COURT OF APPEALS
DECISION
DATED AND FILED

November 15, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP2838 **Cir. Ct. No. 2004CV340**

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

BRIDGET HORN,

PLAINTIFF-RESPONDENT,

V.

AMERICAN COUNTRY INSURANCE COMPANY,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Kenosha County: BARBARA A. KLUKA, Judge. *Affirmed.*

Before Snyder, P.J., Brown and Nettesheim, JJ.

¶1 PER CURIAM. Bridget Horn was injured while a passenger in a taxicab. She recovered a default judgment against Keno Cab Company, Inc., and its driver, David Threlkeld, and then took an assignment of their potential claim against American Country Insurance Company for a violation of the duty to

defend. American Country appeals from a judgment that it breached its duty to defend. We affirm the circuit court's summary judgment ruling.

¶2 The accident occurred February 2, 2001. Threlkeld was operating a 1986 Chevy taxicab. American Country had issued a business auto policy to Keno Cab effective January 23, 2001 to January 23, 2002. The 1986 Chevy taxicab was not listed on the schedule of covered automobiles. A letter of April 19, 2001 informed Horn that the cab involved in the accident was not listed on the policy and there was no coverage for her claim.

¶3 Horn commenced a suit against Keno Cab and Threlkeld on April 19, 2002. Neither Keno Cab nor Threlkeld filed a timely answer to the complaint. On October 24, 2002, Keno Cab demanded that American Country provide a defense in the action commenced by Horn. A copy of the complaint was provided to American Country. American Country did nothing. Horn filed a motion for a default judgment in her action against Keno Cab and Threlkeld on January 16, 2003. The motion was heard and granted April 16, 2003.

¶4 Based on the assignment of rights from Keno Cab and Threlkeld, this action was filed March 2, 2004. Horn's motion for summary judgment was granted. Judgment was entered against American Country for the entire amount of the default judgment against Keno Cab and Threlkeld plus interest, a total sum of $224,622.39.

¶5 Where, as here, there is no dispute as to the facts, the determination of whether an insurer has breached its contractual duty to defend is a question of law that we decide independently of the circuit court. *See* ***Elliott v. Donahue***, 169 Wis. 2d 310, 316, 485 N.W.2d 403 (1992). "The duty to defend is triggered by the allegations contained within the four corners of the complaint." ***Newhouse v.***

Citizens Sec. Mut. Ins. Co., 176 Wis. 2d 824, 835, 501 N.W.2d 1 (1993). It is the nature of the claim being asserted against the insured that determines the existence of the duty to defend and the determination has nothing to do with the merits of the claim. ***Radke v. Fireman's Fund Ins. Co.***, 217 Wis. 2d 39, 43, 577 N.W.2d 366 (Ct. App. 1998). An insurer's duty to defend is broader than its duty of indemnification and an insurer who refuses to provide a defense does so at its own peril. ***Elliott***, 169 Wis. 2d at 320-21.

¶6 American Country first argues that Keno Cab and Threlkeld forfeited the right to coverage by failing to give American Country timely and reasonable notice of the lawsuit. However, the failure of the insured to provide adequate notice, which prejudices the insurer, only negates the insurer's duty of indemnification; the lack of reasonable notice is a coverage defense. *See* ***Neff v. Pierzina***, 2001 WI 95, ¶2, 245 Wis. 2d 285, 629 N.W.2d 177 (determination that insured breached the obligation to provide insurer with timely notice of the accident and that the breach prejudiced the insurer eliminated coverage); see also WIS. STAT. § 632.26 (2003-04).[1] If American Country breached its duty to defend, it may not contest coverage. ***Radke***, 217 Wis. 2d at 48. Seeing that the duty to defend is broader than the duty to indemnify, it is not appropriate to address American Country's claim that its insured breached the contract first. That is akin to putting the cart before the horse.

¶7 "To determine whether a duty to defend exists, the complaint claiming damages must be compared to the insurance policy and a determination

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

made as to whether, if the allegations are proved, the insurer would be required to pay the resulting judgment." ***School Dist. of Shorewood v. Wausau Ins. Cos.***, 170 Wis. 2d 347, 364-65, 488 N.W.2d 82 (1992). Horn's complaint against Keno Cab and Threlkeld alleged that Horn sustained personal injury as a result of negligence in the operation of a motor vehicle owned by Keno Cab.[2] American Country's policy provides that it will pay "all sums an 'insured' legally must pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies, caused by an 'accident' and resulting from the ownership, maintenance or use of a covered 'auto.'" The nature of the claim is covered by American Country's policy.

¶8 American Country contends that the 1986 Chevy taxicab was not a covered auto and all parties knew that the taxicab was not covered. Nothing in Horn's complaint identified the exact taxicab operated by Threlkeld at the time of the accident. In Wisconsin the duty of an insurer to provide a defense to its insured is determined solely from the allegations contained in the complaint; extrinsic facts are not considered. ***Professional Office Bldgs., Inc. v. Royal Indem. Co.***, 145 Wis. 2d 573, 582, 427 N.W.2d 427 (Ct. App. 1988); ***Smith v. State Farm Fire & Cas. Co.***, 127 Wis. 2d 298, 299, 380 N.W.2d 372 (Ct. App. 1985). Comparing the complaint to the policy, there was a duty to defend.

