COURT OF APPEALS
DECISION
DATED AND FILED

December 27, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP1933 **Cir. Ct. No. 2009CV1763**

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

DANIEL J. DEMARCO,

PLAINTIFF-APPELLANT,

V.

KEEFE REAL ESTATE, INC., BEAA SHEEHAN AND ABC INSURANCE COMPANY,

DEFENDANTS,

ACE AMERICAN INSURANCE COMPANY, D/B/A PRIVATE RISK SERVICES AND BALBOA INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS.

APPEAL from judgments of the circuit court for Walworth County: JAMES L. CARLSON, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Brown, C.J., Neubauer, P.J., and Gundrum, J.

¶1 BROWN, C.J. Daniel J. DeMarco appeals from judgments dismissing his claims against ACE American Insurance Company and Balboa Insurance Company. DeMarco argues that these insurers owe him for amounts he paid to defend and settle a lawsuit filed against him in 2007, relating to the sale of his home. DeMarco's claim is based upon insurance policies issued by a predecessor insurer, Atlantic Mutual Insurance Company, which became insolvent during the circuit court proceedings. DeMarco alleges that ACE and Balboa assumed liability for his policies and are also his insurers. The circuit court granted summary judgment against DeMarco and in favor of ACE and Balboa.

¶2 We agree with the circuit court that DeMarco's insurance did not provide coverage for the losses claimed in the lawsuit against DeMarco. Since DeMarco's defense was provided under a reservation of rights, the insurers' right to contest coverage remains enforceable. Because the lawsuit's claims were outside the scope of his coverage, DeMarco is not entitled to reimbursement for the entire $150,000 he paid to settle the litigation.

¶3 Here, however, despite its doubts about coverage, the original insurer, Atlantic, agreed to fund DeMarco's defense and contribute $10,000 to the settlement and that agreement cannot be retroactively revoked. While ACE was never DeMarco's insurer, the record shows that Balboa assumed liability for some of Atlantic's policies, including DeMarco's. Hence, Balboa must reimburse DeMarco for the amount he paid to his defense lawyers to settle a past-due invoice and for the promised settlement contribution. In addition, DeMarco is owed reimbursement for the amounts he paid to litigate and appeal his insurers' breach of the duty to defend, including fees expended to defend himself against a lawsuit

Atlantic filed in Illinois. We affirm in part, reverse in part, and remand for determination of damages.

The Underlying Litigation

¶4 In June 2007, DeMarco sold his home in Fontana to Richard Katz. That November, Katz sued DeMarco under several different legal theories, all arising out of allegations that DeMarco failed to disclose substantial defects in the home before the sale. In April 2008, all but three counts in the Katz litigation were dismissed. The remaining counts were for misrepresentation, breach of contract, and breach of the duty of good faith and fair dealing, based upon allegations that DeMarco made false statements or failed to disclose material information during the sale of his home to Katz.

¶5 In May 2008, DeMarco sought coverage under his homeowner's and umbrella policies with Atlantic for his defense and indemnification in the Katz lawsuit. In July 2008, Atlantic agreed to pay for DeMarco's defense, subject to a reservation of its rights to contest coverage. DeMarco hired Thorpe & Christian, S.C., as his defense counsel.

¶6 Atlantic paid Thorpe & Christian's invoices for several months, and the litigation settled in April 2009. Under the settlement, DeMarco agreed to pay $150,000 to Katz, and Atlantic agreed to contribute $10,000 of this payment. Shortly thereafter, DeMarco paid the $150,000 settlement personally.

¶7 On May 7, 2009, Thorpe & Christian asked Atlantic to pay the remaining charges for DeMarco's defense, approximately $29,000, and to forward its agreed-upon $10,000 contribution to DeMarco**.** Throughout May and June 2009, Atlantic failed to respond to multiple follow-up e-mails from Thorpe &

Christian and forwarded no payments. Finally, in late June, a representative of Atlantic sent Thorpe & Christian an e-mail stating that she had "input the 10K," apparently referring to making a $10,000 partial payment, and that "the rest [would] be brought current shortly." The next day, Atlantic paid $10,000 to Thorpe & Christian toward the final invoice, labeling it a "partial payment legal pending audit." However, contrary to the statement that the balance would soon "be brought current," Atlantic made no more payments.

