UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0102

September Term, 2015

JONATHAN FELDMAN

v.

FIDELITY AND DEPOSIT
COMPANY OF MARYLAND

Eyler, Deborah S.,
Berger,
Harrell, Glenn T., Jr.
(Retired, Specially Assigned),

JJ.

Opinion by Berger, J.

Filed: March 7, 2016

This case arises out of an insurance coverage dispute between appellant, Jonathan Feldman ("Feldman"), and appellee, Fidelity and Deposit Company of Maryland ("F&D"). Feldman maintains that he is entitled to reimbursement of various expenses he incurred during the time period when he was a beneficiary of the policy. F&D responds that coverage was properly denied based upon the express terms of the insurance policy. The circuit court agreed with F&D and entered summary judgment in F&D's favor.

Feldman presents two questions[1] for our consideration on appeal, which we have consolidated and rephrased as a single issue:

> Whether the circuit court erred by granting F&D's motion for summary judgment on the basis that the insurance policy did not provide coverage for Feldman's claim.

For the reasons explained herein, we shall affirm.

FACTS AND PROCEEDINGS

On March 27, 2007, F&D issued a director's and officer's liability policy ("the Policy") to Eastern Savings Bank, F.S.B. ("ESB"). The Policy was maintained through the period of time relevant to this appeal. Feldman was an officer or director of ESB during that period of time. On March 1, 2010, Feldman notified F&D of an investigation by the Office

[1] The questions, as presented by Feldman, are:

1. Did the trial court err in looking beyond the plain language of the insurance contract?

2. Did the trial court err by not resolving ambiguities in the insurance contract against the defendants, the drafter of the policy?

of Thrift Supervision ("OTS") and other regulatory agencies into certain transactions and conduct in which Feldman had been involved during the policy period. F&D responded by letter dated April 15, 2010. F&D informed Feldman that it required additional documentation in order to determine whether the OTS investigation was covered under the policy.

On June 25, 2010, the OTS issued a Notice of Charges, which stated the following: "Although [Feldman] is an IAP [institution-affiliated party] of [ESB], the misconduct that is the basis for this action relates to [Feldman's] conduct, as a member of Ivy Ridge [The Townhomes at Ivy Ridge, LLC], with ESSA [Bank & Trust]." On February 17, 2011, Feldman entered into a Stipulation and Consent to the Issuance of an Order of Assessment of a Civil Money Penalty ("the Consent Order") in the amount of $125,000.00 in connection with the OTS investigation. Feldman did not admit or deny the alleged misconduct. Rather, Feldman only admitted statements and conclusions concerning the jurisdiction of the OTS. The Consent Order included an OTS finding of fact that "Feldman . . . violated a law or regulation and/or recklessly engaged in unsafe or unsound practices in conducting the affairs of ESSA [Bank & Trust], an insured depository institution, which has caused or is likely to cause more than a minimal loss to an insured depository institution and/or has resulted in pecuniary gain or other benefit to Feldman." This particular finding of fact regarding Feldman's alleged improper practices was not stipulated to by Feldman.

In November 2014, Feldman forwarded F&D a copy of the Consent Order as well as a ledger and receipt for the legal expenses he incurred. Feldman's legal expenses totaled $181,078.40. Feldman requested indemnification and/or reimbursement under the Policy for the Civil Money Penalty as well as for the legal expenses he incurred. In February of 2014, F&D informed Feldman that it was denying Feldman coverage under the policy. F&D explained that the Policy included coverage for "any matter claimed against a Director or Officer solely by reason of his or her status as a director or officer of [ESB]." F&D advised Feldman that, because the OTS charges against Feldman involved conduct he allegedly undertook as a member of Ivy Ridge, the charges did not arise "solely by reason of his status as an officer or director" of ESB.

On February 12, 2014, Feldman filed an initial complaint for breach of contract against F&D in the Circuit Court for Baltimore County. On or about July 3, 2014, Feldman filed a second amended complaint. The parties filed cross-motions for summary judgment in November 2014. Following a hearing on March 3, 2015, the circuit court granted summary judgment in favor of F&D. The court explained that it found the relevant portion of the Policy "clear and unambiguous" and concluded that "there [was] no material dispute of fact" and that "the language of the contract is crystal clear." This timely appeal followed.

STANDARD OF REVIEW

The entry of summary judgment is governed by Maryland Rule 2-501, which provides:

> The court shall enter judgment in favor of or against the moving party if the motion and response show that there is no genuine

> dispute as to any material fact and that the party in whose favor judgment is entered is entitled to judgment as a matter of law.

Md. Rule 2-501(f).

