STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II
APPEAL NO.: 2018AP000116

ROGER CHOINSKY, GARY FINN, WILLIAM GAY,
DAVID KLISS, CAROL RUDEBECK
and JANICE WEINHOLD,

Plaintiffs,

v.

GERMANTOWN SCHOOL DISTRICT
BOARD OF EDUCATION and
GERMANTOWN SCHOOL DISTRICT,

Defendants-Appellants,

v.

EMPLOYERS INSURANCE COMPANY OF WAUSAU
and WAUSAU BUSINESS INSURANCE COMPANY,

Intervenors-Respondents.

**APPEAL FROM ORDER DATED NOVEMBER 30, 2017,
WASHINGTON COUNTY CIRCUIT COURT, CASE NO. 13-CV-527,
THE HONORABLE TODD K. MARTENS PRESIDING**

BRIEF AND APPENDIX OF INTERVENORS-RESPONDENTS EMPLOYERS INSURANCE COMPANY OF WAUSAU AND WAUSAU BUSINESS INSURANCE COMPANY

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INTRODUCTION

This appeal seeks a back-door reversal of well-established Wisconsin law based on forfeited arguments and mischaracterizations of the record. The Germantown School District Board of Education and Germantown School District (collectively the "District") argue that they are entitled to recover attorney fees from two insurers that the circuit court "ruled" had "breached their duty to defend." The circuit court in fact reached the opposition conclusion, finding the insurers "complied with the requirements of" Wisconsin law "and thus did not breach their duty to defend."

This false premise dooms this entire appeal. The District misrepresents the circuit court's ruling but never asks to reverse it. Even if it had properly presented the issues, there is no basis for reversal. Employers Insurance Company of Wausau ("Employers") and Wausau Business Insurance Company ("Wausau") (collectively the "Insurers") followed precisely the procedure Wisconsin law prescribes for insurers contesting coverage: they promptly moved to intervene in the lawsuit, bifurcate insurance coverage and merits issues, and stay the merits litigation pending resolution of the coverage questions. When the circuit

court declined to issue a stay, the Insurers provided a defense.

The District's appeal is ultimately a dispute over timing and billing guidelines, neither of which implicate a breach of the duty to defend. Wisconsin law is clear a delay in defending is not a breach if the insurer provides a defense retroactively, as the Insurers did here. Likewise, an insurer can dispute the reasonableness of fees charged while still fulfilling its duty to defend. In any event, the District has forfeited any claim to recover "approximately $50,000" in attorney fees that the Insurers allegedly "still owe" the District, as this issue is raised for the first time on appeal and unsupported by the factual record.

The District also forfeited or waived any claim to recover attorney fees as damages for the alleged breach of the duty to defend. The only question properly before this Court is the issue posed and adjudicated at the circuit court level: whether, under ***Elliott v. Donahue***, the District can recover the attorney fees and costs it incurred in litigating coverage issues. It cannot. The circuit court correctly concluded the Insurers had acted appropriately and the equities do not justify fee-shifting.

The Insurers therefore ask this Court to affirm the judgment denying the District's motion for attorney fees.

RESPONSE TO STATEMENT OF ISSUES

The "Statement of Issues" presented by the District is premised on a mischaracterization of the record below. As its first issue, the District asks whether it is "entitled to attorney's fees as damages based on" the Insurers' "breach of their contractual duty to defend." The issue assumes the Insurers did in fact "breach . . . their contractual duty to defend." The circuit court explicitly held, however, the Insurers "did not breach their duty to defend." The District never asks this Court to reverse the circuit court's ruling.

In addition, the reason the circuit court "[d]id not consider" this issue is because the District forfeited or waived the issue. The Court should address only the second issue, which is correctly articulated in the District's "Statement of Issues."

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not requested or required, as the briefs fully explain the parties' positions.

Publication is not warranted under the criteria set forth in Section 809.23(1)(a), *Wis. Stat.* The issues involve the application of well-settled rules of law and likely will be decided on the basis of controlling precedent.

STATEMENT OF THE CASE

I. NATURE OF THE CASE

This insurance coverage dispute arises from the decision by the District to terminate the long-term care benefit for retired teachers and professional staff. The retired teachers sued the District, and the District sought a defense and indemnity from the Insurers. The Insurers intervened into the action, which was bifurcated between insurance coverage issues and the merits of the underlying claims.

The District engaged the law firm of Buelow Vetter Buikema Olson & Vliet, LLC ("Buelow Vetter") to defend it on the merits – a defense paid for by the Insurers. Another law firm, Strang, Patteson, Renning, Lewis & Lacy, S.C. (“Strang Patteson”), represented the District as to insurance coverage issues.

Early in the case, the Insurers sought a determination by the circuit court that they owed the District no duty to defend or indemnify. After a coverage trial, the circuit court determined the Insurers had a duty to defend and indemnify the District.

The District ultimately prevailed on the merits, defeating the plaintiffs' claims in a six-day jury trial. As a result, the District does not face—and the Insurers do not need to indemnify it for—any liability.

