

STATE OF MINNESOTA

IN COURT OF APPEALS

Appellate Court Case No. A10-913

EEP Workers' Compensation Fund,

Plaintiff/Respondent,

vs.

Fun & Sun, Inc., and Carol A. Wagner,

Defendant/Appellant.

APPELLANT'S BRIEF AND ADDENDUM

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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LEGAL ISSUES

- I. **There are two distinct types of Worker's Compensation self-insurance in Minnesota: individual self-insurance and group self-insurance. In group self-insurance, the group pays claims as a group from its fund. Plaintiff is clearly a group self-insurance fund, and cannot both charge a "premium" to the group members and also charge a group member separately for a claim by plaintiff's employee.**

Trial Court held: The court did not discuss the major distinction between individual self-insurance and a group self-insurance fund, holding that plaintiff could charge defendant separately for its employee's claim, rather than paying the claim from the group fund, despite always having paid claims from the group fund before.

- II. **When a Worker's Compensation Group Fund has always operated as a group fund charging a premium based on payroll hours and classifications, pooling losses, and paying them out of members' premiums, it cannot retroactively charge a withdrawn former member separately for a claim by one of the member's former employees, as if it were not a group fund.**

Trial Court held: The Court granted summary judgment to plaintiff, finding that the fund was entitled to contractual indemnity in the amount of \$60,487.

- III. **When a member withdraws from the Worker's Compensation Fund and has fulfilled all of its obligations to the Fund, consistent with the Fund's practices during the time of membership, and where the member was never notified that it would years later be considered to have been separately liable for claims paid, nothing in the Fund's By-laws allows it to make an assessment for a claim over five years old against the individual member for the first time two years after the member has withdrawn as a member, sold its assets, and the buyer has replaced it as a member of the Fund. Any such claim is properly payable from the Fund, not by the former member.**

Trial Court held: Summary judgment was granted in favor of the fund, and the individual member rather than the fund was required to pay the claim.

STATEMENT OF CASE

This case was heard in Douglas County District Court, the Honorable David R. Battey presiding. Plaintiff was granted summary judgment against Fun & Sun, Inc. The case then proceeded against Carol A. Wagner, the remaining defendant, on the theory that she had statutory personal liability as a shareholder of Fun & Sun, Inc. Wagner was granted summary judgment dismissing the claims against her personally.

STATEMENT OF FACTS

a. **Group self-insurance compared to individual self-insurance**

There are two distinct types of Worker's Compensation self-insurance permitted under Minnesota law. They are not remotely similar. Individual self-insurance is available to large corporations that can fund and pay their own claims. *See, ADD-14-21* (Minn.R. 2780.1100-1800). There is no evidence that individual self-insurance is involved in this case.

EEP, on the other hand, was admittedly formed for the purpose of operating, and did operate, as the other distinct type of self-insurance; a group self-insured program. *See, AA-16* (Affidavit of Leonard Binstock, Ex. T).

A group self-insurer is required to maintain a "common claims fund." *ADD-37* (Minn.R. 2780.4100). When a member pays premiums to the group, a portion goes into the "common claims fund." *Id.* A portion of the assets of the common claims fund is set aside as an actuarial reserve toward "future contingent liabilities," e.g., a reserve is established for potential future payments on a claim. *ADD-40* (Minn.R. 2780.4400).

Compensation benefits, paid pursuant to claims, are paid out of the revolving fund. *See AA-22, #5 (Aff. Binstock).*

The Fund may have a "Fund Surplus" in years when the fund revenues exceed fund obligations. *See AA-17, #6 (By-Laws Art. III.6)* In that case, the fund may choose to distribute the Fund Surplus. *See AA-23 (By-laws Art. IX).*

The Fund may also have a deficit. In that case, the Fund must "first retro-rate *all* members, of the deficit *fund* year...", and then declare an assessment "on a pro-rata basis." *See AA-24 (By-laws, Art. X) (emphasis added).* Or instead of an assessment, the Board may simply make a transfer from a "fund surplus" from a prior year. *See AA-24 (By-Laws, Art. X).*

b. F & S joined EEP in 1997 and annually paid premiums to the fund

Carol Wagner (now Carole Hanish) owned a construction company called F & S Concrete Paving, Inc.¹ *See AA-50, ¶2 (Affidavit of Carole Hanish).* Before his death, her late husband ran the business. Ms. Hanish was not involved in the day-to-day operations of the business. *See AA-50, ¶3.*

In 1997, F & S was approached by an agent for a Workers' Compensation group self-insurance fund called EEP, urging F & S to switch from their commercial Workers' Compensation insurance to EEP group insurance. *See AA-51, ¶5 (Aff. Hanish).*

The documents provided by EEP as part of the sales pitch to encourage F & S to join EEP state that one of the benefits of EEP is that it offers a lower premium than

¹ Because the name was sold along with the company in 2003, and the original corporation had to concurrently change its name to "Fun & Sun, Inc", the corporation is referred to throughout for convenience as "F & S."

traditional commercial insurance. *See AA-57* (Aff. Hanish, Ex. A). Throughout F & S's relationship with EEP, F & S always paid EEP "premiums." *See AA-143* (Affidavit of Cheryle Nibbe, Ex. W).

There was never any suggestion, no matter how remote, that F & S did not have insurance or that it would somehow be responsible to separately pay its own losses, rather than have the losses paid by the group fund. *See AA-52, ¶9* (Aff. Hanish). EEP always operated like a cooperative, or like commercial insurance, whereby the members of EEP shared in the claims made by members' employees and shared in the administrative expenses of running EEP. *See AA-52, ¶¶9, 11* (Aff. Hanish).

