SUPREME COURT OF WISCONSIN

MAYA ELAINE SMITH

Plaintiff,

v.

Appeal No. 2015AP000079
Circuit Court Case No. 2013CV007085

JEFF ANDERSON d/b/a
ANDERSON REAL ESTATE SERVICES,

Defendants-Third Party Plaintiffs,

v.

4TH DIMENSION DESIGN, INC.,

Third-Party Defendant,

R&B CONSTRUCTION, INC.,

Third-Party Defendants-Appellant.

WEST BEND MUTUAL INSURANCE COMPANY

Intervenor–Respondent.

AMICUS CURIAE BRIEF OF WISCONSIN DEFENSE COUNSEL INC.

WEISS LAW OFFICE, S.C.
Monte E. Weiss, (1003816)
1017 W Glen Oaks Lane, Ste. 207
Mequon WI, 53092-3376
Telephone: (262) 240-9663
Fax: (262) 240-9664
E-mail: mweiss@mweisslaw.net

AXLEY BRYNELSON LLP
Timothy M. Barber, (1036507)
Suite 200, 2 East Mifflin Street
Madison, WI 53703
Telephone: (608) 257-5661
Fax: (608) 257-5444
E-mail: tbarber@axley.com

PETERSON, JOHNSON & MURRAY, S.C.
William F. Sulton, (1070600)
788 N Jefferson Street, Suite 500
Milwaukee, WI 53202
Telephone: (414) 221-6639
Fax: (414) 278-0920
E-mail: wsulton@pjmlaw.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES iv
INTRODUCTION 1
ARGUMENT 3
I. WDC Agrees with West Bend Mutual Insurance Company That No Extrinsic Evidence Should Be Considered In A Duty To Defend Analysis. 3
II. This Court Should Reject R&B Construction's Proposal to Make Judgments of No Coverage Non-Final as contrary to the Law and Good Policy. 3
A. This Court Cannot Make An Order Declaring No Converge Non-Final As That Power Is Given Solely To The Legislature. 5
B. Making A No Duty To Defend Judgment Non-Final Would Bind Insurers To Provide A Defense Where They Have Been Found To Have No Duty To Defend. 6
C. R&B Construction's Concerns That It May Be Required To Defend Itself Where There Is Coverage Are Misplaced. 10
CONCLUSION 13
FORM AND LENGTH CERTIFICATION 15
ELECTRONIC FILING CERTIFICATION 16

TABLE OF AUTHORITIES

Cases

Barber v. Nylund, 158 Wis. 2d 192, 461 N.W.2d 809 (Ct. App. 1990) ..8, 14

Elliott v. Donahue, 169 Wis. 2d 310, 485 N.W.2d 403 (1992) .....passim

Estate of Sustache v. Am. Family Mut. Ins. Co., 2008 WI 87, 311 Wis. 2d 548, 751 N.W.2d 845 4

Fireman's Fund Ins. Co. v. Bradley Corp., 2003 WI 33, 261 Wis. 2d 4, 19, 660 N.W.2d 666 ..... 3, 11

Grube v. Daun, 173 Wis. 2d 30, 496 N.W.2d 106 (Ct. App. 1992)..... 7

J.G. v. Wangard, 2008 WI 99, 313 Wis. 2d 329, 753 N.W.2d 475 3

Jackelen v. Russell, 2015 WI App 93, 366 Wis. 2d 255, 873 N.W.2d 265.. 6

Kenefick v. Hitchcock, 187 Wis. 2d 218, 522 N.W.2d 261 (Ct. App. 1994) 8

Mowry v. Badger State Mut. Cas. Co., 129 Wis. 2d 496, 385 N.W.2d 171, 186 (1986) 7, 8

Mullen v. Coolong, 153 Wis. 2d 401, 451 N.W.2d 412 (1990)..... 12

Newhouse v. Citizens Sec. Mut. Ins. Co., 176 Wis. 2d 824, 501 N.W.2d 1, 6 (1993) 8, 9, 10

Sch. Dist. of Shorewood v. Wausau Ins. Cos., 170 Wis. 2d 347, 488 N.W.2d 82, 87 (1992) 6, 9

State v. Stuart, 2005 WI 47, 279 Wis. 2d 659, 695 N.W.2d 259..... 11

Wick v. Mueller, 105 Wis. 2d 191, 313 N.W.2d 799, 802 (1982) 5, 6

Wilson Mut. Ins. Co. v. Falk, 2014 WI 136, 360 Wis. 2d 67, 857 N.W.2d 156 9

Statutes

Wis. Stat. § 806.01(1)(a) 4

Wis. Stat. § 806.01(1)(c)..... 8

Wis. Stat. § 806.04(1) 5
Wis. Stat. § 806.04(2) 6
Wis. Stat. § 806.07(1)(a) 12
Wis. Stat. § 806.07(1)(b) 12
Wis. Stat. § 806.07(1)(h) 12
Wis. Stat. § 808.03(1) 1, 5
Wis. Stat. § 809.19(8)(b) 15
Wis. Stat. § 809.19(c) 15

