**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**June 4, 2013**

**Diane M. Fremgen**
**Clerk of Court of Appeals**

**NOTICE**

**This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.**

**A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.**

**Appeal No. 2012AP2197-FT** **Cir. Ct. No. 2010CV644**

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

---

**DAN HUNT, JANET ZIEGLER-HUNT, DAVID HUNT, SUSAN HUNT, DOUGLAS HUNT AND BEVERLY HUNT,**

**PLAINTIFFS-RESPONDENTS,**

**V.**

**BEACH CLUB CONDOMINIUM ASSOCIATION, INC.,**

**DEFENDANT-APPELLANT,**

**AUTO-OWNERS INSURANCE COMPANY,**

**DEFENDANT-RESPONDENT.**

---

APPEAL from a judgment of the circuit court for Chippewa County: STEVEN R. CRAY, Judge. *Affirmed.*

Before Hoover, P.J., Mangerson, J., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Beach Club Condominium Association, Inc., appeals a judgment dismissing Auto-Owners Insurance Company, its insurer, from this action.[1] We conclude Auto-Owners was properly dismissed because the policy does not provide coverage for the claims set forth in the complaint. Accordingly, we affirm.

## BACKGROUND

¶2 On June 30, 1989, Dan Hunt and Janet Ziegler-Hunt executed a condominium declaration pursuant to the Condominium Ownership Act, WIS. STAT. ch. 703. This converted a portion of the Hunts' property to the ten-unit Beach Club Condominium. The Hunts, whose family owns adjacent property, sought to preserve their right to use the condominium's beach in the declaration, which states that "use of the beach area shall be shared with the Declarant and their family."

¶3 Eventually, the Association believed the Hunts were abusing this privilege.[2] In June 2010, the Association members, on recommendation of the Association's board, voted to terminate the Hunts' use of the beach area. The Declaration was formally amended on June 7. The Hunts then sued under various legal theories.

[1] This is an expedited appeal under WIS. STAT. RULE 809.17. All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

[2] The Hunts' objectionable uses included operating trucks and other vehicles at dangerous speeds, allowing animals to roam unrestrained, verbally abusing Beach Club members when confronted, and generally "fouling [Beach Club members'] view of the lake, and disturbing [their] peaceful use of the property …."

¶4 The Association tendered defense of the action to Auto-Owners, its insurer. The policy included a "Condominium Directors and Officers Liability Endorsement," which provided, as relevant here:

> **INSURING AGREEMENT**
>
> 1. We will pay those sums the insured becomes legally obligated to pay as damages because of any negligent act, error, omission or breach of duty directly related to the management of the premises.

The endorsement also included six exclusions to coverage. Auto-Owners intervened and sought summary judgment, asserting that the policy did not provide coverage for the claims set forth in the Hunts' complaint.

¶5 The circuit court granted Auto-Owners' motion and dismissed it from the suit. The Association filed a motion for reconsideration, which the circuit court denied. The Association now appeals.

## DISCUSSION

¶6 We review a grant of summary judgment de novo, employing the same methodology as the circuit court. ***Palisades Collection LLC v. Kalal***, 2010 WI App 38, ¶9, 324 Wis. 2d 180, 781 N.W.2d 503. First, we examine the moving party's submissions to determine whether they constitute a prima facie case for summary judgment. ***Id.*** If so, we then examine the opposing party's submissions to determine whether there are material facts in dispute that entitle the opposing party to a trial. ***Id.*** A party is entitled to summary judgment if there is no genuine issue of material fact and that party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2).

¶7 This case also requires that we interpret an insurance agreement. Insurance policy interpretation presents a question of law that we review de novo. ***Folkman v. Quamme***, 2003 WI 116, ¶12, 264 Wis. 2d 617, 665 N.W.2d 857. "An insurance policy is construed to give effect to the intent of the parties as expressed in the language of the policy." ***Id.***, ¶16. Generally, we give that language its common, ordinary meaning; that is, the meaning a reasonable person in the position of the insured would give it. ***Id.***, ¶17.

