COURT OF APPEALS
DECISION
DATED AND FILED

March 27, 2018

Sheila T. Reiff
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. 2017AP89 **Cir. Ct. No. 2016CV500**

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

WISCONSIN WEALTH MANAGEMENT, LLC,
A WISCONSIN LIMITED LIABILITY COMPANY,
LITTLE BITS LLC, A WISCONSIN LIMITED
LIABILITY COMPANY, STEVEN G. AMBROSIUS,
DANIEL J. PAMPERIN AND SARAH AND DAVID FELTON,

PLAINTIFFS-RESPONDENTS,

V.

KEY PROPERTY MANAGEMENT, LLC,
A WISCONSIN LIMITED LIABILITY COMPANY,
WILLIAM L. JOHNSON AND DEAN W. JOHNSON,

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Brown County: TIMOTHY A. HINKFUSS, Judge. *Affirmed*.

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 PER CURIAM. Steven Ambrosius, Daniel Pamperin, and Sarah and David Felton (collectively, "the Ambrosius Group") made numerous payments to Johnson Bank pursuant to their respective personal guaranties on a loan Johnson Bank issued to Riverside Group Investments, LLC ("Riverside"). In this lawsuit, they sought equitable contribution from William and Dean Johnson, who also signed personal guaranties on the loan, for the Johnsons' proportionate share of those payments. The circuit court denied the Johnsons' motion to submit the matter to arbitration, and it granted summary judgment in favor of the Ambrosius Group and against the Johnsons.

¶2 The Johnsons assert the circuit court erroneously denied their motion to compel arbitration based on an arbitration provision contained in Riverside's operating agreement. We reject this argument primarily because none of the individuals comprising the Ambrosius Group was a party to Riverside's operating agreement. Rather, the agreement bound only Riverside's members, which were other limited liability companies that the individuals involved in this lawsuit had formed. We also conclude the arbitration provision was not triggered with respect to the equitable contribution claim at issue here, nor does that claim implicate a "Limitation on Liability" provision within the Riverside operating agreement. As a result, the Ambrosius Group's claim in this lawsuit is not a "dispute arising with respect to" the Riverside operating agreement for purposes of the arbitration provision.

¶3 The Johnsons also assert the circuit court erroneously granted summary judgment in favor of the Ambrosius Group. We conclude the court

correctly granted summary judgment because the record establishes the Ambrosius Group is entitled to equitable contribution from the Johnsons for a portion of the payments they made to Johnson Bank under their guaranties. Accordingly, we affirm.

BACKGROUND

¶4 Riverside has three members, all of which are limited liability companies: Key Property Management, LLC ("Key Property"), Wisconsin Wealth Management, LLC ("Wisconsin Wealth"), and Little Bits LLC ("Little Bits"). The Johnsons are Key Property's members; Ambrosius and Pamperin are members of Wisconsin Wealth; and the Feltons are Little Bits' members.

¶5 In 2014, Riverside executed and delivered to Johnson Bank a promissory note in the amount of approximately $1.2 million, accompanied by a business loan agreement. Johnson Bank obtained two mortgages on real property to secure Riverside's indebtedness, but it also required some of the individual members of Key Property, Wisconsin Wealth, and Little Bits to execute commercial guaranty agreements.[1] The commercial guaranties obligated the individual members to personally guarantee, in full and without limitation, the payment of all sums Johnson Bank advanced to Riverside related to the

[1] Although the record identifies both Sarah and David Felton as members of Little Bits, it appears that, of the two, only David signed a commercial guaranty. The Johnsons believe this to be a significant fact, a notion we reject. *See infra* ¶¶24-25.

promissory note.[2] The guaranties all identify them as pertaining to "Loan No. 2288104554-201," which is the loan number associated with Riverside's promissory note and business loan agreement. The business loan agreement identified the Johnsons, Ambrosius, Pamperin and David Felton as guarantors.

