

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 4, 2016

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 No. 2015AP1367

Cir. Ct. No. 2013CV2777

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

THE HOMESTEAD OF WAUKESHA, LLC,

PLAINTIFF,

V.

THE HOMESTEAD CONDOMINIUM ASSOCIATION, INC.,

DEFENDANT-THIRD-PARTY

PLAINTIFF-APPELLANT,

TRAVELERS CASUALTY AND SURETY COMPANY OF AMERICA,

DEFENDANT,

V.

MARK W. HOLIDAY,

THIRD-PARTY DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Waukesha County:
JAMES R. KIEFFER, Judge. *Affirmed.*

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

¶1 PER CURIAM. The Homestead of Waukesha, LLC (Homestead), the declarant and developer of The Homestead Condominiums of Waukesha, filed suit against The Homestead Condominium Association, Inc., (the Association), primarily alleging breach of contract. The action expanded when the Association filed a third-party complaint against Homestead’s managing member, Mark W. Holiday, individually. The matter before us involves the Association’s appeal of the order dismissing its third-party complaint against Holiday. We affirm.

¶2 Homestead sought to recoup and retain nearly \$415,000 it claimed the Association’s members owed it. Contending it had paid for common-area expenses from its “developer’s account” that should have been covered by the Association, Homestead alleged breach of contract, unjust enrichment, quantum meruit, promissory estoppel, slander of title, conversion, and negligence/breach of fiduciary duty. It also sought a declaratory judgment that it could lease or rent parking spaces to non-Association members.

¶3 The Association then filed a third-party complaint against Holiday individually. Besides being Homestead’s managing member, Holiday also managed the Association and served on the Association’s board of directors. Similar to the Association’s counterclaims against Homestead, its third-party complaint alleged strict responsibility, intentional, and negligent misrepresentation for measures taken to induce potential buyers to purchase; conversion; civil theft; unjust enrichment; quantum meruit; breach of fiduciary duty; and intentional trespass to land. The underlying theory was that, from 2006, when Homestead and

the Association were created, until 2010, when the Association hired an independent company to manage it, Holiday wore two hats, simultaneously marketing units for Homestead while spending homeowner money on behalf of the Association, tortiously working this dual role to his own financial advantage.

¶4 All parties moved for summary judgment. The Association moved to dismiss Homestead's complaint and for judgment on its counterclaims against Homestead and its claims against Holiday. Homestead moved to dismiss the Association's counterclaims and for declaratory judgment regarding Homestead's leasing of unassigned parking spaces to nonresidents. Holiday moved to dismiss the third-party complaint.

¶5 The trial court denied the Association's motion to dismiss most of Homestead's claims, but reserved ruling on Homestead's conversion and slander-of-title claims.¹ While it held that Homestead had the right to lease parking spaces on condominium property to nonresidents, it reserved ruling on whether Homestead is liable for trespass by leasing parking spaces to nonresidents or whether Homestead may owe the Association money for maintenance and upkeep. It granted Homestead's motion to dismiss the Association's counterclaims, except for the counterclaims alleging intentional trespass and breach of fiduciary duty. Finally, the court dismissed the Association's third-party complaint against Holiday in its entirety.

¶6 Both the Association and Homestead moved for reconsideration. The Association asked the court to reconsider dismissing the third-party complaint

¹ More precisely, the court denied the Association's motion for dismissal of Homestead's conversion claim "subject to further review."

against Holiday and the misrepresentation and conversion counterclaims against Homestead and to reverse its declaration regarding Homestead's ability to lease parking spots and to reinstate the counterclaims related to that issue. Homestead asked the court to reconsider dismissing the Association's remaining counterclaims against it.

¶7 On the Association's motion, the court declared Homestead's leasing of parking spaces illegal and dismissed, reinstated, or denied related claims consistent with its reversal of the declaratory ruling regarding the parking space leases. The court also reinstated the Association's conversion counterclaim against Homestead but left intact the dismissal of the Association's various misrepresentation counterclaims against Homestead. It also left intact its denial of Homestead's motion to dismiss the Association's breach-of-fiduciary-duty counterclaim. Most relevant to this appeal, the court left intact the dismissal of the third-party complaint against Holiday. The Association appeals only the latter ruling. Further proceedings between the Association and Homestead on the remaining claims and counterclaims have been stayed pending this appeal.

¶8 This court reviews summary judgment decisions independently, applying the same standards as the trial court. *Smith v. Dodgeville Mut. Ins. Co.*, 212 Wis. 2d 226, 232, 568 N.W.2d 31 (Ct. App. 1997). Summary judgment is granted when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). Bilateral motions for summary judgment generally imply that the facts are stipulated, but we nonetheless must determine independently whether material facts remain in dispute so as to preclude a grant of summary judgment. See *Stone v. Seeber*, 155 Wis. 2d 275, 278, 455 N.W.2d 627 (Ct. App. 1990). We also are called upon to construe WIS. STAT.

