

*This opinion will be unpublished and may not be cited except as provided by Minn. Stat. § 480A.08, subd. 3 (2012).*

**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A14-0630**

Builders Commonwealth, Inc.,  
Respondent,

vs.

John Thomas,  
Appellant.

**Filed December 15, 2014  
Affirmed  
Schellhas, Judge**

St. Louis County District Court  
File No. 69DU-CV-13-788

Jeremy M. Hurd, Orman Nord & Hurd P.L.L.P., Duluth, Minnesota (for respondent)

John H. Bray, Maki and Overom, Ltd., Duluth, Minnesota (for appellant)

Considered and decided by Ross, Presiding Judge; Schellhas, Judge; and Smith,  
Judge.

**UNPUBLISHED OPINION**

**SCHELLHAS**, Judge

Appellant seeks reversal of a district court judgment awarding respondent damages for over-advances paid to appellant. We affirm.

## FACTS

Respondent Builders Commonwealth Inc. (BCI) is a cooperative under the Minnesota Cooperative Law, Minn. Stat. §§ 308A.001–.995 (2012).<sup>1</sup> In 2013, BCI began the process of dissolution and liquidation and ceased doing business but remains an active domestic cooperative for purposes of winding up its business.

The government of BCI is vested in a board of directors in a manner provided in BCI's bylaws. The board consists of five or more elected members of BCI. For the years relevant to this appeal, all of BCI's members were elected as directors. BCI's bylaws provide that an "Executive Committee shall have general supervision and control of the business and affairs of [BCI] and shall make all necessary rules and regulations not inconsistent with law or with these Bylaws for the management of the business and the guidance of the employees and agents of [BCI]." The board of directors is responsible for electing and removing the officers of the executive committee, which include a president, vice president, secretary, and treasurer.

On September 11, 2009, appellant John Thomas became a member of BCI by signing a membership agreement, which provided as follows:

3. All members share the losses as well as the revenues of the association on a pro rata basis according to work contributed and that the work value of members may, but need not be equal.

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<sup>1</sup> BCI was formed in 1978 and amended its articles of incorporation in 2005 under Chapter 308A. We cite the most recent version of all statutes referenced in this opinion because the statutes have not been amended in relevant part. *See Interstate Power Co. v. Nobles Cnty. Bd. of Comm'rs*, 617 N.W.2d 566, 575 (Minn. 2000) (stating that, generally, "appellate courts apply the law as it exists at the time they rule on a case").

....

5. Advances of money, or property made to me by the association out of estimated or actual revenues of the association during any fiscal accounting period of the association and before a final audit of the books and records for said period shall constitute advance payments of my share of the association revenues, in the nature of loans, and as a set-off against my share of the association earnings. Any balance due me will be paid to me as a patronage dividend after the close of said fiscal year of the association . . . . In the event that said advances during any fiscal year shall exceed the share of the association revenues to which I [am] entitled, *I agree that I will repay such excess to the association at the times and in the manner as the Board of Directors of the association shall determine.*

(Emphasis added.)

Every two weeks, BCI made advances to Thomas and its other members, based on their individual patronage contributions and BCI's anticipated profits for the fiscal year. After BCI closed its books at the end of each fiscal year, and based on an accounting of its actual profits or losses, BCI adjusted each member's advances according to actual earnings for the year. If BCI's profits exceeded anticipated profits, BCI distributed the excess profits to its members proportionally to their individual patronage contributions. If BCI's profits were less than anticipated profits, the board of directors voted on the means by which BCI would recoup "over-advances" from its members. For fiscal years 2009, 2010, and 2011, BCI's profits were less than anticipated profits.

At BCI's fiscal-year-end meeting in October 2009, the board of directors passed a motion to have "15% of members' draw . . . go straight to repayment of debt owed to BCI." Thomas was present and voted in favor of that motion. Thomas also attended the

fiscal-year-end meeting in September 2010 at which the board of directors passed a motion “to add the 2010 over-advances to our previous debt with a draw payback of 12%.” The record does not reflect whether Thomas voted for or against the motion.

Thomas terminated his membership with BCI on March 7, 2011, at which time he had an equity account balance of \$3,893.88 and had received advances of \$35,550 from BCI during fiscal year 2011. When fiscal year 2011 ended, BCI determined that it had paid Thomas \$11,739.79 in over-advances and that Thomas still owed BCI \$679.75 for over-advances paid during fiscal year 2010. BCI therefore deducted Thomas’s \$3,893.88 equity account balance from the total amount of his over-advances and resolved to collect from Thomas the remaining \$8,525.66. Thomas failed to pay.

BCI sued Thomas and six other members to recover their over-advances and the district court consolidated the cases, conducted a court trial, and granted judgment to BCI. This appeal follows.

