AY

STATE OF NEW MEXICO
THIRTEENTH JUDICIAL DISTRICT
COUNTY OF VALENCIA

CAROL AUFFREY
AND HERBERT MYERS, individually,
and as representatives of the class of those member/owners
of the Socorro Electric Cooperative, Inc.
who are similarly situated

Plaintiffs,

v.

SOCORRO ELECTRIC COOPERATIVE, INC.

Defendant.

Case No: D-1314-CV-2010-849
Judge: Mitchell, Jr.

PLAINTIFFS' RESPONSE TO THE COURT'S AUGUST 14, 2012, LETTER REGARDING AN APPROPRIATE REMEDY

TO THE HONORABLE JUDGE ALBERT J. MITCHELL, JR.:

I. Introduction

On August 14, 2012, the Court requested the parties to provide: "some citations and arguments addressing the issue of what power the Court has to fix the faulty government of a utility" and what "the appropriate remedy is".

The Plaintiffs provide the following in response.

First, the Plaintiffs' response is predicated on the following assumptions:

1) Plaintiffs' allegations are true as pleaded and are not moot;

2) the bylaws are a contract between SEC and SEC's members (including the Plaintiffs);

3) the bylaws must comply with the Electric Cooperative Corporation Act ("ECCA");

4) SEC must act in good faith and fair dealing in its performance of its obligations under its bylaws;

5) SEC has breached its bylaws and has failed to act in good faith and deal fairly with its members.

II. The Court May Enforce the Terms of the Contract Between SEC and Plaintiffs

To redress SEC's breach of contract and failure to act in good faith and fair dealing, the Court may intervene as it would in any other breach of contract case. The Court by declaratory judgment may interpret the contract and the rights of the parties under its terms. The Court may enforce the terms of the parties' contract by its order and compensate the aggrieved party for damages suffered by the other party's breach. In that regard, SEC's breach of contract gives rise to an individual right of each member to seek redress in court. *Baldwin County Elec. Mbrshp. Corp. v. Catrett,* 942 So. 2d 337, 345-46 (Ala. 2006). The Court may enforce the terms of the bylaws and may retain continuing jurisdiction to assure future compliance. *Id.* at 348.

III. The Business Judgment Rule Does Not Insulate SEC from the Court's Intervention

When SEC fails to act in good faith and with fair dealing, the business judgment rule is not implicated. *See Id.; Mueller v. Zimmer,* 124 P.3d 340, 352 (Wyo. 2005); *Lake Monticello Owners' Ass'n. v. Lake,* 463 S.E. 2d 652, 656 (Va. 1995); *Micheve, L.L.C. v.*

Wyndham Place at Freehold Condominium Ass'n., 885 A. 2d 35, 39 (N.J. 2005); *Matanuska Elec. Ass'n v. Waterman*, 87 P.3d 820, 824 (Alaska 2004). Specifically, when the board of directors' and management of the SEC's conduct violates a member's individual rights reserved by law and the bylaws (especially those relating to democratic governance and voting procedures), the Court is empowered to enjoin the illegal conduct, prohibit the offending procedure or conduct, and reform the bylaws to provide for member due process and oversee the implementation of its orders. In such cases, courts have determined that the business judgment rule does not apply. *See Id.*

IV. Court Authority and Remedies

For example, earlier in this cause, the Court ruled that the SEC unlawfully failed to enforce bylaw amendments made by member's initiatives over SEC objections. The Court's remedy was to craft bylaws by court order which were consistent with due process and New Mexico law. Moreover, if the Court determines that cooperative bylaws are made in bad faith, violate Plaintiffs' due process rights, and/or infringe on members' contract rights, the Court has the authority to amend and enforce the bylaws by judicial mandate. *Baldwin County Elec. Mbrshp. Corp. v. Catrett*, 942 So. 2d 337, 347-48 (Ala. 2006)

Additionally, there is ample authority for the Court to provide specific ways for enforcing members' rights, ensuring a democratic election process that the Court oversees, and to provide effective means for members to participate in cooperative

governance. To effectuate these goals, the Court can maintain continuing jurisdiction to enforce the bylaws. *Id.*

This authority supports similar judicial intervention where SEC's application of a bylaw is offensive to members' due process rights, done in bad faith, or that infringes on a contract right (as opposed to failure to enforce or comply). In that case, the Court can vacate the application and order the SEC to act in compliance with the bylaws. And, the Court can sanction the SEC board members individually and retain continuing jurisdiction to ensure the board properly applies the bylaws in the future. *Id.*

V. Conclusion

Under the electric cooperative jurisprudence found in other states, this Court has the jurisdiction and authority to fix the faulty government of a utility like the SEC. That authority is not impeded by the business judgment rule which is not implicated here. Moreover, it is well settled that when the SEC violates the law and/or the express terms of its own bylaws in dealing with its members, the Court may enjoin that conduct, enforce the bylaws, reform offending bylaw language or corporate procedures, re-write the bylaws or establish procedures to provide members with minimum due process in corporate governance and retain continuing jurisdiction to assure future compliance with its rulings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that the foregoing was served on the persons identified below on the date and in the manner stated.

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/s/ Kimberly Selinger
Kimberly Selinger

*942 So. 2d 337, *; 2006 Ala. LEXIS 90, **

Baldwin County Electric Membership Corporation, J. Thomas Bradley, Jr., Steven P. Brill, Tommie Werneth, John D. Taylor, Jr., Peggy R. Vanover, and Thomas J. Helton v. Robert Lee Catrett, Wesley Grant, John Gregg, David Harms, Davida Hastie, George P. Kaiser, Willard Penry, Henry Vick, and Cecil Ward Ex parte Baldwin County Electric Membership Corporation, J. Thomas Bradley, Jr., Steven P. Brill, Tommie Werneth, John D. Taylor, Jr., Peggy R. Vanover, and Thomas J. Helton (In re: Robert Lee Catrett, Wesley Grant, John Gregg, David Harms, Davida Hastie, George P. Kaiser, Willard Penry, Henry Vick, and Cecil Ward v. Baldwin County Electric Membership Corporation, J. Thomas Bradley, Jr., Steven P. Brill, Aubury L. Fuller, Tommie Werneth, John D. Taylor, Jr., Peggy R. Vanover, and Thomas J. Helton)

1040371, 1040362

SUPREME COURT OF ALABAMA

942 So. 2d 337; 2006 Ala. LEXIS 90

May 5, 2006, Released

SUBSEQUENT HISTORY: [1]** Released for Publication October 27, 2006.
Subsequent appeal at Catrett v. Baldwin County Elec. Mbrshp. Corp., 2008 Ala. LEXIS 96 (Ala., May 23, 2008)

PRIOR HISTORY: Proceedings from Baldwin Circuit Court. (CV-04-1320). Charles C. Partin.

DISPOSITION: 1040371 -- AFFIRMED. 1040362 -- PETITION DENIED.

CASE SUMMARY:

PROCEDURAL POSTURE: The Baldwin Circuit Court (Alabama) granted appellee individual members' request for a preliminary injunction directing appellant electric cooperative to overhaul its voting procedures for its board of trustees and its procedure for approving or amending annual meeting minutes. The electric cooperative appealed; the electric cooperative and certain trustees also filed a petition for writ of mandamus seeking to set aside the trial court's ruling.

OVERVIEW: The individual members had a dispute with the electric cooperative over voting procedures for the election of the board of trustees of the electric cooperative, and over procedures for approving or amending annual meeting minutes. Specifically, the individual members asserted their voting rights were diluted if they voted for the trustees by mail and a person was nominated at the annual meeting who the individual members could not vote for by mail. They requested a preliminary injunction. The trial court granted in part the injunctive relief sought and found that their was an irreconcilable conflict in the by-laws between the mail-in voting provision and the provision allowing floor nominations. It also set forth the procedure for correcting or adding to the annual meeting minutes. On appeal, the state supreme court found that the individual members were entitled to relief through their direct action since they were seeking relief for themselves and not derivatively on behalf of the cooperative, that the individual members stated a cause of action, that the issuance of the preliminary injunction did not violate the business judgment rule, and that another argument was waived.

OUTCOME: The trial court's grant of the preliminary injunction in favor of the individual members was affirmed. As a result of that ruling, the electric cooperative's petition for a writ of mandamus was rendered moot, and, thus, the state supreme court denied the petition.

CORE TERMS: cooperative, bylaw, annual meetings, shareholder, nomination, floor, ballot, board of trustees, membership, minutes, election, preliminary injunction, derivative action, electric, voting, mail, injunction, derivative, nominating, by-laws, voting rights, board of directors, right to vote, correction, nominated, writ of mandamus, direct action, business-judgment, derivatively, secretary

LEXISNEXIS(R) HEADNOTES

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions
Civil Procedure > Appeals > Appellate Jurisdiction > Interlocutory Orders

HN1 The issuance of a preliminary injunction is an appealable order; Ala. R. App. P. 4(a)(1)(A) provides that a party can appeal from any interlocutory order granting, continuing, modifying, refusing, or dissolving an injunction, or refusing to dissolve, or to modify, an injunction.

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions
Civil Procedure > Appeals > Standards of Review > General Overview

HN2 A reviewing court reviews a preliminary injunction to determine whether the trial court exceeded its discretion in granting the injunction. The grant of, or refusal to grant, a preliminary injunction rests largely in the discretion of the trial court. Moreover, if it cannot be shown that the trial court exceeded its discretion in either granting or refusing to grant a preliminary injunction, the court's action will not be disturbed on appeal. A trial court exceeds its discretion when it exceeds the bounds of reason, all the circumstances before the lower court being considered.

Civil Procedure > Remedies > Injunctions > Elements > General Overview
Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN3 In order for a trial court to grant a preliminary injunction, a plaintiff must show all of the following: (1) that without the injunction the plaintiff would suffer immediate and irreparable injury, (2) that the plaintiff has no adequate remedy at law, (3) that the plaintiff has at least a reasonable chance of success on the ultimate merits of his case, and (4) that the hardship imposed on the defendant by the injunction would not unreasonably outweigh the benefit accruing to the plaintiff.

Business & Corporate Law > Cooperatives > Members & Other Constituents
Business & Corporate Law > Corporations > Shareholders > Actions Against Corporations > Derivative Actions > General Overview
Business & Corporate Law > Corporations > Shareholders > Actions Against Corporations > Direct Actions

HN4 In analyzing whether a claim is derivative or direct, a reviewing court looks to the nature of the alleged wrong rather than the designation used by a plaintiff in the complaint.

Business & Corporate Law > Cooperatives > Members & Other Constituents
Business & Corporate Law > Corporations > Shareholders > Actions Against Corporations > Derivative Actions > General Overview
Business & Corporate Law > Corporations > Shareholders > Actions Against Corporations > Derivative Actions > Enforcement of Corporate Rights

HN5 Ala. R. Civ. P. 23.1, which sets out the procedural requirements for bringing a derivative action, refers to a derivative action as one brought by one or more shareholders or members to enforce a right of a corporation or of an unincorporated association, the corporation or association having failed to enforce a right which may properly be asserted by it.

Business & Corporate Law > Corporations > Shareholders > Actions Against Corporations > Derivative Actions > General Overview
Business & Corporate Law > Corporations > Shareholders > Actions Against Corporations > Derivative Actions > Enforcement of Corporate Rights
Business & Corporate Law > Corporations > Shareholders > Actions Against Corporations > Direct Actions

HN6 A derivative action has been defined as an action brought by one or more stockholders of a corporation to remedy or prevent a wrong against the corporation, while a direct action has been defined as an action brought by one or a few shareholders to remedy or prevent a direct wrong to plaintiffs.

Business & Corporate Law > Corporations > Shareholders > Actions Against Corporations > Derivative Actions > General Overview
Business & Corporate Law > Corporations > Shareholders > Actions Against Corporations > Derivative Actions > Enforcement of Corporate Rights

HN7 The derivative action provides a method by which shareholders or members can sue on behalf of the corporation or association when those in control of the corporation or association refuse to assert a claim belonging to it. Ala. R. Civ. P. 23.1.

