COURT OF APPEALS
DECISION
DATED AND FILED

March 30, 1999

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. 98-1777

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

JAMES ROBLESKI,

PLAINTIFF,

UTICA MUTUAL INSURANCE COMPANY,

INTERVENING PLAINTIFF-RESPONDENT,

V.

C.R. MEYER AND SONS COMPANY,

DEFENDANT-APPELLANT,

STEBBINS ENGINEERING AND MANUFACTURING COMPANY,

DEFENDANT-RESPONDENT,

FLAMBEAU PAPER CORPORATION, A/K/A FRASIER PAPERS, INC.,

DEFENDANT.

APPEAL from a judgment of the circuit court for Price County: ROBERT O. WEISEL,[1] Judge. *Affirmed.*

Before Cane, C.J., Myse, P.J., and Hoover, J.

PER CURIAM. C.R. Meyer and Sons Co. appeal a judgment awarding Utica Mutual Insurance Co. $135,000 based on a declaratory judgment that concluded Utica was entitled to recoup the sums it paid to satisfy a judgment in favor of James Robleski against C.R. Meyer. C.R. Meyer raises numerous issues on appeal that we conclude distill into two issues: (1) Is Utica barred from recouping the sums it paid under either the indemnity clause in C.R. Meyer's contract with Stebbins or the additional insured endorsement in Stebbins' policy; and (2) Did Utica's conduct during this case, including decisions made by the attorney it hired to represent C.R. Meyer, create coverage for C.R. Meyer by waiver or estoppel. Because we conclude that Utica is contractually entitled to recoupment, that it has not waived and is not estopped from enforcing its right to recoupment and that C.R. Meyer's complaints about its attorney's performance cannot be attributed to Utica, we affirm the judgment.

C.R. Meyer contracted to perform construction work at a paper mill and subcontracted portions of the work to Stebbins and other subcontractors. James Robleski, an employee of one of the other subcontractors, was injured in a work-related accident and sued Stebbins, C.R. Meyer and the paper mill. The jury returned a verdict allocating causal negligence as follows: C.R. Meyer 40%, Robleski 30%, the paper mill 20%, and Stebbins 10%. Utica, reserving its rights

[1] All of the substantive decisions and the order for judgment were rendered by Judge Douglas T. Fox.

against C.R. Meyer, paid Robleski $135,000, and commenced this recoupment action against C.R. Meyer.

Construction of written contracts presents a question of law that we decide without deference to the trial court. *See* ***Heritage Mut. Ins. Co. v. Truck Ins. Exchange***, 184 Wis.2d 247, 252, 516 N.W.2d 8, 9 (Ct. App. 1994). A contract should be interpreted to reflect the parties' intent. ***Id***. Plain and unambiguous terms should be applied without resort to legal rules of construction. *See* ***Eden Stone Co. v. Oakfield Stone Co.***, 166 Wis.2d 105, 115, 479 N.W.2d 557, 562 (Ct. App. 1991).

Neither the indemnity clause in C.R. Meyer's contract with Stebbins nor the additional insured endorsement in Stebbins' policy with Utica can be interpreted to require Utica to pay for C.R. Meyer's negligence. The contract between Stebbins and C.R. Meyer provided "In the event of concuring (sic) negligence, both (contractor/owner) and subcontractor shall share their respective pro-rata portion of the liability." Under the jury verdict, Stebbins was not liable because it was less negligent than Robleski. Under the contract's terms, its pro-rata portion of the liability is zero. Therefore, Stebbins is not required to indemnify C.R. Meyer for Robleski's claim.

The additional insured endorsement in Stebbins' policy does not create coverage for C.R. Meyer's negligence. The endorsement applies only to the general contractor's vicarious liability or negligent supervision of Stebbins. In addition, an exclusion in the endorsement excluded coverage for bodily injury or property damage arising out of the additional insured's and its employees' acts or omissions other than the general supervision of work Stebbins performed for the

additional insured.[2] Neither the verdict nor the evidence presented at trial established C.R. Meyer's vicarious liability or negligence based upon its failure to properly supervise Stebbins as opposed to its own independent acts of negligence.

The law does not support C.R. Meyer's argument that coverage was created by waiver or estoppel. C.R. Meyer contends that Utica's belated reservation of rights letter, its commingling of defenses before it assigned outside counsel and prejudice that arose from its conduct in this case create coverage by estoppel. Insurance coverage cannot be created by estoppel in Wisconsin. *See* ***Shannon v. Shannon***, 150 Wis.2d 434, 454-55, 442 N.W.2d 25, 34 (1989).

C.R. Meyer's complaints about the attorney Utica chose for it do not provide a basis for relief. Utica, Stebbins' insurer, accepted C.R. Meyer's defense tender and initially retained the Ruder, Ware law firm to represent Stebbins and C.R. Meyer. Utica later intervened in the Robleski action and asserted indemnity and coverage limitations under the additional insured endorsement in the Stebbins policy. Before trial, Utica arranged for separate representation of C.R. Meyer by Attorney Keith Ellison. All parties agreed to and the court approved a stipulation and order substituting attorneys. C.R. Meyer accepted Ellison's representation, made no request for a continuance and opposed Robleski's motion for a continuance. Ellison cooperated with the other defendants and presented a joint defense. C.R. Meyer now faults Ellison's performance and contends that Utica's tardy retention of separate counsel prejudiced its interests.

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[2] C.R. Meyer complains that the precise endorsement was chosen by Utica after this action was commenced. Nothing in the record supports that allegation. A September 10, 1992, letter identifies the additional insured endorsement, C.G. 2009 (11/85)-owners, lessees or contractors (Form A), as the endorsement to Stebbins' policy. Nothing in the record supports C.R. Meyer's contention that a more liberal endorsement (Form B) might have applied to this case.

The trial court correctly concluded that it was incumbent on C.R. Meyer to raise these issues before trial to afford the court an opportunity to ameliorate the claimed harm. For example, the trial court could have adjourned the trial date to afford additional preparation time. *See* ***Batchelor v. Batchelor***, 213 Wis.2d 251, 259-60, 570 N.W.2d 568, 571 (Ct. App. 1997). C.R. Meyer did not alert the court before trial to any conflict of interest or prejudice that resulted from the unified defense. When C.R. Meyer's accepted Ellison as its attorney and proceeded to trial without objection, it waived any claim of conflict or prejudice. Any complaints C.R. Meyer has regarding Ellison's representation are matters between C.R. Meyer and Ellison. An attorney appointed for an insured is responsible to and controlled by the insured. *See* ***Jacob v. West Bend Mut.***, 203 Wis.2d 524, 537, 553 N.W.2d 800, 805 (Ct. App. 1996). Utica cannot be faulted for Ellison's strategic decisions.

By the Court.—Judgment affirmed.

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