Constitutional Provisions

Wis. Const. Art. VII §5(3) 5

INTRODUCTION

Wisconsin law is well-established that in order to best avoid breaching its duty to defend its insured, an insurance carrier that wishes to assert a coverage defense should preferably retain separate coverage counsel and promptly move to bifurcate and stay the merits of the lawsuit until the court determines whether coverage exists. Once a no-coverage determination has been made, an insurer no longer has any interest in the litigation and is not further obligated to provide a defense. R&B Construction, Inc. ("R&B") asks this Court to abandon these long-standing rules and hold that an order determining an insurer has no duty to defend a claim is not a final order and that coverage cannot be decided until the summary judgment stage of litigation on the merits of the underlying dispute, following expensive discovery. This Court should reject this radical proposal for several reasons.

First, the legislature has already defined what constitutes a final order under Wis. Stat. § 808.03(1)—one that disposes of the entire matter in the litigation as to one or more parties. A judgment declaring that an insurance policy does not provide coverage for claims asserted in a lawsuit satisfies that definition.

Second, holding that a no-coverage determination is not a final order would upend 25 years of law governing an insurer's duty to its

insured when contesting coverage and would require insurers to provide defenses to claims for which there is not coverage. The rules governing an insurer's obligation to hire defense counsel and move to bifurcate and stay the liability proceedings until coverage is determined are well-established, well-known, and well-thought out. R&B offers no compelling policy justification to abandon this precedent.

Third, none of R&B's arguments concerning subsequent changes in litigation have any merit. Duty to defend determinations are made as a matter of law based on the factual allegations in complaint and insurance policy. Development of those facts should not change a prior no a duty to defend determination. The law of the case doctrine protects an insured from a subsequent inconsistent ruling by the trial court. Amended complaints asserting covered claims can be re-tendered. And, Wis. Stat. § 806.07 provides a variety of mechanisms by which an insured can seek relief from a no-coverage determination if the need arises.

In short, R&B's proposal to declare coverage determinations to be non-final orders is inconsistent with settled law, would have severe consequences in the insurance industry, and is not needed. It should be rejected.

ARGUMENT

I. WDC Agrees with West Bend Mutual Insurance Company That No Extrinsic Evidence Should Be Considered In A Duty To Defend Analysis.

Before addressing the finality issue, WDC believes it is important to indicate that it agrees with and joins West Bend Mutual Insurance Company's ("West Bend") argument that extrinsic evidence should not be considered in the initial duty to defend analysis. WDC believes that the law is well-settled on this issue[1] and believes the arguments set forth by West Bend adequately address it.

II. This Court Should Reject R&B's Proposal to Make Judgments of No Coverage Non-Final as contrary to the Law and Good Policy.

The duty to defend evaporates upon a determination that the insurer has no duty to indemnify its insured. *J.G. v. Wangard*, 2008 WI 99, ¶ 23, 313 Wis. 2d 329, 753 N.W.2d 475 ("An insurer need not defend a suit in which it has no economic interest."). For the duty to indemnify to arise two conditions must be met. The claim must fall within the terms of the insurance policy, and the insurer must agree, or a court find, that the insured is liable on the claim. *Elliott v. Donahue*, 169 Wis. 2d 310, 320-21, 485 N.W.2d 403 (1992). Because the duty to defend is

[1] *See, e.g., Fireman's Fund Ins. Co. v. Bradley Corp.*, 2003 WI 33, ¶ 21, 261 Wis. 2d 4, 19, 660 N.W.2d 666.

broader than the duty to indemnify, a conclusion that there is no duty to defend means that there is no duty to indemnify. And once the court resolves the question of indemnity in the insurer's favor, coverage is no longer open to debate and there is no longer a duty to defend. *J.G.*, 2008 WI 99 at ¶ 23.

It follows that an insurer ought to be able to obtain a final judgment that it has no duty to defend. Wis. Stat. § 806.01(1)(a) ("A judgment is the determination of the action. It may be final or interlocutory."). West Bend did just that in this case. R&B argues, however, that judgments involving coverage determinations should not issue prior to the conclusion of the entire case. R&B's arguments should be rejected.

