COURT OF APPEALS
DECISION
DATED AND FILED

September 1, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2009AP1185 **Cir. Ct. No. 2007CV1775**

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

CHICAGO TITLE INSURANCE COMPANY,

PLAINTIFF-APPELLANT,

V.

PATRICE VOSS,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Waukesha County: KATHRYN W. FOSTER, Judge. *Affirmed in part and reversed in part.*

Before Brown, C.J., Neubauer, P.J., and Anderson, J.

¶1 NEUBAUER, P.J. Chicago Title Insurance Company appeals from a declaratory judgment awarding attorney fees and costs to its insured under WIS.

STAT. § 806.04(8) and (10) (2007-08).[1] Patrice Voss requested attorney fees and costs after Chicago Title unsuccessfully challenged the damages owing her under its title insurance policy. The primary issue on appeal is whether the trial court erred in awarding attorney fees to an insured under § 806.04(8) when there was no breach of a duty to defend. We conclude that it did. The supreme court's decision in ***Reid v. Benz***, 2001 WI 106, 245 Wis. 2d 658, 629 N.W.2d 262, reiterates Wisconsin's adherence to the American Rule and clarifies that an award of attorney fees is not permitted under § 806.04(8), absent a finding of a breach of the duty to defend. However, we uphold the trial court's discretionary award of costs under § 806.04(10). We therefore reverse that portion of the judgment awarding attorney fees to Voss and affirm that portion of the judgment awarding costs.

BACKGROUND

¶2 In spring 2003, Voss purchased a residential lot located on Royal Ridge Drive in Oconomowoc, Wisconsin. At the time of purchase, Voss obtained title insurance on her property from Chicago Title. Two years after purchasing the lot and title insurance, Voss was notified by WE Energies of a natural gas easement on her property. Voss then exchanged correspondence with Chicago Title regarding the need to appraise the reduced value of the property caused by the easement.

¶3 After several exchanges, Chicago Title filed suit against Voss on June 28, 2007, seeking a declaratory judgment. Chicago Title claimed that

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

$14,000 was the proper amount covered by the title insurance policy for "the total loss and damages due to the gas pipeline running along the rear lot of the subject as of the effective date of [the discovery of the defect]." Voss's answer alleged that the appraisal procedure and value were wrong and asked the court to declare the dollar amount owed against the policy to be $33,210. Voss did not plead a counterclaim or allege bad faith.

¶4 After a court trial, the court granted judgment in favor of Voss, granting her $62,500 in damages under the title insurance policy. The court then held a hearing on January 27, 2009, on Voss's posttrial claim for attorney fees and costs. The court awarded Voss attorney fees based on the equities of the case pursuant to WIS. STAT. § 806.04(8), finding that the "spirit" of ***Elliott v. Donahue***, 169 Wis. 2d 310, 485 N.W.2d 403 (1992), allows an award of attorney fees. The court noted that the award of attorney fees in this case was one "of first impression." The court additionally awarded Voss $8382 in costs, including mileage, appraiser fees, service fees and deposition and transcript fees.

¶5 In reaching its decision, the court found that Chicago Title "lowballed" Voss and criticized Chicago Title's appraiser for her lack of independence—commenting that the absence of independence was "much closer to the end of bad faith." However, the court also stated that it found no inappropriate conduct on behalf of either party at trial, stating that it "was a hard fought battle for both sides of the aisle." Ultimately, the court determined that when the insured has to "take on [the insurance carrier] to get what you should have coming [to] you for their error … the court is going to award attorney fees."

¶6 On February 9, 2009, the trial court entered judgment in favor of Voss and denied Chicago Title's motion for declaratory judgment. The court

awarded Voss $24,412.50 in attorney fees and $8382.00 for costs. Chicago Title appeals both the award of attorney fees under WIS. STAT. § 806.04(8) and the award of costs under § 806.04(10).

