COURT OF APPEALS
DECISION
DATED AND FILED

June 5, 2018

Sheila T. Reiff
Clerk of Court of Appeals

Appeal No. 2017AP460 **Cir. Ct. No. 2014CV1152**

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

DANIEL J. OLMSTED,

PLAINTIFF-APPELLANT,

V.

ERIC W. ROSKOM,

DEFENDANT,

STATE FARM MUTUAL INSURANCE CO.,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Outagamie County: MITCHELL J. METROPULOS, Judge. *Affirmed.*

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 PER CURIAM. Daniel Olmsted appeals a judgment denying his claim for interest pursuant to WIS. STAT. § 628.46 (2015-16).[1] We conclude Olmsted is not entitled to interest under § 628.46 and affirm.

BACKGROUND

¶2 This matter stems from a personal injury lawsuit arising out of a motor vehicle accident that occurred on February 26, 2013. Olmsted and his wife were traveling from Appleton to their home in Bear Creek during a snowstorm, when an oncoming vehicle driven by Eric Roskom hit a snowdrift and veered into the Olmsted vehicle. As a consequence of the accident, Olmsted suffered personal injuries and required a discectomy at level C5-6 of his cervical spine.

¶3 On April 18, 2014, Olmsted sent copies of medical treatment records to State Farm Mutual Insurance Company (State Farm), which was Roskom's liability insurer. On April 23, 2014, Olmsted, by his attorney, sent a $250,000 settlement demand to State Farm, offering to settle all claims under Roskom's underlying policy, as well as under Olmsted's own underinsured motorist coverage policy with State Farm. This settlement offer also included settlement of the derivative claims of Olmsted's wife, as well as Olmsted's assumption of the subrogation claim of Blue Cross Blue Shield of Illinois.[2] The settlement demand also stated that it was "subject to the requirements set forth in WIS. STAT. § 628.46."

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

[2] The April 23, 2014 settlement demand package included an itemization of past and future special damages totaling $135,811.21. This amount was below the limit of Roskom's underlying insurance policy, which was $150,000.

¶4 On July 21, 2014, Olmsted sent correspondence to State Farm stating that he had "submitted a settlement demand to your adjuster … on April 23, 2014 … on behalf of Daniel J. Olmsted … to settle his liability claim against your insured, Eric Roskom, for $150,000—the limits of liability insurance which Mr. Roskom purchased from your company." The July 21 correspondence further stated:

> In response to our settlement demand, [your adjuster] informed me on May 14, 2014 that State Farm first wanted to have Mr. Olmsted submit to a medical examination by State Farm for the purpose of "clarifying" whether his cervical surgery was causally related to his claims against Mr. Roskom and your company. On May 28, 2014, I spoke with [your adjuster] again and he confirmed that your company's position regarding first wanting an examination of Mr. Olmsted, before responding to our settlement offer, had not changed.

The July 21, 2014 correspondence also stated:

> As a show of good faith on our part, we are extending an opportunity to State Farm to pay its liability limits of $150,000 in exchange for a full release of all claims against Mr. Roskom, until August 22, 2014. In the event such a settlement occurs, my client will reserve his rights against State Farm pursuant to his insurance contract with your company. If State Farm fails to accept our offer, our offer will be withdrawn and it will not thereafter be renewed.

¶5 On September 29, 2015, a doctor hired by State Farm conducted an independent medical examination of Olmsted. On November 5, 2015, Olmsted served State Farm with "Plaintiff's Amended Offer of Settlement to Defendant, Eric Roskom," offering to settle "all of his individual personal injury claims against Eric W. Roskom" for the sum of $150,000. The amended offer of settlement reserved only Olmsted's claim for underinsured motorist coverage under his own State Farm policies, and it agreed to indemnify Roskom against any

subrogation claims. It did not contain any reservation regarding WIS. STAT. § 628.46 interest.

¶6 On November 12, 2015, Roskom and State Farm served Olmsted with their notice of acceptance of Olmsted's amended offer. On November 25, 2015, State Farm tendered to Olmsted a settlement check in the amount of $150,000. On December 8, 2015, after initially disputing the language of the release of claims, Olmsted executed a release that included the following language:

> Daniel J. Olmsted reserves his underinsured motorist claims against his coverages with State Farm Mutual Automobile Insurance Company which were in effect on February 26, 2013. Daniel J. Olmsted also reserves this [sic] rights under WIS. STAT. § 628.46 regarding the payment of this $150,000.00 although State Farm takes the position that he has no such rights.
>
> This is a full and final release of Eric W. Roskom in all respects but only a full and final release of State Farm as to the payment of the liability limit under policy number 3139-119-49C.

¶7 On August 16, 2016, Olmsted filed a "Notice of Motion and Motion for Judgment Against State Farm, As Insurer For Eric W. Roskom, Awarding Interest Pursuant To WIS. STAT. § 628.46." Olmsted sought twelve percent interest from May 24, 2014 (thirty days after service of his initial settlement offer), in the amount of $27,419.18 plus costs.