The Court of Appeals has explained the standard of review of a trial court's grant of a motion for summary judgment as follows:

> On review of an order granting summary judgment, our analysis "begins with the determination [of] whether a genuine dispute of material fact exists; only in the absence of such a dispute will we review questions of law." *D'Aoust v. Diamond*, 424 Md. 549, 574, 36 A.3d 941, 955 (2012) (quoting *Appiah v. Hall,* 416 Md. 533, 546, 7 A.3d 536, 544 (2010)); *O'Connor v. Balt. Cnty.*, 382 Md. 102, 110, 854 A.2d 1191, 1196 (2004). If no genuine dispute of material fact exists, this Court determines "whether the Circuit Court correctly entered summary judgment as a matter of law." *Anderson v. Council of Unit Owners of the Gables on Tuckerman Condo.*, 404 Md. 560, 571, 948 A.2d 11, 18 (2008) (citations omitted). Thus, "[t]he standard of review of a trial court's grant of a motion for summary judgment on the law is de novo, that is, whether the trial court's legal conclusions were legally correct." *D'Aoust*, 424 Md. at 574, 36 A.3d at 955.

Koste v. Town of Oxford, 431 Md. 14, 24-25, 63 A.3d 582, 589 (2013).

DISCUSSION

The only issue we are presented with in this case is whether the OTS charges against Feldman fall within the Policy's definition of "wrongful act." Under Maryland law, "the terms of an insurance contract are to be interpreted utilizing well-established principles that guide the interpretation of contracts generally." *Kendall v. Nationwide Ins. Co.*, 348 Md. 157, 166 (1997) (citing *Pac. Indem. Co. v. Interstate Fire & Cas. Co.*, 302 Md. 383, 388 (1985)). Words within an insurance contract are given "their usual, ordinary, and accepted

meaning. A word's ordinary signification is tested by what meaning a reasonably prudent layperson would attach to the term." *Bausch & Lomb Inc. v. Utica Mut. Ins. Co.*, 330 Md. 758, 779 (1993) (internal citation omitted).

The Policy defines "wrongful act," in pertinent part, as "any matter claimed against a Director or Officer solely by reason of his or her status as a director or officer of [ESB]."[2] Feldman maintains that, because the OTS only had jurisdiction over Feldman due to his status as an officer of ESB, the OTS investigation was triggered against him "solely by reason of his status . . . as a director or officer" of ESB. F&D responds that, because the

[2] This definition is set forth in Section 3(S)(2) of the policy. An additional definition of "wrongful act" is set forth in Section 3(S)(1), which provides in relevant part:

> (1) any actual or alleged act, error, neglect, omission, misstatement, misleading statement or breach of duty which shall have been committed or attempted, or which shall be alleged to have been committed or attempted
>
> (a) by a Director or Officer, acting in their capacity as such, or, subject to SECTION 2(A), in his or her capacity as a director, officer, member, manager, trustee, regent, or governor of a not-for-profit organization[.]

Feldman asserts that our reading of Section 3(S)(2) renders the distinction between (S)(1) and (S)(2) meaningless because (S)(1) relates to activities related to the corporation. Feldman maintains that Section (S)(2) must be read to include activities unrelated to the corporation, such as those allegedly undertaken by Feldman through his involvement with Ivy Ridge. We disagree. We read Section (S)(1) as relating to activities related to the corporation. Section (S)(2), however, makes no reference to any activities at all, but rather to the status of a director or officer.

OTS brought charges against Feldman due to his conduct as a member of Ivy Ridge, the matter was not claimed against Feldman **solely** by reason of his status as a director or officer.

The analysis in this appeal turns on whether the OTS matter was claimed **solely** by reason of his status as a director or officer. The definition of "solely," according to Merriam-Webster dictionary, means "without another" or "to the exclusion of all else." Solely, Merriam–Webster (2015), http://www.merriam-webster.com/dictionary/solely. Indeed, we adopted this definition of the word "solely" thirty years ago when we cited to Webster's Ninth New Collegiate Dictionary, which "define[d] the word 'solely' as 'without another' or 'to the exclusion of all else.'" *Kern v. S. Baltimore Gen. Hosp.*, 66 Md. App. 441, 447 (1986) (quoting Webster's Ninth New Collegiate Dictionary 1122 (1985)). Applying the definition of "solely" to the language of the Policy, it is clear that if any other reason for the OTS claim exists -- a reason unrelated to Feldman's status as a director or officer of ESB -- then the claim does not fall under the Policy's definition of "wrongful act" and, accordingly, the claim is not covered under the Policy.

