COURT OF APPEALS DECISION DATED AND FILED

March 5, 2014

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 Nos. 2013AP888
2013AP1538

Cir. Ct. No. 2010CV1328

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT II

GUY HOLLINGSWORTH, HILA GREEN HOLLINGSWORTH, DEAN A. SIMON, DAVID M. BARCLAY, CAROL J. BARCLAY, RON BROCK, JACOB LA CONTE, MARTIN SCHRAMM, ELIZABETH SCHRAMM, ERIN TURTENWALD, DMITRY FELDMAN, ANTHONY AIELLO, PAUL ORORKE, JENNIFER ORORKE, COREY DUNTEMAN, JOHN MURPHY, ANDREW PRUNTY, VALERIE PRUNTY, GERALD STRAIT, KATHLEEN STRAIT, ERIC RODDY, AMANDA RODDY, ALEX ASHKINAZI, ANNA ASHKINAZI, MICHAEL HARRIS, KAREN HARRIS, JOHN MELTZER, JASON COOPER, ANGELA COOPER, KAREN NEITZEL, LAURA LISSERMAN, CHRISTOPHER EASTERMAN, BRYAN SOLIS, STEPHEN FITZGERALD, SILVIA FITZGERALD, W. MARKS ATTWOOD, TIMOTHY HATTON, JENNIFER HATTON, RYAN SHEPARD, LORI HOWE, VINCENT MEUCCI, JACKSON SMITH, VIVIAN SMITH, KELSEY A. TAYLOR AND AUDREY WEIDMAN,

PLAINTIFFS-APPELLANTS,

V.

LANDING CONDOMINIUMS OF WAUKESHA ASSOCIATION, INC.,

DEFENDANT,

STATE AUTO INSURANCE COMPANY,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Waukesha County: LEE S. DREYFUS, JR., Judge. *Reversed*.

Before Brown, C.J., Reilly and Gundrum, JJ.

¶1 PER CURIAM. In these consolidated appeals, the individual unit owners of the Landing Condominiums of Waukesha claim that the condominium association's directors and officers breached their fiduciary duties. The directors sought bankruptcy protection and were dismissed from the lawsuit. The issue is whether a directors and officers (D&O) endorsement to a commercial general liability (CGL) policy State Auto Insurance Company issued to the Association still provides coverage for the claims against the directors. The circuit court concluded that the directors' dismissals effectively discharged their liability, declared that State Auto had no duty to defend or indemnify any of the parties and dismissed all claims against it. The owners appeal on the basis that, under the D&O endorsement, an insured's bankruptcy does not relieve State Auto of its obligations. We agree and reverse.

¶2 The Association was the named insured under a State Auto CGL policy. The policy included a D&O endorsement that provided coverage for the wrongful acts of the Association's directors and officers and modified or replaced certain terms and provisions in the CGL policy. For instance, under the endorsement, an "occurrence" was not "an accident" but "a wrongful act"; an "insured" included not just the Association, but also "[d]irectors, officers, or

trustees, individually and collectively, of the named insured while acting within the scope of their duties on behalf of the named insured." The endorsement's insuring agreement provided that State Auto "will pay on behalf of directors, officers, and trustees 'loss' arising from any claims made against them, individually or collectively, by reason of their 'wrongful acts.'" The endorsement also provided that the bankruptcy or insolvency of an insured would not relieve State Auto of its obligations under the policy.

¶3 The owners alleged that, while acting as the Association's directors and officers, Alex Shapiro, Anna Shapiro, and Alex Gershbeyn breached their fiduciary duties by failing to: adopt a sufficient budget for the association, levy and collect sufficient assessments, maintain the common elements, and establish a reserve fund. The owners also claimed that the directors had a conflict of interest because their simultaneous roles as developers of the condominium project influenced their decisions in regard to collecting and directing funds and dues.

¶4 State Auto moved several times to dismiss the owners' claims and to have the court declare that there was no coverage available under the CGL policy and, at best, only limited coverage available under the D&O endorsement. The directors then filed for bankruptcy and were dismissed from the case. State Auto again sought a declaratory judgment, this time arguing that there was no insurance coverage available for the owners' claims because, as the directors no longer were parties to the action, they could incur no personal liability such that there was no "loss" under the endorsement. The circuit court agreed. The owners moved for reconsideration. While allowing as how "there may be coverage under the policy," the court nonetheless denied the motion because, with the directors

dismissed from the case, "there's no methodology for them to be held liable." The owners appeal.

¶5 The grant or denial of a declaratory judgment is addressed to the circuit court's discretion. ***Jones v. Secura Ins. Co.***, 2002 WI 11, ¶19, 249 Wis. 2d 623, 638 N.W.2d 575. When the exercise of such discretion turns upon a question of law, however, we review the question de novo. ***Id.*** Here, the issue turns upon the interpretation of State Auto's CGL policy and D&O endorsement, an exercise that also presents a question of law for our de novo review. *See* ***Everson v. Lorenz***, 2005 WI 51, ¶10, 280 Wis. 2d 1, 695 N.W.2d 298.