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[2] The complaint also alleged that

> the Defendant, ABC Insurance Company, was at all times material the liability insurer of the Defendants, Keno Cab Company, Inc. and David Threlkeld, and is a proper party Defendant pursuant to the provisions of Section 803.04(2), Wis. Stats., and is by reason of the terms of its policy and the Laws of the State of Wisconsin, directly liable to the Plaintiff for the negligence of its insured as alleged herein.

¶9 We acknowledge that one former member of our supreme court, Justice Donald Steinmetz, believed that the four-corners rule sometimes unfairly compels an insurer to intervene in a suit where, from the insurer's perspective, there is no coverage. *See* ***Elliott***, 169 Wis. 2d at 325 (Steinmetz, J., dissenting) (decision allowing insured to recover costs of defense when coverage is fairly debatable requires that "an insurance company take calculated and expensive risks should it decide to deny coverage, no matter how bizarre the facts"). We have also uncovered an old case from the Fifth Circuit that appears to take the same position as the lone dissent in ***Elliott***. In ***Rowell v. Hodges***, 434 F.2d 926, 929 (5th Cir. 1970), the court adopted the insurer's lament that "the general rule does not take into account the possibility that a divergence may exist between the facts as alleged in the Petition and the actual facts as they are known to the insurer." The court then went on to reject the general rule where there was no dispute about the identity of the vehicle involved in the accident and that it was not the vehicle covered by the policy. ***Id***. at 929-930. In such a case, the court held, the insurer's refusal to provide a defense was justified. ***Id***. at 930. The court reasoned that, in its view, it was "completely illogical" to say that regardless of what was undisputedly determined as to the identity of the vehicle involved in the accident, the mere allegation that the insured was "operating an automobile" puts a legal obligation on the insurer to step into the lawsuit, take up the defense, prove what was already known regarding the identity of the automobile and then hand the defense back to the defendant and step out of the case. ***Id***. at 929. The court wrote: "In a sense, to say here, that the [insurer] must gauge its obligation strictly by the pleading called a Complaint, and put blinders on, so to speak, to what it actually knows and has definitely ascertained, is somewhat archaic, considering the nature of our present system of notice pleading." ***Id***. at 930.

¶10 No other justice joined Justice Steinmetz in ***Elliott***. Since six members of the court rejected the rationale espoused by Justice Steinmetz, and since his rationale was similar to the rationale expressed by the court in ***Rowell***, we can, with confidence, be certain that it rejected the ***Rowell*** rationale by implication. We are bound by ***Elliott***. More to the point, we cite with approval the rationale of the Illinois appellate court in ***Chandler v. Doherty***, 702 N.E.2d 634, 640 (Ill. App. Ct. 1998). The court there rejected the ***Rowell*** rationale, saying: "[W]e do not recognize the legal efficacy of an argument suggesting everyone knew something, when the very purpose of some litigation is to resolve a dispute over who knew what and whether what they thought they knew is actually true." We could not say it better.

¶11 Just as we are bound by ***Elliott***, we are also bound by existing precedent that extrinsic facts cannot be considered in determining the duty to defend. *Cf.* ***State v. Clark***, 179 Wis. 2d 484, 493, 507 N.W.2d 172 (Ct. App. 1993), and ***Ranft v. Lyons***, 163 Wis. 2d 282, 299-300 n.7, 471 N.W.2d 254 (Ct. App. 1991). American Country cites ***Kenefick v. Hitchcock***, 187 Wis. 2d 218, 232, 522 N.W.2d 261 (Ct. App. 1994), as approving the use of extrinsic facts to resolve the duty to defend. American Country ignores that in ***Kenefick*** a duty to defend was determined to exist until the time that coverage was determined. ***Id.*** There the extrinsic facts were utilized to determine coverage.

¶12 American Country easily could have, and with only a modicum of cost, fulfilled its duty to defend and retained the right to challenge coverage in order to show the court that the vehicle involved in the accident was not insured by it. It could have: (1) entered into a nonwaiver agreement in which it would agree to defend, and the insured would acknowledge the right of American Country to defend coverage; (2) requested a bifurcated trial or declaratory judgment so that

the coverage issue could be resolved before the liability and damage issues; or (3) filed a reservation of rights which would have allowed its insured to pursue its own defense not subject to American Country's control, but American Country would have been responsible for legal fees incurred. ***Radke***, 217 Wis. 2d at 45. These are easy procedures to follow. The choices properly put the horse before the cart, not the cart before the horse, and allow the court and the parties to address important issues in an orderly, timely and cost-effective manner.

¶13 American Country did not pursue any of these options.[3] Rather, it gambled on a more risky option of simply doing nothing. *See* ***id***. As we pointed out by our supreme court's rejection of the ***Elliott*** dissent, and as eloquently stated by the ***Chandler*** court in its rejection of ***Rowell***, the obligation to contest coverage cannot be overcome simply by a claim that everyone knew the taxicab was not covered. American Country's gamble lost since there was potential coverage for the nature of the claim alleged in Horn's complaint against Keno Cab and Thelkeld. American Country had a duty to defend Keno Cab and Threlkeld until coverage was determined.

By the Court.—Judgment affirmed.

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

[3] We reject American Country's suggestion that because Keno Cab and Threlkeld defaulted in Horn's lawsuit, it had no opportunity to appear and contest coverage. A default judgment had not been entered when American County was given notice of the lawsuit.