COURT OF APPEALS
DECISION
DATED AND FILED

June 4, 2013

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2011AP1758 **Cir. Ct. No. 2008CV1055**

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

MICHAEL B. KAPPERS,

PLAINTIFF,

V.

PROGRESSIVE NORTHERN INSURANCE COMPANY,

DEFENDANT-RESPONDENT,

THEODORE P. BENSON,

DEFENDANT-THIRD-PARTY PLAINTIFF-RESPONDENT-CROSS-APPELLANT,

MEDICA INSURANCE COMPANY,

DEFENDANT,

V.

COUNTRY MUTUAL INSURANCE COMPANY,

THIRD-PARTY DEFENDANT-APPELLANT-CROSS-RESPONDENT.

APPEAL and CROSS-APPEAL from an order of the circuit court for St. Croix County: SCOTT R. NEEDHAM, Judge. *Affirmed*.

Before Hoover, P.J., Mangerson and Stark, JJ.

¶1 PER CURIAM. Country Mutual Insurance Company appeals an order, entered on a jury verdict, declaring that a car insurance policy it issued to Theodore Benson covered injuries Michael Kappers sustained in a motor vehicle accident with Benson. Benson was driving a car owned by his son Mark. It is undisputed that the Country policy did not provide coverage for Kappers' injuries if Mark was a resident of Benson's household at the time of the accident. The jury found that Mark was not a resident of Benson's household, and the circuit court therefore ruled the policy provided coverage.

¶2 On appeal, Country argues that: (1) the circuit court erred by denying Country's motion for summary judgment; (2) the court's "statement of the case" improperly informed the jury that its special verdict answer on Mark's residence would determine whether Benson had insurance coverage; (3) insufficient evidence supports the jury's answer that Mark was not a resident of Benson's household; and (4) the court should have granted Country's motion for a new trial. Benson's cross-appeal contends the court erred by denying his postverdict motion for attorney fees. We reject both Country's and Benson's arguments, and affirm the circuit court's order in all respects.

BACKGROUND

¶3 The accident between Kappers and Benson occurred on September 10, 2005. Kappers' vehicle was insured by Progressive Northern Insurance Company. Benson's vehicle, which was owned by his son Mark, was

not insured. Mark is member of the National Guard, and he was on active duty in Iraq at the time of the accident.

¶4 Benson had a car insurance policy through Country. The policy stated that Country would pay "all sums in behalf of an **insured** which the **insured** becomes legally obligated to pay as damages because of … bodily injury … sustained by any person[.]" (Formatting altered.) However, the policy further provided that the bodily injury "must be caused by an accident resulting from the ownership, maintenance or use of an **insured vehicle** … or any **nonowned vehicle**[.]" The policy defined the term "nonowned vehicle" as "a land motor vehicle **you** or **your relatives** do not own and which is not available for regular use by **you** or a **relative**." The policy defined "relative" as "a person related to **you** by blood, marriage or adoption who is a resident of the same household as **you**, including a ward or foster child."

¶5 Benson notified Country of the accident with Kappers on September 12, 2005. On the same day, Country sent Benson a letter denying coverage for any damages caused by the accident. Country explained that the vehicle Benson was driving was "not defined as an insured vehicle or nonowned vehicle under the policy[.]"

¶6 Benson subsequently retained an attorney to defend him against Kappers' potential claims. In early 2006, Benson began receiving collection notices from Progressive. Benson's attorney wrote to Country on February 3, 2006, stating that he believed the Country policy covered Kappers' injuries because Benson was driving a nonowned vehicle at the time of the accident. Country responded on February 6, reaffirming its denial of coverage.

¶7 On September 8, 2008, Kappers filed a summons and complaint against Benson, asserting a personal injury claim. Benson's attorney sent copies of the summons and complaint to Country on September 24. The September 24 letter also informed Country that Progressive had filed a separate lawsuit against Benson. The letter demanded that Country defend Benson against both lawsuits. The two lawsuits were ultimately consolidated.

¶8 On October 6, 2008, Benson filed a third-party summons and complaint against Country, asserting bad faith and breach of contract claims and seeking a declaration of coverage under Country's policy. On October 14, Country agreed to defend Benson against Kappers' and Progressive's claims, subject to a reservation of rights. Shortly thereafter, Country retained an attorney to represent Benson on the merits of those claims. Country paid Benson's previous attorney $1,075, which represented "the attorneys' fees incurred by [Benson] in defense of the actions filed against him" before Country assumed his defense.

¶9 Country subsequently filed a counterclaim against Benson, seeking a declaratory judgment that it had no duty to defend or indemnify him. It also moved to bifurcate the coverage issue and stay the proceedings on liability and damages. The court granted Country's motion, and the case proceeded with respect to coverage.

¶10 Country then moved for summary judgment on the coverage issue. It asserted its policy did not cover Kappers' injuries because Benson was not driving an insured vehicle or a "nonowned vehicle" at the time of the accident. Country argued the vehicle was "not a 'nonowned vehicle' because it was owned by Mark Benson, who was a relative of Theodore Benson within the meaning of

the policy (including the requirement of Mark Benson being a resident of Theodore Benson's household)." Country also asserted the vehicle did not qualify as a nonowned vehicle because it was available for Benson's regular use. In response, Benson argued the undisputed facts raised competing inferences, which entitled him to a trial. The circuit court agreed with Benson and denied Country's motion.

¶11 The case proceeded to a coverage trial. Before trial, Country submitted the following proposed statement of the case to be read to the jury:

> This case is a bifurcated action. Only limited issues will be decided in this portion of the trial. The balance of the issues will be decided in one or more subsequent trials. The first issue that you will be asked to decide relates to whether or not a vehicle owned by Mark Benson on September [10], 2005 was regularly available for use by his father, Theodore Benson, or other members of Theodore Benson's household. The second issue that you will be asked to decide is whether or not, as of September [10], 2005, Mark Benson was still a resident of his parents' household. Mark Benson was a member of the United States Army as of September [10], 2005, and was stationed in Iraq.

The court rejected Country's proposed statement of the case and instead drafted its own version, which read:

> This action arises out of an automobile accident that occurred on September 10, 2005, involving Michael Kappers and Theodore Benson. At that time, Theodore Benson was driving a car owned by his son, Mark Benson. At the time of the accident, Mark Benson was a member of the United States Army and was stationed in Iraq. On September 10, 2005, Theodore Benson had in force an automobile liability insurance policy issued by Country Mutual Insurance Company on vehicles which Theodore Benson owned. Mr. Kappers was insured by Progressive Northern Insurance Company at the time of the accident.
>
> This lawsuit is a bifurcated action and will be tried in two separate trials. Only limited issues will be decided in this

> portion of the trial. The balance of the issues will be decided in a second trial. As a result, Mr. Kappers is not appearing and will not be participating.
>
> The limited issues that you will be asked to decide are related to whether Theodore Benson is entitled to liability coverage for this accident under his policy with Country Mutual Insurance Company.
>
> At the conclusion of the trial, you will be submitted a verdict asking you to determine two issues. One, whether or not Mark Benson, on September 10, 2005, was a resident of Theodore Benson's household. Two, whether or not the vehicle owned by Mark Benson on September 10, 2005, was regularly available for use by Theodore Benson or other members of the Theodore Benson household.

