

Rel: November 3, 2023

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# SUPREME COURT OF ALABAMA

OCTOBER TERM, 2023-2024

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SC-2023-0015

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Clement J. Cartron III

v.

Board of Governors of Valley Hill Country Club, Inc., et al.

Appeal from Madison Circuit Court  
(CV-20-900007.80)

STEWART, Justice.

AFFIRMED. NO OPINION.

Parker, C.J., and Shaw, Wise, Bryan, Sellers, Mendheim, and  
Mitchell, JJ., concur.

SC-2023-0015

Cook, J., concurs specially, with opinion.

COOK, Justice (concurring specially).

Clement J. Cartron III is a former member of Valley Hill Country Club, Inc. ("Valley Hill"), a nonprofit private-membership corporation that operates a country club in Huntsville. While he was a member of Valley Hill, Cartron asked to inspect and copy several of Valley Hill's records pursuant to § 10A-3-2.32, Ala. Code 1975, a provision of the Alabama Nonprofit Corporation Law, § 10A-3-1.01 et seq., Ala. Code 1975. After Valley Hill denied Cartron's request, Cartron commenced the present action against Valley Hill and several other defendants, seeking to enforce his purported statutory right to inspect and copy the records at issue pursuant to § 10A-3-2.32.

Following Cartron's initiation of this action, Valley Hill terminated his membership. Cartron then amended his complaint to assert additional claims arising from the termination of his membership in Valley Hill, including claims of breach of fiduciary duty, breach of contract, wantonness, and abuse of process.

Following additional filings and proceedings, both Cartron and the

defendants, including Valley Hill, filed summary-judgment motions.<sup>1</sup> After a hearing, the Madison Circuit Court entered a summary judgment in favor of Valley Hill and the other defendants on all claims.

On appeal, Cartron argues (1) that termination of his membership in Valley Hill was improper and (2) that, even if his membership was properly terminated, § 10A-3-2.32 nevertheless grants him a statutory right to inspect the records at issue.

I concur with affirming the trial court's summary judgment insofar as it determined that Cartron's membership in Valley Hill was properly terminated. I am unaware of, and Cartron did not identify, any statutory basis under Title 10A of the Alabama Code for his claims arising out of the termination of his membership in Valley Hill. Moreover, to hold otherwise would invite a host of "freedom-of-association" issues under the First Amendment to the United States Constitution.

However, I write specially to note my concerns with Valley Hill's ability to avoid disclosing the requested records and my concerns with the current statutory law and caselaw in this area. Section 10A-3-2.32

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<sup>1</sup>The defendants moved for a full summary judgment, and Cartron moved for a partial summary judgment.

provides, in relevant part, that the "books and records of a nonprofit corporation may be inspected by any member ... for any proper purpose."

This Court has held that inspection statutes such as § 10A-3-2.32 were intended to codify the broad common-law right to inspection. Bank of Heflin v. Miles, 294 Ala. 462, 467, 318 So. 2d 697, 701 (1975). Generally, "[t]he modern tendency of the courts is to permit shareholders [or members] to examine the books and records of the corporation for the purpose of ascertaining whether the business of the corporation has been properly conducted." 5A William Meade Fletcher et al., Fletcher Encyclopedia of the Law of Corporations § 2223 (rev. vol. 2020).

Although § 10A-3-2.32 provides that the "books and records of a nonprofit corporation may be inspected by any member ... for any proper purpose," I believe that "may" should be construed as mandatory in this statute because "it is necessary to do so in order to accomplish the manifest purpose of the legislature." 82 C.J.S. Statutes § 481 (2022). "[W]here it appears from a consideration of the whole statute and its nature and object[] that the intent of the legislature has been to impose a positive duty ..., the word 'may' normally will be held to be mandatory." Id.

Based on the text of § 10A-3-2.32 as a whole and on this Court's previous recognition that this statute was intended to codify a common-law right of inspection, I believe that § 10A-3-2.32 provides a mandatory right. See 82 C.J.S. Statutes § 481; see also Lott v. Eastern Shore Christian Ctr., 908 So. 2d 922, 931 (Ala. 2005) (noting that the predecessor to § 10A-3-2.32 "guarantees" a member's inspection rights).

There are very good public-policy reasons for this statute. The clear purpose of the statute is transparency. It promotes trust in the nonprofit corporation, discourages fraud, and provides for the discovery of mismanagement and fraud. As Supreme Court Justice Louis Brandeis wrote over 100 years ago: "Sunlight is said to be the best of disinfectants." Louis D. Brandeis, What Publicity Can Do, Harper's Weekly, Dec. 20, 1913, at 10.