We are unpersuaded by Feldman's contention that his status as a director of ESB was the sole reason why the OTS initiated a claim against him. According to Feldman, "[i]t is simply a fact that OTS was only interested, and indeed only permitted, to investigate Feldman because of his affiliation with ESB, thus clearly establishing coverage under the [Policy]." Feldman further maintains that "[a]bsent Feldman's status as an officer or director of ESB, it is clear that OTS would not have had jurisdiction over Feldman's actions

and would therefore not have investigated Feldman." Nonetheless, even though the OTS only had jurisdiction over Feldman because he was an institution-affiliated party, as we shall explain, the OTS matter was not claimed **solely** by reason of Feldman's status as an officer or director of ESB.

There are two reasons why the OTS was able to initiate adjudicatory proceedings and assess civil money penalties against Feldman. First, Feldman was an institution-affiliated party. Second, the OTS alleged that Feldman, by his conduct as a member of Ivy Ridge, violated laws and regulations. Both of these reasons were necessary for the OTS claim to proceed, but neither alone was sufficient. Because Feldman's conduct was one of the two reasons the OTS was able to initiate a claim against him, and because Feldman's conduct as a member of Ivy Ridge formed the basis of the substantive charges brought against Feldman, Feldman's status as a director or officer of ESB was not the *sole* reason the OTS matter was claimed against him.[3]

[3] At oral argument, Feldman pointed to a rider endorsement to the Policy which had been purchased directly by Feldman as an additional example of why F&D was obligated to defend Feldman in the OTS investigation. No party disputes that Feldman purchased the rider endorsement or that the rider endorsement imposed a duty to defend upon F&D in the (continued...)

A review of the relevant statutory authority demonstrates that OTS was not solely able to initiate the claim against Feldman by reason of his status as a director or officer of ESB. 12 U.S.C. § 1818(e) provides, in pertinent part:

> Whenever the appropriate Federal banking agency determines that . . . any institution-affiliated party[4] has, directly or indirectly . . . violated any law or regulation . . . the appropriate Federal banking agency for the depository institution may serve upon such party a written notice of the agency's intention to remove such party from office or to prohibit any further participation by such party, in any manner, in the conduct of the affairs of any insured depository institution.

12 U.S.C. § 1818(e)(1)(A)(i)(I), 12 U.S.C. § 1818(i)(2)(B). The statute further provides that "any institution-affiliated party who . . . [violates any law or regulation] . . . shall forfeit and pay a civil penalty of not more than $25,000 for each day during which such violation, practice, or breach continues." 12 U.S.C. § 1818(i)(2)(B), (i)(2)(A)(i).

To be sure, the relevant statutory authority permits the OTS to initiate claims against institution-affiliated parties, and but for Feldman's status as an institution-affiliated party, the OTS would not have been permitted to initiate the claim against Feldman. Critically, however, the OTS is authorized to initiate a claim against an institution-affiliated party *only*

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[3] (...continued)
definition of "wrongful act" in the Policy. As such, the existence of the rider endorsement is irrelevant to the determination of the narrow issue raised in this appeal.

[4] An "institution-affiliated party" is "any director, officer, employee, or controlling stockholder . . . of, or agent for, an insured depository institution." 12 U.S.C. § 1813(u). As an ESB director or officer, Feldman met the definition of institution-affiliated party.

if that individual has violated laws or regulations. 12 U.S.C. §§ 1818(e), (i)(2)(B), and (i)(2)(A)(i). In this case, the OTS initiated a claim against Feldman because he was an institution-affiliated party who, through his conduct as a member of Ivy Ridge, violated laws and regulations. The OTS Notice of Charges indicated as much through the following language: "Although [Feldman] is an IAP [institution-affiliated party] of [ESB], the misconduct that is the basis for this action relates to Feldman's conduct, as a member of Ivy Ridge . . . . By [his] actions [as a member of Ivy Ridge], [Feldman] has directly or indirectly violated laws and regulations[.]"[5]

Feldman maintains that, because he maintained his innocence throughout the OTS investigation and proceeding, and because he never admitted fault and was never found at fault by the OTS, there was no actual wrongdoing and, therefore, the only basis for the OTS claim was Feldman's status as an institution-affiliated party. As discussed *supra*, the OTS is only authorized to initiate a claim if an institution-affiliated party has violated laws or regulations. In the instant case, as indicated in the Notice of Charges, the basis for the OTS action was Feldman's alleged wrongdoing by materially altering loan documents related to four loans totaling $3.25 million. Absent this specific allegation of wrongdoing, the OTS would not have instituted a claim against Feldman simply because of his status as a director or officer of ESB. The fact that Feldman entered into a Consent Order and was not actually

[5] The parties acknowledge that Ivy Ridge is an entirely separate entity from ESB and is not insured under the Policy.

found to have committed the alleged offense does not render the alleged wrongdoing meaningless when assessing the basis for the OTS claim.

