

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

July 30, 1998

Marilyn L. Graves  
Clerk, Court of Appeals  
of Wisconsin

**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 § 808.10 and RULE 809.62, STATS.

**No. 98-1189-FT**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**MARGARET PRESTWOOD,**

**PLAINTIFF-APPELLANT,**

**V.**

**AMERICO LIFE, INC.,**

**DEFENDANT-RESPONDENT.**

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APPEAL from orders of the circuit court for La Crosse County: JOHN J. PERLICH, Judge. *Affirmed.*

DEININGER, J.<sup>1</sup> Margaret Prestwood appeals an order denying her request for actual attorney's fees following the successful prosecution of her claim against Americo Life, Inc., to recover the proceeds of a life insurance policy Americo had issued to her late husband. She also appeals the trial court's denial

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<sup>1</sup> This appeal is decided by one judge pursuant to § 752.31(2)(a), STATS. This is an expedited appeal pursuant to RULE 809.17, STATS.

of her motion to reconsider the matter. Prestwood claims that because she joined a request for declaratory relief with her breach of contract claim, the trial court should have granted her request for actual attorney's fees under § 806.04(8), STATS.<sup>2</sup> We conclude that the trial court did not erroneously exercise its discretion when it declined to grant declaratory relief under § 806.04, and that Prestwood is not entitled to recover her actual attorney's fees in this action. Accordingly, we affirm the trial court orders.

### **BACKGROUND**

A little over a year before he died, Prestwood's husband, William, took out a \$5,000 life insurance policy from Americo. On the policy application, William failed to disclose that he had been treated for asthma within the preceding year. After reviewing Mr. Prestwood's medical records following his death, Americo denied Prestwood's claim for a death benefit under the policy and instead tendered a return of the premiums paid on the policy. Americo claimed that the failure to disclose the diagnosis and treatment for asthma constituted a misrepresentation on the application which voided the policy.

Prestwood commenced this small claims action, initially employing the standard form summons and complaint, in which she indicated she was

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<sup>2</sup> Section 806.04(8), STATS., provides as follows:

SUPPLEMENTAL RELIEF. Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper. The application therefor shall be by petition to a court having jurisdiction to grant the relief. If the application be deemed sufficient, the court shall, on reasonable notice, require any adverse party whose rights have been adjudicated by the declaratory judgment or decree, to show cause why further relief should not be granted forthwith.

seeking a judgment for money damages in the amount of \$5,000. Subsequently, she filed an amended complaint alleging two causes of action. The first alleged a breach of the life insurance contract and sought contract damages of \$5,000 plus costs; the second requested a declaratory judgment that she was entitled to the specified death benefit under the policy and “actual attorney’s fees pursuant to Wisconsin Statute § 806.04(8).” Following a bench trial, the court concluded that William had not misrepresented his medical history on the policy application, and it awarded judgment to Prestwood for \$5,000 plus allowable costs. Following briefing by both counsel, the trial court entered a decision and order denying Prestwood’s requests for declaratory relief and for actual attorney’s fees. The court subsequently entered an order denying Prestwood’s motion for reconsideration, and she appeals both orders.

### ANALYSIS

Whether to grant or deny declaratory relief is a decision committed to the discretion of the trial court. *See Wisconsin Educ. Ass’n Council v. Wisconsin State Elections Bd.*, 156 Wis.2d 151, 161, 456 N.W.2d 839, 844 (1990). Thus, we will affirm the trial court’s decision to withhold declaratory relief if it applied the correct law to the relevant facts, and through a process of reasoning, reached a result that a reasonable judge could reach. *See Schneller v. St. Mary’s Hosp. Med. Ctr.*, 155 Wis.2d 365, 374, 455 N.W.2d 250, 254 (Ct. App. 1990) *aff’d*, 162 Wis.2d 296, 470 N.W.2d 873 (1991). Whether a party can recover attorney’s fees as damages, however, is a question of law which we decide de novo. *See DeChant v. Monarch Life Ins. Co.*, 200 Wis.2d 559, 568, 547 N.W.2d 592, 595 (1996).

