COURT OF APPEALS
DECISION
DATED AND FILED

July 21, 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. 97-2919

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

DANIEL SUBSTAD AND SUSAN SUBSTAD,

PLAINTIFFS-RESPONDENTS,

V.

FRANCES THORSON,

DEFENDANT,

AMERICAN FAMILY MUTUAL INSURANCE COMPANY,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Polk County: ROBERT RASMUSSEN, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

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

PER CURIAM. American Family Mutual Insurance Company appeals a judgment entered in favor of Daniel Substad. It argues that the trial court erroneously (1) denied it full credit for benefits it paid under a no-fault insurance policy for Substad, and (2) denied its motion for a mistrial when Substad's attorney made an improper closing argument. Because Minnesota statutes and the public policy behind them allow for the deduction, we conclude that American Family is entitled to deduct no fault protection benefits it paid from Substad's underinsured medical benefits, both paid pursuant to American Family's policies with Substad. We disagree, however, that American Family is entitled to a mistrial due to improper argument. We therefore affirm in part, reverse in part and remand for proceedings consistent with this opinion.

Substad suffered injuries while a passenger in a vehicle struck by Frances Thorson in Polk County, Wisconsin. American Family insured Substad under three "Family Car" policies executed in Minnesota. Substad claimed no-fault benefits under his American Family policies. It is undisputed that American Family was obligated under the terms of its contract with Substad and under Minnesota law to pay these benefits. It is also undisputed that American Family paid $9,258.85 in no-fault benefits for medical expenses incurred by Substad as a result of the accident.

American Family also insured Thorson for liability with limits of $50,000 per person for bodily injury. Substad and his wife, Susan, brought this action against Thorson and American Family for damages as a result of that accident. Substad later amended his complaint to include a claim against American Family for underinsurance benefits under the terms of his contract of insurance, based upon the allegation that Thorson had insufficient liability limits for the injuries sustained.

In its answer to Substad's complaint, American Family alleged that it had made payments on Substad's behalf through his policies and "is entitled to set-off for any payments it has made on their behalf" against claims made under Substad's underinsurance policy. American Family also alleged that Minnesota law precluded Substad's claim for payment of past medical bills, for which American Family had already paid no fault benefits.

The jury verdict awarded Substad $9,642.69 for past medical and chiropractic expenses, nothing for past pain and suffering, and $40,000 for future pain, suffering and disability. The trial court granted Substad's request for additur in the sum of $10,000 for past pain, suffering and disability. It entered judgment ordering American Family to pay Substad the $50,000 limits from the Thorson policy, plus costs and disbursements, for a total of $68,010.74.

At motions after verdict, American Family requested that the entire sum of $9,258 that it had already paid as no-fault benefits for medical expenses be deducted from Substad's underinsurance medical benefits. Substad objected. He argued that under MINN. STATS. ANN. § 65B.53 (West 1998), American Family had a right of subrogation, not set-off. Substad contended that under Minnesota law, American Family's subrogated interest must be reduced by one-third, representing Substad's cost of collection.

Pursuant to MINN. STATS. ANN. § 65B.53, subd.8 (West 1998), the court concluded that one-third of $9,258.85 represented Substad's share of attorney fees that the court determined Substad was allowed to retain as a cost of pursuing his claims. The trial court agreed with Substad and ordered that American Family was entitled to subrogation to two-thirds of the $9,258.85 it had paid in no-fault

benefits, and that Substad was to be awarded $3,474.79 in underinsurance benefits.

American Family argues that the trial court erroneously deducted only two-thirds of the no fault payments made under Substad's policies. We agree. The question is whether American Family is entitled to deduct the no-fault benefits it paid for medical expenses from the underinsurance medical benefits for which it is liable under Substad's policies. We conclude that the public policy behind the Minnesota No-Fault Act and MINN. STATS. § 65B.51 require the deduction.[1]