However, the District also filed a motion seeking attorney fees and costs. The circuit court determined the District was not entitled to attorney fees and costs in relation to the coverage matter under ***Elliott v. Donahue*** because the Insurers did not breach the duty to defend.

Thus, the only issue raised by this appeal is whether the Insurers have to pay attorney fees for the insurance coverage dispute. The circuit court correctly concluded that they do not. The Insurers paid for Buelow Vetter to defend the District on the merits; they do not have to pay Strang Patteson on top of that. No authority supports fee-shifting on the coverage side of the litigation where, as here, the Insurers fulfilled their duty to defend.

The District disputes that decision and further argues it is entitled to attorney fees as damages.

II. PROCEDURAL HISTORY

The plaintiffs commenced their lawsuit against the District on July 16, 2013. (R. 1.) The Insurers filed their motion to intervene, bifurcate and stay on August 29, 2013. (R. 12-14.) The motion was scheduled for hearing and heard on September 19, 2013, but the circuit court did not render a decision until it issued a written decision on December 12, 2013. (R. 12, 44.) The circuit court allowed the Insurers to intervene and bifurcated insurance coverage issues from the merits, but it denied the Insurers' request to stay the merits proceedings pending resolution of coverage issues. (R. 44.) On December 19, 2013, the Insurers' complaint for declaratory judgment was filed. (R. 46.)

On December 30, 2013, the Insurers moved for summary judgment, asserting the Insurers owed no duty to defend and indemnify based on the four corners of the complaint. (R. 56, 60-61.) As part of the brief in support of the motion, the Insurers advised the District they would be offering a defense under a reservation of rights. (R. 56:5.) On July 7, 2014, the circuit court denied the Insurers' motion for summary judgment on the coverage issues. (R. 106.) The circuit court determined it was not able to determine based on competing affidavits alone the policies were not

intended to cover the claims pleaded and invited the Insurers to renew the motion after the facts were developed through discovery. (R. 106:4.)

On January 7, 2014, the District filed a cross-claim against the Insurers, requesting a declaration the Insurers were obligated to defend and indemnify the District. (R. 65.) On April 30, 2014, the District filed an amended cross-claim against the Insurers, asserting the Insurers breached the duty to defend by failing to reimburse the District for attorney fees paid to Buelow Vetter and requesting a declaration the Insurers were obligated to indemnify the District because the Insurers breached the duty to defend. (R. 99.)

On October 30, 2014, the Insurers filed a renewed motion for summary judgment, asserting the Insurers owed no duty to defend and indemnify. (R. 130-132.) On June 19, 2015, the circuit court denied the Insurers' renewed motion for summary judgment on the coverage issues. (R. 181, 599-600.)

The coverage issues proceeded to jury trial on April 25 to 28, 2016. (R. 601-612.) The jury was asked, "Was the Germantown School District's conduct which resulted in termination of the longer term care group policy benefit for retired teachers and professional staff negligent or

intentional?" and answered "Negligent." (R. 360.) A finding that the conduct was "intentional" would have foreclosed insurance coverage under the policies at issue. (R. 181, 248, 378, 380-383, 385, 599-600.)

The Insurers and the District filed motions after verdict. (R. 378, 380-383, 385.) The District requested judgment on the verdict as to the Insurers' duty to defend and indemnify; attorney fees and costs as damages for the Insurers' asserted breach of the duty to defend; and attorney fees and costs in relation to the coverage matter under ***Elliott v. Donahue***. (R. 380.) On July 22, 2016, the circuit court issued an oral decision on the motions after verdict, determining the Insurers had a duty to defend and indemnify but declining to make a determination on the motion for attorney fees, advising the parties could let the court know if they were unable to resolve the issues, and the court would then decide same. (R. 616; App. 35-60.) On September 2, 2016, the circuit court issued an order for judgment and judgment that the Insurers "had and have a duty to defend and indemnify" the District under the policies" and that the motion for attorney fees was continued "pending resolution by the parties or further order of the Court." (R. 399; App. 61-62.) The circuit court did not determine, in the oral decision or order for

judgment, the Insurers had breached the duty to defend. (R. 399, 616; App. 35-60, 61-62.)

The Insurers filed a notice of appeal from the circuit court's decision. (R. 411.) After jurisdictional briefing, this Court dismissed the appeal for lack of jurisdiction on the basis the District's pending attorney fees claim rendered the circuit court's September 2, 2016 order nonfinal. (R. 575.)

On August 31, 2016, before the order for judgment was entered, and the appeal was filed, the Insurers advised the circuit court the parties had been unable to resolve the attorney fee issue. (R. 398.) On August 15, 2017, the District advised the circuit court similarly, requesting the circuit court adjudicate the pending attorney fee issue. (R. 581.)

On September 21, 2017, after a status conference with the parties, the circuit court issued a scheduling order, noting the District's motion for attorney fees related to the coverage issue was fully briefed and advising it would issue a written decision. (R. 582.)

