COURT OF APPEALS
DECISION
DATED AND FILED

May 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. 97-3691-FT

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

NANCY J. SCHOPEN AND JACK J. SCHOPEN,

PLAINTIFFS-RESPONDENTS,

V.

SCHULTZ SAV-O-STORES, INC. D/B/A WATERTOWN PIGGLY WIGGLY,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Jefferson County: JOHN ULLSVIK, Judge. *Affirmed.*

Before Eich, C.J., Vergeront and Roggensack, JJ.

PER CURIAM. Schultz Sav-O-Stores, Inc., appeals from a judgment awarding Nancy J. Schopen damages for an injury she sustained in its

store.[1] The issue is whether Schultz was required to amend the pleadings to claim a setoff for payments it made for Schopen's medical expenses. We affirm.

The basic facts are not in dispute. Schopen was injured in Schultz's store. The store paid her medical expenses during the period before she filed suit against it. Her suit did not seek damages for medical expenses. Several weeks before trial, Schultz requested in a motion in limine that its payments for medical expenses be setoff against any other recovery Schopen might make. Schopen objected, arguing that Schultz had not pleaded this issue. The trial court concluded that this was an issue that should have been pleaded. It denied Schultz's oral motion to amend the pleadings because an amendment would require Schopen to have an opportunity to respond, and that would require adjournment of the trial.

The jury found Schopen 36% negligent and Schultz 64% negligent. On appeal, Schultz argues that it is entitled to a setoff of 36% of the medical expenses it paid. It argues that it is entitled to this setoff because the trial court erred by concluding that this issue must be pleaded. It relies on ***Jones v. Aetna Casualty & Surety Company***, 212 Wis.2d 165, 567 N.W.2d 904 (Ct. App. 1997) for the proposition that its request for a setoff need not be pleaded. However, the analysis in ***Jones*** was based on a specific statute giving an insurer a subrogation interest to the extent of the payments made to an insured under a health care policy. That statute is inapplicable here, and therefore so is ***Jones***.

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

Schultz also argues it is entitled to a setoff on a theory of equitable subrogation. This issue is not properly presented in this case because the trial court denied Schultz's request to amend the pleadings.

By the Court.—Judgment affirmed.

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