

CASE NO. A10-913

State of Minnesota
In Court of Appeals

FUN & SUN, INC., AND CAROL A. WAGNER,

Appellant,

vs.

EEP WORKERS' COMPENSATION FUND,

Respondent.

RESPONDENT'S BRIEF

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STATEMENT OF THE LEGAL ISSUES

I. Did the Trial Court Err when it Determined that Respondent's Unambiguous Bylaws Impose Liability on Appellant as a Matter of Law?

The Trial Court Ruled that Respondent's Unambiguous Bylaws Impose Liability on Appellant as a Matter of Law.

Rensch v. General Drivers, etc., Employees, 268 Minn. 307 (Minn. 1964)

II. Did the Trial Court Err when it Determined that Respondent is Entitled to Contractual Indemnification as a Matter of Law?

The trial court ruled that Respondent is entitled to contractual indemnification as a matter of law.

Minn. Stat § 79A.03, Subd. 6 (b) and (c), and Subd. 11.

Minn. R. 2780.2100 and 2780.9920.

STATEMENT OF THE FACTS

Respondent provides this Statement of the Facts to supplement and amend Appellant's Statement of Facts, which Respondent contends does not adhere to Rule 128.02, requiring "complete candor." R. Civ. App. Proc. 128.02, Subd. 1(c).

EEP Workers' Compensation Fund (the "Fund" or "Respondent") is a self-insurance group licensed to coordinate self-insured members pursuant to Minn. Stat. §§ 79A.01 through 79A.18. The Fund employs a Third Party Administrator ("TPA") to administer the members' claims. (AA-4, ¶2). From the Fund's inception until 2000, E.C. Fackler served as the Fund's TPA. (AA-4, ¶3). In 2000, Berkley Risk Administrators Company, LLC, ("Berkley Risk") replaced E.C. Fackler as The Fund's TPA. (AA-4, ¶4).

Fun & Sun, Inc. ("F & S" or "Appellant") was formerly known as F & S Concrete Paving, Inc. On or about April 9, 2003, Appellant sold its assets, (including the name F & S Concrete Paving, Inc.¹) to Glen and Karen Peterson. (AA-50, ¶4).

F & S joined the Fund on April 1, 1997. (AA-4, ¶5, AA-30). On April 1, 1997, Carol Wagner, as president of F & S, executed an indemnity agreement (the "Indemnity Agreement") with Respondent. (AA-6). The Indemnity Agreement states:

1. Whereas, F & S Concrete Paving, Inc. has agreed to be and has been accepted as a member of EEP Workers' Compensation Fund.
2. Whereas, F & S Concrete Paving, Inc. has agreed to be bound by all of the provisions of the Minnesota Workers Compensation Act and all Rules promulgated thereunder.

¹ The "new" F & S Concrete and Paving continued membership in the Fund. It was only after determining that Appellant sold only its assets to the new entity that the Fund pursued Appellant's deficit.

3. Whereas, that F & S Concrete Paving, Inc. has agreed to be bound by the bylaws or plan of operation and all amendments thereto of EEP Workers Compensation Fund.

4. Whereas, that F & S Concrete Paving, Inc. has agreed to be 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 Fun & Sun Underground, Inc. is a member of the group. Provided that if Fun & Sun Underground, Inc. is not a member for the full year, it shall be only liable for a pro rata share of that liability.

(AA-6).

Respondent applied and was accepted to participate in self-insurance as an alternative to conventional insurance. (AA-57-67). Respondent presented the "self-insurance program" and "self-insurance fund" to F & S in 1997. (AA-58). Respondent described the self-insurance program as. "your program, and your funds." (AA- 61). Respondent specifically identified the self-insurance, an "alternative" to conventional programs. Respondent also informed Appellant of the long payout profile, and statistics as to the payout on large losses over time. (AA-64).

As a result of F & S's membership, the Fund paid claims for F & S employees' workers' compensation claims. (AA-101-103A). The Fund paid out \$138,305.71 on F & S's behalf for claims that arose during its membership. (AA-100, ¶17 and AA-101-103A). Respondent keeps a check summary indicating every payment, including dates, check numbers, and purpose. (the "Summary"). (AA-133-141).

