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STATE OF MINNESOTA
IN COURT OF APPEALS
A11-573

Joel J. Phillippi,
Appellant,

vs.

Cedar Creek Oil & Gas Company,
Respondent.

Filed November 21, 2011
Affirmed in part, reversed in part, and remanded
Larkin, Judge

Hennepin County District Court
File No. 27-CV-09-8389

William L. Lucas, William L. Lucas, P.A., Edina, Minnesota (for appellant)

Mark C. Hart, Bonnie Wittenburg, Courey, Kosanda & Zimmer, P.A., Golden Valley, Minnesota (for respondent)

Considered and decided by Larkin, Presiding Judge; Connolly, Judge; and Bjorkman, Judge.

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

LARKIN, Judge

Appellant director challenges the district court's award of summary judgment on his breach-of-contract and defamation claims against respondent company, arguing that he is entitled to certain stock options, deferred compensation, a retainer fee, and defamation damages. We affirm the district court's grant of summary judgment on appellant's stock-option, defamation, and deferred-compensation claims. But because we conclude that the district court erred in interpreting the terms of the parties' retainer agreement, we reverse in part and remand for entry of summary judgment for appellant on that issue.

FACTS

Respondent Cedar Creek Oil & Gas Company is a privately held Delaware corporation located in Minnesota that invests in properties that produce oil and natural gas. Appellant Joel J. Phillippi served on Cedar Creek's board of directors from 1996 to April 27, 2009, and also served as the company's chief financial officer (CFO) from November 2007 to February 2008.[1]

In October 2004, Cedar Creek's board approved a plan to provide directors with the opportunity to purchase shares of Cedar Creek's common stock. The plan, outlined in the minutes of the October 12 board meeting, granted directors

> an Option . . . to acquire 200 shares of Common Stock from the Company during each calendar year of service as a director through the year ending December 31, 2008. The price to be paid for such shares shall be an amount equal to the average price paid by the Corporation for the redemption of shares from others during the most recent 12 month period.

[1] The board voted to remove Phillippi as CFO after he submitted a document entitled "Pre-bill Worksheet," which listed billable hours for work he performed on behalf of Cedar Creek and outlined expenses Phillippi claimed for out-of-pocket costs. Phillippi received a salary for his work as Cedar Creek's CFO, and the board believed he was seeking additional compensation for services for which he had already been paid.

A director could exercise the options "any time during his service and 12 months following the termination of his service." The average redemption value and option price for directors between 2004 and 2007 was approximately $80 to $85. After reviewing a summary of the stock-option plan, shareholders approved the plan on December 14, 2006, but shareholders voiced concerns about the option price, believing it was too low. In response, the board hired an independent appraiser to determine the fair market value of the stock, which ultimately was appraised at approximately $1,104 per share as of December 31, 2006.

At a November 2007 board meeting, the directors approved a cash dividend of $65 per share to shareholders of record as of December 1, 2007. Shortly thereafter, on November 26, Phillippi exercised his options under the plan to purchase 500 shares of Cedar Creek common stock at a price of $80 per share. Despite the $1,104 appraised value of the stock, the option price for directors remained low at this time due to the language of the plan, which tied the option price to the average redemption price during the previous year. A year later, on November 10, 2008, Phillippi expressed his intent to purchase 500 additional shares at $80 per share. Other board members expressed their belief that, based on the appraisal and adjusted redemption values, the option price had increased to $971.62 per share, and the board's executive committee subsequently voted to rescind the stock-option plan for directors. The board chairman informed Phillippi of the executive committee's decision by e-mail on November 19. On November 24, Phillippi attempted to purchase the 500 shares at the $80 price, delivering a check for $40,000 to Cedar Creek. Believing Phillippi was seeking a financial windfall and not acting in the best interests of the company, two Cedar Creek directors asked Phillippi to resign his director position. Phillippi refused to resign, and Cedar Creek formally rejected Phillippi's purchase offer on December 1.

