

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 22, 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. 2015AP1331

Cir. Ct. No. 2013CV207

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

IN RE: PARTNERSHIP HEALTH PLAN, INC.,

PETITIONER,

**MICHAEL S. POLSKY, ESQ. AS CHAPTER 128 RECEIVER OF
COMMUNITY HEALTH PARTNERSHIP, INC.,**

INTERESTED PARTY-APPELLANT,

v.

OFFICE OF THE COMMISSIONER OF INSURANCE,

INTERESTED PARTY-RESPONDENT.

APPEAL from an order of the circuit court for Dane County:
WILLIAM D. JOHNSTON, Judge. *Affirmed.*

Before Kloppenburg, P.J., Higginbotham and Sherman, JJ.

¶1 PER CURIAM. Michael Polsky, the WIS. STAT. ch. 128 receiver for Community Health Partnership (CHP), appeals an order of the circuit court denying Polsky’s motion for an order declaring that CHP is entitled to any and all surplus funds from the liquidation of Partnership Health Plan, Inc. (PHP). Restated and summarized, Polsky contends that CHP is entitled to PHP’s surplus funds because: (1) CHP is the “owner” of PHP and as such, is entitled to any surplus funds under WIS. STAT. § 645.68(11) (2013-14);¹ (2) PHP’s board of directors adopted a resolution directing that any surplus funds are to be paid to CHP; and (3) the surplus funds constitute reimbursement to CHP for money expended by CHP on behalf of PHP. For the reasons discussed below, we affirm.

BACKGROUND

¶2 CHP was incorporated as a nonstock charitable corporation. In 2005, CHP incorporated PHP as a nonstock charitable service insurance corporation under WIS. STAT. ch. 613, WIS. STAT. ch. 181 and I.R.C. § 501(c)(3). PHP’s bylaws provide that CHP is the sole member of PHP.

¶3 PHP operated as a health maintenance organization and provided health and medical services benefits, prescription drug benefits and long-term care benefits to elderly and disabled individuals. PHP did not have any employees or operating assets. Instead, all administrative services for PHP were provided by CHP and the premises occupied by PHP were leased and occupied by CHP.

¹ All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

¶4 CHP and PHP ceased their normal operations as of December 31, 2012. A WIS. STAT. ch. 128 insolvency proceeding was initiated for CHP and Polsky was appointed the receiver of CHP to administer CHP's property. PHP ultimately entered into liquidation under WIS. STAT. ch. 645. On December 17, 2012, prior to PHP ceasing its normal operations and entering into liquidation, the board of directors for PHP adopted a consent resolution authorizing the payment of any assets PHP may have following its liquidation to CHP's receivership estate. PHP's resolution states in relevant part:

Upon the completion of the Liquidation, any assets remaining after the payment of the Corporation's liabilities shall be distributed, at the sole discretion of [Polsky] (or his successor), to the Wisconsin Statutes Chapter 128 receivership estate for ... [CHP], in such amounts as [Polsky] (or his successor) shall determine, or if there is no receivership estate for either entity, to the entities themselves, for the purpose of paying the creditors of each such entity.

¶5 Polsky, CHP's receiver, filed a claim with the Commissioner of Insurance in PHP's liquidation proceeding for "all surplus funds," which Polsky estimates to be approximately \$6,000,000. Polsky's proof of claim states that CHP is "the sole owner of PHP," and as such is entitled to all excess funds under WIS. STAT. § 645.68(11).²

¶6 The Commissioner denied Polsky's claim, and thereafter Polsky filed a motion for declaratory relief with the circuit court seeking an order that CHP is entitled to any surplus funds following PHP's liquidation that remain after

² WISCONSIN STAT. § 645.68 governs the order of the distribution of claims from an insurer's estate during liquidation. "Propriety claims," which are described as "[t]he claims of shareholders or other owners, including policyholders of a mutual insurance corporation within the limits of[WIS. STAT. §] 645.72(2)," are given last priority. Sec. 645.68(11).

all claims against PHP have been paid in PHP's liquidation proceeding. The circuit court denied Polsky's motion. Polsky appeals. Additional facts are discussed below where necessary.