On November 3, 2017, the circuit court issued a written decision denying the District's motion for attorney fees. (R. 583; App. 3-6.) The circuit court determined the District was not entitled to reimbursement of attorney fees

in establishing its right to coverage as the Insurers followed the appropriate procedure for requesting a stay of the merits portion of the case, pending resolution of the coverage issues, although the court declined to grant the stay. (Id.) In its decision, the circuit court stated as follows:

> Here, the request to stay trial on the merits pending resolution of the coverage issue was denied (even though the coverage trial did in fact precede the trial on the merits). But because Intervening Defendants in this case asked for the stay, they complied with the requirements of **Mowry** and thus did not breach their duty to defend.

(R. 583:3; App. 5) (emphasis added.)

On November 30, 2017, the circuit court issued an order for judgment and judgment, granting judgment in favor of the Insurers on the denial of the District's motion for attorney fees, in accordance with the court's November 3, 2017 written decision. (R. 590; App. 1-2.) The District never sought clarification of the November 3, 2017 written decision or November 30, 2017 order for judgment and judgment or a specific ruling on the issue of whether they were entitled to attorney fees or costs as damages. (R. 583, 590, 592; App. 1-2, 3-6.) The District had the opportunity to comment on and object to the form of the

order for judgment and judgment pursuant to Washington County's five-day rule. (R. 584.)[1]

On January 12, 2018, the District filed its notice of appeal. (R. 592.)

III. STATEMENT OF FACTS

On August 8, 2013, twenty-three (23) days after the lawsuit was filed, the Insurers advised the District of their coverage position and intent to intervene in the lawsuit and seek a declaratory judgment with respect to their obligation to defend or indemnify the District against the claims asserted in the lawsuit. (R. 353; App. 7-18.)

On January 14, 2014, the Insurers wrote to the District in response to the circuit court's December 12, 2013 decision on the Insurers' August 29, 2013 motion, granting the motion to intervene and bifurcate but denying the motion to stay. (R. 44, 355; App. 22-34.) The Insurers advised the District, consistent with the assertion in their December 30, 2013 summary judgment brief, they would provide the District with a full defense against the claims asserted in the lawsuit, under a reservation of rights. (R.

[1] *See* Washington County Circuit Court Rules, Civil Procedures, Rule I.B (revised June 2012).

56:5, 355; App. 22-34.) The letter further advised the District as follows:

> We understand that the district desires to use the law firm of Buelow, Vetter, Buikema, Olson & Vliet, LLC as defense counsel. This is acceptable to the Insurers provided an agreement can be reached on the hourly rates to be charged by the firm. Please have the firm send to my attention its fee schedule for the Insurer's approval.

(R. 355; App. 22-34.)

The District was represented by the Buelow Vetter law firm continuously, since the vote to cancel the long-term care group policy, until the Insurers' January 14, 2014 letter, and through the merits trial on the plaintiffs' claims. (R. 312, 353, 576; App. 7-18.) The Buelow Vetter law firm mounted a vigorous defense to the lawsuit, initially moving to dismiss the claims, filing a petition for leave to appeal the circuit court's denial of the motion to dismiss, filing a motion for summary judgment, opposing the plaintiffs' motion for partial summary judgment, opposing the plaintiffs' motion to proceed as a class action, filing a motion for leave to amend affirmative defenses, filing a motion for reconsideration of summary judgment, and obtaining a defense verdict at the merits trial. (R. 8-10, 38-40, 76, 136-140, 143, 194, 215-216, 405-406, 573.)

Prior to the inception of this lawsuit, the Buelow Vetter firm agreed to abide by the Insurers' billing guidelines in the course of work for other matters. (R. 391:1-2, 5-6.)[2] For legal services rendered in the District's defense from July 16, 2013 through November 30, 2013, the Insurers required Buelow Vetter to reissue the invoices in the format required for law firms providing legal defense services commissioned by the Insurers on behalf of an insured. (R. 391:2.) Buelow Vetter complied with this request, but the total amount of invoices submitted to the Insurers was $70,685.16 because the Insurers did not receive a copy of the Buelow Vetter invoice dated August 6, 2013 in the sum of $9,856.50. (Id.)

The Insurers reviewed the invoices and subsequently issued reimbursement in the amount of $47,129.50 for the legal services charged by the Buelow Vetter law firm from July 16, 2013 through November 30, 2013. (R. 391:2) This resulted in an amount of $33,412.16 that the District paid to Buelow Vetter for legal defense services, but for which the District has not received reimbursement. (Id.) The

[2] The District's citation to its amended counterclaim as support for its assertions regarding actions taken by both Buelow Vetter and the Insurers after the Insurers advised the District they would provide the District with a full defense and regarding the amount of attorney fees billed by Buelow Vetter and paid or not paid by the Insurers is improper, as the pleading is not evidence. *See, e.g.,* ***Nelson v. Schreiner***, 161 Wis. 2d 798, 804, 469 N.W.2d 214 (Ct. App. 1991) (explaining appropriate references to the record are to evidence).

shortfall was the result of (1) the August 6, 2013 invoice which was never received by the Insurers ($9,856.50) and (2) violations of the litigation and billing guidelines which Buelow Vetter had previously agreed to abide by ($23,555.66). (R. 391:3.) The billing guidelines have an appeal process which allows a law firm to appeal any deductions made by the Insurers, and the Buelow Vetter law firm never filed an appeal from any deductions made by the Insurers from the invoices dated July 6, 2013 through November 30, 2013. (Id.)