¶8 At about the same time as it sent its $10,000 "partial payment" to Thorpe & Christian, Atlantic sent a $10,000 check to DeMarco with a notation that the payment would be in "Full & Final settlement [of] all claims." DeMarco did not deposit the check and, in August, he retained new legal counsel "to investigate and prosecute [Atlantic's] liability for any contribution due and owing" to DeMarco. In a letter to Atlantic dated August 10, 2009, DeMarco's new counsel asserted that Atlantic was liable to indemnify him for the $150,000 settlement in its entirety, in addition to paying the balance due on Thorpe & Christian's final invoice.

¶9 On August 24, Atlantic assured DeMarco that "the legal bills are being processed this week after they had been audited" and that Atlantic was "look[ing] into the issues you raise in your letter and will address same in the near future."

¶10 Throughout late July and August, Thorpe & Christian repeatedly attempted to get Atlantic to pay the balance due on its final invoice. Finally, on August 24—the same day that it e-mailed DeMarco's new lawyer—Atlantic e-mailed Thorpe & Christian saying that the audit had been received and that the invoice would be paid "today." No such payment, however, was forthcoming.

Instead, a week later, on August 31, 2009, Atlantic demanded a "breakdown" of the charges. The attorney who handled the DeMarco defense immediately responded via e-mail to explain the charges in more detail. Still Atlantic did not pay the bill. In mid-September, DeMarco finally paid the remaining charges himself.

¶11 In late August 2009, as Atlantic e-mailed with DeMarco and his defense counsel about payments, Atlantic simultaneously readied an Illinois lawsuit against DeMarco, seeking a declaration that it owed no duty to defend or indemnify him in the Katz litigation. DeMarco first received notice of the Illinois lawsuit when Atlantic e-mailed him a courtesy copy on September 10, 2009.

¶12 In November, DeMarco commenced the action that is the subject of this appeal, suing Atlantic and a number of other defendants in the Walworth county circuit court for reimbursement of the amounts he paid to defend and settle the Katz litigation. On DeMarco's motion, the Illinois suit was dismissed.

¶13 In the case at hand, Atlantic moved to dismiss, but its motion was denied. Atlantic then failed to timely file an answer, so DeMarco filed motions for default judgment and partial summary judgment. At the hearing on those motions, however, Atlantic's attorney informed the court that moments before entering the courtroom she learned that Atlantic had been made subject to rehabilitation proceedings by the New York Department of Insurance, proceedings that imposed an indefinite stay on all litigation concerning Atlantic. The circuit court granted a stay of the hearing and subsequently dismissed Atlantic from the case because of the New York proceedings, without ever deciding the motions for default and partial summary judgment.

¶14 Having dismissed Atlantic, the circuit court permitted DeMarco to amend the complaint to add other insurers who were, allegedly, liable for claims under DeMarco's policies. DeMarco's amended complaint named Balboa and ACE as additional insurers.

¶15 Balboa and ACE filed motions for summary judgment on several bases, including that DeMarco's policies provided no coverage and no duty to defend DeMarco in the Katz lawsuit. The circuit court granted summary judgment in favor of both insurers. With respect to ACE, the court held ACE "was not DeMarco's insurer, and, therefore, did not assume any liability in connection with plaintiff's policies," and also that "there … was no potential coverage" for the Katz litigation under these policies, because the misrepresentations and nondisclosure alleged in the Katz complaint did not constitute an "occurrence" under the policy's definition of that term. As for Balboa, the court held that although Balboa had assumed liability for DeMarco's policy, there had never been any duty to defend or indemnify under the policy.[1] DeMarco appeals.

[1] Also, with respect to Balboa's liability for the attorney fees DeMarco paid out of pocket, the circuit court accepted Balboa's proposed finding of fact that Atlantic paid defense invoices "until August 2009, when Atlantic requested additional information concerning certain invoices and De Marco's counsels failed to provide the requested information." This finding is similar to Balboa's assertion in its brief before this court that "[w]hen it appeared resolution was in sight, Atlantic asked" Thorpe & Christian to give it "the figure for the final legal bill," but that "[f]or reasons unknown" Thorpe & Christian failed to respond.

We reject those assertions because they are not supported by the record. The communication that Balboa provides as proof that Thorpe & Christian failed to respond to Atlantic's request came in September 2008, at which point the insurer had been in possession of the "figure for the final legal bill" for months, had already audited the bill, and had already asked for and received detailed information concerning the charges. In fact, the bill had gone unpaid for so long that Thorpe & Christian, and DeMarco, had given up on its being paid, and DeMarco paid it himself. Also, Atlantic had sued DeMarco in Illinois, seeking a declaration that it did not owe him anything more. In context, Thorpe & Christian had numerous reasons to fail to respond to Atlantic's request for a restatement of the final figure owed.