DISCUSSION

¶7 Polsky contends that the circuit court erred in denying his motion for an order declaring that CHP is entitled to any surplus funds following PHP's liquidation. Polsky makes the following three arguments in support of this contention, which we have summarized and restated: (1) CHP is entitled to PHP's surplus funds under WIS. STAT. § 645.68(11) because CHP is the "owner" of PHP; (2) the board of directors for PHP properly adopted a resolution directing that any of PHP's surplus funds be distributed to CHP; and (3) payment of PHP's surplus funds to CHP would constitute reimbursement to CHP for money expended by CHP on behalf of PHP, which is authorized by PHP's articles of incorporation.³

¶8 Resolution of Polsky's arguments on appeal requires this court to interpret relevant statutory provisions and PHP's articles of incorporation. Both present questions of law. *See State v. Cole*, 2000 WI App 52, ¶3, 233 Wis. 2d 577, 608 N.W.2d 432 (statutory construction is a question of law); *Schlosser v. Allis-Chalmers Corp.*, 86 Wis. 2d 226, 244, 271 N.W.2d 879 (1978) (contract interpretation is a question of law); *State ex rel. Siciliano v. Johnson*, 21 Wis. 2d

³ Polsky devotes a substantial amount of his brief-in-chief to arguing that the Commissioner of Insurance does not have authority to recommend what charitable entity should receive PHP's surplus funds and that the circuit court lacks jurisdiction to determine what charitable organization, other than CHP, should receive PHP's surplus funds. Neither of these issues was determined by the circuit court in the order appealed from, which denied Polsky's motion for a declaratory judgment that CHP is entitled to PHP's surplus assets following PHP's liquidation. These issues are, therefore, not before this court on appeal and are not addressed.

482, 487, 124 N.W.2d 624 (1963) (principles of contract construction govern the construction of corporate articles and bylaws). “When a circuit court’s ruling on [a] motion[] for declaratory judgment depends on a question of law, we review the ruling de novo.” *Gister v. American Family Mut. Ins. Co.*, 2012 WI 86, ¶8, 342 Wis. 2d 496, 818 N.W.2d 880.

*A. Whether CHP is Entitled to Any of PHP’s
Surplus Funds Under WIS. STAT. § 645.68(11).*

¶9 Polsky contends that under WIS. STAT. § 645.68(11), CHP is entitled to any surplus funds remaining following PHP’s liquidation because CHP is the owner of PHP.

¶10 WISCONSIN STAT. ch. 645 governs insurer rehabilitation and liquidation in Wisconsin. *Ambac Assurance Corp. v. Wells Fargo Bank*, 2013 WI App 129, ¶12, 351 Wis. 2d 539, 841 N.W.2d 482; *see* WIS. STAT. § 645.01(1); *see also* WIS. STAT. § 613.03(3) (providing that service corporations are subject to ch. 645). The parties do not dispute that ch. 645 applies to PCP’s liquidation. WISCONSIN STAT. § 645.68 sets forth the order of the distribution of claims from the insurer’s estate during liquidation. The type of claim listed last in priority is “propriety claims,” which are: “The claims of shareholders *or other owners*, including policyholders of a mutual insurance corporation within the limits of [WIS. STAT. §] 645.72(2).” Sec. 645.68(11) (emphasis added). In determining whether CHP is entitled under § 645.68(11) to PHP’s surplus assets, the sole question before us is whether CHP is an “owner[]” of PHP within the meaning of that subsection.

¶11 As already noted above, statutory interpretation presents a question of law, which we review de novo. *State v. Kirch*, 222 Wis. 2d 598, 602, 587

N.W.2d 919 (Ct. App. 1998). The goal of statutory interpretation is to ascertain and give effect to the intent of the legislature. *Id.* When interpreting a statute, we begin with the statute’s text, giving it its common, ordinary, and accepted meaning, except that we give technical or specially defined words their technical or special definitions. *State v. Warbelton*, 2008 WI App 42, ¶13, 308 Wis. 2d 459, 747 N.W.2d 717. If the language of the statute is plain and unambiguous, we apply the plain meaning. *Id.* Neither party argues that the term “owner[.]” in WIS. STAT. § 645.68(11) is ambiguous, and we agree that it is not. Accordingly, we apply the plain meaning of the term.