The Insurers also reviewed the paper invoices for the period of December 1, 2013 through April 30, 2014, approving $55,221.98 of the $72,568.87 billed to be paid. (R. 391:3.) The deductions were based on violations of the billing guidelines previously agreed to and were subject to reconsideration if an appeal was filed by Buelow Vetter. (Id.)

As of June 22, 2016, the Insurers paid the sum of $260,021.32 in costs and attorney fees incurred for the defense of the District against the claims asserted in the lawsuit. (R. 391:3.) The amount paid through the merits trial and defense verdict is not part of the record.

STANDARD OF REVIEW

Whether an insurer breached its duty to defend requires interpretation of an insurance contract, which presents a question of law reviewed independently. *See* ***Water Well Sols. Serv. Grp. Inc. v. Consol. Ins. Co.***, 2016 WI 54, ¶ 12, 369 Wis. 2d 607, 881 N.W.2d 285.

Whether an insured is entitled to attorney fees and costs in relation to coverage is a question of law reviewed independently of a lower court's decision, but benefiting from the analysis of the court. *See* ***Reid v. Benz***, 2001 WI 106, ¶12, 245 Wis. 2d 658, 629 N.W.2d 262.

The proper measure of damages for an insurer's breach of its duty to defend is a question of law reviewed independently. *See* ***Steadfast Ins. Co. v. Greenwich Ins. Co.***, 2018 WI App 11, ¶ 20.

ARGUMENT

I. THE TRIAL COURT PROPERLY HELD THE INSURERS DID NOT BREACH THE DUTY TO DEFEND.

A. The circuit court determined the Insurers followed the recommended procedures for resolving coverage disputes and did not breach the duty to defend.

The District repeatedly asserts the circuit court ruled the Insurers breached their duty to defend. (App. Br. v, 1, 14, 18, 21.) This assertion is a significant mischaracterization of the record.

Contrary to the District's repeated assertion, the circuit court never ruled the Insurers breached their duty to defend. Rather, the circuit court determined that the Insurers did not breach the duty to defend because they followed the proper procedure for raising a coverage dispute. (R. 583:3; App. 5) ("because Intervening Defendants in this case asked for the stay, they complied with the requirements of **Mowry** and thus did not breach their duty to defend".)

The recommended procedure for contesting coverage is well-established under Wisconsin law: to intervene, to request a bifurcated trial of liability and coverage, and to move to stay the liability proceeding pending a decision on the coverage proceeding. *See, e.g.,* ***Reid***, 2001 WI 106, ¶¶ 3(*citing* ***Mowry v. Badger State Mut. Cas. Co.***, 129 Wis. 2d 496, 528-29, 385 N.W.2d 171 (1986)); ***Water Well***, 2016 WI 54, ¶ 27.

As the Wisconsin Supreme Court held in ***Mowry***, and as Wisconsin courts have reiterated in subsequent cases, an insurer who follows this recommended procedure avoids the risk of breaching the duty to defend. ***Mowry***, 129 Wis. 2d at 528-29. *See also* ***Water Well***, 2016 WI 54, ¶ 27; ***Burgraff v. Menard, Inc.*** 2016 WI 11, ¶ 77, 367 Wis.2d 50, 875 N.W.2d

596 (2016); ***Newhouse by Skow v. Citizens Sec. Mut. Ins. Co.***, 176 Wis. 2d 824, 836, 501 N.W.2d 1 (1993).

It is undisputed the Insurers followed the ***Mowry*** procedure by intervening, requesting a bifurcated trial, and moving to stay the liability proceedings. (R. 12-14.) Although the circuit court denied the motion to stay the liability proceedings, pending resolution of the coverage issues, the Insurers complied with ***Mowry*** and its progeny by requesting the stay and unilaterally assuming the defense of the District when the stay request was denied. (R. 44.)

B. The fee dispute raised by the District does not constitute a breach of the duty to defend under Wisconsin law.

This appeal is premised largely on the District's effort to transform disagreements over timing and fees into a breach of the duty to defend. But the circuit court properly determined that the fee dispute raised by the District does not constitute a breach of the duty to defend. After the circuit court denied the Insurers' motion for summary judgment, the Insurers agreed, subject to a reservation of rights, to pay for the defense of the District, including all reasonable and necessary defense costs incurred on or after July 16, 2013, the date the lawsuit was filed. (R. 355; App. 22-34.) However, the District suggests the Insurers breached the duty to defend

by delaying in providing a defense and by not paying 100% of the fees billed by Buelow Vetter. These arguments are not supported under Wisconsin law, which is clear that such questions of timing and fees do not qualify as breaches of the duty to defend.

