**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A17-1923**

Fern Hill Place Retail Association, Inc.,
Appellant,

vs.

Fern Hill Place Homeowners Association, Inc.,
Respondent,

Cities Management, Inc.,
Respondent.

**Filed August 6, 2018**
**Affirmed**
**Rodenberg, Judge**

Hennepin County District Court
File No. 27-CV-15-8156

Jenneane L. Jansen, Kris E. Palmer, Jansen & Palmer, LLC, Minneapolis, Minnesota; and Michael R. Moline, Lommen Abdo, P.A., Minneapolis, Minnesota (for appellant)

Thomas A. Harder, Thomas H. Priebe, Foley & Mansfield, PLLP, Minneapolis, Minnesota (for respondent Fern Hill Place Homeowners Association, Inc.)

Jessica J. Theisen, Rachel B. Beauchamp, Cousineau, Van Bergen, McNee & Malone, P.A., Minnetonka, Minnesota (for respondent Cities Management, Inc.)

Considered and decided by Rodenberg, Presiding Judge; Halbrooks, Judge; and Jesson, Judge.

## U N P U B L I S H E D  O P I N I O N

**RODENBERG**, Judge

Appellant Fern Hill Place Retail Association Inc. challenges the district court's grant of summary judgment and award of attorney fees in favor of respondents Fern Hill Place Homeowners Association Inc. (HOA) and Cities Management Inc. (Cities). Appellant argues that the district court erred in denying its motion to amend its complaint for a second time, in failing to declare appellant a "creditor association" under the parties' agreement, in awarding attorney fees to HOA, and in granting summary judgment in favor of Cities. In a related appeal, HOA argues that the district court erred in granting summary judgment to Cities on its claim for contractual defense and indemnity. We affirm.

## FACTS

### *Background*

This long-simmering dispute between the parties concerns a condominium development that is combined with designated retail space located at 5101 Minnetonka Boulevard in St. Louis Park (the property). Appellant and HOA are each organized as a common interest community (CIC).[1] The two CICs entered into a Joint Declaration of Easements, Covenants, and Restrictions, which allocates maintenance and other

[1] A CIC consists of "contiguous or noncontiguous real estate within Minnesota that is subject to an instrument which obligates persons owning a separately described parcel of the real estate, or occupying a part of the real estate pursuant to a proprietary lease . . . to pay for . . . taxes . . .; insurance premiums . . .; construction, maintenance, repair or replacement of improvements located on, one or more parcels or parts of the real estate other than the parcel or part that the person owns or occupies." Minn. Stat. § 515B.1-103(10) (2016).

obligations concerning the property as between the CICs. Paragraph 4(c) of the Joint Declaration provides that:

> If any portion of the Building is damaged, then such damage shall be repaired and restored by the Association having responsibility for the portion of the Building in which the damage occurs. If any disrepair or damage adversely affects the structural support or any other portion of the Building, . . . and if at any time the Association having responsibility for the disrepair or damage (herein called the "Defaulting Association") is not proceeding diligently with the work of repair and restoration, then the other Association (herein called the "Creditor Association") may give written notice to the Defaulting Association specifying the respect in which such repair or restoration is not proceeding diligently. If, upon the expiration of ten (10) days after the giving of such notice, the work or repair or restoration is not proceeding diligently, then the Creditor Association may perform the repair and restoration and may take all appropriate steps to complete the same. The Creditor Association shall be entitled to reimbursement from the Defaulting Association for all reasonable and necessary costs and expenses incurred by Creditor Association therefor and shall have a lien against any insurance proceeds payable under any policy of insurance protecting against such damage to secure repayment.

Appellant is responsible for the retail space on the ground floor of the property. HOA is responsible for the residential units occupying the upper floors and a below-ground parking garage. The declaration also provides that expenses for general maintenance work on "all driveways and parking areas" are to be paid as follows: 80% by HOA and 20% by appellant. The residential parking garage is a "common element" under the HOA declaration. Cities is a property-management company that contracted with both CICs for property-management services.

A dispute arose between the parties because of water intrusion at the property. Appellant alleges that HOA took steps to correct the water intrusion in the residential garage and other areas, but did not permit any involvement by appellant. Appellant claims that the repairs "were not conducted in a workmanlike manner." It alleges that, starting in "2010 or earlier, the water intrusion issues were obvious upon mere inspection in the residential garage," and that it became clear that the repairs had failed to correct the problems. Appellant alleges that, on March 24, 2010, it gave HOA notice of the need for repair of the continuing problems, and that HOA failed to make repairs. In July 2014, appellant retained counsel to pursue its legal remedies concerning the repairs it believed necessary.