¶12 The term “owner[.]” is not defined in WIS. STAT. ch. 645, nor is it defined in either of the statutory chapters governing nonstock corporation and service insurance corporations, WIS. STAT. chs. 181 and 613. Without citing to any legal authority, the parties discuss who constitutes an “owner[.]” in terms of the rights and powers that a member of a nonstock service insurance corporation has over the corporation. This is consistent with the legal dictionary definition of “owner,” which is defined as “[s]omeone who has the right to possess, use, and convey something; a person in whom one or more interests are vested.” BLACK’S LAW DICTIONARY, 1280 (10th ed. 2014). *See Wall v. Pahl*, 2016 WI App 71, ¶12, 371 Wis. 2d 716, 886 N.W.2d 373 (“When a statutory term is undefined, its ordinary and accepted meaning can be established by reference to a recognized dictionary.”) Accordingly, we follow the parties lead, without opining definitively on whether these factors are the full or apt measure of whether a person or entity is an “owner[.]” under WIS. STAT. § 645.68(11).

¶13 PHP is a nonstock service insurance corporation organized under WIS. STAT. chs.181 and 613. As a nonstock service insurance corporation, PHP does not have any shareholders. *See generally* chs. 181 and 613. Although

nonstock service insurance corporations do not have shareholders, they may have members. *See* WIS. STAT. §§ 181.0202(1)(f) and 613.12(1)(d) and (f). PHP's articles of incorporation provide that it has one member, which is CHP.

¶14 There is no evidence before us that CHP, as a member of PHP, has the right to possess, use, or convey all or any part of PHP's property or assets. As a member of PHP, CHP does not own any shares in PHP, CHP is not entitled to receive any distributions from PHP, and under PHP's articles of incorporation CHP is not designated to receive any assets remaining after the payment of all liabilities upon the dissolution of PHP. CHP is responsible for electing PHP's board of directors; however, PHP's directors, not CHP, are responsible for managing PHP's affairs and for determining what organization or organizations should be given any assets remaining upon PHP's dissolution after the payment of all liabilities. In short, CHP does not have any of the rights or powers traditionally held by an owner.

¶15 Polsky argues that because WIS. STAT. § 645.68(11) provides that "other owners" includes "policyholders of a mutual insurance corporation," "other owners" must also "include persons who have rights similar to the rights associated with policyholders of mutual insurance companies." *See State v. Powers*, 2004 WI App 156, ¶14, 276 Wis. 2d 107, 687 N.W.2d 50 (when a statute defines a term as "including" an enumerated list of items, the term is generally understood to be open-ended, encompassing not only the enumerated items but things of a similar nature.) Polsky surmises that because mutual insurance corporations are nonstock corporations, *see* WIS. STAT. § 611.01(2), and policyholders of mutual insurance corporations "are statutorily defined as members of [the corporation] ... it follows that 'other owners' as used in

§ 645.68(11) is not intended to exclude other members of nonstock corporations like CHP.” We disagree.

¶16 There can be no dispute that shareholders are owners, that policyholders in a mutual insurance company are effectively shareholders, although they need not be denominated as such, and that, therefore, like shareholders in a stock corporation, policyholders are owners. *Huber v. Martin*, 127 Wis. 412, 432-33, 105 N.W. 1031 (1906).

¶17 Polsky’s argument is that because policyholders in a mutual insurance corporation are owners, but also members of a nonstock corporation, it necessarily follows that all members of a nonstock corporation are owners. Polsky’s argument is a logical fallacy. Policyholders are entitled to make a claim not because they are members of a nonstock corporation, but instead because they are owners. It does not necessarily follow that because one type of owner—a policyholder in a mutual insurance company—is a member of a nonstock corporation, all members of a nonstock corporation are owners.

