

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 8, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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No. 98-1521

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

96 CV 1749

WILLIAM A. PANGMAN AND MARY PANGMAN SCHMITT,

PLAINTIFFS-RESPONDENTS,

V.

**RICHARD WILLIAM KING AND LAW OFFICES OF
RICHARD WM. KING, S.C.,**

DEFENDANTS-APPELLANTS,

**GARTEN BRAU HOLDINGS COMPANY, INC. AND CAPITAL
BREWERY COMPANY, INC.,**

DEFENDANTS,

WISCONSIN LAWYERS MUTUAL INSURANCE COMPANY,

DEFENDANT-RESPONDENT.

96 CV 2141

MARY PANGMAN SCHMITT AND THOMAS D. PANGMAN,

PLAINTIFFS,

WILLIAM PANGMAN,

**NECESSARY-PARTY-INVOLUNTARY-
PLAINTIFF,**

V.

**RICHARD WILLIAM KING, GARTEN BRAU HOLDINGS
COMPANY, INC., AND XYZ INSURANCE COMPANY,**

DEFENDANTS.

APPEAL from a judgment and an order of the circuit court for Dane County: ROBERT DE CHAMBEAU, Judge. *Affirmed.*

Before Dykman, P.J., Roggensack and Deininger, JJ.

DYKMAN, P.J. Richard William King appeals from a judgment and an order dismissing his insurer, Wisconsin Lawyers Mutual Insurance Company (WILMIC), from further liability for claims brought by William Pangman and Mary Pangman Schmitt, regarding King's legal representation in various business dealings. King argues that WILMIC has not been absolved of its duty to defend him against these claims. We disagree and affirm.

BACKGROUND

William Pangman (Pangman) and King met while they were classmates in law school. In the early 1980s, Pangman, King and Schmitt, who is Pangman's sister, invested in a business together. In the years that followed, they engaged in various other business pursuits as well. However, by 1995, Pangman and Schmitt's relationship with King began to sour. In 1997, Pangman and Schmitt jointly filed suit against King and his insurer, WILMIC, alleging

numerous causes of action.¹ Some of the alleged facts giving rise to these causes of action are set out later in this opinion.

King and WILMIC each filed separate answers to this complaint. WILMIC raised the affirmative defense that its professional liability policy with King does not cover claims that arise directly or indirectly out of “intentional, dishonest, fraudulent, criminal or malicious acts or omissions.” Therefore, it did not have a duty to indemnify King against any such claims.

In 1997, King moved for summary judgment on all of Pangman and Schmitt’s claims. On January 28, 1998, the trial court issued its decision, granting and denying parts of King’s motion. It denied summary judgment on: (1) Schmitt’s tort malpractice claim; (2) Schmitt’s contract malpractice claim; (3) Schmitt’s and Pangman’s conversion claim; (4) Pangman’s constructive trust claim; and (5) Schmitt’s and Pangman’s intentional misrepresentation claims.

¹ According to Schmitt and Pangman’s second-amended complaint, the claims filed are as follows: (1) Schmitt’s tort claim of malpractice against King and King Law Offices; (2) Schmitt’s contract claim for legal malpractice against King and King Law Offices; (3) William Pangman and Schmitt’s claims for misappropriation and conversion against King and King Law Offices; (4) William Pangman and Schmitt’s claims for imposition of a constructive trust against King and King Law Offices; (5) Thomas Pangman (William’s brother) and Schmitt’s claims for declaratory judgment against Garten Brau Holdings Company (GBH) and Capital Brewery; (6) Schmitt’s claim for breach of fiduciary duty against King, King Law Offices, GBH and Capital Brewery; (7) William Pangman and Schmitt’s claims for intentional misrepresentation against King and King Law Offices; (8) William Pangman and Schmitt’s claims for negligent misrepresentation against King and King Law Offices; (9) William Pangman and Schmitt’s claims for strict responsibility misrepresentation against King and King Law Offices; and (10) Schmitt’s claim against WILMIC.

