**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

February 6, 2001

**Cornelia G. Clark**
**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* WIS. STAT. § 808.10 and RULE 809.62.**

**No. 99-1954**

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

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**MICHAEL MAKAREWICZ,**

**PLAINTIFF-APPELLANT,**

**v.**

**ALLSTATE INSURANCE COMPANY**
**AND JOHN J. TREMBLAY,**

**DEFENDANTS-RESPONDENTS.**

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APPEAL from a judgment of the circuit court for Milwaukee County: FRANCIS T. WASIELEWSKI, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Schudson, JJ.

¶1 PER CURIAM. Michael Makarewicz appeals from the judgment, following a jury trial, awarding him $11,500, plus costs and disbursements. Makarewicz challenges the trial court's order denying his request for actual

attorney fees and costs. *See* WIS. STAT. § 809.10(4) (1997-98).[1] He argues that the trial court erred in denying his postverdict motion for actual attorney fees and costs for establishing that his automobile insurance policy with Allstate Insurance Company was in force when he was involved in an auto accident. We affirm.

## I. BACKGROUND

¶2 In 1995, Allstate issued an automobile insurance policy to Makarewicz. Makarewicz, however, failed to pay the premiums due in November and December 1996. As a result, Allstate mailed, to the address where Makarewicz resided with his parents, a notice informing Makarewicz that the "insurance afforded under [his] policy" would be cancelled if Allstate did not "receive the **Minimum Amount Due** before the **Cancel Date** and time of: 12:01 a.m. Standard Time on January 7, 1997." Makarewicz denied receiving the notice of cancellation.

¶3 On January 20 or 21, 1997, Makarewicz made a partial premium payment of $160. He explained:

> In January, 1997 [Allstate insurance agent] John Tremblay called my home and spoke with my father. My father and my mother immediately told me that John Tremblay told them that I had to go immediately to Mr. Tremblay's office and pay my automobile insurance premium or it would be cancelled and I would not have any insurance. I think this was on a Saturday. I went to his office that day but he was not there.
>
> I went back to Mr. Tremblay's office the next Monday and paid him $160.00 in cash, all the money I had at the time. He took the money and gave me a receipt … and I told him I'd bring in whatever else I owed the next payday at work. At that time, I was being paid every other

[1] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

> week on Friday …. The records of my employer … show that my first payday after January 20, 1997 would have been January 31, 1997 for the time period through January 23, 1997. Mr. Tremblay said: "See you next Friday." He did not tell me that my insurance was cancelled or that I did not have insurance coverage or that the $160.00 was not sufficient to make sure I continued to have automobile insurance. The clear impression Mr. Tremblay left me, based upon what my father said Mr. Tremblay had told him and based upon what he did and said when I went to his office was that I would continue to have automobile insurance coverage and I would remain covered as long as I brought the rest of the premium in on Friday.

¶4 Tremblay disputed Makarewicz's account of the circumstances surrounding the $160 payment. In a letter to Makarewicz, Allstate summarized its position, stating, in part:

> We have recently received your inquiry through the Wisconsin Commissioner of Insurance concerning the cancellation of [your policy.]
>
> Allstate … has a six (6) month renewal period and a billing system designed to allow the insured to pay premiums in installments, with one payment being due every month. Whenever a payment is missed, the insured is at risk of not having coverage.
>
> Our records indicate this policy began on January 7, 1995 and has renewed at six (6) month intervals until January 7, 1997.
>
> A billing notice was mailed on October 18, 1996 in the amount of $146.16 due by November 7, 1996. No payment was received. On November 18, 1996 the renewal declaration with identification cards attached was mailed.
>
> Due to no payment received for the November premium, a double billing in the amount of $288.21 was mailed on November 18, 1996 due by December 7, 1996. Again, no payment was received. Therefore, a notice of cancellation was mailed on December 18, 1996 in the amount of $462.71 and due in full by January 7, 1997 or coverage would be out of force as of that date. We have attached a copy of this notice ….
>
> ….
>
> A payment in the amount of $160.00 was received on January 21, 1997. However, since this did not pay the minimum amount due in full, the coverage remained out of force as of January 7, 1997.

> Allstate agent John Tremblay contacted you in January to notify you of the cancellation status of your insurance. Mr. Tremblay did this as a courtesy, he was under no obligation to do so. The attached signed statement details the events occurring in his office in which he states you were notified the payment in the amount of $160.00 would not reinstate your insurance coverage.
>
> No further payment was received and this policy terminated February 11, 1997 effective January 7, 1997 with an outstanding amount due of $128.21 for coverage provided until that date.