Business & Corporate Law > Cooperatives > General Overview
Business & Corporate Law > Cooperatives > Members & Other Constituents

HN8 The constitution, bylaws, rules, and regulations of a voluntary association constitute a contract between an association's members, which is binding upon each member so long as the bylaws, etc., remain in effect.

Business & Corporate Law > Corporations > Shareholders > Actions Against Corporations > Direct Actions

HN9 An action to protect shareholder or member voting rights can be maintained as a direct or individual action.

Business & Corporate Law > Corporations > Shareholders > General Overview
Business & Corporate Law > Corporations > Shareholders > Actions Against Corporations > Direct Actions

HN10 The right to vote is a contractual right that a plaintiff possesses as a shareholder of the corporation, which is independent of any right of the corporation. The alleged interference with that right meets the requirements in setting forth an individual action.

Business & Corporate Law > Corporations > Directors & Officers > Management Duties & Liabilities > Defenses > Business Judgment Rule

HN11 If in the course of management, directors arrive at a decision, within the corporation's powers, for which there is a reasonable basis, and they act in good faith, as the result of their independent discretion and judgment, and uninfluenced by any consideration other than what they honestly believe to be the best interest of the corporation, a court will not interfere with the internal management and substitute its judgment for that of the directors to enjoin or set aside the transaction or to surcharge the directors for any resulting loss.

Business & Corporate Law > Corporations > Directors & Officers > Management Duties & Liabilities > Defenses > Business Judgment Rule
Civil Procedure > Appeals > Appellate Jurisdiction > General Overview

HN12 Judicial review of an organization's actions is available to a member of the organization who challenges such actions on the grounds that they do not conform to the organization's constitution or bylaws.

Business & Corporate Law > Corporations > Directors & Officers > Management Duties &

Liabilities > Defenses > Business Judgment Rule

HN13 The business judgment rule generally insulates the acts of directors done in good faith and with sound business judgment from interference by the courts. An act of the directors beyond the limits of their powers as defined by statute or bylaw is also grounds for interference by the courts.

Civil Procedure > Equity > General Overview

HN14 Ordinarily a court of equity will not interfere with the internal affairs of a voluntary association, or assume jurisdiction to restrain its acts done or attempted in accordance with its rules and within the scope of its powers.

COUNSEL: Daniel G. Blackburn and Cynthia J. Sherman of Blackburn & Conner, P.C., Bay Minette; and Robert A. Huffaker, Jr., of Rushton, Stakely, Johnston & Garrett, P.A., Montgomery, for appellant/petitioner Baldwin County Electric Membership Corporation; Douglas L. McCoy of Hand Arendall, L.L.C., Mobile, for appellants/petitioners J. Thomas Bradley, Jr., Steven P. Brill, Tommie Werneth, John D. Taylor, Jr., and Thomas J. Helton; and Mary E. Murchison of Murchison & Howard, LLC, Foley, for appellant/petitioner Peggy R. Vanover.

Taylor D. Wilkins, Jr., of Wilkins, Bankester, Biles & Wynne, P.A., Bay Minette, for appellees/respondents.

JUDGES: SMITH, Justice. Nabers, C.J., and See, Harwood, Woodall, Bolin, and Parker, JJ., concur. Lyons and Stuart, JJ., recuse themselves.

OPINION BY: SMITH

OPINION

[*339]

PETITION FOR WRIT OF MANDAMUS

SMITH, Justice.

This appeal and petition for a writ of mandamus arise out of a dispute over voting procedures for the election of the board of trustees of the Baldwin County Electric Membership Corporation ("the Cooperative") and over procedures for approving or amending the minutes from the Cooperative's annual meetings. The Cooperative and certain individuals serving on the board of trustees of the Cooperative [1] (collectively "BCEMC") appeal from the trial court's order issuing a preliminary injunction. BCEMC has also filed a petition for a writ of mandamus asking this Court to set aside the trial court's order. The appellees/respondents are nine individual members of the Cooperative ("the plaintiffs"). [2] Our affirmance of the trial court's order in case no. 1040371 renders **[**2]** BCEMC's petition moot. We therefore deny the petition.

FOOTNOTES

1 The individuals include J. Thomas Bradley, Jr., Steven P. Brill, Tommie Werneth, John D. Taylor, Jr., Peggy R. Vanover, and Thomas J. Helton. Aubury L. Fuller, a defendant below, also served on the Cooperative's board of trustees; Fuller, however, is not a party on appeal.

2 The appellees include Robert Lee Catrett, Wesley Grant, John Gregg, David Harms, Davida Hastie, George P. Kaiser, Willard Penry, Henry Vick, and Cecil Ward.

Facts and Procedural History

The Cooperative is organized under Ala. Code 1975, §§ 37- 6-1 through -49, for the purpose of supplying electric service to customers in Baldwin County and Monroe County. It is the largest electric cooperative in Alabama. Any person or entity that receives electric service from the Cooperative is eligible to become a member. [3]

FOOTNOTES

[3] The Cooperative's bylaws state:

> "Any person, firm, association, corporation, or body politic or subdivision thereof will become a member of Baldwin County Electric Membership Corporation (hereinafter called the 'Cooperative') upon receipt of electric service from the Cooperative, provided that the person or entity has first:
>
> "(a) Made a written application for membership therein;
>
> "(b) Agreed to purchase from the Cooperative electric energy as hereinafter specified;
>
> "(c) Agreed to comply with and be bound by the articles of incorporation and bylaws of the Cooperative and any rules and regulations adopted by the board; and
>
> "(d) Paid the membership fee hereinafter specified."

[3]** **[*340]** The Cooperative is managed by a board of seven trustees. The Cooperative serves a territory that is divided into seven districts, and each district is represented by one trustee, who resides within the district he or she represents. [4] The Cooperative holds an annual meeting for the purposes of electing trustees and conducting its business. All members of the Cooperative are entitled to vote in the at-large trustee elections. According to the bylaws, the president of the board of trustees must appoint a nominating committee before the annual meeting. The nominating committee consists of two members from each district for which trustees are to be elected at that year's annual meeting plus one at-large member who is not from any of the districts for which elections are to be held. The nominating committee nominates at least one candidate for each district from which a trustee must be elected.

FOOTNOTES

[4] The bylaws of the Cooperative also state that "the officers of the Cooperative shall be a President, Vice- President, Secretary, Treasurer, and such other officers as may be determined by the board from time to time." Those officers are "elected annually by and from the board [of trustees]." In 2004, Steven P. Brill, the trustee representative from district 2, was selected by the board of trustees to serve as president of the Cooperative.

[4]** In 2004, the membership of the Cooperative was scheduled to elect trustees for districts 2, 4, and 6. Steven P. Brill, trustee representative from district 2 and the president of the board of trustees, appointed a nominating committee in accordance with the bylaws. The committee met to discuss nominations for the trustee positions. David Harms, a member of the Cooperative and one of the plaintiffs in this case, appeared before the nominating committee and requested to be nominated for the trustee position for district 2. The committee decided not to place Harms

on the ballot. The committee nominated Brill for district 2, Tommie Werneth for district 4, and Peggy Vanover and Roy LeBlanc for district 6.

The bylaws of the Cooperative state that members can vote for trustees by mail-in ballot or in person at the annual meeting. [5] The secretary of the board of trustees is responsible for mailing members the official notice of the annual meeting, along with the mail-in ballots. If a member decides to vote by mail, he or she returns the completed ballot to the Cooperative by the deadline set by the board of trustees. However, the members may also attend the annual meeting and vote in person. **[**5]**

FOOTNOTES

[5] An amendment to the bylaws permitting the membership to vote in the election of trustees by mail was approved on July 22, 1999. Before this amendment, members were required to attend the annual meeting to vote in the election of trustees. The amended bylaws state:

> "Any member of record shall be entitled to only one vote upon each matter submitted to a vote of the members. Any member of record may vote in person or by mail on all matters requiring a vote of the membership, except for matters involving the disposition of Cooperative property pursuant to Article VIII hereof which requires that members vote in person."

The bylaws also state that "nothing contained herein shall, however, prevent additional nominations from the floor at the meeting of the members." Therefore, according to the bylaws, the president must call for additional nominations to be made from the floor at the annual meeting. **[*341]** However, because the deadline for mail-in voting is before the annual meeting, the bylaws do not include **[**6]** a procedure that allows members voting by mail to vote for any candidates who might be nominated from the floor at the annual meeting. The plaintiffs allege that this voting system violates the bylaws of the Cooperative and the parliamentary procedure requirements set out in *Robert's Rules of Order*. [6]

FOOTNOTES

[6] The bylaws state that "parliamentary procedure as established by the last edition of *Robert [']s Rules of Order* shall govern all issues at the meetings of the members and trustees of the Cooperative."

The 2004 annual meeting was scheduled to be held on December 9, 2004. In late October or early November 2004, after the nominating committee had met, the secretary of the board of trustees mailed notice of the annual meeting and mail-in voting ballots to members. Members opting to vote for trustees by mail had to return their ballots by December 2, 2004.

The plaintiffs sued BCEMC on November 18, 2004, seeking a declaratory judgment, a preliminary injunction, and a permanent injunction. [7] The plaintiffs **[**7]** requested that the trial court hold a hearing on their request for a preliminary injunction and that BCEMC be enjoined "from proceeding with the election of trustees at the December 9, 2004, annual meeting." The plaintiffs also requested that upon a final hearing the trial court enter a permanent injunction "enjoining [BCEMC] from proceeding with the election of the trustees at the [Cooperative's] annual meeting on December 9, 2004" and "ordering [that] the By-Laws of the [Cooperative] be amended to provide for a special or regular meeting of the membership to receive the nominating committee's report for nominations of the trustees and to allow nominations from the floor prior to the vote of the membership for trustees at the annual

meeting of the corporation."

FOOTNOTES

7 The trial court has not yet adjudicated the plaintiffs' request for a declaratory judgment or a permanent injunction. The complaint requested that a judgment be entered declaring:

> "1. That the Defendants be required to comply with the By-Laws of the corporation by following Robert[']s Rules of Order in the election process.
>
> "2. That the By-Laws of the Baldwin County Electric Membership Corporation be amended to provide for a special or regular meeting of the membership to receive the nominating committee's report for nominations of the trustees and to allow nominations from the floor prior to the vote of the membership for trustees at the annual meeting of the corporation.
>
> "3. That the president of the Baldwin County Electric Membership Corporation allow nominations from the floor at said special or regular meeting.
>
> "4. That the tabulation or votes for trustees be made by an independent accountant not employed by the corporation."

[8]** In addition to the dispute over the voting procedures for the election of trustees, the plaintiffs' complaint alleged that the method for approving or amending the minutes from past annual meetings was improper. The Cooperative held its 2003 annual meeting on March 28, 2003. During the meeting, the Cooperative conducted trustee elections for districts 5 and 7. The plaintiffs contended that Brill, serving as president of the board of trustees and presiding over the meeting, refused to recognize nominations from the floor. Witness testimony as to whether Brill allowed nominations from the floor at the 2003 meeting is conflicting. The minutes from the meeting indicate that Brill opened the floor to nominations for trustees for districts 5 and 7, but that no members made nominations from the floor.

The notice of the 2004 annual meeting that was mailed to members also contained **[*342]** a ballot for members to vote to approve or disapprove the minutes from the March 2003 meeting. The plaintiffs allege that the voting procedure used by the board of trustees to obtain approval of the minutes of the 2003 annual meeting violates the bylaws of the Cooperative because it does not give members the opportunity **[**9]** to suggest amendments or additions to the minutes. Therefore, the plaintiffs' complaint also requested a judgment declaring "that the minutes of the March 28, 2003, annual meeting be submitted to the membership for corrections." In addition, the complaint requested a preliminary injunction ordering that "the annual Minutes of March 28, 2003, not be submitted for approval or disapproval to the membership without correction." Lastly, the complaint requested that upon final hearing the trial court enter a permanent injunction ordering "that the annual Minutes of March 28, 2003, not be submitted for approval or disapproval."