## **D E C I S I O N**

Citing *Builders Commonwealth, Inc. v. Dep’t of Emp’t and Econ. Dev.*, 814 N.W.2d 49 (Minn. App. 2012), Thomas first argues that he was an employee of BCI who received wages, not a member who received over-advances, and that the wages paid to him are unrecoverable under Minn. Stat. § 181.79 (2012). The district court rejected Thomas’s argument, noting that the holding in *Builders Commonwealth* is limited to the definition of wages under unemployment-insurance law. We agree. In *Builders Commonwealth*, we recognized that the advances that members received were wages and that “[m]embers ke[pt] any amount of the advances that [wa]s above their payback

*amount if [Builders Commonwealth] sustain[ed] a loss during a fiscal year.”* 814 N.W.2d at 58 (emphasis added). The only pertinent portion of Minn. Stat. § 181.79 provides as follows:

No employer shall make any deduction . . . from the wages due or earned by any employee . . . to recover any . . . claimed indebtedness running from employee to employer, unless the employee, after . . . the claimed indebtedness has arisen, voluntarily authorizes the employer in writing to make the deduction or unless the employee is held liable in a court of competent jurisdiction for the loss or indebtedness.

Minn. Stat. § 181.79, subd. 1(a).

Citing *Meyer v. Mason Pub. Co.*, 372 N.W.2d 403 (Minn. App. 1985), the district court concluded that this section does not preclude BCI’s recovery because the advances that Thomas received from BCI were not “‘due or earned’ wages but were instead advances subject to adjustment at the end of the fiscal year.” We agree. *See Meyer*, 372 N.W.2d at 404–05 (noting that “[s]ection 181.79 provides that an employer may not ‘make any deduction from *wages due or earned*’ without an employee’s authorization” and that district court “found appellant did not have wages due, earned or unpaid within the meaning of these statutes because appellant’s draw exceeded his earned commissions during his employment”). BCI paid advances to Thomas based on his pro rata share of BCI’s *anticipated* profits. Thomas does not dispute that the advances paid exceeded his pro rata share of BCI’s actual profits by \$8,525.66. The over-advances paid to Thomas were not “wages due or earned” under section 181.79 and therefore are recoverable by BCI.

Thomas argues that BCI may not recover the over-advances under the terms of the membership agreement—that it only may address over-advances under Article XII, Section 9 of BCI’s bylaws. In the membership agreement, Thomas agreed that he would “repay such excess[, i.e., over-advances,] to the association at the times and in the manner as the Board of Directors of the association shall determine.” The membership agreement implicitly incorporates the bylaws by providing that “I [signor] hereby agree to be bound by and to comply with the provisions of the Articles of Incorporation *and the Bylaws of the association.*” (Emphasis added). Thomas argues that the bylaws preclude BCI from recovering Thomas’s over-advances because they do not specifically authorize recovery. The bylaws provide that:

Allocation of Net Loss. In the event that the Cooperative has an annual net operating loss, the Executive Committee shall have the power and authority to allocate such losses in the following manners:

- a) if attributed to business done with patrons, then to apply such losses on a patronage basis against the equity credits of patrons receiving advances over \$500.00 in the fiscal year for such year or years;
- b) to apply the loss to the Cooperative’s capital reserve;
- c) to carry the loss forward or back.

In addition, in the event that the Cooperative has an annual net operating loss, the Executive Committee may obtain a loan evidenced by a promissory note to cover such loss.

But the bylaws also provide that “[m]embers shall . . . comply with the requirements of these Bylaws *and the contracts with the Cooperative.*” (Emphasis added).

We construe several instruments as one contract when they are made part of the same transaction. *See Marso v. Mankato Clinic, Ltd.*, 278 Minn. 104, 114, 153 N.W.2d 281, 289 (1967) (“Where several instruments are made part of one transaction, they will be read together and each will be construed with reference to the others, although the instruments do not in terms refer to each other.”); *Roemhildt v. Kristall Development, Inc.*, 798 N.W.2d 371, 373 (Minn. App. 2011) (“[I]nstruments executed at the same time, by the same parties, relating to the same transaction will be considered and construed together, since they are, in the eyes of the law, one contract or instrument.” (quotation omitted)), *review denied* (Minn. July 19, 2011). We read the membership agreement and bylaws together and treat them as one contract between BCI and Thomas. *See Marso*, 278 Minn. at 114, 153 N.W.2d at 289; *Roemhildt*, 798 N.W.2d at 373.

The bylaws provide that BCI may allocate losses through its executive committee. The membership agreement provides that BCI may seek repayment of over-advances through its board of directors. That is what BCI did—it sought to recover Thomas’s over-advances lawfully under the membership agreement and bylaws. We conclude that the district court did not err.

**Affirmed.**