Phillippi initiated this action against Cedar Creek in January 2009, alleging breach of contract based on Cedar Creek's refusal of his attempt to purchase the stock. On February 19, Cedar Creek's officers and board chairman sent a letter to shareholders addressing Phillippi's lawsuit against the company, and asked the shareholders to vote to remove Phillippi as a director. The shareholders voted to remove Phillippi at a shareholder meeting on April 27. On December 3, the district court granted Cedar Creek's motion for summary judgment on Phillippi's breach-of-contract claim under the stock-option plan. Phillippi filed a supplemental complaint against Cedar Creek alleging defamation based on the letter sent to shareholders, and two additional breach-of-contract claims related to plans established by the board in March 2008 that provided for deferred compensation and a $12,000 annual retainer for directors.

On April 13, 2010, the district court granted Cedar Creek's motion for summary judgment on Phillippi's defamation claim. In September, the parties agreed that Phillippi's remaining contract claims regarding the deferred-compensation and annual retainer plans would be decided on cross motions for summary judgment. After briefing by the parties, the district court awarded summary judgment for Cedar Creek on Phillippi's remaining contract claims. This appeal follows.

D E C I S I O N

"A motion for summary judgment shall be granted when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that either party is entitled to a judgment as a matter of law." *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). "On an appeal from summary judgment, we ask two questions: (1) whether there are any genuine issues of material fact and (2) whether the [district] court[] erred in [its] application of the law." *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). "We review de novo whether a genuine issue of material fact exists" and "whether the district court erred in its application of the law." *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 77 (Minn. 2002). We "view the evidence in the light most favorable to the party against whom judgment was granted." *Fabio*, 504 N.W.2d at 761.

I. The district court properly determined that Cedar Creek effectively rescinded the stock-option plan prior to Phillippi's 2008 purchase attempt.

Phillippi challenges the district court's award of summary judgment on his breach-of-contract claim related to the stock-option plan. The district court determined, and the parties do not dispute, that Delaware law applies to substantive issues related to company stock.[2] *See Axford v. W. Syndicate Inv. Co.*, 141 Minn. 412, 422, 170 N.W. 587, 591 (1919) (stating that issues related to stock ownership are governed by the laws of the state of incorporation); *Beard v. Elster*, 160 A.2d 731, 735 (Del. 1960) ("The issuance of stock

[2] The parties do not dispute that Minnesota law applies to Phillippi's other claims.

option plans by Delaware corporations involves the internal affairs of a Delaware corporation and is, therefore, controlled by the laws of Delaware.”).

An option contract must possess its own consideration to be irrevocable. *See Kahn v. Gen. Dev. Corp.*, 174 A.2d 307, 312 (Del. 1961) (an option “is a continuing offer made irrevocable for a fixed period when given for present consideration”); *Gottlieb v. Heyden Chem. Corp.*, 92 A.2d 594, 597 (Del. 1952) (acknowledging “the difference between a continuing offer to sell and an agreement to keep that continuing offer open for a specified term without changing the price,” and noting that an option contract “must, of course, possess its own consideration”). “Although a gratuitous option may be revoked by the optionor at will, it constitutes a continuing offer to the optionee unless and until it is revoked.” *Mobil Oil Corp. v. Wroten*, 303 A.2d 698, 700 (Del. Ch. 1973), *aff’d* 315 A.2d 728 (Del. 1973); *see also Montray Realty Co. v. Arthurs*, 105 A. 183, 186-87 (Del. 1918) (stating that an offer may be “effectively revoked before its acceptance,” provided “notice of the revocation” is communicated to the offeree).

In dismissing Phillippi’s breach-of-contract claim related to the stock-option plan, the district court determined that no consideration supported an irrevocable option contract. The district court reasoned that Phillippi “was already being compensated” for his services as director, and no money payment or “promise to take on additional or different duties [was required] in exchange for the ability to participate” in the plan. The district court further determined that Phillippi’s “continuing service as a director was not consideration for the option because it did not differ from his existing obligation.” And the district court determined that Cedar Creek effectively “communicated the revocation” of the option to Phillippi prior to his attempt to purchase additional shares on November 24, 2008.