DISCUSSION

Attorney Fees under WIS. STAT. § 806.04(8)

¶7 Wisconsin follows the American Rule regarding attorney fees. ***Elliott***, 169 Wis. 2d at 324-25. The American Rule is the longstanding, common-law principle that litigants must pay their own attorney fees unless there is a statute or enforceable contract providing otherwise or when recovery results from third-party litigation. ***Id.*** at 323; ***Kremers-Urban Co. v. American Emp'rs Ins. Co.***, 119 Wis. 2d 722, 744-45, 351 N.W.2d 156 (1984). Indeed, Wisconsin courts follow the United States Supreme Court's directive that departures from the American Rule require explicit statutory authority. ***Kolupar v. Wilde Pontiac Cadillac, Inc.***, 2004 WI 112, ¶17, 275 Wis. 2d 1, 683 N.W.2d 58 (citing ***Buckhannon Bd. and Care Home, Inc. v. West Virginia Dep't of Health & Human Res.***, 532 U.S. 598, 602 (2001)). Whether the trial court erred in its determination that it had authority to award Voss her attorney fees by extending the holding of ***Elliott*** involves a question of law that we review de novo. *See* ***Reid***, 245 Wis. 2d 658, ¶12.

¶8 Voss contends that an award of attorney fees is consistent with the precedent in ***Elliott*** and proper under WIS. STAT. § 806.04(8), which permits a trial court to award "supplemental relief" in a declaratory judgment.[2]

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

(continued)

¶9 The attorney fees issue in ***Elliott*** arose when an automobile insurance carrier breached its contractual duty to defend its insured against a third-party suit. ***Elliott***, 169 Wis. 2d at 318. The insurance carrier initially denied coverage of the insured and refused to provide a defense. ***Id.*** at 314-15. Suit was filed, and the liability and coverage issues were bifurcated. ***Id.*** However, because the insurer failed to request a stay on the liability claim, the coverage and liability issues were litigated simultaneously. ***Id.*** at 315, 318. As a result, the insured was required to obtain his own counsel and essentially fight two battles at once: one against a third party over liability and the other with his insurance carrier over coverage. *See* ***id.*** at 318. Ultimately, the insured prevailed in establishing coverage, and the insurer then immediately assumed his defense and settled all pending claims against him. ***Id.*** at 315. The insured subsequently filed a motion to recover from the insurer his actual attorney fees and costs incurred in the litigation. ***Id.***

> 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.

We note that Voss additionally cites to § 806.04(10) in support of the trial court's award of attorney fees. However, ***Elliott v. Donahue***, 169 Wis. 2d 310, 323-24, 485 N.W.2d 403 (1992), recognized the supreme court's holding in ***Kremers-Urban Co. v. American Emp'rs Ins. Co.***, 119 Wis. 2d 722, 745-47, 351 N.W.2d 156 (1984), that § 806.04(10) "does not entitle an insured to recover attorney fees incurred in a declaratory judgment action commenced by the insured against the insurer" because "there is a distinction between costs and attorney fees." Rather, the ***Elliott*** court awarded attorney fees pursuant to § 806.04(8) "under the principles of equity." ***Elliott***, 169 Wis. 2d at 324.

¶10 The ***Elliott*** court found that the insurer had failed to comply with the requirement set forth in ***Mowry v. Badger State Mutual Casualty Co.***, 129 Wis. 2d 496, 385 N.W.2d 171 (1986), that an insurer not only request a bifurcated trial on the issues of coverage and liability, but that it also move to stay any proceedings on liability until the issue of coverage is resolved. ***Elliott***, 169 Wis. 2d at 318. Thus, even though the insurer tendered a defense immediately following resolution of the coverage issue, the failure to stay the liability case constituted an indirect breach of its duty to defend. ***Id.*** at 322. The court found that, regardless of whether an insurance carrier directly or indirectly breaches its duty to defend, the carrier's failure to provide a defense to its insured creates an inequitable situation. ***Id.*** The court stated that the inequities of forcing "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 the benefit that was bargained for." ***Id.***

¶11 The ***Elliott*** court held that, in such a situation, supplemental relief under WIS. STAT. § 806.04(8) "permit[ted] a recovery of attorney fees ... under the principles of equity." ***Elliott***, 169 Wis. 2d at 324. In response to the insurer's contention that the ***Elliott*** holding would deter insurers from contesting coverage where appropriate, the ***Elliott*** court stated that its holding "merely preserves for the insured the benefit of indemnification and defense that was contracted and paid for under the contract of insurance." ***Id.*** at 325.

