COURT OF APPEALS
DECISION
DATED AND FILED

December 11, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP895 **Cir. Ct. No. 2013CV116**

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

DOUGLAS A. LARSON AND FLS, LLP,

PLAINTIFFS-APPELLANTS,

V.

CASTLE AT THE BAY, LLC, TIMBER SHORES, LLC AND SUNSET CONDOMINIUMS AT NORTHERN BAY OWNERS ASSOCIATION, INC.,

DEFENDANTS-RESPONDENTS,

CITY OF ADAMS,

DEFENDANT.

APPEAL from an order of the circuit court for Adams County: PAUL S. CURRAN, Judge. *Reversed and cause remanded for further proceedings*.

Before Blanchard, P.J., Lundsten and Higginbotham, JJ.

¶1 LUNDSTEN, J. This case involves two condominium owners who seek a declaratory judgment, under WIS. STAT. § 841.01(1),[1] declaring that all of the condominium owners in their association jointly own a sewage system because the sewage system is part of the condominium common elements, and declaring that nearby property owners do not own the sewage system. The complaint alleges that the nearby property owners falsely claim that they own the sewage system. The circuit court, acting on a motion filed by the nearby property owners, concluded that the two condominium owners lacked standing to obtain the declaratory relief requested with respect to the nearby property owners, and dismissed the owners' claims against the nearby property owners. We conclude that the arguments of the nearby property owners fail to demonstrate that the two owners lack standing. Accordingly, we reverse and remand for further proceedings.

Background

¶2 This dispute concerns Sunset Condominiums at Northern Bay, located in Adams County. Although many of the following facts, taken from the amended complaint, are disputed by Castle at the Bay and Timber Shores, those facts are accepted as true for purposes of Castle at the Bay's and Timber Shores' motion to dismiss for lack of standing. We also note at the outset that the amended complaint is complicated and makes many allegations involving Castle at the Bay, Timber Shores, the Sunset Condominiums Owners Association, and

[1] All references to the Wisconsin Statutes are to the 2011-12 version. We cite the 2011-12 version because it is the version that was in effect at the time plaintiffs filed suit. The parties do not suggest that there have been any changes in the statutes during relevant time periods that matter.

the City of Adams. We summarize here only the facts necessary to understand and resolve the dispute on appeal.

¶3 Sunset Condominiums has 248 units. Douglas Larson and FLS, LLP, a limited liability partnership, collectively own eight of the units.

¶4 Sunset Condominiums was declared a condominium in 2003 under WIS. STAT. ch. 703 by Larson's predecessor in title, Northern Bay, LLC. The common elements of Sunset Condominiums include a sewage system that transports condominium sewage water about 7 miles to a wastewater treatment facility owned and operated by the City of Adams.

¶5 The sewage system, "buried" below the condominium complex, includes a lift station, pumps, and a portion of a "Force Main" pipeline.[2] The sewage system has an "off site" component consisting of the portion of the "Force Main" pipeline that extends beyond the condominium property until it connects with a wastewater facility owned by the City. The estimated construction cost of the sewage system was $1,700,000 and estimated present fair market value exceeds $2,000,000.

¶6 Defendant Castle owns adjacent property, including a golf course and an undeveloped 32-acre parcel. Defendant Timber Shores owns real estate located approximately one mile from Sunset Condominiums that Timber Shores is in the process of developing for resale. Castle's golf course disposes of its waste water through "sewer laterals" connected to the condominium's sewage system.

[2] In contrast to the complaint, the amended complaint seems to acknowledge that the "Force Main" pipeline may sometimes travel under Castle's golf course property. This circumstance does not affect our analysis.

Timber Shores has an easement to connect to the "off site" portion of the condominium's sewage system's "Force Main" pipeline, which requires Timber Shores to pay a percentage of the expense of maintaining the "off site" portion of the sewage system.[3] Timber Shores has a separate agreement with the City of Adams for the treatment of waste water.