¶6 Riverside defaulted on the promissory note, and Johnson Bank began collection activities. The Ambrosius Group made several payments pursuant to their commercial guaranties. First, to ensure the mortgaged premises were sold at their highest value, the Ambrosius Group made mortgage, interest, insurance and utility payments totaling $149,253.64. There remained a deficiency following the sale of the mortgaged properties, and Johnson Bank required an additional $294,623.15 payment in order to release the commercial guaranties. The Ambrosius Group paid that amount. The Ambrosius Group also paid $31,376.85 for, among other things, Johnson Bank's attorney fees, which the commercial guaranties obligated them to pay. Neither the Johnsons nor Key Property contributed to any of those payments.

¶7 Wisconsin Wealth and Little Bits then commenced this action for equitable contribution against Key Property and the Johnsons. The complaint was later amended to add some of Wisconsin Wealth's and all of Little Bits' individual members—i.e., the Ambrosius Group—as plaintiffs. These individual plaintiffs sought reimbursement from the Johnsons in the amount of $158,417.88, which

[2] The commercial guaranties all appear to have the same terms. They specify that the guarantor "absolutely and unconditionally guarantees full and punctual payment and satisfaction of the Indebtedness …. Guarantor's liability is unlimited and Guarantor's obligations are continuing." Further, the guaranties state they are guarantees of "payment and performance and not of collection, so Lender can enforce this Guaranty against Guarantor even when Lender has not exhausted the Lender's remedies against anyone else obligated to pay the Indebtedness or against any collateral securing the Indebtedness …."

they represented to be the Johnsons' one-third shares of the sums the Ambrosius Group had paid pursuant to their commercial guaranties. In the alternative, Wisconsin Wealth and Little Bits sought reimbursement in the same amount from Key Property.

¶8 Key Property and the Johnsons moved to stay the proceedings and have the entire matter submitted to arbitration. The circuit court denied the motion following a hearing. The court reasoned that the various individuals comprising the Ambrosius Group were not bound by the arbitration provision contained in the Riverside operating agreement because they had signed that agreement only on behalf of Wisconsin Wealth and Little Bits, and not in their individual capacities. As a result, the court concluded their claim based on disproportionate amounts paid under entirely different agreements—namely, the commercial guaranties—need not be submitted to arbitration. Alternatively, the court held that, even if the operating agreement did bind the individual members of Riverside's member LLCs, the arbitration provision, by its plain language, did not apply to the Ambrosius Group's claim for equitable contribution.

¶9 Key Property and the Johnsons then sought summary judgment on the Ambrosius Group's claim for equitable contribution. Their argument was based entirely on their interpretation of ***Kafka v. Pope***, 186 Wis. 2d 472, 521 N.W.2d 174 (Ct. App. 1994), *aff'd*, 194 Wis. 2d 234, 533 N.W.2d 491 (1995). Key Property and the Johnsons argued they were not liable for the same debt as the Ambrosius Group because the circuit court had already determined there was no contractual relationship between the Johnsons and the individuals within the Ambrosius Group. In other words, the Johnsons believed the fact that they, personally, were not Riverside members meant they were not liable to equitably contribute to the Ambrosius Group's payments under the guaranties.

¶10 In response, the Ambrosius Group and their LLCs asserted that the circuit court's decision regarding arbitration was "not pertinent" to their claim for equitable contribution. They further argued that, for purposes of equitable contribution, the requisite relationship was established as a matter of law because all of the individuals were co-obligors of the same debt (i.e., the Riverside promissory note). The Ambrosius Group filed supporting affidavits from Ambrosius and a Johnson Bank vice president, and they requested that summary judgment be entered in their favor.

¶11 The circuit court granted summary judgment to the Ambrosius Group in the amount of $158,417.88. The court determined there was no issue of material fact that remained: it was undisputed the Johnsons had not paid anything on their commercial guaranties, and the only question was whether the Ambrosius Group was legally entitled to contribution. Because the guaranties were associated with the same debt and were unconditional, the court concluded all elements of equitable contribution were present and equity required the Johnsons to pay their share of the guaranty payments the Ambrosius Group had made. Notably, the judgment was awarded only to the individual members of the Ambrosius Group and only against the Johnsons in their individual capacity.

