COURT OF APPEALS DECISION DATED AND FILED

September 3, 2008

David R. Schanker
Clerk of Court of Appeals

NOTICE

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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. 2007AP2342

Cir. Ct. No. 2006CV1907

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

NORMA J. HUNSAKER, INDIVIDUALLY, AND AS SPECIAL ADMINISTRATOR OF THE ESTATE OF CURTIS E. HUNSAKER,

PLAINTIFF,

MICHAEL O. LEAVITT, SECRETARY OF DEPARTMENT OF HEALTH & HUMAN SERVICES, BLUE CROSS BLUE SHIELD OF WISCONSIN AND JARDEN CORPORATION,

INVOLUNTARY-PLAINTIFFS,

V.

FEAP OF MILWAUKEE, LLC, FEAP CORPORATION AND JAMES P. MAZULLA,

DEFENDANTS,

COVENANT HEALTHCARE SYSTEM, INC., N/K/A WHEATON FRANCISCAN SERVICES, INC.,

DEFENDANT-THIRD-PARTY
PLAINTIFF-RESPONDENT,

V.

LILLIBRIDGE HEALTHCARE SERVICES, INC.,

THIRD-PARTY DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: ELSA C. LAMELAS, Judge. *Affirmed*.

Before Curley, P.J., Fine, J., and Daniel L. LaRocque, Reserve Judge

¶1 CURLEY, P.J. Lillibridge Healthcare Services, Inc. (Lillibridge) appeals from a final judgment entered in favor of Covenant Healthcare System, Inc. (Covenant), n/k/a Wheaton Franciscan Services, Inc., after the trial court granted Covenant's motion for summary judgment. On appeal, Lillibridge argues that the trial court erred in granting summary judgment to Covenant because: (1) the trial court incorrectly determined that the Management Agreement of February 12, 2001, required Lillibridge to indemnify Covenant for all claims asserted in the plaintiff's amended complaint; (2) the Management Agreement does not require indemnification for safe-place obligations of the owner of the premises; and (3) any of Lillibridge's obligations pursuant to the Management Agreement are covered by an insurance policy issued to Covenant.

¶2 We conclude that: the Management Agreement is not ambiguous and that, pursuant to its terms, Lillibridge was required to defend and indemnify Covenant for the plaintiff's claims in this matter; contrary to Lillibridge's contention, it is not being held responsible for the safe-place obligations of the owner of the premises; and Lillibridge is not afforded coverage for the plaintiff's claims under Covenant's insurance policy. Accordingly, we affirm the grant of summary judgment.

I. BACKGROUND.

¶3 This matter arises out of a wrongful death action filed by Norma Hunsaker, individually and as special administrator of the estate of Curtis Hunsaker, against FEAP of Milwaukee, LLC (FEAP) and Covenant, asserting negligence claims and violations of safe-place law. According to the complaint, on April 5, 2005, Curtis was injured while exiting through the front entrance of a medical office complex located at 2500 West Layton Avenue in Milwaukee, Wisconsin (the Property). It was alleged that the Property's "automatic swinging entrance door closed on him suddenly and without warning, knocking him down and causing him to forcefully strike his head on the floor." It was further alleged that Curtis ultimately died as a result of the injuries he sustained.

¶4 Among other things, the defendants were allegedly negligent because they "failed to ensure that the subject automatic swinging doors were properly maintained, inspected and/or repaired; failed to ensure that said doors were properly equipped with presence sensors and/or other safety devices to prevent said doors from suddenly closing on a person attempting to walk through said doors." The complaint also stated that the Property was a public building within the meaning of WIS. STAT. § 101.11 (2003-04) and that the defendants failed to make the Property "as safe as [its] nature reasonably permitted as required by the Safe Place Act, and were otherwise negligent."[1]

¶5 FEAP owned the Property, which Covenant leased. Prior to Curtis's accident, on February 12, 2001, representatives of Covenant and Lillibridge

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

entered into a Management Agreement, pursuant to which Lillibridge contracted to undertake "various responsibilities relating to the leasing, management, maintenance and operation" of Covenant's portfolio of properties, which consisted of fifty-eight owned facilities and thirty-one leased locations, including the Property at issue.