First, Wisconsin courts have determined a delay in providing a defense does not constitute a breach of the duty to defend provided the agreement to provide a defense is retroactive. In ***Kenefick v. Hitchcock***, for example, the lawsuit against the insured alleged a potentially covered claim, and the insurer did not immediately provide a defense, but instead sought and obtained a bifurcated trial and a stay of the liability proceeding until coverage was determined. 187 Wis. 2d 218, 322, 522 N.W.2d 261 (Ct. App. 1994), *overruled on other grounds by* ***Marks v. Houston Cas. Co.***, 2016 WI 53, ¶ 76, 369 Wis. 2d 547, 881 N.W.2d 309. The insured asserted the insurer breached its duty to defend because the insurer did not request bifurcation until roughly six months after the complaint was filed, and, as a result, the insured was compelled to supply answers to numerous interrogatories and production requests, attend several depositions and incur substantial attorneys' fees for the monitoring and preparation of the case without a defense from the insurer. ***Id***. at 233 n. 6. The Court of

Appeals rejected this argument, determining the insurer was not estopped from asserting its coverage defenses and was not liable for all damages that may be assessed against the insureds in the underlying action, as the insurer had followed the proper procedure for contesting coverage. ***Id***. at 234-34.

Other Wisconsin court decisions support this conclusion. In ***Wisconsin Pharmacal Company, LLC v. Nebraska Cultures of California, Inc.*** the Wisconsin Supreme Court reversed the Court of Appeals' decision the insurer breached its duty to defend by rejecting the initial tender, prior to discovery of additional facts bearing on coverage, stating, "an insurer may avoid breaching the duty to defend by requesting a bifurcated trial on the issues of coverage and liability [ ] [and] mov[ing] to stay any proceedings on liability until the issue of coverage is resolved." 2016 WI 14, ¶¶ 17-19, 367 Wis. 2d 221, 876 N.W.2d 72. Moreover, in ***Lakeside Foods, Inc. v. Liberty Mutual Fire Insurance Company***, the Court of Appeals found a three-month delay in deciding to defend did not constitute a breach of the duty to defend, when the insured proceeded with the counsel of its choice and the insurer agreed to pay for it. 2010 WI App 120, ¶ ¶ 40-43, 329 Wis. 2d 270,

789 N.W.2d 754 (unpublished decision cited for persuasive value pursuant to Wis. Stat. 809.23(3)).

Federal courts, applying Wisconsin law, have also rejected the District's argument that a delay in accepting a defense tender is a breach of the duty to defend. *See* ***Am. Design & Build, Inc. v. Hous. Cas. Co.***, No. 11-C-293, 2012 U.S. Dist. LEXIS 28268, at *29 (E.D. Wis. Mar. 5, 2012) ("An insurer may investigate a claim before accepting the defense, so long as it reimburses the insured for the defense retroactive to the date of the claim."); ***Haley v. Kolbe & Kolbe Millwork Co.***, No. 14-cv-99-bbc, 2015 U.S. Dist. LEXIS 148023, at *11-12 (W.D. Wis. Nov. 2, 2015), *appealed and reversed on other grounds at* 866 F.3d 824 (7th Cir. 2017) ("I find persuasive the view in ***Lakeside Foods*** and ***American Design & Build*** that a delay in deciding whether to defend an insured does not qualify as a breach of duty to defend or an exercise of bad faith when the reason for the delay is the insurer's investigation of coverage, the insured has counsel while the insurer is conducting its investigation and the insurer pays the cost of counsel even for the time period that the investigation was pending."); ***Carney v. Village of Darien***, 60 F.3d 1273, 1277 (7th Cir. 1995) (concluding that insurer complies with

duty to defend so long as it seeks coverage declaration from court “prior to the trial on the liability issue”).

Second, a dispute over the reasonable and necessary fees does not constitute a breach of the duty to defend under Wisconsin law. To begin, ***Sauk County v. Employers Insurance*** directly refutes the District's argument. *See* 202 Wis. 2d 433, 550 N.W.2d 439 (Ct. App. 1969). In ***Sauk***, the insurer only paid a small fraction of the defense invoices, the amount it deemed attributable to the covered claim, while withholding the remainder. ***Id***. at 444. The Court of Appeals rejected the insured's argument the insurer was breaching its duty to defend by not paying in full, holding the insured's approach was reasonable and "did not constitute a breach of the duty to defend." ***Id.*** at 446.

This principle is supported by other Wisconsin court decisions. In ***Lakeside Foods***, for example, the insurer claimed a fee arrangement was reached whereby the insurer would pay the insured's selected counsel the panel counsel hourly rate and the insured would pay the difference, and the insurer paid this hourly rate through the settlement of the case. 2010 WI App 120, ¶¶ 11-12. The insured filed a complaint against the insurer for breach of the duty to defend and bad faith, asserting the insurer's payment of only part of the attorney fees violated the duty to defend.

Id. at ¶ 16. The Court of Appeals determined an issue of fact existed as to the amount the insurer owed the insured for fees, which depended on whether an agreement on rates was reached and whether the request for compensation of the fees was reasonable. ***Id***. at 35. However, the court did not determine the insurer breached the duty to defend. ***Id***. at ¶ 50. *See also* ***DeMarco v. Keefe Real Estate, Inc.***, 2014 WI App 16, 352 Wis. 2d 573, 842 N.W.2d 536 (unpublished opinion cited for persuasive value pursuant to Wis. Stat. 809.23(3)) (rejecting the argument the insurer was estopped from denying coverage because it breached the duty to defend by failing to pay the final invoice from defense counsel and contributing a certain amount to the settlement, determining instead the insurer was bound to pay the fees promised).