Phillippi contends that the district court incorrectly applied Delaware law. He argues that his continuing service as a director was consideration for the plan because he "did not have any existing obligation to serve as a director," and could resign at any time. *See* Del. Code Ann. tit. 8, § 141(b) (2011) ("Each director shall hold office until such director's successor is elected and qualified or until such director's earlier resignation or removal. Any director may resign at any time upon notice given in writing or by electronic transmission to the corporation."). He asserts that, while the options were "effective immediately," the options were tied to a director's years of service and could only be exercised by "continuing to serve as a director" and paying the required price per share.

Cedar Creek maintains that the stock option plan was "revocable." Cedar Creek contends that the plan was "merely . . . an offer to make Cedar Creek shares available to its directors," without requiring any action in return in an effort to align director interests with shareholder interests. Cedar Creek emphasizes that there was "no detriment" to Phillippi, no "monetary payments," and no "additional or different duties" agreed to by Phillippi in exchange for participation in the plan.

We agree that the plan was not supported by its own consideration. While Phillippi argues that he "could have resigned at any time," and indeed "served for more than five years after the plan was adopted," his decision to forgo resignation does not, by itself, establish consideration. There was no change in Phillippi's duties or his commitment to serve as a Cedar Creek director in exchange for participating in the plan. And notwithstanding Delaware law providing that a director "may resign at any time," Phillippi already had an existing obligation under Cedar Creek's bylaws to serve one-year terms,[3] and nothing in the plan required him to commit to a longer, specified term in order to participate.

Moreover, Phillippi's reliance on *Gottlieb* is unavailing. In *Gottlieb*, the Delaware Supreme Court determined that the "[r]etention of services" was the intended consideration for a stock-option contract. 92 A.2d at 598. But in that case, the "option agreement requirement that the optionee remain with the company to a fixed future date" was "an explicit and very important part of the option agreement." *Gottlieb v. Heyden Chem. Corp.*, 99 A.2d 507, 509 (Del. Ch. 1953) (*Gottlieb II*). Here, there is no evidence that the purpose of the plan was to retain Phillippi's services, or the services of any other director. And tying the number of shares available for purchase to a director's years of service "through the year ending December 31, 2008," did not create a *requirement* that a director remain with the company for that specified period of time. The December 31 end date merely closed the window of time in which directors had the ability to directly purchase common stock from the company. Accordingly, because Phillippi gave no additional consideration for the stock options, we conclude that the stock-option plan was revocable.

[3] Article 3.2 of the 1981 Restated By-laws of Cedar Creek Oil and Gas Company states, in relevant part, that "Each Director shall be elected to serve for one (1) year."

Phillippi also argues that the board executive committee did not have authority to rescind the plan. The executive committee charter provides that it may "exercise all of the powers and authority of the Board on matters of an urgent nature which arise between regularly scheduled Board meetings." Phillippi contends that there is "no evidence of any urgency" justifying the exercise of the executive committee's authority. Cedar Creek counters that the executive committee's decision to revoke the stock-option plan is protected by the business-judgment rule, and that Phillippi "failed to meet his burden of establishing facts rebutting the presumption" afforded by the rule.

The General Corporation Law of the State of Delaware provides that directors have authority to manage the business and affairs of the corporation. Del. Code. Ann. tit. 8, § 141(a) (2011). Section 141(a) states, in pertinent part: "The business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors, except as may be otherwise provided in this chapter or in its certificate of incorporation." *Id.* "The business judgment rule is an acknowledgment of the managerial prerogatives of Delaware directors under Section 141(a)." *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984), *overruled on other grounds by Brehm v. Eisner*, 746 A.2d 244 (Del. 2000). "It is a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company." *Id.* The burden is on the party challenging the decision to establish facts rebutting the presumption. *Id.* If the proponent fails to meet her burden, the business-judgment rule "will attach to protect the directors and the decisions they make." *Citron v. Fairchild Camera & Instrument Corp.*, 569 A.2d 53, 64 (Del. 1989).