On November 24, 2004, the trial court held a hearing on the plaintiffs' request for the preliminary injunction. At the hearing, the plaintiffs presented the trial court with an amended complaint asking the trial court "to require that the [Cooperative] follow [its] bylaws in the election process for trustees." In addition, BCEMC filed a motion to dismiss or, in the alternative, for a summary judgment. The trial court denied the motion.

On December 2, 2004, the trial court granted in part the injunctive relief sought. The trial court found that when the Cooperative **[**10]** amended the bylaws to allow members to vote by mail, "a comprehensive study was not conducted to determine whether any other portions of the

bylaws should be amended to accommodate mail voting." The trial court also found that there was an irreconcilable conflict in the bylaws between the mail-in voting provision and the provision allowing nominations from the floor. Therefore, the trial court held that it had a "duty" to interpret the procedural provisions together "so that no provision of [the bylaws] is arbitrarily disregarded." The trial court then ordered:

> "(a) The president of the [Cooperative] shall, at the annual meeting to be held on December 9, 2004, open the floor for nominations for a trustee for each district that must elect a trustee for a new term in numerical order of the districts.
>
> "(b) If there is no floor nomination for a particular district, the balloting and tabulation of mail votes for that district shall continue according to the by-laws and the result certified by the independent auditor together with the tabulation of the on-site votes. The result of the election for that district shall become final, and the person elected shall assume office **[**11]** at the proper time.
>
> "(c) If there is a floor nomination of a person qualified under the by-laws to serve as a trustee for a particular district, the president shall adjourn the annual meeting, as permitted by *Robert[']s Rules of Order*, 10th edition, with respect to the trustee election for that district or districts only. The president shall as soon as practicable select a date to reconvene the 2004 annual meeting for the purpose of completing the voting for the district trustee in question. The date shall be at the earliest possible time that will allow the secretary to prepare new ballots containing the same type of information for each person nominated for the office of trustee with respect to a particular district, whether nominated by the nominating committee or from the floor. The secretary shall also be responsible for enclosing with each ballot the notice of the re-convening of the adjourned Annual meeting, and the **[*343]** court orders that all other provisions of the by-laws respecting mail ballots be complied with, including instructions for mail voting and the return of ballots by the required deadline.
>
> "(d) The president shall call for any corrections or additions **[**12]** to the minutes of the 2003 meeting. If there are none, the proposed minutes may be approved using the mail ballots and the on-site votes. If there are corrections or additions proposed at the meeting, no vote shall be taken unless there is a quorum not counting mailed ballots. If there is a quorum of the members at the meeting, as defined by the by-laws, then any additions or corrections to the minutes are to be submitted at the meeting, and the same shall be voted upon by the members present, as required by the by-laws and *Robert's Rules of Order*. If there is no quorum present, then the matter must be continued to the next Annual Meeting. The Secretary shall include any proposed amendment to the minutes on the next notice sent to the members and appropriate instructions for voting on the corrections."

The trial court denied the plaintiffs' request to enjoin the 2004 annual meeting until it ruled on other issues raised by the plaintiffs.

On December 3, 2004, BCEMC filed a motion requesting that the trial court amend its order. On December 6, 2004, BCEMC filed a petition for a writ of mandamus with this Court, asking us to set aside the trial court's order. On December 8, 2004, the **[**13]** trial court granted BCEMC's motion and amended its order to provide that if nominations were made from the floor at the annual meeting, then while the meeting was still taking place, the Cooperative should prepare ballots containing the names of all nominees. The trial court ordered that the Cooperative then distribute these ballots to the membership physically present. In addition, the trial court ordered that the Cooperative would not be required to print and mail new ballots to the membership with the names of all nominees until this Court ruled on the merits of their appeal, filed on December 8, 2004, and only if this Court so ordered.

On December 9, 2004, the Cooperative held its annual meeting. In compliance with the trial court's order, the president of the board of trustees called for any corrections or additions to the minutes prepared for the 2003 meeting. A member moved to correct the minutes, but the Cooperative continued the matter until the next annual meeting because a quorum was not present to vote on the motion. In compliance with the trial court's order, the president of the board of trustees called for nominations from the floor for trustee positions for districts **[**14]** 2, 4, and 6. The Cooperative accepted one nomination from the floor for each district. After nominations were closed, all nominees were given time to speak to the members present at the meeting. The Cooperative prepared ballots containing the names of both the candidates who had been selected by the nominating committee and the candidates who were nominated from the floor. Using these new ballots, the members present at the annual meeting voted. Consistent with the trial court's amended order, the Cooperative has not yet printed or mailed to members not present at the annual meeting ballots containing the names of those candidates nominated from the floor.

The Cooperative appealed the trial court's issuance of a preliminary injunction in favor of the plaintiffs. [8] We have consolidated **[*344]** this appeal with BCEMC's petition for a writ of mandamus for the purpose of issuing one opinion.

FOOTNOTES

[8] HN1 The issuance of the preliminary injunction is an appealable order; Rule 4(a)(1)(A), Ala. R. App. P., provides that a party can appeal from "any interlocutory order granting, continuing, modifying, refusing, or dissolving an injunction, or refusing to dissolve or to modify an injunction."

[15]** *Standard of Review*

> HN2 "We review a preliminary injunction to determine whether the trial court exceeded its discretion in granting the injunction. 'The grant of, or refusal to grant, a preliminary injunction rests largely in the discretion of the trial court.' *Teleprompter of Mobile, Inc. v. Bayou Cable TV*, 428 So. 2d 17, 19 (Ala. 1983). Moreover, if it cannot be shown that the trial court exceeded its discretion in either granting or refusing to grant a preliminary injunction, the court's 'action will not be disturbed on appeal.' 428 So. 2d at 19. A trial court exceeds its discretion when it 'exceeds the bounds of reason, all the circumstances before the lower court being considered.' *Valley Heating, Cooling, & Elec. Co. v. Alabama Gas Corp.*, 286 Ala. 79, 82, 237 So. 2d 470, 472 (1970)."

Johnson v. Willis, 893 So. 2d 1138, 1140-41 (Ala. 2004) (footnote omitted).

Analysis

> HN3 "In order for a trial court to grant a preliminary injunction, the plaintiff must show *all* of the following: (1) that without the injunction the plaintiff would suffer immediate and irreparable injury; (2) that the plaintiff **[**16]** has no adequate remedy at law; (3) that the plaintiff has at least a reasonable chance of success on the ultimate merits of his case; and (4) that the hardship imposed on the defendant by the injunction would not unreasonably outweigh the benefit accruing to the plaintiff."

Perley v. Tapscan, Inc., 646 So. 2d 585, 587 (Ala. 1994) (citing *Martin v. First Fed. Sav. & Loan Ass'n of Andalusia*, 559 So. 2d 1075 (Ala. 1990); *Board of Dental Exam'rs of Alabama v. Franks*, 507 So. 2d 517 (Ala. Civ. App. 1986)).

I.

A.

BCEMC argues that the trial court erred in issuing the preliminary injunction because, it contends, the plaintiffs should have filed a derivative action, and, having failed to do so, they cannot succeed on the merits of the case. [9] We disagree.

FOOTNOTES

[9] To maintain a derivative action, a plaintiff must first meet the procedural requirements set out in Rule 23.1, Ala. R. Civ. P. Rule 23.1 states that to maintain a derivative action, the plaintiff must "allege with particularity the efforts, if any, made by the plaintiff to obtain the action the plaintiff desires from the directors or comparable authority ...." *See also James v. James*, 768 So. 2d 356, 360 (Ala. 2000) ("Before a shareholder can be awarded damages on a derivative claim, the shareholder must make a presuit demand on the board of directors of the corporation to correct the wrongs alleged, so that the corporation can deal with the problems internally if possible."). The plaintiff's effort to obtain action from the board of directors is known as the "director demand." *Elgin v. Alfa Corp.*, 598 So. 2d 807, 814 (Ala. 1992).

There is no evidence in the record indicating that the plaintiffs made a demand upon the board of trustees before filing this action. In addition, the plaintiffs did not allege in their complaint that they had made a demand upon the Cooperative's board of trustees. If the plaintiffs should have brought this action derivatively, as BCEMC contends, then the plaintiffs lack standing to maintain the action because no evidence was presented indicating that they met the director- demand requirement.

[17]** The plaintiffs' complaint does not allege that the action was brought derivatively on behalf of the Cooperative; even **[*345]** so, HN4 in analyzing whether a claim is derivative or direct, this Court looks to the nature of the alleged wrong rather than the designation used by the plaintiff in the complaint. *See Pegram v. Hebding*, 667 So. 2d 696, 702 (Ala. 1995) (addressing whether a plaintiff stockholder's action against a corporation could be brought individually or whether it could be maintained only as a derivative action); *McDonald v. U.S. Die Casting & Dev. Co.*, 541 So. 2d 1064, 1068-70 (Ala. 1989) (analyzing whether an individual shareholder could "sue in his own name" or whether the action should have been brought derivatively on behalf of the corporation); *Green v. Bradley Constr., Inc.*, 431 So. 2d 1226, 1228-29 (Ala. 1983) (addressing whether an action brought by a shareholder against a corporation as an "individual" or "direct" action was actually derivative in nature).

There are no Alabama cases addressing the precise question whether a claim alleging a violation of shareholder or member voting rights is a direct or derivative action. **[**18]** However, HN5 Rule 23.1, Ala. R. Civ. P., which sets out the procedural requirements for bringing a derivative action, refers to a derivative action as one

> "brought by one or more shareholders or members to enforce a *right of a corporation* or of an unincorporated association, the corporation or association having failed to enforce a right which may properly be asserted by it ...."

Rule 23.1, Ala. R. Civ. P. (emphasis added). HN6 A derivative action has also been defined as an action "brought by one or more stockholders of a corporation to remedy or prevent a wrong *against the corporation*," while a direct action has been defined as an action "brought by one or a few shareholders to remedy or prevent a direct wrong *to the plaintiffs*." 19 Am. Jur. 2d *Corporations* § 1934 (2004) (emphasis added). *See also*, 19 Am. Jur. 2d *Corporations* § 1944

(2004) (stating that a derivative action is brought to enforce "a corporate right or to prevent or remedy a wrong to the corporation"); *Black's Law Dictionary* 475 (8th ed. 2004) (defining a derivative action as an action "asserted by a **[**19]** shareholder on the corporation's behalf against a third party ... because of the corporation's failure to take some action against the third party"). HN7 The derivative action provides a method by which shareholders or members can sue on behalf of the corporation or association when those in control of the corporation or association refuse to assert a claim belonging to it. Rule 23.1, Ala. R. Civ. P. *See also Robbins v. Sanders*, 890 So. 2d 998, 1014 (Ala. 2004) ("In a shareholder-derivative action, the claims are asserted on behalf of a corporation ...."). The plaintiffs in this case allege that the board of trustees infringed upon their voting rights because, they say, the board failed to follow the procedures set out in the bylaws for the election of trustees and for approving or amending the minutes from annual meetings. "'It is well established that HN8 the constitution, bylaws, rules and regulations of a voluntary association constitute a contract between an association's members, which is binding upon each member so long as the bylaws, etc., remain in effect.'" *Turner v. West Ridge Apartments, Inc.*, 893 So. 2d 332, 335 (Ala. 2004) (quoting *Wells v. Mobile County Bd. of Realtors, Inc.*, 387 So. 2d 140, 142 (Ala. 1980)). **[**20]** The right to vote is granted to all members of the Cooperative under the bylaws and by statute. [10] Thus, each **[*346]** member of the Cooperative had a contractual right to vote. If the plaintiffs' voting rights have been violated, the plaintiffs--not the corporation--have suffered a harm. The plaintiffs can maintain this action directly because they are enforcing an individual right--the right to vote--rather than a right of the corporation. *See Green*, 431 So. 2d at 1229 (holding that an action for "fraudulent conversion of *corporate assets*" was derivative given that "if the allegations are true, [the assets] would by law have to be returned to the corporation as the assets are not solely [the plaintiff's] but belong to *the corporation*" (emphasis added)); *General Motors Corp. v. Bell*, 714 So. 2d 268, 290 (Ala. 1996) (holding that a plaintiff shareholder's action against a third party for fraud and wantonness *resulting from a loss of corporate funds* was a derivative--rather than direct--action); *Pegram*, 667 So. 2d at 702 (holding that a plaintiff's claims based upon allegations that a corporate officer defrauded *the corporation* **[**21]** were derivative). In addition, the relief sought by the plaintiffs here--an injunction to protect the plaintiffs' voting rights--benefits the plaintiffs, not the Cooperative.