As for WILMIC's liability, the trial court held as follows:

It is clear that any claim that the court has already dismissed in this decision applies to WILMIC as well as to King. Therefore, WILMIC has no liability to cover King for misappropriation, imposition of a constructive trust, breach of fiduciary duty, negligent misrepresentation, and strict responsibility misrepresentation.

WILMIC argues, and King concedes in his reply brief, that all intentional tort claims are not afforded coverage based upon the clear exclusionary language of the policy:

....

Therefore, King is not afforded coverage on Schmitt's claim for conversion, intentional misrepresentation, and any claim of malpractice, tort or contract, which finds that King was *intentional* in his actions (rather than negligent). The two coverage areas left for discussion are the claims for negligent malpractice in both tort and contract.

Following the court's decision, WILMIC explored the possibility of settling the remaining claims against King. While the parties were unwilling to settle the intentional (i.e. noncovered) claims, they were interested in settling the negligence-based (i.e. covered) claims. Pangman and Schmitt eventually agreed to settle all claims that were or are later determined to be covered under King's policy with WILMIC, in exchange for \$25,000. WILMIC advised King of the settlement and gave him forty-eight hours to consent to or reject the settlement arrangement. The letter and the attached release and covenant not to sue, which WILMIC had drawn up, set out the terms of the arrangement. The letter also contained a paragraph that reads as follows:

If you consent to the proposed settlements, WILMIC will promptly implement the settlement which will settle all claims which have been made against you to the extent that those claims are covered by your policy with WILMIC. Upon the settlement, WILMIC intends to obtain a dismissal of all claims against you and WILMIC for which WILMIC provides liability coverage and a

declaration from the Court terminating any further duty on the part of WILMIC to defend the remaining non-covered claims being made against you.

King consented to the settlement arrangement. Upon obtaining King's consent, Pangman and Schmitt each signed a release and covenant not to sue.

WILMIC filed a motion seeking the following: (1) the dismissal of all claims against WILMIC with prejudice and without costs; (2) the dismissal of all claims against King and the King Law Offices that were or subsequently would be determined to be covered under the King Law Office's insurance policy with WILMIC; (3) a declaration that WILMIC's duty to defend King and King Law Offices terminated upon the settlement of the covered claims; (4) a declaration that King be required to reimburse WILMIC for defense costs paid by it for expenses incurred after the settlement of the covered claims and before entry of this order; and (5) an order staying any further proceedings on the liability and damage issues until all appeal rights arising from the above orders have expired.

At the motion hearing, King appeared and opposed WILMIC's motion. The trial court granted WILMIC's motion and later entered judgment to that effect. King appeals.

DISCUSSION

1. Constructive Trust Claim

King points out that when the trial court decided King's motion for summary judgment, it never determined whether Pangman's claim for a constructive trust was covered under his policy with WILMIC. As a result, he argues that WILMIC continues to have a duty to defend him regarding this claim.

See *Elliott v. Donahue*, 169 Wis.2d 310, 321, 485 N.W.2d 403, 407 (1992) (any doubt regarding an insurer's duty to defend must be resolved in favor of the insured); see also *Production Stamping v. Maryland Cas. Co.*, 199 Wis.2d 322, 326-27, 544 N.W.2d 584, 586 (Ct. App. 1996). The issue of whether a claim is covered under a policy presents an issue of contract interpretation, which we review de novo. See *Jacob v. West Bend Mut. Ins. Co.*, 203 Wis.2d 524, 538 n.9, 553 N.W.2d 800, 805 n.9 (Ct. App. 1996).

A constructive trust is not a claim, but rather an equitable remedy utilized to prevent unjust enrichment. See *M & I First Nat'l Bank v. Episcopal Homes Management Inc.*, 195 Wis.2d 485, 512, 536 N.W.2d 175, 188 (Ct. App. 1995).² We therefore must look to the facts set out in Schmitt and Pangman's second-amended complaint, which they allege gave rise to a constructive trust against King and King Law Offices, to determine whether they are covered under King's policy.