¶8 The main issue presented is whether the Association's insurance policy, quoted above, provides coverage for the Hunts' claims.[3] There is a well-established process for analyzing this issue. "First, the court examines whether the policy's insuring agreement makes an initial grant of coverage." ***Olson v. Farrar***, 2012 WI 3, ¶41, 338 Wis. 2d 215, 809 N.W.2d 1. If there is an initial grant of coverage, we then examine the various exclusions to determine whether coverage is nonetheless precluded. ***Id.*** If so, we then determine whether an exception to the exclusion reinstates coverage. ***Id.*** In this case, we need not proceed past the first step, as there is no initial grant of coverage.

¶9 Although the Auto-Owners policy provides several types of insurance, the Association's sole argument is that the "Condominium Directors and Officers Liability Endorsement" provides coverage for the Hunts' claims. The endorsement requires Auto-Owners to "pay those sums the insured becomes legally obligated to pay as damages because of any negligent act, error, omission

[3] The Association frames the issue in terms of the duty of defense, but Auto-Owners intervened in the suit and there is no allegation it has breached this duty.

or breach of duty directly related to management of the premises." The present dispute revolves around whether the Hunts' complaint sought "damages."

¶10 The Hunts' complaint set forth several causes of action, but clearly sought only one remedy. First, they alleged breach of contract. Their desired relief was "to have their interest in the condominium and real estate declared and made certain." Their second cause of action asserted that the initial 1989 declaration reserved a portion of the fee title to the Hunts, who are therefore co-owners of the beach area as tenants in common with the Association. Again, they sought as relief "to have their ownership interest in the condominium real estate declared and made certain." Third, the Hunts sought a judicial construction of the phrase "the beach area," as the declaration left this phrase undefined. Finally, in their fourth cause of action, the Hunts sought to "establish their prescriptive rights to make use of the [Association's] real estate" through a prescriptive easement. As is plain from the substance of the Hunts' complaint, they sought only the right to continue to use the property.

¶11 The term "damages" in an insurance policy has a specific meaning under Wisconsin law.[4] As our supreme court has explained, for purposes of a commercial liability policy, "damages" means "legal damages"—legal compensation for past wrongs or injuries—which are generally pecuniary in nature. ***Johnson Controls, Inc. v. Employers Ins. of Wausau***, 2003 WI 108, ¶36, 264 Wis. 2d 60, 665 N.W.2d 257 (citing ***School Dist. of Shorewood v. Wausau Ins. Cos.***, 170 Wis. 2d 347, 368, 488 N.W.2d 82 (1992)). The ***Johnson Controls***

[4] Thus, we reject the Association's argument that the policy is ambiguous merely because it failed to define the term "damages."

court rejected ***Shorewood***'s broad holding that "damages" do not include the cost of complying with an injunctive decree, holding instead that it is the nature and purpose of the requested relief that controls. ***Johnson Controls***, 264 Wis. 2d 60, ¶¶36-38. If the requested equitable relief provides compensation for past wrongs—i.e., if it is remedial in nature—it may constitute "damages" for purposes of an insurance policy. *See* ***id.***, ¶43. Here, the complaint does not seek remedial relief; the Hunts' desired result is the right to use the beach area in the future.

¶12 The record supports this conclusion. In an apparent effort to have Auto-Owners dismissed from the case, each of the plaintiffs, and their attorney, filed identical affidavits declaring that they were not seeking a pecuniary remedy for past wrongs:

> I am asking the court to declare my rights to the use of property under the condominium declaration referred to in the Complaint.
>
> I am not seeking any money damages from the Defendant, Beach Club Condominium Association Inc.

These affidavits are fully consistent with the substance of the complaint and are conclusive on the issue of damages.

