STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0293

Edna Ruth Albertson, et al.,
Appellants,

vs.

Timberjay, Inc., et al.,
Respondents.

Filed September 5, 2017
Affirmed
Schellhas, Judge

St. Louis County District Court
File No. 69VI-CV-16-555

John M. Colosimo, Colosimo, Patchin & Kearney, Ltd., Virginia, Minnesota (for appellants)

R. Thomas Torgerson, Hanft Fride, Duluth, Minnesota (for respondents)

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

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

SCHELLHAS, Judge

Minority-shareholder appellants challenge the summary-judgment dismissal of their equitable claims against corporate and majority-shareholder respondents, arguing that genuine issues of material fact exist about whether respondents treated appellants in an

unfairly prejudicial manner and violated their right to inspect corporate documents. We affirm.

FACTS

In December 1989, H. Arthur Dale and Madonna Ohse formed a Minnesota corporation, respondent Timberjay Inc. (Timberjay), which operates a weekly newspaper covering the communities of Cook, Tower, and Ely.[1] Dale and Ohse are named in Timberjay's articles of incorporation as first directors. As of June 1997, respondents Marshall Helmberger and Jodi Summit-Helmberger[2] (Helmbergers) were directors and officers of Timberjay and owned a combined 54% of Timberjay stock. Additionally, Timberjay employed Helmberger as its publisher and Summit-Helmberger as its general manager. As of June 1997, Ohse owned the remaining 46% of Timberjay stock; no record evidence indicates whether Ohse was a director, officer, or employee of Timberjay at that time.

In July 1997, appellants Edna and Gary Albertson (Albertsons) purchased Ohse's Timberjay stock for $33,000.[3] Albertsons had no contact with Helmbergers prior to purchasing the stock, and they knew that by purchasing the stock, they would become minority shareholders in Timberjay. Yet Albertsons claim that they purchased the stock with an expectation that they would have some level of involvement in Timberjay's

[1] Timberjay originally was named "Orr Timberjay Inc." but was renamed "Timberjay Inc." in September 1991.

[2] Certain filings in the district court and on appeal indicate that Jodi's surname is "Summit," not "Summit-Helmberger." We use the parties' names as they appear in the case caption.

[3] The record suggests that Albertsons then had an ownership interest in a competitor newspaper and later acquired an ownership interest in a second competitor newspaper.

management and that Timberjay would pay dividends or make other distributions to its shareholders from its net profits.

In the years following Albertsons' purchase of their 46% interest in Timberjay, Helmbergers served as Timberjay's only directors and officers and continued in their positions of employment. Timberjay paid no dividends to shareholders, instead using net profits to build Timberjay's reserve fund and to reinvest in Timberjay's newspaper operations. Albertsons did not seek employment by Timberjay; made a single, unsuccessful attempt to be elected as directors of Timberjay; and stopped attending shareholder meetings. After Helmbergers stopped holding shareholder meetings—as permitted by Timberjay's bylaws—Albertsons did not exercise their right under the bylaws to demand regular or special shareholder meetings.

In December 2015, Albertsons sued Timberjay and Helmbergers, alleging, among other things, that Helmbergers treated them in an unfairly prejudicial manner and failed to provide them with "financial information with regard to the operations of [Timberjay]." They sought equitable relief in district court, asking that the court order Helmbergers to purchase Albertsons' Timberjay stock "at fair market value but in no event less than what [Albertsons] initially paid for the stock, plus a reasonable return," or, alternatively, order that Timberjay and its assets be sold at fair market value.

On the same day that Timberjay and Helmbergers filed an answer, Albertsons moved the district court to grant the equitable relief requested in their complaint. They filed Gary Albertson's affidavit in support of their motion. Timberjay and Helmbergers opposed the motion and moved for summary judgment, attaching supporting documents that

included Timberjay's articles of incorporation and bylaws, Marshall Helmberger's affidavit, correspondence between Marshall Helmberger and Gary Albertson, and Albertsons' interrogatory answers. After a hearing, the district court granted summary judgment in favor of Timberjay and Helmbergers.