¶7 At some point, Northern Bay was put into receivership. The receiver conveyed the last of the 248 units by quit claim deed on March 30, 2011. Northern Bay is now a defunct corporation.

¶8 At a meeting on April 28, 2013, and in subsequent writings, Castle's president asserted, in effect, that Castle and Timber Shores own the sewage system, including its "off site" component. Castle's president further stated that Castle is "working on a proposal to charge the [Sunset Condominiums] Association ... a fair fee for the use of the sewer line, [because Castle] is responsible for its maintenance and **the Association has been using this line for free for at least as long as I've been involved**." We assume for purposes of this decision that a reasonable inference from the amended complaint is that Sunset Condominiums owners, via the mechanism of condominium fees, would be required to bear the expense associated with Castle charging the Association for use of the sewage system.

¶9 Larson and FLS filed suit against Castle and Timber Shores, seeking declaratory relief under WIS. STAT. § 841.01(1), which authorizes declaratory relief to persons "claiming an interest in real property," and under WIS. STAT.

[3] The amended complaint explains that the easement was actually granted to Timber Shores' predecessor, Naterra Land, Inc.

§ 806.04, the general declaratory judgment statute. Larson and FLS sought a declaration that Castle and Timber Shores do not own the sewage system and that the system is part of the condominium's real property and, therefore, jointly owned by Sunset Condominiums' unit owners.

¶10 Based on the court's conclusion that Larson lacked standing to bring a declaratory judgment action against Castle and Timber Shores on the topic of who owns the sewage system, the circuit court ordered dismissal of claims against Castle and Timber Shores.

Discussion

¶11 The multiple parties in this case make it cumbersome to talk about their arguments and disputes. To simplify our discussion, we will speak as if Larson was the sole plaintiff/owner on appeal. And, we generally refer to Castle and Timber Shores collectively as Castle.

¶12 Larson seeks a declaration that the sewage system located under Sunset Condominiums is a condominium common element, rather than property owned by Castle. With respect to this requested relief, the circuit court decided that Larson lacked standing, at least as against Castle. Our review of this decision requires us to construe statutes and language in condominium documents and, then, to apply such statutes and contract language to undisputed facts. These are questions of law that we decide without deference to the circuit court. *See* ***Northernaire Resort & Spa, LLC v. Northernaire Condo. Ass'n***, 2013 WI App 116, ¶15, 351 Wis. 2d 156, 839 N.W.2d 117 ("Interpretation and application of a statute to an undisputed set of facts are questions of law that we review de novo. Interpretation of a written document affecting land is also a question of law that

we review independently of the circuit court." (citations omitted)), *review denied*, 2014 WI 22, 353 Wis. 2d 449, 846 N.W.2d 14.

¶13 As indicated, the pertinent facts are undisputed. But we note that they are undisputed in a particular sense. The circuit court decided standing based on the pleadings. This means that the circuit court, and now this court, accepts allegations in the complaint as true for purposes of resolving whether Larson has standing. *See* ***Town of Eagle v. Christensen***, 191 Wis. 2d 301, 316, 529 N.W.2d 245 (Ct. App. 1995) ("When standing is challenged on the basis of the pleadings, we 'accept as true all material allegations of the complaint, and ... construe the complaint in favor of the complaining party.'" (quoted source omitted)).

1. Preliminary Observations And Dispute Clarification

¶14 In an effort to clarify the dispute, we make four observations and then summarize Larson's argument. In subsequent subsections, we organize our discussion around Castle's counter-arguments.

¶15 First, like the parties, we focus our attention on whether Larson has standing under WIS. STAT. § 841.01(1), sometimes referred to as the quiet title statute.[4] Because we conclude that Larson has standing under this statute, we need not address whether Larson also has standing under the general declaratory judgment statute, WIS. STAT. § 806.04.