All documents and evidence confirmed F&S's assumption that its premiums were being used to spread around and pay claims incurred by the employees of all 20 companies in the group, just as any other insurance would work. There was never any indication that F & S was individually responsible to pay the claims made by its employees. *See AA-56, ¶32* (Aff. Hanish). EEP provided reinsurance coverage for its members. EEP always billed F & S for "premiums" based on payroll hours; never for "claims" or anything related to payment of claims. *See AA-59* (Aff. Hanish).

The members were the owners and the group paid out dividends if there was a fund surplus and required the members to pay money in if there was a fund deficit. *See AA-23 - 25* (By-laws IX, X).

EEP had reinsurance, and the reinsurance policy names "EEP Workers Compensation Fund" as the insured, not the individual members of EEP. *See AA-45* (Affidavit of Chad R. Felstul, Ex. B).

After F & S joined, it would receive annual billings for "premiums" and it would promptly pay the billed premiums. *See AA-68* (Aff. Hanish, Ex. B). Any time there were claims made by employees of F & S, EEP would handle the claims. F & S was never billed for claims paid. *See AA-52, ¶10* (Aff. Hanish).

c. F & S withdrew from the fund in April 2003, because the business was sold, at a time when there was no fund deficit.

Ms. Hanish sold the assets of F & S, along with the name, in April of 2003. *See AA-50, ¶4; AA-55, ¶29* (Aff. Hanish). Ms. Hanish was not aware of any open claim at the time the assets were sold, nor would she have been concerned about it if there were, because claims had never been billed to F & S. *See AA-55, ¶29* (Aff. Hanish). Because EEP did not inform F & S about any open claim, or about the possibility of F & S being liable indefinitely, at the time of the sale, F & S was deprived of any ability to deal with the issue. *See AA-55, ¶30* (Aff. Hanish).

In 1999, an employee of F & S named Daniel Wittmer had had a fairly serious claim, and as always, EEP took care of handling and paying the claim. *See AA-54, ¶17* (Aff. Hanish). Nothing was being paid on this claim in 2003 when F & S withdrew from EEP. *See AA-105* (Aff. Nibbe, Ex. G). Prior to F & S withdrawing from EEP, the last payment made on behalf of Wittmer had been on January 17, 2001. *See AA-105*. (Aff. Nibbe, Ex. G) Apparently, EEP resumed paying Wittmer several years later, with the first additional payment after Fun & Sun, Inc. withdrew from EEP being on December 8, 2003. *See AA-105*. (Aff. Nibbe, Ex. G)

d. Premiums were based on applying experience factors to the amount of payroll, and were then audited and adjusted based on payroll times premium.

For the six years that it was a member of EEP, F & S always received a bill for the premium year, and F & S would pay the premium. *See AA-51, ¶8 (Aff. Hanish)*. The billings always showed the same calculations that F & S had always seen from its previous Workers' Compensation insurance policies, and said nothing about claims incurred. *See AA-51, ¶8 (Aff. Hanish)*. It worked like this: F & S would report the dollar amount of its payroll to the insurance company every year, and the premium would be set based on the dollar amount of its payroll multiplied by a factor that took into account how hazardous the particular jobs were and what F & S's loss experience had been in the past. *See AA-51, ¶8 (Aff. Hanish)*. For example, if payroll was \$250,000 and the premium was 10 percent of payroll, the premium would be \$25,000. *See AA-51, ¶8 (Aff. Hanish)*. All of the billings ever provided F & S before 2005 followed this pattern. *See AA-68 (Aff. Hanish, Ex. B)*.

The other annual adjustment to the premium was that EEP or its agent would "audit" F & S's payroll records each year and adjust the Workers' Compensation premium according to the actual payroll worked in the prior year. *See AA-51, ¶8 (Aff. Hanish)*. For example, if the payroll for F & S had actually been \$253,000 instead of a projected \$250,000, then F & S would be billed for the additional premium on the additional \$3,000 of payroll. *See AA-51, ¶8; AA-71-77 (Aff. Hanish)*. This is also exactly how it had been done when F & S had commercial insurance. *See AA-51, ¶8 (Aff. Hanish)*.

Never do any of the annual renewal invoices or any of the audit documents ever mention claims or losses in any way. *See AA-68* (Aff. Hanish, Ex. B).

- e. **In 2005, EEP for the first time claimed there was a "negative fund balance."**

After her husband died, Ms. Hanish sold the company. *See AA-50*, ¶4; *AA-52*, ¶11 (Aff. Hanish). Because she was no longer in business, Ms. Hanish cancelled the insurance coverage for the company and withdrew from EEP. *See AA-52*, ¶11 (Aff. Hanish).

F & S withdrew its membership in 2003. F & S's withdrawal was accepted unconditionally by EEP. Ms. Hanish received several letters from EEP stating that F & S had not paid premium adjustments based on payroll audits the years prior to 2003. These audits allegedly found that F & S employees worked more hours than initially thought. *See AA-52*, ¶13 (Aff. Hanish). These letters provided no foreshadowing whatsoever that EEP would later claim F & S was individually responsible for claims paid. *See AA-52*, ¶13 (Aff. Hanish).

Ms. Hanish was completely and utterly stunned by a letter she received from EEP in August 2005, claiming that F & S owed EEP \$58,224.00 as the result of a "negative fund balance as of June 30, 2005", two years after withdrawal. *See AA-53*, ¶14 (Aff. Hanish). This was the first that Ms. Hanish learned that F & S had an alleged "negative fund balance." *See AA-53*, ¶14 (Aff. Hanish). In fact, EEP admits that there was no deficit at the time of withdrawal. *See AA-47*, ¶15 (Aff. Felstul, Ex. C).