The Minnesota No-Fault Automobile Insurance Act, MINN. STATS. ANN. §§ 65B.41 to 65B.71 (West 1998), covers persons injured in accidents arising in Minnesota, as well as those injured in another state who are covered by a policy complying with the act. *See* Michael K. Steenson, *A Primer on Minnesota No-Fault Insurance*, 7 WM. MITCHELL L. REV. 313, 322 (1978). If an underinsured individual is involved in an accident, the injured person may in addition to basic economic loss benefits, be entitled to receive underinsured motorist benefits. *See* ***id.*** One of the act's purposes is to avoid duplicate recovery by the injured party. "There are two provisions of the No-fault Act which prevent double recovery of economic loss benefits: the offset provision in Minn. Stats. § 65B.51, subd. 1, and the subrogation provisions of § 65B.53." ***Fox v. City of Holdingford,*** 375 N.W.2d 44, 46 (Minn. App. 1985).

[1] The parties agree that the rights of parties under a Minnesota insurance contract are governed by Minnesota law. *See* ***Peterson v. Warren,*** 31 Wis.2d 547, 557, 143 N.W.2d 560, 564 (1966), *overruled in part on other grounds*, ***Allen v. Ross***, 38 Wis.2d 209, 156 N.W.2d 434 (1968) (Generally, "the law of the state where the contract is made determines the obligations of the contract, not the law of the state where performance happens to be required." (citation omitted)).

"The offset provision is designed to ensure that an injured individual recovers in tort only for uncompensated loss." 7 WM. MITCHELL L. REV. at 323. MINN. STATS. ANN. § 65B.51, subd. 1 (West 1998), the offset provision, states:

> **Deduction of basic economic loss benefits**. With respect to a cause of action in negligence accruing as a result of injury arising out of the operation, ownership, maintenance or use of a motor vehicle with respect to which security has been provided as required by sections 65B.41 to 65B.71, the court shall deduct from any recovery the value of basic or optional economic loss benefits paid or payable, or which would be payable but for any applicable deductible.

There is no dispute that American Family paid the medical benefits under the no-fault provisions of its policy with Substad. The plain language of "Section 65B.51(1) of Minnesota's no-fault insurance law specifically provides that economic loss benefits that have already been paid shall be deducted from any … recovery." ***American Standard Ins. Co. v. Cleveland,*** 124 Wis.2d 258, 271, 369 N.W.2d 168, 171 (Ct. App. 1985). Therefore, under the statute's plain terms, American Family is entitled to deduct the economic loss benefits, also referred to as no fault benefits, that it has paid from the amount that Substad recovers as underinsurance medical benefits.

Substad contends that because subrogation applies,[2] offset does not. He contends that because Minnesota statutes governing subrogation allow for the

[2] The subrogation provisions of MINN. STATS. ANN. § 65B.53, subd. 2 (West 1998), state as follows:

> A reparation obligor paying or obligated to pay basic or optional economic loss benefits is subrogated to the claim for the recovery of damages for economic loss that the person to whom the basic or optional economic loss benefits were paid or payable has against another person whose negligence in another state was the direct and proximate cause of the injury for which the basic economic

(continued)

recovery of attorney fees and one-third of the sum recovered represents attorney fees, the trial court correctly ordered that American Family deduct only two-thirds of the no fault benefits it paid.[3] Because American Family's claim is not for subrogation, we reject his argument.

At trial, American Family did not seek subrogation. Its pleading merely sought to offset no-fault benefits from Substad's recovery under his underinsurance provisions. Additionally, American Family did not seek subrogation rights against Thorson's policy, because Substad's award exceeds Thorson's policy limits. Because American Family did not seek subrogation, subrogation rules do not apply.

Substad makes a myriad of arguments concerning subrogation, and contends that American Family failed to cite certain statutory references in its answer and failed to refer to its contractual language providing for a right to set-off. As a result, Substad argues, American Family failed to preserve its claim for set-off. We are satisfied that American Family's answer, as well as its argument,

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> loss benefits were paid or payable. This right of subrogation exists only to the extent that basic economic loss benefits are paid or payable only to the extent that recovery on the claim absent subrogation would produce a duplication of benefits or reimbursement of the same loss.