Analysis

¶16 DeMarco asserts a number of related theories for reversing the summary judgments granted in favor of Balboa and ACE. With respect to the liability of Balboa and ACE for the coverage in the policies issued by Atlantic, DeMarco asserts that his motion for default judgment against Atlantic should have been granted and that "Balboa and/or" ACE were liable under the policies as well. He further argues that, since Atlantic agreed to defend him in the Katz matter, and no insurer sought a determination of coverage issues before the settlement in Katz was completed, it was too late to raise any coverage questions. In a related argument, he asserts that by failing to pay the final bill from Thorpe & Christian and suing DeMarco in Illinois for a declaratory judgment on coverage, Atlantic (and hence, in DeMarco's view, the other insurers) breached its duty to defend and acted in bad faith.

Balboa Assumed Liability for DeMarco's Policies, but ACE Did Not

¶17 We begin with the threshold question of which (if either) of the insurer defendants is liable to DeMarco under the policies at issue. We conclude that Balboa is liable, but ACE is not.

¶18 Balboa's liability to DeMarco depends on the agreements it made under its "various reinsurance arrangements" with Atlantic and ACE about policies like DeMarco's. At the hearing on the summary judgment motions, the circuit court noted that Balboa (unlike ACE) "had reassumed responsibility for certain insurance policies and coverages," but that finding does not appear in its order issued after the hearing and, in any event, the court ultimately determined that Balboa had no liability because the policies offered no coverage. Balboa does not directly dispute its liability to DeMarco and instead states that it "assumes,

without conceding, that it is the insurer on-risk for the policies under various reinsurance arrangements" between Atlantic, Balboa, and ACE.

¶19 While "reinsurance arrangements" typically provide no direct liability of the reinsurer to the policy holder, sometimes insurers do assume direct liability for a book of policies issued by another insurer. *See, e.g.*, ***Travelers Indem. Co. v. Gillespie***, 785 P.2d 500, 508 (Cal. 1990) ("A contract by which a reinsurer assumes the policies of the original insurer does result in the reinsurer being directly liable to the original insureds…." (emphasis added)). These agreements are not truly reinsurance contracts but are sometimes labeled such. *See also* ***Johannes v. Phoenix Ins. Co.***, 66 Wis. 50, 57, 27 N.W. 414 (1886) (rejecting reinsurer's argument that the insured had no right to sue it directly, on grounds that "if, on the receipt of a good and sufficient consideration, A. agrees with B. to assume and pay a debt of the latter to C., then C. may maintain an action directly upon such contract against A., notwithstanding C. is not privy to the consideration received by A."); 1A COUCH ON INSURANCE §§ 9:4 ("There are certain additional contracts not qualifying as … reinsurance that the courts have nevertheless labeled as reinsurance…. [One of these is] where an insurer transfers its portfolio and assets to another presumably solvent insurer….") and 9:30 (explaining that direct liability to insured can arise in a reinsurance agreement by express agreement or by implication).

¶20 Based on the record, we agree with the circuit court's statement during the hearing that Balboa assumed liability for certain of Atlantic's policies, including DeMarco's policies. A publicly filed California insurance examiner's report about Balboa's business conditions states that on March 1, 2006, Balboa "assume[d] 100% of in-force, new and renewal policies of the Atlantic Mutual Group." This description confirms that the agreement between Balboa and

Atlantic was not a mere reinsurance agreement but an assumption agreement, with Balboa assuming direct liability on certain policies, including DeMarco's.

¶21 As for ACE, however, we agree with the circuit court that the record shows no basis for holding it liable to DeMarco. ACE simply "did not assume liabilit[y] under Atlantic policies that were issued … or for losses that occurred … before December 31, 2007," such as DeMarco's policy and losses.[2]

¶22 In short, Balboa is directly liable to DeMarco but ACE is not.

The Insurers Did Not Lose the Right to Contest Coverage by Defending DeMarco in the Katz Litigation and Settlement

¶23 Turning to DeMarco's first contention, we reject his assertion that the coverage dispute "comes too late." An insurer does not lose the right to challenge coverage simply because it waits to resolve that issue. "Providing a defense does not give rise to estoppel or waiver of a coverage clause." ***Maxwell v. Hartford Union High Sch. Dist.***, 2012 WI 58, ¶40, 341 Wis. 2d 238, 814 N.W.2d 484. This was true in ***Maxwell*** even though the insurer failed to expressly reserve its rights, ***id.***, ¶63, so it is even more obvious in the case at hand, where Atlantic did so.