¶12 At the conclusion of the summary judgment hearing, the parties and the circuit court discussed the disposition of the case as to the entity parties. It appears further proceedings were contemplated regarding the entity parties, particularly concerning whether Wisconsin Wealth and Little Bits had potential remaining claims against Key Property and the Johnsons, and whether any such claims would have to be arbitrated. Because the judgment from which the Johnsons now appeal concerns only the individual parties, we confine our analysis to the issues concerning those parties.

DISCUSSION

¶13 The Johnsons first argue the circuit court erred by not requiring the parties to submit the Ambrosius Group's equitable contribution claim to arbitration under the Riverside operating agreement. A motion to compel arbitration "involves issues of contract interpretation and a determination of substantive arbitrability, questions of law we review de novo." ***Cirilli v. Country Ins. & Fin. Servs.***, 2009 WI App 167, ¶10, 322 Wis. 2d 238, 776 N.W.2d 272. Wisconsin has a clearly established public policy to enforce arbitration agreements, and there is a "strong presumption of arbitrability where the contract in question contains an arbitration clause." ***Id.***, ¶¶11, 14. However, as with all contract interpretation, the meaning and scope of the arbitration provision depends upon the parties' intent as expressed by the language of the agreement. ***Madison Teachers, Inc. v. Wisconsin Educ. Ass'n Council***, 2005 WI App 180, ¶13, 285 Wis. 2d 737, 703 N.W.2d 711; *see also* ***Estate of Thompson v. Jump River Elec. Co-op.***, 225 Wis. 2d 588, 598, 593 N.W.2d 901 (Ct. App. 1999). Moreover, background principles of state contract law apply to ascertain whether a contract between certain parties has been formed in the first instance. ***Arthur Andersen LLP v. Carlisle***, 556 U.S. 624, 630 (2009).

¶14 Thus, our review of a circuit court's decision on a motion to compel arbitration begins with the language of the relevant arbitration clause. ***Cirilli***, 322 Wis. 2d 238, ¶14. The arbitration clause in Riverside's operating agreement stated:

> Any dispute arising with respect to this Agreement, its making or validity, its interpretation, or its breach shall be settled by arbitration in Green Bay, Wisconsin, by a single arbitrator mutually agreed to by the disputing parties pursuant to the then obtaining rules of the American Arbitration Association. Such arbitration shall be the sole

> and exclusive remedy for such disputes except as otherwise provided in this Agreement. Any award rendered shall be final and conclusive upon the parties, and a judgment may be entered in any court having jurisdiction.

The Johnsons do not argue this lawsuit concerns the making, validity, or breach of the Riverside operating agreement. Rather, they appear to argue the Ambrosius Group's equitable contribution claim constitutes a "dispute arising with respect to" the Riverside operating agreement or its interpretation.

¶15 We conclude the Ambrosius Group's equitable contribution claim, which is grounded in the various personal guaranties executed by the individual guarantors, is not a dispute "arising with respect to" the Riverside operating agreement. As an initial matter, there is no basis to conclude the individuals comprising the Ambrosius Group are bound by the Riverside operating agreement, including its arbitration provision. The operating agreement's signature page shows the Ambrosius Group, as well as the Johnsons, signed that agreement not in their individual capacities, but rather in their agency capacities as members of the various member LLCs. The general rule of agency is that, unless otherwise agreed, "an authorized agent for a disclosed principal does not become a party to a contract and is thus not personally liable to the other contracting party." ***Theuerkauf v. Sutton***, 102 Wis. 2d 176, 187-88, 306 N.W.2d 651 (1981) (footnote omitted); *see also* ***DK Joint Venture 1 v. Weyand***, 649 F.3d 310, 314-15 (5th Cir. 2011) (reasoning that defendant corporations lacked the authority to bind their officers personally to an arbitration clause). And no party can be required to submit to arbitration any dispute that he or she has not agreed to submit. ***Cirilli***, 322 Wis. 2d 238, ¶12.