[4] The relationship between common law quiet title actions and WIS. STAT. § 841.01 is touched on in ***Village of Hobart v. Oneida Tribe of Indians of Wisconsin***, 2007 WI App 180, ¶¶6-15, 303 Wis. 2d 761, 736 N.W.2d 896; ***Klawitter v. Klawitter***, 2001 WI App 16, ¶5, 240 Wis. 2d 685, 623 N.W.2d 169 (WI App 2000); and ***Erickson Oil Products, Inc. v. DOT***, 184 Wis. 2d 36, 45-46, 516 N.W.2d 755 (Ct. App. 1994).

¶16 Second, the dispute here does not involve whether unit owners like Larson have standing generally with respect to matters affecting common elements. For example, we do not address whether an owner like Larson has standing to seek declaratory relief under WIS. STAT. § 841.01(1) if the owner's unit was, allegedly, uniquely or disproportionately affected by an issue involving the common elements. Rather, it appears that the dispute over standing arises here because of the parties' apparent agreement that the requested declaration would uniformly affect all Sunset Condominiums unit owners—that is, apparent agreement that there is no allegation of a unique harm to Larson.

¶17 Third, the fact that Larson named the Association and the City of Adams as defendants does not affect the dispute on appeal. First, the record indicates that default judgment has previously been granted against the City of Adams. As to the Association, although the parties do not discuss the topic, it appears that the circuit court's decision to dismiss claims against Castle, but not the Association, stems from the fact that some relief Larson seeks against the Association does not plainly hinge on Larson's standing with respect to the claims against Castle. The court explained that, to the extent the amended complaint "contains actions pled against Sunset Condominiums at Northern Bay Owners Association," such "claims stay." We do not weigh in on whether it makes sense for the Association to remain a party in the absence of Castle. Our point here is that, so far as the parties' arguments disclose, the fact that the Association and the City were named as defendants has no effect on the standing issue presented on appeal.

¶18 Fourth, a twist in this case is that it pits the rights of a condominium association against the rights of a condominium owner, but the Sunset Condominiums Owners Association does not participate in the appellate briefing.

Rather, Castle, a third party that stands to gain if the sewage system is not a common element, effectively argues on behalf of the Association. This alignment may implicate whether the interests of the Association are adequately represented on appeal, but no one suggests that we need to take this circumstance into consideration, and we discuss it no further.

¶19 We now turn our attention to Larson's argument.

¶20 Larson sought a declaratory judgment under WIS. STAT. § 841.01(1). That statute provides: "Any person claiming an interest in real property may maintain an action against any person claiming a conflicting interest, and may demand a declaration of interests." Larson contends that his situation, and the action he brings, fits this statutory language. Boiled down, we understand Larson to be relying on the following propositions:

1. The disputed sewage system is real property;
2. Larson's suit alleges that the sewage system is a part of the common elements of Sunset Condominiums;
3. Larson claims an ownership interest in the sewage system;
4. Larson has an ownership interest in whatever comprises the common elements of Sunset Condominiums because he is a condominium unit owner and, as such, owns a proportionate share of condominium common elements pursuant to WIS. STAT. § 703.04[5];
5. Sunset Condominiums Owners Association does not own common elements and, therefore, has no ownership interest in the sewage system; and

[5] WISCONSIN STAT. § 703.04 provides: "A unit, together with its undivided interest in the common elements, for all purposes constitutes real property."

6. Larson's suit alleges that Castle asserted a conflicting ownership interest in the sewage system.

According to Larson, these six propositions show that his declaratory judgment action against Castle satisfies the requirements of § 841.01(1) because, in the words of the statute, Larson is a "person claiming an interest in real property ... against [another] person [Castle] claiming a conflicting interest."

¶21 We do not understand Castle to be disputing this part of Larson's argument, so far as it goes. For example, although Castle disputes whether the sewage system actually is part of the Sunset Condominiums common elements, Castle does not, and could not reasonably, dispute the fact that Larson's suit *alleges* that the sewage system is a part of the common elements, the second proposition above. And, we perceive no dispute regarding the legal underpinnings of these six propositions. For example, regarding the fourth proposition, Castle does not dispute that Larson has, pursuant to WIS. STAT. § 703.04, an ownership interest in whatever comprises the common elements of Sunset Condominiums. For that matter, Castle does not dispute that Larson's condominium ownership confers on Larson the *type* of ownership interest in real property normally covered by WIS. STAT. § 841.01(1). Indeed, Castle states: "Wisconsin's declaratory judgment laws under Wis. Stat. ch. 840 and 841 apply to all real property interests, including condominium property ...."