FOOTNOTES

[10] The bylaws of the Cooperative state that "only members of record shall be entitled to vote on matters submitted to a vote of the members. Each member of record shall be entitled to only one vote upon each matter submitted to a vote of the members." *See also* § 37-6-9(b), Ala. Code 1975 ("Each member [of an electric cooperative] shall be entitled to one vote on each matter submitted to a vote at a meeting.").

Although there is no direct Alabama caselaw on point, there is authority from other jurisdictions to support the proposition that HN9 an action to protect shareholder or member voting rights can be maintained as a direct or individual action. In *Lipton v. News International, Plc*, 514 A.2d 1075, 1079 (Del. 1986) (overruled in part on other grounds by *Tooley v. Donaldson, Lufkin, & Jenrette, Inc.*, 845 A.2d 1031, 1037 (Del. 2004)), **[**22]** the Delaware Chancery Court addressed the question whether a shareholder's claim alleging that a corporate stock-exchange agreement violated shareholder voting rights was a direct or derivative action. The court held:

> HN10 "The right to vote is a contractual right that [the plaintiff] possesses as a shareholder of [the corporation] which is independent of any right of [the corporation]. The alleged interference with that right meets the requirements ... in setting forth an individual action ... *See also Reifsnyder v. Pittsburgh Outdoor Advertising Co.*, 405 Pa. 142, 173 A.2d 319 (1961) (Pennsylvania Supreme Court found a direct, or individual, action, concerned primarily with the protection of the plaintiff's voting rights, where plaintiff alleged that his own votes had been wrongly diluted by the majority shareholder's improper vote on a resolution in which the

majority shareholder had a pecuniary interest)."

514 A.2d at 1079. *See also Paskowitz v. Wohlstadter*, 151 Md. App. 1, 10, 822 A.2d 1272, 1277 (2003) (stating that "'a wrong involving a contractual right of a shareholder, such as the right to vote, ... exists independently **[**23]** of any right of the corporation'" (quoting *Moran v. Household Int'l, Inc.*, 490 A.2d 1059, 1070 (Del. Ch. 1985))); *G&N Aircraft, Inc. v. Boehm*, 743 N.E.2d 227, 234 (Ind. 2001) (holding that "direct actions are typically appropriate to enforce the right to vote"); *Reifsnyder v. Pittsburgh Outdoor Adver. Co.*, 405 Pa. 142, 149, 173 A.2d 319, 322 (1961) ("The right to vote is basic and fundamental to most shares of stock and is independent of any right that the corporate entity possesses and the shareholder could enforce and protect such rights by bringing a direct action." (footnotes omitted)).

B.

BCEMC also argues that under this Court's holding in *Rezner v. Fairhope* **[*347]** *Single Tax Corp.*, 292 Ala. 456, 296 So. 2d 166 (1974), the plaintiffs failed to state a cause of action. In *Rezner*, plaintiff shareholders sued a corporation seeking to dissolve the corporation or, in the alternative, to prohibit the corporation from charging what they alleged was excessive rent. The Court stated: "It is a well-established rule of substantive law in this state that before stockholders can sue the corporation to remedy corporate wrongs, **[**24]** they must first apply to the corporation's directors for redress." *Rezner*, 292 Ala. at 460, 296 So. 2d at 170. The Court held that the plaintiffs failed to state a cause of action "absent allegations that the internal remedies of the corporation had been invoked or to do so would be futile." *Rezner*, 292 Ala. at 459, 296 So. 2d at 169.

BCEMC argues that under *Rezner* the plaintiffs were required to "apply to the corporation's directors for redress" before suing BCEMC. *Rezner*, 292 Ala. at 460, 296 So. 2d at 170. However, it is unclear whether the action in *Rezner* was direct or derivative. The Court in *Rezner* did not address whether the plaintiffs sued derivatively--on behalf of the corporation-- or directly--as individuals. In addition, it is clear under Alabama caselaw that there is no director-demand requirement when a member or shareholder sues an association or corporation directly rather than derivatively.

In *Boykin v. Arthur Andersen & Co.*, 639 So. 2d 504, 508 (Ala. 1994), this Court, on appeal from the trial court's order granting the defendant's motion to dismiss, addressed whether the plaintiffs' **[**25]** claims against a corporation were direct or derivative. First, the Court explained that "the trial court's rationale for dismissing the claims against the individual defendants was that the plaintiffs had failed to make a demand on the board of directors pursuant to Rule 23.1, Ala. R. Civ. P." *Boykin*, 639 So. 2d at 507. This Court held that the plaintiffs' claims were not derivative and, therefore, that the trial court had erred in dismissing the claims. *Boykin*, 639 So. 2d at 508. Thus, this Court reversed the trial court's judgment dismissing the plaintiffs' claims because the plaintiffs were not required to make a demand upon the board of directors before suing the corporation, given that the plaintiffs' claims were direct rather than derivative. *Boykin*, 639 So. 2d at 508. *See also*, John W. Welch, *Shareholder Individual and Derivative Actions: Underlying Rationales and the Closely Held Corporation*, 9 J. Corp. L. 147, 151 (1984) ("Unlike plaintiffs seeking individual recoveries, plaintiffs bringing derivative actions must first exhaust internal corporate remedies."). We reject BCEMC's argument that, under *Rezner* **[**26]** , the plaintiffs were required to exhaust corporate remedies or to make a director demand in order to state a cause of action.

II.

BCEMC also argues that the trial court exceeded its discretion in issuing the preliminary injunction because the injunction violated the business-judgment rule. We disagree.

Alabama's business-judgment rule was set out in *Roberts v. Alabama Power Co.*, 404 So. 2d 629, 631 (Ala. 1981) (quoting H. Henn, *Law of Corporations* § 242 (2d ed. 1970), quoted with approval in *Michaud v. Morris*, 603 So. 2d 886, 888 (Ala. 1992)):

> HN11 "'If in the course of management, directors arrive at a decision, within the corporation's powers ..., for which there is a reasonable basis, and they act in good faith, as the result of their independent discretion and judgment, and uninfluenced by any consideration other than what they honestly believe to be the best interest of the corporation, a **[*348]** court will not interfere with the internal management and substitute its judgment for that of the directors to enjoin or set aside the transaction or to surcharge the directors for any resulting loss.'"

Although the business-judgment rule may **[**27]** apply to the business decisions of BCEMC, it is clear under Alabama caselaw that HN12 "'judicial review of an organization's actions is available to a member of the organization who challenges such actions on the grounds that [they do] not conform to the organization's constitution or [bylaws].'" *Dawkins v. Walker*, 794 So. 2d 333, 338 (Ala. 2001) (quoting *Mitchell v. Concerned Citizens of CVEC, Inc.*, 486 So. 2d 1283, 1287 (Ala. 1986)). It is clear under Alabama caselaw that the trial court acted properly in reviewing whether BCEMC was acting within the scope of its powers as articulated in its bylaws. *See Dawkins*, 794 So. 2d at 338 (addressing whether the board of directors had authority under its bylaws to remove one of the board members); *Mitchell*, 486 So. 2d at 1287 (addressing whether the board of directors of an electric cooperative had authority to remove a board member under the powers granted to the board in the cooperative's bylaws). Further, the bylaws of the Cooperative are clearly binding upon BCEMC. *Dawkins*, 794 So. 2d at 339 ("'It is well established that the constitution, bylaws, rule **[**28]** and regulations of a voluntary association constitute a contract binding upon each member so long as the bylaws, etc., remain in effect.'" (quoting *Wells v. Mobile County Bd. of Realtors*, 387 So. 2d at 142)). HN13 "The business judgment rule ... generally insulates the acts of directors done in good faith and with sound business judgment from interference by the courts .... An act of the directors beyond the limits of their powers as defined by statute or *bylaw* is also grounds for interference by the courts." 18B Am. Jur. 2d *Corporations* § 1296 (2004) (emphasis added). Further, BCEMC has not cited any authority to support its argument that the business-judgment rule applies to decisions of an association construing and applying the bylaws of the association. Therefore, we reject BCEMC's contention that the business-judgment rule applies to the facts of this case. [11]

FOOTNOTES

11 Decisions from other jurisdictions support this holding. *See Mueller v. Zimmer*, 2005 WY 156, 124 P.3d 340, 352 (Wyo. 2005) ("'As the name implies, a necessary predicate for the application of the business judgment rule is that the directors' decision be that of a *business* judgment and not a decision ... which construes and applies a statute and a corporate bylaw.'" (quoting *Lake Monticello Owners' Ass'n v. Lake*, 250 Va. 565, 571, 463 S.E.2d 652, 656 (1995))); *Micheve, L.L.C. v. Wyndham Place at Freehold Condominium Ass'n*, 381 N.J. Super. 148, 154, 885 A.2d 35, 39 (2005) (holding that "the business judgment rule, which governs judicial review of decisions within the scope of [the association's] discretionary authority, has no applicability to this case" because the actions of the defendant violated the bylaws of the association); *Matanuska Elec. Ass'n v. Waterman*, 87 P.3d 820, 824 (Alaska 2004) (holding that "reliance on the business judgment rule [was] misplaced" in a case alleging that the board of directors of an electric cooperative violated the bylaws of the cooperative).

[29]** III.

BCEMC also argues that under this Court's holding in *Fairhope Single Tax Corp. v. Rezner*, 527 So. 2d 1232, 1234 (Ala. 1987), the trial court impermissibly interfered with the internal management of the Cooperative by essentially amending the bylaws of the Cooperative. This Court has held that HN14 "'[o]rdinarily a court of equity will not interfere with the internal affairs of a voluntary association, or assume jurisdiction to restrain its acts done or attempted in accordance with its rules and **[*349]** within the scope of its powers.'" *Dawkins*, 794 So. 2d at

337-38 (quoting *Medical Soc'y of Mobile County v. Walker*, 245 Ala. 135, 140, 16 So. 2d 321, 325 (1944)). *See also Fairhope Single Tax Corp.*, 527 So. 2d at 1236. However, BCEMC never made this argument before the trial court, and it made this argument to this Court only in its reply brief. Thus, this argument has not been preserved for review. *See Marks v. Tenbrunsel*, 910 So. 2d 1255, 1263 (Ala. 2005) ("'This Court cannot consider arguments raised for the first time on appeal; rather, our review is restricted to the evidence and arguments considered by **[**30]** the trial court.'" (quoting *Andrews v. Merritt Oil Co.*, 612 So. 2d 409, 410 (Ala. 1992))), and *Byrd v. Lamar*, 846 So. 2d 334, 341 (Ala. 2002) (holding that it is a "settled rule that this Court does not address issues raised for the first time in a reply brief").

Conclusion

We reject BCEMC's argument that the plaintiffs could not succeed upon the merits of this case because the action should have been filed derivatively, and we hold that this action was properly brought as a direct action. In addition, we reject BCEMC's argument that the trial court's judgment violated the business-judgment rule, and BCEMC failed to preserve its argument that the trial court's order impermissibly interferes with the internal management of the corporation under this Court's holding in *Fairhope Single Tax Corp.*, 527 So. 2d at 1236. Therefore, the judgment of the trial court is affirmed. Our disposition of this appeal renders moot BCEMC's petition for the writ of mandamus, and we therefore deny the petition.

1040371--AFFIRMED.

1040362--PETITION DENIED.

Nabers, C.J., and See, Harwood, Woodall, Bolin, and Parker, JJ., concur.

Lyons and Stuart, **[**31]** JJ., recuse themselves.