¶13 The Association contends we must limit our analysis to the "four corners" of the complaint and disregard extrinsic evidence like the affidavits. The Association misapprehends the nature of our inquiry. "To understand the role of the four-corners rule, it is essential to distinguish between the insurer's duty to indemnify and its duty to defend." ***Olson***, 338 Wis. 2d 215, ¶27. The four-corners rule is related to the duty to defend; the insurer must provide a defense if the four corners of the complaint alleges facts that, if proven, would constitute a covered claim. ***Id.***, ¶31. The purpose of the four-corners rule has been served once the

insurer has elected to provide a defense, and the court then proceeds to a determination of coverage. ***Id.***, ¶34. There is no suggestion that Auto-Owners has breached its duty to defend; the dispute before us is solely a coverage dispute. As ***Olson*** makes clear, it is entirely appropriate to consider extrinsic evidence when resolving the coverage question. ***Id.***, ¶38.[5] Moreover, a motion for summary judgment must be resolved by reference to the affidavits, if any. *See* WIS. STAT. § 802.08(2).

¶14 The Association claims there is coverage because the Hunts' prayer for relief included "costs, disbursements and attorney fees." The *ad damnum* clause is not a substantive part of the complaint and "is nothing more than an 'asking price.'" ***Baumann v. Elliott***, 2005 WI App 186, ¶15, 286 Wis. 2d 667, 704 N.W.2d 361 (quoting ***Midway Motor Lodge of Brookfield v. Hartford Ins. Group***, 226 Wis. 2d 23, 35-36, 593 N.W.2d 852 (Ct. App. 1999)). However, the clause may clarify the allegations stated elsewhere in the complaint. ***Id.***, ¶16. Here, the substantive portion of the Hunts' complaint does not need clarification; it is abundantly clear the Hunts are not seeking a monetary remedy for past wrongs. In addition, the Hunts' request for "costs, disbursements and attorney fees" is only a small portion of the prayer for relief. Elsewhere, and more prominently, they request declaratory judgment, judicial construction of the initial declaration, and the right to a prescriptive easement. Taken as a whole, the

[5] Indeed, the "right to a determination on coverage in the circuit court would often be empty if … the court's inquiry were limited by the four-corners rule. If the coverage determination were constrained by the four-corners rule, then what evidence could ever be presented at a coverage trial?" ***Olson v. Farrar***, 2012 WI 3, ¶37, 338 Wis. 2d 215, 809 N.W.2d 1.

complaint indicates the Hunts do not want money; they want the right to use the beach area.

¶15 The Association next asserts that the six exclusions in the endorsement "gut it" and render coverage illusory.[6] "Coverage is illusory only when we cannot foresee liability in any imaginable set of circumstances." ***Id.***, ¶20. The Association does not engage in any detailed analysis of the exclusions, or explain precisely how they render coverage illusory. We decline to address

[6] The exclusions portion of the endorsement provided as follows:

> This coverage does not apply to:
>
> 1. "bodily injury", "property damage", "personal injury" or "advertising injury";
>
> 2. Any transactions of the insured from which the insured gained any personal profit or advantage not shared equitably by the members of the association;
>
> 3. any failure to:
>
>  a. procure or maintain any insurance policy or bond; or
>
>  b. obtain proper amounts, forms, conditions or provisions of any insurance policy or bond;
>
> 4. Violation of any civil rights law, whether federal, state or local ordinance, including but not limited to discrimination based on race, religion, sex or age;
>
> 5. any criminal or malicious act; or
>
> 6. any dishonest or fraudulent act, if judgment against the insured establishes that either:
>
>  a. affirmative dishonesty; or
>
>  b. actual intent to defraud
>
> was material to such act.

undeveloped arguments.[7] ***M.C.I., Inc. v. Elbin***, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988). The Association has failed to show there is no conceivable circumstance that would trigger coverage.

*By the Court.*—Judgment affirmed.

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

[7] We observe that Auto-Owners takes a significant gamble by failing to respond to the Association's assertions regarding illusory coverage. Ordinarily, unrefuted arguments are deemed conceded. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 108-09, 279 N.W.2d 493 (Ct. App. 1979). However, this is a rule of judicial administration, and we decline to apply it in light of the undeveloped nature of the argument.