¶22 Rather, the parties' dispute concerns whether other aspects of the condominium context here should lead to the conclusion that Larson lacks standing. According to Castle, Larson's reliance on WIS. STAT. § 841.01(1) is misplaced because § 841.01(1) is trumped here by more specific language in the Condominium Ownership Act and the condominium documents. Castle's general argument, in its own words, is that Larson "fail[s] to account for the special nature

of common elements, which are jointly owned by unit owners, [and fails to account for] the power granted to the Association and the commensurate restriction on the rights and interests of individual unit owners relating to common elements under the Condominium Ownership Act." As to this alleged "special nature," we organize our discussion around Castle's specific arguments.

2. Castle's Arguments

a. Castle's "Exclusive"-Right-To-Sue Argument

¶23 According to Castle, when Larson purchased his units, Larson bought into an unambiguous contractual and statutory scheme that caused Sunset Condominiums' buyers to relinquish to the Association any rights that the buyers would otherwise have to sue with respect to all issues involving the common elements. In Castle's words, "on matters involving the common elements," the Association has the "exclusive right to sue."[6]

[6] We summarize Castle's argument as asserting that the Association has the exclusive right to sue with respect to all issues involving the common elements because that summary seems the most apt for purposes of the dispute at hand. Castle does not, in any clear fashion, attempt to carve out exceptions to this general assertion. Still, we doubt that Castle means to suggest that there are no circumstances in which a condominium owner could sue in regard to a dispute involving common elements. In paragraph 16 of this opinion, we have noted that we do not address a situation in which a unit owner or subset of unit owners allege an unequal effect on them relating to an issue involving the common elements. We do not understand Castle to be taking a position on that topic. We are less sure whether Castle means to suggest that the purported exclusive right to sue applies in *all* circumstances in which unit owners are uniformly affected. For example, during a hearing and without dispute from Castle, the circuit court appeared to suggest that WIS. STAT. § 703.25 permits a condominium owner to sue an association over the association's maintenance of common elements, even if the alleged deficient maintenance affects all owners equally. The lack of precision in Castle's appellate arguments leaves us in doubt about Castle's views on these other situations. Lacking the ability to more precisely define Castle's position, we use the exclusive-right-to-sue-with-respect-to-all-issues formulation.

¶24 In support, Castle points to language in the Sunset Condominiums declaration granting the Association "exclusive management and control of the Common Elements and facilities of the Condominium" and the "powers ... set forth in ... the Condominium Ownership Act." Turning to the Condominium Ownership Act, WIS. STAT. ch. 703, Castle points to WIS. STAT. § 703.15(3)(a)3., which confers on condominium associations "the power to ... [s]ue on behalf of all unit owners."

¶25 Castle's reliance on this declaration and statutory language is misplaced. Neither the declaration nor the statute says anything about an *exclusive* right to sue. The declaration confers the exclusive right to manage and control whatever comprises the common elements. In this regard, the phrase "management and control" is not an unambiguous reference to the power to sue, much less a reference to the exclusive power to do so. Turning to the statute, it does address the power to sue, but says nothing about such power being exclusive. Indeed, Castle acknowledges that WIS. STAT. § 703.15(3)(a)3. is silent as to whether a unit owner may also sue.