¶6 The Management Agreement provided, in pertinent part:

> **ARTICLE 2**
>
> **MANAGEMENT SERVICES TO BE PERFORMED**
>
> Section 2.01. … LHM [Lillibridge] agrees to perform the following management services pertaining to the Properties:
>
> ….
>
> (b) At Client's [Covenant's] expense, cause the Properties to be maintained in good condition and repair, and, in any event, in such condition as in Client's [Covenant's] judgment may be advisable, including but not limited to, cleaning, repairs and alterations, plumbing, carpentry, and decorating, subject only to the limitations contained in this Agreement. The Properties shall be maintained in a manner that enhances their appearance including, without limitation, interior and exterior cleaning, painting and decorating, maintenance of electrical, plumbing and other mechanical installations, including heating, ventilating and air conditioning systems, landscaping and parking area maintenance, roof and structural maintenance and implementation of such preventative maintenance programs as Client [Covenant] may direct. Advance approvals and consents shall be obtained by LHM [Lillibridge] from Client [Covenant] for any single repair or alteration exceeding Five Thousand Dollars ($5000). LHM [Lillibridge] acknowledges that Client's [Covenant's] approval of the annual operating budget specifically listing individual repairs or alterations exceeding Five Thousand Dollars ($5000) shall not constitute advance approval as to such items for purposes of the preceding sentence.…
>
> ….

> (l) Provide maintenance, leasing and administrative services for Properties leased by Client [Covenant] from third-party owners, and upon request by LHM [Lillibridge], audits of common area maintenance assessments, taxes and other charges.

Article 3 provides:

> **ARTICLE 3**
>
> **ASSESSMENT, CONSULTING AND COMPLIANCE SERVICES TO BE PERFORMED**
>
> Section 3.01. LHM [Lillibridge] shall provide the following assessment, consulting and compliance services pertaining to each of the Properties:
>
> ….
>
> (f) Insure that each of the Properties is in compliance with applicable laws, private restrictions, lease requirements and that any licenses, permits (including occupancy permits) and similar compliance issues are current and in full force and effect.

(Parenthetical in original.)

¶7 The Management Agreement also required each party to assume the defense and indemnification of the other under various circumstances:

> Section 7.01. As part of the consideration for execution of this Agreement, Client [Covenant] agrees:
>
> (a) Client [Covenant] shall defend, indemnify and hold LHM [Lillibridge], its officers, directors, agents, employees, affiliates, successors and assigns harmless from and against any and all damages, liabilities, losses, costs, attorneys' fees, judgments, expenses, lawsuits, actions, proceedings, claims and causes of action of any kind or nature, caused, directly or indirectly, by or arising from: 1) the acts or omissions (whether negligent or intentional) of Client [Covenant], Client's [Covenant's] employees, contractors, agents or invitees; 2) claims made against LHM [Lillibridge] by Client's [Covenant's] tenants related to LHM's [Lillibridge's] enforcement of leases; and 3) any breach of or default in the performance of any [of] Client's [Covenant's] obligations under the Agreement.

(b) Where Client [Covenant] has an obligation to defend any person or entity under this paragraph, Client [Covenant] shall defend that person or entity at Client's [Covenant's] sole cost and expense by counsel approved by LHM [Lillibridge].

….

Section 7.02. As part of the consideration for execution of this Agreement, LHM [Lillibridge] agrees:

(a) Subject to Section 6.03 hereof, LHM [Lillibridge] shall defend, indemnify and hold Client [Covenant], its officers, directors, agents, employees, affiliates, successors and assigns harmless from and against any and all damages, liabilities, losses, costs, attorneys' fees, judgments, expenses, lawsuits, actions, proceedings, claims and causes of action of any kind or nature caused, directly or indirectly, by or arising from: 1) the acts or omissions (whether negligent or intentional) of LHM [Lillibridge], LHM's [Lillibridge's] employees, contractors, agents or invitees and 2) any breach or default in the performance of any of LHM's [Lillibridge's] obligations under the Agreement.

