COURT OF APPEALS
DECISION
DATED AND FILED

July 21, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP2323 **Cir. Ct. No. 2011CV646**

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

JULIE L. PETTIS AND MICHAEL PETTIS, SR.,

PLAINTIFFS-APPELLANTS,

V.

DAWN PRICE AND AMERICAN FAMILY MUTUAL INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS,

PROGRESSIVE UNIVERSAL INSURANCE COMPANY,

DEFENDANT.

APPEAL from an order of the circuit court for Eau Claire County: KRISTINA M. BOURGET, Judge. *Affirmed.*

Before Hoover, P.J., Hruz and Neubauer, JJ.

¶1 PER CURIAM. Julie Pettis and Michael Pettis, Sr., appeal an order directing the Eau Claire County Clerk of Courts to satisfy a money judgment with

respect to American Family Mutual Insurance Company. There is no dispute that, in the underlying case, American Family pleaded its insurance policy limit in its answer and proved that limit by introducing the insurance policy during the trial. However, the Pettises contend American Family is liable for the full amount of the judgment, which is well in excess of the applicable policy limit, because American Family neither affirmatively reasserted that policy limit in a postverdict motion, nor objected to language in the judgment making American Family and its insured, Dawn Price, "jointly and severally" liable for the full amount of the judgment.

¶2 We conclude the circuit court properly ordered the judgment satisfied as to American Family. There was no basis in law or fact for the judgment's imposition of joint and several liability beyond American Family's limits of liability in the applicable policy. Under existing law, the extent of an insurer's liability in a direct-action claim corresponds to the limits of coverage established by the underlying policy if the insurer pleads and proves those limits. American Family undisputedly did so here, and we reject the Pettises' invitation to require insurers to do more in order to limit their liability to direct-action plaintiffs when faced with a verdict in excess of their policy limits. Because American Family has paid the Pettises an amount equal to the applicable policy limit plus an additional amount for interest and costs, satisfaction of the judgment as to American Family was warranted. We therefore affirm.

BACKGROUND

¶3 Julie Pettis was injured by a hit-and-run driver in August 2009. She and her husband, Michael, commenced this action, alleging that Price caused the accident and then left the accident scene. At the time of the accident, Price was insured under a motor-vehicle liability policy issued by American Family. Price and American Family denied liability for the Pettises' injuries,[1] and specifically denied that Price was negligent. They admitted the existence of the insurance policy, but asserted coverage under the policy was "subject to the terms, conditions and limitations set forth therein, including a limitation as to the amount recoverable for injuries."

¶4 The Pettises filed a statutory offer to settle with Price and American Family for $75,000. The offer was not accepted, and the case proceeded to a jury trial. It is undisputed that during the trial, and outside the presence of the jury, American Family introduced a certified copy of the insurance policy, which included an applicable policy limit of $150,000. The policy was admitted and received into evidence without objection. Ultimately, the jury found that Price was the driver whose negligence caused the accident. It awarded the Pettises a total of $330,000 in damages.

¶5 Price and American Family filed a motion to set aside the verdict on the bases that it awarded excessive damages and was not in the interests of justice, which motion was denied. American Family did not file a postverdict motion seeking to limit its liability to the $150,000 policy limit. American Family also did not object to the following language in the proposed judgment, which the

[1] Michael's claim was for loss of consortium.

Pettises drafted and which purported to impose joint and several liability on both Price and American Family for the full amount of the verdict:

> Plaintiffs Julie L. Pettis and Michael Pettis, Sr., for their judgment against Defendants Dawn Price and American Family Mutual Insurance Company, jointly and severally, shall have and recover the sum of $330,000, together with double costs and interest though May 22, 2014 in the amount of $24,290.16, and interest thereafter at the daily rate of $38.42, until the judgment is satisfied.

The proposed judgment was ultimately signed and entered by the circuit court on May 28, 2014.

¶6 American Family paid the Pettises $150,000 on June 26, 2014, and shortly thereafter made an additional payment of $24,290.16 for statutory costs and interest. On July 11, 2014, the Pettises filed a garnishment action in Marathon County, seeking to garnish $206,097.48, plus additional accruing interest, from American Family's bank accounts with U.S. Bank located in Wausau, Wisconsin.