*2005 WY 156, *; 124 P.3d 340, **;*
*2005 Wyo. LEXIS 186, ****

RONALD MUELLER, as an individual and Director of the Star Valley Ranch Association; and WILLIAM L. DALEY, an individual, Appellants (Plaintiffs), v. VINCE ZIMMER, an individual; and STEVE CRITTENDEN, an individual, Appellees (Defendants). RONALD MUELLER, as an individual and Director of the Star Valley Ranch Association; and WILLIAM L. DALEY, an individual, Appellants (Plaintiffs), v. STAR VALLEY RANCH ASSOCIATION, a Wyoming non-profit corporation; STAR VALLEY RANCH ASSOCIATION BOARD OF DIRECTORS, in their official capacity; ROGER COX, an individual; and COX, OHMAN & BRANDSTETTER, an Idaho chartered law firm, Appellees (Defendants).

No. 05-9, No. 05-10

SUPREME COURT OF WYOMING

2005 WY 156; 124 P.3d 340; 2005 Wyo. LEXIS 186

December 5, 2005, Decided

SUBSEQUENT HISTORY: Costs and fees proceeding at Mueller v. Zimmer, 2007 WY 195, 2007 Wyo. LEXIS 206 (Wyo., 2007)

PRIOR HISTORY: [*1]** Appeal from the District Court of Lincoln County. The Honorable Dennis L. Sanderson, Judge.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant association members sought review of a decision of the District Court of Lincoln County, Wyoming, granting summary judgment in favor of appellees, a subdivision association, its board of directors, and former directors and managers, in the members' derivative action against appellees alleging that through fraud, appellees deprived the association of money and that the board breached its fiduciary duty to the members.

OVERVIEW: Two former managers had been overpaid, and the board compromised with the first manager and settled with the second manager. The members alleged that the board should not have approved the settlement. The court held that the district court did not lose jurisdiction when the summary judgment motions were deemed denied because the denial of a motion for summary judgment was not a final appealable order. The court held that the members' allegation of fraud against the first former manager was not pleaded with particularity and there were no facts to support their claim. Furthermore, the board's decision to enter into a settlement agreement with the second manager was a business judgment, and the members did not establish any facts that the board's actions were in bad faith. The members' claim for restitution was barred under Wyo. Stat. Ann. § 17-19-304 (2005). Also, there was no conflict of interest on the part of the director by claiming reimbursement of expenses to the director's law firm because the director was not conducting business with the association; rather, he incurred the expenses while furthering the association's business in his capacity as director.

OUTCOME: The court affirmed the summary judgments on the derivative action and finding that one of the members' claims was frivolous. The court awarded appellees their costs in defending the action. The court also affirmed the summary judgment on the declaratory judgment action.

CORE TERMS: summary judgment, bylaw, general manager, conflict of interest, nonprofit, election, overtime, judgment rule, reimbursement, deemed denied, derivative, settlement, overpayment, settlement agreement, hearsay, amend, salary, board of directors, voting power, misrepresentation, ranch, law firm, fraud claim, indirect interest, shareholder, number of directors, material facts, ultra vires, declaratory, fiduciary

LEXISNEXIS(R) HEADNOTES

Business & Corporate Law > Corporations > Shareholders > Actions Against Corporations > Derivative Actions > Procedures

HN1 See Wyo. Stat. Ann. § 17-19-630 (2005).

Civil Procedure > Summary Judgment > Appellate Review > Standards of Review
Civil Procedure > Summary Judgment > Standards > General Overview

HN2 When the appellate court reviews a summary judgment, it has before it the same materials as did the district court, and it follows the same standards which applied to the proceedings below. The propriety of granting a motion for summary judgment depends upon the correctness of the dual findings that there is no genuine issue as to any material fact and that the prevailing party is entitled to judgment as a matter of law. A genuine issue of material fact exists when a disputed fact, if proven, would have the effect of establishing or refuting an essential element of an asserted cause of action or defense. The appellate court, of course, examines the record from a vantage point most favorable to that party who opposed the motion, affording to that party the benefit of all favorable inferences that fairly may be drawn from the record.

Civil Procedure > Appeals > Standards of Review > De Novo Review

HN3 Questions of law are reviewed de novo.

Civil Procedure > Summary Judgment > Appellate Review > Standards of Review

HN4 The appellate court may uphold the grant of summary judgment upon any proper legal ground finding support in the record.

Civil Procedure > Judgments > Relief From Judgment > Motions to Alter & Amend
Civil Procedure > Appeals > Reviewability > Notice of Appeal
Civil Procedure > Appeals > Reviewability > Time Limitations

HN5 Under Wyoming's Rules of Appellate Procedure, a notice of appeal must be filed within 30 days of the entry of the appealable order. Wyo. R. App. P. 2.01(a). That time period may be tolled by the filing of a motion for judgment under Wyo. R. Civ. P. 50(b), a motion to amend or make additional findings of fact under Wyo. R. Civ. P. 52(b), a motion to alter or amend the judgment or for a new trial under Wyo. R. Civ. P. 59. Wyo. R. App. P. 2.02(a). The 30-day time period for filing a notice of appeal commences to run upon the entry of any order granting or denying the motions for judgment, to amend or make additional findings of fact, to alter or amend the judgment or upon the denial of a motion for a new trial. Wyo. R. App. P. 2.02(b). If no order is entered, however, the full time for appeal commences to run when the motions are deemed denied. A motion is deemed denied if it has not been determined within 90 days after it was filed. Wyo. R. Civ. P. 6(c)(2).

Evidence > Procedural Considerations > Burdens of Proof > Clear & Convincing Proof
Torts > Business Torts > Fraud & Misrepresentation > Actual Fraud > Elements

HN6 In order to establish fraud, a plaintiff must demonstrate, by clear and convincing evidence, that: (1) the defendant made a false representation intended to induce action by the plaintiff; (2) the plaintiff reasonably believed the representation to be true; and (3) the plaintiff relied on the false representation and suffered damages.

Civil Procedure > Pleading & Practice > Pleadings > Heightened Pleading Requirements > Fraud Claims
Civil Procedure > Summary Judgment > Appellate Review > Standards of Review
Torts > Business Torts > Fraud & Misrepresentation > Actual Fraud > General Overview

HN7 Within the context of a summary judgment, courts have said the following regarding claims of fraud: When determining if a genuine issue of material fact exists regarding a claim of fraud, a trial judge must bear in mind the actual quantum and quality of proof necessary to support liability. In ruling on a motion for summary judgment, the judge must view the evidence presented through the prism of the substantive evidentiary burden. A demonstration of a genuine issue of material fact requires more than repeated assertions that a defendant is liable. Assuming the pleadings alleged fraud with sufficient particularity, and the parties accused of fraud have presented facts in support of a motion for summary judgment that refute the allegations of fraud, the party relying upon the fraud claims then must demonstrate the existence of genuine issues of material fact by clear, unequivocal and convincing evidence.

Civil Procedure > Settlements > Settlement Agreements
Contracts Law > Types of Contracts > Settlement Agreements

HN8 The general rule of compromise and settlement has been described as being that the settlement of a bona fide dispute or a doubtful or unliquidated claim, if made fairly and in good faith, is a sufficient consideration for a compromise based thereon. Compromise has been defined as an agreement between two or more persons who, to avoid a lawsuit, amicably settle their differences on such terms as they can agree on. A settlement agreement is a contract and, therefore, subject to the same legal principles that apply to any contract. The elements are the same as the elements of any contract: offer, acceptance, and consideration, and establishment of the existence of these elements leads courts to conclude that mutual assent has occurred. A compromise and settlement agreement is, also like other contracts, subject to construction as a matter of law.

Civil Procedure > Settlements > Settlement Agreements > Validity
Contracts Law > Types of Contracts > Settlement Agreements

HN9 A contract made in settlement of claims is valid even if the claims settled are of doubtful worth. This means that the court will not look behind a settlement agreement to see who would have prevailed in a dispute out of which the settlement agreement arises. If the settlement agreement itself meets contractual requirements, it will be enforced.

Contracts Law > Types of Contracts > Settlement Agreements

HN10 When a party asserting a claim relinquishes it as part of a compromise and settlement, such a concession is sufficient consideration for the promise or act of the other party.

Business & Corporate Law > Corporations > Directors & Officers > Management Duties & Liabilities > Defenses > Business Judgment Rule

HN11 It is a general rule that courts of equity will not interfere in questions of corporate management or policy. They are reluctant to undertake the management of private corporations, and, in the absence of fraud, usurpation, or gross negligence and mismanagement equivalent to fraud, they generally refuse to interfere, and allow the majority of the stockholders to rule, leaving dissatisfied stockholders to redress their grievances by ordinary corporate. This principle is known as the business judgment rule. The rule governs the question of whether or not and to what extent the business decisions of a corporate entity should be subject to judicial review.

Business & Corporate Law > Corporations > Directors & Officers > Management Duties & Liabilities > Defenses > Business Judgment Rule

HN12 The business judgment rule is a standard of judicial review for director conduct, not a standard of conduct. The rule presumes that business decisions are made by disinterested and independent directors on an informed basis and with a good faith belief that the decision will serve the best interests of the corporation. If directors are sued with respect to a decision they have made (either in an action by the corporation on its own behalf, by shareholders acting derivatively on behalf of the corporation, by shareholders suing individually on their own behalf or as a class, or by a regulatory body that has assumed control of the corporation and is suing on behalf of the corporation), the court will examine the decision only to the extent necessary to determine whether the plaintiff has alleged and proven facts that overcome the business judgment rule presumption that business decisions are made by disinterested and independent directors on an informed basis and with a good faith belief that the decisions will serve the best interests of the corporation. If the presumption has not been overcome, then the business judgment rule prohibits the court from going further and examining the merits of the underlying business decision and prevents a factfinder, in hindsight, from second-guessing the decisions of directors.

Business & Corporate Law > Corporations > Directors & Officers > Management Duties & Liabilities > Defenses > Business Judgment Rule

HN13 Where a board of a corporation acts with due care, good faith, and in the honest belief that they are acting in the best interests of the stockholders, the courts give great deference to the substance of the directors' decision and will not invalidate the decision, will not examine its reasonableness, and will not substitute its views for those of the board if the latter's decision can be attributed to any rational business purpose. In other words, courts give deference to directors' decisions reached by a proper process and do not apply an objective reasonableness test in such a case to examine the wisdom of the decision itself. A court does not substitute its own notion of what is or is not sound business judgment in place of the board's judgment. Additionally, approval of a transaction by a majority of independent, disinterested directors almost always bolsters the presumption that the business judgment rule attaches to transactions approved by a board of directors that are later attacked on grounds of lack of due care.

Business & Corporate Law > Corporations > Directors & Officers > Management Duties & Liabilities > Defenses > Business Judgment Rule

HN14 In order to state a claim, a shareholder plaintiff has the heavy burden of alleging and proving facts - not merely legal conclusions - that overcome the business judgment rule presumption. The business judgment rule presumption thus is a rule of evidence that places the initial burden of proof on the plaintiff challenging the board's decision. If a shareholder plaintiff fails to meet this evidentiary burden, the business judgment rule attaches to protect corporate officers and directors and the decisions they make. To rebut the presumption, a shareholder plaintiff assumes the burden of providing evidence that the board of directors, in reaching its challenged decision, breached any one of its triad of fiduciary duties: good faith, loyalty or due care. If the plaintiff fails to rebut the presumption that the directors acted in good faith, in the corporation's best interest and on an informed basis, the business judgment standard protects both the directors and the decisions they make.

Business & Corporate Law > Corporations > Directors & Officers > Management Duties & Liabilities > Defenses > Business Judgment Rule

HN15 As the name implies, a necessary predicate for the application of the business judgment rule is that the directors' decision be that of a business judgment and not a decision which construes and applies a statute and a corporate bylaw.

Business & Corporate Law > Corporations > Directors & Officers > Management Duties & Liabilities > Defenses > Business Judgment Rule

Business & Corporate Law > Corporations > Directors & Officers > Scope of Authority > Discretion

HN16 Whether a corporation should pursue a claim through litigation is a matter for the business judgment of its board.