Ms. Hanish had no clue why F & S would owe EEP \$58,224.00 more than two years after F & S had withdrawn from EEP and had paid its final premium. *See AA-53, ¶15* (Aff. Hanish). Ms. Hanish frantically checked her records to see if there was any type of disclosure or explanation as to why F & S would owe EEP for claims paid after withdrawal, and apparently have been left uninsured for them. *See AA-53, ¶16* (Aff. Hanish). She found no such disclosure or explanation. *See AA-54, ¶18* (Aff. Hanish). Ms. Hanish was amazed to learn that EEP was apparently claiming that although F & S withdrew from EEP and no longer had insurance with EEP, nevertheless F & S was somehow allegedly responsible for claims paid after withdrawal, and was left totally uninsured as to such claims. *See AA-53, ¶16* (Aff. Hanish).

- f. Also in 2005, EEP notified F & S that it had been paying on a claim that it believed to be the sole responsibility of EEP, not of the fund.**

F & S also learned in 2005 that EEP had apparently continued to pay claims on behalf of Mr. Wittmer after F & S withdrew from EEP. *See AA-54, ¶20* (Aff. Hanish). She also learned that EEP was apparently taking the position that it could continue to pay Workers' Compensation benefits indefinitely into the future, without informing her or F & S, and EEP would simply pay the benefits, bill them back to F & S, and somehow expect F & S to pay forever. *See AA-53, ¶16* (Aff. Hanish). After F & S withdrew, EEP allegedly paid out approximately \$80,000 in additional benefits to and on behalf of Mr. Wittmer. *See AA-105* (Aff. Nibbe, Ex. G).

For over two years, EEP did not inform Ms. Hanish that Mr. Wittmer's claim was still open when F & S withdrew from EEP, despite the fact that EEP knew that F & S

changed ownership. *See AA-54, ¶18 (Aff. Hanish); AA-44 (Aff. Felstul, Ex. A).* Ms. Hanish received no notification from EEP that it had continued to pay Mr. Wittmer. *See AA-54, ¶20 (Aff. Hanish).* As EEP continued to pay benefits to Mr. Wittmer after F & S's withdrawal, EEP did not give Ms. Hanish an opportunity to challenge the claim, intervene or take any other action on the claim. *See AA-55, ¶28 (Aff. Hanish).*

Ms. Hanish had no idea that EEP would claim that it could continue to pay benefits to an employee of a member after that member's withdrawal, without informing that former member, without providing that member with any kind of notice that the benefits were being paid or that a claim was open, and without discussing the claim with the member. *See AA-54, ¶20 (Aff. Hanish).* Prior to 2005, there was never any suggestion that F & S would ever owe anything different than its annually adjusted audit premium. *See AA-54, ¶23 (Aff. Hanish).*

EEP admits that at the time F & S withdrew from EEP, there was no negative fund balance. *See AA-47, ¶15 (Aff. Felstul, Ex. C).* F & S was never told that it would be individually liable or responsible for monies paid on behalf of claims after F & S withdrew from EEP. *See AA-56, ¶32 (Aff. Hanish).*

- g. EEP now takes the position that it is not the fund that pays claims, but instead each individual group member is separately responsible for its own claims.**

When it brought this lawsuit, EEP undertook the strange exercise of going back through all the claims ever paid by the fund and comparing them with premiums paid by

F & S. Most of these claims were paid and closed many years before F & S left the fund.²

Yet, EEP has now aggregated all claims and takes the position that F & S separately is liable for any amounts payable to any of its former employees, apparently forever, including all past claims, and including all future claims still unknown, and apparently in an unlimited amount; as if no group insurance fund ever existed.

The Indemnity Agreement signed by F & S directly contradicts EEP's contention that F & S is individually liable for the claims paid to its employees. The Indemnity Agreement provides that a member is "jointly and severally liable for *all* claims and expenses of *all* the members of EEP Worker's Compensation arising in any fund year" in which the member is part of EEP. Presumably all the members have signed identical agreements. *See AA-6. (emphasis added)* (Aff. Binstock, Ex. R) There is nothing in the Indemnity Agreement that states that individual members are individually responsible for claims paid on behalf of their employees.

² For example:

Claim Number 022419053 was closed by EEP on September 22, 1998, more than nine years before the summons and complaint was served on Fun & Sun, Inc. and Carole Hanish. The last date that any payment was made on this claim was on August 13, 1998 for expenses incurred on July 30, 1998. The total paid on this claim were \$11,017.64. *See AA-103B-103C* (Aff. Nibbe, Ex. B).

Claim Number 022419056 was closed by EEP on December 28, 1998, close to nine years before the summons and complaint was served on Fun & Sun, Inc. and Carole Hanish. The last date that any payment was made on behalf of this claim was on December 16, 1998 for expenses incurred on September 5, 1998. The total monies paid on behalf of this claim were \$1,097.62. *See AA-103H-103I* (Aff. Nibbe, Ex. E).

In assessing deficits, pursuant to Article X of the By-laws, individual members of EEP are *not* assessed based on claims paid to the individual member's employees. Instead, assessments are based on a pro-rata basis of premiums paid by all the members. *See AA-16 through 27.* The By-laws go on to state that:

"[i]n a deficit year, *all* members with aggregate negative balances will be assessed on a *pro rata of premium basis*, not to exceed 150% of annual premium."³ *See AA-25. (emphasis added)* (Aff. Binstock, Ex. T)

Assessments are on a premium paid basis, not on a claims paid basis on behalf of individual members.