This appeal follows.

D E C I S I O N

"A district court may grant summary judgment when 'there is no genuine issue as to any material fact' and one party 'is entitled to a judgment as a matter of law.'" *Kelly v. Kraemer Constr., Inc.*, 896 N.W.2d 504, 508 (Minn. 2017) (quoting Minn. R. Civ. P. 56.03). Appellate courts review the grant of summary judgment de novo, considering two questions: "whether a genuine issue of material fact exists, and whether an error in the application of law occurred." *Id.* (quotation omitted). "A genuine issue of material fact arises when there is sufficient evidence regarding an essential element to permit reasonable persons to draw different conclusions." *Id.* (quotation omitted). "The evidence must be viewed in the light most favorable to the nonmoving party . . . ." *Id.* But the nonmoving party "may not rest upon the mere averments or denials of [its] pleading but must present specific facts showing that there is a genuine issue for trial." Minn. R. Civ. P. 56.05.

I.

If a shareholder in a corporation brings an action in which the shareholder establishes that "the directors or those in control of the corporation have acted in a manner unfairly prejudicial toward one or more shareholders in their capacities as shareholders or directors of a corporation that is not a publicly held corporation, or as officers or employees

of a closely held corporation," the district court "may grant any equitable relief it deems just and reasonable in the circumstances or may dissolve [the] corporation and liquidate its assets and business." Minn. Stat. § 302A.751, subd. 1(b)(3) (2016). If the corporation is not publicly held, the court alternatively

> may . . . order the sale by a plaintiff or a defendant of all shares of the corporation held by the plaintiff or defendant to either the corporation or the moving shareholders . . . if the court determines in its discretion that an order would be fair and equitable to all parties under all of the circumstances of the case.

Minn. Stat. § 302A.751, subd. 2 (2016).

"The term 'unfairly prejudicial' is not explicitly defined" by statute, *U.S. Bank N.A. v. Cold Spring Granite Co.*, 802 N.W.2d 363, 377 (Minn. 2011), and "is to be interpreted liberally," *Bolander v. Bolander*, 703 N.W.2d 529, 552 (Minn. App. 2005), *review dismissed* (Minn. Nov. 15, 2005). "[U]nfairly prejudicial conduct under Minn. Stat. § 302A.751 includes conduct that violates the reasonable expectations of the shareholder." *U.S. Bank*, 802 N.W.2d at 379 & n.10; *see also* Minn. Stat. § 302A.751, subd. 3a (2016) ("In determining whether to order equitable relief, dissolution, or a buy-out, the court shall take into consideration . . . the reasonable expectations of all shareholders as they exist at the inception and develop during the course of the shareholders' relationship with the corporation and with each other."); *Bolander*, 703 N.W.2d at 552 ("Unfair prejudice exists when a shareholder's reasonable expectations have been frustrated.").

"[A]ny written agreements, including employment agreements and buy-sell agreements, between or among shareholders or between or among one or more

shareholders and the corporation are presumed to reflect the parties' reasonable expectations concerning matters dealt with in the agreements." Minn. Stat. § 302A.751, subd. 3a. "But, in close corporations, the expectations of shareholders are not always encompassed in written agreements and written agreements are not always dispositive of shareholder expectations." *Haley v. Forcelle*, 669 N.W.2d 48, 58 (Minn. App. 2003), *review denied* (Minn. Nov. 25, 2003). "Often, shareholder expectations arise from understandings that are not expressly stated in the corporation's documents." *Gunderson v. All. of Computer Professionals, Inc.*, 628 N.W.2d 173, 186 (Minn. App. 2001), *review dismissed* (Minn. Aug. 17, 2001).