(b) Where LHM [Lillibridge] has an obligation to defend any person or entity under this paragraph, LHM [Lillibridge] shall defend that person or entity at LHM's [Lillibridge's] sole cost and expense by counsel approved by Client [Covenant].[2]

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[2] Section 6.03 reads:

> Client [Covenant], on behalf of itself and its insurers, waives its right of recovery against LHM [Lillibridge] or LHM's [Lillibridge's] officers, directors and employees, for damages sustained by Client [Covenant] as a result of any damage to Client's [Covenant's] property only, but only to the extent that such property damage is covered (or would have been covered had the required insurance been maintained) by a property insurance policy carried or required to be carried by Client [Covenant] pursuant to Section 6.01 hereof, regardless of cause including negligence; and Client [Covenant] agrees that no party shall have any such right of recovery by way of subrogation or assignment.

(Underlining and parenthetical in original.)

(Footnote added; underlining and parentheticals as they appear in original.)

¶8 Based on the Management Agreement, Covenant tendered the matter to Lillibridge. Lillibridge's insurance carrier refused to accept Covenant's tender. Covenant retendered the matter, and Lillibridge's insurer again refused acceptance. Consequently, Covenant filed a third-party summons and complaint against Lillibridge seeking an order declaring that Lillibridge was obligated under the Management Agreement to pay for Covenant's defense, contribution, and/or indemnification in the lawsuit, along with an award of costs, disbursements, and attorney's fees. The plaintiff then amended her complaint to assert direct claims against Lillibridge. Lillibridge answered the pleadings denying liability and cross- and counter-claimed against Covenant for contribution and/or indemnification.

¶9 Covenant subsequently filed a motion seeking summary judgment on the allegations contained in its third-party complaint and a declaration that Lillibridge had a duty to defend and indemnify Covenant. In granting Covenant's motion, the trial court held that Lillibridge had a duty to indemnify Covenant on the plaintiff's negligence claim and for the safe-place claim to the extent that it "relates to an unsafe condition which would arise in a day-to-day operation Lillibridge has contracted to be financially liable [for] as provided in the agreement between Covenant and Lillibridge."[3] In addition, the trial court determined that the policy of insurance issued by Wheaton Franciscan Insurance

[3] The trial court stated that as to any safe-place violation related to an unsafe condition associated with the structure, Lillibridge would be financially responsible pursuant to the Management Agreement. However, to the extent that the alleged safe-place violation was structural, the trial court concluded that Covenant would be responsible because it had agreed to indemnify FEAP. This issue of whether the alleged defect with the door was structural or, instead, was a condition associated with the structure was not before the court during the summary judgment hearing.

Company to Covenant "does not change the fact that Lillibridge has a management agreement to perform certain duties."

¶10 Shortly after the trial court's grant of summary judgment, the plaintiff's claims were mediated and resolved by Covenant, which reserved its right to seek indemnification. Counsel for Lillibridge was present at the mediation; however, Lillibridge declined to contribute to the settlement. Lillibridge's refusal to contribute was apparently based on the trial court's comments during the summary judgment hearing related to differing safe-place obligations that would result depending on whether the defect was structural or was a defective condition associated with the structure.[4]

¶11 As a result, Covenant filed a motion for clarification on that issue. Following a hearing, the trial court clarified its earlier grant of summary judgment in favor of Covenant in an order, stating: "Any alleged unsafe condition of the Premises in this action, regardless of the reason for that alleged unsafe condition, is irrelevant to Lillibridge's duty to defendant [sic] and indemnify Covenant and has no effect on said duty." Accordingly, the trial court reiterated that Lillibridge was required to defend and indemnify Covenant for its costs and attorney's fees in the action. A final order and judgment was entered to this effect.

