COURT OF APPEALS
DECISION
DATED AND FILED

September 5, 2001

Cornelia G. Clark
Clerk of Court of Appeals

No. 00-2777

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

PRECISION CABLE ASSEMBLIES LLC,

PLAINTIFF-RESPONDENT,

V.

CENTRAL RESISTOR CORPORATION,

DEFENDANT-THIRD-PARTY PLAINTIFF-RESPONDENT,

V.

HARTFORD FIRE INSURANCE COMPANY AND HARTFORD CASUALTY INSURANCE COMPANY,

THIRD-PARTY DEFENDANTS-APPELLANTS.

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

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

¶1 PER CURIAM. Hartford Fire Insurance Company and Hartford Casualty Insurance Company (Hartford) have appealed from a judgment awarding Central Resistor Corporation $45,400, plus attorney's fees, costs and disbursements of $34,358. Precision Cable Assemblies, LLC, was awarded $109,599, plus attorney's fees in the amount of $17,987. We affirm the judgment.

¶2 This action involves claims for money damages stemming from Hartford's failure to defend Central Resistor in a lawsuit commenced against Central Resistor by Precision. In its complaint against Central Resistor, Precision sought damages based upon breach of contract, breach of warranty, and negligence. Precision alleged that it is engaged in the business of manufacturing wire harnesses, and that Central Resistor is engaged in the business of manufacturing resistors. Precision alleged that between May and August 1997, Central Resistor negligently manufactured and delivered to Precision two-ohm resistors instead of three-ohm resistors as ordered by Precision. Precision alleged that because Central Resistor provided the wrong resistors, the wire harnesses into which they were inserted were rendered useless and were rejected by Precision's customers. Precision alleged that it was unaware of the defective nature of the resistors until after they were installed into 111,300 wire harness units, and that as a direct and proximate result of Central Resistor's negligence, it was forced to recall its product and rebuild its wire assemblies. It alleged that in removing and replacing the two-ohm resistors, it had to damage and destroy portions of its existing finished units. It sought damages arising from the recall project, including labor and material costs, as well as lost profits for the time expended on the recall.

¶3 Precision specifically alleged that it suffered damage to its finished product as a direct and proximate result of the incorporation of Central Resistor's

defective component. It further alleged that all sums incurred by it to recall the two-ohm resistors were the result of "property damage" caused by an "occurrence" as defined in Central Resistor's comprehensive general liability (CGL) insurance policy. That policy had been issued to Central Resistor by Hartford.

¶4 Central Resistor tendered its defense of the lawsuit to Hartford. Hartford denied that coverage existed under its policy, and declined to provide a defense. Central Resistor subsequently defended the lawsuit at its own expense, and eventually reached a settlement with Precision. Under the terms of the settlement, Precision and Central Resistor stipulated to the entry of judgment in favor of Precision in the amount of $155,000. In exchange for a satisfaction of judgment from Precision, Central Resistor paid Precision $31,000 and voluntarily dismissed counterclaims against Precision seeking damages of $14,400.93. The parties also stipulated that Central Resistor had certain claims against Hartford, including a claim for breach of the duty to defend in this case. Central Resistor assigned to Precision $109,599.07 of its claims against Hartford, representing the $155,000 total judgment less the $31,000 paid in settlement by Central Resistor and the $14,400.93 in dismissed counterclaims. Central Resistor retained its claims against Hartford for its $31,000 payment to Precision, its dismissed counterclaims for $14,400.93, and "for its attorney fees and costs incurred in defending itself [in the action brought by Precision] and in obtaining reimbursement from … Hartford for its attorney fees and costs."

¶5 Subsequently, Central Resistor filed a third-party complaint against Hartford alleging, among other things, that Hartford had breached its duty to defend Central Resistor in this lawsuit. It requested an award of the amount paid and forgiven in settlement by it. Pursuant to WIS. STAT. § 806.04(8) (1999-

2000),[1] it also requested its actual costs and attorney's fees incurred in defending against Precision's claims and seeking insurance coverage. In addition, based upon the assignment of Central Resistor's claims, Precision filed an amended complaint against Hartford. Precision requested a declaration that Hartford breached its duty to defend Central Resistor. It requested an award of $109,599, representing the unpaid portion of the stipulated judgment. Pursuant to § 806.04(8), it also requested costs, disbursements and attorney's fees incurred in pursuing insurance coverage.