¶7 On August 22, 2014, American Family filed a motion in this case seeking, alternatively, relief from the May 28, 2014 judgment, to correct a clerical error in that judgment, and satisfaction of the judgment as to American Family. The garnishment action was stayed pending resolution of American Family's motion in this case. At a September 8, 2014 hearing on the motion, American Family argued it could not be jointly and severally liable for the full amount of the judgment because there was no legal basis for imposing liability in excess of an insurer's policy limits when those limits have been adequately pleaded and proven at trial. The Pettises argued that by failing to reassert its policy limit in a postverdict motion, and by failing to object to the judgment as worded, American Family had either waived or forfeited its right to so limit its liability.

¶8 The circuit court agreed with American Family and granted the motion. It determined that American Family "was not required to assert its policy limits defense in any post-verdict proceedings" when American Family already had "properly pleaded its policy limits in its Answer and properly proved those policy limits by introducing the insurance policy into evidence at trial." The circuit court further determined that the judgment's joint and several language was not incorrect per se, but that American Family was jointly and severally liable only up to the amount of its policy limit. It being undisputed that American Family had paid the limits on its policy, the court ordered the Clerk of Court for Eau Claire County to satisfy the May 28, 2014 judgment as to American Family. The garnishment action was then dismissed without prejudice by stipulation of the parties, and the Pettises appeal.

DISCUSSION

¶9 The Pettises contend the money judgment entered against American Family and Price is unambiguous and makes each of them jointly and severally liable for the entire amount of the judgment. They argue the phrase "jointly and severally" in the judgment, as well as the phrase "joint and several liability" more generally, have commonly accepted meanings—namely, liability that "'*may be apportioned* either among two or more parties or to only one or a few select members of the group, *at the adversary's discretion*.'" ***Cleaver Brooks, Inc. v. AIU Ins. Co.***, 2013 WI App 135, ¶18, 351 Wis. 2d 643, 839 N.W.2d 882 (quoting BLACK'S LAW DICTIONARY at 933 (8th ed. 2004) (emphasis added in case opinion)), *review denied*, 2014 WI 22, 353 Wis. 2d 450, 846 N.W.2d 15. The Pettises further contend that, absent any language in the judgment suggesting American Family's responsibility for the money judgment is subject to the limits of an underlying insurance policy, they are necessarily entitled to recover the full

amount of the judgment only from Price, only from American Family, or from a combination of the two.

¶10 However, American Family does not dispute, and has never disputed, that the judgment, by its plain language, imposes joint and several liability. Rather, American Family's motion argued that the judgment could not validly impose joint and several liability for the entire $330,000 sum, and that, in fact, no party in the lawsuit had ever affirmatively asserted to the contrary prior to entry of the judgment. Thus, American Family sought relief from the judgment under WIS. STAT. § 806.07(1)(a) based on a "mistake," correction of a clerical error in the judgment to reflect the true extent of American Family's liability, or an order deeming the judgment satisfied as to American Family because it had paid an amount equal to the full policy limit plus statutory costs and interest.[2] In essence, American Family's arguments regarding the judgment as entered and the scope of its liability thereunder are that the judgment as worded, and even if interpreted as the Pettises contend, is invalid, as there is no basis in law or in fact

[2] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

to hold American Family accountable for any portion of the verdict in excess of its pleaded and proven policy limits.[3]

¶11 The Pettises' second argument is that no "mistake" justified granting relief under WIS. STAT. § 806.07(1)(a). They contend American Family did not satisfy its burden of showing that its failure to object to the judgment's language was justifiable or excusable. *See* ***State v. Schultz***, 224 Wis. 2d 499, 502, 591 N.W.2d 904 (Ct. App. 1999). However, as the Pettises acknowledge, the circuit court did not grant relief under § 806.07(1)(a) based on a "mistake." Accordingly, we also need not address the Pettises' challenge to the circuit court's order in that respect.

¶12 Instead, the circuit court concluded the judgment had been satisfied as to American Family, pursuant to WIS. STAT. §§ 806.07(1)(e) and 806.20. Paragraph 806.07(1)(e) provides that a circuit court may relieve a party from a judgment if the judgment has been "satisfied, released or discharged." Section 806.20 provides that a court, when presented with a judgment that has been fully paid but not satisfied, "may by order declare the judgment satisfied and direct

[3] The Pettises observe that a judgment may be entered in other counties, or even in foreign jurisdictions. They emphasize that a clerk or judge in any of these venues, tasked with interpreting the judgment at issue, would not understand American Family's liability to be limited by policy provisions that are not evident on the face of the judgment. This argument implicates a set of considerations not present in this case, as the Pettises are not attempting to enforce a foreign judgment in a separate action. Rather, we are tasked with reviewing the circuit court's decision on American Family's motion to remove or otherwise limit the effect of the judgment's unqualified "joint and several" language. In this sense, it is important to note that the judgment at issue provided that it was "[b]ased on the entire file, record and proceedings in this action." These words would mean very little to a court unfamiliar with those aspects of the underlying case, but they mean a great deal in the context of American Family's motion, which was brought in the same action in which the judgment was entered.