In an earlier lawsuit, HOA sued appellant, alleging that appellant was in default of its financial obligations under the parties' Joint Declaration. *Fern Hill Place Retail Ass'n, Inc. v. Fern Hill Place Homeowners Ass'n, Inc.*, No. A15-1318, 2016 WL 1551669 (Minn. App. 2016), *review denied* (Minn. June 29, 2016) (*Fern Hill I)*. HOA had commenced an arbitration proceeding pursuant to the Joint Declaration. The parties reached an agreement to settle the dispute, but appellant did not sign the written agreement. The HOA later brought a motion to the arbitrator, before whom that proceeding was still pending, requesting that the arbitrator confirm the validity and enforceability of the settlement agreement. The arbitrator granted this motion. Appellant moved the district court to vacate the award. The district court denied that motion. Appellant appealed, and we affirmed the district court.

***The Current Dispute***

The current suit was started in March 2015. Appellant amended its complaint on May 4 (first amended complaint). Count one of the first amended complaint sought a declaratory judgment under Minn. Stat. § 555.01-.16 (2016) that appellant was a "creditor association" under the Joint Declaration. Count two requested an injunction to allow appellant to undertake repairs without HOA's interference. Count three claimed that HOA violated its duties under Minnesota law. Count four alleged that Cities violated Minnesota law by aiding and abetting HOA's violation of its duties. Count five alleged unjust enrichment by HOA. Count six alleged that appellant is entitled to a lien against HOA for costs incurred in any future repairs. Count seven alleged that HOA and Cities committed waste by failing to properly repair the ongoing water-intrusion issues. Count eight requested the appointment of a receiver over HOA. Finally, Count nine asked the court to award appellant its attorney fees.[2]

Cities cross-claimed against HOA, arguing that Cities is contractually entitled to indemnity from HOA for attorney fees and for any liability of Cities to third parties resulting from its work for HOA. It also requested attorney fees and other costs incurred in defense of appellant's claims against it.

[2] HOA counterclaimed, alleging that appellant breached the parties' agreement by failing to pay HOA what appellant owed under the earlier settlement agreement between the parties and by failing to pay its portion of the common expenses for the property. HOA also sought attorney fees under Minn. Stat. § 515B.4-116(b). With the district court's approval, HOA voluntarily dismissed this counterclaim without prejudice.

Appellant moved the district court to appoint a receiver over HOA. It alleged that HOA was insolvent, that its board was not structurally sound, and that immediate action was required. The district court denied this motion. It found that there was a legitimate dispute regarding the extent and cost of the necessary repairs, and that HOA was not insolvent for the purposes of the motion because HOA was paying its debts in the ordinary course of business and appeared likely to be able to obtain financing for the repair work. It further found that HOA was not committing waste. The district court also concluded that, because the extent of the necessary repairs was a factual dispute, the appointment of a receiver was not necessary and would needlessly increase costs. It noted that the parties' Joint Declaration provided for an architect to determine the extent and nature of any necessary repairs.

HOA and appellant eventually agreed to retain a firm to assess what repairs were needed. On Sept. 18, 2015, the district court issued an order allocating responsibility for the costs of the engineering firm. In April 2016, HOA moved to compel discovery. The district court granted the motion, and awarded HOA attorney fees.

Cities moved for summary judgment, seeking dismissal of appellant's claims against it, and seeking summary judgment on its cross-claim against HOA for indemnification. HOA also moved for summary judgment, seeking dismissal of appellant's complaint and asking for attorney fees. In its brief to the district court opposing summary judgment, appellant requested leave to amend its complaint and asked for summary judgment in its favor, but it noted no motions concerning these items of requested relief and did not produce a proposed second amended complaint.

The district court denied appellant's request to amend its complaint for a second time. It noted that appellant failed to comply with the motion-practice requirements of the General Rules of Practice, did not identify its proposed pleading amendments, and did not provide a proposed amended complaint. The district court concluded that Minn. R. Civ. P. 15.02, providing that the pleadings may be amended to conform to the evidence, did not apply because appellant was presenting new theories to the district court to which HOA had not consented. Further, it concluded that amendment of the pleadings was not required in the interests of justice, because the amendment would introduce entirely new causes of action and claims for relief which would delay the proceedings further.