¶6 All of the parties filed motions for summary judgment. The trial court granted summary judgment in favor of Central Resistor and Precision.

¶7 Our review of the trial court's grant of summary judgment is de novo. ***Millen v. Thomas***, 201 Wis. 2d 675, 682, 550 N.W.2d 134 (Ct. App. 1996). Summary judgment is warranted when there are no genuine issues of material fact and one party is entitled to judgment as a matter of law. ***Id.*** When, as here, all parties move by cross-motions for summary judgment, it is the equivalent of a stipulation of facts permitting the trial court to decide the case on the legal issues, although always subject to the rule that summary judgment may be granted only if no material issue of fact is presented by the parties' respective evidentiary facts. ***Id.*** at 682-83 and n.2.

¶8 Because no material facts are in dispute in this case, the issue of whether Hartford had a duty to defend Central Resistor against Precision's lawsuit presents a question of law which we review de novo. *See* ***Radke v. Fireman's***

[1] All references to the Wisconsin Statutes are to the 1999-2000 version.

Fund Ins. Co., 217 Wis. 2d 39, 43, 577 N.W.2d 366 (Ct. App. 1998); ***Grube v. Daun***, 173 Wis. 2d 30, 72, 496 N.W.2d 106 (Ct. App. 1992). "When determining whether an insurer has a duty to defend, the allegations within the four corners of the complaint must be compared with the terms of the insurance policy. The existence of the duty to defend depends solely upon the nature of the claim being asserted against the insured and has nothing to do with the merits of the claim." ***Radke***, 217 Wis. 2d at 43 (citations omitted). "If there are allegations in the complaint which, if proven, would be covered, the insurer has a duty to defend." ***Grube***, 173 Wis. 2d at 72. An insurance company that declines to defend does so at its own peril and will be held liable to its insured if there is, in fact, coverage under the policy or coverage is fairly debatable. ***Radke***, 217 Wis. 2d at 44. In determining whether an insurer had a duty to defend its insured, this court is required to ignore both the merits of the claim alleged in the complaint and any exclusionary or limiting terms and conditions of the policy. ***Id***.

¶9 The policy issued by Hartford to Central Resistor provided:

> 1. Insuring Agreement.
>
> > a. We will pay those sums that the insured becomes legally obligated to pay as damages because of … "property damage" to which this insurance applies.… However, we will have no duty to defend the insured against any "suit" seeking damages for … "property damage" to which this insurance does not apply.

"Property damage" was defined in the policy as:

> "Property damage" means:
>
> a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or

b. Loss of use of tangible property that is not physically injured.

¶10 Precision's complaint alleged property damage within the meaning of the policy. The policy issued by Hartford is a standard CGL policy, which protects the insured against liability for damages which the insured's negligence causes to third parties. *See* ***Wis. Label v. Northbrook Prop. & Cas. Ins.***, 2000 WI 26, ¶27, 233 Wis. 2d 314, 607 N.W.2d 276. "The risk intended to be insured [in a CGL policy] is the possibility that the goods, products or work of the insured, once relinquished or completed, will cause bodily injury or damage to property other than to the product or completed work itself, and for which the insured may be found liable." ***Id.*** (quoting ***Bulen v. West Bend Mut. Ins. Co.***, 125 Wis. 2d 259, 264-65, 371 N.W.2d 392 (Ct. App. 1985)).

¶11 In this case, Precision's complaint specifically alleged that its finished product (i.e., the wire harnesses) was damaged because of the incorporation of the two-ohm resistors. It also alleged that removal of the two-ohm resistors from the wire harnesses led to the destruction of portions of the finished units. It thus alleged physical injury to tangible property.