F & S's share of the fixed costs to operate the Fund is \$38,560.00. (AA-142-143).

On or about April 9, 2003, F & S voluntarily terminated its membership in the Fund. (AA-5, ¶8). The Fund's bylaws, in place on April 9, 2003, state, "[a]ny 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 annual premium equal to the deficit." (AA-7-15, and AA-16-27). On August 12, 2005, the Fund, through its attorney, requested F & S pay its deficit. (AA-28-29). F & S's deficit, to date is \$60,487 on a "paid basis."² (AA-143).

ARGUMENT

I. Standard of Review:

On appeal from summary judgment, this Court determines whether there are genuine issues of material fact that preclude summary judgment. *Dykes v. Sukup Mfg. Co.*, 781 N.W.2d 578, 581 (Minn. 2010). This Court also reviews whether the district court properly applied the law. *Id.* When reviewing the application of law, a de novo standard of review is applied. *Id.*

A. The District Court did not Err when it Granted Summary Judgment in Favor of Respondent.

F & S seeks to avoid the result of its decision to self-insure, rather than purchase traditional workers compensation insurance. In hindsight, F & S seeks to modify its decision and treat the self-insurance Fund as a conventional insurer.

² EEP calculates the deficit on a "paid basis" and an "audited premium basis". Paid basis is based on amount a fund member actually paid, without taking into account any fixed costs associated with unpaid premiums. "audited premium basis" reflects what should have been paid. This, the "paid basis" favors the member as less fixed costs are deducted from the loss fund.

The State of Minnesota requires employers to make provisions to compensate employees injured in the course of their employment. Traditionally, this provision is made by the purchase of workers' compensation insurance.

Under very limited circumstances, Minnesota law allows employers to self-insure. A self-insured employer simply pays the claims of its employees directly as they are incurred (from a statutorily defined fund), along with the inherent cost of administering the claims. The State only allows employers that demonstrate the financial capability to handle a dire experience/expense scenario to self-insure.

Very few employers have the financial resources required to immediately pay employees' claims under a dire scenario. Accordingly, the Minnesota legislature created a statutory provision allowing smaller employers to have their assets considered collectively in determining the financial resources available for claims. This requires the members to commit to be jointly and severally liable for the claims made by any one member's employees.

In addition, self-insurance groups are required to hire management assistance (TPA's) for administering claims and conforming to Minnesota law. This is a sophisticated accounting and administrative undertaking, far beyond the expertise of most individual employers. Self-insured groups receive funding through periodic payments from members (called "premiums"), contemplating two items: (1) an estimate of the claims likely to be incurred by the group based upon the history of the claims made and estimated payroll, and (2) a pro rata share of the costs of managing the group and claims.

There is no provision anywhere in the applicable law by which a self-insured employer participating in a self-insurance group is relieved of the ultimate liability to pay the workers' compensation claims made by its employees. The creation of the self-insurance group simply provides a greater pool of resources to look to in case any one employer is unable to pay the claims of its own employees. If one member has a catastrophic claim, that member can sustain by continuing its membership in the group. Further, Minnesota law requires each group to purchase reinsurance through the Workers' Compensation Reinsurance Association ("WCRA"). *Workers' Compensation Reinsurance Ass'n v. Commissioner of Revenue*, 1995 Minn. Tax LEXIS 24 (Minn. T.C. May 9, 1995); Minn. Stat. § 79.34. WCRA pays claims that surpass certain limits, thus protecting self-insureds from excess liability.

In this case, F & S elected to self-insure. Undoubtedly, a significant factor in F & S's decision was that it might save money by self-insuring rather than paying higher premiums for traditional insurance. F & S opted to manage its own risk assuming it could prevent or reduce claims. Now, in hindsight, F & S wishes it had simply purchased traditional workers' compensation insurance. If it had, it would have no further liability on the claims. However, F & S elected to self-insure and in its third year as a member, experienced a major claim.

F & S voluntarily withdrew from the Fund. After F & S's withdrawal, the Fund continued to administer and pay F & S's employees' claims that arose during its membership. The Fund paid more on behalf of F & S to administer F & S's employees' claims than F & S paid to the Fund. Appellant has an individual deficit.