The district court granted HOA's motion for summary judgment on count one. It concluded that appellant is not entitled to declaratory relief, because appellant has a contractual remedy available under the Joint Declaration, which permits appellant to commence repairs that it believes necessary and seek reimbursement from HOA. It also concluded that HOA was not a defaulting association under the terms of the Joint Declaration. The district court determined that "the largest obstacle in the way of commencing repairs at this point is the present lawsuit." It granted summary judgment for HOA and Cities on appellant's count two, because the injunctive relief sought by appellant was "not the type of relief for which the parties contracted in the Declaration." It granted summary judgment for HOA on count three, relying on its own earlier finding that the board was not defunct from 2010 to 2017, and that appellant had failed to demonstrate a genuine issue of material fact concerning HOA's alleged financial mismanagement. It further concluded that appellant lacked standing to bring its count three claims. The district

court summarily dismissed count five, reasoning that appellant has no claim for unjust enrichment where the parties have an enforceable contract and HOA has not been demonstrated to have been enriched. On count six, the district court applied this same analysis to determine that a lien is not an available remedy. The district court summarily dismissed count seven, which alleged waste against HOA and Cities, concluding that such claims were time-barred under the six-year statute of limitations. On count eight, the district court concluded that appointment of a receiver was not necessary, because HOA's financial and organizational position had only improved since the district court's earlier denial of appellant's motion for appointment of a receiver. The district court, having dismissed all of appellant's substantive claims for relief, awarded appellant no attorney fees.

The district court granted summary judgment in favor of Cities on count four of appellant's complaint, and on Cities' cross-claim against HOA for contractual defense and indemnification. Concerning count four, it concluded that there was no violation of law by HOA that Cities could have aided and abetted. Concerning the cross-claim, the district court concluded that the agreement between Cities and HOA requires HOA to indemnify and hold Cities harmless for actions taken by Cities on behalf of HOA. Finally, as HOA was the prevailing party in litigation under Minn. Stat. § 515B.4-116(b), the district court awarded attorney fees to both HOA and Cities (including those which HOA had incurred in indemnifying Cities from the cost of litigation).

By separate order, the district court ordered appellant to pay HOA's attorney fees, totaling $272,546.77, under Minn. Stat. § 515B.4-116(b). The district court later entered

judgment on Cities' cross-claim, requiring HOA to pay Cities $42,883.89 on Cities' claim for contractual defense and indemnification.

This appeal followed.

## D E C I S I O N

On appeal, appellant argues that the district court erred in denying its request to amend its complaint for a second time, in failing to declare appellant a creditor association under the agreement between it and HOA, in its award of attorney fees and costs to HOA, and in awarding summary judgment in Cities' favor.[3] In a related appeal, HOA challenges the district court's entry of judgment in favor of Cities on its claims for contractual indemnification from HOA.

### I. The district court did not abuse its discretion when it denied appellant's request to amend its complaint a second time.

We first address appellant's argument that the district court improperly denied what appellant intended to be a motion to amend its complaint for a second time. Leave to amend a pleading "shall be freely given when justice so requires." Minn. R. Civ. P. 15.01. We review a district court's decision to permit or deny amendments to pleadings for abuse of discretion. *Johns v. Harborage I, Ltd.*, 664 N.W.2d 291, 295 (Minn. 2003).

Appellant did not comply with Minn. R. Gen. P. 115.04's notice and timing requirements when it requested permission to amend its complaint. *See* Minn. R. Gen. P.

[3] Appellant makes no argument concerning the district court's dismissal of its claims against HOA for unjust enrichment and for a constitutional lien. It also makes no arguments regarding the district court's summary judgment dismissing its claims against HOA and Cities for waste and for appointment of a receiver.

115.04 (providing that a moving party must serve documents on all opposing counsel and file motion papers with the court administrator at least fourteen days prior to a hearing on the motion). Appellant raised the issue in its memorandum of law opposing summary judgment. Appellant did not provide a proposed amended complaint. Nevertheless, in its order denying amendment, the district court parsed out the substance of appellant's proposed amendments. The district court determined that appellant was intending to seek either monetary damages for future repairs or injunctive relief requiring the HOA to commence repairs at its own expense.