¶12 Country objected to the court's proposed statement of the case, arguing it improperly advised the jury that its answers to the special verdict questions on residence and regular use would determine whether Benson had insurance coverage. The court overruled Country's objection. It reasoned that the information included in its statement of the case was necessary to prevent juror confusion and speculation. The court explained, "To name parties [in the caption] who have no role and/or function, per se, in this case, without providing some information, I believe, would lead to conjecture, speculation, as well as uncertainty in the jurors' minds as to exactly what was going on or what this case is about." The court also stated it "firmly believe[d]" the jurors would follow the instructions given to them, which would include instructions advising them "not to be swayed by passion, prejudice, [or] sympathy but, rather, to make their decision based only on the facts and the evidence offered during the trial." Finally, the court stated that jurors are routinely informed

> as to what [the] nature of the contest is. The nature of this contest is insurance coverage, as well as questions associated with coverage. And for any of us to sit at this table and suggest that the jury could, in some way, be insulated against that, I think, is naïve at best and unrealistic on the opposite end of the spectrum.

¶13 Following a two-day trial, the jury determined that Mark was not a resident of Benson's household and that Mark's vehicle was not available for Benson's regular use. Country filed a postverdict motion asking the circuit court to change the jury's answer to the residence question. Alternatively, Country sought a new trial, pursuant to WIS. STAT. § 805.15.[1] Benson also filed a postverdict motion, asking the court to award him the attorney fees and costs he incurred "in defending the merits of [Kappers'] claim, and in establishing insurance coverage[.]" The court denied both parties' postverdict motions.

¶14 Kappers subsequently settled his claims against Benson, and the court entered a "Final Order of Partial Dismissal" on June 13, 2011. Country appeals from that order, and Benson cross-appeals. The parties inform us that Benson's bad faith and breach of contract claims against Country are still pending, as are Progressive's reimbursement claim against Country and its subrogation claim against Benson. Additional facts are included in the discussion section as necessary.

DISCUSSION

I. Country's appeal

¶15 Country argues the circuit court erred in four ways: (1) by denying Country's summary judgment motion on the issue of Mark's residence;[2] (2) by

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

[2] Country has abandoned its argument that its policy did not cover Kappers' injuries because Mark's car was available for Benson's regular use. *See* ***A.O. Smith Corp. v. Allstate Ins. Cos.***, 222 Wis. 2d 475, 491, 588 N.W.2d 285 (Ct. App. 1998) (An issue raised in the trial court but not raised on appeal is deemed abandoned.).

informing the jury that its special verdict answer on Mark's residence would determine whether Benson had insurance coverage; (3) by refusing to change the jury's answer to the residence question; and (4) by refusing to grant Country a new trial. We address each of these arguments in turn.

A. Country's summary judgment motion

¶16 We independently review a grant or denial of summary judgment, using the same methodology as the circuit court. ***Malzewski v. Rapkin***, 2006 WI App 183, ¶11, 296 Wis. 2d 98, 723 N.W.2d 156. Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2). In making this determination, we view the parties' submissions in the light most favorable to the nonmoving party, and we draw all reasonable inferences in that party's favor. ***Novell v. Migliaccio***, 2010 WI App 67, ¶9, 325 Wis. 2d 230, 783 N.W.2d 897. If the undisputed facts give rise to competing inferences, one of which favors the nonmoving party, that party is entitled to a trial and summary judgment must be denied. *See* ***Village of Hobart v. Brown Cnty.***, 2005 WI 78, ¶19, 281 Wis. 2d 628, 698 N.W.2d 83.

¶17 On summary judgment, the parties submitted the following undisputed facts relevant to whether Mark was a resident of Benson's household at the time of the September 10, 2005 accident.

¶18 Mark lived at his parents' home in Roberts, Wisconsin, while he was in high school. In the summer of 2001, between his junior and senior years of high school, Mark enlisted in the National Guard. He did not consult his parents before enlisting.

¶19 The day after his high school graduation, Mark was sent to Fort Benning, Georgia, for training. He left all of his personal property at his parents' home while he was away. Mark completed his training during the first week of October 2002 and then returned to his parents' home. He planned to begin college at UW–La Crosse in January 2003, but he lived with his parents during the interim.

¶20 In January 2003, Mark moved into a dorm room on the UW–La Crosse campus, which is about 125 miles from Roberts. Because of his National Guard service, Mark was able to pay his own tuition and housing expenses without his parents' help. Mark took a few personal effects with him to La Crosse, but he did not take any furniture. At the end of the semester, he returned to his parents' home, bringing all of his personal property with him. He spent the entire summer at his parents' house, aside from two weeks and two weekends of National Guard training and two weekends spent in Milwaukee.

¶21 Mark returned to UW–La Crosse for the 2003-2004 academic year, again living in a dorm room. As before, he took some personal possessions to La Crosse but did not bring any furniture. In February 2004, he received notice that he would be deployed for active military service in Iraq on June 19, 2004. Before the end of the spring 2004 semester, Mark confirmed that he would be able to resume his studies at UW-La Crosse after he completed his tour of duty.

¶22 When the semester ended in May 2004, Mark had approximately five weeks before his deployment. He spent about three-and-one-half weeks of that time at his parents' house in Roberts. He spent the remainder of the time in Minnesota, Appleton, and Milwaukee.

¶23 Mark arranged to store all of his personal property at his parents' home while he was on active duty, with the exception of a futon and television that he left with friends in La Crosse. He and his parents executed a written lease agreement, pursuant to which Mark rented his bedroom in his parents' home and some storage space in the garage. Mark testified the lease was designed to allow him to receive a housing allowance from the army. He explained, "When a soldier is mobilized, if they have a mortgage or lease they are eligible to receive a basic allowance for housing." Benson testified the purpose of the lease was to compensate him for storing Mark's personal property. Under the lease, Mark paid his parents $100 per month for the duration of his deployment.

¶24 Mark reported to the River Falls armory on June 19, 2004. After three or four days of training, he flew to Camp Shelby, Mississippi, where he remained until October 30, 2004. He then had two weeks' leave, of which he spent five days in La Crosse and nine days at his parents' house in Roberts. Mark was then deployed to Kuwait, and shortly thereafter to Iraq.