In cases similar to the one now before us, courts in other jurisdictions have concluded that a former member is entitled to inspect a nonprofit corporation's records if the invocation of this statutory right occurred before the former member's expulsion and if the lawsuit seeking to inspect the records was commenced before the expulsion. See, e.g., Raffinan v. Philippine Cultural Found., Inc., 821 So. 2d 1272, 1272, 1275

(Fla. Dist. Ct. App. 2002) (affirming a nonprofit corporation's right to expel members under the corporation's bylaws but concluding that the former members were entitled to enforce the statutory record-inspection rights acquired and invoked before their expulsion); Leary v. Foley, 884 So. 2d 655, 658 (La. Ct. App. 2004) (concluding that "the determinative date, in regards to [statutory record-inspection] rights, is the date of demand, not the date of corporate compliance" (citing Naquin v. Air Engineered Sys. & Servs., 423 So. 2d 713, 716 (La. Ct. App. 1983)) (emphasis added)).

Moreover, because § 10A-3-2.32 provides a member of a nonprofit corporation the right to inspect the corporation's records, the corporation cannot avoid this right through its bylaws. The bylaw provision of the Alabama Nonprofit Corporation Law provides: "The bylaws may contain any provision for the regulation and management of the affairs of a corporation not inconsistent with law or the certificate of formation." § 10A-3-2.31, Ala. Code 1975 (emphasis added). Accordingly, because a bylaw limiting a member's inspection rights would be "inconsistent with [the] law," I do not believe that Valley Hill and the remaining defendants should be able to circumvent the inspection right created by § 10A-3-2.32

through other means (such as the termination of membership). See §§ 10A-3-2.31 and -2.32.

Although all of this is certainly compelling, there are two problems that prevent me from dissenting in the present appeal; therefore, I reluctantly concur with affirming the trial court's summary judgment in favor of the defendants, including Valley Hill, on Cartron's statutory-inspection claim under § 10A-3-2.32.

First, the statute does not expressly indicate whether a request to inspect a nonprofit corporation's "books and records" can be invoked by either a former member or an individual whose membership is terminated after the inspection right in § 10A-3-2.32 has been invoked. This Court has previously addressed this issue on at least two occasions and has held that, once an individual's membership in a nonprofit corporation has been revoked, the right to inspect the records of the nonprofit corporation that the individual possessed under the statute while he or she was a member is abated. See Ex parte Board of Trustees/Directors and/or Deacons of Old Elam Baptist Church, 983 So. 2d 1079 (Ala. 2007); Lott, supra.

Cartron has not asked this Court to revisit or overrule our decisions

in those cases in this appeal, and we should not do so in the absence of such a request. See Clay Kilgore Constr., Inc. v. Buchalter/Grant, L.L.C., 949 So. 2d 893, 898 (Ala. 2006) (recognizing that this Court is generally "not inclined to abandon precedent without a specific invitation to do so"). However, I believe that our decisions in those cases are due to be reexamined, and I invite future litigants to address whether this Court should consider overruling or sharply limiting those decisions in an appropriate case.

Second, I note that there has been a statutory amendment to the general provisions in Title 10A -- the Alabama Business and Nonprofit Entities Code -- that further complicates the issue in this case. Section 10A-1-3.32(b), Ala. Code 1975,<sup>2</sup> provides, in relevant part:

"With respect to a domestic entity covered by this section, the books and records maintained under the chapter of this title applicable to the entity and any other books and records of the

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<sup>2</sup>Chapter 1 of Title 10A applies to, among others, "all entities formed pursuant to or governed by Chapters 2A to 11, inclusive, ... except as set forth in this chapter ...." unless "a provision of [Chapter 1] conflicts with a provision in another chapter in [Title 10A]." § 10A-1-1.02(a) and (c). Nonprofit corporations are formed pursuant to and governed by the Alabama Nonprofit Corporation Law, which is set forth in Chapter 3 of Title 10A. See § 10A-3-1.03, Ala. Code 1975. Thus, nonprofit corporations are subject to the statutory provisions in Chapter 1 unless those provisions conflict with other statutory provisions. See § 10A-1-1.02(a) and (c).

entity, wherever situated, are subject to inspection and copying at the reasonable request, and at the expense of, any owner or member or the owner's or member's agent or attorney during regular business hours. The right of access extends to the legal representative of a deceased owner or member or owner or member under legal disability. The entity shall also provide former owners and members with access to its books and records pertaining to the period during which they were owners or members."

(Emphasis added.)

Previously, there was a question regarding whether this statute (specifically, its express language providing an inspection right to former members) applied to nonprofit corporations like Valley Hill. See § 10A-1-3.32(a), Ala. Code 1975. However, the Legislature approved an amendment to § 10A-1-3.32(a), which became effective in 2020, to expressly exclude nonprofit corporations (along with certain other types of business entities previously excluded) from being subject to the provisions of § 10A-1-3.32 (including the inspection provision in § 10A-1-3.32(b)). Now § 10A-1-3.32(a) provides, in pertinent part: "This section applies to domestic entities other than ... nonprofit corporations ... governed by Chapter 3, ... which are governed by the separate recordkeeping requirements and record inspection provisions set forth in [the] entity's respective chapter." (Emphasis added.)