¶8 The circuit court denied the motion. The court concluded the November 2015 amended offer of settlement was made to both Roskom and State Farm. It also found the amended offer of settlement did not reserve the claim for WIS. STAT. § 628.46 interest. Further, the court found that a question remained regarding Olmsted's own liability or negligence to be determined at the time of

trial, as well as a potential dispute over the amount of damages, such that the damages were not in a sum certain amount. Olmsted now appeals.

DISCUSSION

¶9 Although not delineated as such in Olmsted's circuit court motion,[3] this case is before us on what is akin to review of a motion for summary judgment on the question of entitlement to statutory prejudgment interest under WIS. STAT. § 628.46. *See* ***Casper v. American Int'l S. Ins. Co.***, 2017 WI App 36, ¶14, 376 Wis. 2d 381, 897 N.W.2d 429. We review such motions de novo, benefitting from the circuit court's analysis. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315-17, 401 N.W.2d 816 (1987). To be entitled to judgment in a case such as this, the moving party must prove that no genuine issue exists as to any material fact and that the moving party is entitled to judgment as a matter of law. ***Lambrecht v. Estate of Kaczmarczyk***, 2001 WI 25, ¶¶20-24, 241 Wis. 2d 804, 623 N.W.2d 751. Moreover, the question of whether § 628.46 applies to particular facts presents a question of law we review independently. *See* ***Casper***, 376 Wis. 2d 381, ¶15.

¶10 An insurer's liability for interest on claims that are overdue was created by WIS. STAT. § 628.46(1), which provides:

> A claim shall be overdue if not paid within 30 days after the insurer is furnished with written notice of the fact of a covered loss and of the amount of the loss. … Any payment shall not be deemed overdue when the insurer has reasonable proof to establish that the insurer is not responsible for the payment, notwithstanding that written notice has been furnished to the insurer.

[3] Olmsted's motion in the circuit court failed to delineate the statutory basis on which the motion proceeded.

¶11 The parties initially disagree as to whether Olmsted lost any claim to interest under WIS. STAT. § 628.46 for his third-party claim against Roskom by settling that claim without expressly reserving a right to such interest. Assuming without deciding that Olmsted reserved a valid claim for § 628.46 interest, we conclude Olmsted failed to satisfy the conditions for triggering the recovery of § 628.46 interest as set forth in ***Kontowicz v. American Standard Insurance Co.***, 2006 WI 48, ¶55, 290 Wis. 2d 302, 714 N.W.2d 105.

¶12 In ***Kontowicz***, our supreme court answered the question of whether WIS. STAT. § 628.46 interest can be awarded in cases of third-party liability claims for personal injury. ***Id.***, ¶48. It held the phrase "every insurance claim" in the statute's language encompassed such claims. ***Id.***, ¶27. However, the court limited awards of § 628.46 interest to third-party claimants "to only those situations in which three conditions to trigger interest are met." ***Id.***, ¶48. ***Kontowicz*** required third-party claimants to show: first, that there is "no question" of the insured's liability; second, that there is a sum certain of plaintiff's damages; and third, that the insurer received written notice of liability and the sum certain damages. ***Id.***

¶13 ***Kontowicz*** noted that WIS. STAT. § 628.46 does not apply if the insurer has reasonable proof that it is not responsible. ***Id.*** The court defined "reasonable proof" for purposes of the statute as "that amount of information which is sufficient to allow a reasonable insurer to conclude that it may not be responsible for payment of a claim." ***Id.***

¶14 Here, the circuit court found the first two conditions set forth in ***Kontowicz*** were not met. As to whether there was "no question" of the insured's liability under ***Kontowicz***'s first condition, the court determined that "it's not uncommon for accident cases, vehicular accident cases, for there to be some

liability placed upon a plaintiff, even in clear liability cases, so I don't think necessarily that [the] first element is satisfied." The court further stated: "Second, whether the damages were a sum certain, obviously the plaintiff can give notice of what their claim is, but certainly there may have been a dispute that, had this matter been litigated, as to whether, especially those medical bills, were reasonable." The court concluded that "if there had been a trial in the matter, that issues of responsibility and a reasonable amount of damages may very well ha[ve] likely been disputed."

¶15 We agree with the circuit court that the first and second conditions of ***Kontowicz*** were not met in this case. Regarding the first condition—i.e., there being no question of liability on the part of the insured—the ***Kontowicz*** court found the condition was satisfied, apparently based on the tortfeasors' admissions of liability. *See* ***Casper***, 376 Wis. 2d 381, ¶41. That finding does not mean that such admissions are a prerequisite to concluding that there is no question of liability on the part of the insured. ***Id.*** However, State Farm and Roskom questioned Roskom's liability in this case, and we cannot say, given the facts of record, that there is "no question" of liability on the part of Roskom.