In 1991, Pangman, King and Schmitt each became shareholders in Garten Brau Holdings Co. (GBH). At that time, Pangman owned an interest

² In *Wilharms v. Wilharms*, 93 Wis.2d 671, 678-79, 287 N.W.2d 779, 783 (1980), the court held that:

The constructive trust is an equitable device created by law to prevent unjust enrichment, which arises when one party receives a benefit, the retention of which is unjust to another. A constructive trust will be imposed only in limited circumstances. The legal title must be held by someone who in equity and good conscience should not be entitled to beneficial enjoyment. Title must also have been obtained by means of actual or constructive fraud, duress, abuse of a confidential relationship, mistake, commission of a wrong, or by any form of unconscionable conduct.

(Footnotes and citations omitted.)

equivalent to 564 shares of GBH stock, King owned an interest equivalent to 450 shares, and Schmitt owned an interest equivalent to 214 shares.

During 1992, King made substantial loans to Pangman to use toward debts that both he and his law firm had incurred. Pangman signed a promissory note for those amounts. In February 1993, Pangman also signed a document purporting to give King an interest in Pangman's GBH stock as security for the promissory note. Pangman also received loans from other individuals, including Schmitt.

In August 1993, Pangman was incarcerated for failing to pay child support. Pangman called King from jail and asked King to assist him. The two discussed having King purchase Pangman's law firm, and King allegedly expressed an interest in the idea. On or about August 10, 1993, Schmitt again loaned Pangman money to assist Pangman's firm meet its cash flow needs, and Pangman promised Schmitt a security interest in his GBH stock as collateral on the loan.

On August 12, 1993, King and Pangman allegedly entered into an oral agreement for King to purchase Pangman's firm. As part of the agreement, Pangman agreed to transfer title to his 564 shares of GBH stock to King, so that King could use the stock to raise funds to operate Pangman's firm, either by selling part of the stock or by using it as security for the loans. King was aware that Schmitt had a security interest, and King allegedly assured Pangman and Schmitt that transferring the stock to him would not harm Schmitt's interests. The shares of stock were eventually transferred to King.

Pangman retained an attorney to prepare the documents formalizing the sale of his firm to King. King, however, refused to go through with the deal.

A dispute then arose between King and Pangman over who had control over the stock that had been transferred to King as part of the sale agreement. King allegedly assured Pangman and Schmitt on several occasions that he did not intend to steal the stock, and that he was only holding it to secure payment of the amounts Pangman owed to him.

In late 1995, additional shares of GBH became available after the death of Joseph Kuehn, the majority shareholder of GBH. King allegedly told Schmitt and other GBH shareholders that he would negotiate an agreement to purchase on their behalf the remaining shares on a pro rata basis.

Prior to February 1996, no stock certificates had ever been issued by GBH, and the interests of the various stockholders were carried on the books of the company, which were maintained by an accountant, Don Bailey. In January 1996, Bailey informed King that GBH stock certificates would be issued to its shareholders in order to facilitate the sale of Kuehn's stocks. Bailey stated that the 564 shares of stock in dispute between Pangman, Schmitt and King would be issued to Pangman, who could then transfer the shares to King if and when they reached an agreement.

However, King allegedly was able to convince Bailey to issue the disputed shares to him, over the objections of Schmitt and Pangman. After obtaining the 564 shares, King then allegedly arranged to purchase another 1309 shares of stock, to the detriment of Schmitt and Pangman, who both believed that King was acting on their behalf to negotiate a pro rata purchase of the GBH stock.

The section of Pangman's and Schmitt's complaint, in which they sought a constructive trust, reads in pertinent part as follows:

A constructive trust was created by King's retention of the 564 shares of GBH stock after breaching the agreement to purchase the Pangman Firm and after William Pangman had performed his portion of the agreement executing the bill of sale and irrevocable stock power prepared by King.

King's subsequent denial of any fiduciary obligation to Pangman or Schmitt with regard to the GBH stock, and conversion to his own use and control of all 564 shares of GBH stock was unconscionable conduct that resulted in King's unjust enrichment, both as to the equity in said stock, and in King's usurpation of the concordant opportunities to obtain an additional 1,309 shares of stock from the Kuehn Estate, and to utilize the 564 shares and/or their cash equivalent to participate in the Blackstone project. King acted unconscionably by: agreeing to purchase the Pangman Firm but failing to perform; unlawfully retaining and converting the BGH stock; misrepresenting his intention to protect Schmitt's security interest in the GBH stock; and misrepresenting his intention to act as agent for William Pangman and Schmitt in negotiating for the Kuehn estate's GBH stock.