Business & Corporate Law > Corporations > Directors & Officers > Management Duties & Liabilities > Defenses > Business Judgment Rule

Business & Corporate Law > Corporations > Directors & Officers > Scope of Authority > Discretion

HN17 Whether or not a particular action by a board of a corporation is reasonable is not for courts to decide - that determination is vested in the discretion of the board. A court does not apply an objective reasonableness test in such a case to examine the wisdom of the decision itself.

Business & Corporate Law > Corporations > Directors & Officers > Management Duties & Liabilities > Defenses > Business Judgment Rule

HN18 The application of the business judgment rule is "consistent" with the standards of conduct established for directors and that in the nonprofit context the business judgment rule should apply to discretionary matters voted upon by the board of directors.

Business & Corporate Law > Corporations > Formation > Corporate Existence, Powers & Purpose > Powers > Ultra Vires Doctrine

HN19 See Wyo. Stat. Ann. § 17-19-304 (2005).

Business & Corporate Law > Corporations > Formation > Corporate Existence, Powers & Purpose > Powers > Ultra Vires Doctrine

HN20 When an ultra vires contract has been fully performed on both sides, neither party can maintain an action to set aside the transaction or to recover what has been parted with. In other words, neither a court of law nor a court of equity will interfere to deprive either the corporation or the other party of money or other property acquired under the contract. The reason for the rule, which is well settled, is that the attempted contract, being void, is disregarded, and in its place a quasi-contractual obligation to do justice is enforced. Ultra vires will not justify the reopening of a completely executed transaction. Stated differently, if an ultra vires contract is fully executed on both sides, it cannot be attacked or set aside either by the corporation or by the other party to the contract, and the fact that the contract is ultra vires cannot be collaterally urged by a third person not a party to the contract.

Business & Corporate Law > Corporations > Directors & Officers > Management Duties & Liabilities > Causes of Action > General Overview

Business & Corporate Law > Corporations > Directors & Officers > Management Duties & Liabilities > Fiduciary Responsibilities > Duty of Loyalty

HN21 See Wyo. Stat. Ann. § 17-19-831 (2005).

Governments > Legislation > Interpretation

HN22 Courts endeavor to interpret statutes in accordance with the Legislature's intent. They begin by making an inquiry respecting the ordinary and obvious meaning of the words employed according to their arrangement and connection. Courts construe the statute as a whole, giving effect to every word, clause, and sentence, and we construe together all parts of the statute in pari materia.

Business & Corporate Law > Corporations > Directors & Officers > Management Duties & Liabilities > Fiduciary Responsibilities > Duty of Loyalty

HN23 "Transaction" for purposes of a director's conflict of interest generally connotes

negotiations or a consensual bilateral arrangement between the corporation and another party or parties that concern their respective and differing economic rights or interests - not simply a unilateral action by the corporation but rather a "deal."

Business & Corporate Law > Corporations > Governing Documents & Procedures > Articles of Incorporation & Bylaws > Interpretation of Bylaws

HN24 Bylaws are contractual in nature. Bylaws are interpreted according to the principles applicable to the interpretation of contracts.

Civil Procedure > Appeals > Standards of Review > De Novo Review
Contracts Law > Contract Interpretation > General Overview

HN25 In contract litigation, when the terms of the agreement are unambiguous, the interpretation is a question of law. Whether a contract is ambiguous is a question of law for the reviewing court. The appellate court reviews questions of law de novo without affording deference to the decision of the district court.

Contracts Law > Contract Interpretation > General Overview

HN26 According to established standards for interpretation of contracts, the words used in the contract are afforded the plain meaning that a reasonable person would give them. When the provisions in the contract are clear and unambiguous, the court looks only to the "four corners" of the document in arriving at the intent of the parties. In the absence of any ambiguity, the contract will be enforced according to its terms because no construction is appropriate.

Business & Corporate Law > Corporations > Directors & Officers > Scope of Authority > Meetings > Procedures
Business & Corporate Law > Corporations > Governing Documents & Procedures > Articles of Incorporation & Bylaws

HN27 See Wyo. Stat. § 17-19-707.

Business & Corporate Law > Corporations > Directors & Officers > Scope of Authority > Meetings > General Overview

HN28 "Voting power" has been defined as the current power to vote in the election of directors. Application of this definition turns on whether the relevant shares carry the power to vote in the election of directors as of the time for voting on the relevant transaction.

Civil Procedure > Summary Judgment > Burdens of Production & Proof > General Overview
Evidence > Procedural Considerations > Rulings on Evidence

HN29 The determination of the admissibility of evidence is vested in the district court's discretion. After a movant has adequately supported a motion for summary judgment, the opposing party must come forward with competent evidence admissible at trial showing that there are genuine issues of material fact.

Evidence > Hearsay > Rule Components > Statements
Evidence > Hearsay > Rule Components > Truth of Matter Asserted

HN30 Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Wyo. R. Evid. 801(c) (2005). A "statement" is an oral or written assertion or nonverbal conduct of a person, if it is intended by him as an assertion. Rule 801(a).

Evidence > Hearsay > Rule Components > Truth of Matter Asserted

HN31 It is basic evidence law that any writing, other than one made by a witness during the witness's testimony in court, is hearsay if offered to prove the truth of what is written.

Business & Corporate Law > Corporations > Governing Documents & Procedures > Records & Inspection Rights
HN32 See Wyo. Stat. Ann. § 17-19-1601(a) (2005).

Business & Corporate Law > Corporations > Directors & Officers > Scope of Authority > Meetings > Procedures
Evidence > Documentary Evidence > Parol Evidence
HN33 When a corporation's minutes do not fully reflect an action taken by a corporation, parol evidence may be admissible to establish what transpired: Where the minutes contain a record of action taken, it will be presumed, prima facie, that the record covers the entire action. This is not conclusive, however, and parol evidence may be introduced to show what was in fact done. If the minutes appear on their face or are shown to be incomplete or incorrect or otherwise fail to show what actually transpired, parol evidence is admissible to supply the omission and to aid, correct and supplement them, or to aid in ascertaining the true meaning of indefinite or ambiguous records. Thus, where the corporate minutes are incomplete but are sufficient to show that the shareholders and directors present at a meeting did enter into an agreement, the courts may resort to evidence of extrinsic facts and circumstances to determine the full intent of the agreement if any ambiguity arises.

Business & Corporate Law > Corporations > Shareholders > Actions Against Corporations > Costs & Attorney Fees
HN34 See Wyo. Stat. Ann. § 17-19-630(d) (2005).

COUNSEL: Representing Appellants: Robert J. Logan of Thayne, Wyoming.

Representing Appellees: John R. Hursh of Central Wyoming Law Associates, P. C., Riverton, Wyoming, for Appellees Zimmer and Crittenden; William K. Rounsborg of White and Steele, P. C., Denver, Colorado, for Appellees Star Valley Ranch Association and Star Valley Ranch Association Board of Directors; and Donald F. Carey of Quane Smith, LLP, Idaho Falls, Idaho, for Appellees Cox and Cox, Ohman & Brandstetter.

JUDGES: Before HILL, C. J., and GOLDEN, KITE, VOIGT, and BURKE, JJ.

OPINION BY: HILL

OPINION

[343] HILL, Chief Justice.**

[*P1] The Star Valley Ranch Association (the Association) is a nonprofit, mutual benefit corporation that manages a recreational residential subdivision in Lincoln County, Wyoming. The Association is incorporated under the Wyoming Nonprofit Corporation Act, Wyo. Stat. Ann. §§ 17-19-101, *et seq*. (LexisNexis 2005). A Board of Directors governs the Association with its members elected **[***2]** by the lot owners within the subdivision. The day-to-day operations of the Association are managed by a general manager, who is hired by and serves at the pleasure of the Board. Appellant Ronald D. Mueller (Mueller) is a lot owner and a member of the Association's Board of Directors. Appellant William L. Daley is a lot owner. Appellants **[**344]** filed a derivative action [1] against the Association, its Board of Directors (the Board), and former directors and general managers of the Association. Appellants alleged that through fraud, misrepresentation, and conflict of interest transactions, the former directors and general managers deprived the Association of money to which it was entitled and that the Board breached its fiduciary duty to the Association members by failing to collect those funds. Appellants also filed a declaratory judgment action seeking to have an election to amend the

Association bylaw setting the number of directors on the Board declared void. The district court granted summary judgment motions filed by the various defendants, and Appellants appeal. We affirm the summary judgments on the derivative action and finding that one of the Appellants' claims was frivolous, we award **[***3]** the defendants their costs, including attorneys' fees incurred in defending against that claim. We also affirm the district court's summary judgment on the declaratory judgment action.

FOOTNOTES

1 Wyo. Stat. Ann. § 17-19-630 (LexisNexis 2005) provides:

> HN1(a) A proceeding may be brought in the right of a domestic or foreign corporation to procure a judgment in its favor by:
>
> (i) Any member or members having five percent (5) or more of the voting power or by fifty (50) members, whichever is less; or
>
> (ii) Any director.
>
> (b) In any proceeding under this section, each complainant shall be a member or director at the time of bringing the proceeding.
>
> (c) A complaint in a proceeding brought in the right of a corporation shall be verified and allege with particularity the demand made, if any, to obtain action by the directors and either why the complainants could not obtain the action or why they did not make the demand. If a demand for action was made and the corporation's investigation of the demand is in progress when the proceeding is filed, the court may stay the suit until the investigation is completed.
>
> (d) On termination of the proceeding the court may require the complainants to pay any defendant's reasonable expenses, including counsel fees, incurred in defending the suit if it finds that the proceeding was commenced frivolously or in bad faith.
>
> (e) If the proceeding on behalf of the corporation results in the corporation taking some action requested by the complainants or otherwise was successful, in whole or in part, or if anything was received by the complainants as the result of a judgment, compromise or settlement of an action or claim, the court may award the complainants reasonable expenses, including counsel fees.
>
> (f) The complainants shall notify the secretary of state within ten (10) days after commencing any proceeding under this section if the proceeding involves a public benefit corporation or assets held in charitable trust by a mutual benefit corporation. The secretary of state shall then notify the attorney general.

[*4] ISSUES**

[*P2] In Case No. 05-09, the Appellants set forth the following issues:

> 1. Did the District Court err in granting summary judgment to Steve Crittenden when there were material facts in dispute as to whether Crittenden and the Star

Valley Ranch Association ever had an oral agreement settling the overpayment of Crittenden's salary and other alleged benefits?

2. Did the District Court err by granting summary judgment to Vince Zimmer when there were material facts in dispute and Zimmer failed to refute the allegation of fraud?

3. Was the settlement agreement between Vince Zimmer and the Star Valley Ranch Association void as a matter of public policy?

4. Was the hiring of Steve Crittenden and Vince Zimmer as general managers without a personal services contract an ultra vires act?

Defendants Vince Zimmer (Zimmer) and Steve Crittenden (Crittenden) responded with a statement of two issues:

1. With reference to Appellee Crittenden, was the District Court correct in granting Summary Judgment on the basis of a salary overpayment settlement ratified by the Board of Directors of Star Valley Ranch Association within which any and **[***5]** all prior antecedent salary and employment issues merged, which settlement has been fully performed absent the showing by pleading or otherwise of any fraud as required by Wyoming law?

[345]** 2. With reference to Appellee Zimmer, was the District Court correct in granting Summary Judgment giving full effect to a written settlement agreement ratified by the Board of Directors of Star Valley Ranch Association within which all previous claims and disputes merged, which settlement agreement has been fully performed, absent a showing of a viable fraud claim?

In Case No. 05-10, the Appellants set out these issues:

A. Re Appellees Roger Cox and Cox, Ohman & Brandstetter

1. As a matter of law, was the transaction between the Association, Cox and Cox, Ohman & Brandstetter a conflict of interest transaction and, if so, did Cox obtain specific board approval required by state law and the Association Bylaw regulating conflict of interest transactions?

2. Did the District Court err in precluding Appellants from inquiring into the early billings of Cox, Ohman & Brandstetter and then use information from those billings to conclude that all charges were in furtherance **[***6]** of corporation business and that there was only an 8% average markup on the bills?