¶5 On January 27, 1997, Makarewicz was involved in an auto accident. American Family Insurance, the insurer of the other driver involved in the accident, compensated its insured and sought subrogation recovery from Allstate against Makarewicz. American Family then pursued an action against Makarewicz under the provisions of Wisconsin's safety responsibility law, *see* WIS. STAT. §§ 344.12-344.22. Makarewicz ultimately settled the claims filed against him.

¶6 Makarewicz commenced the underlying action against Tremblay and Allstate (collectively, Allstate) to establish that he had coverage under the Allstate policy at the time of the accident.[2] *See* WIS. STAT. §§ 631.36(2) and 631.09(2).[3]

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[2] The record on appeal does not establish exactly *when* Allstate first informed Makarewicz that it denied coverage. At oral argument before this court, however, counsel for Allstate clarified that, in his estimation, Allstate first denied coverage the day after the accident when Tremblay, in his office, informed Makarewicz that his policy had lapsed.

This court ordered oral argument, in part, as a result of certain difficulties in deciphering the partial circuit court record presented on appeal. In response, Makarewicz moved to file an affidavit with documents for reference during oral argument. Allstate objected, and we denied Makarewicz's motion. It is an appellant's responsibility to assure that the record on appeal is complete. ***State v. Koeppen***, 2000 WI App 121, ¶37, 237 Wis. 2d 418, 614 N.W.2d 530, *review denied*, 2000 WI 121, ___ Wis. 2d ___, 619 N.W.2d 92.

[3] WISCONSIN STAT. § 631.36(2) provides, in relevant part:

> MIDTERM CANCELLATION. (a) *Permissible grounds*.… [N]o insurance policy may be canceled by the insurer prior to the expiration of the agreed term except for failure to pay a premium when due ….

(continued)

The jury agreed with Makarewicz, answering "Yes" to the following questions: (1) "Did John Tremblay represent to [Michael's father,] Robert Makarewicz[,] that a partial premium payment would continue Michael Makarewicz'[s] automobile liability policy in force to at least January 31, 1997?"; and (2) "Did the statement of John Tremblay cause Michael Makarewicz to make less than the full premium payment owing?"[4]

¶7 In his postverdict motions, Makarewicz requested, among other things, "supplemental relief … under Section 806.04(8), Stats., together with actual attorneys fees for the litigation of this matter in the amount of $ 65,870.00 and actual costs in the amount of $ 2,429.06 incurred in establishing … coverage" under the Allstate policy. In the alternative, he also asked the trial court, "if the Court deems it necessary," to "grant [him] the right to amend his complaint, pursuant to Section 802.09(2) Stats., to ask for such declaratory relief." The trial court denied Makarewicz's "motion for an award of actual attorney's fees and expenses."[5]

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WISCONSIN STAT. § 631.09(2) provides:

> ACTS OF AGENT. A failure by any policyholder or insured to perform an act required to perfect his or her rights under the policy, or failure to perform the act in the time and manner prescribed, does not affect the insurer's obligations under the policy if the failure was caused by an act, statement or representation or omission to perform a duty by an agent of the insurer who has apparent authority, whether or not the agent was within the actual scope of the agent's authority.

[4] The jury also found that $11,500 would compensate Makarewicz for the damages he incurred as a result of the denial of coverage, and that Allstate had not acted in bad faith in denying coverage.

[5] In its order addressing Makarewicz's postverdict motions, the trial court indicated that it had "placed its decisions and the reasons therefore on the record." The trial court's rationale for its denial of Makarewicz's motion for attorney fees and costs, however, is not revealed by the record.

## II. DISCUSSION

¶8 Challenging the trial court's denial of his request for actual attorney's fees and expenses, Makarewicz argues that, under ***Elliott v. Donahue***, 169 Wis. 2d 310, 485 N.W.2d 403 (1992), and WIS. STAT. § 806.04(8), he is entitled to attorney fees and costs because, as the supreme court held in ***Elliott***, that statute "recognizes the principles of equity" and "permits the recovery of reasonable attorney fees incurred by the insured in successfully establishing coverage." ***Elliott***, 169 Wis. 2d at 314. He maintains that the ***Elliott*** holding applies "regardless of whether the establishment of coverage occurs in the context of a lawsuit brought against the insured by a third party, or after the insured has resolved the third party's claim and then brings an action against his or her insurer to establish coverage."

¶9 Allstate responds that, in ***Ledman v. State Farm Mutual Automobile Ins. Co.***, 230 Wis. 2d 56, 601 N.W.2d 312 (Ct. App. 1999), *review denied*, 2000 WI 21, 233 Wis. 2d 84, 609 N.W.2d 473, this court "further clarified the limited extent to which ***Elliott*** allows for the recovery of actual attorney fees" by declaring: "Attorney's fees should only be awarded in limited circumstances: when an insurer breaches its duty to defend an insured." ***Ledman***, 230 Wis. 2d at 70. Here, Allstate argues, "Allstate did not breach its duty to defend the plaintiff and there was no claim in [Makarewicz's action to establish coverage] that it had done so."