The district court could have denied appellant's request to amend because of the complete failure to comply with Minn. R. Gen. P. 115.04. But, despite appellant's noncompliance with the rule, the district court thoroughly and accurately analyzed appellant's request to amend the complaint, concluding that the proposed amendment would "introduce entirely new causes of action and claims for relief," would prejudice HOA and Cities by requiring them to gather and prepare new evidence "more than 18 months after the pleadings, where the court is considering summary judgment," and further delay the case, doing "nothing but harm." The record supports the district court's analysis.

Appellant argued to the district court, and maintains on appeal, that Minn. R. Civ. P. 15.02, providing that "[w]hen issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings," should permit the amendment here. Minn. R. Civ. P. 15.02. The district court determined that the issues that appellant sought to raise by the additional amendment had not been consented to by HOA and Cities "either expressly or by implication." We

agree with the district court, and we see no abuse of its discretion in denying appellant the opportunity to amend its pleadings by introducing new causes of action and claims for relief at the summary-judgment stage, particularly where appellant failed to comply even minimally with the applicable motion-practice rules.

## II. The district court did not err in summarily dismissing appellant's first amended complaint.

We next address appellant's arguments concerning the district court's summary judgment dismissing its claims.[4]

"We review a district court's summary judgment decision de novo. In doing so, we determine whether the district court properly applied the law and whether there are genuine issues of material fact that preclude summary judgment." *Riverview Muir Doran, LLC v. JADT Dev. Grp., LLC*, 790 N.W.2d 167, 170 (Minn. 2010) (citation omitted).

### A. Appellant's Declaratory-Judgment Claim Against HOA

Appellant's essential claim is that it is entitled to a declaratory judgment that, if appellant does as the parties' Joint Declaration permits and repairs the water-intrusion damages, it will be a creditor association, and entitled to recover from HOA all amounts it expends.

"In any action for declaratory relief, the court has full discretion pursuant to Minn. Stat. § 555.06 to refuse to enter a judgment or decree granting relief where such judgment

[4] We focus our inquiry on the actual claims asserted by appellant and addressed by the district court below in appellant's first amended complaint, although we note that, even in its briefing on appeal, appellant attempts to raise arguments which were the subject of its proposed second amended complaint and are outside the scope of our review.

or decree would not terminate the controversy giving rise to the proceedings." *Bailey v. Univ. of Minn.*, 187 N.W.2d 702, 703 (Minn. 1971); *see* Minn. Stat. § 555.06 ("The court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding.").

In its first amended complaint, appellant asked the district court for a declaratory judgment under Minn. Stat. § 555.01-.16 (providing that courts may "declare rights, status and other legal relations whether or not further relief is or could be claimed" and that "a contract may be construed either before or after there has been a breach thereof") as to its rights as the "creditor association" under paragraph 4(c) of the Joint Declaration between appellant and HOA. This paragraph of the Joint Declaration provides that, if one of the parties responsible for repairs "adversely affect[ing] the structural support of any other portion" of the property "is not proceeding diligently with the work of repair and restoration," then the other party, designated by the declaration as "the creditor association," may give notice to the party not proceeding diligently, the "defaulting association," "specifying the respect in which such repair or restoration is not proceeding diligently." If the repair is not begun after ten days, the creditor association "may perform the repair and restoration and may take all appropriate steps to complete the same" and is entitled to reimbursement from the defaulting association "for all reasonable and necessary costs and expenses incurred." Because the Joint Declaration expressly provides how the parties are to proceed in this situation, the district court declined to issue a declaratory judgment.

The district court got it exactly right. The parties have a detailed written agreement that contemplates this precise situation and provides a process for a remedy. Despite years of haggling between these parties, appellant has yet to move forward under the process to which it agreed in the Joint Declaration—that is, commencing repairs unilaterally and seeking reimbursement from HOA.

A declaratory judgment is not appropriate if it would not "terminate the controversy" between parties. *Bailey*, 187 N.W.2d at 703. An actual controversy "is not one that will arise in the future upon the happening of a certain contingency, but is a controversy over a present right." *Harrington v. Fairchild*, 235 Minn. 437, 443, 51 N.W.2d 71, 74 (Minn. 1952). Here, appellant improperly and prematurely seeks a judicial declaration that would amount to "advising what the law would be upon a hypothetical state of facts." *Seiz v. Citizens Pure Ice Co.*, 207 Minn. 277, 281, 290 N.W. 802, 804 (Minn. 1940). Appellant is asking what the district court thinks will happen if appellant takes the action it thinks it is entitled to take under the parties' agreement. The "declaration" sought by appellant is not a determination of the present rights of the parties under the declaration. The district court properly declined to enter a declaratory judgment and did not err in granting summary judgment in favor of HOA on this issue.