¶12 ***Elliott***'s holding has been limited by the supreme court in subsequent case law, most decisively in ***Reid v. Benz***, 2001 WI 106, 245 Wis. 2d 658, 629 N.W.2d 262. The question presented in ***Reid*** is precisely the question presented in this case, "whether ***Elliott*** permits recovery of attorney fees expended solely in establishing coverage, where there has been no breach of the duty to

defend." ***Reid***, 245 Wis. 2d 658, ¶29.[3] The ***Reid*** court explained that the award of attorney fees in ***Elliott*** was "inextricably connected to the facts and circumstances of that case; namely, that the insurer failed to comply with the dictates of ***Mowry***" and breached its duty to defend. ***Reid***, 245 Wis. 2d 658, ¶3. The court explained that its conclusion to award attorney fees in ***Elliott*** was "intertwined with the equitable considerations that arise where an insurer refuses to defend the insured and the coverage and liability phases proceed simultaneously. Those equitable considerations arise from the scope of the insurer's duty to defend, as compared to its duty to indemnify." ***Reid***, 245 Wis. 2d 658, ¶19 (citation omitted).[4]

¶13 In ***Reid***, the insurer followed the procedure established in ***Mowry***, seeking a declaration of coverage while staying liability. ***Reid***, 245 Wis. 2d 658, ¶4. As such, the insurer did not breach its duty to defend. Even though the insured ultimately established that the insurer owed it indemnity coverage under the policy and had to expend money to establish coverage that fell within the ambit of the insurance policy, "the basis for the attorney fees award in ***Elliott***" was absent, and the circuit court's order awarding fees to the insured was reversed.

[3] The question certified to the supreme court in ***Reid v. Benz***, 2001 WI 106, ¶1, 245 Wis. 2d 658, 629 N.W.2d 262, was whether "the supreme court's award of attorney fees to an insured in ***Elliott*** [was] premised upon the insurer's contractual breach of the duty to provide coverage or the duty to defend or both?" (Citation omitted.)

[4] From this court's count, the ***Reid*** court confirmed five times that the award of attorney fees in ***Elliott*** was based on the breach of the duty to defend. ***Reid***, 245 Wis. 2d at 658, ¶17, (noting that because the insurance carrier did not provide the needed defense, it was liable to the insured for attorney fees); ***id.***, ¶20 ("it was the equities related to the duty to defend that prompted us [the supreme court] to award attorney fees to the insured in ***Elliott***"); ***id.***, ¶21 ("It was the inequity of the circumstances facing us in ***Elliott***—that the insurer was attempting to avoid its duty to defend … that prompted us to award the attorney fees."); ***id.***, ¶35 ("it was the indirect breach of the duty to defend … which gave rise to the equities compelling an award of attorney's fees"); ***id.***, ¶36 ("Unlike the situation in ***Elliott***, there was no attempt on the part of [the insurance carrier] to avoid its duty to defend.").