¶12 Even if Precision's wire harnesses were not physically damaged as a result of Central Resistor's alleged negligence, Precision also alleged that incorporation of the two-ohm resistors in its wire harnesses rendered the wire harnesses useless and caused them to be rejected by its customers. Thus, even if the complaint did not allege "physical injury to tangible property," it alleged "loss of use of tangible property that is not physically injured." The complaint thus alleged property damage covered by the CGL policy issued by Hartford.

¶13 Hartford relies on ***Wisconsin Label*** to contend that coverage of the claims alleged in Precision's complaint was not fairly debatable. Its reliance is misplaced. The potential liability of the insured in ***Wisconsin Label*** was based solely on the mislabeling of packaged products. The mislabeling caused the products to be sold at less than their intended retail price. ***Wis. Label***, 2000 WI 26 at ¶2. In addition, unsold packages had to be inspected and relabeled. ***Id.*** at ¶¶8-9.

¶14 In contrast to the allegations in this case, there was no physical damage to the mislabeled product, and only relabeling was required, not repair of the product. *See* ***id.*** at ¶¶32-33. Thus, no "physical injury to tangible property" occurred. *See* ***id.*** at ¶¶30-31. In addition, because the product remained useable and damages were not sought for loss of use of the product while it was relabeled, the ***Wisconsin Label*** court concluded that "property damage" could not be based upon "loss of use of tangible property that is not physically injured." ***Id.*** at ¶54. In contrast, Precision specifically alleged that its wire harnesses were rendered useless because they incorporated the two-ohm resistors, and thus alleged "property damage" within the meaning of the CGL policy. *See* ***id.*** at ¶50. In addition, it specifically alleged that the wire harnesses were damaged both because of the incorporation of the two-ohm resistors, and by the actions which were required to remove and replace the two-ohm resistors. "Property damage" to Precision's product resulting from Central Resistor's negligence was thus clearly alleged. Because the nature of the claim being asserted by Precision would, if proven, have been covered by the CGL policy, Hartford had a duty to defend Central Resistor.

¶15 Hartford argues that it did not have a duty to defend Central Resistor because the claims alleged by Precision fell within various exclusions in the CGL

policy. However, as already pointed out, in determining whether a duty to defend exists, this court is required to ignore both the merits of the claim alleged in the complaint and any exclusionary or limiting terms and conditions of the policy. ***Radke***, 217 Wis. 2d at 44. Because Precision's complaint alleged claims which were covered by the CGL policy, and because Hartford denied coverage outright without seeking a judicial determination of its duty to defend, it is precluded from raising any challenges to coverage based upon policy exclusions. *See* ***Grube***, 173 Wis. 2d at 74. "Rather than raising the issue in court, an insurer cannot deliberately reach its own conclusion on coverage and then maintain that a clause in the policy would have excused it from indemnifying had the coverage issue correctly been decided by a court originally." ***Id.*** at 75.

¶16 While acknowledging that ***Grube***, ***Radke*** and ***Kenefick v. Hitchcock***, 187 Wis. 2d 218, 232, 522 N.W.2d 261 (Ct. App. 1994), state that policy exclusions cannot be considered in determining whether an insurer has a duty to defend its insured, Hartford contends that in other cases, such as ***Last v. American Family Mutual Insurance Co.***, 2000 WI App 169, ¶10, 238 Wis. 2d 140, 617 N.W.2d 215, courts have considered exclusions in determining whether a breach of a duty to defend occurred. Hartford also relies on language in ***Shannon v. Shannon***, 150 Wis. 2d 434, 452, 442 N.W.2d 25 (1989), stating that waiver and estoppel may not be relied upon to compel an insurer to provide coverage for a risk excluded by the policy. Hartford contends that we therefore should not follow the ***Grube*** line of cases here.