**B. Appellant's Claim for Injunctive Relief Against HOA and Cities**

We next address appellant's arguments that the district court should have determined that it is entitled to injunctive relief.

"A temporary injunction is an extraordinary remedy. Its purpose is to preserve the status quo until adjudication of the case on its merits." *Haley v. Forcelle*, 669 N.W.2d 48,

55 (Minn. App. 2003) (citation omitted), *review denied* (Minn. Nov. 25, 2003). For permanent injunctive relief to be awarded, a right to the injunctive relief must be established at trial. *Bio-Line, Inc. v. Burman*, 404 N.W.2d 318, 320 (Minn. App. 1987).

Appellant's first amended complaint requested both temporary and permanent injunctive relief. The district court determined that injunctive relief was not warranted because there remained "a contractual remedy under the [d]eclaration for [appellant] to complete repairs it deems necessary." The district court's determination comports with Minnesota law. Despite the longstanding acrimony between these parties, the record does not support the contention that HOA is preventing appellant from making the repairs that appellant thinks necessary and seeking thereafter to assume the role of creditor association under the Joint Declaration. What appellant wants is a judicially crafted injunctive remedy that is nowhere contemplated by the parties' agreement. The district court did not err in granting summary judgment on appellant's claims for injunctive relief.

**C. Appellant's Claim for Violation of Statutory Duties Against HOA**

Appellant argues that HOA violated its statutory duties under the Minnesota Common Interest Ownership Act and the Minnesota Nonprofit Corporation Act. In count three of its first amended complaint, appellant alleged that HOA's board failed to comply with its bylaws and with both Minnesota Statutes Chapter 317A (2016) and Minnesota Statutes Chapter 515B (2016). It alleged that the HOA was operating with a defunct board from 2010 until 2014, that the HOA board breached its statutory duties by failing to address water intrusion issues and failing to properly manage reserve funds. It further maintained

that the HOA board's breach of its statutory duties resulted in the "committing of waste, and damages to [appellant]."

The district court found that appellant "presented no evidence that it has been harmed by the alleged breaches of 515B and 317A, and did not respond to the HOA's argument that no damages resulted from these claims." The district court further determined that appellant lacked standing to bring these claims. It concluded that Chapter 515B permits recovery of damages for any person "adversely affected by [a] failure to comply" with the chapter, and found that appellant failed to demonstrate how it was adversely affected by any violation of Chapter 515B by HOA. It noted that appellant is not a member of the HOA, does not pay an association fee to the HOA, and is not subject to the HOA's declaration. The district court further concluded that appellant failed to demonstrate how any fiduciary duties of the HOA board extend to appellant, and that appellant had not established a connection between the HOA board's alleged violation of Minn. Stat. § 317A.251 and any damages suffered by appellant.

"We review de novo whether a party has standing." *Fed. Home Loan. Mort. Corp. v. Mitchell*, 862 N.W.2d 67, 70 (Minn. App. 2015), *review denied* (Minn. June 30, 2015). "Standing is the requirement that a party has a sufficient stake in a justiciable controversy to seek relief from a court. Standing is acquired if the plaintiff has suffered some injury-in-fact or if the plaintiff is the beneficiary of some legislative enactment granting standing." *Pollard v. Southdale Gardens of Edina Condo. Ass'n., Inc.*, 698 N.W.2d 449, 455 (Minn. App. 2005)

Minn. Stat. § 515B.3-103 identifies the statutory duties of a CIC's board of directors and officers. Minn. Stat. § 515B.4-116 provides a claim of relief for "any person or class of persons adversely affected" by a party's failure to comply with any provision of Chapter 515B or a CIC's declaration, bylaws, or rules and regulations. Minn. Stat. § 317A.251 also identifies the duties of a nonprofit corporation's board of directors, and charges directors to act "in a manner the director reasonably believes to be in the best interests of the corporation." In order to establish standing, a litigant must demonstrate "a harm that is both concrete and actual or imminent, not conjectural or hypothetical." *Hanson v. Woolston*, 701 N.W.2d 257, 262 (Minn. App. 2005) (quotations omitted).