Cedar Creek's bylaws provide that the "property, affairs, and business of the corporation shall be managed by or under the direction of the Board of Directors." The bylaws further authorize the board to "designate one or more committees . . . [which] shall have and may exercise all the powers and authority of the Board of Directors." Based on the language of the bylaws, as well as the business-judgment rule, we conclude that the executive committee acted within its authority in revoking the plan and communicating that revocation to Phillippi prior to his attempt to purchase the shares.

In sum, the executive committee's revocation of the stock-option plan was effective on November 12, 2008, and the board communicated the termination of the plan to Phillippi by e-mail on November 19. Phillippi attempted to purchase additional shares under the plan on November 24—after he was notified of the plan's revocation. Accordingly, as a matter of law, Phillippi could not exercise any rights under the plan, and the district court properly granted summary judgment on Phillippi's breach-of-contract claim relating to the stock-option plan.

II. Phillippi's defamation claim is barred by the judicial-proceedings privilege.

Phillippi challenges the district court's award of summary judgment on his defamation claim. On February 19, 2009, Cedar Creek sent a letter to its shareholders addressing Phillippi's lawsuit against the company. The letter—signed by the president, vice president, and chairman of Cedar Creek's board—informed shareholders that Phillippi had initiated a lawsuit against Cedar Creek and that the company had filed breach-of-fiduciary-duty counterclaims in response. The letter elaborated that the "Executive Committee is determined to aggressively defend the suit and it feels that it has reliable evidence and law to support its claims against Mr. Phillippi." The letter also asked shareholders "to vote for the removal of Mr. Phillippi from the Board of Directors." Phillippi claims that the letter is "intended to convey and does convey a defamatory impression."

There are three elements in a defamation claim: (1) "a false and defamatory statement about the plaintiff"; (2) made "in unprivileged publication to a third party"; and (3) "that harmed the plaintiff's reputation in the community." *Weinberger v. Maplewood Review*, 668 N.W.2d 667, 673 (Minn. 2003). Statements, even if defamatory, may be protected if covered by an absolute or qualified privilege. *Matthis v. Kennedy*, 243 Minn. 219, 227-28, 67 N.W.2d 413, 419 (1954).

In granting Cedar Creek's motion for summary judgment, the district court determined that Phillippi's defamation claim is "barred by the absolute immunity of the judicial proceeding privilege." Minnesota first recognized the absolute privilege for judicial-proceeding communications in *Matthis*, which held that "[d]efamatory matter published in the course of a judicial proceeding before a court of competent jurisdiction by a party or his attorney is absolutely privileged if it is related to the subject matter of the proceeding." *Id*. at 219, 67 N.W.2d at 414. The supreme court quoted the Restatement of Torts for the proposition that "'[a] party to a private litigation . . . is absolutely privileged to publish false and defamatory matter of another in communications preliminary to a proposed judicial proceeding, or in the institution of or during the course and as part of a judicial proceeding in which he participates, if the matter has some relation thereto.'" *Id.* at 228, 67 N.W.2d at 419 (quoting Restatement of (First) Torts § 587 (1938)).

To be protected under the judicial-proceedings privilege, a statement (1) must have been made by a party, participating attorney, judge, judicial officer, or witness, (2) must be in communications preliminary to, or in the course of, a judicial proceeding, (3) must be relevant to the subject matter of the litigation, and (4) must be entitled to protection in the interest of the administration of justice. *Id*. at 223-29, 67 N.W.2d at 417-20; *see also Mahoney & Hagberg v. Newgard*, 729 N.W.2d 302, 306 (Minn. 2007).