satisfaction to be entered upon the judgment and lien docket." We regard whether a judgment has been satisfied under these provisions as a question of law.[4]

¶13 American Family contends the circuit court properly ordered the judgment satisfied as to American Family because there was no basis in fact or law for the judgment to impose joint and several liability for any sum greater than its proven policy limits. It asserts the applicable case law requires only that an insurer plead and prove the policy limits to limit the amount of its liability. It is undisputed that American Family accomplished these tasks here, and that American Family has paid the full policy limit of $150,000, plus an additional sum in accrued interest and statutory costs. American Family therefore asserts the circuit court properly determined that American Family "fully paid" its payment obligations under the judgment, but that the judgment as against American Family was not yet satisfied, prompting it to grant relief under WIS. STAT. §§ 806.20(1) and 806.07(1)(e).

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[4] We typically review a circuit court's decision to grant relief under WIS. STAT. § 806.07 for an erroneous exercise of discretion. *See* ***State ex rel. M.L.B. v. D.G.H.***, 122 Wis. 2d 536, 541, 363 N.W.2d 419 (1985). However, it is apparent that, in this case, the circuit court concluded relief was available under § 806.07(1)(e) only because the judgment had been "fully paid" as to American Family and therefore should be ordered satisfied under WIS. STAT. § 806.20. Because the facts in this case are undisputed, the application of § 806.20 to those facts presents a question of law. *See* ***Reusch v. Roob***, 2000 WI App 76, ¶10, 234 Wis. 2d 270, 610 N.W.2d 168 ("Whether a particular statute applies to undisputed facts is a question of law that we review independently.").

Subsumed within the question of whether the court properly ordered the judgment satisfied is the question of whether American Family was required to reassert its policy limit in a postverdict motion or otherwise after having already pleaded and proved those limits. We have previously treated the question of whether an insurer is required to plead and prove its policy limits as a question of law, and we also apply that standard to the present issue. *See* ***Price v. Hart***, 166 Wis. 2d 182, 189, 480 N.W.2d 249 (Ct. App. 1991). Additionally, whether a circuit court had authority to enter a judgment against an insurer for the full amount of a verdict is a question of law. ***Id.*** at 192.

¶14 We agree with American Family that there was no basis in fact or law for the judgment to impose joint and several liability on American Family in excess of its established policy limits. We reach this conclusion based on our analysis of the case law establishing what an insurer must do to successfully assert its policy limits. This involves consideration of four cases: ***Dostal v. St. Paul Mercury Indemnity Co.***, 4 Wis. 2d 1, 89 N.W.2d 545 (1958); ***Nichols v. United States Fidelity & Guaranty Co.***, 13 Wis. 2d 491, 109 N.W.2d 131 (1961); ***Jansa v. Milwaukee Automobile Mutual Insurance Co.***, 18 Wis. 2d 145, 118 N.W.2d 149 (1962); and ***Price v. Hart***, 166 Wis. 2d 182, 480 N.W.2d 249 (Ct. App. 1991).

¶15 ***Dostal*** establishes that an insurer bears the burden of pleading and proving its policy limits. There, the defendant insurer answered the complaint by generally stating that the insurance policy was "subject to conditions, exceptions and limitations more fully set forth in the policy." ***Dostal***, 4 Wis. 2d at 11. "The answer contained no allegation specifying the amount of coverage." ***Id.*** The jury returned a verdict in excess of the policy limit, and the insurer then sought, in motions after verdict, to introduce the insurance policy as evidence of its limits of liability. ***Id.*** at 3-4. The circuit court received the policy into evidence and reduced the amount of the award, as the insurer was the only defendant. ***Id.*** at 4. On appeal, our supreme court held that although it was the insurer's burden to plead and prove the policy limit, a circuit court may, in the exercise of its discretion, and based on the "interests of justice," provide relief to an insurer "from its failure to raise the issue of policy limits more particularly or to offer proof thereof at an earlier time." ***Id.*** at 16.