¶26 Castle argues that "[a]ny possible question" as to whether the Association has an exclusive right to sue is "laid to rest by the Association's Bylaws." Castle does not, however, explain why any bylaws language might clarify language in the declaration and the statutes that we have already addressed. For example, Castle directs our attention to the following bylaws language addressing the powers of the Association board of directors: "All of the powers and duties of the Association ... shall be exercised by the Board of Directors except those powers and duties specifically given to or required of any committees of the Association or the Unit Owners," but Castle does not explain how this language puts the question to rest. And, we see no reason why it might bolster

Castle's position. The quoted language tells us that the "powers and duties" of the Association, whatever those powers and duties might be, are exercised by the board of directors or, under some circumstances, a committee made up of unit owners. The language sheds no light on whether the exclusive right to sue is one of the "powers and duties." We do not address here the remainder of Castle's bylaws discussion because that discussion is similarly unpersuasive.

¶27 We have suggested the possibility of ambiguity, but, notably, Castle does not address the topic. Castle does not argue that, if the declaration language or the statutory language quoted above is ambiguous, then that ambiguity may, based on the record before us, be resolved in favor of Castle's exclusive-right-to-sue interpretation. We simply comment here, without definitively resolving the issue, that the language Castle points to seems unambiguous in that the language does not on its face confer an exclusive right to sue with respect to common elements.

¶28 We pause to comment on two of Castle's arguments that might be viewed as relating to possible ambiguity.

¶29 First, Castle presents policy reasons for why the legislature would *want* to limit lawsuits like the one Larson filed. For example, Castle asserts that the "Association's board of directors, as the body of elected representatives for all unit owners, is in the best position to determine how matters affecting the Condominium's common elements, and thus the shared interests of all unit owners, should be handled." However, in the absence of demonstrated ambiguity, there is no apparent cause to consider reasons why the legislature might desire a different construction.

¶30 Second, specific to the facts here, Castle appears to argue that an interpretation allowing Larson to seek a declaratory judgment would unreasonably allow Larson to undermine the Association's management and control of common elements. As with the prior argument, in the absence of ambiguity this argument goes nowhere. We comment further that the argument seemingly assumes that Larson is interfering with a legitimate exercise of authority, an assumption that is at the heart of the dispute. If Larson is correct that the Association negotiated with Castle for the use of a sewage system that belongs to the unit owners, not Castle, then the part of Larson's suit seeking a declaration that the sewage system is owned by the unit owners would not interfere with any proper exercise of the Association's right to manage and control common elements.

*b. Castle's Reliance On **Apple Valley Gardens** And WIS. STAT. §§ 703.09, 703.10, And 703.15*

¶31 Castle contends that the Condominium Ownership Act "both confers rights on condominium owners' associations and permits the modification and restriction of unit owners' property rights." In support, Castle quotes the following from ***Apple Valley Gardens Ass'n v. MacHutta***, 2009 WI 28, 316 Wis. 2d 85, 763 N.W.2d 126:

> Condominium ownership is a statutory creation that obligates individual owners to relinquish rights they might otherwise enjoy in other types of real property ownership. When purchasing a condominium unit, individual owners agree to be bound by the declaration and bylaws as they may be amended from time to time.

Id., ¶17. Turning to the statutes, Castle argues that WIS. STAT. §§ 703.09 and 703.10, viewed together, authorize limiting the rights of condominium owners regarding the management and operation of condominiums, and that WIS. STAT.

§ 703.15(3)(b)4. permits associations to acquire and convey title or interest in real property.[7]

¶32 We need not address the particulars of this part of Castle's argument. At best, ***Apple Valley Gardens*** and the three statutes quoted above demonstrate that a condominium association *could* hold property rights in common elements (thereby possibly conferring an ownership interest in common elements to the Association) and that a condominium purchaser *could* contract away his or her right to file the sort of declaratory judgment action at issue here. Even if this legal argument is correct, something we need not and do not decide, Castle has not demonstrated that such authority has been exercised here. That is, Castle has not demonstrated that the Association here actually holds pertinent property rights or that Larson has effectively contracted away his right to seek declaratory relief under WIS. STAT. § 841.01(1).