Phillippi argues that the "rule announced in *Matthis* was subsequently qualified by the [Minnesota] Supreme Court" in *Moreno v. Crookston Times Printing Co.*, 610 N.W.2d 321 (Minn. 2000). *Moreno* held that "[t]he fair and accurate reporting privilege is not defeated by a showing of common law malice, but is defeated by a showing that the report is not a fair and accurate report of the events that are part of the regular business of a city council meeting." 610 N.W.2d at 323. Phillippi asserts that Cedar Creek's statement that the executive committee "feels that it has reliable evidence and law to support its claims" is not privileged under *Moreno* because "it is not a fair and accurate report of what is stated in Cedar Creek's pleadings." Phillippi further asserts that the statement is false in that "Cedar Creek knows that there are no facts and there is no evidence to support its defamatory statements."

Phillippi's reliance on *Moreno* is misplaced. *Moreno* concerned application of the fair-and-accurate-reporting privilege—a qualified privilege that is separate and distinct from the absolute judicial-proceedings privilege.[4] *Id.* The fair-and-accurate-reporting privilege generally protects members of the press in the reporting of public records and other public proceedings. *See Jadwin v. Minneapolis Star and Tribune Co.,* 390 N.W.2d 437, 441 (Minn. App. 1986) ("Newspapers have a qualified privilege when making a fair and accurate report of public records."). Phillippi inappropriately conflates the qualified fair-and-accurate-reporting privilege and the absolute judicial-proceedings privilege. And he does not cite legal authority to support his implicit assertion that the fair-and-accurate-reporting privilege applies to statements published by a *non*-media individual or entity such as Cedar Creek. Because the fair-and-accurate-reporting privilege is inapplicable here, we reject Phillippi's argument that the district court's award of summary judgment was erroneous under *Moreno*.

Not only do we reject Phillippi's *Moreno*-based challenge, we also conclude that the district court's application of the judicial-proceedings privilege is sound. The statements were made by a party to the action, Cedar Creek, to its own shareholders, who are, as the district court determined, individuals "connected with the judicial proceeding at the very least through economic association." And the statements were made in the course of the judicial proceeding at issue. It is irrelevant that the statements were not made at a court hearing. The privilege applies to "'communications preliminary to a

[4] Privileges "generally have been divided into two categories, absolute and qualified." *Moreno*, 610 N.W.2d at 328. "Absolute privilege means that immunity is given even for intentionally false statements, coupled with malice, while a qualified or conditional privilege grants immunity only if the privilege is not abused and defamatory statements are publicized in good faith and without malice." *Matthis,* 243 Minn. at 223, 67 N.W.2d at 416.

proposed judicial proceeding.'" *Matthis*, 243 Minn. at 228, 67 N.W.2d at 419 (quoting Restatement (First) of Torts § 587); *see also Kittler v. Eckberg, Lammers, Briggs, Wolff & Vierling*, 535 N.W.2d 653, 656 (Minn. App. 1995) (holding that statements made by attorney in a letter mailed out to shareholders of a corporation in an attempt to solicit clients for a suit against the corporation were absolutely privileged even though "preliminary to a proposed judicial proceeding"), *review denied* (Minn. Oct. 10, 1995).

The statements were also relevant to the subject matter of the litigation. Statements are relevant to the subject matter of the litigation if the statements "have reference and relation to the subject matter of the action and they are connected therewith." *Mahoney*, 729 N.W.2d at 306 (quotation omitted). "[R]elevance is defined broadly" and encompasses "all statements that have reference, relation, or connection to the case." *Id.* at 308. If the statement is related to the subject matter under inquiry "in any manner, then all doubt must be resolved in favor of" the party claiming the privilege. *Matthis*, 243 Minn. at 229, 67 N.W.2d at 420. The letter clearly referenced Phillippi's lawsuit against Cedar Creek, and its contents are relevant under this prong.