ARGUMENT

A. Standard of review

On appeal from summary judgment, the reviewing court makes two determinations:

- (1) whether there are any genuine issues of material fact;
- (2) whether the District Court erred in its application of the law.

The reviewing court must view the evidence in the light most favorable to the party against whom judgment was granted. *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn.1993). Any doubt about the existence of an issue of material fact should be resolved in the appellant's favor. *Rathbun v. W. T. Grant Co.*, 219 N.W.2d 641 (1974).

³ Even assuming for argument that F&S did owe EEP on account of a deficit, its liability would have been limited to 150% of its 1999 premium, which would have been only \$23,728.

- I. **There are two distinct types of Worker's Compensation self-insurance in Minnesota: individual self-insurance and group self-insurance. In group self-insurance, the group pays claims as a group from its fund. Plaintiff is clearly a group self-insurance fund, and cannot both charge a "premium" to the group members and also charge a group member separately for a claim by plaintiff's employee.**

EEP always operated as a group fund, sharing the risk and paying claims out of its statutory fund during the entire time F & S was a member, and yet it now bizarrely claims that F & S should have been treated as if it were an individual self-insured, not a member of a group; all despite the clear preamble to the EEP By-laws proclaiming that it is a group, and despite clearly having operated as a group at all times.

- a. **How a group self-insured fund operates:**

EEP is a group fund. There is no dispute about that. Nor can there be any dispute about any of these:

1. A group fund is in many ways like a commercial insurance policy, with a major difference being is that it is member-owned and controlled.
2. Members pay a premium and a fund is set aside to pay claims. A portion of the premium goes to pay administrative expenses of the group and the balance goes into the fund to pay claims.
3. All of the group's claims are pooled and paid out of the group fund, not from the pocketbook of any individual member.
4. If there is a balance left over in the fund at the end of a year, it can be retained toward future years' claims; and/or all members pro rata can be issued a dividend.
5. If there is a deficit at the end of a year, the prior years' surplus can be spent; and/or all members pro rata can be assessed to pay the deficit. The group has the ability to levy its members for a fund deficit, because all members have signed an indemnity agreement.

b. How a group self-insured fund does *not* operate:

1. Claims are paid out of the common fund and are not charged against individual members of the group (except that if a member has had claims experience, over time its premiums will rise.)
2. An individual member does not receive a separate dividend each year if that member had few claims.
3. An individual member does not receive a separate assessment each year if that member had a lot of claims.

c. Statutory scheme

Employers in Minnesota are required to carry Workers' Compensation insurance. If an employer chooses to and can qualify, it has several options in lieu of purchasing commercial insurance. It may become an individual self-insured; or it may become part of a group self-insurer's fund. *ADD-8* (Minn. Stat. § 176.181 subd. 2).

The statute authorizes the Commissioner of Commerce to permit qualified employers to individually self-insure. This is called, logically enough, "individual self-insurance." *ADD-14-21* (Minn.R. 2780.1100-1800). EEP was formed to provide group self-insurance, not individual self-insurance.

The statute goes on to direct the Commissioner of Commerce to adopt rules permitting two or more employers to "enter into agreements to pool their liabilities...for the purpose of qualifying as group self-insurers." *ADD-8* (Minn.Stat. §176.181 subd. 2). EEP admits and represents that it is a "group self insurance fund," and of course it cannot be and is not an "individual self-insured," since its members are a *group* of employers.

See AA-58 (Aff. Hanish). The rules define the broader term, "self-insurer," as meaning both individual and group self-insurers. ADD-12 (Minn.R. 2780-0100, Subp. 11).

Group self-insurance funds are governed by their own separate set of rules. ADD-22-46 (Minn.R. 2780.2100-2780.5000). Within the group rules, self-insurance rules are a subset of rules which specifically govern the group self-insurer's fund. Such a "fund" is defined in the rules as a "monetary fund or account created by a group self-insurer to pay Workers' Compensation claims..." ADD-12; 37-46 (Minn.R. 2780.0100 Subp. 12; Minn.R. 2780.4100-2780.5000).

EEP has elected to operate as a group under Minn.Stat. Chapter 79A. See AA-16 (Binstock Aff). Under the statute, a group's claims are to be paid from a "common claims fund." ADD-1, 3 (§§ 79A.01 sub. 10; 79A.19 subd. 4).

Nothing in the record indicates whether EEP has elected to be a "commercial" group pursuant to § 79A.19 *et seq.* The description of the process for satisfying a fund deficit in § 79A.22 subd. 12, (ADD-6) however, is particularly clear. It is to be satisfied either from surplus funds or by assessment of the membership. The assessment is to be levied *on a proportionate basis against the members.* The entire statutory scheme, the rules, and the By-laws, all point clearly to the fact that the fund is truly a "common fund." There is no such thing as an "individual fund balance" described in any authority or document. "Fund balance" means the "common fund balance," and claims are paid out of the common fund on behalf of all of the membership.

- d. Group self-insurers "pool" claims; individual self-insured have no one to "pool" with. EEP is a group.**

A group self-insurer's Workers' Compensation fund operates differently than an individual self-insurer, in that it pools its claims and liabilities among all its members, and the group pool, rather than the individual employer-member alone, pays claims.

If a company is large enough to individually self-insure, and can meet the financial and other qualifications to do so, it may do so. Small employers such as F & S Concrete Paving, Inc. (whose name was changed to Fun & Sun, Inc. in 2003 when it sold its name and assets) cannot ordinarily qualify as individual self-insureds, and EEP is clearly (and admittedly) a "group self-insurer."