1. Respondent is Entitled to Summary Judgment Based on Appellant's Contractual Liability to Respondent Pursuant to Respondent's Bylaws.

Appellant voluntarily agreed to be bound by the Fund's Bylaws. (AA-6). F & S expressly contracted for membership in the Fund. F & S voluntarily withdrew from the Fund. F & S failed to pay its eventual deficit of \$60,487.00.

F & S breached the Funds' bylaws. The elements of a breach of contract are: (a) the formation of the contract; (b) performance by plaintiff of any conditions precedent to his right to demand performance by defendant; and (c) a breach of the contract by defendant. *Johnny's Plumbing & Heating, Inc. v. Sperry Rand Corporation--Univac Div.*, 298 Minn. 294, 297 (Minn. 1974).

A member of an organization may agree to be contractually bound to that organization's bylaws. *Rensch v. General Drivers, etc., Employees*, 268 Minn. 307, 310 (Minn. 1964). F & S agreed to be bound by the Fund's bylaws (and amendments thereto). (AA-6).

The Indemnity Agreement and bylaws satisfy the first element. F & S voluntarily, "agreed to be bound by the bylaws or plan of operation and all amendments thereto of EEP Workers' Compensation Fund." (AA-7-15).

The Fund satisfied the second element by administering and paying F & S's obligations on F & S employees' workers' compensation claims.

F & S breached the bylaws by failing to pay its current deficit upon request. Article XIII, of the Fund bylaws, allows the Fund to seek a deficit attributable to a withdrawn member. (AA-26). On August 12, 2005, the Fund's attorney, Michael S.

Dietz requested F & S pay its deficit pursuant to Article XIII. (AA-28-29). F & S failed to pay.

a. Not all Deficits are the Same.

F & S insists that where the word deficit is used, it must mean the same thing.

The fund year deficits are distinct from individual member's aggregate deficits (or negative balances). (Add-46). The fund year balance and mandatory assessment for a deficit insures that the group (pool) is adequately funded in years of poor performance. EEP has an assessment mechanism in its bylaws that seeks the assessment from members who have an aggregate individual deficit. Thus the members with a higher experience "mod" rating reimburse the fund in a higher proportion than those who are not experiencing high value or volume claims. These payments ultimately increase the yearly pool, and decrease the member's aggregate individual deficit.

Article X of the Fund's bylaws addresses the legal requirement to make up a fund year deficit. (AA- 24-25). Article X is taken directly from Minnesota Administrative Rule 2870.5000:

2780.5000 DEFICITS.

Subpart 1. **Payment.** In the event of a deficit in any fund year, such deficit shall be paid up immediately, either from surplus from a fund year other than the current fund year or by assessment of the membership. The commissioner shall be notified within ten days of any transfer of surplus funds.

Subp. 2. **Assessment.** If the commissioner finds that any deficit has not been paid up, the commissioner shall order an assessment to be levied against the members of a group self-insurer sufficient to make up any deficit.

The Fund addresses this legal requirement with Article X of its bylaws:

Assessment of Deficit

When, in accordance with applicable laws and regulations of the State of Minnesota. A deficit for any fund year exists, the Board of Directors shall make up such deficit as follows:

* * *

In a deficit year, all members with aggregate negative balances will be assessed in a pro rata of premium basis, not to exceed 150% of annual premium.

Thus, where a fund year deficit exists, the individual members are assessed on a pro rata basis. Members with an aggregate negative balance are assessed an additional amount, not to exceed 150% of their annual premium.

b. The Fund's Bylaws are Unambiguous.

The Fund's bylaws are not ambiguous. F & S claims the language in Article XIII is at odds with Article X. They are completely distinct issues and are not ambiguous despite the existence of the word deficit in each. Again, Article X addresses Rule 2780.5000, for fund year deficits. Article XIII addresses individual member aggregate deficits payable upon withdrawal.

Article XIII requires the payment of a withdrawing member's deficit position but does not prohibit collection from future deficits. In fact, it specifically states that, "[a]ny **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." (AA-26). As the trial court noted, this sentence addresses deficits determined post-withdrawal. The preceding sentence simply addresses the method of assessment of

deficits that exists at the time of withdrawal. The plain meaning of the last two sentences of Article XIII are that member's individual deficits shall be paid if they are present at the time of withdrawal, and shall be paid if requested, if a deficit occurs post-withdrawal.