R&B essentially speculates that it is possible that facts will later surface that may support a covered claim. But that would be a different case. The mere possibility that a new and different claim may be asserted should not deprive an insurer of its right to a coverage determination based on the claims actually alleged. *Estate of Sustache v. Am. Family Mut. Ins. Co.*, 2008 WI 87, ¶ 26, 311 Wis. 2d 548, 751 N.W.2d 845 ("Both the insurer and the insured have the right to have the court resolve the issue of coverage separate from any trial on liability."). To hold otherwise would make coverage determination

impossible absent a full and complete trial. That is not and should not be the law.

A. This Court Cannot Make An Order Declaring No Converge Non-Final As That Power Is Given Solely To The Legislature.

First, this Court cannot change the appealability of an order that the Legislature has determined to be final. The Wisconsin Constitution assigns to the legislature the sole power to determine the jurisdiction of the Court of Appeals. *See* Wis. Const. Art. VII §5(3) ("The appeals court shall have such appellate jurisdiction in the district, including jurisdiction to review administrative proceedings, as the legislature may provide by law . . ."). This Court agrees:

> [T]he Supreme Court is without power to determine whether a particular type of order is appealable or not. The question of appealability is within the legislative prerogative and not with the prerogative of the court's rule-making power.

Wick v. Mueller, 105 Wis. 2d 191, 196, 313 N.W.2d 799, 802 (1982). Once a final order is in place, the appeal must be taken within the time limits or it is lost.

The Legislature, in exercising its constitutional prerogative, has already determined what a final order for purposes of appeal is. A final order is one that "disposes of the entire matter in litigation as to one or more of the parties . . . ." Wis. Stat. § 808.03(1). Declaratory judgments can be final judgments in litigation. *See* Wis. Stat. § 806.04(1) ("such

declarations shall have the force and effect of a final judgment or decree . . .").

A judgment declaring an insurer has no duty to defend or indemnify satisfies the statutory test for finality, as it establishes that the insurer "has no economic interest" in the litigation. *Sch. Dist. of Shorewood v. Wausau Ins. Cos.*, 170 Wis. 2d 347, 364, 488 N.W.2d 82, 87 (1992). By declaring the "rights, status or other legal relations" under the policy, it fully resolves the controversy between them. Wis. Stat. § 806.04(2). Such a judgment or order is a final appealable order. *See, e.g.*, *Jackelen v. Russell*, 2015 WI App 93, 366 Wis. 2d 255, 873 N.W.2d 265. This Court cannot make such a judgment non-final by judicial fiat. *Wick, supra*.

B. Making A No Duty To Defend Judgment Non-Final Would Bind Insurers To Provide A Defense Where They Have Been Found To Have No Duty To Defend.

Even if the Court could change no duty to defend declarations into non-final judgments, it should not. Almost a quarter century ago, this Court laid out the options for an insurer who wishes to contest coverage. *Elliott,* 169 Wis. 2d at 318. Under *Elliott*, the most common way is for the insurer to seek bifurcation and a stay of liability issues until resolution of the coverage issue. *Id.* at 318. Indeed, *Elliott* stated that anytime an insurer sought a coverage determination, this is the

procedure that must be followed: "[T]he insurer should not only request a bifurcated trial on the issues of coverage and liability, but it should also move to stay any proceedings on liability until the issue of coverage is resolved." *Id.* This is, of course, what West Bend did here: follow appropriate Wisconsin procedure, allowing all parties to weigh in on the coverage issues.

One of the basic reasons for the *Elliott* procedure is to determine coverage *before* liability, such that an insurer does not run the risk of breaching its duty to defend its insured if coverage is found to exist. *Id.* Before, in and since *Elliott*, courts have explained the advantages of determining coverage before liability: avoiding a breach of the duty to defend,[2] judicial economy,[3] and encouragement of settlement.[4] But if a no coverage or no duty to defend determination is non-final, it becomes impossible to have a final coverage determination before a liability trial.

R&B's proposal leads to a particularly ridiculous result—an insurer may be forced to provide a defense in a case where there is no coverage. Under *Elliott* and its progeny, an insurer must continue to defend until there is a final coverage determination including appeals.