¶17 We reject Hartford's contentions. Unlike the other cases cited by Hartford, ***Grube*** and ***Radke*** specifically address the issue of whether policy exclusions may be considered in determining whether an insurer breaches its duty to defend when it declines to provide a defense to a claim tendered by its insured

without first seeking a judicial determination that no coverage exists.[2] "[W]hen an appellate court intentionally takes up, discusses and decides a question germane to a controversy, such a decision is not a *dictum* but is a judicial act of the court which it will thereafter recognize as a binding decision." ***Malone v. Fons***, 217 Wis. 2d 746, 754, 580 N.W.2d 697 (Ct. App. 1998) (citation omitted). In addition, we are bound by prior published decisions of this court and may not overrule, modify, or withdraw language from them. ***Cook v. Cook***, 208 Wis. 2d 166, 190, 560 N.W.2d 246 (1997). We therefore follow the dictates of our prior rulings, and decline to consider any exclusions in the policy issued by Hartford in determining whether it breached its duty to defend Central Resistor.

¶18 In making this determination, we emphasize that if Hartford believed that the exclusions in the CGL policy precluded coverage in this case, it was required to take timely steps to seek and obtain a bifurcated trial—litigating coverage first and obtaining a stay of all proceedings in the liability and damage aspects of the case until coverage, or lack of coverage, was determined. *See* ***Kenefick***, 187 Wis. 2d at 232-33.[3] An insurance company which follows this procedure runs no risk of breaching its duty to defend. ***Radke***, 217 Wis. 2d at 45.

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[2] In contrast, in ***Shannon v. Shannon***, 150 Wis. 2d 434, 439, 442 N.W.2d 25 (1989), the insurer was a party to the lawsuit commenced against its insured, and timely sought a judicial determination that coverage was excluded under an exclusion in its policy. Waiver of an insurer's right to contest coverage is applicable to situations where the insurer attempts to challenge coverage after improperly refusing to defend, not to situations where the insurer timely contests coverage by seeking bifurcation of coverage and liability issues in the trial court. ***Kenefick v. Hitchcock***, 187 Wis. 2d 218, 233-34, 522 N.W.2d 261 (Ct. App. 1994).

[3] Alternative procedures which could have been followed by Hartford to protect its interests are outlined in ***Radke v. Fireman's Fund Insurance Co.***, 217 Wis. 2d 39, 44-45, 577 N.W.2d 366 (Ct. App. 1998). All of these alternative procedures serve the interest of judicial economy and further the goal of defining an insurer's obligations at an early stage of the proceedings. *See* ***Grube v. Daun***, 173 Wis. 2d 30, 75-76, 496 N.W.2d 106 (Ct. App. 1992).

However, when a case proceeds without a prior determination of coverage, the insurer who declines to defend does so at its peril, and if it improperly refuses to defend, it will be held to have waived any subsequent right to litigate coverage. ***Id.***

¶19 Hartford's next argument is that the trial court erred in awarding Central Resistor the amount paid and forgiven in settlement, and in awarding Precision the $109,599 claim assigned in settlement. We disagree. "The general rule is that where an insurer wrongfully refuses to defend on the grounds that the claim against the insured is not within the coverage of the policy, the insurer is guilty of a breach of contract which renders it liable to the insured for all damages that naturally flow from the breach." ***Newhouse v. Citizens Sec. Mut. Ins.***, 176 Wis. 2d 824, 837, 501 N.W.2d 1 (1993). "Damages which naturally flow from an insurer's breach of its duty to defend include: (1) the amount of the judgment or settlement against the insured plus interest; (2) costs and attorney fees incurred by the insured in defending the suit; and (3) any additional costs that the insured can show naturally resulted from the breach." ***Id.*** 838. Because judgment was entered in favor of Precision in the underlying lawsuit, Central Resistor was entitled to recover from Hartford the portion of that judgment which was paid or forgiven by it as part of the settlement of the case. *See* ***Radke***, 217 Wis. 2d at 49. Moreover, "[a]n assignee of a cause of action stands in the shoes of the assignor." ***Delta Group, Inc. v. DBI, Inc.***, 204 Wis. 2d 515, 521, 555 N.W.2d 162 (Ct. App. 1996). As the assignee of Central Resistor's claim for the remaining portion of the judgment which was neither paid nor forgiven by Central Resistor, Precision was entitled to damages of $109,599 from Hartford. *See* ***id.*** at 526.