We find nothing in this language that suggests anything other than intentional conduct. Pangman and Schmitt allege in this portion of their complaint that King: (1) retained the GBH stock after he breached his agreement to purchase Pangman's firm; (2) denied his fiduciary duty; (3) converted the GBH stock and engaged in unconscionable conduct that resulted in his unjust enrichment; and (4) misrepresented his intention to protect Schmitt's interest in the stock and to act as an agent for Pangman and Schmitt in buying the deceased shareholder's stock shares.

King does not address in his brief whether these alleged acts or omissions were covered under the policy. He simply quotes *M& I First Nat'l Bank*, 195 Wis.2d at 512, 536 N.W.2d at 188, which states that a proponent of a constructive trust must establish "the elements of unjust enrichment and also that the benefit to the other party was obtained or retained by means of actual or

constructive fraud, duress, abuse of confidential relationship, mistake, commission of a wrong, or other unconscionable conduct.” He then argues that an actor who commits a mistake, commits a wrong, or abuses the attorney-client relationship does not necessarily need to act intentionally, which means that the constructive trust claim is a covered under his policy with WILMIC.

However, Pangman and Schmitt do not allege in this section of their complaint that King committed a mistake, committed a wrong, or abused the attorney-client relationship. Instead, they assert that he engaged in conversion, breached an agreement, acted unconscionably, and misrepresented his intentions. We view these as intentional acts, and as such, not covered under the express terms of the policy WILMIC issued to King.

2. Timing of WILMIC’s Motion

King also contends that WILMIC’s motion was a motion for judgment on the pleadings, *i.e.* a motion to dismiss, pursuant to § 802.06(3), STATS. Section 802.06(3) reads as follows:

After issue is joined between all parties but within time so as not to delay the trial, any party may move for judgment on the pleadings. Prior to a hearing on the motion, any party who was prohibited under s. 802.02 (1m) from specifying the amount of money sought in the demand for judgment shall specify that amount to the court and to the other parties. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in s. 802.08, and all parties shall be given reasonable opportunity to present all material made pertinent to the motion by s. 802.08.

(Emphasis added.)

King contends that WILMIC's motion amounts to a motion for summary judgment, because it includes matters outside the pleadings, *i.e.* WILMIC's liability for covered claims as a result of the settlement agreement. Section 802.08(2), STATS., states that a motion for summary judgment "shall be served at least 20 days before the time fixed for the hearing." In this case, a total of only six days elapsed between the date that WILMIC filed its motion and the date that the court scheduled the hearing to be held.

At the hearing, King brought the notice issue to the court's attention, but the court did not address it. We conclude that the trial court erred procedurally in failing to provide King with the notice required under the statute. However, under § 805.18, STATS., we should not reverse a judgment in any action or proceeding for a procedural error, unless we are satisfied after reviewing the entire action or proceeding, that the error affected the substantial rights of the party seeking reversal. We therefore must look to see whether there is a reasonable possibility that the court's failure to provide adequate notice harmed King. *See Nischke v. Farmers & Merchants Bank & Trust*, 187 Wis.2d 96, 108, 522 N.W.2d 542, 547 (Ct. App. 1994).

King raises several arguments in his briefs as to how he was prejudiced by the inadequate notice. First, he contends that his counsel's trial preparations were placed on hold by WILMIC, which prejudiced him because the trial was scheduled to proceed four days after the motion hearing. Second, he argues that if the trial court recognized that it gave inadequate notice, WILMIC would have been responsible to defend him throughout the balance of the trial; therefore, WILMIC was improperly relieved of its duty to defend King. Third, King contends that he has been prejudiced in having to assert an appeal and thus shoulder the burden of what constitutes a covered versus uncovered claim. Fourth,

King maintains that he is now in a position of having to pay for counsel to again prepare for trial on the noncovered claims, as well as to represent him in determining whether Pangman's constructive trust claim is covered under the policy.