¶10 Whether an insured is *eligible* to recover attorney fees and costs incurred in an action to establish insurance coverage presents a question of law this court decides independently, without deference to the trial court's determination. *See* ***DeChant v. Monarch Life Ins. Co.***, 200 Wis. 2d 559, 568, 547

N.W.2d 592 (1996); ***Gloudeman v. City of St. Francis***, 143 Wis. 2d 780, 784, 422 N.W.2d 864 (Ct. App. 1988). The decision whether to *award* attorney fees and costs, however, falls within the trial court's discretion. *See* WIS. STAT. § 806.04(8), (10).[6] We must sustain a trial court's discretionary act if the trial court "examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach." ***Loy v. Bunderson***, 107 Wis. 2d 400, 414-15, 320 N.W.2d 175 (1982).

¶11 In ***Elliott***, Elliott sued Donahue for damages resulting from injuries sustained in an auto accident. ***Elliott***, 169 Wis. 2d at 314. Donahue tendered the defense to Heritage Mutual Insurance Company, but Heritage, maintaining that Donahue did not have permission to drive the insured vehicle, denied coverage under the non-permissive use exclusion of the policy. ***Id.*** at 314-15. Thus, Donahue retained counsel. ***Id.*** at 315. Despite an order for a bifurcated trial, damages and coverage were tried together. ***Id.*** The jury found that Donahue had permission to drive the insured vehicle and, therefore, the trial court entered judgment finding that he was covered under the Heritage policy. ***Id.*** Heritage then assumed Donahue's defense and settled the claims against him. ***Id.***

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[6] WISCONSIN STAT. § 806.04(8) provides:

> SUPPLEMENTAL RELIEF. Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper. The application therefor shall be by petition to a court having jurisdiction to grant the relief. If the application be deemed sufficient, the court shall, on reasonable notice, require any adverse party whose rights have been adjudicated by the declaratory judgment or decree, to show cause why further relief should not be granted forthwith.

WISCONSIN STAT. § 806.04(10) provides: "In any proceeding under this section the court may make such award of costs as may seem equitable and just."

¶12 Donahue sought to recover his actual attorney fees and costs of litigation. ***Id.*** The trial court denied his request. ***Id.*** This court reversed, in part, concluding that Donahue was entitled to recover costs and actual attorney fees incurred in defending against the damages claim but, under the American Rule, was not permitted to recover attorney fees with respect to contesting Heritage's denial of coverage. ***Elliott v. Donahue***, 163 Wis. 2d 1059, 1062, 473 N.W.2d 155 (Ct. App. 1991), *rev'd*, 169 Wis. 2d 310, 485 N.W.2d 403 (1992). On further appeal, the supreme court thus considered whether an insured may recover attorney fees incurred in successfully establishing coverage[7] in the course of defending against an action for damages. ***Elliott***, 169 Wis. 2d at 314-16.

¶13 The supreme court concluded that, under the policy provision obligating Heritage to reimburse an insured for any "reasonable expenses incurred at [the insurer's] request," Donahue was permitted to recover reasonable attorney fees incurred in establishing coverage. ***Id.*** at 319. The court explained: "Initiating an action which imposes an obligation on the part of the insured to successfully [establish] coverage is the equivalent of requesting the insured to incur reasonable expenses. Therefore, the attorney fees incurred by Donahue in successfully [establishing] coverage under the policy represent[] expenses incurred at Heritage's request." ***Id.***

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[7] In ***Elliott v. Donahue***, 169 Wis. 2d 310, 485 N.W.2d 403 (1992), the supreme court alternated between characterizing Donahue's efforts as an insured's attempt either to *defend* coverage or to *establish* coverage. The former terminology is misleading; in this opinion, therefore, we will consistently refer to an insured's efforts to *establish* coverage.

***Elliott*** is unnecessarily confusing in one other respect. Initially and ultimately, the supreme court states its holding exclusively with reference to WIS. STAT. § 806.04(8). ***Id.*** at 314, 324. Elsewhere, however, it articulates its conclusion exclusively with reference to WIS. STAT. § 806.04(10). ***Id.*** at 319. Clearly, *both* statutes relate to the supreme court's rationale.

¶14 The supreme court, however, then stated that it "need not rely on this line of reasoning [based on the policy provision] because sec. 806.04(10), Stats., which recognizes the equities of the situation, permits a recovery of attorney fees by the insured." ***Id.*** The court reiterated that an insurance policy is "a unique type of legally enforceable contract" requiring an insurer, in return for the insured's premiums, to "assume[] the contractual duties of indemnification and defense for claims described in the policy." ***Id.*** at 320. Thus, the court declared:

> The insurer that denies coverage and forces the insured to retain counsel and expend additional money to establish coverage for a claim that falls within the ambit of the insurance policy deprives the insured [of] the benefit that was bargained for and paid for with the periodic premium payments. Therefore, the principles of equity call for the insurer to be liable to the insured for expenses, including reasonable attorney fees, incurred by the insured in successfully establishing coverage.