¶16 In ***Nichols***, as in ***Dostal***, the insurer answered generally that its liability was limited by the terms, conditions, and provisions of its policy and the coverage afforded thereunder, without specifically pleading the limits of liability

in its policy. ***Nichols***, 13 Wis. 2d at 493. However, unlike the policy in ***Dostal***, the policy in ***Nichols*** was admitted into evidence at trial. ***Nichols***, 13 Wis. 2d at 499. Notably, our supreme court concluded that when an insurer pleads the ultimate fact that its liability is limited under the terms of the policy, and it subsequently proves those policy limits at trial, those limits establish the maximum extent of its liability to the plaintiff:

> The fact that a third party can sue an insurer of a motor vehicle direct under sec. 260.11, Stats., 30 W.S.A. 39,[5] without first recovering a judgment against the insured defendant, does not enlarge the coverage afforded by such policy or determine the insurer's liability thereunder. *The third party can only recover from the insurer by virtue of the contract existing between it and its insured, and if the limits and coverage of the policy are properly pleaded and proved, the policy determines the insurer's liability with some exceptions not material to this case.*

Id. (emphasis added).

¶17 In ***Jansa***, the supreme court rejected an insurer's attempt to first raise the defense of its policy limits after a jury verdict, concluding the insurer had waited too long "to insert the question of coverage into the case." ***Jansa***, 18 Wis. 2d at 150. The insurer's answer admitted it had a policy insuring the negligent defendant, but the insurer did not specifically plead that its liability was limited in any way by the terms of that policy. ***Id.*** at 148-49. The court held that, absent court permission to amend the answer, the insurer's failure to assert its policy limits as a defense before the verdict was reached rendered any subsequent attempt to assert those policy limits ineffective:

[5] The current version of the direct action statute is found in WIS. STAT. § 632.24.

> If the defendant insurance company admits liability to its insured by an insurance policy but denies any liability to plaintiff and fails to allege any limitations of liability by the terms of the policy, the policy itself cannot be admitted into evidence for purposes of limiting the liability of the insurer after the jury has reached its verdict unless defendant has moved to amend its answer and the court has permitted the amendment under circumstances where the permission did not constitute an [erroneous exercise] of discretion.

Id. at 150. The supreme court concluded the circuit court in that case erred by receiving the policy into evidence after the verdict and by limiting the plaintiff's recovery against the insurer to that policy's limits. ***Id.*** at 149.

¶18 Finally, in ***Price***, we summarized the foregoing line of cases as follows:

> Thus, the supreme court has made it clear that if an insurer pleads that its policy is limited as to the amount of coverage but does not prove those specific limits prior to verdict, the trial court has discretion to allow this proof after verdict and to enter judgment in the amount of those limits. However, it is also clear that if an insurer does not plead or prove its policy limits prior to verdict or motions on the verdict, the trial court must enter judgment in the amount of the verdict.

Price, 166 Wis. 2d at 190. The facts in ***Price*** were "almost identical" to the facts in ***Jansa***. ***Price***, 166 Wis. 2d at 192. The insurer in ***Price*** admitted the existence of an insurance policy, but failed to plead the policy limits or prove them at trial. ***Id.*** Thus, ***Price*** is a fairly straightforward application of ***Jansa***, in that the insurer's attempts to obtain the benefit of the limits of liability in its policy came too late. Not only did the circuit court have the authority to enter judgment against the insurer in excess of its policy limits, it was "required do so under the holding in ***Jansa***." ***Price***, 166 Wis. 2d at 193.

¶19 These authorities establish that an insurer, as a direct-action defendant, *see* WIS. STAT. § 632.24, can successfully restrict its liability to the coverage limits of the underlying policy by pleading such limits and proving them during trial. Indeed, if a circuit court is so inclined, it may permit such proof after a trial concludes, if the insurer had properly pled its limits. It is undisputed that American Family followed the existing case law in an exacting manner—namely, its answer alleged that the underlying insurance policy included a "limitation as to the amount recoverable for injuries," and then the precise limitation at issue was introduced during trial by virtue of a certified copy of the policy. Under the case law we have recited, this is all American Family was required to do to obtain the benefit of the coverage limitation in its policy. Consequently, there was no basis in existing law for the judgment to impose joint and several liability on American Family for the entire amount of the verdict, which was well in excess of the policy limits pleaded and proved by American Family.

¶20 The Pettises concede that none of the applicable authorities require an insurer to do anything more than American Family has done here. However, they argue that in addition to pleading and proving its policy's limits of liability, an insurer faced with a verdict in excess of those limits should also have to reassert those policy limits prior to the entry of judgment, by means of a postverdict motion or otherwise, or else be held to have forfeited that defense. The Pettises argue that this rule is simply "the natural extension of the logic in ***Jansa*** and ***Price***," while American Family argues that the existing law actually demonstrates a judicial policy favoring an insurer's ability to restrict its liability in accord with the underlying insurance agreement.