¶12 Lillibridge now appeals. Additional contractual language and insurance policy provisions are provided in the remainder of this opinion as needed.

[4] Lillibridge does not dispute "[t]he merit of the mediated settlement."

II. ANALYSIS.

¶13 Our review of a trial court's grant of summary judgment is *de novo*. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). First, we must determine whether the complaint states a claim for relief. ***Id.*** If the complaint states a claim and the answer joins issue, we must then determine whether the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits, if any, entitle a party to judgment as a matter of law. ***Id.*** Summary judgment must be entered if the evidentiary material demonstrates "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." WIS. STAT. § 802.08(2) (2005-06).

A. Management Agreement

¶14 The first issue presented on appeal is whether the Management Agreement requires that Lillibridge defend, hold harmless, and indemnify Covenant for the claims alleged. "The interpretation of a contract is a question of law that we review *de novo*." ***Teacher Ret. Sys. of Texas v. Badger XVI Ltd. P'ship***, 205 Wis. 2d 532, 555, 556 N.W.2d 415 (Ct. App. 1996). Our objective in interpreting contracts is to ascertain the parties' intent, giving terms their plain and ordinary meaning. ***Goldstein v. Lindner***, 2002 WI App 122, ¶12, 254 Wis. 2d 673, 648 N.W.2d 892. A contract provision is ambiguous when it is reasonably and fairly susceptible to more than one construction. ***Jones v. Jenkins***, 88 Wis. 2d 712, 722, 277 N.W.2d 815 (1979).

¶15 It is undisputed that the Management Agreement was in effect at the time of Curtis's accident and applies to the Property. Lillibridge has not renewed on appeal the issue of whether, as to the plaintiff's safe-place claim, it had a duty

to defend and indemnify Covenant, regardless of the reason for the alleged unsafe condition. Therefore, that issue is not before us.

1. Covenant's "retained control."

¶16 Lillibridge first argues that the Management Agreement does not support Covenant's central argument that Lillibridge was solely responsible for maintenance of the Property. Lillibridge cites Section 2.01(b) of the Management Agreement which, it contends, reflects Covenant's retained control by providing as follows: that maintenance duties were performed at Covenant's expense; that Covenant directed the implementation of preventative maintenance programs; that Lillibridge was under an obligation to secure for Covenant's benefit any discounts, commissions, or rebates available from purchases or service contracts; and that Lillibridge could not make emergency repairs unless Lillibridge was unable to notify Covenant prior to the time when the emergency repair needed to be made.

¶17 We fail to see how Lillibridge's argument that Covenant retained control of the Property renders ambiguous or somehow negates the other language in Section 2.01(b) of the Management Agreement, which clearly states that Lillibridge agreed to perform maintenance services pertaining to the Property, including among other things, "caus[ing] the Propert[y] to be maintained in good condition and repair…." In addition, under the terms of the Management Agreement, Lillibridge also agreed to "[i]nsure that each of the Properties is in compliance with applicable laws…."

¶18 Covenant asserts that Lillibridge was the party involved with the maintenance and repair of the doors in question, and Lillibridge, by failing to submit a reply brief, does not contest this. *See* ***Fischer v. Wisconsin Patients Comp. Fund***, 2002 WI App 192, ¶1 n.1, 256 Wis. 2d 848, 650 N.W.2d 75 ("An

argument asserted by a respondent on appeal and not disputed by the appellant in the reply brief is taken as admitted."). Lillibridge has not provided any legal authority to support its position that retained control on the part of Covenant somehow nullified Lillibridge's contractual obligations; as a result, this argument fails. *See* ***Young v. Young***, 124 Wis. 2d 306, 312, 369 N.W.2d 178 (Ct. App. 1985) (We have said previously that we will not consider an argument "without legal authority specifically supporting the relevant propositions."); *see also* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (appellate court "cannot serve as both advocate and judge" by developing arguments for the parties).