By contrast, an individual self-insured would pay no premiums; it would simply pay claims.

The statute states the purpose of the creation of "group self-insurers" as "permitting two or more employers...to pool their liabilities." *ADD-8* (Minn.Stat. § 176.181 Subd. 2).

In effect, then, a group self-insurer functions exactly like a commercial insurance carrier, except that the profits or losses of the group flow back to the members as a group, rather than to shareholders as a group, in the form of dividends if the group shows a profit or assessments if the group shows a loss. *ADD-30* (Minn.R. 2780.2900 Subp. 2 L).

Every other phase of the group fund's operation is almost like a commercial insurance company. The member is charged a "premium." *ADD-30* (Minn.R. 2780.2900 Subp. 2 F). The premium is set according to the member's payroll classification and experience rating. *ADD-30* (Minn.R. 2780.2900 Subp. 2 J). The group maintains a reserve fund for payment of claims incurred, and determined actuarially according to the

claims. *ADD-37* (Minn.R. 2780.4100). It may carry re-insurance. *See AA-61* (Aff. Hanish). The group fund (not any individual member) reports to and is supervised by the Department of Commerce. *ADD-8* (Minn.Stat. § 176.181).

All of the regulations are consistent with this concept.

EEP has By-laws, but of course to the extent they are incomplete or inconsistent, its operations are governed first by statute, then by rule, and finally by By-law. In fact, all of EEP's By-laws are also consistent with this concept.⁴

Further, in every respect, EEP has always functioned in every way as a "group self-insurer," not an "individual self-insured" (and the latter would in fact be nonsensical, since a "group" is the opposite of an "individual."

e. Deficits, if any, are repaid by the group as a whole, not by a single member.

1. The rules so provide

Minn.R. 2780.5000 prescribes the method for dealing with a fund deficit. If the group fund incurs a deficit for any fund year, it is made up by the fund as a whole either by drawing on retained surpluses from prior years or assessment of the membership (not an "individual member" or "former member.") *ADD-45* (Minn.R. 2780.5000 Subp. 1). The statute goes on to provide that if a deficit has not been paid up, there shall be an

⁴ The By-laws contain numerous references to the group self-insurance concept, starting with the preamble (Members "have joined together in a Fund for the purpose of establishing a group self-insured Workers' Compensation program..."). Contrary to the misrepresentation of plaintiff in paragraph 6 of the Complaint, they do not contain a single reference which suggests or implies that claims against an individual member are in any way separately charged to that individual member, except in the experience rating used to establish premiums. *See AA-16 through 27* (Aff. Binstock, Ex. T).

assessment against the members (plural) or a group self-insurer "to make up any deficit."
(Again, there is no provision for an assessment against former members.) *ADD-46*
(Minn.R. 2780.5000 Subp. 2).

2. The By-laws also so provide.

Article X of the By-laws provides a means for dealing with a year in which the entire fund, as a whole, sustains a deficit. *See AA-24, 25* (Aff. Binstock). It is consistent with the rules. Plaintiff has introduced no evidence, nor made any claim, that there has ever been a fund deficit for any year, so Article X is inapplicable to this case. Article X does explicitly provide for "retro-rating *all* members...and assess members, *on a pro-rata basis*, for incurred losses." (*emphasis added*). There is nothing anywhere in the By-laws that under any circumstances suggests that an individual member is separately responsible for its employees' claims. That would be individual self-insurance, not group self-insurance. There is also nothing anywhere in EEP's past practices that ever individually assessed F & S for any of its employees' claims. Each year it paid a "premium" based on payroll hours. Never did it pay its employees' claims. *See AA-68, 69* (Aff. Hanish, Ex. B).

f. The fact that F & S withdrew and is no longer a member does not create liability.

1. Minnesota Rules exactly set forth the status of a withdrawing member.

Minn.R. 2780.2800, subp. 1 provides for a penalty to withdraw during the first three years of membership. F & S had been a member for approximate six years when it withdrew, so penalty is not an issue here. Further, the penalty is waived entirely upon

sale of the company, and F & S was sold. The rules (and By-laws) specifically provide that under these conditions, there is no penalty for withdrawal.

2. The District Court based its decision on an erroneous interpretation of Article XIII of the By-laws, dealing with withdrawn members.

Article XIII first explains that there is no penalty for withdrawal in this case.

Next, it contains two sentences, which were incorrectly interpreted by plaintiff and by the Trial Court. The crucial language says:

"Any member withdrawing from the fund at the time when that member's share of the fund surplus is in a deficit position (negative) shall pay to the Fund at the time of withdrawal a sum in addition to that members (sic) annual premium equal to the deficit. Any additional deficit determined after withdrawal to be attributable to the withdrawn member shall be paid to the Fund by the withdrawn member upon demand by the Fund." *See AA-26 (Aff. Binstock, Ex. T).*

"Fund surplus" is a defined term in the By-laws:

"'Fund surplus' shall mean the excess of *all fund revenues* over the amount necessary to fulfill all fund obligations (including all operating expenses & prior dividend distributions) for all fund years that the Fund has been in operation." *See AA-17 (Aff. Binstock, Ex. T).*

There is no evidence in the record that the "fund surplus" was in a deficit position in 2003 when F & S withdrew. Therefore, F & S cannot be said to have owed anything to the Fund under Article XIII based upon any deficit which existed at the time it withdrew.