Yet "a claim of oppression or unfairly prejudicial conduct may not be predicated on the failure to fulfill a minority shareholder's subjective hopes and desires in joining the venture." *Id.* at 191 (quotation omitted). "Instead, oppression should be deemed to arise only when the majority conduct substantially defeats expectations that, objectively viewed, were both reasonable under the circumstances and central to the minority shareholder's decision to join the venture." *Id.* (quotation omitted). "Because whether a shareholder's reasonable expectations have been frustrated is essentially a fact issue," a minority shareholder's unfair-prejudice claim may not be dismissed on summary judgment unless no rational fact-finder could find that his frustrated expectations were reasonable. *Id.* at 186.

In this case, Albertsons argue that the district court erred in its summary-judgment dismissal of their section 302A.751 unfair-prejudice claim because genuine issues of material fact exist as to whether Helmbergers treated them in an unfairly prejudicial

manner. Specifically, Albertsons claim that Helmbergers' conduct frustrated their reasonable expectations of some level of involvement in Timberjay's management (management expectation) and payment of dividends or receipt of other distributions from Timberjay's net profits (dividends expectation). Timberjay and Helmbergers respond that Albertsons' "expectations of management control and payment of dividends were, at best, subjective, contrary to law and corporate documentation, and not shared by all shareholders," such that no rational fact-finder could find that Albertsons' expectations were reasonable. We agree.

Albertsons' management expectation has no basis in Minnesota statute or in Timberjay's articles of incorporation or bylaws. The Minnesota Business Corporation Act (MBCA), Minn. Stat. §§ 302A.001–.92 (2016), provides that "[t]he business and affairs of a corporation shall be managed by or under the direction of a board" of directors, Minn. Stat. § 302A.201, subd. 1, who "are elected by a plurality of the voting power of the shares present and entitled to vote on the election of directors," Minn. Stat. § 302A.215, subd. 1. Timberjay's bylaws echo the MBCA, "[t]he business and affairs of this corporation shall be managed by or under the direction of a Board of Directors." Timberjay's bylaws further provide that "[a]t each regular meeting of shareholders there shall be an election of qualified successors for directors who serve for an indefinite term," and Timberjay's articles of incorporation specify that "shareholders shall take action by the affirmative vote of the holders of fifty-one percent (51%) of the voting power of all voting shares."

Albertsons' dividends expectation also has no basis in Minnesota law or in Timberjay's articles of incorporation or bylaws. Under the MBCA, "[a] corporation *may*

effect a share dividend," Minn. Stat. § 302A.402, subd. 1 (emphasis added), and dividends may not be withheld in bad faith or for an improper purpose, *Keough v. St. Paul Milk Co.*, 205 Minn. 96, 118, 121, 285 N.W. 809, 821, 823 (1939). But "the determination whether or not a dividend should be declared is essentially a matter of internal management" and "is primarily for the corporate directors in their sound discretion to decide." *Keough*, 205 Minn. at 117, 285 N.W. at 821. Timberjay's bylaws provide:

> Dividends upon the shares of this corporation may be declared by the Board of Directors to the extent permitted by law at any time and from time to time as the Board of Directors in its sole discretion may determine. Before payment of any dividend or making any distribution of the profits there may be set aside out of the surplus or net profits of this corporation such sum or sums as the directors from time to time in their absolute discretion think proper as a reserve fund to meet contingencies . . . or for such other purposes as the directors shall think conducive to the interests of this corporation.

Moreover, undisputed record evidence shows that Albertsons had no contact with Helmbergers prior to purchasing Ohse's Timberjay stock and that, when Albertsons bought Ohse's shares in 1997, "the corporation did not have a history of paying dividends but rather had a history and future objective of reinvesting profits to increase product quality and to secure growth." The record contains no evidence that Helmbergers chose not to pay dividends for the purpose of harming Albertsons or for any other improper purpose.