2. The Management Agreement's lack of an express reference to safe-place law.

¶19 Lillibridge next argues that Section 3.01(f) of the Management Agreement is ambiguous because it does not expressly reference safe-place law and that one reasonable construction of its terms "is that it concerns appropriate real estate and tenant leases and contracts" as opposed to the safe-place statute. If compliance with safe-place law was to fall within Lillibridge's duties under the Management Agreement, Lillibridge contends that a specific reference would have been contained within the scope of Article 2, which outlines the management services required of Lillibridge.

¶20 "Language in a contract is ambiguous only when it is 'reasonably or fairly susceptible of more than one construction.'" ***Teacher Ret. Sys.***, 205 Wis. 2d at 555 (citation omitted). Here, the language of the Management Agreement is clear, and thus, is not reasonably or fairly susceptible of more than one construction.

¶21 Section 3.01 states that Lillibridge is to insure compliance with applicable laws, which necessarily includes compliance with Wisconsin's safe-place law. As previously stated, this section provides:

> **ARTICLE 3**
>
> **ASSESSMENT, CONSULTING AND COMPLIANCE SERVICES TO BE PERFORMED**
>
> Section 3.01. LHM [Lillibridge] shall provide the following assessment, consulting and compliance services pertaining to each of the Properties:
>
> ….
>
> (f) Insure that each of the Properties is in compliance with applicable laws, private restrictions, lease requirements and that any licenses, permits (including occupancy permits) and similar compliance issues are current and in full force and effect.

(Parenthetical in original.)

¶22 Despite the clear language of Section 3.01, Lillibridge argues that it was not required to insure that the Property complied with safe-place law because no such reference was included in Article 2, which specifies the management services that Lillibridge was to perform pursuant to the Management Agreement. We agree with Covenant that Lillibridge's attempt to limit its contractual obligations under the Management Agreement to only those falling under Article 2 amounts to an unreasonable reading of the contract.

¶23 We are not convinced that a reasonable construction of Section 3.01(f) is to limit its terms to real estate and tenant leases and contracts. If Lillibridge wanted to limit its contractual obligations, it should have included them in the contract; it is not this court's job to rewrite the Management Agreement to limit Lillibridge's contractual obligations. *Cf.* ***Town of Neenah Sanitary Dist.***

No. 2 v. City of Neenah, 2002 WI App 155, ¶15, 256 Wis. 2d 296, 647 N.W.2d 913 ("declin[ing] to rewrite the parties' agreement to provide something that the District failed to include"). Article 3 requires Lillibridge to "[i]nsure … compliance with applicable laws," which necessarily includes safe-place law. These terms cannot be read out of the Management Agreement; to the contrary, they are read in relation to the contract as a whole. *See* ***Tempelis v. Aetna Cas. & Sur. Co.***, 169 Wis. 2d 1, 9, 485 N.W.2d 217 (1992) ("The general rule as to construction of contracts is that the meaning of particular provisions in the contract is to be ascertained with reference to the contract as a whole."). Because the contractual language is clear, we apply it as it is written and conclude that Lillibridge's obligations under Section 3.01(f) encompass compliance with safe-place law. *See* ***Yee v. Giuffre***, 176 Wis. 2d 189, 192-93, 499 N.W.2d 926 (Ct. App. 1993) ("Where an agreement contains unambiguous contractual language, that language must be enforced as written.").

3. Whether the indemnification clause in the Management Agreement requires Covenant to indemnify Lillibridge.

¶24 According to Lillibridge, Covenant's claim for indemnification must be examined in light of the indemnification provision benefitting Lillibridge, which is contained in the Management Agreement. After examining the indemnification provision Lillibridge relies on, i.e., Section 7.01(a), we conclude that it does not apply under the facts of this case.