3. Did the District Court err in precluding the claim of negligent misrepresentation and fraud against Roger Cox?

B. Re Appellees Star Valley Ranch Association and its Board of Directors

1. Did the District Court err in not applying the more specific bylaw in determining if the increase in the size of the board of directors received the necessary affirmative vote?

2. Did the District Court err in concluding that the Association was not required to maintain records of actions taken by the members and the

board?

3. Did the District Court err in determining that the Board exercised good business judgment in its decision to not seek the return of overpayment of salaries and benefits from prior general managers and the return of monies earned from a conflict of interest transaction without specific board approval[?]

Defendant Roger Cox (Cox) and the law firm of Cox, Ohman & Brandstetter (the law firm) reply with these issues:

1. Does this Court lack subject matter jurisdiction?

2. Did the trial court properly grant Roger Cox and Cox, Ohman **[***7]** & Brandstetter's motion for summary judgment on the equitable defenses of estoppel by acquiescence, laches and promissory estoppel as against Appellants' shareholder derivative lawsuit?

The Association and the Board offer the following statements of the issues:

1. Was the District Court correct in concluding that Appellees' properly placed Motion for Summary Judgment with respect to the change in the number of members of the Board of Directors from five to seven ought to be granted when Appellants failed to come forward with any competent and admissible evidence to call into question the vote of the membership to effect such change?

2. Was the District Court correct in concluding that Appellees' properly placed Motion for Summary Judgment with respect to Appellants' derivative claims concerning expense reimbursements to Cox ought to be granted when Appellants failed to come forward with any competent and admissible evidence to call into question the validity of those reimbursements, or to identify any legal authority to allow Appellants to challenge the actions of the Board?

3. Was the District Court correct in concluding that Appellees' properly placed **[***8]** Motion for Summary Judgment with respect to Appellants' derivative claims concerning alleged salary overpayments to Crittenden and Zimmer ought to be granted when Appellants failed to come forward with any competent **[**346]** and admissible evidence to call into question the validity of the decision not to pursue recovery of those alleged overpayments, or to identify any legal authority to allow Appellants to challenge the actions of the Board?

STANDARD OF REVIEW

[*P3] Our oft reiterated and well established standard for reviewing appeals from a summary judgment order:

HN2 When we review a summary judgment, we have before us the same materials as did the district court, and we follow the same standards which applied to the proceedings below. The propriety of granting a motion for summary judgment depends upon the correctness of the dual findings that there is no genuine issue as to any material fact and that the prevailing party is entitled to judgment as a matter of law. *Reed v. Miles Land and Livestock Company*, 2001 WY 16, P9, 18 P. 3d 1161, P9 (Wyo. 2001). A genuine issue of material fact exists when a disputed fact, if proven, would have the effect **[***9]** of establishing

> or refuting an essential element of an asserted cause of action or defense. We, of course, examine the record from a vantage point most favorable to that party who opposed the motion, affording to that party the benefit of all favorable inferences that fairly may be drawn from the record. *Scherer Construction, LLC v. Hedquist Construction, Inc.*, 2001 WY 23, P15, 18 P. 3d 645, P15 (Wyo. 2001); *Central Wyoming Medical Laboratory, LLC v. Medical Testing Lab, Inc.*, 2002 WY 47, P15, 43 P. 3d 121, P15 (Wyo. 2002).

Burnham v. Coffinberry, 2003 WY 109, P9, 76 P. 3d 296, P9 (Wyo. 2003). HN3 Questions of law are reviewed *de novo*.

Martin v. Committee for Honesty and Justice at Star Valley Ranch, 2004 WY 128, P8, 101 P. 3d 123, 127 (Wyo. 2004). HN4 We may uphold the grant of summary judgment upon any proper legal ground finding support in the record. *Coates v. Anderson*, 2004 WY 11, P5, 84 P. 3d 953, 956 (Wyo. 2004).

DISCUSSION

Jurisdiction

[*P4] Before getting to the substance of the parties' arguments regarding the propriety of the district court's summary **[***10]** judgment orders, we must first address two issues questioning our jurisdiction to resolve these appeals raised by Appellee Cox.

[*P5] Cox contends that this Court lacks subject matter jurisdiction because the motions for summary judgment filed by the various defendants were not ruled upon by the district court within 90 days, and by operation of W.R.C.P. 6(c)(2), they were deemed denied. [2] Cox relies on our decision in *Paxton Resources, LLC v. Brannaman*, 2004 WY 93, 95 P. 3d 796 (Wyo. 2004). That case concerned the consequences of a trial court's failure to timely issue an order on post-trial motions. HN5 Under Wyoming's Rules of Appellate Procedure, a notice of appeal must be filed within 30 days of the entry of the appealable order. W.R.A.P. 2.01(a). That time period may be tolled by the filing of a motion for judgment under W.R.C.P. 50(b), a motion to amend or make additional findings of fact under W.R.C.P. 52(b), a motion to alter or amend the judgment or for a new trial under W.R.C.P. 59. W.R.A.P. 2.02(a). The 30-day time period for filing a notice of appeal commences to run upon the entry of any order granting or denying the motions for judgment, to amend **[***11]** or make additional findings of fact, to alter or amend the judgment or upon the denial of a motion for a new trial. W.R.A.P. 2.02(b). If no order is entered, however, the full time for appeal commences to run when the motions are deemed denied. *Id.* A motion is deemed denied if it has not been determined within 90 days after it was filed. W.R.C.P. 6(c)(2). In *Paxton*, the jury rendered a verdict, and Paxton filed motions under W.R.C.P. 50 and 59 for judgment as a matter of law, for new trial, and for remittitur. *Paxton*, 95 P. 3d at **[**347]** 797-98. The 90-day "deemed denied" date passed, as well as the 30-day period for filing a notice of appeal, before the district court issued an order denying the motions. *Id.* at 799. After noting that Rule 6(c)(2) did not allow for any continuances and that the whole point of a "deemed denied" provision was that the judgment would automatically become final and appealable upon passage of the specified time, we held that the district court no longer had jurisdiction to consider the motions once that occurred. *Id.* at 800-802. We concluded that an appeal not filed within 30 days after post-trial motions were deemed denied is untimely **[***12]** and would be dismissed. *Id.* at 802.

FOOTNOTES

[2] In his brief, Cox's argument concerns only the summary judgment filed by him. Since the issue ostensibly concerns the subject matter jurisdiction of this Court, and the motions for summary judgment filed by the other defendants are in the same procedural posture as that

filed by Cox, our discussion encompasses all of the motions.

[*P6] The procedural chronology in this case is as follows:

> . July 1, 2003 - Zimmer and Crittenden file motion for summary judgment.
>
> . July 3, 2003 - Cox and Cox, Ohman & Brandstetter file motion for summary judgment.
>
> . October 6, 2003 - The Association and Board file motion for summary judgment.
>
> . October 21, 2003 - Appellants file cross-motion for partial summary judgment.
>
> . November 17, 2003 - Hearing held on summary judgment motions.
>
> . July 14, 2004 - District court issues Decision Letter granting the summary judgment motions filed by all of the defendants and effectively denying Appellants' **[***13]** motion.
>
> . August 13, 2004 - Order granting Zimmer and Crittenden motion for summary judgment entered.
>
> . September 7, 2004 - Order granting motion for summary judgment filed by Cox and Cox, Ohman & Brandstetter entered.
>
> . September 9, 2004 - Appellants file notice of appeal of order granting Zimmer and Crittenden summary judgment.
>
> . September 27, 2004 - Order granting motion for summary judgment filed by the Association and the Board entered.
>
> . October 1, 2004 - Notice of appeal from the orders granting summary judgment for Cox and Cox, Ohman & Brandstetter and the Association and Board filed by Appellants.

Obviously, 90 days passed from the filing of all of the motions for summary judgment filed by the parties before the district court ruled on them. There are, however, several critical differences between the situation here and those present in *Paxton* that lead us to reject Cox's argument.

[*P7] The key to the holding in *Paxton* was that the 30-day period for filing an appeal had commenced upon passage of the "deemed denied" date and had already lapsed when the district court finally issued its decision on the defendants' post-trial **[***14]** motions. The district court did not have jurisdiction to rule on those motions, however, because the judgment became final upon the lapse of the time in which an appeal could be filed. As we recently stated in a case where the defendant had filed a renewed motion for extension of time to file a response to discovery requests for admission after a previous motion for the same was deemed denied under Rule 6(c)(2):

> The difference between the *Paxton* case and the case at bar is obvious. In *Paxton*, the "deemed denied" rule applied to a final judgment; conversely, in this case, the "deemed denied" rule simply applied to an interlocutory discovery motion. The case law is replete with instances where renewed discovery motions are considered.

(Citations omitted.)

Hodges v. Lewis & Lewis, Inc., 2005 WY 134, P21, 121 P. 3d 138, 145 (Wyo. 2005). Here, the motions were for summary judgment - they were not post-trial motions. When the summary judgment motions were deemed denied by the lapse of 90 days from their filing, the district court did not lose jurisdiction because the denial of a motion for summary judgment is not a final appealable order. [3] *McLean v. Hyland Enterprises, Inc.*, 2001 WY 111, P17, **[**348]** 34 P. 3d 1262, 1267-68 (Wyo. 2001). **[***15]** There was no final judgment at the time the motions were deemed denied, so the rule in *Paxton* is simply not applicable to the situation before us in this case, and we have jurisdiction over the matter. [4]

FOOTNOTES

3 There are two exceptions to this rule: when the district court grants one party's motion for summary judgment while denying the opposing party's summary judgment motion and the decision completely resolves the case, and when there is a denial of a summary judgment motion on the issue of qualified immunity. *McLean*, 34 P. 3d at 1267-68; see also *Lieberman v. Wyoming. com LLC*, 11 P. 3d 353, 356 (Wyo. 2000) (denial of cross-motion for summary judgment); and *Lawson v. Garcia*, 912 P.2d 1136, 1138 (Wyo. 1996) (qualified immunity). Neither exception is applicable here.

4 Cox only argues the applicability of *Paxton* and does not raise any argument regarding the district court's authority to *sua sponte* reconsider a previously denied motion for summary judgment. Accordingly, we will not make that determination today but note that what little authority that appears to exist on this point indicates that trial courts do possess such authority as part of their inherent powers. *See Schachter v. Citigroup, Inc.*, 126 Ca. App. 4th 726, 23 Cal. Rptr. 3d 920 (2005) (courts have such authority within limits established by California statute); and *Chubb Group of Insurance Companies v. Guyuron*, 1995 Ohio App. LEXIS 5512.

[*16]** **[*P8]** The second jurisdictional issue raised by Cox is a contention that the district court did not issue an appealable order because its ruling on Cox's motion for summary judgment did not resolve all issues between him and Appellants. Specifically, Cox argues that he did not move for summary judgment on a fraud claim advanced by Appellants alleging that Cox had made a false statement to the Board regarding a claim by Zimmer for unpaid overtime. Since the judgment on his motion could only be viewed as a partial grant of summary judgment and there was no entry of a final judgment upon an express determination that there was no just reason for delay pursuant to W.R.C.P. 54(b), Cox contends that this appeal must be dismissed.

[*P9] In their motion for summary judgment, Cox and Cox, Ohman & Brandstetter set forth the following prayer for relief:

> WHEREFORE, Defendants Cox and Cox, Ohman & Brandstetter respectfully request that this Court grant their motion for summary judgment and **dismiss Plaintiffs' Revised First Amendment to First Amended Complaint against them with prejudice** and for such further and additional relief as the Court deems appropriate under **[***17]** the circumstances. [Emphasis added.]

In their Revised First Amendment to First Amended Complaint, the Appellants alleged that Zimmer had knowingly made a fraudulent claim for unpaid overtime. With respect to Cox, the Appellants alleged that he had made false statements regarding the validity of Zimmer's

overtime claim to the Board. In order for the district court to grant Cox the relief requested in his motion for summary judgment - dismissal of Appellants' Revised First Amendment to First Amended Complaint with prejudice - it necessarily would have had to determine all claims raised against Cox therein. Indeed, in its decision letter, the district court stated that:

> Summary judgment in favor of Cox is granted for the reasons set forth in Cox's motion and memoranda. The finding that Cox's billings were appropriate pursuant to an agreement precludes the claims of negligent misrepresentation and **fraud**. [Emphasis added.]