¶21 We reject the Pettises' invitation to impose this additional burden upon insurers. We have previously expressed our dissatisfaction with formalities

that "serve[] no purpose" and rules that place "form over substance. *See* ***Price***, 166 Wis. 2d at 191. Notably, in ***Price***, we opined that even the current rules seem ill-suited to the procedure and practice in direct-action lawsuits against insurers, as "insurance policy limits are available to the parties through discovery and cannot be presented to the jury." ***Id.*** Thus, we stated that the better rule is that an insurer need not prove its policy limits at trial, but rather upon a proper postverdict motion the circuit court should reduce the verdict as to the insurer so as to reflect those limits. ***Id.*** However, we were (and are) ultimately required to follow supreme court precedent, which requires only that an insurer plead and prove its policy limits. *See* ***id.*** at 191-92.

¶22 The rule the Pettises propose is not a logical extension of either ***Jansa*** or ***Price***. As previously discussed, the issue in those cases was whether an insurer could successfully invoke its policy limits following an excess verdict, despite not having raised those limits as a defense to liability at any prior point in the litigation. The ***Jansa*** and ***Price*** courts simply determined that allowing the insurer to do so would contravene ***Dostal*** and ***Nichols***, which establish what an insurer must do to preserve its rights under an insurance policy when it is named as a direct-action defendant. The Pettises' argument is not based so much on the "logic" of ***Jansa*** and ***Price***, but rather on temporal logic: If an insurer must plead its policy limits and then must prove those limits during trial, why should the insurer not also be required to affirmatively request application of its proven policy limits in order to curb its liability after an excess verdict has been reached?

¶23 The answer is fairly simple, and rooted in existing statutory and case law. Wisconsin's direct action statute imposes liability for insurers "up to the amounts stated in the bond or policy." WIS. STAT. § 632.24. The pleading and proof requirements exist because an insurer must establish the extent of its

coverage obligations to receive the benefit of limited liability under the statute. Once that has been accomplished, however, there is no basis for imposing additional liability. As ***Nichols*** stated, a third party can "only recover from the insurer by virtue of the contract existing between it and its insured, and if the limits and coverage of the policy are properly pleaded and proved, the policy determines the insurer's liability[.]" ***Nichols***, 13 Wis. 2d at 499.

¶24 Indeed, the Pettises do not provide any public policy rationale justifying their proposed rule. Instead, they simply assert that if American Family did not agree with the imposition of complete joint and several liability, it should have filed a timely objection to the judgment's language, or else appealed the judgment. We agree that the judgment's language should have raised a red flag for American Family, as it was arguably inconsistent with American Family's liability as established in the case. But we cannot agree that the failure to object alone undid American Family's compliance with existing law and exposed it to liability to the Pettises that had no basis in fact or in law and which was not contemplated by the contract between it and its insured.

¶25 The Pettises candidly admit their addition of the "jointly and severally" language to the proposed (and ultimately adopted) judgment was a strategic effort to force American Family into an ethical dilemma. The Pettises argue that once the jury returned a verdict in excess of American Family's policy limits, "American Family faced a position at odds with its insured because to assert the policy limit would expose the insured to a personal judgment." They further argue, but without citation to any applicable case authority, that, having previously refused to settle the case within the policy limits, American Family was required either to retain separate counsel for its insured, or to refrain from enforcing its policy limit in order to avoid a bad faith claim. The Pettises reason

that because American Family did not engage separate counsel, it must have decided to waive its policy limit defense. This contention has no support in the record or case law, and we decline to infer American Family's waiver of its policy limits defense from a speculative scenario. Moreover, the fact that American Family did only pay that portion of the judgment up to its policy limit (plus interest and costs) belies the Pettises' speculation. The inclusion of the unqualified "jointly and severally" language in the judgment had no factual or legal basis, regardless of what the Pettises had in mind when they included it in their proposal.

¶26 In sum, we conclude the circuit court properly ordered the judgment satisfied as to American Family. It is undisputed that American Family has paid its full policy limit, plus an additional amount in accrued interest and statutory costs. By pleading and proving the applicable policy limit, American Family had done all that was required under the law to maintain the benefit of its limits of liability defense.

By the Court.—Order affirmed.

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