¶16 In the circuit court, Olmsted argued that liability was never fairly debatable. In this regard, Olmsted relied upon the motor vehicle accident report, indicating Roskom was cited for driving too fast for conditions. However, Olmsted concedes in his appellate briefs that motor vehicle accident reports are not admissible at trial. Olmsted nevertheless contends, without citing supporting legal authority, that "there is no reason why the trial judge couldn't consider the facts as summarized in that report to conclude that there 'was no question of liability' on the part of Roskom." We shall not consider unsupported arguments

and will not further address this contention. ***M.C.I., Inc. v. Elbin***, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988).

¶17 Olmsted also argued below that the deposition testimony of Olmsted and Roskom clearly established Roskom's causal negligence for Olmsted's injuries. Olmsted's motion for WIS. STAT. § 628.46 interest stated the "grounds for this Motion are set forth in the attached 'Affidavit of [Olmsted's attorney].'"[4] The attorney's affidavit purported to characterize the deposition testimony of Olmsted and Roskom. According to the attorney's affidavit, Olmsted's deposition testimony established that prior to the accident, Olmsted drove at a speed of only twenty-five to thirty miles-per-hour because of the snowstorm. Olmsted noticed there was a snowdrift building on the highway, and another vehicle was approaching from the north. As a result, Olmsted steered his car toward the right shoulder while also trying to slow down, but Roskom never slowed down.

¶18 We note in this regard that the depositions of Olmsted and Roskom were conducted on August 26, 2015, long after the April 23, 2014 initial settlement demand, the date from which Olmsted claimed WIS. STAT. § 628.46 applied. More important, however, is that Roskom's negligence at the time of the accident is far from clear. A review of Roskom's deposition testimony establishes that Roskom testified that he had never exceeded thirty to thirty-five miles-per-hour because of the snow, and he had engaged the four-wheel drive in his vehicle. Roskom further testified that he felt he was driving at a prudent speed but, despite

[4] We note that significant portions of the attorney's affidavit supporting the motion in the circuit court were not based on personal knowledge and did not contain evidentiary facts such as they would be admissible in evidence, including statements of law. *See* WIS. STAT. § 802.08(3). Moreover, the attorney's affidavit did not provide citations to the pages of the Olmsted or Roskom deposition transcripts purportedly relied upon.

his precautions, the extenuating circumstances of the severe weather caused the accident. Specifically, Roskom testified that the accident was caused by a snowdrift, and, as soon as he felt his vehicle slide, he took corrective action by applying the brakes and turning the steering wheel. Roskom did not know why his vehicle slid on this snowdrift when it did not slip on any of the snowdrifts he had previously driven through that day. In fact, Olmsted himself testified that in the five-mile stretch from Appleton to the accident, there had been no sliding of his car.

¶19 In determining negligence, the law does not impose an absolute duty to prevent harm, and the fact that an automobile accident occurs does not mandate the finding that someone has been negligent. *See* ***Millonig v. Bakken***, 112 Wis. 2d 445, 452-57, 334 N.W.2d 80 (1983). In the present case, while a jury may have been entitled to draw the conclusion that Roskom was negligent in the operation of his vehicle, that is not the question presented by ***Kontowicz***'s first condition. Like the circuit court, we cannot say in the present case that "there can be no question of liability on the part of the insured." ***Kontowicz***, 290 Wis. 2d 302, ¶55. Nor are we persuaded that there is "no question" that Olmsted's purported damages were so great that after reduction for any contributory negligence, his damages would still "vastly exceed" Roskom's liability limits. We conclude the first condition of ***Kontowicz*** is not met.

¶20 Because we conclude the present case does not satisfy the "no question of liability" condition, we need not address the remaining conditions. However, we note as to the second condition, the ***Kontowicz*** court stated:

> However, in this case, because Metropolitan had information that there were pre-existing injuries of a similar nature, as well as similar injuries subsequent to the Schoessow accident, and it was fairly debatable as to

> whether the wage loss and medical specials were *all* attributable to the Schoessow accident, we determine that Metropolitan had reasonable proof to establish that it was not responsible for at least a portion of Buyatt's claim. The amount that it was responsible for could not be determined with any certainty. Therefore, interest under WIS. STAT. § 628.46 is not appropriate in Buyatt's case.

Id., ¶54.

¶21 Olmsted's injury complaints included neck and back pain, among other things. Olmsted's medical records indicated a history of back pain, including a discectomy in 2008. State Farm declined the original demand in order to obtain Olmsted's complete medical records, and it also elected to undertake an independent medical examination to establish causation before responding to Olmsted's settlement offer. That examination was conducted on September 29, 2015, shortly before Olmsted served his amended offer of settlement on November 5, 2015. State Farm and Roskom accepted the offer of settlement on November 12, 2015, and State Farm promptly tendered the settlement payment. Due to a history of pre-existing injuries to Olmsted's back, State Farm had reason to believe that it might not be responsible for at least a portion of the claim. State Farm had a right to investigate the claim. In all, the claimed damage amount was not a sum certain at the time of Olmsted's settlement demand, as ***Kontowicz*** requires.

¶22 Accordingly, we conclude Olmsted is not entitled to WIS. STAT. § 628.46 interest in this case. The circuit court properly denied the motion.

By the Court.—Judgment affirmed.

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