[7] We have attempted to capture the gist of Castle's argument in the text. In its own words, Castle writes:

> [WISCONSIN STAT. § 703.09(1)(j)] permits a declaration to include "any further details in connection with the property" that are consistent with chapter 703 and are not required to be part of the bylaws. Wisconsin Statute § 703.10 expressly recognizes that the bylaws govern the administration of a condominium and can restrict the rights of unit owners by "contain[ing] any other provision regarding the management and operation of the condominium, including any restriction on or requirement respecting the use and maintenance of the units and the common elements." *See, e.g.*, [***Apple Valley Gardens***] (upholding restrictions ability of unit owners to rent their units). The Condominium Ownership Act also empowers an association to "[a]cquire, hold, encumber and convey any right, title or interest in or to real property," including a Condominium's common elements. Wis. Stat. § 703.15(3)(b)4.

c. Castle's Real-Party-In-Interest Argument based on ***Marshfield Clinic***

¶33 Castle argues that Larson lacks standing because the Association, not Larson, is the "real party in interest." Castle begins by reciting real-party-in-interest language from case law. For example, Castle quotes the portion of ***Mortgage Associates, Inc. v. Monona Shores, Inc.***, 47 Wis. 2d 171, 177 N.W.2d 340 (1970), which states: "The real party in interest ... is one who has a right to control and receive the fruits of the litigation." ***Id.*** at 179. Castle does not, however, fashion an argument based on general case law. Rather, as we read on in Castle's briefing, Castle's only discernible affirmative argument hinges on the proposition that the Association here is similarly situated to a corporation deemed to be a real party in interest in ***Marshfield Clinic v. Doege***, 269 Wis. 519, 69 N.W.2d 558 (1955). However, the comparison of the Association here and the corporation in ***Marshfield Clinic*** does not withstand scrutiny.[8]

¶34 ***Marshfield Clinic*** involved a dispute over compliance with a non-compete agreement between Marshfield Clinic, a stock corporation, and a former employee of the corporation. ***Id.*** at 520-21. The corporation and three of its stockholders sued the former employee. The question on appeal was whether the three stockholders—who sued to vindicate alleged contractual obligations to them as individuals—were real parties in interest. *See* ***id.*** at 522-24. The ***Marshfield***

[8] We use the phrase "only discernible affirmative argument" in the paragraph above to distinguish this argument from Castle's other significant real-party-in-interest argument—Castle's attack on Larson's reliance on ***Annoye v. Sister Bay Resort Condominium Ass'n***, 2002 WI App 218, 256 Wis. 2d 1040, 652 N.W.2d 653. In this respect, we agree with Castle that ***Annoye*** does not help Larson. ***Annoye*** simply does not address condominium owner standing, much less address standing based on an alleged property interest under WIS. STAT. § 841.01(1). Because Castle does not appear to rely in any affirmative way on ***Annoye***, we do not describe the decision or explain more fully why it does not shed light on the dispute before us.

Clinic court concluded that the answer was no. Rather, as the court explained, the corporation *alone* was the real party in interest because the corporation, as the beneficiary of the contract at issue, was entitled to the fruits of the litigation. ***Id.*** at 524. That is, the corporation was the sole real party in interest because a successful action against the former employee based on the non-compete agreement would have resulted in a payment to the corporation, not to individual stockholders. Consistent with this holding, the court made the observation that, if the corporation had refused to enforce its rights, a stockholder may be "privileged to do so on [the corporation's] behalf." ***Id.*** at 526.

¶35 Castle asserts that the Association's interest here is comparable to the stock corporation's interest in ***Marshfield Clinic***. Castle's supporting discussion, however, fails to explain why the interests are comparable. Why is a stock corporation's interest in its own profit comparable to a condominium association's interest in whether it manages and controls a sewage system as part of common elements owned not by the association but by its members? Although the Association here is charged with controlling and managing common elements, whatever they may be, the Association is not richer or poorer depending on the value of the common elements. In contrast, the lawsuit at issue in ***Marshfield Clinic*** had the potential to add to the corporation's own coffers. The ***Marshfield Clinic*** corporation's direct stake in the outcome of litigation was obvious. The Association's interest in what it manages or how much property its members own is not, so far as we can tell, similarly direct.