¶25 Mark returned to the United States on leave in May 2005. During that leave, he spent only one night at his parents' house and otherwise stayed in hotels or with friends. Afterwards, Mark returned to Iraq to complete his tour of duty.

¶26 During his last few months in Iraq, Mark began planning his return to the United States. In an e-mail to Benson sent on June 27, 2005, Mark wrote that he had begun looking at internet real estate listings for properties in La Crosse "for fun[.]" By September 2005, Mark had found several properties in La Crosse that he planned to view when he returned from Iraq. He had also applied to resume school at UW–La Crosse for the spring 2006 semester.

¶27 Mark completed his tour of duty and returned to the United States on October 29, 2005. He lived at his parents' house from November 2, 2005 until January 2006. On January 5, 2006, he purchased a home in La Crosse. Shortly thereafter, he moved into his new house and resumed his college education.

¶28 From the time he graduated high school until he bought his house in La Crosse, Mark invariably provided his parents' address when asked to list an address for himself on official documents. For instance, his car was registered under his parents' address during the relevant time period, and annual registration renewal notices were sent to his parents' home. All of the tax returns Mark filed before the September 2005 accident indicated that he lived at his parents' address. His driver's license and his military certificate of discharge from active duty also listed his parents' address. Before September 2005, the only place Mark had ever voted or registered to vote was the township where his parents lived.

¶29 Although Mark moved to La Crosse to begin college in January 2003, he never opened a bank account in La Crosse. Instead, he continued banking at WESTconsin Credit Union in River Falls, which is about ten miles from Roberts. In February 2005, Benson purchased a certificate of deposit at WESTconsin on Mark's behalf, and he represented that Mark lived at the Benson home. When Mark applied for a credit card in November 2005, he listed his parents' address on the application. Before January 2006, Mark never gave WESTconsin any address for himself other than the address of his parents' house.

¶30 Mark did not file a change of address form with the post office before reporting for active duty in June 2004. Thus, his parents continued to receive bank statements and other mail for him while he was away. Mark testified he maintained a mailing address at his parents' house because he knew he was

going to be living in several different locations while he was deployed. In addition, while in Iraq, Mark would sometimes order things online and have them shipped to his parents' house. Mark testified he did this because certain retailers refused to ship items to Iraq. When Mark's parents received the items he ordered, they mailed them to the base where he was stationed. Mark also received other mail at his base in Iraq.

¶31 Mark testified that, as of September 2005, he did not consider Iraq his home. He "felt like [he] didn't really have a home" during his military deployment. However, he conceded that to the extent he had a home during that time, it was his parents' house in Roberts. He also acknowledged that, throughout his time on active duty, he considered Wisconsin to be his state of residence. Additionally, in e-mails to his parents during the course of his deployment, Mark repeatedly referred to his parents' house and to the Roberts area as "home."

¶32 Country argues these undisputed facts conclusively establish that Mark was a resident of Benson's household at the time of the accident. Conversely, Benson and Progressive argue the facts give rise to competing inferences, one of which is that Mark was not a resident of Benson's household. We agree with Benson and Progressive.

¶33 Whether a person is a resident of a household for insurance coverage purposes is a fact intensive inquiry. ***Seichter v. McDonald***, 228 Wis. 2d 838, 844, 599 N.W.2d 71 (Ct. App. 1999). We must consider whether the person and the named insured were:

> (1) Living under the same roof; (2) in a close, intimate and informal relationship; and (3) where the intended duration is likely to be substantial, where it is consistent with the informality of the relationship, and from which it is reasonable to conclude that the parties would consider the

> relationship "… in contracting about such matters as insurance or in their conduct in reliance thereon."

Pamperin v. Milwaukee Mut. Ins. Co., 55 Wis. 2d 27, 37, 197 N.W.2d 783 (1972) (quoting another source). When applying these factors, we must also consider: (1) the age of the person; (2) whether a separate residence is established; (3) the self-sufficiency of the person; (4) the frequency and duration of the stay in the family home; and (5) the person's intent to return. ***Seichter***, 228 Wis. 2d at 845. "[N]o one factor is controlling[,] … all of the elements must combine to a greater or lesser degree in order to establish the relationship." ***Pamperin***, 55 Wis. 2d at 37.

¶34 Applying the ***Pamperin***/***Seichter*** test to the undisputed facts of this case gives rise to competing inferences about whether Mark was a resident of Benson's household. For instance, some of the facts suggest Mark was "living under the same roof" as Benson at the time of the accident. *See* ***Pamperin***, 55 Wis. 2d at 37. Mark was only twenty-one years old on the accident date, and he had not yet established a residence of his own. *See* ***Seichter***, 228 Wis. 2d at 845 (age and existence of separate residence are relevant to residence determination). Although he was not physically present in his parents' home on date of the accident, most of his personal property was stored there and much of his mail continued to be delivered to the house. When asked to provide an address for himself, Mark routinely gave his parents' address. E-mails written while he was in Iraq repeatedly referred to his parents' house as "home." In addition, although Mark felt as though he "didn't really have a home" during his military deployment, to the extent he had a home, he conceded it was his parents' house. These facts raise a reasonable inference that Mark was living under the same roof as Benson at the time of the accident.

¶35 Other facts, however, suggest that Mark and Benson were not living under the same roof. On the date of the accident, Mark was actually living on a military base in Iraq. He had not lived at his parents' house on a permanent basis since he graduated from high school. During the forty months between his high school graduation and the accident, Mark stayed at his parents' home for only about seven months, or 17.5 percent of the time. Additionally, Mark's stays at his parents' house were relatively short and infrequent. *See* ***id.*** (frequency and duration of stays are relevant to residence determination). He stayed with his parents only five times, and never for longer than three months. These facts raise a reasonable inference that Mark and Benson were not living under the same roof.

¶36 The facts also give rise to competing inferences on the second ***Pamperin*** factor—whether Benson and Mark were living "in a close, intimate and informal relationship[.]" ***Pamperin***, 55 Wis. 2d at 37. Benson and Mark are father and son, which raises a reasonable inference that their relationship was close, intimate, and informal. However, they entered into a lease agreement before Mark was deployed, pursuant to which Mark paid Benson $100 per month in rent to compensate Benson for storing Mark's property. This raises a competing inference that their relationship was not wholly informal.

¶37 Under the third ***Pamperin*** factor, we consider whether the "intended duration" of Mark's stay in Benson's household was "likely to be substantial[.]" ***Id.***; *see also* ***Seichter***, 228 Wis. 2d at 845 ("intent to return" home is relevant to residence determination). Again, the undisputed facts give rise to competing inferences on this factor. For instance, as of the accident date, Mark had not arranged to live anywhere other than his parents' house when he returned from Iraq. This suggests Mark intended to return to his parents' home when he finished his tour of duty.