Because Feldman's conduct as a member of Ivy Ridge was one of the reasons for the OTS action against him, the OTS matter was not "claimed against [Feldman] solely by reason of his . . . status as a director or officer of" ESB. Accordingly, we reject Feldman's assertion that the OTS charges fall within the Policy's definition of "wrongful act."

Furthermore, Feldman's reliance upon various cases construing various other jurisdictions' indemnification statutes is misplaced. Feldman offers a public policy argument relating to the importance of indemnification statutes and policies. Feldman posits that no one would be willing to serve as an officer or director of a corporation, subjecting oneself to extra scrutiny or personal liability, without some means of protection. According to Feldman, this is the reason indemnification statutes and policies exist.

In support of this assertion, Feldman cites to cases interpreting Delaware's indemnification statute. *See Heffernan v. Pacific Dunlop GNB Corp.*, 965 F.2d 369, 375 (7th Cir. 1992) (commenting that Delaware's indemnification statute exists to "encourage capable individuals to serve as corporate directors, secure in the knowledge that expenses incurred by them in upholding their honesty and integrity as directors will be borne by the corporation they serve.") (internal quotations omitted). Critically, however, Maryland does not have an indemnification statute. Although there may be strong public policy reasons supporting Delaware's indemnification statute, the General Assembly has not enacted such

a law in the State of Maryland. Any public policies which may underlie Delaware's indemnification statute are irrelevant to this appeal.[6] As such, we conclude that Feldman's attempts to analogize to out-of-state cases interpreting out-of-state indemnification statutes are unavailing.

Our task in this appeal is not to interpret an indemnification statute but rather to interpret the language of a specific insurance policy. Indeed, although there are public policy reasons which would support broad indemnification of officers and directors sued for wrongful conduct, multiple courts in a range of jurisdictions have held that coverage could only be afforded for officers' and directors' losses in connection with wrongful acts committed by the officer or director "in their capacities as directors and officers of the insuring corporations, but not for acts committed in other capacities, such as while serving as a director of a corporation other than the insuring company." David J. Marchitelli,

[6] Furthermore, the language of the Delaware indemnification statute differs significantly from the Policy language at issue in this appeal. The Delaware indemnification statue does not limit indemnification to individuals **solely** by reason of their status as directors or officers of a corporation. Rather, the statute provides that "[a] corporation shall have the power to indemnify any person who was or is a party . . . to any threatened, pending, or completed action or suit by or in the right of the corporation to procure a judgment in its favor by reason of the fact that the person is or was a director, officer, employee or agent of the corporation . . . ." Del. Code Ann. Tit. 8, § 145. That language has been interpreted to include circumstances in which an individual's status as director is one reason, among others, for the claim against the individual. *Heffernan*, *supra*, 965 F.2d at 364-75. Indeed, the *Heffernan* court specifically commented that if Delaware had "desired to limit permissible indemnification solely to those suits in which a director is sued for breaching a duty of his directorship . . . it would have jettisoned the supple 'by reason of the fact that' phrase in favor of more specific language." *Id.* at 375. In this case, the Policy included more specific language through the use of the word "solely."

Construction and Application of Directors and Officers Insurance Policy, Exclusive of Exclusion and Notice of Claim Provisions, 22 A.L.R. 6th 113 (2007) § 5 (collecting cases). Marchitelli explained:

> In order to qualify for coverage for loss in connection with wrongful acts, policies often require that the insured director or officer engaged in the wrongful conduct while acting in his or her capacity as a director or officer of the insuring corporation, often "solely" in that capacity, so it has been held that directors and officers who served more than one company, or also served as an attorney with a law firm that represented the insuring company, were not insured where their wrongful acts were committed while they acted in the capacity of the positions they held with the other organizations, rather than in their capacities as directors and officers of the insuring companies

22 A.L.R.6th 113 § 3. *See also Federal Sav. & Loan Ins. Corp. v. Mmahat*, 97 B.R. 293 (E.D. La. 1988), *judgment aff'd in part and remanded on other grounds*, 907 F.2d 546 (5th Cir. 1990) (applying Louisiana law) (holding that a director of a failed banking institution was not entitled to recoup costs incurred in defending claims made against him for allegedly dishonest acts when the acts were committed in the director's capacity as a lawyer, rather than "solely" in his capacity as a director of the insuring institution).

Because the OTS claim against Feldman was not brought solely by reason of his status as a director or officer of ESB, the Policy did not provide coverage for the OTS

claims. We, therefore, hold that the circuit court properly granted F&D's motion for summary judgment.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.