This amendment would seem to now preclude former members of nonprofit corporations from claiming the benefit of the express language providing an inspection right to former members in § 10A-1-3.32(b). Given this Court's decisions in Lott, supra, and Old Elam, supra, we do not need to address the question whether this statute originally applied to Cartron or whether its amendment stripped Cartron of his inspection rights in this case.<sup>3</sup>

The amendment may do more than just eliminate a statutory basis for a former member's being able to inspect the records of a nonprofit corporation. To me, it is unclear what impact this amendment to § 10A-1-3.32, which now clearly does not apply to nonprofit corporations, has on an individual's inspection right under § 10A-3-2.32, which does apply to nonprofit corporations and is at issue in this appeal. The general provision in § 10A-1-3.32(b) expressly provides an inspection right to "any

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<sup>3</sup>Cartron made his demand to inspect Valley Hill's records before the amendment excluding nonprofit corporations from the scope of § 10A-1-3.32 became effective, but he commenced this action one day after the effective date of the amendment. Absent the precedent of Lott and Old Elam, these circumstances would create very difficult questions regarding retroactive application of the amendment. However, given these precedents, I need not (and do not) express any opinion on those retroactivity issues.

... member" and "former ... members," while the statute that specifically applies to nonprofit corporations -- § 10A-3-2.32 -- merely provides the inspection right to "any member." Thus, by using different wording (albeit in different statutes), one possible implication of the amendment is that the Legislature has precluded former members of a nonprofit corporation from inspecting the records pertaining to the time when they were members. See Pinigis v. Regions Bank, 977 So. 2d 446, 453 (Ala. 2007) ("[W]hen the [Legislature] includes specific language in one section of a statute, but omits that language from another section of the statute, we must presume that the exclusion of the language was intentional." (quoting Halifax Corp. v. First Union Nat'l Bank, 262 Va. 91, 100, 546 S.E.2d 696, 702 (2001)) (emphasis added)). Further, the Alabama Nonprofit Corporation Law defines a member of a nonprofit corporation in the present tense as "[o]ne having membership rights in a corporation in accordance with the provisions of its governing documents." § 10A-3-1.02(7), Ala. Code 1975 (emphasis added).

Using this logic, I would expect that future litigants like Valley Hill will argue that they are able to extinguish the right to inspect records by simply terminating the membership of the requesting party. Further, §

10A-1-3.32(a) expressly excludes from the scope of § 10A-1-3.32 various types of entities -- not just nonprofit corporations. Thus, such an argument may be made in a broader array of cases.<sup>4</sup>

I offer no opinion on the resolution of these issues at this time. For all the public-policy reasons I listed above, I mention these issues to bring them to the attention of the bench, the bar, and the Legislature. If the Legislature actually intends to extinguish the inspection rights of former members of certain types of entities (or if it does not wish to do so for the policy reasons I outlined above), I encourage the Legislature to clarify the language of these statutes.<sup>5</sup> For the present, I concur reluctantly with

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<sup>4</sup>The type of entities that might be able to make such an argument include "(i) corporations ... governed by Chapter 2A or Chapter 4, and real estate investment trusts ... governed by Chapter 10, ... and (ii) nonprofit corporations ... governed by Chapter 3, ... which are governed by the separate recordkeeping requirements and record inspection provisions set forth in each entity's respective chapter governing that entity." § 10A-1-3.32(a).

<sup>5</sup>Notably, the Legislature has recently amended the Alabama Nonprofit Corporation Law, adding Chapter 3A to govern nonprofit corporations (and excluding nonprofit corporations governed by Chapter 3A from the scope of § 10A-1-3.32). See Ala. Acts 2023, Act No. 2023-503, §§ 1 and 2. Although Act No. 2023-503 will become effective on January 1, 2024, Chapter 3A will apply only to nonprofit corporations (i) incorporated after January 1, 2024, or (ii) that elect to be governed by Chapter 3A in their articles of incorporation, until January 1, 2025, when

affirming the trial court's summary judgment in favor of Valley Hill and the other defendants on Cartron's inspection claim.

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Chapter 3A will begin applying to all nonprofit corporations. Id. at § 1 (§ 10A-3A-14.01, Ala. Code 1975). Thus, the issues existing under Chapter 3 will remain until that date. Moreover, Chapter 3A does not address the potential issues addressed above. Chapter 3A provides certain inspection rights to "[a] member of a membership nonprofit corporation." Id. (§ 10A-3A-4.02, Ala. Code 1975)(emphasis added). Chapter 3A defines a member as "a person in whose name a membership is registered on the records of the membership nonprofit corporation and who has a right to (i) select or vote for the election of directors or (ii) vote on any type of fundamental transaction." Id. (§ 10A-3A-1.02(26), Ala. Code 1975). Although Chapter 3A provides a right to request a court order compelling a nonprofit corporation to permit inspection of records, it does not address the effect of the termination of a person's membership during the action. Id. (§ 10A-3A-4.04, Ala. Code 1975).