Reid, 245 Wis. 2d 658, ¶4. The insured was not entitled to attorney fees expended solely to establish a duty to indemnify. ***Id.***, ¶32 ("***Elliott*** did not … fashion a rule that the duty to indemnify requires the insurer to pay the insured's attorney fees, when it loses a contest over coverage.").[5]

¶14 The court's conclusion in ***Reid*** leaves little doubt that the rationale of ***Elliott*** does not apply in this case. Both prior to and since ***Reid***, Wisconsin courts have recognized that ***Elliott*** involved a unique set of circumstances in which the insurance carrier had breached its duty to defend. *See* ***Reid***, 245 Wis. 2d 658, ¶28 (declining to extend ***Elliott*** beyond its particular facts and circumstances); s*ee also* ***Gorton v. Hostak, Henzl & Bichler, S.C.***, 217 Wis. 2d 493, 512, 577 N.W.2d 617 (1998)[6] (recognizing that courts have declined to extend ***Elliott*** beyond its particular facts and circumstances and citing ***DeChant v. Monarch Life Ins. Co.***, 200 Wis. 2d 559, 569, 547 N.W.2d 592 (1996)); *see also* ***Riccobono v. Seven Star, Inc.***, 2000 WI App 74, ¶24, 234 Wis. 2d 374, 610

[5] While the ***Reid*** court also noted that there was no argument that the insurer's challenge to indemnity was "unfair or unreasonable, or in bad faith," ***Reid***, 245 Wis. 2d 658, ¶35, we do not read the single reference to "unfair" as addressing anything other than the fact that the parties did not so contend. In the context of the entire opinion, the court was not suggesting a new basis for recovery of attorney fees. Rather, after thoroughly considering the potential inequities associated with requiring the insured to establish indemnity coverage, including unequal resources, the court made clear that the inequity in ***Elliott*** was squarely based on the breach of the duty to defend. ***Reid***, 245 Wis. 2d 658, ¶34.

[6] The supreme court in ***Gorton v. Hostak, Henzl & Bichler, S.C.***, 217 Wis. 2d 493, 512, 577 N.W.2d 617 (1998), refused to extend ***Elliott***, stating that "we decline to adopt the rule that in every instance of a suit between a fiduciary and a beneficiary the prevailing beneficiary is entitled to attorney fees under WIS. STAT. § 806.04(8)." The court added, "This refusal is consistent with our history of crafting only limited and narrow exceptions to the American Rule." ***Gorton***, 217 Wis 2d at 512. ***Gorton*** recognized that the ***Elliott*** court's award of attorney fees under its equitable power is only proper when the insurance carrier has breached its duty to defend. ***Gorton***, 217 Wis. 2d at 511-12.

N.W.2d 501; ***Ledman v. State Farm Mut. Auto. Ins. Co.***, 230 Wis. 2d 56, 70, 601 N.W.2d 312 (Ct. App. 1999).

¶15 In an effort to illustrate the proper application of ***Elliott***, the ***Reid*** court contrasted two of the court of appeals' post-***Elliott*** rulings. ***Reid***, 245 Wis. 2d 658, ¶26 n.7. The ***Reid*** court noted that the court of appeals correctly applied ***Elliott*** in ***Ledman***, 230 Wis. 2d at 69-70, when it declined to award attorney fees where there had been no breach of a duty to defend. ***Reid***, 245 Wis. 2d 658, ¶26 n.7. The ***Ledman*** court reasoned that "the court [in ***Elliott***] determined that the insured was entitled to an award of attorney's fees incurred because the insurer breached its duty to defend. That is not the case here." ***Ledman***, 230 Wis. 2d at 70 (citations omitted). The ***Reid*** court then cited the court of appeals decision in ***Sauk County v. Employers Insurance of Wausau***, 2001 WI App 22, 240 Wis. 2d 608, 623 N.W.2d 174, as an arguable misapplication of ***Elliott*** insofar as it awarded attorney fees incurred to establish indemnity, where there was no indication of a breach of the duty to defend. ***Reid***, 245 Wis. 2d 658, ¶26 n.7.