§ 183.0304 (2013-14).² The interpretation and application of a statute are questions of law that we review independently, but benefiting from the analysis of the trial court. *Marder v. Board of Regents of the Univ. of Wis. Sys.*, 2005 WI 159, ¶19, 286 Wis. 2d 252, 706 N.W.2d 110.

¶9 The trial court held that Holiday was immune from personal liability because there was no evidence that he ever acted other than as a representative of Homestead. The Association asserts that he nonetheless is not exempt from personal tort liability. Both the trial court and the Association find support in WIS. STAT. § 183.0304, the court in subsec. (1) and the Association in subsec. (2). The statute provides:

(1) The debts, obligations and liabilities of a limited liability company, whether arising in contract, tort or otherwise, shall be solely the debts, obligations and liabilities of the limited liability company. Except as provided in [WIS. STAT. §§] 183.0502 and 183.0608, a member or manager of a limited liability company is not personally liable for any debt, obligation or liability of the limited liability company, except that a member or manager may become personally liable by his or her acts or conduct other than as a member or manager.

(2) Notwithstanding sub. (1), nothing in this chapter shall preclude a court from ignoring the limited liability company entity under principles of common law of this state that are similar to those applicable to business corporations and shareholders in this state and under circumstances that are not inconsistent with the purposes of this chapter.

¶10 The Association argues that the court read the statute too narrowly. It asserts that WIS. STAT. § 183.0304(2) plainly permits a court to disregard the

² All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

corporate or LLC framework to determine a member's personal liability. The Association bolsters its assertion that Holiday can be held personally responsible for his tortious conduct by looking to *Oxmans' Erwin Meat Co. v. Blacketer*, 86 Wis. 2d 683, 273 N.W.2d 285 (1979), where the court held:

An individual is personally responsible for his³ own tortious conduct. A corporate agent cannot shield himself from personal liability for a tort he personally commits or participates in by hiding behind the corporate entity; if he is shown to have been acting for the corporation, the corporation also may be liable, but the individual is not thereby relieved of his own responsibility.

Id. at 692-93.

¶11 The Association correctly states the law but it leapfrogs the critical hurdle of demonstrating that Holiday personally acted as it alleges. As the trial court concluded:

[T]he Association has not established Holiday's individual participation in any of the tortious claims that it alleges. There is no evidence stated that he made any of the misrepresentations personally and there is no evidence that he received any of the funds personally that he acquired from the Association for reimbursement for repair and maintenance of common areas. There is no evidence that he acted in any manner whatsoever except as a representative of Homestead. This record is devoid of any basis of holding Holiday personally liable.

We can state it no better.

¶12 The Association next suggests that, because its conversion, intentional trespass, and breach of fiduciary duty counterclaims against Homestead remain at issue in the trial court, its similar claims against Holiday also should

³ We cite the quoted passage as written. Adding bracketed gender-neutral corrections after each of the numerous male pronouns makes reading overly cumbersome.

have survived dismissal. It specifically contends the trial court held that there is a genuine issue of material fact as to whether Holiday obtained actual consent from board members to transfer over \$115,000 from the Association's account and that Holiday personally caused trespass onto the condominium property by leasing parking spaces to nonowners, breached his fiduciary duties, and misrepresented to unit purchasers the true costs of running the Association. The Association's claims do not persuade.

¶13 Holiday concedes that he transferred funds from the Association's reserve account to Homestead's developer account. He explains, however, that in the first few years he mistakenly paid Association expenses from the developer account and contends the Association's Board of Directors later approved a transfer of funds from the reserve account to the developer account to cover those mistaken expenditures. While the trial court found that, *as to Homestead*, the Board's consent presents a genuine issue of material fact, it reiterated on motion for reconsideration that the Association failed to establish in any regard that Holiday acted, in the words of WIS. STAT. § 183.0304(1), "other than as a member or manager" of Homestead for his own personal gain.

¶14 Likewise here, the Association directs us to nothing showing that Holiday, acting in his own stead, took any money, caused third persons to trespass, made any misrepresentations, mismanaged the Association's finances, or personally engaged in any other tortious misconduct *outside his capacity as a managing member of Homestead*. While the trial court initially determined that material facts remained in dispute on the claim that Holiday breached his fiduciary responsibilities to the Association, it decided on reconsideration that the Association failed to show that Holiday acted on his own behalf.

¶15 The record bears out that conclusion. The fact that certain claims still are at issue against Homestead is irrelevant to Holiday's personal liability. The court did not err in dismissing the Association's complaint against him.

By the Court.—Order affirmed.

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