We agree with the district court that appellant does not have standing to sue HOA under Chapters 317A or 515B. As the district court rightly noted, appellant is not a member of HOA and is not party to HOA's declaration. Appellant cites no binding authority to support a conclusion that it has standing to sue HOA for a breach of its duties under either of these statutes.

Even if HOA breached a statutory duty in improperly addressing the water intrusion issue, appellant has suffered no damages. It has not undertaken to make repairs as provided for by the Joint Declaration.

**D. The District Court's Award of Attorney Fees to HOA**

Appellant next argues that the district court erred by awarding attorney fees to HOA and Cities under Minn. Stat. § 515B.4-116. Appellant clarified at oral argument that it only challenges on appeal the fact of the attorney-fee award, and not the amount. Appellant

argues that the district court erred in finding that HOA was a "prevailing party" under the statute, and in awarding attorney fees when HOA had dismissed its crossclaim.

The Minnesota Common Interest Ownership Act provides for attorney fees related to litigation under the Act. Minn. Stat. § 515B.4-116(b) ("The court may award reasonable attorney fees and costs of litigation to the prevailing party.") "Appellate courts only reverse attorney fee awards if there is an abuse of discretion." *301 Clifton Place LLC v. Clifton Place Condo. Ass'n*, 783 N.W.2d 551, 569 (Minn. App. 2010). We review a district court's interpretation of a statute de novo. *Cocchiarella v. Driggs*, 884 N.W.2d 621, 624 (Minn. 2016).

In awarding HOA attorney fees, the district court interpreted Minn. Stat. § 515B.4-116 to identify, under subpart (a), the circumstances under which a party has a right of action under the statute, and under subpart (b), for an award of reasonable fees and costs to the "prevailing party" in that action. It determined that the statute does not distinguish between prevailing plaintiffs and prevailing defendants. It also determined that HOA did not waive its claim for fees and costs when it dismissed its counterclaim without prejudice.

We agree with the district court's construction of Minn. Stat. § 515B.4-116. The plain language of the statute is unambiguous. Minn. Stat. § 515B.4-116(a) identifies who may sue for a violation of the Minnesota Common Interest Ownership Act, and Minn. Stat. § 515B.4-116(b) provides that attorney fees and litigation costs may be assessed in favor of the prevailing party in such an action. "Prevail" is defined as "[t]o obtain the relief sought in an action; to win a lawsuit." *Black's Law Dictionary* 1380 (10th ed. 2014).

Nothing in the statute suggests that, to "prevail," a party must be seeking affirmative relief. Either a plaintiff or a defendant may be a prevailing party. Appellant's lawsuit against HOA is meritless, and HOA is plainly entitled to attorney fees as a prevailing party under Minn. Stat. § 515B.4-116.

Concerning appellant's argument that the district court erred in awarding HOA attorney fees because HOA's counterclaim was dismissed, we have held that attorney fees remain available after the dismissal of a claim in comparable circumstances. *See Vegemast v. DuBois*, 498 N.W.2d 763, 766 (Minn. App. 1993) (holding that a district court retains jurisdiction to consider rule 11 attorney fees even after an underlying claim is dismissed). HOA is entitled to attorney fees under Minn. Stat. § 515B.4-116 as the prevailing party in a suit under the Minnesota Common Interest Ownership Act because it obtained a summary judgment dismissing all of appellant's claims, regardless of the dismissal of its counterclaim against appellant.

### E. Appellant's Claim of Aiding and Abetting a Violation of Minnesota Statutory Law Against Cities

Appellant also challenges the district court's grant of summary judgment in favor of Cities on count four of the first amended complaint.

The district court summarily dismissed appellant's claim against Cities alleging that it aided and abetted HOA's breach of its duties under the Minnesota Common Interest Ownership Act and the Minnesota Nonprofit Corporations Act. The district court concluded that appellant's aiding-and-abetting claims against Cities were predicated on its claims that HOA breached its statutory duties. Because we affirm the district court's grant

of summary judgment for HOA on appellant's claims that it violated its statutory duties, we similarly conclude the district court properly granted summary judgment in favor of Cities on appellant's aiding-and-abetting claim against it.

## III. The district court did not err in granting summary judgment in favor of Cities on its cross-claim against HOA for contractual indemnification.

In a related appeal, HOA argues that the district court erred in granting summary judgment for Cities on the cross-claim against HOA for contractual indemnification. Cities had a separate contract with HOA to assist with financial and other management.