Finally, the District argues the Insurers did not provide a true defense because the defense was provided subject to a reservation of rights to seek reimbursement for defense costs paid to the extent allowed by law. The argument is not developed, and the District cites no case law in support of this argument. On these bases, this argument should be ignored. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).

Furthermore, the record reflects the Insurers merely reserved their rights to seek reimbursement for defense costs paid to the extent allowed by law. (R. 355; App. 22-34.) The Insurers did not condition the provision of a defense on the District agreeing to such a reservation or right to reimbursement. (Id.) Moreover, the Insurers never sought any reimbursement.

As demonstrated herein, the circuit court properly determined the Insurers did not breach the duty to defend because the fee dispute raised by the District does not constitute a breach of the duty to defend.

C. The District forfeited any argument regarding the $50,000 attorney fees the District asserts the Insurers failed to reimburse.

In multiple instances, the District asserts, without record citation, the Insurers still owe the District approximately $50,000 for attorney fees associated with the defense of the merits claims. (App. Br. 2-12, 14.) Later in its brief, the District includes two record citations. (App. Br. 22.) However, neither supports its assertion that approximately $50,000 has not been reimbursed by the Insurers. (R. 382, 390:14-15.)

Rather, the record citations indicate as follows: (1) Buelow Vetter billed and the District paid $80,541.66 from

July 16, 2013 to November 30, 2013, and the Insurers reimbursed $47,129.50; (2) Buelow Vetter billed and the District paid $72,568.87 from December 1, 2013 to April 30, 2014, and the Insurers reimbursed nothing; and (3) the Insurers approved and would make payment of $55,221.98 on the Buelow Vetter invoices for December 1, 2013 to April 30, 2014. (Id.)[3] There is no evidence cited, or otherwise in the record, as to whether the $55,221.98 was paid. (Id.)

The District's assertion approximately $50,000 has not been reimbursed is improper. Assertions of fact not found in the record are prohibited and will not be considered by the court. *See* ***Nelson***, 161 Wis. 2d at 804. A failure to provide record citations violates Rule 809.19 and may warrant sanctions against the offending party's attorney. *See* ***State v. Bergwin***, 2010 WI App 137, ¶18, 329 Wis. 2d 737, 793 N.W.2d 72.

Moreover, the District never sought an adjudication from the circuit court as to whether the approximately $50,000 was paid or should be paid. (R. 583, 584, 590; App. 1-2, 3-6.) And, the November 3, 2017 written decision and the November 30, 2017 order for judgment and judgment did

[3] As explained, the difference between what was billed and reimbursed resulted from an invoice never received by the Insurers and violations of the litigation and billing guidelines by which Buelow Vetter had previously agreed to abide. (R. 391:3.)

not address the approximately $50,000. (R. 583, 590; App. 1-2, 3-6.) Thus, District forfeited any argument regarding the approximately $50,000 because it was not raised and addressed with the circuit court.

The rule requiring issues to be raised first in the circuit court is "a bedrock principle of appellate practice." ***Nickel v. United States (In re Rehab. of Segregated Account of Ambac Assurance Corp.)***, 2012 WI 22, ¶ 35, 339 Wis. 2d 48, 810 N.W.2d 450. "It is well-established law in Wisconsin that those issues not presented to the trial court will not be considered for the first time at the appellate level." ***Shadley v. Lloyds of London***, 2009 WI App 165, ¶ 25, 322 Wis. 2d 189, 776 N.W.2d 838. The rule "gives the parties and the circuit court notice of the issue and a fair opportunity to address it; encourages attorneys to diligently prepare for and conduct trials; and prevents attorneys from 'sandbagging' opposing counsel by failing to object to an error or strategic reasons and later claiming that the error is grounds for reversal." ***Schill v. Wis. Rapids Sch. Dist.***, 2010 WI 86, ¶ 45 n.21, 327 Wis. 2d 572, 786 N.W.2d 177 (explaining the failure to raise an issue in the circuit court is generally referred to as waiver but is properly characterized as forfeiture). The rule is "not merely a technicality or a rule of

convenience; it is an essential principle of the orderly administration of justice." ***State v. Huebner***, 2000 WI 59, ¶ 11, 235 Wis. 2d 486, 611 N.W.2d 727.

Under limited circumstances, appellate courts may choose to review a forfeited issue: (1) "where a waived issue is of statewide importance or interest"; (2) "when a question of law is presented that is not dependent on the facts as presented below"; and (3) "where the parties have fully briefed the issue" and "there are no factual disputes". ***Estate of Hegarty v. Beauchaine***, 2001 WI App 300, ¶¶ 11-13, 249 Wis. 2d 142, 638 N.W.2d 355.

Because the District did not raise and seek an adjudication as to the approximately $50,000, the District forfeited any argument on this issue. Furthermore, none of the appropriate circumstances under which this Court may choose to review the forfeited issue are satisfied. Resolution of the issue would depend on the facts presented below, but as discussed, there is no evidence in the record as to whether the approximately $50,000 was paid. In addition, the parties have not had the opportunity to brief the issue, and the issue is not one of statewide importance or interest.