---

[2] *Mowry v. Badger State Mut. Cas. Co.*, 129 Wis. 2d 496, 529, 385 N.W.2d 171, 186 (1986).
[3] *Grube v. Daun*, 173 Wis. 2d 30, 76, 496 N.W.2d 106, 123-24 (Ct. App. 1992).
[4] *Id.*

See Newhouse v. Citizens Sec. Mut. Ins. Co., 176 Wis. 2d 824, 836, 501 N.W.2d 1, 6 (1993). That is the recognized reason for the *Elliott* stay: so the insurer does not incur defense costs where there is no coverage. *See Mowry,* 129 Wis. 2d at 529 ("Badger State was not required to provide a free defense in this case because the coverage trial preceded a trial on liability and damages"); *Barber v. Nylund*, 158 Wis. 2d 192, 196-98, 461 N.W.2d 809 (Ct. App. 1990) (same). Naturally, when a court determines that coverage does not exist under the policy, an insurer is no longer obligated to pay for a defense. *Kenefick v. Hitchcock*, 187 Wis. 2d 218, 235, 522 N.W.2d 261 (Ct. App. 1994).

Under R&B Construction's proposal, the entire line of cases following *Newhouse*, *Mowry* and *Elliott* would be upended. If, as R&B Construction argues, a coverage or duty to defend determination cannot be made final until the court decides the merits, there simply would be no point to a bifurcated proceeding or of seeking a declaratory judgment of no coverage early in the case. *Cf.* Wis. Stat. § 806.01(1)(c) ("Every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled . . .").

Moreover, there would be a coverage determination in the trial court but no ability to appeal before a liability determination. Without appeal, there could be no final determination of coverage within the

meaning of *Newhouse*.[5] Thus, an insurer would then be required to defend even in the face of a declaration in the trial court that it had no duty to do so. In other words, if a no-coverage determination is not a final order, an insurer would be required to provide a "free defense" throughout the remainder of the proceeding, in every instance, until liability is determined.

That result is an absurdity and inconsistent with the maxim that an insurer should not be forced to pay for a risk it has not assumed by contract. *Wilson Mut. Ins. Co. v. Falk*, 2014 WI 136, ¶ 25, 360 Wis. 2d 67, 857 N.W.2d 156 (policies should be rewritten "to bind an insurer to a risk which it did not contemplate and for which it did not receive a premium."). Moreover, such a result would be contrary to the well-established rule that an insurer "should not be required to defend an insured in a suit in which the insurer has no economic interest." *Sch. Dist. of Shorewood*, 170 Wis. 2d at 364.

---

[5] *Newhouse* requires an insurer to continue providing a defense during the pendency of an appeal of a no-coverage determination if there is not a stay of the underlying litigation on the merits. *Newhouse v. Citizens Sec. Mut. Ins. Co.*, 176 Wis. 2d 824, 836, 501 N.W.2d 1 (1993). The statement in *Newhouse* that the trial court's no coverage determination "was not a final decision because it was timely appealed," *id.*, was made in the sense that until an appellate court has ruled on the matter, the coverage question is not fully resolved. However, *Newhouse* cannot be read for the proposition that a no-coverage determination is not a "final order" for purposes of appeal.

The bifurcation and stay procedure is well-established, relied upon by insurers and insureds throughout the State, and makes sense. It provides a sensible and predictable mechanism by which an insurer can simultaneously exercise its right to contest coverage without violating its duty to its insured. The procedure has worked for Wisconsin. It allows for an orderly resolution of coverage questions and provides finality. There is no reason to abandon it now. R&B's proposal to make no coverage determination non-final should be rejected.

C. R&B's Concerns That It May Be Required To Defend Itself Where There Is Coverage Are Misplaced.

R&B expresses concerns about "inconsistent rulings" and having to defend itself while West Bend's appeal was pending. However, those concerns are misplaced. As explained above, in the usual case, there should be a stay on litigation of the merits until there is a final decision on the coverage issues. *Elliott, supra*. That stay should continue while the no coverage conclusion is on appeal. *Newhouse, supra*. In this case, it appears R&B decided to violate the stay or have it lifted so it could litigate the merits of the claims against itself. That was by its choice.

Moreover, R&B's concern that subsequent developments in the litigation could change the coverage picture is without basis. First, because a duty to defend is determined based on the nature of claim,

according to the factual allegations in the complaint, and without resort to extrinsic evidence, *Fireman's Fund Ins. Co. v. Bradley Corp.*, 2003 WI 33, ¶ 21, 261 Wis. 2d 4, 660 N.W.2d 666, subsequent factual developments should not, by definition, affect a coverage determination.

Second, the law of the case doctrine prevents a trial court from making legal rulings inconsistent with a previous appellate decision. *State v. Stuart*, 2005 WI 47, ¶ 3 n. 2, 279 Wis. 2d 659, 695 N.W.2d 259 ("Under the law of the case doctrine, 'a decision on a legal issue by an appellate court establishes the law of the case, which must be followed in all subsequent proceedings in the trial court or on later appeal.'"). Thus, if a circuit court makes a no coverage determination and that determination is affirmed on appeal, the circuit court could not thereafter, construe the same allegations in the complaint as giving rise to a covered claim.