Finally, protection of the communication is necessary to the administration of justice. *Mahoney*, 729 N.W.2d at 306 (stating that "the applicability of absolute privilege is limited," and that a court should not apply absolute privilege unless the "administration of justice requires complete immunity from being called to account for language used" (quotation omitted)). Communication of information from a company to its shareholders regarding whether, and to what extent, the company will pursue litigation impacts both the company and judicial system. Shareholders need such information to make informed decisions regarding the company's involvement in litigation. And to the extent those decisions may impact the company's litigation strategies, the decisions may increase demands on the judicial system. Any exchange of information between a company and its shareholders that may result in a decision to forgo litigation or to enter into a settlement agreement is encouraged as a matter of public policy and necessary to the administration of justice. *See Voicestream Minneapolis, Inc. v. RPC Props., Inc.*, 743 N.W.2d 267, 271 (Minn. 2008) (stating that "[s]ettlement of claims is encouraged as a matter of public policy").

Moreover, we discern no competing policy interest that weighs against application of the judicial-proceedings privilege in this case. *See Mahoney*, 729 N.W.2d at 309 ("Before applying absolute privilege, we look to see if there are competing policy interests that would counsel against application of the privilege."). In fact, Cedar Creek's communication of information to its shareholders regarding litigation affecting the company likely was required. *See* Minn. Stat. § 302A.251, subd. 1 (2010) (requiring directors to discharge their duties "in good faith, in a manner the director reasonably believes to be in the best interests of the corporation"); *see also Stroud v. Grace*, 606 A.2d 75, 84 (Del. 1992) (noting the "well-recognized proposition that directors of Delaware corporations are under a fiduciary duty to disclose fully and fairly all material information within the board's control"). To the extent that application of the privilege protects communications made pursuant to Cedar Creek's discharge of its fiduciary obligations to its shareholders, the privilege should be applied as a matter of public policy. *See Matthis*, 243 Minn. at 223, 67 N.W.2d at 417 ("The doctrine of privileged communication rests in that of public policy.").

In sum, the district court did not err in determining that Cedar Creek's letter to its shareholders is absolutely protected by the judicial-proceedings privilege and in granting summary judgment on Phillippi's defamation claim.

III. Phillippi is not entitled to deferred compensation.

Phillippi challenges the district court's summary dismissal of his breach-of-contract claim for $120,000 in deferred compensation, arguing that he is entitled to the compensation because he was not removed with cause. In March 2008, the board approved a deferred-compensation plan to provide the directors with "a supplemental executive retirement plan." The plan provided that a director serving between ten and fourteen years is entitled to receive compensation equal to $24,000 annually, paid quarterly, for five years commencing on the date that the director "has retired, resigned, dies, or is otherwise no longer acting as a Director, except in cases in which . . . removal from the Board is With Cause." If the director is removed with cause, the director "shall not be entitled to any benefits" under the plan. The plan defines "With Cause" to mean "the removal of a Director by the shareholders pursuant to Delaware Code Annotated § 141(k)." That section provides, in relevant part, that "[a]ny director or the entire board of directors may be removed, with or without cause, by the holders of a majority of the shares then entitled to vote at an election of directors." Del. Code Ann. tit. 8, § 141(k) (2011).

The district court determined that Phillippi is not entitled to deferred compensation because he was removed from his position as director "with cause."[5] The district court relied on a letter from the board to shareholders that asked them to vote to remove Phillippi from the board. The letter stated the other board members' beliefs that Phillippi had a conflict of interest with Cedar Creek, that he had disclosed confidential financial information to competitors, and that he had filed false claims seeking double payment for services rendered. Reasoning that the letter essentially alleged that Phillippi "had engaged in misconduct," the district court concluded that, "[s]imilar to an employee that is discharged for misconduct, it appears that [Phillippi] was removed with cause because he was removed for alleged violations of the standard of conduct." *See* Minn. Stat. § 302A.251, subd. 1 (requiring directors to discharge their duties "in good faith, in a manner the director reasonably believes to be in the best interests of the corporation").