[3] MINNESOTA STATS ANN. § 65B.53, subd. 8 (West 1998), refers to the collection of attorney fees and provides:

> [T]he right of an insurer to be subrogated to all or a portion of the claim of an insured … shall be enforceable against the insured only if the insurer, upon demand by the insured, agrees to pay a share of the attorney fees and costs incurred to prosecute the claim, in such proportion as the insurer's subrogated interest in the claim bears to any eventual recovery on the claim.

plainly indicate that it was seeking set-off. We conclude that its claim for set-off has not been waived.

Substad also contends that American Family's motion was untimely under a Minnesota procedural statute requiring that motions must be filed ten days after entry of the verdict and, therefore, the trial court erroneously addressed the issue of subrogation and set-off rights. We disagree. Substad fails to develop his proposition that Minnesota procedural law governs a Wisconsin trial. *See* ***Jaeger v. Jaeger,*** 262 Wis. 14, 18, 53 N.W.2d 740, 742 (1952) (the law of the forum governs the conduct of trial); ***Davis v. Furlong,*** 328 N.W.2d 150, 153 (Minn. 1983) (concluding that choice of law considerations were applicable only to conflicts of substantive law and that the law of the procedure was to be applied to conflicts of procedure). In any event, the record indicates that the motion was heard by stipulation of the parties, and that Substad did not raise his procedural objection before the trial court.

The record plainly supports American Family's claim for set-off. Its claim is not one of subrogation claim. Having considered the parties' various alternative arguments concerning subrogation, we do not address them further. *See* ***State v. Castillo***, 213 Wis.2d 488, 492, 570 N.W.2d 44, 46 (1997) (an appellate court should decide cases on the narrowest possible grounds.); *see also* ***State v. Blalock***, 150 Wis.2d 688, 703, 442 N.W.2d 514, 520 (Ct. App. 1989). Therefore, the portion of the judgment deducting two-thirds of the no fault benefits is reversed and the matter is remanded with directions to deduct the entire sum American Family paid in no fault benefits.

Finally, we reject American Family's argument that it is entitled to a mistrial because of Substad's closing argument. American Family argues that the

trial court erroneously denied it a mistrial where opposing counsel utilized the prohibited "golden rule" argument. *See* ***Dostal v. Millers Nat'l Ins. Co.***, 137 Wis.2d 242, 260, 404 N.W.2d 90, 97 (Ct. App. 1987). "A 'golden rule' argument asks the individual jurors to put themselves in the shoes of the plaintiff … and decide what they themselves would want to recover for that particular injury." ***Id.***

> It is a "do unto others" argument that shifts the jurors' attention from the parties and the evidence before them to matters relating to their own feelings, emotions and biases. It asks the jurors to internalize and personalize the case, rather than to search for the truth from the evidence, and it is universally recognized as improper argument.

Id.

The portion of the argument in question is as follows:

> And counsel says you are not telling the truth. It is bad enough to have this injury from a relatively minor car accident, but then to be brought here and then be subjected to attacks on your credibility that your family is not telling the truth, the doctors you went to are not telling the truth. I can tell you this, no matter what happens here, *if he had a choice, he would gladly give the money back and pay you if you could make this accident go away and he wouldn't have the problems that he has.* (Emphasis added.)

American Family objected. The trial judge commented that counsel was "moving on" to another point and Substad's counsel immediately moved on to argument concerning credibility.

Substad's argument approaches the prohibited "golden rule" argument. *See* ***Featherly v. Continental Ins. Co.,*** 73 Wis.2d 273, 283-84, 243 N.W.2d 806, 814 (1976). Although we do not approve of an argument of this nature, there is no evidence that it had any effect on the damage award. *See* ***id.*** at 284, 243 N.W.2d at 814. The challenged argument was directed at credibility, and

not damages. Indeed, if the remark had focused on damages, and had influenced the jury, it is improbable that the jury would have returned a verdict awarding nothing for past pain and suffering. As a result, we conclude that even if the remark could be deemed improper, no prejudice resulted.

Accordingly, we affirm the trial court's decision to deny American Family a new trial. We reverse, however, that portion of the judgment deducting two-thirds of the sum American Family had paid as no-fault benefits, and remand with directions to the trial court to deduct the full amount paid as no-fault benefits from Substad's recovery of underinsurance benefits.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded with directions. Costs to American Family Mutual Insurance Company.

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