We conclude that none of these claims of alleged prejudice have anything to do with the notice that was given to King. Rather, they are all claims of how King was prejudiced when the trial court granted WILMIC's motion.³ Because King has not provided any explanation as to how he was prejudiced by the inadequate notice, we conclude that there is no reasonable possibility that the court's failure to provide adequate notice harmed King.

Moreover, we view this motion as an extension of the settlement agreement. WILMIC advised King when it gave him a copy of the settlement documents that if he consented to the settlement arrangement, it would promptly implement the settlement, which would settle all claims made against King that were covered under his policy. WILMIC further stated that once the covered claims were settled, it intended to obtain a dismissal of all claims against King and WILMIC for which WILMIC provides liability coverage, as well as a declaration from the court terminating any further duty on WILMIC's part to defend King against the remaining non-covered claims. Therefore, King was aware of WILMIC's intentions when he agreed to the settlement. We believe that if King did not want WILMIC's duty to defend to end, he should not have agreed to the settlement arrangement.

³ King does not allege that the trial court erred in granting WILMIC's motion on the merits; he instead argues that the motion should not have been granted, and WILMIC should not be dismissed from its duty to defend, because he was given inadequate notice of the motion.

3. *Duty to Defend*

King contends that WILMIC continues to have a duty to defend him on all covered or potentially covered claims, and that duty did not end after the trial court granted WILMIC's motion. In particular, he argues that because the trial court did not address whether the constructive trust claim was covered under his policy, that coverage issue still remains, and WILMIC still has a duty to defend. Whether the insurer has duty to defend is a question of law, which we review de novo, and we make that determination on the basis of the allegations contained in the complaint. *See Kenefick v. Hitchcock*, 187 Wis.2d 218, 231, 522 N.W.2d 261, 266 (Ct. App. 1994).

An insurance policy imposes two duties on an insurer: (1) the duty to defend the insured against third-party claims covered under the policy; and (2) the duty to indemnify for claims covered under the policy. *See Barber v. Nylund*, 158 Wis.2d 192, 195, 461 N.W.2d 809, 811 (Ct. App. 1990). The duty to defend is broader than the separate duty to indemnify, because the duty to defend is triggered by arguable, as opposed to actual coverage. *See Newhouse v. Citizens Sec. Mut. Ins. Co.*, 176 Wis.2d 824, 834-35, 501 N.W.2d 1, 5 (1993). "If there are allegations in the complaint, which, if proven, would be covered by the policy, the insurer has a duty to defend." *See Grube v. Daun*, 173 Wis.2d 30, 72, 496 N.W.2d 106, 122 (Ct. App. 1992). When there are uncertainties over coverage, as there were in this case prior to appeal, the insurer bears the burden of resolving the coverage issues. *See Valley Bancorporation v. Auto Owners Ins. Co.*, 212 Wis.2d 609, 619, 569 N.W.2d 345, 349 (Ct. App.), *rev. denied*, 215 Wis.2d 426, 576 N.W.2d 281 (1997).

Though the trial court did not address whether the constructive trust issue was covered under the policy, we have now decided that issue. We have concluded that it is not covered, because it is based on intentional acts. Therefore, all issues regarding coverage have now been decided. All that remains to be tried are claims not covered under WILMIC's policy.

All the parties in this case agreed to a settlement agreement that released King and WILMIC from any liability for claims that have been or may be deemed "covered" under the policy, and King has not challenged this agreement on appeal. The trial court ordered that WILMIC had no duty to indemnify against claims that are not covered under the policy, and King has not challenged this order on appeal. The trial court also issued an order granting WILMIC's motion for an order consistent with the settlement agreement. This order absolved WILMIC of any further duty to defend or indemnify King on claims that were covered under the policy, and King has not challenged the merits of the order. Instead, he is challenging the timing of the motion, and we have concluded that he has failed to articulate how he has been prejudiced by the timing of the motion. We therefore conclude that King has failed to show that the trial court did something that necessitates reversal. Accordingly, we affirm.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.