¶6 D&O policies generally are issued to protect an insured's directors and officers from third-party claims made against them while acting in that capacity. *See* ***Farmers Sav. Bank v. WMBIC Indem. Corp.***, 175 Wis. 2d 398, 405-06, 499 N.W.2d 257 (Ct. App. 1993). The D&O endorsement here, entitled "Directors, Officers, Trustees Liability Endorsement," modified definitions and the coverage in the underlying CGL policy.

¶7 As noted above, the insuring agreement provided that State Auto "will pay on behalf of directors, officers, and trustees 'loss' arising from any claims made against them, individually or collectively, by reason of their 'wrongful acts.'" "Wrongful act" is defined as any "[a]ctual or alleged act, breach of duty, error, omission, misleading statement or misstatement attributed to … [a]ny director, officer or trustee while acting in their [sic] capacity as such." As it pertains to the directors, "loss" is defined as "any amount the insured director or officer is obligated to pay because of their [sic] legal liability, either actual or asserted, due to an alleged 'wrongful act.'"

¶8 State Auto basically argues that, regardless of the alleged wrongful acts spawning this lawsuit, the directors have no legal liability because they were dismissed from the case. Accordingly, State Auto posits there can be no "loss" under the endorsement to trigger insurance coverage.

¶9 The owners hang their collective hat on the endorsement's bankruptcy provision. It reads:

> Conditions **1.** through **4.** of **Section IV—Conditions** are replaced by the following:
>
> 1. Bankruptcy. Subject to exclusion j. the bankruptcy or insolvency of the insured … will not relieve us of our obligations under this policy.
>
> ….

State Auto responds that the bankruptcy filing, per se, is irrelevant. Its obligation pursuant to the insuring agreement, it claims, is to pay for a "loss" arising from the directors' wrongful acts. As a "loss" is the amount the directors are legally liable for, State Auto argues that the directors' dismissal from the case, whether for seeking bankruptcy protection or for any other reason in the world, has nullified the personal liability necessary to trigger D&O coverage.

¶10 We see it differently. When interpreting an insurance contract, as with any contract, we strive for a construction that gives reasonable meaning to every provision of the contract, rather than leaving part of the language useless or meaningless. ***Stanhope v. Brown Co.***, 90 Wis. 2d 823, 848-49, 280 N.W.2d 711 (1979). The point of the D&O endorsement was to protect the Association against malfeasance by the directors. Admittedly, the directors were dismissed before being found liable, but the harm the owners alleged in their complaint was due to the directors wrongful acts and could have ripened into a compensable loss but for

the bankruptcy. State Auto plainly agreed that its obligation would remain when an insured—here, the directors—would be obligated to pay due to a legal liability but instead sought bankruptcy protection. That is the coverage for which the Association paid State Auto, even in the event the directors sought bankruptcy protection. The touchstone of coverage determinations is the reasonable expectations of the insured. ***Carrington v. St. Paul Fire & Marine Ins. Co.***, 169 Wis. 2d 211, 226, 485 N.W.2d 267 (1992). Perhaps the provision might have been more precisely crafted, but we construe the language as written against the insurer that drafted it. *See* ***Stanhope***, 90 Wis. 2d at 849.

¶11 That is what distinguishes this case from ***Farmers Savings Bank***, cited above, and ***Green v. Heritage Mutual Insurance Co.***, 2002 WI App 297, 258 Wis. 2d 843, 655 N.W.2d 147. As here, at issue in those cases was a D&O policy purchased to protect officers or trustees from personal liability in two situations: when claims made against them were not indemnified by the bank or the religious congregation and to reimburse the bank or congregation for amounts paid to indemnify the officers or trustees for covered losses. ***Farmers Sav. Bank***, 175 Wis. 2d at 404; ***Green***, 258 Wis. 2d 843, ¶14. Both involved the second possibility. In ***Farmers***, the bank sought reimbursement for an amount it had paid on its own to settle claims made against two of its officers. ***Farmers Sav. Bank***, 175 Wis. 2d at 403. This court concluded that the insurer was not obliged to reimburse the bank for sums it never was legally obligated to pay. ***Id.*** at 406-07. Likewise in ***Green***, we concluded that while the complaint stated claims against the congregation through acts of its trustees, the complaint failed to allege any claims for which the trustees ever could have been held personally liable. ***Green***, 258 Wis. 2d 843, ¶17. The complaints in ***Farmers*** and ***Green*** thus fell

irredeemably short of being able to establish legal liability on the part of the entity sought to be protected by the D&O policy.

¶12 That is not the case here. The owners' allegations against the directors fall squarely within the ambit of what the D&O endorsement was purchased to safeguard. The bankruptcy provision derails any argument on State Auto's part that the directors' claimed insolvency absolves its obligation.

¶13 Finally, we part ways with the circuit court's conclusion that, once the directors were dismissed, there is no methodology to enforce any liability against them. The point of the bankruptcy provision is that the court need not call the directors to financial task. State Auto has agreed to assume that liability.

By the Court.—Judgment reversed.

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