¶24 Having accepted responsibility for DeMarco's defense in Katz (albeit under a reservation of rights), the insurer was bound to provide that defense unless it later obtained a declaration that no coverage was owed. ***Estate of***

[2] Thus, we reject DeMarco's assertion that the date of "losses" ACE reinsured was to be determined with reference to the dates when costs were incurred or damages were awarded, rather than the date that the Katz litigation was initiated or the underlying dates in that lawsuit. And we find no basis for DeMarco's underdeveloped claims that ACE can be held liable due to its role as a claim administrator or under the theory of third-party administrator bad faith.

Sustache v. American Family Mut. Ins. Co., 2008 WI 87, ¶25, 311 Wis. 2d 548, 751 N.W.2d 845. But the fact that the Katz litigation settled before the coverage issue was litigated did not somehow decide the coverage issue in DeMarco's favor.

The Insurers Did Not Lose the Right to Contest Coverage By Failing to Pay the Final Invoice for the Defense and the $10,000 Settlement Contribution

¶25 Likewise, we reject DeMarco's assertion that the insurers are estopped from denying coverage because of a breach of the duty to defend, namely, failure to pay the final invoice from Thorpe & Christian and to contribute $10,000 to the settlement as promised. It is true that an insurer's breach of the duty to defend may render it liable for damages outside the scope of the policy's coverage, ***Maxwell***, 341 Wis. 2d 238, ¶58, but that is because an insurer who breaches a duty to defend "is on the hook for all damages that result *from that breach* of its duty," ***id.***, ¶54 (emphasis added).

¶26 In DeMarco's case, as already discussed, Atlantic agreed to defend DeMarco in the Katz litigation, subject to a reservation of rights. And in fact Atlantic did pay for DeMarco's defense, for many months, up through the mediation that settled the lawsuit for $150,000, to which Atlantic agreed to contribute $10,000.

¶27 We fail to see how the subsequent failure to pay the last invoice from Thorpe & Christian or to pay the $10,000 settlement contribution was in any way a cause of DeMarco's $150,000 settlement costs. In fact, one might assume the opposite, that a subsidized legal defense helped DeMarco obtain a favorable settlement. In these circumstances, where the defense was already completed and

the lawsuit already settled, the insurer's breach of the duty to pay defense bills and contribute to the settlement did not render it liable for the full settlement amount.

DeMarco Is Owed Attorney Fees for His Defense in Katz and the Promised $10,000 Contribution to the Katz Settlement

¶28 Although Atlantic did not become liable for the rest of the settlement just because of its failure to timely pay its obligation, it was bound to pay the defense costs it promised, even though it reserved its right to contest coverage. *See* ***Grube v. Daun***, 173 Wis. 2d 30, 75-76, 496 N.W.2d 106 (Ct. App. 1992). Hence, it was obligated to pay Thorpe & Christian's final bill and to contribute the $10,000 it had promised for the settlement.

¶29 Balboa relies on ***Sustache*** for the proposition that the insurer is bound to provide that defense unless it later obtained a declaration that no coverage was owed. Balboa asserts that, since the court has now found no coverage, it likewise is no longer liable for the remaining attorney fees bill. This is the argument with which the circuit court agreed. We reject that reliance on ***Sustache***. ***Sustache*** concerns ongoing litigation and we read the case to hold that an insurer has a duty to defend *unless* and *until* the court finds no coverage. *See* ***Sustache***, 311 Wis. 2d 548, ¶25. Then, the insurer may leave the ongoing litigation. But, here, the litigation was done and over with. The defense had already been provided and concluded. The attorney fees bill was for past attorney fees incurred when the duty to defend still existed. Atlantic agreed to pay those fees. Balboa cannot come in after the fact and try to get out of a bill due and owing for work already performed, especially where its predecessor agreed to pay. Had there been more legal work that needed to be done in the ongoing litigation after coverage was found not to exist, then we would have a different case before

us. But as it stands, Balboa owes DeMarco for the amount DeMarco paid his attorneys to settle the bill.