¶16 In their reply brief, the Johnsons appear to acknowledge that neither they nor the individuals within the Ambrosius Group are parties to the Riverside

operating agreement because none of the individuals signed the agreement in their individual capacities. However, the Johnsons assert they still may invoke the arbitration provision against the Ambrosius Group. The Johnsons first rely on ***Scheurer v. Fromm Family Foods LLC***, 202 F. Supp. 3d 1040 (W.D. Wis. 2016), *aff'd*, 863 F.3d 748 (7th Cir. 2017), for the proposition that "[a] nonparty may invoke an arbitration clause if the ordinary principles of state contract law permit it to do so." ***Id.*** at 1043 (citing ***Arthur Andersen***, 556 U.S. at 631). Here, the Johnsons argue both that they and the Ambrosius Group are third-party beneficiaries of the Riverside operating agreement, and that the Ambrosius Group's claim is "grounded in or intertwined with" other claims arising under the operating agreement.[3]

¶17 The Johnsons cannot prevail on their third-party beneficiary argument. As an initial matter, the Johnsons did not clearly argue to the circuit court that they were somehow third-party beneficiaries of the Riverside operating agreement and thereby entitled to enforce it against the Ambrosius Group. Thus, they could be deemed to have forfeited the issue for purposes of this appeal. *See* ***State v. Reese***, 2014 WI App 27, ¶14 n.2, 353 Wis. 2d 266, 844 N.W.2d 396

[3] Both ***Arthur Andersen LLP v. Carlisle***, 556 U.S. 624 (2009), and ***Scheurer v. Fromm Family Foods LLC***, 202 F. Supp. 3d 1040 (W.D. Wis. 2016), *aff'd*, 863 F.3d 748 (7th Cir. 2017), interpreted the Federal Arbitration Act to permit enforcement of written arbitration provisions against nonsignatories if the provision would be enforceable against (or for the benefit of) a third party under state contract law. ***Arthur Andersen***, 556 U.S. at 631; ***Scheurer***, 202 F. Supp. 3d at 1043. The parties have not argued whether the relevant Wisconsin statutes, WIS. STAT. §§ 788.01 and 788.02 (2015-16), should be (or have been) similarly interpreted. We assume without deciding that is the case for purposes of this decision.

All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

(observing this court will not address arguments raised for the first time on appeal).

¶18 In any event, we reject the third-party beneficiary argument as inadequately developed. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992). The Johnsons claim they were third-party beneficiaries of the Riverside operating agreement because both they and the Ambrosius Group were protected by the agreement's limited liability provision. While that may perhaps be true in a general sense, as we later explain, the limited liability provision is, by its plain terms, inapplicable to the Ambrosius Group's claim for equitable contribution. *See infra* ¶¶21-23. In all, the Johnsons fail to explain how, under the operating agreement, they were either "specifically intended by the contracting parties to benefit from the contract or … member[s] of the class the parties intended to benefit" for purposes of invoking the arbitration clause in this instance. *See* ***Milwaukee Area Tech. College v. Frontier Adjusters of Milwaukee***, 2008 WI App 76, ¶20, 312 Wis. 2d 360, 752 N.W.2d 396.

¶19 We turn now to the Johnsons' "intertwinement" theory. The Johnsons did make a type of "intertwinement" argument before the circuit court and in their brief-in-chief, although they did not clearly delineate it as an argument conceding the Johnsons' nonsignatory status. They argued that, in some way, the Ambrosius Group's claim was "part and parcel to the relationship of Key Property

to Riverside, triggering the application of the Operating Agreement."[4] However, under ***Scheurer*** and related authorities, the Johnsons must articulate an "intertwinement" theory that is based on some ordinary principle of state contract law. *See* ***Arthur Andersen***, 556 U.S. at 630-31; ***Scheurer***, 202 F. Supp. 3d at 1043. They make no real effort to do so. Rather, the Johnsons cite only a federal district court decision originating in Illinois, which held that the claims of chiropractic professionals should be arbitrated even as to defendant entities that were nonparties to certain provider agreements.[5] ***Pennsylvania Chiropractic Ass'n v. Blue Cross Blue Shield Ass'n***, 713 F. Supp. 2d 734, 745 (N.D. Ill. 2010). Even assuming the Johnsons' brief-in-chief sufficiently raised an "intertwinement" theory, their sole citation to ***Pennsylvania Chiropractic Association*** fails to demonstrate that such "intertwinement" is recognized as an ordinary principle of Wisconsin contract law, much less that it would apply under the facts of this case.