¶38 Other facts, however, suggest that the "intended duration" of Mark's stay with his parents was not "likely to be substantial" after he returned from Iraq. *See* ***Pamperin***, 55 Wis. 2d at 37. As of September 2005, Mark had applied to resume his studies at UW–La Crosse during the spring 2006 semester. This suggests Mark intended to live with his parents at most until January 2006. In addition, by September 2005, Mark had identified several properties in La Crosse he was interested in purchasing. He returned to the United States on October 29, 2005, and he began looking at the properties in November. He made an offer to purchase a property in December, and the transaction closed on January 5, 2006. Shortly thereafter, Mark moved into his new house and resumed college at UW–La Crosse. Based on these facts, one could reasonably infer that, at the time of the accident, Mark did not intend to return to his parents' home on a permanent basis.

¶39 Moreover, the facts show that Mark was relatively self-sufficient. *See* ***Seichter***, 228 Wis. 2d at 845 (self-sufficiency is relevant to residence determination). He joined the National Guard while still in high school, without consulting his parents. His military service allowed him to pay his own college tuition and housing expenses, without his parents' help. He owned a vehicle which was not named in Benson's insurance policy. Mark's self-sufficiency suggests that his time at his parents' home was not likely to be so substantial that he and his parents would consider their relationship when contracting about matters such as insurance. *See* ***Pamperin***, 55 Wis. 2d at 37.

¶40 The undisputed facts therefore give rise to competing inferences on all three of the ***Pamperin*** factors. As a result, the circuit court properly denied Country's summary judgment motion. In its argument to the contrary, Country emphasizes that Mark stored personal property at his parents' home and continued to receive mail at his parents' address while he was in college and on active duty.

Country suggests these facts conclusively establish that Mark was a resident of his parents' household at the time of the accident. However, we have previously explained that "[p]ersonal possessions remaining in the home and that the home continues to be the mailing address may be considered [as part of the residence inquiry] but are not dispositive." ***Seichter***, 228 Wis. 2d at 845. Thus, Mark's storage of personal property and continued receipt of mail at his parents' home are merely two facts to be considered in the residence analysis. As explained above, other facts suggest that Mark was not a resident of his parents' household. Because the facts give rise to competing inferences, which must be viewed in a light most favorable to the nonmoving party, Country was not entitled to summary judgment.

¶41 Country nevertheless argues the circuit court should have granted summary judgment because the facts of this case are similar to other cases where courts found that adult children were residents of their parents' households for insurance coverage purposes. However, Country's citations to these other cases are not particularly helpful because "[a] determination of residency in a household is fact specific to each case." ***Id.*** Furthermore, the cases Country cites are distinguishable.

¶42 Country first relies on ***Giese v. Karstedt***, 30 Wis. 2d 630, 141 N.W.2d 886 (1966). There, Theodore Karstedt was involved in a car accident while driving his son Frederick's vehicle, which was not insured. ***Id.*** at 633. Theodore sought coverage under his own car insurance policy, but that policy excluded coverage for "any automobile owned by … a member of the same household." ***Id.***

¶43 The evidence showed that Frederick graduated from high school in the spring of 1957. ***Id.*** at 631. After graduation, he continued living with his parents in Cecil, Wisconsin, for about fifteen months. ***Id.*** In September 1958, he went away to college in Milwaukee for nine months. ***Id.*** at 631-32. Theodore paid part of Frederick's tuition, and he also made a payment on Frederick's car. ***Id.*** at 632. Frederick returned to his parents' house in May 1959 and stayed there for the summer. ***Id.*** He went back to school in September 1959, but he quit in April or May of 1960 because of financial problems, and he returned to his parents' home. ***Id.*** He re-enrolled in school in September 1960, but he quit after two weeks and again returned to live with his parents. ***Id.*** He did not pay his parents rent. ***Id.*** He continued living with his parents until he entered the military on February 22, 1961. ***Id.*** The accident giving rise to the lawsuit occurred on April 2, 1961, a little over one month later. ***Id.*** at 633.

¶44 While Frederick was away at school and in the military, he stored personal property at his parents' home. ***Id.*** at 632. He maintained a bank account in Cecil, and the registration papers for his car showed a Cecil address. ***Id.*** at 632-33. He never notified the post office of a change in address, and he continued to receive mail at his parents' house during his military service. ***Id.*** at 633.

¶45 On these facts, our supreme court concluded as a matter of law that Frederick was a member of his parents' household. ***Id.*** at 637. Country argues we must reach a similar conclusion because the facts of ***Giese*** are directly on point with this case. We disagree.

¶46 In ***Giese***, Frederick stayed with his parents for 27.5 months during the 44.5-month period between his high school graduation and the accident—about sixty-two percent of the time. In contrast, Mark stayed with his parents for

only seven months during the forty-month period between his high school graduation and the accident—only 17.5 percent of the time. Additionally, Frederick lived with his parents for fifteen months after he graduated from high school and for about 5.5 months immediately before he entered the military. Mark left for military training the day after his high school graduation, and after that he never spent more than three months at his parents' home. Thus, Mark stayed at his parents' home for a smaller percentage of time than Frederick, and his stays tended to be shorter and more temporary.

¶47 Other factual differences also distinguish this case from ***Giese***. For instance, the accident giving rise to the lawsuit in ***Giese*** occurred a little over one month after Frederick left his parents' home for the military. Here, Mark had been absent from his parents' home for about fifteen months when the accident occurred, aside from nine days in November 2004 and one day in May 2005. Additionally, in ***Giese***, there was no evidence that Frederick intended to live anywhere other than his parents' home when he returned from the military. Conversely, Mark applied for readmission to UW–La Crosse while he was still in Iraq, and he began looking online for a property to purchase in La Crosse. These facts suggest that, while Mark intended to return to his parents' home when he finished his tour of duty, he did not intend to stay there for a significant period of time.

¶48 Further, there was no evidence in ***Giese*** that Frederick was self-sufficient. He lived with his parents for extended periods without paying rent, and his father financed part of his education and made a payment on his car. In contrast, Mark paid his own tuition, and he paid his parents $100 per month in rent while he was deployed. Because of these factual differences, the supreme court's

determination that the son in ***Giese*** was a resident of his parents' household does not mandate a similar conclusion in this case.