Third, the prospect of changes in the pleadings does not present a significant concern. In the vast majority of cases, plaintiffs have every encouragement to put their best case forward so that they can actually obtain the coverage promised under an insurance policy. Plaintiffs want there to be coverage so they have access to the financial resources of insurers to cover their damages. That access is the whole reason to have insurance in the first place. There is very little reason for a Plaintiff to

"plead around" coverage. As a practical matter it simply does not happen.

Finally, there are existing mechanisms to deal with the circumstance where a plaintiff later amends a pleading to include new, covered claims based on evidence uncovered during discovery. Wisconsin Stat. § 806.07, allows a party to seek relief from judgment in a variety of circumstances. *See Mullen v. Coolong*, 153 Wis. 2d 401, 407, 451 N.W.2d 412, 414 (1990) (Statute "seeks to achieve a balance between the competing values of finality and fairness in the resolution of disputes."). For example, if a plaintiff wishes to amend a complaint because of newly discovered evidence, the trial court has the power to vacate the no coverage determination to accommodate the amendment. Wis. Stat. § 806.07(1)(b). Such an exercise of discretion might be particularly appropriate if the failure to discover the evidence was due to the *Elliott* stay. If the complaint is so amended, the insured can then re-tender the claim to the insurer. If the trial court determines it made a mistake before appeal, it may be that relief under Wis. Stat. § 806.07(1)(a) would be appropriate. Finally, if there were other extraordinary circumstances, relief could be available under Wis. Stat. § 806.07(1)(h).

In the end, current law amply deals with the concerns raised by R&B. The *Elliott* stay prevents an insured from having to defend himself

alone before a final coverage determination. The law of the case doctrine prevents a trial court from changing its construction of the pleadings post-appeal. The statutes governing amendment of pleadings and granting equitable relief from orders protect an insured from changes to the pleadings after a final coverage determination. There simply is no practical concern justifying changing a no coverage determination to a non-final order.

CONCLUSION

For the above reasons, this Court should affirm the court of appeals' decision and reject R&B's proposal to make orders declaring there is no coverage or a duty to defend non-final.

Dated at the law offices of Peterson, Johnson & Murray, S.C., in Milwaukee, Wisconsin, on this 27th day of June, 2016.

Attorneys for Wisconsin Defense Counsel, Inc.

/s/ William F. Sulton, Esq.
William F. Sulton Esq.
State Bar No. 1070600

WEISS LAW OFFICE, S.C.
Monte E. Weiss, State Bar Number 1003816
1017 W Glen Oaks Ln Ste 207
Mequon WI 53092-3376
Telephone: (262) 240-9663
Fax: (262) 240-9664
E-mail: mweiss@msweisslaw.net

AXLEY BRYNELSON LLP
Timothy M. Barber, State Bar No.: 1036507
Suite 200, 2 East Mifflin Street (53703)
Post Office Box 1767
Madison, WI 53701-1767
Telephone: (608) 257-5661
Fax: (608) 257-5444
E-mail: tbarber@axley.com

PETERSON, JOHNSON & MURRAY, S.C.
William F. Sulton, Esq., State Bar No.: 1070600
788 N Jefferson Street, Suite 500
Milwaukee, WI 53202
Telephone: (414) 221-6639
Fax: (414) 278-0920
E-mail: wsulton@pjmlaw.com

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font (Century 13 pt for body text and 11 pt for quotes and footnotes).

The length of this brief is 3854 words.

Dated at the law offices of Peterson, Johnson & Murray, S.C., in Milwaukee, Wisconsin, on this 27th day of June, 2016.

/s/ William F. Sulton, Esq.

William F. Sulton, Esq.
State Bar No. 1070600

Peterson, Johnson & Murray, S.C.
788 N Jefferson St Ste 500
Milwaukee, WI 53202
Phone 414-278-8800
Fax: 414-28-0920
Email: wsulton@pjmlaw.com

ELECTRONIC FILING CERTIFICATION

I certify that an electronic copy of this brief has been submitted and that the text of the electronic copy of the brief is identical to the text of the paper copy of the brief filed with the Court. A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all parties of record.

Dated at the law offices of Peterson, Johnson & Murray, S.C., in Milwaukee, Wisconsin, on this 27th day of June, 2016.

/s/ William F. Sulton, Esq.

William F. Sulton, Esq.
State Bar No. 1070600

Peterson, Johnson & Murray, S.C.
788 N Jefferson St Ste 500
Milwaukee, WI 53202
Phone 414-278-8800
Fax: 414-28-0920
Email: wsulton@pjmlaw.com