¶18 Polsky next argues “other owners” should be interpreted as including a member of a nonstock service insurance corporation because doing so is consistent with the legislative directive that WIS. STAT. ch. 645 is to “be liberally construed” to effect ch. 645’s purpose, which is “the protection of the interests of insureds, creditors, and the public generally” WIS. STAT. §§ 645.01(3) and (4). Here, where the interests of the insureds and the public are generally not at issue, the focus of protection is on the creditors of the insurance company in liquidation. However, Polsky seeks to protect another entity’s creditors. Accordingly, we reject this argument.

¶19 Finally, Polsky argues that if “other owners” is not interpreted as including members of nonstock service insurance corporations, the Commissioner and circuit court will be permitted to interfere with PHP’s board of directors’ “prerogative” to ensure that CHP’s creditors, who provided goods, services, and leasehold space for the combined charitable operations of CHP and PHP, are paid. Our focus in statutory interpretation is to ascertain the legislature’s intent, not to mold a particular statute to best suit the needs of an appellant. Accordingly, we reject this argument as well.

¶20 In summary, we conclude that CHP does not have any of the rights or powers over PHP that are generally held by an owner. We conclude that CHP is not an “owner[.]” of PHP and CHP is therefore not entitled to PHP’s surplus assets under WIS. STAT. § 645.68(11)

B. Whether CHP is entitled to PHP’s Surplus Funds Based on a Resolution Adopted by PHP’s Board of Directors

¶21 Polsky argues that CHP is entitled to PHP’s surplus funds because the board of directors for PHP adopted a resolution directing that any of PHP’s surplus funds be distributed to CHP’s receivership estate.

¶22 In December 2012, PHP’s board of directors authorized the liquidation of PHP and they adopted a resolution that states in pertinent part:

Upon the completion of the Liquidation [of PHP], any assets remaining after the payment of the Corporation’s liabilities shall be distributed, at the sole discretion of [Polsky] (or his successor), to the Wisconsin Statutes Chapter 128 receivership estate for ... [CHP], in such amounts as [Polsky] (or his successor) shall determine, or if there is no receivership estate for [CHP], to the entit[y] [itself], for the purpose of paying the creditors of [CHP].

¶23 In support of his motion for an order declaring that CHP is entitled to any surplus funds in PHP's liquidation, Polsky argued to the circuit court that after the liquidator of PHP satisfies his obligations under WIS. STAT. ch. 645, the liquidator has no authority over PHP's surplus funds and that PHP's board of directors had authorized him to receive any surplus funds on behalf of CHP. Polsky argued that in adopting the resolution, PHP's board of directors exercised their authority under PHP's articles of incorporation by designating CHP, a charitable corporation, as the recipient of PHP's assets.

¶24 The Commissioner argued to the circuit court that CHP is not entitled to the surplus funds because: (1) the resolution is void because it exceeds the authority of PHP's board of directors under PHP's articles of incorporation; and (2) the resolution is invalid under WIS. STAT. § 617.21 and WIS. ADMIN. CODE § Ins. 40.04⁴ (through Dec. 2016) because the resolution was not timely disclosed to the Office of the Commissioner.

¶25 The circuit court agreed with the Commissioner, concluding that the resolution is not permitted by PHP's articles of incorporation and that it violates WIS. STAT. § 617.21 and WIS. ADMIN. CODE § Ins. 40.04 (through Dec. 2016).

¶26 On appeal, Polsky contends that the circuit court erred in concluding that the December 2012 resolution is invalid, arguing that the resolution does not exceed PHP's board of directors' authority under PHP's articles of incorporation and that the resolution does not violate WIS. STAT. § 617.21 and WIS. ADMIN.

⁴ WISCONSIN STAT. § 617.21 and WIS. ADMIN. CODE § Ins. 40.04 (through Dec. 2016) provide that an insurer such as PHP may not enter into transactions with affiliates unless the transaction is disclosed in advance to the Officer of the Commission of Insurance.