¶49 Factual differences also distinguish this case from another cited by Country, ***National Farmers Union Property & Casualty Co. v. Maca***, 26 Wis. 2d 399, 132 N.W.2d 517 (1965). There, Robert Maca, a thirty-two-year-old man, was injured while operating a piece of machinery on his parents' farm. ***Id.*** at 400. Robert had moved out of his parents' home in 1949 when he married, but he moved back in May 1961 after his marriage ended and he lost his job. ***Id.*** at 406-07. After Robert returned to his parents' home, he obtained a permanent job nearby. ***Id.*** at 407. He wanted to find other employment, and he planned to move if he got a new job, but "nothing had materialized" as of the accident date. ***Id.*** He had lived with his parents for five months before the accident occurred. ***Id.*** After the accident, he sought damages from his father's insurance company, which denied coverage based on a provision excluding coverage for injuries to "a relative of the named insured if a resident of the household of the named insured." ***Id.*** at 400-01. The circuit court granted summary judgment based on the resident-relative exclusion, and the supreme court affirmed. ***Id.*** at 402, 408.

¶50 The supreme court concluded Robert's mere plans to get a new job and move away from his parents' home at some point in the future did not change the fact that, at the time of the accident, he was a resident of his parents' household. ***Id.*** at 408. In contrast, unlike Robert, Mark did not have a vague, indefinite plan to leave his parents' house at some unspecified time. Instead, he had a definite plan to be out of his parents' house by January 2006, and he took concrete steps to make that plan a reality. He applied for readmission to UW–La Crosse for the spring 2006 semester, and he identified houses in La Crosse that he wanted to view when he returned from Iraq.

¶51 Moreover, in ***National Farmers***, Robert was actually living in his parents' house on the date of the accident. Conversely, Mark was living on a military base in Iraq and had been away from his parents' home for fifteen months when the accident occurred aside from brief stays in November 2004 and May 2005. Thus, this case differs from ***National Farmers*** in significant respects.

¶52 ***Seichter***, 228 Wis. 2d 838, is also distinguishable. There, a passenger was killed in an ATV accident. ***Id.*** at 841. Her parents sued the ATV driver, Joseph McDonald, and his parents' homeowners insurer. ***Id.*** The homeowners policy provided coverage for Joseph as an insured only if he was a resident of his parents' household. ***Id.*** A jury determined that Joseph was a resident, and the insurance company appealed. ***Id.***

¶53 The evidence at trial established that Joseph lived with his parents for twenty-nine months after graduating from high school in May 1992. ***Id.*** at 841-42. In December 1994, he moved to Madison and began attending school part-time. ***Id.*** at 842. He began attending school full time in the fall of 1995, and he was still living in Madison when the accident occurred on June 29, 1996. ***Id.*** However, he maintained "strong ties" with his parents' home. ***Id.*** at 846. He stayed there overnight on a regular basis and helped with farm work three to four times a week during the planting and harvesting seasons. ***Id.*** He had full use of the family goods, equipment, vehicles, and gasoline. ***Id.*** His driver's license, hunting license, credit cards, and tax returns listed his parents' address as his place of residence. ***Id.*** He voted and banked in his parents' town, rather than in Madison. ***Id.*** In addition, both of his cars were insured under his parents' car insurance policy. ***Id.*** On appeal, we concluded a jury "could reasonably find" that Joseph was a resident of his parents' household based on this evidence. ***Id.***

¶54 ***Seichter*** differs from this case in several important respects. In ***Seichter***, Joseph stayed with his parents for twenty-nine of the forty-eight months between his high school graduation and the accident. In contrast, during the forty-month period between Mark's graduation and the accident, he stayed with his parents for only seven months. Joseph regularly stayed overnight at his parents' home, and he returned to his parents' house three or four times a week during the planting and harvesting seasons. Mark did not return to his parents' home with such frequency or regularity. Joseph's vehicle was listed as an insured under his parents' car insurance policy. Mark's was not. Further, Mark paid his own college tuition and housing expenses, and he paid his parents rent while he was deployed. There was no evidence in ***Seichter*** that Joseph was financially independent from his parents. Thus, our affirmance of the jury's verdict in ***Seichter*** does not prevent us from concluding that a jury could reasonably find Mark was not a resident of his parents' household.

¶55 Finally, Country argues Mark must have been a resident of his parents' household because there is no evidence that any affirmative act occurred before the accident to "legally destroy" Mark's status as a resident. Country relies on ***Giese***, where the supreme court noted that the adult son had not "completely severed the 'household' umbilical cord" before the accident occurred. ***Giese***, 30 Wis. 2d at 636-37. However, cases since ***Giese*** have not required proof that ties to the family home have been completely severed. Instead, these subsequent cases employ a multi-factor analysis, in which no single factor is dispositive. *See, e.g.*, ***Pamperin***, 55 Wis. 2d at 37; ***Ross v. Martini***, 204 Wis. 2d 354, 358-59, 555 N.W.2d 381 (Ct. App. 1996); ***Seichter***, 228 Wis. 2d at 844-45. After applying this multi-factor test, we have concluded the facts give rise to a reasonable inference

that Mark was not a resident of his parents' household. The circuit court therefore properly denied Country's summary judgment motion.

B. The court's statement of the case

¶56 Country next argues the circuit court's statement of the case improperly informed the jury that its answers to the special verdict questions would determine whether Benson had insurance coverage.[3] A circuit court possesses broad discretion in instructing the jury. ***State v. McCoy***, 143 Wis. 2d 274, 289, 421 N.W.2d 107 (1988). We will not reverse a circuit court's discretionary ruling if the record shows that discretion was in fact exercised and we can perceive a reasonable basis for the court's decision. ***Raby v. Moe***, 149 Wis. 2d 370, 390, 441 N.W.2d 263 (Ct. App. 1989), *rev'd on other grounds*, 153 Wis. 2d 101, 450 N.W.2d 452 (1990).

¶57 "The fundamental rule in this state is that it is reversible error for either the court or counsel to inform the jury of the effect of their answer on the ultimate result of their verdict[.]" ***Kobelinski v. Milwaukee & Suburban Transp. Corp.***, 56 Wis. 2d 504, 520, 202 N.W.2d 415 (1972). The purpose of this rule is "to secure a direct answer free from any bias or prejudice in favor of or against either party." ***McGowan v. Story***, 70 Wis. 2d 189, 197, 234 N.W.2d 325 (1975) (quoting ***Ryan v. Rockford Ins. Co.***, 77 Wis. 611, 615-16, 46 N.W. 885 (1890)). However, a particular instruction does not violate the rule "merely because an

[3] Country also suggests the circuit court should not have informed the jury that this case involved a motor vehicle accident. However, Country fails to explain how the court erred by providing that information to the jury. We need not consider undeveloped arguments. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).

intelligent juror might be able to infer therefrom the effect upon the final result of his [or her] answers to the special verdict." ***Kobelinski***, 56 Wis. 2d at 521.