¶20 Besides the fact that neither the Johnsons nor the Ambrosius Group signed the Riverside operating agreement in their individual capacities, the nature of this lawsuit also counsels against applying the arbitration provision. The

[4] Elsewhere in their briefing, the Johnsons hint that the Ambrosius Group's individual claim should be arbitrated merely because the Riverside member LLCs are parties to this lawsuit. To the extent the Johnsons intended to raise such an argument, it is undeveloped and unsupported by citation to any legal authority holding that if arbitration is available for one party's claim in the lawsuit, all claims must be arbitrated. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992). Moreover, the judgment under review relates only to the individual parties. Given all of the foregoing, the issue of whether, and to what extent, claims involving the entities must be arbitrated is not relevant to our review.

[5] Notably, the defendants were a federation of entities that all worked together to administer health care plans. ***Pennsylvania Chiropractic Ass'n v. Blue Cross Blue Shield Ass'n***, 713 F. Supp. 2d 734, 738 (N.D. Ill. 2010). In holding that the plaintiffs' claims against the signatory defendants were intertwined with those against nonsignatory defendants, the circuit court applied an estoppel theory that was based on the plaintiffs' own arguments to the district court. ***Id.*** at 745. Here, the Ambrosius Group has not maintained that their individual claim is intertwined with the claims of the Riverside member organizations.

Ambrosius Group's claim is one for equitable contribution relating to contracts the individuals entered into that are wholly separate from the operating agreement. The claim does not, on its face, concern the operating agreement, its making, its validity, its interpretation, or its breach. The Johnsons' primary argument against this proposition is that the commercial guaranties were required for Riverside to consummate the business loan transaction, which was for Riverside's benefit. However, they cite no authority for the notion that any dispute relating to Riverside's general business or even to transactions for its benefit "arises" from the operating agreement and is therefore subject to arbitration.

¶21 The Johnsons further argue that the Ambrosius Group's claim is arbitrable because it implicates a "Limitation on Liability" provision in the Riverside operating agreement. That provision consists of a single sentence:

> Each Member shall look solely to the Company's assets for all distributions from the Company and the return of the Member's Capital Contribution to the Company and shall have no recourse (upon dissolution or otherwise) against the Managing Members, any other Members, or any of their affiliates.

The Johnsons' argument is simple: they believe they are entitled to the protection of the limited liability clause (and hence they may compel arbitration) because they are "affiliates" of Key Property, a Riverside member.

¶22 Ultimately, this is too simplistic and superficial a view of the limited liability provision, and one that ignores its plain language. The group to which the provision applies is Riverside's "members"—namely, Key Property, Wisconsin Wealth, and Little Bits. The provision requires that these entities look only to Riverside for their distributions or the return of their capital contributions, and it precludes them from pursuing claims regarding those matters against fellow

members or "any of their affiliates." Even if one views the Johnsons as "affiliates" of Key Property, that is of no help to the Johnsons here. The limited liability provision plainly does not protect the Johnsons against unrelated, individual claims that do not involve distributions from Riverside or the return of its members' capital contributions, especially claims by persons who are one level removed from Riverside's member entities.