In sum, Albertsons have not identified a legal or factual basis for their management and dividends expectations. We therefore conclude that no rational fact-finder could find that Albertsons' subjective hopes and desires were reasonable under the circumstances. Because no genuine issue of material fact remains on this point, the district court did not

err in its summary-judgment dismissal of Albertsons' section 302A.751 unfair-prejudice claim.

II.

"If a corporation or an officer or director of the corporation violates a provision of th[e MBCA], a court in this state may, in an action brought by a shareholder of the corporation, grant any equitable relief it deems just and reasonable in the circumstances . . . ." Minn. Stat. § 302A.467. One provision of the MBCA requires corporations to keep certain documents and codifies shareholders' common-law right to inspect corporate documents. Minn. Stat. § 302A.461, subd. 4; *see State ex rel. Boldt v. St. Cloud Milk Producers' Ass'n*, 200 Minn. 1, 6, 273 N.W. 603, 606 (1937) ("The common-law right of inspection is part of the common law and has been enforced by all the courts in this country.").

As relevant here, a shareholder in a corporation that is not publicly held has "an absolute right, upon written demand, to examine and copy . . . at any reasonable time . . . within ten days after receipt by an officer of the corporation of the written demand," certain documents. Minn. Stat. § 302A.461, subds. 2, 4(a). Those documents are: "a share register not more than one year old, containing the names and addresses of the shareholders and the number and classes of shares held by each shareholder," *id.*, subd. 1(a); "records of all proceedings of shareholders for the last three years," *id.*, subd. 2(a); "records of all proceedings of the board for the last three years," *id.*, subd. 2(b); the corporation's "articles and all amendments currently in effect," *id.*, subd. 2(c); the corporation's "bylaws and all amendments currently in effect," *id.*, subd. 2(d); the corporation's "annual financial

statements," which must include "a balance sheet as of the end of [the] fiscal year and a statement of income for the fiscal year, which shall be prepared on the basis of accounting methods reasonable in the circumstances," *id.*, subd. 2(e); Minn. Stat. § 302A.463(a);[4] any "financial statement for the most recent interim period prepared in the course of the operation of the corporation for distribution to the shareholders or to a governmental agency as a matter of public record," Minn. Stat. § 302A.461, subd. 2(e); "reports made to shareholders generally within the last three years," *id.*, subd. 2(f); "a statement of the names and usual business addresses of its directors and principal officers," *id.*, subd. 2(g); any "voting trust agreements," *id.*, subd. 2(h); any "shareholder control agreements," *id.*, subd. 2(i); and "a copy of [any] agreements, contracts, or other arrangements or portions of them incorporated by reference" in the corporation's articles, *id.*, subd. 2(j).

Additionally, a shareholder in a corporation that is not publicly held "has a right, upon written demand, to examine and copy . . . other corporate records at any reasonable time only if the shareholder . . . demonstrates a proper purpose for the examination," defined as a purpose that is "reasonably related to [his or her] interest as a shareholder." *Id.*, subd. 4(b), (d); *see also Fownes v. Hubbard Broad., Inc.*, 302 Minn. 471, 473, 225 N.W.2d 534, 536 (1975) (identifying as proper shareholders' purposes "to place an accurate value on their shares of stock, and to evaluate the conduct and affairs of the

[4] As to annual financial statements, the corporation's duty extends beyond allowing shareholders to examine and copy the statements; the corporation also must provide the statements to shareholders at their request. *See* Minn. Stat. § 302A.463(b) ("Upon written request by a shareholder, a corporation shall furnish its most recent annual financial statements . . . no later than ten business days after receipt of a shareholder's written request.").

corporation's officers and majority shareholders so as to determine the effects on the financial condition of [the corporation]"). "[A] prima facie case of good faith purpose is achieved by the mere allegation . . . that the information sought is for a proper purpose." *Fownes*, 302 Minn. at 473, 225 N.W.2d at 536. But that prima facie case of good faith may be "rebutted by evidence of improper motive or purpose." *Id.* at 473–74, 225 N.W.2d at 536; *see also Bergmann v. Lee Data Corp.*, 467 N.W.2d 636, 640 (Minn. App. 1991) (rejecting proposition that "the mere incantation of a proper purpose by a requesting shareholder" suffices), *review denied* (Minn. May 23, 1991).