¶58 At the outset, we note that we are not convinced the circuit court's statement of the case actually informed the jury of the ultimate effect of its verdict. Country repeatedly asserts that the court informed the jury its verdict answers would determine whether Benson had insurance coverage, "effectively informing the jury that its verdict could leave [Benson] uninsured[.]" However, that assertion is not technically correct. The court actually informed the jury that its verdict answers would relate to whether Benson had insurance coverage "under his policy with [Country.]" That Benson did not have coverage under the Country policy does not foreclose the possibility he had coverage from some other source, including Progressive, which was also a party in the coverage trial. Thus, the court did not actually inform the jury that its answers could leave Benson uninsured with respect to the accident.

¶59 Moreover, informing a jury that its verdict will affect whether a party has insurance coverage is not necessarily reversible error. *See* ***Raby***, 149 Wis. 2d at 389-92. In ***Raby***, there was a dispute over whether the intentional acts exclusion in a homeowners policy issued by Heritage Mutual barred coverage for damages caused by Terrence Moe's participation in an armed robbery. ***Id.*** at 376-77. At trial, the special verdict asked the jury to determine whether the damages were "expected or intended." ***Id.*** at 377. The circuit court instructed the jury, "The policy of insurance issued by Heritage Mutual provides that it will pay damages for which Terrence Moe is legally liable. It, however, excludes situations where the bodily injury is expected or intended by the insured." ***Id.*** at 388. Heritage objected that this language impermissibly informed the jury its

verdict would determine whether Moe had insurance coverage. ***Id.*** The circuit court overruled Heritage's objection, reasoning:

> There are times when a case, for practical purposes, just can't be tried without the jury having some insight into what's going to happen if they answer a question in [a] certain way. That one party or the other is going to prevail. That doesn't necessarily mean that they know all of the aspects of what happens if the party prevails and to know it affects a recovery.

Id. at 389.

¶60 On appeal, we quoted the circuit court's reasoning with approval. ***Id.*** We stated it would be "apparent to any jury in a case such as this that insurance coverage [was] an issue." ***Id.*** at 389. Consequently, it was not "unreasonable to allow the jury to know that one of the key elements of this lawsuit was insurance coverage." ***Id.*** at 390. We also noted that, at the conclusion of the trial, the jurors were instructed they should not "concern [them]selves about whether [their] answers will be favorable to one party or the other nor with what the final result of this lawsuit may be[.]" ***Id.*** at 391. The jurors were also told not to add or subtract from the damages "because of sympathy or resentment or because one of the parties from whom damages are sought is an insurance corporation." ***Id.*** We concluded these admonitions "militated against any possible adverse effect" on Heritage's substantial rights. ***Id.*** at 392. Accordingly, we held the circuit court's instruction was not an erroneous exercise of discretion.

¶61 We similarly conclude the circuit court properly exercised its discretion in this case and provided a reasonable basis for its decision to include the disputed information. The case caption included the names Michael Kappers, Country Mutual Insurance Company, Theodore Benson, and Progressive Northern Insurance Company. Because Kappers was not participating in the coverage phase

of the case, the court reasoned that the caption would confuse the jury, leading to "conjecture, speculation, [and] uncertainty[.]" Consequently, the court decided the disputed information in its statement of the case was necessary to give the jurors the proper context to answer the special verdict questions.

¶62 As in ***Raby***, the court here reasoned that the insurance coverage dispute between Benson and Country was central to the case, and under the circumstances, it was unrealistic to think the jurors could be insulated from that fact. *See* ***id.*** at 389-90. Here, the jurors knew the case involved a dispute between Benson and his insurance company.[4] They also knew from the parties' arguments that Benson and Progressive wanted the special verdict questions answered "no," and Country wanted the questions answered "yes." Thus, even without the disputed information in the statement of the case, an intelligent juror would likely have inferred that his or her answers to the special verdict questions would determine whether Country's policy provided insurance coverage for Benson. *See* ***Kobelinski***, 56 Wis. 2d at 521.

¶63 The court also stated it planned to instruct the jurors to decide the case based on the evidence, rather on than passion, prejudice, or sympathy. The court explained it had "full confidence" the jury would follow its instructions. The court ultimately instructed the jurors that they were to answer two specific questions: whether Mark was a resident of Benson's household, and whether Mark's vehicle was available for Benson's regular use. The jurors were instructed

[4] Country filed a motion in limine to prevent the introduction of evidence that "as of September 10, 2005, there [were] in effect one or more policies of insurance issued by [Country] pursuant to which members of the Benson family were named insureds." The circuit court denied Country's motion, and Country does not explicitly challenge the court's ruling on appeal.

to answer these questions based on the evidence, without regard for "whether your answers will be favorable to one party or to another nor with [regard to] what the final result of this lawsuit may be." The court also told the jurors to answer the special verdict questions without "sympathy, bias, or prejudice." As in ***Raby***, we conclude these admonitions "militated against any possible adverse effect" on Country's substantial rights. *See* ***Raby***, 149 Wis. 2d at 392; *see also* ***State v. Truax***, 151 Wis. 2d 354, 362, 444 N.W.2d 432 (Ct. App. 1989) (We presume jurors follow the instructions given to them.). Consequently, the court did not erroneously exercise its discretion by providing the disputed information to the jury.

C. Country's motion to change the jury's answer on Mark's residence

¶64 Country next contends the circuit court erred by denying its motion to change the jury's answer to the residence question from "no" to "yes." Any party may move the court to change an answer in the jury's verdict on the ground that the answer is not supported by sufficient evidence. WIS. STAT. § 805.14(5)(c). However, a court may grant the motion only if there is "no credible evidence" to support the answer. WIS. STAT. § 805.14(1). When we review a circuit court's denial of a motion to change a verdict answer, we must affirm if the answer is supported by any credible evidence, even if contradictory evidence is stronger and more convincing. *See* ***Weiss v. United Fire & Cas. Co.***, 197 Wis. 2d 365, 389-90, 541 N.W.2d 753 (1995).

¶65 Here, credible evidence supports the jury's finding that Mark was not a resident of Benson's household at the time of the accident. The evidence at trial largely mirrored the undisputed facts the parties submitted on summary

judgment. We have already concluded those facts supported a reasonable inference that Mark was not a resident of Benson's home. *See supra*, ¶¶34-40.

¶66 Additional evidence presented at trial also supported the jury's answer to the residence question. For instance, while Country argued that Mark's storage of personal property at his parents' home weighed in favor of residency, Benson explained at trial that much of Mark's personal property is still stored at the Benson house, even though Mark purchased his own home in January 2006 and is now married. Benson also testified his two other adult children continue to store property at the Benson home, even though they moved out in 2001. Benson's testimony undermined Country's position that a child's storage of personal property at his or her parents' home necessarily equated with residence there. Benson further testified that from the time Mark graduated from high school he paid for his own gas, books, clothing, and car insurance. Benson's wife testified that, on the date of the accident, Mark had his own health insurance through a policy provided by the military. This evidence of Mark's self-sufficiency further supported a finding that Mark was not a resident of his parents' home.