¶23 Nonetheless, the Johnsons assert the Ambrosius Group's claim must be submitted to arbitration regardless of whether the limited liability provision's plain language supports their view. They assert that the claim is arbitrable merely because the Ambrosius Group does not agree with their interpretation. In the Johnsons' view, this transforms the dispute into one about the proper interpretation of the limited liability provision, which should be decided by the arbitrator, not the circuit court. To the contrary, we have done nothing more here than determine there is no reasonable construction of the limited liability provision or arbitration clause that would cover the Ambrosius Group's claim on its face. *See* ***Cirilli***, 322 Wis. 2d 238, ¶14. This is the permissible role of courts with respect to an arbitration clause. ***Id.***

¶24 Finally, the Johnsons find it significant that the Ambrosius Group sought to recover one-third of their guaranty payments, representing this to be the Johnsons' share. There were five guaranties, two of which were from the Johnsons, so their proportionate share of the guaranty payments appears to be forty percent; Sarah Felton did not enter into a guaranty. The Johnsons apparently believe the Ambrosius Group's damages theory reveals their "attempt to conceal the true nature of their claims, which necessarily implicate the Operating Agreement and therefore the arbitration clause."

¶25 We, too, are somewhat puzzled by the Ambrosius Group's damages calculation. Ultimately, however, a potentially erroneous damages theory does not transform a nonarbitrable claim into an arbitrable one.[6] At the end of the day, the Johnsons must show that the equitable contribution claim is a "dispute arising with respect to" the operating agreement. Their argument on this point is only the conclusory assertion that, because the Ambrosius Group is "necessarily seeking contribution proportionate to Key Property's interest in Riverside," this somehow "implicates the 'Limitation on Liability' clause in the Operating Agreement." But, as we have explained, that provision is inapplicable here. The Johnsons do not explain how the Ambrosius Group's apparently erroneous damages theory otherwise brings the claim here within the scope of that provision.

¶26 For the foregoing reasons, we conclude the circuit court properly denied the Johnsons' motion to compel arbitration of the Ambrosius Group's equitable contribution claim against the Johnsons individually. No member of the Ambrosius Group signed the Riverside operating agreement in their individual capacity, and, under black-letter agency law, this means they are not bound by that agreement. Further, we either will not entertain or reject the Johnsons' generally tardy theories regarding how the Ambrosius Group may be bound by the arbitration provision regardless of the capacity in which they signed the operating agreement. Finally, analyzing the plain language of the arbitration and "Limitation on Liability" provisions in the context of the Ambrosius Group's

[6] The Johnsons have not directly challenged the damages award. Moreover, the Ambrosius Group's apparently erroneous damages calculation inured to the Johnsons' benefit (one-third under their theory, as opposed to forty percent under the Johnsons').

equitable contribution claim confirms the conclusion that the claim is not arbitrable.

¶27 Next, the Johnsons claim the circuit court improperly granted the Ambrosius Group summary judgment. We independently review a grant of summary judgment, using the same methodology as the circuit court. ***Hardy v. Hoefferle***, 2007 WI App 264, ¶6, 306 Wis. 2d 513, 743 N.W.2d 843. We need not restate that well-established methodology here. *See* ***Tews v. NHI, LLC***, 2010 WI 137, ¶41, 330 Wis. 2d 389, 793 N.W.2d 860. Suffice it to say that a party is entitled to summary judgment if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2).

¶28 The parties agree the two appellate opinions in the ***Kafka*** case are outcome-determinative.[7] Our supreme court concluded equitable contribution has two elements: "(1) the parties must be liable for the same obligation; and (2) the party seeking contribution must have paid more than a fair share of the obligation." ***Kafka***, 194 Wis. 2d at 242-43. The Johnsons make clear in their reply brief that they no longer take issue with the circuit court's reliance on this statement of the law. Rather, they merely argue the court erred by not going further and determining whether the Riverside operating agreement's limited liability provision barred the Ambrosius Group from recovering against the Johnsons. We have already concluded this provision does not bar recovery on the Ambrosius Group's equitable contribution claim, either on its own or in

[7] The Johnsons do not argue there are disputed facts that made summary judgment inappropriate. Rather, their argument is entirely based on their interpretation of the applicable case law.

conjunction with the arbitration provision. Accordingly, the circuit court properly granted summary judgment in favor of the Ambrosius Group.

By the Court.—Judgment affirmed.

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