CODE § Ins. 40.04 (through Dec. 2016). For the reasons explained below, we disagree.

¶27 PHP’s articles of incorporation provide that PHP:

Upon the dissolution of [PHP], the Board of Directors shall, after paying or making provision for the payment of all of the liabilities of the Corporation, dispose of all of the assets of the Corporation exclusively for the purposes of the Corporation to such organization or organizations, as the Board of Directors shall select, *which are organized and operated exclusively for charitable, educational or scientific purposes as shall at the time qualify as an exempt organization or organizations under section 501(c)(3)⁵ of the Code.*

¶28 There is no dispute that previously, CHP operated as a charitable organization under I.R.C. § 501(c)(3). However, at the time CHP filed its claim with the Commissioner and moved the circuit court for declaratory judgment, CHP had ceased its normal business operations, an insolvency proceeding had been initiated under WIS. STAT. ch. 128, and CHP assets had been liquidated. When a corporation’s assets are liquidated, the “corporation ceases to be a going concern and its activities are merely for the purposes of winding up its affairs, paying its debts, and distributing the remaining cash or other property” 33A Am. Jur. 2d Federal Taxation ¶5458. It can no longer be said that CHP operates exclusively for charitable purposes. Accordingly, the board’s resolution is contrary to PHP’s articles of incorporation and is, therefore, invalid.

⁵ Under I.R.C. § 501(c)(3), a “[c]orporation ... organized and operated exclusively for ... charitable ... purposes” of which “no part of the net earnings ... inures to the benefit of any private shareholder or individual” is exempt from taxation unless that exemption is otherwise denied under I.R.C. §§ 502 and 503. *See* I.R.C. § 501(a).

¶29 We also agree with the circuit court that the resolution violates WIS. STAT. § 617.21 and WIS. ADMIN. CODE § Ins. 40.04 (through Dec. 2016).

¶30 WISCONSIN STAT. ch. 617 sets forth regulations for insurance companies and intercorporate transactions relating to insurers. WISCONSIN STAT. § 617.21 provides:

(2) TRANSACTIONS OF DOMESTIC INSURERS SUBJECT TO DISCLOSURE. (a) 1. Except as provided under sub. (3t), the commissioner may promulgate rules requiring a domestic insurer ... to report a transaction ... if all of the following are satisfied:

a. The transaction directly or indirectly benefits ... [an] affiliate [of the domestic insurer].

b. The transaction is ... material to the domestic insurer.

....

2.(b) sub.(3t) Except as provided under sub. (3t), no domestic insurer ... or affiliate of the domestic insurer may enter into a transaction required to be reported to the commissioner under this subsection unless the domestic insurer ... and affiliate report the transaction to the commissioner in the form and by the date before the effective date of the transaction that are prescribed by the commissioner by rule. The commissioner may not require the transaction to be reported earlier than at least 30 days before the effective date.

....

(3g) Transactions prohibited. Except as provided under sub. (3t), no domestic insurer ... or affiliate of the insurer may enter into a transaction that is not reported as required under sub. (2)

¶31 WISCONSIN ADMIN. CODE § Ins. 40.04(2) (through Dec. 2016) sets forth those transactions between a domestic insurer and an affiliate that are required to be reported. Section Ins. 40.04(2)(f) requires that a domestic insurer

report “[a]ny material transactions which the commissioner requires to be reported by order. Section Ins. 40.04(2)(f). Section Ins. 40.04(6) provides that “[n]o person may enter into or assent to a transaction ... which is subject to reporting under sub. (2) but not reported.”

¶32 In June 2012, the Commissioner entered an order against PHP, which provided in relevant part:

(5) I hereby order [PHP] to cease the following transactions, except as provided in paragraph (6);

....

(d) Any distribution to the corporate member.

....

(6) Before any of the transactions itemized in paragraph (5) may take place, [PHP] must provide the Commissioner notice of the proposed transaction 30 days prior to its effective date....