¶67 Country highlights additional trial testimony in support of its position. However, as discussed above, credible evidence supports the jury's finding that Mark was not a resident. A jury's answer must be affirmed if it is supported by any credible evidence. *See* ***Weiss***, 197 Wis. 2d at 389-90. Consequently, the circuit court properly denied Country's motion to change the jury's answer.

D. Country's motion for a new trial

¶68 Lastly, Country argues the circuit court should have granted its motion for a new trial. WISCONSIN STAT. § 805.15(1) permits a party to "move to set aside a verdict and for a new trial because of errors in the trial, or because the verdict is contrary to law or to the weight of evidence, or because of excessive or inadequate damages, or because of newly-discovered evidence, or in the interest of justice." We owe great deference to a circuit court's decision denying a new trial because the circuit court is in the best position to observe and evaluate the evidence. *See* ***Sievert v. American Family Mut. Ins. Co.***, 180 Wis. 2d 426, 431, 509 N.W.2d 75 (Ct. App. 1993), *aff'd*, 190 Wis. 2d 623, 528 N.W.2d 413 (1995). Thus, we will not disturb the circuit court's decision absent an erroneous exercise of discretion. ***Id.***

¶69 Country first argues a new trial is required because the jury's verdict is contrary to the great weight of the evidence. The circuit court rejected this argument, reasoning the trial evidence established that: (1) Mark had been in Iraq for "many months" at the time of the accident; (2) since graduating from high school, Mark's stays at his parents' home were "sporadic and for short and definite periods of time"; (3) Mark had been financially independent from his parents since his high school graduation; (4) Mark previously paid for his own car insurance and had health insurance through the military on the accident date; and (5) while in Iraq, Mark formed an intent not to return to his parents' home on a permanent basis. We agree with the circuit court that this evidence amply supported the jury's finding that Mark was not a resident of his parents' household.

¶70 Country next argues a new trial is required "in the interest of justice" because the statement of the case improperly informed the jury its answers would

determine whether Benson had insurance coverage for the accident. We have already rejected Country's challenge to the statement of the case. *See supra*, ¶¶57-63. Country provides no additional legal or factual support for this argument. There is no evidence Country was prejudiced by the statement of the case, and there is ample evidence in the record to support the jury's verdict. We therefore conclude Country is not entitled to a new trial in the interest of justice.

II. Benson's cross-appeal

¶71 In his cross-appeal, Benson argues the circuit court erred by denying his postverdict motion for attorney fees. Whether an insured is entitled to recover attorney fees from his or her insurer is a question of law that we review independently. ***Reid v. Benz***, 2001 WI 106, ¶12, 245 Wis. 2d 658, 629 N.W.2d 262.

¶72 Benson first argues he is entitled to recover the attorney fees he incurred to defend himself against Kappers' and Progressive's claims because Country breached its duty to defend him. "When an insurer refuses to defend, it does so at its peril." ***Patrick v. Head of the Lakes Co-op. Elec. Ass'n***, 98 Wis. 2d 66, 72, 295 N.W.2d 205 (Ct. App. 1980). If the insured incurs reasonable defense costs and a court ultimately finds that the insurer's policy provides coverage, then the insurer must pay for the insured's defense. *See* ***id.*** at 72-73.

¶73 It is undisputed that Kappers filed his complaint on September 8, 2008, and that Country agreed to defend Benson, subject to a reservation of rights, on October 14. It is also undisputed that Country paid Benson's defense costs from the time Kappers filed his complaint until Country assumed the defense. However, Benson argues Country must also reimburse him for the attorney fees he incurred *before* Kappers' complaint was filed.

¶74 In response, Country argues Benson is not entitled to the fees he seeks because Country did not have a duty to defend Benson until after Kappers' lawsuit was filed. Country notes that an insurer's duty to defend is based solely on the allegations in the complaint. ***Fireman's Fund Ins. Co. of Wis. v. Bradley Corp.***, 2003 WI 33, ¶19, 261 Wis. 2d 4, 660 N.W.2d 666. Because there is no complaint to analyze before a lawsuit is filed, Country argues the duty to defend cannot predate the filing of a lawsuit.

¶75 We disagree. Country's policy states that Country will defend "any *claim* or *lawsuit* alleging bodily injury or property damage covered by this policy[.]" (Emphasis added.) The term "claim" must mean something different from the term "lawsuit," or Country would not have included both terms. *See* ***Goebel v. First Fed. Sav. & Loan Ass'n of Racine***, 83 Wis. 2d 668, 680, 266 N.W.2d 352 (1978) (We must "avoid a construction which renders portions of a contract meaningless, inexplicable or mere surplusage."). The policy does not define the term "claim," but the ordinary meaning of a "claim" is "a demand or request for something considered one's due." NEW OXFORD AMERICAN DICTIONARY 314 (2001); *see also* ***Weimer v. Country Mut. Ins. Co.***, 216 Wis. 2d 705, 722-23, 575 N.W.2d 466 (1998) (When a policy term is undefined, we may look to a recognized dictionary for guidance in interpreting its ordinary meaning.). Nothing in the policy, or in the ordinary meaning of the term claim, suggests that a claim cannot arise before a lawsuit is filed. Thus, because Country's policy promises to defend claims as well as lawsuits, we reject Country's assertion that it did not have a duty to defend before Kappers' lawsuit was filed.

¶76 To recover his attorney fees, though, Benson must show that Country actually breached its pre-lawsuit duty to defend. He has failed to do so. Benson argues Country breached its duty to defend by failing to conduct an

adequate investigation into the coverage issue. Benson emphasizes that Country denied coverage on September 12, 2005, the same day it was notified of the accident, after a single phone call with Benson.

¶77 The policy provides that County will "make any investigation or settle any claim or suit we consider appropriate." However, the record is devoid of information about any investigation Country conducted before or after initially denying coverage. As a result, we cannot determine one way or the other whether Country conducted an adequate investigation. Therefore, we cannot conclude that Benson is entitled to recover attorney fees because Country breached its pre-lawsuit duty to defend.

¶78 In addition, we observe that whether Country adequately investigated the coverage issue goes to the heart of Benson's bad faith claim. The first element of a bad faith claim is the "absence of a reasonable basis for denying policy benefits." ***Trinity Evangelical Lutheran Church & School-Freistadt v. Tower Ins. Co.***, 2003 WI 46, ¶33, 261 Wis. 2d 333, 661 N.W.2d 789. The absence of a reasonable basis for denying a claim exists when the claim is not "fairly debatable." ***Id.*** Whether a matter is fairly debatable "implicates the question whether the facts necessary to evaluate the claim are properly investigated[.]" ***Anderson v. Continental Ins. Co.***, 85 Wis. 2d 675, 691, 271 N.W.2d 368 (1978). According to the parties, Benson's bad faith claim is still pending in the circuit court. Thus, the circuit court will ultimately be required to determine whether Country conducted an adequate investigation. If Benson prevails on his bad faith claim, he may be entitled to recover his pre-lawsuit attorney fees as consequential damages. *See* ***DeChant v. Monarch Life Ins. Co.***, 200 Wis. 2d 559, 571, 576, 547 N.W.2d 592 (1996) ("[W]hen an insurer acts in

bad faith by denying benefits, it is liable to the insured in tort for any damages which are the proximate result of that conduct[,]" including attorney fees.).