That leaves only the very last sentence of Article XIII as a potential basis to support the Trial Court's decision: "Any additional deficit determined after withdrawal to be attributable to the withdrawn member shall be paid to the Fund by the withdrawn

member upon demand by the Fund." In that sentence, "deficit" obviously continues to have the same meaning that it did in the immediately preceding sentence; *i.e.*, it refers to a deficit in the "fund surplus." Again, there is no evidence that there was ever a deficit in the "fund surplus" in 2003 at the time of withdrawal or thereafter. Further, the only sensible reading of the "after withdrawal" provision is that it refers to a re-calculation of the "fund surplus" for those years in which the withdrawn member had been a member. No subsequent years "fund surpluses" are "attributable to the withdrawn member."

Plaintiff's complaint never asserts that F & S's "member's share of the fund surplus is in a deficit position" because it cannot. There is no evidence that EEP's fund surplus *ever* has been in a deficit position. And if the fund surplus is not in a deficit position, then it is impossible for any member's pro rata share of that fund surplus to be in a deficit position.

Plaintiff's complaint thereby must fail, and if any party was entitled to summary judgment here, it was defendant, not plaintiff.

Paragraph 6 of plaintiff's complaint is pure distortion. It refers to "the total of the Worker's Compensation claims by EEP on behalf of participant," but neither those words nor that concept is anywhere to be found in Article XIII.

3. The Indemnity Agreement does not create liability on defendant.

Likewise, plaintiff's references to Article IV of the By-laws and to the Indemnity Agreement are distortion. It is true enough that under the By-laws and the Indemnity Agreement, all *members* (not former members) are responsible for the fund's debts.

Thereby, if the fund balance as a whole incurred a deficit balance, EEP would have the tool necessary to assess the members (pro-rata)⁵ and collect the assessment if necessary.

There is certainly a lot of ambiguity in the Indemnity Agreement, but this Court does not have to address it, because as discussed above, there is no evidence of a deficit fund balance in the group fund. If the Indemnity Agreement *were* interpreted, however, all kinds of questions would arise: Does it only refer to the pro rata assessment provided for in the By-laws and discussed above? When does a "claim and expense" arise: does it arise in the year of an initial claim, or does it arise in a later year when an employee claims additional benefits or is paid a settlement? What is the group's practice regarding setting aside reserves for claims? Was a sufficient reserve set aside in the year when an injury was first reported? If so, and if a claim file is closed without paying out the entire reserved amount, what happens?

The Indemnity Agreement implies finality upon a member's withdrawal. It does not imply the open-ended, forever liability which results from the Trial Court's interpretation. The Agreement even states that if F & S is not a member for a full year, it shall be only liable for a pro rata share of that liability. That provision makes perfect sense if EEP is a group fund that spreads its claims and liabilities pro rata among its members (as it did), but it makes no sense at all if EEP were operated like an individual self-insurance program where each member stands on its own and the member's individual claims are somehow segregated from the fund and accounted for separately.

⁵ But, it should be noted, there is still no provision anywhere to assess members for claims paid to their separate employees; only for a deficit incurred by the entire fund.

II. When a Worker's Compensation Group Fund has always operated as a group fund charging a premium based on payroll hours and classifications, pooling losses, and paying them out of members' premiums, it cannot retroactively charge a withdrawn former member separately for a claim by one of the member's former employees, as if it were not a group fund.

The By-laws, statutes, and rules are all consistent in describing the concept of a group self-insurance fund, as opposed to an individual self-insurance arrangement. Everything about EEP's operational practices, and every EEP document, also shows that EEP always operated as the group fund that it always proclaimed itself to be.

EEP operated much as a typical commercial insurance company; never suggesting that its members were instead individual self-insureds. F & S paid premiums, was named as an insured and had a policy period. *See AA-57 through 67* (Aff. Hanish, Ex. A) (stating that F & S paid premiums and had a policy period) and *AA-68 through 89* (Aff. Hanish, Ex. B) (stating that F & S was the insured). What was the purpose of paying premiums if the members also were supposed to pay claims made by their employees on an individual basis? And, why is there not one word in any document that suggested that members were supposed to pay claims made by their employees on an individual basis? F & S paid yearly "premiums." F & S did not pay yearly "claims." EEP acted like a typical Workers' Compensation insurer. There was nothing disclosed to F & S, either prior to joining or after joining that suggested that F & S would be individually liable for claims made by its employees.

If withdrawing members were about to become exposed to a huge liability, would not there have been some mention of it somewhere? Would not EEP have offered them

the chance to purchase some kind of "tail" coverage, or at least advised them to do so? Perhaps it even had a fiduciary duty to its members to do so.

Finally, the entire basis of EEP's claim is that F & S had a deficit for the fund year 1999. *See AA-143* (Aff. Nibbe, Ex. W). Based on the By-laws, if it were somehow determined that F & S were liable, its liability would have been capped at 150 percent of the premium it paid in 1999, which was \$15,819. The maximum liability is \$23,728.50 (\$15,819 multiplied by 150 percent). F & S cannot be liable for the amount claimed by EEP and awarded by the Trial Court.

III. When a member withdraws from the Worker's Compensation Fund and has fulfilled all of its obligations to the Fund, consistent with the Fund's practices during the time of membership, and where the member was never notified that it would years later be considered to have been separately liable for claims paid, nothing in the Fund's By-laws allows it to make an assessment for a claim over five years old against the individual member for the first time two years after the member has withdrawn as a member, sold its assets, and the buyer has replaced it as a member of the Fund. Any such claim is properly payable from the Fund, not by the former member.