¶33 Polsky argues that the December 2012 resolution does not violate WIS. STAT. § 617.21(2) and WIS. ADMIN. CODE § Ins. 40.04 (through Dec. 2016) notice requirements because the resolution is not material to PHP, which is requisite for the notice requirements to apply. *See* § 617.21(2)(a)1.b. and § Ins. 40.04(2)(f). Polsky asserts that because the resolution does not take effect until PHP is liquidated and it concerns only PHP’s surplus funds, which are those that remain after all of PHP’s obligations have been paid, “the disposition of the surplus funds will have no effect on PHP ... and [] cannot be deemed material to PHP.”

¶34 Polsky does not explain to this court what constitutes “material” for purposes of WIS. STAT. § 617.21(2) and WIS. ADMIN. CODE § Ins. 40.04(2)(f) (through Dec. 2016), whether a determination that a transaction is or is not

material is a legal or factual determination, or how this court reviews a circuit court's determination that a transaction is material. We decline to abandon our neutrality to develop Polsky's argument for him. See *State v. Pettit*, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (we need not consider arguments that are undeveloped or unsupported by references to relevant legal authority). Accordingly, we do not address this argument.

¶35 Polsky also argues that even if the formal notice requirements of WISCONSIN STAT. § 617.21(2) and WIS. ADMIN. CODE § Ins. 40.04(2)(f) (through Dec. 2016) were not satisfied, the resolution should nevertheless be deemed valid because the Commissioner was aware of the resolution by at least January 18, 2013, and did not object to the resolution within thirty days thereof.

¶36 WISCONSIN STAT. § 617.21(3t) provides that “Section 617.21(2) to (3g) does not apply ... if *the insurer reports as required under sub. (2)* on behalf of the person or on behalf of the affiliate, and the transaction is not disapproved by the Commissioner under sub. (3).” There is no dispute that PHP did not notify the Commissioner of the resolution in the manner specified in § 617.21(2). Polsky argues, however, that PHP “substantially complied” with the notice requirements, and that substantial compliance is sufficient under § 617.21(2).

¶37 Polsky does not explain what language in WIS. STAT. § 617.21 allows for substantial compliance, and even if he had developed such an argument, the argument would not prevail. The language of § 617.21(3t) is clear—the insurer must report the transaction to the Commissioner in the manner specified in subsection (2). Nothing in the language of § 617.21(3t) allows for substantial compliance with the notice requirements of subsection (2). Accordingly, we reject this argument.

C. Reimbursement

¶38 Polsky contends that CHP is entitled to PHP's surplus funds as reimbursement to CHP for expenses CHP incurred on behalf of PHP. Polsky points out that CHP contracted for all of the goods, services, and leasehold space for the combined operations for CHP and PHP. Polsky raises this argument in the context of the December 2012 resolution—arguing that payment to CHP as reimbursement for expenses incurred on behalf of PHP does not violate PHP's articles of incorporation. However, as explained above, regardless of whether the resolution violates PHP's articles of incorporation, the resolution is invalid because the notice requirements of WIS. STAT. § 617.21(2), WIS. ADMIN. CODE § Ins. 40.04(2)(f) (through Dec. 2016), and the Commissioners June 2012 order were not complied with.

¶39 To the extent that Polsky is arguing that CHP is entitled to the surplus funds under WIS. STAT. § 645.68 as a general claim against PHP, CHP did not file such a claim with the Commissioner. CHP filed a claim with the Commissioner for all of PHP's surplus funds under § 645.68(11), and, as we have explained above, CHP is not entitled to the surplus funds under § 645.68(11).

¶40 In addition, Polsky's argument suffers the additional deficit of not explaining what percentage of CHP's expenses were incurred on behalf of PHP. Polsky makes a general assertion that CHP is entitled to all of PHP's surplus assets, estimated to be approximately \$6 million, but does not provide documentation or argument to support a finding that CHP incurred expenses on behalf of PHP in that amount. Accordingly, we conclude that Polsky has not established that CHP is entitled to PHP's surplus funds as reimbursement.

CONCLUSION

¶41 For the reasons discussed above, we affirm.

By the Court.—Order affirmed.

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