¶25 The provision Lillibridge relies on reads as follows:

> Section 7.01. As part of the consideration for execution of this Agreement, Client [Covenant] agrees:
>
> (a) Client [Covenant] shall defend, indemnify and hold LHM [Lillibridge], its officers, directors, agents, employees, affiliates, successors and assigns harmless from and against any and all damages, liabilities, losses, costs,

> attorneys' fees, judgments, expenses, lawsuits, actions, proceedings, claims and causes of action of any kind or nature, caused, directly or indirectly, by or arising from: 1) the acts or omissions (whether negligent or intentional) of Client [Covenant], Client's [Covenant's] employees, contractors, agents or invitees; 2) claims made against LHM [Lillibridge] by Client's [Covenant's] tenants related to LHM's [Lillibridge's] enforcement of leases; and 3) any breach of or default in the performance of any Client's obligations under the Agreement.

(Parenthetical in original.)

¶26 In addition to the language of Section 7.01(a), to further support this argument, Lillibridge relies on language in the preamble to the Management Agreement to the following effect: "WHEREAS, Client [Covenant] desires LHM [Lillibridge] to act as its agent in carrying out various responsibilities relating to the leasing, management, maintenance and operation of the Properties, and LHM [Lillibridge] is willing to do so on the terms and conditions set forth herein…." According to Lillibridge, it was because of its status as Covenant's agent that the indemnification clause requiring Covenant to indemnify it was included in the Management Agreement. If Covenant had no responsibility for management or maintenance at the Property, Lillibridge asserts there would have been no need for indemnification language requiring Covenant to indemnify Lillibridge. Even if we were to agree that Lillibridge was Covenant's agent, Covenant would not be required to indemnify Lillibridge for Lillibridge's negligence because there is no language to this effect in the Management Agreement. *See* ***Spivey v. Great Atl. & Pac. Tea Co.***, 79 Wis. 2d 58, 63, 255 N.W.2d 469 (1977) ("The general rule accepted in this state and elsewhere is that an indemnification agreement will not be construed to cover an indemnitee for his own negligent acts absent a specific and express statement in the agreement to that effect.").

¶27 Moreover, although Lillibridge states in its brief that it was designated as Covenant's agent in the preamble to the Management Agreement, no further explanation or analysis is offered as to what implications an agency relationship might have with respect to the terms of the Management Agreement. To the extent that this can be construed as an argument, we consider it undeveloped and do not need to consider it further. *See* ***Barakat v. DHSS***, 191 Wis. 2d 769, 786, 530 N.W.2d 392 (Ct. App. 1995) (reviewing court need not address "amorphous and insufficiently developed" arguments). We do, however, address the issue insofar as we agree with Covenant that the language found in Section 7.05 of the Management Agreement, which specifically provides, "[n]othing contained in this Agreement, or in the relationship of Client [Covenant] and LHM [Lillibridge], shall be deemed to constitute a partnership, employer-employee joint venture, or any other relationship between them, except that of client and independent contractor," trumps any general language, including that found in the preamble, to the contrary. *See* ***Thomsen-Abbott Constr. Co. v. City of Wausau***, 9 Wis. 2d 225, 234, 100 N.W.2d 921 (1960) (specific contract provisions take precedence over general provisions). Therefore, Lillibridge's references to a purported agency relationship also do not support its argument that Covenant is required to indemnify it.

¶28 In terms of interpreting Section 7.01(a), although our review is *de novo*, we still benefit from the trial court's analysis. *See* ***Bass v. Ambrosius***, 185 Wis. 2d 879, 883 n. 3, 520 N.W.2d 625 (Ct. App. 1994) (noting that although "review is *de novo*, the rationale underlying a trial court's decision on summary judgment is often extremely helpful to our analysis"). In ruling on Covenant's motion for summary judgment, the trial court analyzed the two indemnification provisions in the Management Agreement, stating:

