COURT OF APPEALS
DECISION
DATED AND FILED

June 2, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP531 **Cir. Ct. No. 2005CV180**

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

DIOCESE OF SUPERIOR,

PLAINTIFF,

V.

SWAN & ASSOCIATES, INC. AND ROBERT SWANFELD,

DEFENDANTS-THIRD-PARTY PLAINTIFFS-APPELLANTS,

AMERICAN SAFETY CASUALTY INSURANCE COMPANY,

DEFENDANT-RESPONDENT,

V.

BENSON ELECTRIC COMPANY AND WESTERN NATIONAL INSURANCE COMPANY,

THIRD-PARTY DEFENDANTS.

APPEAL from a judgment and an order of the circuit court for Douglas County: GEORGE L. GLONEK, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Swan & Associates, Inc., and Robert Swanfeld (collectively Swan) appeal a judgment and an order dismissing their coverage claims against American Safety Casualty Insurance Company. Swan argues the circuit court erred by enforcing a Georgia choice-of-law provision in the insurance agreement. We affirm the court's choice-of-law determination, but remand for a determination of coverage under Georgia law.

BACKGROUND

¶2 The Cathedral of Christ the King in Superior, Wisconsin, is approximately seventy-five years old. By 2004, the building needed extensive restoration. The Diocese of Superior, which suspected asbestos-containing materials were used during remodeling in the 1950s, hired Swan & Associates, Inc., a Minnesota corporation, to test the cathedral before renovation. Testing in limited areas revealed asbestos, but Swan allegedly performed no additional testing on the remainder of the building. The Diocese asserts that on February 15, 2004, employees of Benson Electric Company cut into cornices in the cathedral, releasing asbestos particles that contaminated the church.

¶3 The Diocese filed suit on April 27, 2005, alleging Swan and its insurer, American Safety, were liable for breach of contract, negligence, and negligent misrepresentation. American Safety denied coverage and sought declaratory and summary judgment. Swan then filed its own motion for summary

judgment, arguing Wisconsin law required coverage. American Safety objected to application of Wisconsin law, noting the following choice-of-law provision in the insurance agreement: "This policy and all additions to, endorsements to, or modifications of the policy shall be interpreted under the laws of the State of Georgia."[1]

¶4 The circuit court determined Wisconsin law did not apply, but did not identify the applicable law. Instead, it requested further briefing from Swan addressing which nonforum law controlled and American Safety's obligations under that law. Swan's supplemental brief argued for application of Minnesota law. In response, American Safety again sought enforcement of the agreement's Georgia choice-of-law provision.

¶5 Following supplemental briefing, the circuit court granted American Safety's motion for declaratory and summary judgment. It agreed Georgia law governed the dispute. It also viewed Swan's failure to brief the issue of coverage under Georgia law as a concession:

> Although [Swan's] Supplemental Brief addresses at length the insurer's alleged duty to defend and indemnify based upon an application of Minnesota law, [Swan] again present[s] no legal authority or argument to support any claim that [American Safety] has a duty to defend and indemnify its insureds based upon an application of Georgia law.
>
> The Court views this as an acknowledgement by [Swan] that [American Safety] has no duty to defend or indemnify the insured … if Georgia law (rather than Minnesota or Wisconsin law) applies.

[1] There are actually two policies involved in this case. The policy period of the first runs from November 2, 2003, to November 2, 2004, while the second is a renewal in force from November 2, 2004, to November 2, 2005. Both policies apparently contain the same choice-of-law provision, and we refer to them in the singular throughout this opinion.

DISCUSSION

¶6 This appeal requires us to determine whether the circuit court properly selected Georgia law as controlling and granted summary judgment. The choice-of-law inquiry presents a question of law subject to independent appellate review. ***Drinkwater v. American Family Mut. Ins. Co.***, 2006 WI 56, ¶14, 290 Wis. 2d 642, 714 N.W.2d 568. We review a grant of summary judgment de novo, applying the same standard as the circuit court. *See* ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315-16, 401 N.W.2d 816 (1987). Summary judgment is appropriate where no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2);[2] ***Kersten***, 136 Wis. 2d at 315.

