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**DISTRICT II**

March 25, 2020

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You are hereby notified that the Court has entered the following opinion and order:

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2019AP611 Kristine M. Farnsworth v. American Family Mutual Insurance Company, S.I. (L.C. #2017CV384)

Before Neubauer, C.J., Gundrum and Davis, JJ.

Defendant WEA Property & Casualty Insurance Company (WEA) appeals from a trial court order finding that Plaintiff Kristine M. Farnsworth was not made whole in her settlement with American Family Mutual Insurance Company (American Family) and that consequently WEA had no right of subrogation. Based upon our review of the briefs and the record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2017-18).[1] We affirm.

In June 2017 Farnsworth brought suit against Macie Hill and Hill's automobile insurer, American Family, for damages arising out of a November 2014 automobile accident. Farnsworth named as a defendant her automobile insurer, WEA, because of its subrogated interest arising by virtue of medical payments it made under its policy. Ten months later, Farnsworth, Hill, and American Family settled Farnsworth's personal injury action for $155,000. WEA then moved for an order requiring Farnsworth to reimburse it $10,000 for medical payments or, in the alternative, to adjudicate the matter at a ***Rimes*** hearing. *See* ***Rimes v. State Farm Mut. Auto. Ins. Co.***, 106 Wis. 2d 263, 271-72, 278-79, 316 N.W.2d 348 (1982) (an insurer is entitled to subrogation if the insured has been made whole for his or her loss, which is determined by a hearing to the court).

The trial court held a ***Rimes*** hearing, at which it considered the following exhibits: photographs of damage to Farnsworth's car; medical reports of Farnsworth's injuries; an itemization of Farnsworth's medical expenses and lost wages, totaling approximately $81,000; a

[1] All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

July 2014 medical record for Farnsworth, stating that she had "NECK PAIN DUE TO AUTO ACCIDENT." The court also heard Farnsworth's testimony, in which she provided a detailed account of her injuries and reasons for settlement. Farnsworth was driving her car and at a stop when Hill rear-ended her, totaling Farnsworth's car. As a result of the accident Farnsworth experienced back pain, which went away, and neck pain, which did not. Farnsworth saw two specialists, neither of whom could cure the neck pain. Farnsworth was told that her neck injury was permanent. In addition to pain, Farnsworth experienced "constant tension" in the right side of her neck and decreased range of motion, making it hard to look to her right. This impacted her job performance as a physical education teacher and gymnastics coach, since those positions required her to be "very physical." She also experienced sleep loss, headaches, and anxiety. Because of the accident, Farnsworth could not participate in activities she used to enjoy, including boating and "four-wheeling." She had never been in an automobile accident before, and she did not have any neck problems prior to her accident.

Farnsworth decided to settle the case, in part, because she had "extreme concern" about the July 2014 medical record, dated four months before the accident with Hill, which stated that she had neck pain caused by an automobile accident. Farnsworth explained that this medical record was incorrect, possibly a clerical error, and that she was likely out of town on the date of that appointment. She was worried that a jury might not believe her, however, so settlement seemed like a safer option than risking a trial. Farnsworth also decided to settle because of "[t]he stress of going to a jury trial" and "[t]he toll [the lawsuit] ha[d] already taken on [her]." Farnsworth believed that she settled for an amount that was "a lot lower" than what she deserved, although she was admittedly unaware of "the range of values that cases like this might … settle for."

The trial court found that Farnsworth's explanation of the "rogue medical record" was credible and that a jury could likely find so as well. The court acknowledged, however, that the medical record could have been a problem for Farnsworth had she gone to trial, given that "[i]t's pretty uncommon to have an important document … be this wrong," and given the likely difficulty of locating the person who made the error. The court also found that "[t]here were increased costs of litigation on the horizon at the time of settlement" which "would have been significant and gave the plaintiff a motivation to settle for less than what [she] otherwise might have gotten at the time of trial." In addition, settlement avoided the "unpleasant" necessity for Farnsworth to submit to an independent medical examination—"a legitimate issue from the plaintiff's perspective." Finally, the court found that there was no "question or doubt … that [the] plaintiff did suffer from permanent type of injuries here. In other words, [the court] believe[d] her when she testified to that effect." In the trial court's view, the "value of this case overall" increased because of the effect of these permanent injuries on the "active lifestyle" of a "younger woman" (Farnsworth was fifty years old at the time). The court concluded that Farnsworth was not made whole by her settlement, "[g]iven the permanent nature of this injury and the sheer amount of medical bills, special damages that she did suffer." The court ruled that as a result, WEA had no right of subrogation.