"[T]he existence and terms of a contract are questions for the fact finder." *Morrisette v. Harrison Int'l Corp.*, 486 N.W.2d 424, 427 (Minn. 1992). But, "[a]bsent ambiguity, the interpretation of a contract is a question of law." *Roemhildt v. Kristall Dev. Inc.*, 798 N.W.2d 371, 373 (Minn. App. 2011). "Whether a contract is ambiguous is a question of law that we review de novo." *Dykes v. Sukup Mfg. Co.*, 781 N.W.2d 578, 582 (Minn. 2010).

The district court determined that the agreement between HOA and Cities requires HOA "to indemnify Cities for all damages, claims, and expenses sustained by Cities when carrying out the provisions of the agreement." The district court determined that the contract is unambiguous and that its plain language provides that HOA "is contractually obligated to indemnify Cities and pay Cities' attorney fees and costs incurred."

The terms of the agreement between the parties provide:

> Except for damages or injuries caused by the illegal or intentional misconduct of Cities, its agents, or its employees, the Association agrees to indemnify and hold Cities and the Affiliated Companies harmless for all damages, claims, and

> expenses sustained by Cities when carrying out the provisions of this Agreement . . . . This indemnity and hold harmless provision shall apply even in the event that Cities may have breached the terms of this Agreement. The Association hereby holds Cities . . . harmless from and indemnifies them against any and all losses, damages, expenses which arise due to claims for damages or injury to persons or property except for those actions of Cities found to be illegal or intentional. . . . The Association agrees to pay all expenses incurred by Cities and the Affiliated Companies, including without limitation, attorneys' fees for counsel employed to represent the Association, Cities and the Affiliated Companies, in any proceeding or suit brought by them . . . including any action brought by Cities to collect sums due to it by the Association. This indemnification shall include any claim brought by a member of the Association or a third party for problems with the construction, maintenance or repair of the property.

We agree with the district court's conclusion that the indemnification provision in the parties' agreement is unambiguous. When this lawsuit was commenced, the 2014-2015 agreement between HOA and Cities governed. The language in the indemnification provision clearly provides that HOA must indemnify Cities against any claims arising out of Cities' duties under the contract and provides that HOA will pay all expenses incurred by Cities regarding these claims.

HOA argues on appeal that the provision is ambiguous because it contains conflicting language providing exceptions. Language in the agreement exempts damages or injuries arising out of Cities' "illegal or intentional misconduct" from the hold-harmless agreement. But here, HOA does not claim, and the record would not support, that Cities engaged in any such conduct. On the contrary, all of appellant's claims against both HOA and Cities are meritless. HOA is responsible to indemnify Cities for claims arising out of Cities' duties under its agreement with HOA.

HOA further argues that appellant's claims against Cities are not within the scope of the indemnification provision because the claims involve conduct outside of Cities' duties to HOA. HOA argues that the allegations in appellant's complaint that Cities took "numerous intentional and illegal actions" removes those claims from indemnification under the parties' agreement. Only count four of appellant's complaint relates to Cities' allegedly intentional and illegal conduct.[5] As discussed, count four claimed that Cities was aiding and abetting HOA's breach of its statutory duties. That claim was properly dismissed as against both of respondents as a matter of law.

HOA argues for the first time on appeal that Minn. Stat. § 337.02 (2016) renders the indemnification provision unenforceable. Minn. Stat. § 337.02 provides that indemnification provisions are unenforceable in certain circumstances for "building and construction" contracts. Minn. Stat. § 337.01, subd. 2 (2016) defines a building and construction contract as "a contract for the design, construction, alteration, improvement, repair or maintenance of real property, highways, roads or bridges." Minn. Stat. § 337.02 does not apply to the agreement between Cities and HOA, because the parties' agreement is for "financial management" and "property management" duties. The agreement is not a building and construction contract under Minn. Stat. § 337.01, subd. 2.[6]

[5] Count seven alleged waste by both respondents.

[6] The United States District Court for the District of Minnesota has reached a similar conclusion and has interpreted the word "maintenance" in the statute to apply to "construction-industry projects, not housekeeping projects" when considering this statute in the context of a contract for housekeeping services. *Target Corp. v. All Jersey Janitorial Serv., Inc.*, 916 F. Supp. 2d 909, 913 (D. Minn. 2013).

The district court did not err in granting summary judgment to Cities on its cross-claim against HOA.

**Affirmed.**