II. THE CIRCUIT COURT PROPERLY DETERMINED THE DISTRICT IS NOT ENTITLED TO ATTORNEY FEES OR COSTS UNDER *ELLIOTT V. DONAHUE*.

The District argues, relying on ***Elliott v. Donahue***, it is entitled to recover the attorney fees and costs it has incurred to secure its defense and insurance coverage. *See* 169 Wis. 2d 310, 485 N.W.2d 403 (1992). But ***Elliott*** is not controlling because the Insurers asked to stay liability proceedings pending resolution of the coverage question—and then provided a defense as soon as the circuit court declined to issue a stay. The circumstances here are instead analogous to ***Reid v. Benz***, wherein the Wisconsin Supreme Court refused to order fee-shifting.

First, the facts at bar are distinguishable from ***Elliott***. In ***Elliott***, the insurer advised the insured it was denying coverage based upon a non-permissive use exclusion in the policy. 169 Wis. 2d at 314. The insurer advised the insured to obtain its own counsel on liability, and the insured did so. ***Id***. at 315. The insurer then requested a bifurcated trial on the coverage issue, which the court ordered. ***Id***. However, and importantly, the insurer did not request the liability proceedings be suspended while the coverage issue was being resolved. ***Id***. At the bifurcated coverage trial, the jury found the insured had coverage. ***Id***. The insured filed a motion after verdict to recover the

attorney fees and costs for the litigation, and the issue was appealed to the Wisconsin Supreme Court. ***Id***. at 315-16. The Wisconsin Supreme Court determined the insurer was liable to the insured for the attorney fees incurred in defending itself in the liability proceedings and in the coverage trial. ***Id***. at 322.

Elliott is distinguishable and is not controlling herein because the Insurers did not fail to request the liability proceedings be stayed pending resolution of the coverage issues. The Wisconsin Supreme Court clarified this critical distinction in ***Reid v. Benz***, 2001 WI 106, 245 Wis. 2d 658, 629 N.W.2d 262.

In ***Reid***, the court reiterated the recommended procedure set forth in ***Mowry v. Badger State Mutual Casualty Company***, and subsequent cases, for contesting coverage by intervening, requesting a bifurcated trial of liability and coverage, and moving to stay the liability proceeding pending a decision on the coverage issues. ***Id***. at ¶ 18. The court explained that although the insurer in ***Elliott*** requested a bifurcated trial, it did not comply with ***Mowry*** by moving to stay the liability proceeding while the coverage issues were resolved. ***Id***. at ¶¶ 13, 16. Moreover, the court specifically held ***Elliott*** is not applicable when an insurer follows the ***Mowry*** procedure:

> In ***Mowry***, we indicated that an insurer can avoid the risk of breaching the duty to defend by seeking bifurcation of the coverage and liability issues, and a stay of the liability phase until coverage has been decided. Where an insurer fails to follow that procedure, as the insurer did in ***Elliott***, the insurer does indirectly what it cannot do directly. The insurer breaches the duty to defend by requiring the insurer to incur attorney fees to defend him or herself on the issue of liability and to litigate coverage simultaneously . . . . There is no dispute that [the insurer] followed the procedure established in ***Mowry***. Consequently, the basis for the attorney fee award in ***Elliott*** is absent here.

Id. at ¶¶ 3-4. The court also rejected the argument ***Elliott*** "fashion[ed] a rule that the duty to indemnify requires the insurer to pay the insured's attorney fees, when it loses a contest over coverage." ***Id***. at ¶ 32.

In ***Reid***, the Wisconsin Supreme Court noted the Court of Appeals properly applied ***Elliott*** in the ***Ledman v. State Farm Mutual Automobile Insurance Company*** decision. ***Id***. at ¶ 675 n. 7 (*citing* 230 Wis. 2d 56, 69, 601 N.W.2d 312 (Ct. App. 1999)). In ***Ledman***, the Court of Appeals reversed the circuit court's decision to award attorney fees under ***Elliott*** because there was no breach of the duty to defend:

> In ***Elliott***, the court 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. There was no breach of a duty to defend. Further, our supreme court has declared that ***Elliot*** [sic] should not be extended "beyond its particular facts and circumstances." Attorney's fees should only be

> awarded in limited circumstances: when an insurer breaches its duty to defend an insured.

230 Wis. 2d at 70. The court determined that because the insurer did not breach its duty to defend, the trial court erred in ordering the insurer to pay the insured's attorney fees under ***Elliott***. ***Id***.

Moreover, the Wisconsin Supreme Court has, on numerous occasions, expressly declined to extend ***Elliott*** "beyond its particular facts and circumstances." ***Reid***, 2001 WI 106, ¶ 28; ***Gorton v. Hostak, Henzl & Bichler, S.C.***, 217 Wis. 2d 493, ¶ 33, 577 N.W.2d 617 (1998); ***DeChant v. Monarch Life Ins. Co.***, 200 Wis. 2d 559, 569, 547 N.W.2d 592 (1996). This Court has recognized the Wisconsin Supreme Court has limited and declined to extend ***Elliott*** in subsequent case law. *See* ***Chicago Title Ins. Co. v. Voss***, 2010 WI App 145, ¶ 12, 330 Wis. 2d 96, 791 N.W.2d 404 (unpublished decision cited for persuasive value pursuant to Wis. Stat. 809.23(3)).