Phillippi argues that he was not removed with cause. He contends that his term as a director simply "ended when his successor was elected" because shareholders "elected five directors before taking any action to remove Phillippi from the board." *See* Del. Code Ann. tit. 8, § 141(b) ("Each director shall hold office until such director's successor is elected and qualified or until such director's earlier resignation or removal."). He notes that the "order of business" for the shareholder meeting listed the election of other

[5] Neither the district court nor the parties refer to the plan's definition of "with cause" or section 141(k) of the Delaware code. Instead, the district court analyzed the issue using Minn. Stat. § 302A.223, subd. 3 (2010) (stating "any one or all of the directors may be removed at any time, with or without cause, by the affirmative vote of the holders of a majority of the voting power of all shares entitled to vote at an election of directors"). Both the Delaware and Minnesota statutes have the same effect in this case.

directors before the request for his removal and did not specifically reference his proposed removal as being "with cause."

We are not persuaded. First, as Cedar Creek observes, if Phillippi had resigned as requested, "he would have been entitled to benefits under the Deferred Compensation Plan." But because he refused to resign, a shareholder vote was necessary to remove him. *See Stroud v. Milliken Enters., Inc.*, 585 A.2d 1306, 1309 (Del. Ch. 1988) ("Generally, directors do not have power under Delaware law to remove fellow directors."). The shareholders were explicitly informed of the reasons they were asked to vote to remove Phillippi as a director, and the letter notifying shareholders of the vote stated that the board had "lost all confidence in [Phillippi's] ability and motives to serve as a Director."

Second, as the district court observed, Phillippi's argument that he was replaced and not removed, based on the order of the voting items on the shareholder proxy, appears to be an attempt to "circumvent the evidence" that a principal purpose of the meeting was to effect his removal. Phillippi's removal was contemplated within the same proxy as the election of his successor, and Phillippi's argument elevating form over substance would render an entire agenda item and shareholder vote meaningless. Accordingly, we conclude that the district court appropriately determined that shareholders voted to remove Phillippi from his position as director with cause and therefore did not err in awarding summary judgment on his breach-of-contract claim for deferred compensation.

IV. Phillippi is entitled to the 2009 director retainer fee.

Phillippi next challenges the district court's award of summary judgment on his breach-of-contract claim for a $12,000 retainer fee for 2009. "A claim of breach of contract requires proof of three elements: (1) the formation of a contract, (2) the performance of conditions precedent by the plaintiff, and (3) the breach of the contract by the defendant." *Thomas B. Olson & Assocs., P.A. v. Leffert, Jay & Polglaze, P.A.*, 756 N.W.2d 907, 918 (Minn. App. 2008), *review denied* (Minn. Jan. 20, 2009). It is undisputed that a contract for an annual director retainer fee exists. At a March 2008 board meeting, the board approved a plan to pay directors a $12,000 annual retainer fee and a per-meeting fee of $1,500. But no formal, written plan was memorialized beyond the meeting minutes. Thus, the issue presented involves construing the terms of the plan.

The construction and effect of a contract generally are questions of law for the court. *Turner v. Alpha Phi Sorority House*, 276 N.W.2d 63, 66 (Minn. 1979). The goal in construing a contract is to determine and give effect to the intent of the parties to the contract. *Karim v. Werner*, 333 N.W.2d 877, 879 (Minn. 1983). "[A] court gives effect to the parties' intentions as expressed in the four corners of the instrument, and clear, plain, and unambiguous terms are conclusive of that intent." *Knudsen v. Transp. Leasing/Contract, Inc.*, 672 N.W.2d 221, 223 (Minn. App. 2003), *review denied* (Minn. Feb. 25, 2004). But if that language is "reasonably susceptible of more than one interpretation," the contract is ambiguous. *Art Goebel, Inc. v. N. Suburban Agencies, Inc.*, 567 N.W.2d 511, 515 (Minn. 1997). To ascertain the parties' intent, "the court should look to (1) circumstances surrounding the making of the contract and (2) the parties' own subsequent interpretations of the contract." *Davis by Davis v. Outboard Marine Corp.*, 415 N.W.2d 719, 723-24 (Minn. App. 1987), *review denied* (Minn. Jan. 28, 1988). And the process of contract interpretation "can be supplemented by a practical construction of a contract," including "the parties' conduct during the course of performance which may support inferences as to the meaning of language in the contract, or as to their intentions with respect to gaps or omissions in the contract." *J.J. Brooksbank Co. v. Budget Rent-A-Car Corp.*, 337 N.W.2d 372, 376 (Minn. 1983) (quotation omitted). "Whether a contract is ambiguous is a question of law," which this court reviews de novo. *Carlson v. Allstate Ins. Co.*, 749 N.W.2d 41, 45 (Minn. 2008). But construction of an ambiguous contract presents a question of fact for the jury. *Turner*, 276 N.W.2d at 66.