***Id.*** at 322.

¶15 Makarewicz asserts that his circumstances differ from those of Donahue in only one way: Donahue established coverage in an action brought by the third-party claimant; he (Makarewicz) established coverage in a separate suit subsequent to a third party's action under the Wisconsin safety responsibility law. Makarewicz explains:

> [He] stands in nearly the exact same shoes as Donahue did: a third party's liability claim was presented against each of them. Their liability insurers each refused to indemnify or defend them. They each had to "retain counsel and expend additional money to establish coverage for a claim that falls within the ambit of the insurance policy[." *See* ***Elliott***, 169 Wis. 2d at 322.] The fact that [he] had to first defend himself against the third party's revocation of his driver's license in the forum of the Wisconsin Safety Responsibility Law, Ch. 344, rather than in an action filed in Circuit Court, is a distinction without a meritorious difference. Having been forced to indemnify and defend himself in that forum he then had to file an action against his insurer in circuit court to establish that there <u>was</u> a policy of insurance in existence on the day of

> the accident which provided coverage, something Donahue did arguably much later in the game than [he] did, and without the benefit of any request for equitable relief.

¶16 ***Elliott***, however, is distinguishable. In ***Elliott***, unlike the instant case, it was undisputed that: (1) an insurance contract was in effect at the time of the accident; (2) a complaint had been filed against the insured; (3) the insured had tendered the defense to the insurer; and (4) although the insurer had initially denied coverage, once coverage had been established in a bifurcated trial, it immediately assumed the insured's defense. ***Elliott***, 169 Wis. 2d at 314-15. At the very least, here, unlike the situation in ***Elliott***, the record does not establish that Makarewicz was sued or, if he was, that his defense was tendered to Allstate.

¶17 "A tender of defense occurs once an insurer has been put on notice of a claim against the insured." ***Towne Realty, Inc. v. Zurich Ins. Co.***, 201 Wis. 2d 260, 267, 548 N.W. 2d 64 (1996). Moreover, "the duty to defend is not based on 'extrinsic evidence,' but is, as the supreme court has said, 'triggered by the allegations contained within the four corners of the complaint.'" ***Kenefick v. Hitchcock***, 187 Wis. 2d 218, 232, 522 N.W.2d 261 (Ct. App. 1994) (citation omitted).

¶18 We understand Makarewicz's implicit argument that, given Allstate's denial of the existence of an insurance policy covering his accident, such notice and specification of the allegations may seem immaterial. Still, the rather uncertain record in this case does not allow for the leaps that would be required to grant Makarewicz relief. The record simply does not establish the nature, substance and timing of American Family's action against Makarewicz under the safety responsibility law. Without such clarification, and notwithstanding Allstate's concession at oral argument that it denied coverage the

day after the accident, we are unable to conclude that Makarewicz had a claim filed against him that could have triggered Allstate's duty to defend.[8]

*By the Court.*—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (1999-2000).

[8] Makarewicz also challenges the trial court's denial of his postverdict motion to amend the complaint to allege a claim for declaratory judgment establishing coverage. His premise is that without the trial court's declaration that he was entitled to coverage under the Allstate policy, he "would not be entitled to judgment against Allstate under the facts as found by the jury."

Ironically, it is Allstate that, on appeal, clarifies that Makarewicz's "effort to obtain an award of actual fees by amending his complaint so as to allege a claim for declaratory judgment based upon § 806.04, Stats., was not necessary for [him] to receive the relief he sought through this litigation." Allstate is correct and, as Makarewicz ultimately acknowledges (in his reply brief and in his brief in opposition to Allstate's motion to reconsider this court's order allowing Makarewicz to file a supplemental appendix), in ***Elliott***, a declaratory judgment was neither requested nor provided. That, however, did not prevent the supreme court from awarding attorney fees.

Thus, although once the jury found, in ***Elliott***, that Donahue had permission to drive, and once the jury found, in the instant case, that Makarewicz had coverage, it might have been appropriate, as a formality, to amend the pleadings to include a declaratory judgment claim, such an amendment is not a prerequisite to the award of costs and attorney fees under the policy or under WIS. STAT. § 806.04(8), (10). *See* ***Hough v. Dane County***, 157 Wis. 2d 32, 48-49, 458 N.W.2d 543 (Ct. App. 1990) (where "separate declaratory ruling … would make no difference and would confer no additional benefit," court may deny request for declaratory judgment).