¶30 Atlantic as much as acknowledged its obligation to pay the outstanding bill when it explained in June that the first $10,000 had been paid and that the remainder "will be brought current shortly," and again in late August when it told Thorpe & Christian it would "pay … today."[3]

¶31 Similarly, Atlantic's promise to pay $10,000 towards the settlement is confirmed by a letter written shortly after mediation settled the case, where Thorpe & Christian requested "payment into our trust account in the amount of $10,000.00 which represents the amount agreed upon by Atlantic Mutual to contribute towards mediation." Nothing in the parties' subsequent communications, nothing in the record, and nothing in the parties' briefs contradicts this evidence that Atlantic agreed to pay $10,000 of the settlement in the Katz lawsuit.

¶32 Although Atlantic was dismissed before it made those payments, Balboa assumed direct liability to DeMarco and is obligated to pay what DeMarco is owed per the policy terms as carried out by Atlantic. Balboa is liable to reimburse DeMarco for the amount he paid Thorpe & Christian and for the promised $10,000 settlement contribution.

[3] Atlantic's acceptance of its responsibility for the invoice from Thorpe & Christian provides an independent legal foundation for its obligation to pay the bill. *See* ***Stan's Lumber, Inc. v. Fleming***, 196 Wis. 2d 554, 565, 538 N.W.2d 849 (Ct. App. 1995) (explaining the theory of "account stated," which is an action based upon "an agreement between a debtor and creditor that the items of a transaction between them are correctly stated in a statement rendered, that the balance shown is owed by one party to the other and that the party has promised to pay that balance to the other").

DeMarco's Policies Provide No Indemnification for the Katz Lawsuit Damages

¶33 Interpretation of an insurance policy and whether it provides coverage under particular facts is a question of law. ***Doyle v. Engelke***, 219 Wis. 2d 277, 284, 580 N.W.2d 245 (1998). In determining whether a particular claim is covered, we follow the "four-corners rule," in which we read the complaint itself to decide whether a claim of the type in question falls within the policy's coverage. ***Sustache***, 311 Wis. 2d 548, ¶20.

¶34 DeMarco, in his reply brief, argues that rather than applying the four-corners rule, we should determine simply whether coverage is "fairly debatable." But as he acknowledges, the "fairly debatable" test applies to determining whether there is a duty to defend, not determining the ultimate coverage issues. DeMarco's defense in the Katz litigation is over, and the only remaining question is whether the policies indemnified him. As already explained, an insurer's decision to accept a duty to defend does not expand the scope of its duty to indemnify. *See* ***Maxwell***, 341 Wis. 2d 238, ¶53.

¶35 We agree with the circuit court that DeMarco's policy provided no indemnification for the Katz claims. Katz alleged that DeMarco made false statements or omissions about the condition of the property before the sale. Misrepresentations and omissions were not occurrences for purposes of DeMarco's personal liability or umbrella coverages, because the policy defined an "occurrence" as an "accident" leading to bodily injury, personal injury, or property damage. Even negligent misrepresentation, if the underlying action is "volitional," falls outside the category of "accident." ***Everson v. Lorenz***, 2005 WI 51, ¶¶21-22, 280 Wis. 2d 1, 695 N.W.2d 298. Rather than bodily or personal

injury, or property damages, the losses alleged in the Katz complaint were "pecuniary" in nature. ***Id.***, ¶25.

¶36 We reject DeMarco's arguments in the reply brief, in which he attempts to characterize the claims in the Katz complaints as "arguably" involving accidental conduct that caused "property damage," analogous to the claims in ***Phillips v. Parmelee***, 2013 WI App 5, 345 Wis. 2d 714, 826 N.W.2d 686 (2012). In ***Phillips***, the claims arose out of the fact that the seller failed to disclose the known likelihood that certain pipes were covered with asbestos insulation, which resulted in the buyer's contractor cutting into the asbestos and damaging the property. ***Id.***, ¶¶7-8. No such damage to property was at issue in the Katz lawsuit; that case was all about damage that already existed and was, allegedly, not disclosed. So ***Phillips*** is inapplicable. Instead, as the circuit court explained, "DeMarco's misrepresentations and non-disclosures [as alleged in the Katz complaint] do not constitute an occurrence" and no property damage (let alone bodily or personal injury) was at issue in the Katz lawsuit.