> In Section 7.01 Covenant has provided reassurance that for actions for which Covenant should be held liable, Covenant's employees' actions, actions relating to enforcement of leases with Covenant's tenants, Covenant will indemnify Lillibridge.
>
> An example of this would be if a fire were started by Covenant's employee or Covenant's subcontractor, Covenant would be responsible for that.
>
> This section does not overlap Section 7.02, the clause that provides that Lillibridge will indemnify Covenant for actions that are related to actions or omission[s] or breaches of Lillibridge's duties.
>
> Article 2 of the management agreement provides and explains the responsibilities of Lillibridge under the contract which includes the operation and maintenance of Covenant's properties. Section 7.02 provides that Lillibridge will indemnify Covenant for actions that relate to Lillibridge's acts, omissions, or obligations, such as maintaining and operating Covenant's properties.
>
> These two provisions protect each company and do not overlap. Covenant is protected from Lillibridge's negligent actions in relation to managing the property, and Covenant has provided and agreed that any action that relates to actions taken by Covenant will protect Lillibridge.
>
> Lillibridge was required to operate, repair, and maintain Covenant's properties and this property in question. Any suit arising out of Lillibridge's failure to do this would be covered by Lillibridge. Lillibridge would have to indemnify Covenant.

¶29 We agree with the trial court's reading of the indemnification provisions and conclude that Covenant's obligation to indemnify Lillibridge is not triggered under the clear language of the Management Agreement. The plaintiff's claims do not relate to acts or omissions of Covenant, Covenant's employees, contractors, agents, or invitees; claims made against Lillibridge by Covenant's tenants related to Lillibridge's enforcement of leases; or any breach of or default in Covenant's performance of its obligations under the Management Agreement.

Rather, the plaintiff's claims involve a failure to maintain and repair the Property, which was Lillibridge's responsibility under the terms of the Management Agreement. Accordingly, we conclude that Section 7.01(a) does not require Covenant to indemnify Lillibridge under the circumstances presented.

B. FEAP's safe-place duties.

¶30 Lillibridge next argues that the indemnity provisions relied upon by Covenant do not support the conclusion that the obligations Covenant assumed pursuant to its lease with FEAP were to become the obligations of Lillibridge under the Management Agreement. However, this case is not about Covenant's obligations under its agreement with FEAP; it is about Lillibridge's contractual obligations to Covenant.

¶31 Lillibridge correctly points out that when a party is subject to safe-place law, the duty imposed is non-delegable. *See* ***Barry v. Employers Mut. Cas. Co.***, 2001 WI 101, ¶42, 245 Wis. 2d 560, 630 N.W.2d 517 ("The duties imposed on employers and property owners under the safe place statute are non-delegable."). While this is certainly true, as Lillibridge acknowledges in its brief, contractual liability can nevertheless ensue. Wisconsin case law is clear on this point:

> [T]he duty of an owner or employer to keep the premises safe under both the common law and the safe place statute had nothing to do with his right to financial recoupment from another party either by operation of law or by contract. All that is meant by the statement that duties under the safe place statute are nondelegable is that the person who has that duty cannot assert that another to whom he has allegedly delegated the duty is to be substituted as the primary defendant in his stead for a violation of safe place provisions.

Dykstra v. Arthur G. McKee & Co., 100 Wis. 2d 120, 132, 301 N.W.2d 201 (1981).

¶32 Lillibridge does not point to any evidence in the record that would indicate that FEAP sought to substitute Lillibridge in its stead. *See* ***id.*** Consequently, we agree with Covenant's statements to the following effect:

> Lillibridge confuses being relieved of the statutory Safe Place duty, which cannot take place and is not taking place here, with the ability through contract to be financially made whole by another party, which is precisely the situation at bar. The ability of Covenant to hold Lillibridge to its Agreement for management, repair and maintenance of the premises, and the corresponding claims related to those obligations, does not hinge on any perceived rights or obligations of FEAP.