F & S's interpretation of article XIII is unsupportable. The second to last sentence of Article XIII states, "[a]ny 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 annual premium equal to the deficit." (AA-26). This sentence does not suggest that the "fund surplus" is in a deficit position. Rather, it suggests that a "member's share" of the fund surplus is "negative." The term "deficit" in this sentence is clarified by "(negative)."

The unambiguous bylaws entitle the fund to recover F & S's individual deficit.

2. Respondent is Entitled to Contractual Indemnification as a Matter of Law.

Appellant executed an Indemnity Agreement. Appellant agreed to be "jointly and severally liable for all claims and expenses of all members of **EEP Workers' Compensation Fund** arising in any fund year in which **F & S Concrete Paving, Inc.** is a member of the group." (AA-6). Now Appellant claims the statutorily required Indemnity Agreement is ambiguous.

The right of indemnity can arise through a contractual obligation. *Altermatt v. Arlan's Dep't Stores*, 169 N.W.2d 231, 232 (Minn. 1969). F & S executed a contract indemnifying Respondent. (AA-6).

The Indemnity Agreement expresses the codified language requiring all Fund members be jointly and severally liable for all claims and expenses of all the members. Minn. Stat. § 79A.03, Subd. 11; (AA-6). The Indemnity Agreement is statutory requirement. Minn. Stat. § 79A.03, Subd. 6 (b) and (c) (referencing Minn. R. 2780.9920). The Fund continued to pay for F & S's claims (for indemnification and medical expense on employees' injuries that occurred while F & S was a member) even after F & S left the fund. Pursuant to the Indemnity Agreement, the Fund is entitled to reimbursement from F & S for the money the Fund paid on F & S's behalf.

3. Appellant's Remaining Attempts to Overturn Summary Judgment Fail.

F & S appears to have spared no effort to create confusion as to the relationship between the parties. Luckily, the terms of the relationship are controlled by Minnesota Statutes, Administrative Rules, and the parties' contract. Despite the ultimate simplicity of the issue at bar, Respondent must dispose of the red herring(s) in Appellant's Brief.

a. The Fund's Administration and Collection of "Premiums" does not Remove it from the Realm of Self Insureds.

F & S argues that because the Fund collects premiums and rates its members, similar to a conventional insurer, that it cannot be self-insurance. The opposite is true. Minnesota Rules Administrative Code requires the collection of funds through "premiums." Minn. R. 2780.4100 (ADD-39) (anticipating collection of funds through "premiums"). Minn. R. 2780.0100 (ADD- 12) (defining modified premiums). F & S seems to think that the only model for operating a self insurance fund is to immediately require each member to pay its employees claims as they come due. However, this is

impossible, and thus a pool is established so that as time goes on, each member will be able to pay its actual share. This is true even if the member experiences a large claim. As long as the member stays in the Fund and continues to pay premiums, any deficit will eventually be erased.

b. Laches is not Applicable.

The trigger for the Fund's claim was F & S's withdrawal from the Fund. Once the withdrawal occurred, Article XIII became actionable. The deficit that accrued post-withdrawal was not a valid claim until F & S's loss fund ran dry and payments on the large claim continued to surface.

c. There are no Factual Disputes as to F & S's Employee's Claims.

F & S is now accusing Berkley Risk of some undefined wrongdoing with no evidence whatsoever. The only discernable allegation is that Respondent (or Berkley Risk) may have improperly paid claims because of gap in an employee's treatment. The proper time to raise any questions as to the payment of expenses, indemnity or medical costs was prior to this appeal. This is especially true due to the fact F & S has the complete file for each of its employees' claims in its possession. The Fund's books and records are audited each year (as required by law). Appellant's claim of fiscal impropriety is reckless and desperate.

CONCLUSION

Respondent seeks affirmation of the trial court's decision.

Dated: July 21, 2010.

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CERTIFICATE OF BRIEF LENGTH

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds. 1 and 3, for a brief produced with a proportional font. The length of this brief is 3,841 words. This brief was prepared using Microsoft Office Word 2003.

Dated: July 21, 2010.

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