WEA presents four arguments on appeal. First, it argues that "[t]he ***Rimes*** procedure requires the circuit court to determine the specific monetary amount of the damages an injured party incurred," and that the trial court's failure to do so constitutes reversible error. We find no support in ***Rimes*** or its progeny, however, for the proposition that "the trial court [must] itemize Farnsworth's damages before determining whether she was made whole." Trial courts are certainly free to make such a finding, and did indeed do so in some of the cases to which WEA

cites; however, this was merely incidental to the ultimate finding that the plaintiff had or had not been made whole. *See, e.g.*, ***Drinkwater v. American Family Mut. Ins. Co.***, 2006 WI 56, ¶10, 290 Wis. 2d 642, 714 N.W.2d 568 (finding total damages of $424,000 and itemizing those damages); *but see* ***Employer's Mut. Cas. Co. v. Kujawa***, 2015 WI App 26, ¶5, 361 Wis. 2d 213, 861 N.W.2d 808 (not itemizing damages and merely finding "that it would have taken 'somewhere between fifteen and twenty' thousand dollars to make Kujawa whole"). It is also true that portions of the ***Rimes*** decision, taken in isolation, lend superficial support to WEA's position. *See* ***Rimes***, 106 Wis. 2d at 265 ("The court found … that … Rimes sustained damages in the amount of $300,433.54"); ***id.*** at 277 ("The assumption on which the trial judge proceeded was that, under the circumstances, only a trial in which the various items of damages would be ascertained could determine what sum would have made the plaintiffs whole…. [W]e conclude the trial judge proceeded appropriately."). Read in its entirety, however, ***Rimes*** requires only a final determination as to whether the insured has been made whole. ***Id.*** at 271-72, 279.

WEA next argues that the trial court improperly considered attorney fees and litigation costs as an element of Farnsworth's damages. *See* ***Oakley v. Fireman's Fund of Wis.***, 162 Wis. 2d 821, 830-31, 470 N.W.2d 882 (1991) (attorney fees are not an element of damages, and an insured is "made whole" even if attorney fees decrease the amount recovered from the tortfeasor). As summarized above, however, the trial court did not discuss attorney fees at all, and only considered future litigation costs insofar as they impacted Farnsworth's desire to settle her case. There is no support in the record for WEA's position that the trial court factored costs and fees into its determination that $155,000 did not make Farnsworth whole.

WEA further asserts that the made-whole doctrine does not apply to this action as a matter of law: "[t]he settlement is half of the American Family policy limit of $300,000 per person, and

almost twice [Farnsworth's] special damages … [and so] is sufficient to cover Farnsworth's claim and WEA's $10,000 medical payment lien. Therefore … WEA is entitled to recover regardless of whether Farnsworth was made whole." However, we have rejected this reasoning in the context of personal injury cases, which often involve damages disputes, and where, as determined by the trial court here, settlement results in a limited pool of funds between plaintiff and insurer. ***Kujawa***, 361 Wis. 2d 213, ¶¶8-11. WEA's reliance on ***Muller v. Society Ins.***, 2008 WI 50, ¶¶39-41, 60, 87, 309 Wis. 2d 410, 750 N.W.2d 1, which ***Kujawa*** distinguishes on these very points, is therefore misplaced. *See* ***Kujawa***, 361 Wis. 2d 213, ¶¶8-10.

Finally, WEA argues that Farnsworth has not demonstrated that she was not made whole by the settlement. WEA disputes the extent of Farnsworth's injuries and questions her motivations for settlement. We review these findings of fact under the "clearly erroneous" standard, giving "due regard … to the opportunity of the trial court to judge the credibility of the witnesses." WIS. STAT. § 805.17(2). A finding of fact is "clearly erroneous" where "it is against the great weight and clear preponderance of the evidence." ***Phelps v. Physicians Ins. Co. of Wis., Inc.***, 2009 WI 74, ¶39, 319 Wis. 2d 1, 768 N.W.2d 615. We search the record not for evidence opposing the trial court's factual findings, but for evidence in support, and we affirm so long as the evidence would permit a reasonable person to reach the same conclusion. ***Royster-Clark, Inc. v. Olsen's Mill, Inc.***, 2006 WI 46, ¶12, 290 Wis. 2d 264, 714 N.W.2d 530. Here we find that the undisputed testimony at the ***Rimes*** hearing, as summarized above, amply shows that Farnsworth's injuries were significant and permanent, that her quality of life was worsened, and that she settled her case for less than she believed it was worth to avoid the "rogue medical record" issue. The trial court's conclusion that Farnsworth's damages were greater than $155,000 was not clearly erroneous.

We therefore affirm the order of the trial court finding that Farnsworth was not made whole in her settlement and that WEA has no right of subrogation.

IT IS ORDERED that the order of the circuit court is summarily affirmed, pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

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*Sheila T. Reiff*
*Clerk of Court of Appeals*