In the alternative, although defendant believes this case can be properly decided on the statutes, rules, and By-laws discussed above, there are additional defenses available which would also require reversing the grant of summary judgment. They are briefly discussed below:

a. Laches prevents EEP from recovering any damages

The doctrine of laches is clearly applicable to this case. Laches is an equitable doctrine, one that is intended "to prevent one who has not been diligent in asserting a known right from recovering at the expense of one who has been prejudiced by the

delay." *Klapmeier v. Town of Center*, 346 N.W.2d 133, 137 (Minn. 1984). The doctrine of laches depends on a factual determination in each case. *Id.* The question is "whether there has been such an unreasonable delay in asserting a known right, resulting in prejudice to others, as would make it inequitable to grant the relief prayed for." *Fetsch v. Holm*, 52 N.W.2d 113, 115 (Minn. 1952).

F & S does not concede that EEP has a right to recover the damages it claims are due and owing. However, if EEP does have a right to do so, laches prevents EEP from recovering any damages in this case. EEP's own conduct in not informing F & S of the open claim at the time of withdrawal; not telling F & S that EEP was paying benefits after withdrawal; and not providing F & S with an opportunity to intervene, investigate or settle Mr. Wittmer's claim, prevents EEP from recovering any damages.

EEP unreasonably delayed in asserting a known right. EEP knew or should have known that Mr. Wittmer's claim was still open at the time it was aware that Ms. Hanish sold F & S because it had a duty to regularly run claim reports. *See AA-16 through 27*. (Aff. Binstock, Ex. T). The information as to Mr. Wittmer's claim was solely within EEP's possession. EEP knew, by at least July 18, 2003, that F & S changed ownership. *See AA-44* (Aff. Felstul, Ex. A). Not only should EEP have informed Ms. Hanish at that time of the open claim, but EEP should have informed Ms. Hanish when F & S withdrew from EEP.

In addition to not informing Ms. Hanish that Mr. Wittmer's claim was still open, EEP failed to inform Ms. Hanish that EEP was paying benefits to and on behalf of Mr. Wittmer.

Ms. Hanish was prejudiced by EEP's silence relative to Mr. Wittmer's open claim and the benefits paid to or on behalf of Mr. Wittmer. Ms. Hanish was prejudiced because she was not given the opportunity to investigate Mr. Wittmer's claim to determine whether the benefits were properly paid, intervene in Mr. Wittmer's claim, attempt to settle Mr. Wittmer's claim, or otherwise provide for Mr. Wittmer's claim when she sold F & S on an asset only sale. *See AA-55, ¶28 (Aff. Hanish).*

Because laches requires a factual determination, summary judgment should not have been granted. Factual disputes exist as to whether EEP's silence or inaction prejudiced Ms. Hanish.

b. Equitable estoppel precludes summary judgment

EEP's conduct in not having informed F & S of the supposed open claim at the time of withdrawal, not having told F & S that EEP was paying benefits after withdrawal and not having provided F & S with an opportunity to intervene, investigate or settle the claim prevents EEP from recovering any damages under the doctrine of equitable estoppel.

Equitable estoppel requires the following showing:

- (1) There must be conduct, acts, language or silence amounting to a representation or a concealment of material facts;
- (2) These facts must be known to the party estopped at the time of his said conduct, or at least the circumstances must be such that knowledge of them is necessarily imputed to him;
- (3) The truth concerning these facts must be unknown to the other party claiming the benefit of the estoppel, at the time when such conduct was done, and at the time when it was acted upon him;

- (4) The conduct must be done with the intention, or at least the expectation, that it will be acted upon by the other party, or under such circumstances that it is both natural and probably that it will be so acted upon;
- (5) The conduct must be relied upon by the other party, and, thus relying, he must be led to act upon it;
- (6) He must in fact act upon it in such a manner as to change his position for the worse, in other words, he must so act that he would suffer a loss if he were compelled to surrender or forego or alter what he has done by reason of the first party being permitted to repudiate his conduct and to assert rights inconsistent with it. *Lunning v. Land O'Lakes*, 303 N.W.2d 452, 457 (Minn. 1980).

The elements of equitable estoppel are present in this case. At the very least, factual disputes exist to preclude summary judgment.

- (1) EEP's silence or inaction of information F & S or Ms. Hanish about Mr. Wittmer's open claim is a material fact because that is the claim that is the primary subject of the dispute.
- (2) The fact that Mr. Wittmer's claim was still open was within EEP's knowledge. EEP is to provide regular reports of claims. *See AA-16 through 27*. (Aff. Binstock, Ex.T). This report would show Mr. Wittmer's claim as still being open.
- (3) Ms. Hanish did not know that Mr. Wittmer's claim was still open or that EEP would continue paying benefits after F & S's withdrawal. Ms. Hanish did not know that the claim was open or that benefits were being paid after withdrawal at the time she sold the company or when the benefits were actually being paid.
- (4) EEP's failure to inform F & S that Mr. Wittmer's claim was open or that it was paying benefits did not allow Ms. Hanish to take the open claim into consideration when she sold the business and did not allow Ms. Hanish to investigate the claim to ensure that the benefits were being properly paid.
- (5) Because Ms. Hanish was not aware of the open claim or the benefits being paid, she did not and could not investigate the claim or take it into consideration when selling the business.

- (6) Ms. Hanish is in a much worse position now than had she known about the open claim or the fact that EEP continued to pay benefits after F & S's withdrawal. Had she known about the open claim or the payment of benefits, she could have demanded different terms on the sale of the business or attempted to intervene, investigate or settle Mr. Wittmer's claim.

The foregoing proves that EEP is equitably estopped from claiming damages as the result of Mr. Wittmer's claim. At the very worst, there are fact questions that preclude summary judgment as to whether the facts in this case give rise to the defense of equitable estoppel.

c. Factual disputes exist as to whether EEP or its agents breached their contractual duty relative to Mr. Wittmer's claim.