¶36 Thus, in the absence of an explanation as to why the Association is comparably situated to the stock corporation in ***Marshfield Clinic***, we discuss Castle's reliance on that case no further. And, because Castle's real-party-in-interest argument is built on ***Marshfield Clinic***, we reject the argument.

¶37 Before moving on, we note that Larson argues that Castle has forfeited its real-party-in-interest argument because Castle makes the argument for the first time on appeal. We agree that the argument is made for the first time on appeal, but that is not a problem for Castle because Castle makes the argument in an effort to persuade us to affirm the circuit court. As we have explained, forfeiture "generally applies only to appellants, and we will usually permit a respondent to employ any theory or argument on appeal that will allow us to affirm the trial court's order, even if not raised previously." ***Finch v. Southside Lincoln-Mercury, Inc.***, 2004 WI App 110, ¶42, 274 Wis. 2d 719, 685 N.W.2d 154.

d. Castle's Reliance On The Direct Action Statutes In WIS. STAT. Ch. 181

¶38 Castle argues that Larson "cannot" bring his action "under the derivative action provisions of Wisconsin's nonstock corporation law, Wis. Stat. § 181.0740, *et seq.*" The simple response to this argument is the one Larson provides: his suit is not, and does not purport to be, a derivative action authorized under WIS. STAT. ch. 181. Indeed, it is undisputed that Larson has not complied with the requirements of a derivative action suit under ch. 181. *See* WIS. STAT. §§ 181.0741 and 181.0742. Thus, Castle's contention that Larson may not bring his action as a derivative action under ch. 181 addresses a non-issue.

¶39 Castle may be arguing that, because of the condominium context here, Larson may *only* bring his suit as a derivative action under WIS. STAT. ch. 181—that is, that Larson lacks standing to bring his declaratory action as

anything other than a derivative action. If Castle means to make this argument, we reject it.[9]

¶40 According to Castle, ***Ewer v. Lake Arrowhead Ass'n***, 2012 WI App 64, ¶50, 342 Wis. 2d 194, 817 N.W.2d 465, recognizes "the ability of one or more appropriate representatives to sue on behalf of a class of unit owners." Relying on ***Ewer***, Castle writes:

> The fundamental inquiry in determining whether a claim *must* be brought as a derivative claim is "to determine whether the direct injury is to the shareholder or member as an individual or, instead, is to the corporation." *Ewer v. Lake Arrowhead Assoc., Inc.*, 2012 WI App 64, ¶25, 342 Wis. 2d 194, 208, 817 N.W.2d 465, 472 (Ct. App. 2012). A derivative action involves an injury primarily to the corporation, with the resulting right of action belonging to the corporation. *See Ewer*, 2012 WI App 64, ¶17, 342 Wis. 2d at 204, 817 N.W.2d at 470 (listing examples of derivative actions).

(Emphasis added; footnote omitted.) Continuing with its reliance on ***Ewer***, Castle goes on to argue:

> The key distinction that makes the claims in this case derivative is that the rights of the unit owners in common property are not several and independent but are, instead, joint and shared—and are explicitly placed in the care of the Association. For this reason, the claims at issue do not involve any right or obligation of any individual unit owner, but rather the collective interests of all unit owners.
>
> The Association's rights and interests are directly impacted by claims concerning the title of the common elements, because the Association has exclusive responsibility for them.... The Association is the

[9] Castle's appellate brief does not point to evidence establishing that the Association here is incorporated as a nonstock corporation governed by WIS. STAT. ch. 181. Nonetheless, for purposes of this decision we will assume, without deciding, that the Association is a ch. 181 nonstock corporation.

> representative of the Condominium, and acts on behalf of the Condominium as an undivided whole. As a result, the Association is the party "[w]hose right is sought to be enforced." *Ewer*, 2012 WI App 64, ¶17, 342 Wis. 2d at 203-204, 817 N.W.2d at 470 (Ct. App. 2012).
>
> Although this controversy necessarily involves the unit owners' proportionate interests in the common elements, the primary injury is to their collective interests, and claims to redress the injury are, therefore, derivative.