The district court determined that Phillippi is not entitled to a retainer fee for 2009 because Cedar Creek "was not desirous of [his] services in 2009." The court emphasized that, regardless of the meaning of the word "retainer," there must be "a willingness from the party that is engaging the services, or seeking to make services available," and it is "undisputed" that Cedar Creek did not desire Phillippi's services after asking him to resign in November 2008.

Cedar Creek admits that Phillippi was a director for "four months" of 2009, but it maintains that Phillippi "did not perform any activity as a director on behalf of Cedar Creek." Cedar Creek also argues that the retainer fee cannot be based upon a director's availability because "there was never a meeting of the minds" as to the terms under which a retainer fee would be paid.

Phillippi contends that he "earned his retainer" for 2009 because he was "available" to the company during that period. Phillippi notes the definition of "retainer" as adopted in the deferred-compensation plan, which states that "Annual Retainer" means "the current annual retainer paid by the Corporation to a Director in order to secure his services as a Director." He also analogizes the director retainer to fees paid to retain the services of attorneys. *See St. Cloud Nat'l Bank & Trust v. Brutger*, 488 N.W.2d 852, 854 (Minn. App. 1992) (recognizing one purpose of a retainer fee as "a fee prepaid to engage a lawyer's services for a given period of time to ensure the lawyer's availability"), *review denied* (Minn. Nov. 17, 1992). Emphasizing the separate $1,500 meeting fee for directors, Phillippi contends that the purpose of the retainer fee "must necessarily have been to secure [directors'] availability."

We reject Cedar Creek's contention that the definition of "retainer" in the deferred-compensation plan is "irrelevant" and "take[s] the word out of context." We conclude that the definition is relevant, because the operation of the deferred-compensation plan is linked to the payment of the annual retainer. The deferred-compensation plan links an "annual payment" to "the greater of the Annual Retainer paid to the Directors as of the date of a Participant's retirement, death or resignation from the Board," or another specified amount based on the director's years of service. Thus, the "annual retainer" referenced in the deferred-compensation plan is, in fact, the very retainer at issue here. Accordingly, we conclude that the circumstances surrounding the retainer plan and the parties' own interpretations of the retainer plan as memorialized in the deferred-compensation plan provide evidence that the retainer fee was intended to "secure" the directors' availability, not to compensate directors for "active participation" as Cedar Creek argues. *See Davis by Davis*, 415 N.W.2d at 723-24.

Moreover, it is irrelevant that the directors no longer desired Phillippi's service on the board. Both Delaware law and Cedar Creek's bylaws provide that the shareholders have authority to elect and remove directors. *See Stroud*, 585 A.2d at 1309 ("Generally, directors do not have power under Delaware law to remove fellow directors."). Despite the board's desire to remove Phillippi, Phillippi remained a director and was available to serve in that role until he was removed by shareholders. And it is immaterial that no meetings were held during that period because directors were separately compensated for meetings with the $1,500 per-meeting fee. Accordingly, because the retainer was created "to secure" a director's services and there is no dispute that Phillippi made his services available to Cedar Creek, we conclude that the district court erred in granting Cedar Creek's motion for summary judgment on this claim. As a matter of law, Phillippi is entitled to the $12,000 retainer fee for 2009. We therefore reverse the district court's award of summary judgment for Cedar Creek on Phillippi's retainer-fee claim and remand for entry of judgment in Phillippi's favor in the amount of $12,000.

Affirmed in part, reversed in part, and remanded.

Dated:

Judge Michelle A. Larkin