¶7 In general, Wisconsin courts will enforce parties' express agreement that the law of a particular jurisdiction shall control their contractual relations. ***Bush v. National Sch. Studios, Inc.***, 139 Wis. 2d 635, 642, 407 N.W.2d 883 (1987). Allowing parties some degree of autonomy to stipulate controlling law "promotes certainty and predictability in contractual relations …." ***Id.*** (citing WILLIS L. M. REESE, *Choice of Law in Torts and Contracts and Directions for the Future*, 16 COLUM. J. TRANSNAT'L L. 1, 22-24 (1977)). The right is not unqualified, however; parties are not permitted, through their contractual selection of applicable law, to disregard the "important public policies of a state whose law would be applicable if the parties choice of law provision were disregarded." ***Id.***

[2] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

¶8 Swan argues we must look to Minnesota public policy because, absent the choice-of-law provision, Wisconsin courts would apply Minnesota law. Absent agreement by the parties, the law of the forum presumptively applies unless it becomes clear that nonforum contacts are of greater significance. ***Drinkwater***, 290 Wis. 2d 642, ¶40. Even if Swan is correct, and Minnesota contacts are clearly of greater significance, Minnesota public policy does not require abrogation of the parties' choice of law. Citing MINN. STAT. § 60A.08(4) (2009), and ***Onstad v. State Mutual Life Assurance Co.***, 32 N.W.2d 185 (Minn. 1948), Swan contends the choice-of-law provision contravenes Minnesota public policy deeming insurance contracts "made" in Minnesota. Section 60A.08(4) simply provides, as relevant, "All contracts of insurance on property, lives, or interests in this state, shall be deemed to be made in this state," and does not, by its plain terms, prohibit choice-of-law agreements. Further, ***Onstad*** did not involve a conflict-of-laws provision, but an aviation exclusion rider prohibited under then-existing Minnesota law. ***Onstad***, 32 N.W.2d at 186-87. Neither authority establishes an important public policy flouted by choice-of-law agreements. Instead, Minnesota courts have a "longstanding policy of enforcing contractual choice of law provisions." ***Hagstrom v. American Circuit Breaker Corp.***, 518 N.W.2d 46, 49 (Minn. Ct. App. 1994); *see also* ***Medtronic, Inc. v. Advanced Bionics Corp.***, 630 N.W.2d 438, 454 (Minn. Ct. App. 2001).

¶9 While we recognize Minnesota courts will ordinarily give effect to the parties' agreement, we have not addressed any alleged substantive conflicts between Georgia and Minnesota law that might lead a Minnesota court to apply the law of its own forum for public policy reasons. This omission falls squarely on Swan, whose brief contains only the most cursory analysis of the purported conflicts. Swan's brief-in-chief cites only two Georgia authorities. Swan does not

explain what these two authorities say, nor analyze how they conflict with Minnesota law, preferring instead to simply note each "does not appear" to adequately protect Minnesota insureds. These conclusory arguments do not merit our attention. *See* ***M.C.I., Inc. v. Elbin***, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988) (we need not consider undeveloped arguments). We therefore conclude Georgia law governs resolution of this insurance dispute.[3]

¶10 While we affirm the circuit court on the choice-of-law issue, we disagree with its decision to treat Swan's failure to brief coverage under Georgia law as a concession. The court's request for supplemental briefing permitted Swan to address two issues: (1) which law, other than Wisconsin's, applied to the coverage dispute; and (2) "whether [American Safety] has a duty to defend and indemnify the insureds if Wisconsin law does not apply." Swan submitted a brief arguing for application of Minnesota law, which purportedly requires coverage. While it was perhaps strategically unwise not to address coverage under Georgia law, Swan's interpretation of the court's request was reasonable. We therefore remand for further proceedings consistent with this opinion, including a determination of coverage under Georgia law.

By the Court.—Judgment and order affirmed in part; reversed in part and cause remanded with directions. No costs on appeal.

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

[3] On appeal, Swan does not challenge the circuit court's conclusion that Wisconsin law does not apply.