Because the Insurers followed the ***Mowry*** procedure by intervening, requesting a bifurcated trial, and moving to stay the liability proceedings, and because the Insurers did not breach the duty to defend, ***Elliott*** does not apply. The circuit court properly determined the Insurers are not

liable to the District for its attorney fees and costs associated with the coverage proceeding.

III. THE DISTRICT IS NOT ENTITLED TO ATTORNEY FEES OR COSTS AS DAMAGES.

A. The District forfeited or waived the attorney fees as damages issue.

The issue of whether the District is entitled to attorney fees or costs incurred for its defense as damages is not properly before this Court because the District forfeited or waived the issue.

As discussed *supra*, the forfeiture rule is "a bedrock principle of appellate practice," and "an essential principle of the orderly administration of justice." ***Nickel***, 2012 WI 22, ¶ 35; ***Huebner***, 2000 WI 59, ¶ 11. Parties are required to both raise and preserve an issue before the circuit court. *See* ***Nickel***, 2012 WI 22, ¶ 8 n.10. Thus, it is well-established issues not raised and preserved before the trial court "will not be considered for the first time at the appellate level." ***Shadley***, 2009 WI App 165, ¶ 25. Appellate courts may choose to review a forfeited issue under limited circumstances. *See* ***Estate of Hegarty***, 2001 WI App 300, ¶¶ 11-13 (describing the circumstances as "where a waived issue is of statewide importance or interest"; "when a question of law is presented that is not dependent on the facts as presented

below"; and "where the parties have fully briefed the issue" and "there are no factual disputes").

The District concedes the circuit court did not address the issue of whether the District is entitled to attorney fees or costs as damages for the alleged breach of the duty to defend. (App. Br. v, 14.) That concession dooms their argument. In order to preserve the issue, the District should have, and did not, request clarification as to the circuit court's November 3, 2017 ruling or specifically request a ruling on the issue of whether it was entitled to attorney fees or costs as damages. (R. 583, 590; App. 1-2, 3-6.) As a result, this issue has been forfeited.

Moreover, none of the appropriate circumstances under which this Court may choose to review the forfeited issue are met. The issue is not one of statewide importance or interest, and the legal question is dependent on the facts presented below. There is also no evidence in the record as to the $50,000 the District asserts was not reimbursed, the issue that is central to the District's argument.

Alternatively, the District waived the issue. Waiver is the "intentional relinquishment or abandonment of a known right." ***State v. Ndina***, 2009 WI 21, ¶ 29, 315 Wis. 2d 653, 761 N.W.2d 612. The District was aware neither the

circuit court's written decision nor the order for judgment and judgment on the motion for attorney fees addressed the issue of whether it was entitled attorney fees or costs as damages. By failing to seek clarification as to the circuit court's ruling or specifically request a ruling on the issue, the issue was waived.

Because the attorney fees as damages issue was forfeited, and the circumstances to consider the forfeited issue are not met, or the issue was waived, the issue should not be considered by this Court in the first instance.

B. The District is not entitled to attorney fees or costs as damages because there was no breach of the duty to defend.

The District's argument it is entitled to attorney fees as damages is predicated on a finding the Insurers breached the duty to defend. Thus, even if this Court considers the attorney fees as damages argument, which the Insurers oppose, the District is not entitled to attorney fees as damages because the Insurers did not breach the duty to defend.

The Wisconsin Supreme Court has determined an insurer who breaches the duty to defend is "guilty of a breach of contract which renders it liable to the insured for all

damages that naturally flow from the breach." ***Newhouse by Skow***, 176 Wis. 2d at 837; ***Burgraff***, 2016 WI 11, ¶ 60.

As set forth herein, the circuit court properly held the Insurers did not breach the duty to defend. Consequently, the District's attorney fees and costs cannot be recovered as damages flowing from said breach.

CONCLUSION

The Insurers request this Court affirm the trial court decision finding the Insurers did not breach the duty to defend and the District is not entitled to attorney fees or costs under ***Elliott v. Donahue***.

Dated this 13th day of April, 2018.

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CERTIFICATION

I certify that this brief conforms to the rules contained in sec. 809.19 (8) (b) and (c), for a brief and appendix produced using the following font: Monospaced font: 10 characters per inch; double spaced; 1.5 inch margin on left side and 1 inch margin on the other 3 sides. The length of this brief is 35 pages.

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CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of §809.19(12).

I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

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APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using the first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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I further certify that this electronic appendix is identical in content and format to the printed form of the appendix filed as of this date.

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CERTIFICATON OF THIRD-PARTY COMMERCIAL DELIVERY

I hereby certify that on April 13, 2018 this brief and appendix was delivered to a third-party commercial carrier for delivery to the Clerk of the Court of Appeals within 3 calendar days. I further certify that the brief and appendix were correctly addressed.

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