¶41 We understand this part of Castle's argument to hinge on the existence of at least one of the following two assumptions: (1) that the right to sue to vindicate ownership rights in common elements has been "explicitly placed in the care of the Association" by the unit owners through a combination of contractual and statutory provisions, or (2) that the Association is the party whose right is sought to be enforced in the declaratory judgment action. We reject both underlying assumptions.

¶42 **Assumption 1:** So far as we can tell, Castle's assumption that the right to sue to vindicate ownership rights in common elements has been "explicitly placed in the care of the Association" is based on Castle's argument that condominium documents, read in combination with certain provisions in the Condominium Ownership Act, unambiguously grant the Association the exclusive right to sue with respect to issues involving the common elements. We explain in paragraphs 23 to 32 above why we reject that argument. Thus, we reject the first assumption.

¶43 **Assumption 2:** Castle's assumption that the Association is the party whose right is sought to be enforced in Larson's declaratory judgment action is also a topic that we have touched on in the context of discussing ***Marshfield Clinic***, but we explain a bit more here.

¶44 The point of our discussion of ***Marshfield Clinic*** was to explain the flaw in Castle's reliance on that case. Simply put, the interest of the Association here is not the same as the interest of the corporation in ***Marshfield Clinic***. However, just because ***Marshfield Clinic*** does not help Castle does not mean that Castle's second assumption is wrong. Indeed, we do not mean to suggest that the Association has no interest in the outcome of Larson's request for a declaration specifying who owns the sewage system. Obviously, if a court declares that the sewage system is a common element, the Association must manage and control the sewage system rather than negotiate over the use of that system.

¶45 However, Castle fails to persuade us that the Association is the party whose right is sought to be enforced in Larson's declaratory judgment action. The right directly at stake in Larson's action is ownership and the benefits that come with ownership. Larson effectively argues that property has been taken from him and other owners and, if the situation goes uncorrected, he and other owners will not only lose the property, they will have to pay for the use of that property. Thus, if it can be said that the Association is harmed, it is a different and less substantial harm. The Association does not own and it does not pay for use of the sewage system. Rather, members such as Larson own or, in the alternative, would pay.

¶46 As Castle's brief accurately states: "A derivative action involves an injury primarily to the corporation, with the resulting right of action belonging to the corporation." Castle fails to suggest any reason why the injury alleged is primarily to the Association.

¶47 Thus, we reject Castle's second assumption and turn to what remains of Castle's derivative action argument.

¶48 Castle appears to argue that Larson's only available option was to pursue a derivative action because the dispute here involves a third party, rather than being an "internal dispute" between Larson and the Association.[10] In support, Castle cites ***Ewer*** and ***Annoye v. Sister Bay Resort Condominium Ass'n***, 2002 WI App 218, 256 Wis. 2d 1040, 652 N.W.2d 653. However, we find no such "third-party" rule in those cases. It is true that both ***Ewer*** and ***Annoye*** involved "internal" disputes between owners and their associations and that the owners in those cases brought non-derivative actions against their associations. *See* ***Ewer***, 342 Wis. 2d 194, ¶¶6-9; ***Annoye***, 256 Wis. 2d 1040, ¶¶1-7. But nowhere do those cases suggest that owners like Larson may *only* bring a derivative action if a dispute involves a third party. Indeed, ***Annoye*** does not even involve a dispute over the propriety of or need for a derivative action.

Conclusion

¶49 For the reasons above, we conclude that Castle's arguments fail to demonstrate that Larson lacks standing under WIS. STAT. § 841.01(1). Accordingly, we reverse the order dismissing claims against Castle and Timber Shores, and remand for further proceedings.

By the Court.—Order reversed and cause remanded for further proceedings.

Not recommended for publication in the official reports.

[10] Consistent with our earlier explanation, this appeal does not deal with the portion of Larson's declaratory judgment action in which he seeks relief against the Association.