On appeal, Albertsons argue that the district court erred in its summary-judgment dismissal of their section 302A.467 claim because genuine issues of material fact exist as to whether Helmbergers violated Albertsons' right to inspect Timberjay's documents. Albertsons claim that "[Gary] Albertson requested access to the financial records of the corporation on multiple occasions and was denied the absolute right that shareholders have to inspect the documents he requested." Undisputed record evidence indicates that Timberjay provided Albertsons with its annual financial statements in the form of accountant-reviewed tax returns, as required by Minn. Stat. § 302A.463(b). Yet Albertsons assert that the district court erroneously concluded that, because "the provided tax records were the only accountant-reviewed financial records of the corporation," the tax records "were the only financial documents to which the Albertsons had a statutory right of inspection." Albertsons mischaracterize the district court's summary-judgment order.

The district court stated in its order that

> [Minn. Stat. § 302A.463] clearly requires the corporation to furnish certain financial documents upon request of a shareholder. [Albertsons] claim that [Helmbergers] have provided little to no information regarding the finances of [Timberjay]. [Helmbergers] assert that [Albertsons] have been furnished with [Timberjay]'s financial statements in the form of the corporate federal tax returns each year and that Timberjay, Inc. relies on those returns as its only accountant-reviewed financial statement.
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> [T]here is evidence on the record in the form of correspondence between the parties acknowledging that [Albertsons] received [Timberjay]'s federal tax returns. This contradicts [Albertsons'] claim that they have received little or no financial information. Additionally, [Timberjay's] corporate tax return provided to the court includes a balance sheet . . . . The financial disclosure statute does not require disclosure of any additional financial information outside of a balance sheet. Minn. Stat. § 302A.463. Thus, based on the record before the court, there exists no issue of fact as to whether [Helmbergers] were in compliance with the financial disclosure requirement of Minn. Stat. § 302A.463.

The court reasonably focused on Minn. Stat. § 302A.463, because Albertsons neither alleged in their complaint nor identified evidence that Helmbergers violated their right to inspect under Minn. Stat. § 302A.461, subds. 2 or 4(a). Instead, Albertsons consistently articulated their corporate-documents allegation below as a failure to provide them with Timberjay's financial information. As a result, we may decline to consider Albertsons' section 302A.461 argument. *See Engfer v. Gen. Dynamics Advanced Info. Sys., Inc.*, 869 N.W.2d 295, 306 (Minn. 2015) (stating that "generally [appellate courts] will not consider an issue raised for the first time on appeal").

In any event, Albertsons' argument lacks merit. They claim that their argument is supported by *Blohm v. Kelly*, a case in which we concluded that a minority shareholder was

entitled to trial on the question of "whether the [corporate] records [he] seeks are records to which he is entitled by statute." 765 N.W.2d 147, 158 (Minn. App. 2009). But in *Blohm*, the record contained evidence that the corporation's sole director and officer "ha[d] not given [the minority shareholder] the access to records that he requested." 765 N.W.2d at 157–58. Here, by contrast, the record contains evidence that Helmbergers generally responded to Albertsons' requests for information by promptly providing the requested information and that, as to Albertsons' few rejected requests, Albertsons made the requests either without an absolute right to inspect or a demonstration of proper purpose. On these facts, we conclude that no genuine issue of material fact remains about whether Helmbergers violated Albertsons' right to inspect Timberjay's documents. We therefore conclude that the district court did not err in its summary-judgment dismissal of Albertsons' section 302A.467 MBCA-violation claim.

Affirmed.