¶16 We conclude that ***Elliott*** and its progeny do not authorize an award of attorney fees under WIS. STAT. § 806.04(8) under the facts and circumstances presented here, where there has been no breach of the duty to defend.[7] Despite the fact that Voss had to expend money to establish coverage that fell within the ambit

[7] We note that, while the trial court referenced "bad faith" in its decision, Voss did not make a claim based on the tort of bad faith, and the trial court did not make a finding of bad faith. Further, neither party raises the issue of bad faith on appeal or argues that attorney fees were awarded as damages under ***DeChant v. Monarch Life Insurance Co.***, 200 Wis. 2d 559, 547 N.W.2d 592 (1996). Voss did not pursue and attorney fees were not awarded as a sanction pursuant to WIS. STAT. § 802.05.

of the insurance policy, "the basis for the attorney fees award in ***Elliott*** is absent here." *See* ***Reid***, 245 Wis. 2d 658, ¶4.

¶17 Voss additionally argues that she was contractually entitled to an award of costs and attorney fees under the terms of her title policy. However, the policy language upon which she relies provides for attorney fees incurred in defense of the title, not in a first-party indemnification dispute between Voss and Chicago Title over the scope of coverage.[8]

Costs under WIS. STAT. § 806.04(10)

¶18 Chicago Title next argues that the trial court erred in awarding costs to Voss under WIS. STAT. § 806.04(10). Section 806.04(10) provides that, in a declaratory judgment proceeding, a court "may make such award of costs as may seem equitable and just." The decision to award equitable and just costs under § 806.04(10) is left to the trial court's discretion. *See* ***Kremers-Urban Co.***, 119 Wis. 2d at 746.

¶19 In support of its contention, Chicago Title discusses the litigation history at length, laying out the conduct of the parties in litigation and the efforts made by Chicago Title in adhering to court rules and deadlines, despite difficulties in dealing with Voss's attorney. The trial court, which had presided over the case from start to finish, acknowledged these difficulties and noted that Chicago Title's

[8] The policy's provision, entitled Company's Duty to Defend Against Court Cases, states:

> We will defend your title in any court case as to that part of the case that is based on a Covered Title Risk insured against by this Policy. We will pay the costs, attorneys' fees, and expenses we incur in that defense.

attorney had conducted himself "extremely well." However, the court also noted its finding of excusable neglect on the part of Voss's attorney and a valid reason for delay on the part of Voss's appraiser. The trial court ultimately determined that the "bottom line" was that Chicago Title had "lowballed" Voss with its appraisal of $14,000, thereby forcing her to prove her claim and litigate to recover the diminution in value for her property. We can infer that the court's finding as to Chicago Title's appraisal was based on its assessment that Voss's appraiser, who valued the diminution at $62,500, was "more clear[,] satisfactory and convincing as to the diminution of value of [Voss's] property."

¶20 We will uphold the trial court's exercise of discretion if it examined the relevant facts, applied a proper standard of law and, using a demonstrated rational process, arrived at a conclusion a reasonable judge could reach. ***Dickman v. Vollmer***, 2007 WI App 141, ¶27, 303 Wis. 2d 241, 736 N.W.2d 202. While Chicago Title seems to argue that an award of costs may only be based on procedural failure or improper conduct, it fails to cite to any law in support of its contention. Rather, WIS. STAT. § 806.04(10) leaves it to the trial court's discretion to award costs. Here, the trial court made a discretionary determination that an award of equitable and just costs was warranted and explained its reasoning on the record. We see no error and uphold the trial court's award.

CONCLUSION

¶21 We conclude that the trial court erred in its award of attorney fees to Voss. The limited awarding of attorney fees in ***Elliott*** under the Wisconsin declaratory judgment statute, WIS. STAT. § 806.04(8), was based on the insurance carrier's breach of its duty to defend. ***Reid***, 245 Wis. 2d 658, ¶¶36-37. Because this case involved a first-party coverage dispute in which there had been no breach

of a duty to defend, there is simply no basis for Voss to receive attorney fees under § 806.04(8). However, we uphold the trial court's discretionary award of equitable and just costs under § 806.04(10). We therefore reverse that portion of the trial court's judgment awarding attorney fees and affirm that portion awarding costs.

By the Court.—Judgment affirmed in part and reversed in part.

Not recommended for publication in the official reports.