right to object to the amount or terms of the settlement. *See* ***Elliott v. Employers Mut. Cas. Co.***, 176 Wis.2d 410, 416, 500 N.W.2d 397, 400 (Ct. App. 1993). A litigant who fails to attend a hearing cannot be heard to complain about the trial court's order that results from that hearing. While ***Elliott*** and ***Rice v. Gruetzmacher***,

> 30 Wis.2d 222, 227-28, 140 N.W.2d 238, 241 (1966), hold that an insurer is always entitled to share in a third-party settlement under the statutory formula unless it stipulates otherwise, those cases do not allow a defaulting insurer to later contest the amount of a settlement or its terms. They merely require the trial court to apply the formula set out in § 102.29, STATS., to the settlement as agreed upon by the interested parties. The allocation of the settlement to the various plaintiffs and their causes of action are "terms" of the settlement that cannot be contested by an insurer who defaults at the hearing. While Heritage does not lose its right to share in the recovery by its failure to participate, it does forfeit its right to object to the application of the settlement proceeds to specific claims.

Id.

Although there was never a hearing for approval of the proposed settlement, by failing to file with the trial court its dissatisfaction to the allocation of the proceeds, Liberty failed to preserve any objection to the terms of the settlement. We agree, however, that Liberty did not lose its right to its correct statutory share in the recovery by failing to object. Because the Tiskes concede that a correct application of the statutory formula would result in Liberty recovering an additional $912.35, we reverse only that portion of the order and remand the matter to the trial court for the entry of an order reflecting the correct calculation. Therefore, we affirm the order in part, reverse it in part and remand the matter with directions.

By the Court.—Order affirmed in part; reversed in part, and cause remanded with directions. No costs to either party.

Not recommended for publication in the official reports.