¶20 Hartford also contends that the trial court erred in awarding Precision attorney's fees incurred in pursuing coverage. However, as already

noted, an assignee of a cause of action stands in the shoes of the assignor. While the assignment from Central Resistor to Precision provided that Central Resistor retained its claim against Hartford for attorney's fees incurred in defending against the underlying action and seeking reimbursement for the amounts paid and forgiven by it, this did not alter the fact that Precision stood in Central Resistor's shoes in seeking to collect the remaining $109,599 of the judgment. Central Resistor had a right to attorney's fees incurred in establishing coverage in the trial court. *See* ***Elliott v. Donahue***, 169 Wis. 2d 310, 322, 485 N.W.2d 403 (1992). Because Precision stood in Central Resistor's shoes in pursuing recovery of the judgment, Central Resistor's right to attorney's fees incurred in pursuing coverage attached to Precision.[4]

¶21 As a final matter, we address the requests by Central Resistor and Precision for attorney's fees incurred on appeal. Central Resistor's request consists of a one-sentence statement in its respondent's brief, stating that "Central Resistor's entitlement to attorney fees extends to this appeal as well." Precision's respondent's brief also includes a request for attorney's fees incurred in defending this appeal. In addition, at the time it filed its respondent's brief, Precision filed a motion requesting that this court award it reasonable attorney's fees for defending

[4] Hartford relies on ***Riccobono v. Seven Star, Inc.***, 2000 WI App 74, 234 Wis. 2d 374, 610 N.W.2d 501, to contend that Precision is not entitled to attorney's fees incurred in seeking coverage in the trial court. However, the issue in ***Riccobono*** was whether an insurer could recover attorney fees incurred in establishing that another insurer provided primary coverage for its insured. ***Id.*** at ¶¶1-2. This court held that an insurer did not have the same right to recover attorney fees incurred in successfully establishing coverage that an insured had. ***Id.*** at ¶¶22-24. ***Riccobono*** is thus inapplicable here where attorney's fees were awarded not to an insurer, but to an assignee who stood in the shoes of the insured.

this appeal, and that the matter be remanded to the trial court to conduct an evidentiary hearing to determine the amount of those fees.[5]

¶22 The requests for appellate attorney's fees are denied. Central Resistor cites no law in support of its one-line request. This court may decline to review issues which are inadequately briefed. ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).

¶23 We also deny Precision's motion for attorney's fees. In support of its motion, Precision cites cases in which this court has awarded appellate attorney fees incurred in defending a trial court order awarding attorney fees based on a finding of frivolousness under WIS. STAT. § 802.05 or WIS. STAT. § 814.025. Precision cites ***Chase Lumber & Fuel Co. v. Chase***, 228 Wis. 2d 179, 213, 596 N.W.2d 840 (Ct. App. 1999), and ***Riley v. Isaacson***, 156 Wis. 2d 249, 262, 456 N.W.2d 619 (Ct. App. 1990). These cases are clearly not controlling here.

¶24 Precision also cites ***Elliott***, 169 Wis. 2d at 324-25, which held that attorney fees incurred by an insured in successfully establishing coverage under an insurance policy may be awarded under WIS. STAT. § 806.04(8), the declaratory judgment statute. However, this court does not directly issue judgments under § 806.04, and Precision cites no cases where attorney fees have been awarded to an insured on appeal. In addition, the Wisconsin Supreme Court has recently reiterated that there are exceptions to the American Rule of liability for attorney fees, but only where statutes or contracts provide for fee shifting, or where this court has found special circumstances warranting an exception, as in ***Elliott***. *See*

[5] In an order issued on March 16, 2001, this court held the motion in abeyance and stated that it would be decided when the appeal was decided.

Reid v. Benz, 2001 WI 106, ¶34, ___ Wis. 2d ___, 629 N.W.2d 262. Absent a clear recitation of authority for awarding appellate attorney's fees in this case, Precision's motion is denied.

By the Court.—Judgment affirmed.

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