Our supreme court has noted on numerous occasions that Wisconsin “continues to adhere to the American Rule on the award of attorney fees.” *Gorton v. Hostak, Henzl & Bichler, S.C.*, 217 Wis.2d 493, \_\_\_, 577 N.W.2d 617, 624 (1998). Under the Rule, actual attorney’s fees are only recoverable if authorized by statute or contract, or when the fees are incurred by a plaintiff who is subjected to third-party litigation on account of a defendant’s wrongful act. *See id.* Prestwood does not base her claim for recovery of actual attorney’s fees on any language in the life insurance contract. Rather, she relies on *Elliott v. Donahue*, 169 Wis.2d 310, 485 N.W.2d 403 (1992), for her argument that she is entitled under § 806.04(8), STATS., to recover the actual attorney’s fees she incurred in enforcing the life insurance contract against Americo.

In *Elliott*, a motor vehicle liability insurer sought a declaratory judgment that it was not obligated to defend the insured operator of a motor vehicle in a personal injury action because of an exclusion from coverage contained in the applicable liability insurance policy. *See id.* at 315, 485 N.W.2d at 404. The insured prevailed at trial on the coverage issue and sought to recover from the insurer his actual attorney’s fees “in successfully defending coverage.” *Id.* at 315, 318-19, 485 N.W.2d at 405, 406. The supreme court concluded that “supplemental relief under sec. 806.04(8) may include a recovery of attorney fees incurred by the insured in successfully establishing coverage under an insurance policy.” *Id.* at 324, 485 N.W.2d at 409.

We conclude, however, that the rationale and holding in *Elliott* is of no assistance to Prestwood on the present facts. The successful insured in *Elliott* was awarded actual attorney’s fees after successfully defending against a liability insurer’s attempt to avoid its duty to defend the insured in a personal injury action. The supreme court has noted the “limited circumstances” under which *Elliott*

recognized an equitable power, as well as statutory authority, for a court to award attorney's fees to an insured, and it expressly declined "to extend *Elliott* beyond its particular facts and circumstances." *DeChant*, 200 Wis.2d at 569, 547 N.W.2d at 595; *see also Gorton*, 217 Wis.2d at \_\_\_, 577 N.W.2d at 625 ("*Elliott* remains the only instance in which this court has interpreted § 806.04(8), STATS., to allow a grant of attorney fees. Accordingly, we decline to adopt [a] rule ... that in every instance of a suit between a fiduciary and a beneficiary the prevailing beneficiary is entitled to attorney fees under § 806.04(8).").

Thus, even if Prestwood had obtained a declaratory judgment validating the life insurance contract along with her judgment for breach of contract damages, we would be reluctant to extend the *Elliott* holding to the present facts. More importantly, however, we conclude that the trial court did not erroneously exercise its discretion in denying Prestwood declaratory relief. In its written decision and order, the court noted that "[t]his action is one best described as an action to force [Americo] to perform under the terms of the contract, or for breach of contract, not for declaratory judgment." We have previously held that the existence of "an adequate alternative remedy" to declaratory relief is a proper basis for a trial court to deny a request for a declaratory judgment. *See Hough v. Dane County*, 157 Wis.2d 32, 48-49, 458 N.W.2d 543, 550 (Ct. App. 1990). We agree with Americo that adopting Prestwood's position in this appeal would be tantamount to approving the coupling of a request for declaratory relief with virtually any breach of contract claim in an effort to finesse the American Rule on the recovery of attorney's fees. As we have noted above, the supreme court has disavowed the extension of *Elliott* toward such an end.

Finally, we consider whether Prestwood has established any basis for the recovery of her fees under the third exception to the American Rule, that is,

as an element of the damages she sustained on account of Americo's breach. We conclude that she has not. She argues that a "widow [should not be] forced ... to exhaust the proceeds she was suing to obtain through the process of proving she was entitled to them." We have noted above that the third exception generally applies only where attorney's fees are incurred in litigation with third parties. The supreme court in *DeChant*, 200 Wis.2d at 575-77, 547 N.W.2d at 598-99, however, widened the exception to encompass a "first-party" action against an insurer for the tortious, bad faith denial of a claim for disability benefits, inasmuch as attorney's fees constituted a part of the "compensatory damages resulting from the insurer's bad faith." *Id.* at 577, 547 N.W.2d at 599. Here, Prestwood did not allege that Americo had acted in bad faith when it denied her claim for a death benefit under the life insurance policy. Thus, *DeChant* is of no more assistance to Prestwood on the present facts than is *Elliott*.

For the reasons discussed above, we affirm the order denying Prestwood's request for the recovery of actual attorney's fees and the order denying reconsideration of the issue.

*By the Court.*—Orders affirmed.

This opinion will not be published. See RULE 809.23(1)(b)4, STATS.