EEP's fiscal agent is responsible for maintaining and administering the monies of the Fund. *See AA-16 through 27* (Aff. Binstock, Ex. T). EEP's service company is responsible for the following duties:

- (1) minimizing losses to the fund⁶;
- (2) receive all claims for compensation benefits and make initial determinations of compensability and set loss reserves;
- (3) pay all claims *from the revolving fund (emphasis added)*; and
- (4) provide regular reports of claims and other administrative activity to EEP members. *See AA-22 & 23* (Aff. Binstock, Ex. T, VII).

Fact questions exist as to whether EEP's agents breached their duties. Mr. Wittmer was not continuously receiving benefits from the date of his injury on April 5,

⁶ Note that yet again is there a reference to losses from the "fund," not from an individual member.

1999. There were significant gaps between treatment dates and disability payments. *See AA-105 - 112* (Aff. Nibbe, Ex. G). This is not a case where benefits were being continuously paid from the date of the injury to the present. In fact, there is a significant gap between payments.

Prior to F & S withdrawing from EEP, the last payment made on behalf of Mr. Wittmer, Claim Number 022419052, was for a doctor's visit at Alexandria Ortho on January 17, 2001, more than two years prior to withdrawal. *See AA-105 - 112* (Aff. Nibbe Ex. G). Prior to withdrawal, the last payment for total temporary disability was made on March 23, 2000 more than three years prior to withdrawal. *See AA-105 - 112* (Aff. Nibbe, Ex. G). The last payment for permanent partial disability, prior to withdrawal, was made on August 8, 2000, more than two and one-half years prior to withdrawal. *See AA-105 - 112* (Aff. Nibbe, Ex. G).

The gaps in treatment and disability payments are perplexing and raise serious concerns about whether EEP was properly paying on this claim. Ms. Hanish was given no opportunity to investigate this claim. Instead, EEP just paid the claim. There is no incentive for EEP to investigate this claim to ensure that payments should be made because according to EEP's rationale, F & S would be responsible for the payments into the indefinite future. EEP's failure to inform Ms. Hanish of the open claim and ongoing payments is a fact question that precludes summary judgment. The fact is whether this claim was properly paid. A trier of fact must answer that question; it cannot be answered on summary judgment.

Another fact question is whether EEP set aside the appropriate reserve on this claim. From the documents, it appears that EEP set aside \$18,640.00 in 1999. It is impossible to tell from the documents whether this reserve was set aside for Mr. Wittmer's claim or for another claim. However, if it was for Mr. Wittmer's claim, it is quite obvious that the reserve was wholly insufficient because the amounts allegedly paid out total more than \$122,000. The obvious conclusion is that because EEP set aside a reserve, F & S would not be responsible for more than the loss reserve because one of the duties of EEP's service company is to set aside loss reserves. See *AA-16 - 27* (Aff. Binstock, Ex. T).

CONCLUSION

There would be no point in an employer joining a self-insured fund and paying premiums for years, only to be told later that the employer has to pay all of its own employees' claims all by itself anyway. The whole purpose of being part of a group is to pay premiums in order to pay losses from a "common claims fund."

EEP admits that it provided group self-insurance, not individual self-insurance. EEP's position, upheld by the trial court, would create some sort of strange half-individual and half-group coverage. The four problems with that are that:

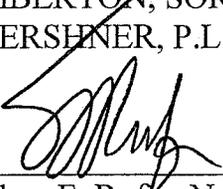
- (1) it is not authorized by statute;
- (2) EEP's documents do not support it;
- (3) EEP never operated that way until now; and
- (4) it was never disclosed to the members.

There is no language in either the By-laws or the Indemnity Agreement which holds EEP members individually liable for claims paid on the member's behalf. Additionally, F & S did not have a deficit when it withdrew from EEP. There can be no individual liability to F & S. For the foregoing reasons, F & S respectfully requests that this Court reverse the trial court and grant judgment for F & S, or in the alternative, remand the matter for trial.

Respectfully submitted:

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Dated: 6/22/10

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2009-5006

STATE OF MINNESOTA
IN COURT OF APPEALS
Appellate Court Case No. A10-913

EEP Workers' Compensation Fund,
Plaintiff/Respondent,

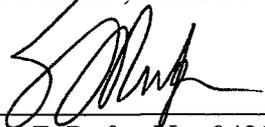
vs.

Fun & Sun, Inc., and Carol A. Wagner,
Defendant/Appellant.

I hereby certify that this brief conforms to the requirements of Minn.R.Civ.App.P. 132.01, subdvs. 1 and 3. The length of this brief is 8295 words. This brief was prepared using Windows Vista, Microsoft® Word 2007 software.

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& KERSHNER, P.L.L.P.

Dated: June 21, 2010

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STATE OF MINNESOTA)
)ss.
COUNTY OF OTTER TAIL)

AFFIDAVIT OF MAILING

The undersigned, being first duly sworn, says that two copies of the attached **APPELLANT'S BRIEF AND ADDENDUM** was served upon:

**Mr. Michael S. Dietz
Mr. Scott J. Hoss
Dunlap & Seeger
206 South Broadway, Suite 505
Rochester, MN 55904**

by enclosing the same in an envelope addressed to such party at the above address with postage fully prepaid and by depositing said envelope in the United States Post Office in the City of Fergus Falls, Minnesota, on the 22nd day of June, 2010.

Barbara K. Mickens

Subscribed and sworn to before me
this 22nd day of June, 2010.

Marilyn M. Olson
Notary Public

SFR:mo
2009-5002