¶33 Lillibridge goes on to argue that if FEAP had a right of entry or control at the Property, FEAP was unable to delegate its safe-place duties. Again, this case is not about FEAP being relieved of its safe-place duties; instead, this case is about the contractual obligations between Lillibridge and Covenant. Moreover, for a second time, Lillibridge has failed to provide legal authority to support its argument that it is somehow relieved of its contractual duty to indemnify another party if it did not have sole control over the Property. *See* ***Young***, 124 Wis. 2d at 312. Thus, whether FEAP had a right of entry or control at the Property is of no consequence to Lillibridge's obligations under the Management Agreement.

¶34 Furthermore, Section 2.01(l) of the Management Agreement requires Lillibridge to "*[p]rovide maintenance*, leasing and administrative services *for Properties leased by Client [Covenant] from third-party owners*…." (Emphasis added.) FEAP is the "third-party owner" of the Property and, as such, this provision is directly applicable. Lillibridge is not being held responsible for

Covenant's obligations to FEAP; it is merely being held responsible for its own contractual obligations to Covenant.

C. Insurance Policy.

¶35 According to Lillibridge, any obligations it has pursuant to the Management Agreement are covered by the policy of insurance issued by Wheaton Franciscan Insurance Company to Covenant. The parties do not dispute that the insurance policy was in full force and effect on the date of Curtis's accident.

¶36 Insurance policies are contracts and are interpreted as such. *See* ***State Farm Mut. Auto. Ins. Co. v. Bailey***, 2007 WI 90, ¶22, 302 Wis. 2d 409, 734 N.W.2d 386. Accordingly, as with the Management Agreement, our review is *de novo*. ***American Family Mut. Ins. Co. v. American Girl, Inc.***, 2004 WI 2, ¶23, 268 Wis. 2d 16, 673 N.W.2d 65.

¶37 "Insurance policies are construed as they would be understood by a reasonable person in the position of the insured," but will not be interpreted to provide coverage for risks that the insurer did not underwrite and for which it has not collected a premium. ***Id.*** The interpretation of an insurance contract requires this court to take three steps. We must first determine whether the policy's insuring agreement makes an initial grant of coverage by examining the facts of the insured's claim; "[i]f it is clear that the policy was not intended to cover the claim asserted, the analysis ends there." ***Id.***, ¶24. If the initial grant of coverage is triggered by the claim, this court must then look to the policy's exclusions and determine whether any preclude coverage. ***Id.*** Should an exclusion apply, we lastly look for an exception to that exclusion that would reinstate coverage. ***Id.***

¶38 We turn to the pertinent policy language. Covenant is a named insured under the policy.[5] Also included as a "named insured" under the policy's terms is "[a]ny person (other than an employee of a named insured or organization) while acting as real estate manager, for a named insured." (Parenthetical in original.)

¶39 Lillibridge argues that because it is a real estate manager as defined in the policy of insurance, it is afforded coverage. Although we agree that the policy covers Lillibridge as an insured, we conclude coverage is nevertheless precluded by an exclusion in the policy. The exclusion provides:

> **II. <u>EXCLUSIONS</u>**
>
> This coverage does not apply:
>
> ….
>
> n. **Bodily injury** or **property damage** for which **named insureds** are obligated to pay damages by reason of the assumption of liability in a contract or agreement.

(Bolding in original.)

¶40 Based on this exclusion, Covenant argues "Lillibridge assumed by contract – i.e., the Agreement – certain obligations to pay damages for the bodily injury of Mr. Hunsaker. This exclusion therefore applies." Because Lillibridge did not submit a reply brief, it concedes that the exclusionary language applies to preclude coverage. *See* ***Fischer***, 256 Wis. 2d 848, ¶1 n.1. Based on this concession, we need not address the other arguments Covenant makes to support the judgment.

[5] Identified as Wheaton Franciscan Services, Inc.

¶41 For the foregoing reasons, we affirm the trial court's grant of summary judgment in favor of Covenant.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.