¶79 Benson next argues he is entitled to recover the attorney fees he incurred in successfully litigating the coverage issue. In support of his argument, he relies on ***Elliott v. Donahue***, 169 Wis. 2d 310, 485 N.W.2d 403 (1992). There, Karen Elliott was involved in a motor vehicle accident with a vehicle operated by Michael Donahue. ***Id.*** at 314. Donahue tendered defense of the lawsuit to Heritage Mutual, which denied coverage. ***Id.*** It advised Donahue to retain counsel at his own expense, which he did. ***Id.*** at 315. Heritage then successfully moved to bifurcate the coverage issue. ***Id.*** "However, proceedings on the claim for damages were not suspended pending resolution of the coverage issue. Donahue's counsel represented him on both the claims for damages as well as in the coverage dispute." ***Id.***

¶80 After a jury trial on the coverage issue, the circuit court determined Donahue was entitled to coverage under the Heritage policy. ***Id.*** Heritage immediately assumed Donahue's defense and settled all pending claims against him. ***Id.*** Donahue filed a postverdict motion for the attorney fees he incurred to litigate coverage, which the circuit court denied. ***Id.***

¶81 On appeal, Donahue contended he was entitled to recover his attorney fees because Heritage's denial of coverage constituted a breach of its duty to defend. ***Id.*** at 316. Heritage responded that it did not breach its duty to defend because coverage was fairly debatable and because it complied with the procedure set forth in ***Mowry v. Badger State Mutual Casualty Co.***, 129 Wis. 2d 496, 385 N.W.2d 171 (1986). ***Elliott***, 169 Wis. 2d at 316. ***Mowry*** indicates that an insurer can avoid breaching its duty to defend by obtaining an order to bifurcate the

liability and coverage issues and to stay the liability phase until coverage has been decided. ***Mowry***, 129 Wis. 2d at 528-29.

¶82 The supreme court concluded that Heritage did not directly breach its duty to defend by denying coverage because coverage was fairly debatable, and once coverage was established, Heritage immediately assumed Donahue's defense. ***Elliott***, 245 Wis. 2d at 317-18. However, the court concluded Heritage indirectly breached its duty to defend by failing to comply with the requirements of ***Mowry***. Although Heritage obtained an order to bifurcate, it did not obtain a stay of the liability proceedings. ***Elliott***, 245 Wis. 2d at 318. As a result, Donahue was forced to "retain counsel to simultaneously defend him in both aspects of the case." ***Id.*** The court stated that, under these circumstances, equitable considerations supported awarding Donahue the fees he incurred to litigate the coverage issue. ***Id.*** at 322.

¶83 The supreme court subsequently clarified in ***Reid***, 245 Wis. 2d 658, that ***Elliott***'s holding is limited to the specific factual circumstances of that case. In ***Reid***, American Family agreed to defend its insured against a lawsuit under a reservation of rights. ***Id.***, ¶5. It then obtained an order bifurcating the liability and coverage issues and staying all proceedings on liability. ***Id.***, ¶6. The circuit court subsequently found that American Family's policy provided coverage. ***Id.***, ¶8. The court also awarded the insured the attorney fees she incurred in establishing coverage. ***Id.***

¶84 On appeal, the supreme court reversed the attorney fee award, stating it was not supported by ***Elliott***. ***Reid***, 245 Wis. 2d 658, ¶37. The court clarified that it was the "'*limited circumstances*' presented in ***Elliott*** that prompted

the court to exercise its equitable power to award attorney fees to the insured." ***Id.***, ¶26 (quoting ***DeChant***, 200 Wis. 2d at 569). The court explained:

> It was the inequity of the circumstances facing us in ***Elliott***—that the insurer was attempting to avoid its duty to defend indirectly by adjudicating coverage without seeking a stay of liability—that prompted us to award the attorney fees the insured incurred. We reasoned that it was only fair that the insurer be held liable for the attorney fees that the insured incurred, when the insurer denied coverage in such a way that forced the insured to incur fees to defend himself. That was contrary to the dictates of ***Mowry***.

Id., ¶21. Unlike the insurer in ***Elliott***, American Family complied with ***Mowry*** by obtaining an order to bifurcate and stay. ***Id.***, ¶37. American Family therefore avoided breaching its duty to defend. Consequently, its insured was not entitled to recover the attorney fees she incurred to establish coverage. ***Id.***, ¶36.

¶85 This case is more like ***Reid*** than ***Elliott***. Like the insurer in ***Reid***, Country followed the procedures outlined in ***Mowry***. After it received a copy of Kappers' complaint, Country agreed to defend Benson under a reservation of rights, and it retained an attorney to represent him. It paid the attorney fees Benson had incurred between the time Kappers filed his complaint and the time Country assumed the defense. Country then obtained an order bifurcating the liability and coverage issues and staying the proceedings on liability. Thus, unlike the insured in ***Elliott***, Benson was not forced to litigate the coverage issue and defend on liability simultaneously. The equitable considerations that supported an award of attorney fees in ***Elliott*** are therefore absent here.

¶86 Benson nevertheless argues he should be allowed to recover his attorney fees because Country breached its duty to defend by "not timely appointing defense counsel … after the lawsuits were filed." He notes that Country did not appoint an attorney for him until after the deadline for answering

Kappers' complaint had expired. However, Benson has not established that this delay was improper or had any negative effect on him. Benson was served with Kappers' complaint on September 10, 2008. Instead of immediately notifying Country of the lawsuit, he waited until September 24, and then mailed Country a copy of the complaint. Rather than waiting for Country's response, Benson's attorney filed an answer to the complaint on September 26. Because an answer had already been filed, Benson was not prejudiced by Country's failure to appoint defense counsel before the deadline for filing an answer expired. This is especially true given that Benson himself was partially responsible for the delay. In addition, Country paid the attorney fees Benson incurred to prepare and file the answer. We therefore reject Benson's argument that he is entitled to recover attorney fees because Country failed to appoint counsel in a timely manner.

¶87 Benson may recover the appellate costs he incurred in Country's appeal. Country may recover its appellate costs incurred in Benson's cross-appeal. *See* WIS. STAT. RULE 809.25(1)(a)1.

By the Court.—Order affirmed.

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