DeMarco Is Owed Attorney Fees for Litigating His Right to Reimbursement for Defense Costs in Katz and for His Defense in the Illinois Lawsuit His Insurer Filed Against Him

¶37 Finally, DeMarco seeks "reimbursement for the attorney's fees and costs incurred in this action [and this appeal], as well as the attorney's fees and costs Mr. DeMarco expended in defeating the [Illinois] lawsuit and prosecuting this lawsuit." As authority for his right to payment of those fees, DeMarco cites ***Liebovich v. Minnesota Ins. Co.***, 2007 WI App 28, ¶4, 299 Wis. 2d 331, 728 N.W.2d 357:

> An insurer believing that its policy does not indemnify against a particular claim has several options for preserving its rights without violating its duty to defend. It may seek a

> judicial resolution of coverage before the underlying claim is tried, or it may defend its insured under a reservation of rights. The insurer may, on the other hand, simply refuse to assist and leave the insured to his or her own defense. If the insurer is correct that it owes no duty to defend, then it suffers no negative consequences of this action. However, the insurer should be very wary of taking this route, because if it is later found that the insurer did have a duty to defend, the breach of that duty estops the insurer from contesting coverage in the underlying action. This means that it must pay, in addition to the insured's cost to defend the underlying action, any damages awarded in that action. The insurer must also pay the insured's attorney fees in successfully establishing coverage.

Id. (citations and emphasis omitted).

¶38 The rule from ***Liebovich*** is not precisely applicable here because Atlantic did accept the duty to defend DeMarco in the Katz lawsuit and paid for that defense up until the settlement was reached. The insurer's breach of its voluntarily accepted duty to defend happened not at the outset but at the end, when it insistently failed to pay a bill it acknowledged was due, owing, and payable. Indeed, one might reasonably question the sincerity of Atlantic's questions about the bill and promise to pay it "today" in late August 2009, when just a few days later it filed a lawsuit in Illinois disclaiming any liability to DeMarco with respect to Katz.

¶39 Under the circumstances, it was the insurer's actions that caused DeMarco to incur the additional attorney fees for getting the Illinois lawsuit dismissed and for litigating his right to the defense costs via the present lawsuit and appeal. So, Balboa owes DeMarco reimbursement for that portion of the fees in this lawsuit and appeal that are attributable to the insurers' failure to timely pay Thorpe & Christian's final bill and to complete the promised contribution to the settlement of Katz (without, as Atlantic attempted to do here, conditioning that

contribution on DeMarco's waiver of his claim for the owed attorney fees). Balboa also owes DeMarco for all of the fees he expended in defending against the Illinois lawsuit, the filing of which suggests gamesmanship. DeMarco is not entitled, however, to fees incurred in relation to his quest for full indemnification. That is a coverage issue and ***Elliott v. Donahue,*** 169 Wis. 2d 310, 313-14, 485 N.W.2d 403 (1992), only authorizes insureds to recover attorney fees in coverage disputes based on fairness considerations that do not apply here. This is not a case where the insurer's actions caused the insured to become liable for damages in the underlying lawsuit. To the contrary, as already explained, DeMarco's defense in the Katz litigation was complete by the time Atlantic breached the duty to defend by refusing to pay the final legal bills. Failure to pay was, technically, a breach of duty to defend, but in no way was that breach a cause of DeMarco's damages in Katz.

¶40 On remand, the circuit court, to the extent it can, will have to determine that amount of attorney time spent in asserting DeMarco's rights to reimbursement for both the approximately $10,000 he paid to his attorneys and the $10,000 he is owed as part of the amount Atlantic agreed to pay as part of the settlement, separated from the amount of attorney time spent arguing for full indemnification (attorney time for which DeMarco is not entitled to reimbursement). It may be the case that the attorney time spent on the former is "inexplicably intertwined" with the time spent on the latter, such that DeMarco is entitled to reimbursement for all of the fees. *See* ***Benkoski v. Flood***, 2001 WI App 84, ¶¶35-37, 242 Wis. 2d 652, 626 N.W.2d 851. This question of whether the attorney fees can be separated is for the circuit court to decide on remand.

¶41 For these reasons, we affirm the grant of summary judgment in favor of ACE in all respects. As for Balboa, we reverse the summary judgment to the

extent of its liability to reimburse DeMarco for the defense costs and settlement contribution for the Katz litigation as well as the attorney fees incurred in litigating his right to those reimbursements, and affirm the summary judgment in all other respects.

¶42 We remand for determination of the total damages for which Balboa must reimburse DeMarco (that is, (1) the $10,000 settlement contribution that was never made; (2) the more than $10,000 that DeMarco paid out-of-pocket for the final bill from his defense lawyers in the Katz litigation; and (3) the attorney fees DeMarco incurred in the present appeal, in defending against the Illinois lawsuit and litigating his right to reimbursement for the Katz settlement contribution and attorney fees).

By the Court.—Judgments affirmed in part; reversed in part and cause remanded with directions.

Not recommended for publication in the official reports.