As the fraud claim set forth in the Revised First Amendment to First Amended Complaint was the only fraud claim against Cox, it is clear that the district court considered the matter raised by Cox's summary judgment motion and proceeded **[***18]** to determine it. All indications in the record are that the motion for summary judgment was for dismissal of all claims against Cox in their entirety. There is nothing that even remotely suggests that Cox intended or the district court ever considered the motion as a partial one excluding the fraud claim. Cox's argument is without merit; the district court order on Cox's motion for summary judgment was a final, appealable order, and this Court has jurisdiction over the appeal.

Derivative claims alleging fraud against Zimmer, seeking restitution from Crittenden for overpaid salary and breach of fiduciary duty by the Board for failure to seek reimbursement

[*P10] Zimmer was elected to the Board in 1996. He resigned that position to accept an appointment from the Board as general manager of the Association. Zimmer resigned from that position in January of 2000. **[**349]** Contemporaneously with his resignation, Zimmer submitted a request for unpaid overtime incurred attending Board ordered meetings and other obligations. The Board denied Zimmer's request.

[*P11] It was later discovered that a clerical error had resulted in Zimmer's salary being overpaid by $ 2,025.87. **[***19]** After giving Zimmer credit for paid time off, the Board sent Zimmer a letter demanding repayment of $ 1,380.47. Zimmer responded in writing reasserting his demand for unpaid overtime, which he estimated to be $ 2,482.96. The Board's staff recommended that the matter be settled as the legal costs of pursuing collection were not worth the amount in dispute. A mutual release was then executed wherein the Association released Zimmer from all claims of overpayment while Zimmer released his claims for unpaid overtime and any other compensation earned during his employment as general manager.

[*P12] After Zimmer resigned as general manager, the Board began a search for his replacement. The Board wanted Crittenden to temporarily assume the general manager duties during the interim. At the time, Crittenden was a director on the Board, and the Association's bylaws prohibited a director from serving as general manager. As a compromise, the Board created the position of "Business Agent" to allow Crittenden to continue to serve as a director and fulfill the duties of the general manager until a permanent replacement for Zimmer was found. In March of 2000, Crittenden accepted appointment **[***20]** as general manager on a permanent basis and resigned his directorship.

[*P13] As with Zimmer, it was discovered that Crittenden had been overpaid. Crittenden believed that the amount of overpayment was $ 562.85. He instructed the payroll clerk to withhold $ 281.43 for two consecutive pay periods. On June 23, 2001, Crittenden was terminated as general manager. In October of 2001, a finance committee determined that Crittenden had been overpaid $ 1,520.13 more than the amount Crittenden had withheld from his paycheck. In September of 2002, the general manager of the Association sent a demand letter to Crittenden requesting repayment of that amount. Crittenden responded that he had made restitution by having the $ 562.85 withheld from his paycheck and that a prior Board meeting in executive session had approved that as a full settlement of the issue. The Board's staff recommended that the matter be settled as the legal costs of pursuing collection were not

worth the amount in dispute. On November 16, 2002, the Board, citing the previous agreement with Crittenden, voted four to one to settle the claim.

[*P14] In their Complaint, Appellants alleged that Zimmer's claim for **[***21]** unpaid overtime was false and fraudulent. They contended that Zimmer "knowingly and with intent to deceive" made an "unjustified and false" claim for unpaid overtime in order to mislead the Board and so avoid having to make restitution on the overpaid salary. Appellants alleged that the Board knew or should have known that Zimmer's claim for overtime was meritless and that its failure to seek full restitution for the overpayment breached its fiduciary duty to the Association members and constituted a waste of Association assets. The district court granted Zimmer's motion for summary judgment. No reason was specified for the ruling; the court only stated that the motion was granted for reasons set forth by Zimmer in his motion and memoranda.

[*P15] With regard to Crittenden, Appellants alleged that the Board should not have approved the settlement because there was no evidence that a previous Board had forgiven the overpayment to Crittenden and that by doing so, the Board breached its fiduciary duty to the Association's members. Appellants sought restitution from Crittenden for the full amount of overpayment. The district court granted summary judgment without analysis.

[*P16] **[***22]** We begin with the fraud claim against Zimmer. HN6 In order to establish fraud, a plaintiff must demonstrate, by clear and convincing evidence, that: (1) the defendant made a false representation intended to induce action by the plaintiff; (2) the plaintiff reasonably believed the representation to be true; and (3) the plaintiff relied on the false representation and suffered damages. *Bitker v. First National Bank in Evanston*, **[**350]** 2004 WY 114, P12, 98 P. 3d 853, 856 (Wyo. 2004). HN7 Within the context of a summary judgment, we have said the following regarding claims of fraud:

> When determining if a genuine issue of material fact exists regarding a claim of fraud, a trial judge must bear in mind the actual quantum and quality of proof necessary to support liability. [*Lee v. LPP Mortgage, Ltd.*, 2003 WY 92, P12, 74 P. 3d 152, 158 (Wyo. 2003).] In ruling on a motion for summary judgment, "the judge must view the evidence presented through the prism of the substantive evidentiary burden." *Id.* A demonstration of a genuine issue of material fact requires more than repeated assertions that a defendant is liable. *Radosevich v. Board of County Commissioners of the County of Sweetwater*, 776 P.2d 747, 750 (Wyo. 1989). **[***23]**
>
> ... Assuming the pleadings alleged fraud with sufficient particularity, and the parties accused of fraud have presented facts in support of a motion for summary judgment that refute the allegations of fraud, the party relying upon the fraud claims then must demonstrate the existence of genuine issues of material fact by clear, unequivocal and convincing evidence. [*Richardson v. Hardin*, 5 P. 3d 793, 797 (Wyo. 2000).]

Bitker, PP11-12, 98 P. 3d at 855-56.

[*P17] After reviewing the record, we conclude that the district court was correct to grant summary judgment. Appellants' allegation of fraud was not pleaded with particularity. Indeed, allegations of fraud are all that Appellants have provided; there are no facts to support their claim. Appellants' allegation of fraud is entirely predicated on their belief that Zimmer's claim for overtime was without merit. However, there is no evidence in the record that Zimmer knew his claim was false or without merit. We are presented only with Appellants' speculations on Zimmer's motives. This is not sufficient to meet Appellants' burden to demonstrate that genuine issues of material fact existed **[***24]** by "clear, unequivocal, and convincing evidence" in response to Zimmer's motion for summary judgment. See *Bitker*, P13, 98 P. 3d at 856.

[*P18] Furthermore, whether or not Zimmer's claim for overtime had merit or not is irrelevant

to whether the mutual release he signed with the Board was valid.

> This Court has on several occasions addressed the theory of "compromise and settlement." In *Parsley v. Wyoming Automotive Co.*, 395 P.2d 291, 295 (Wyo. 1964), we described HN8 the general rule of compromise and settlement as being "that the settlement of a bona fide dispute or a doubtful or unliquidated claim, if made fairly and in good faith, is a sufficient consideration for a compromise based thereon." We have defined a compromise as "' an agreement between two or more persons who, to avoid a lawsuit, amicably settle their differences on such terms as they can agree on.'" *Peters Grazing Ass'n v. Legerski*, 544 P.2d 449, 456 n. 3 (Wyo. 1975) (quoting 15A C.J.S. *Compromise and Settlement* § 1 at 170). A settlement agreement is a contract and, therefore, subject to the same legal principles that apply to any contract. *In re Estate of Maycock*, 2001 WY 103, P10, 33 P. 3d 1114, 1117 (Wyo. 2001); **[***25]** *Matter of Estate of McCormick*, 926 P.2d 360, 362 (Wyo. 1996). The elements are the same as the elements of any contract: offer, acceptance, and consideration, and establishment of the existence of these elements leads courts to conclude that mutual assent has occurred. *Matter of Estate of McCormick*, 926 P.2d at 362. A compromise and settlement agreement is, also like other contracts, subject to construction as a matter of law. *Ludvik v. James S. Jackson Co., Inc.*, 635 P.2d 1135, 1143 (Wyo. 1981).

> HN9 ***A contract made in settlement of claims is valid even if the claims settled are of doubtful worth. ... This means that this court will not look behind a settlement agreement to see who would have prevailed in a dispute out of which the settlement agreement arises. If the settlement agreement itself meets contractual requirements, it will be enforced***.

Kinnison v. Kinnison, 627 P.2d 594, 596 (Wyo. 1981).

[351]** *Dobson v. Portrait Homes, Inc.*, 2005 WY 95, P9, 117 P. 3d 1200, 1204 (Wyo. 2005) (emphasis added). We are not concerned with the worth of Zimmer's claim for overtime. **[***26]** The question we are concerned with here is whether or not the settlement agreement satisfies the requirements of a contract. The answer is unequivocally yes. Both parties to the agreement agreed to relinquish a claim that they had against the other in exchange for the other party to doing the same with their claim. HN10 When a party asserting a "claim relinquishes it as part of a compromise and settlement, such a concession is sufficient consideration for the promise or act of the other party." *Dobson*, P10, 117 P. 3d at 1205. The summary judgment on the fraud claim against Zimmer is affirmed.

[*P19] Returning to Crittenden, Appellants argue that summary judgment was improper because there are facts in dispute as to whether or not a prior agreement existed between

Crittenden and a previous board. Appellants contend that no reasonable board would have approved a settlement under these circumstances.

[*P20] We held many years ago that in a case where a minority stockholder sought to have the sale of certain corporate assets declared void that "in the absence of fraud, the fact that a difference of opinion may have existed between the majority and minority shareholders **[***27]** would not justify interference by a court of equity." *Smith v. Stone*, 21 Wyo. 62, 91, 128 P. 612, 619 (Wyo. 1912), (citing *North American Land & Timber Company v. Watkins*, 109 Fed. 101, 48 CCA 254 (C.C.A. 5 1901)). (HN11"It is a general rule that courts of equity will not interfere in questions of corporate management or policy. They are reluctant to undertake the management of private corporations, and, in the absence of fraud, usurpation, or gross negligence and mismanagement equivalent to fraud, they generally refuse to interfere, and allow the majority of the stockholders to rule, leaving dissatisfied stockholders to redress their grievances by ordinary corporate methods.") This principle embodied in *Smith* is known as the business judgment rule. The rule governs the question of whether or not and to what extent the business decisions of a corporate entity should be subject to judicial review.

HN12The business judgment rule is a standard of judicial review for director conduct, not a standard of conduct. The rule presumes that business decisions are made by disinterested and independent directors on an informed basis and with a good faith belief **[***28]** that the decision will serve the best interests of the corporation. If directors are sued with respect to a decision they have made (either in an action by the corporation on its own behalf, by shareholders acting derivatively on behalf of the corporation, by shareholders suing individually on their own behalf or as a class, or by a regulatory body that has assumed control of the corporation and is suing on behalf of the corporation), the court will examine the decision only to the extent necessary to determine whether the plaintiff has alleged and proven facts that overcome the business judgment rule presumption that business decisions are made by disinterested and independent directors on an informed basis and with a good faith belief that the decisions will serve the best interests of the corporation. If the presumption has not been overcome, "then the business judgment rule prohibits the court from going further and examining the merits of the underlying business decision" and "prevents a factfinder, in hindsight, from second-guessing the decisions of directors." ...

....

Thus, HN13where "the board acts with due care, good faith, and in the honest belief that they are acting in **[***29]** the best interests of the stockholders ..., the Court gives great deference to the substance of the directors' decision and will not invalidate the decision, will not examine its reasonableness, and 'will not substitute [its] views for those of the board if the latter's decision can be 'attributed to any rational business purpose.'" In other words, "courts give deference to directors' decisions reached by a proper process, and do not apply an objective reasonableness test in such a case to examine the wisdom of the decision itself." A court does not "substitute its own notion **[**352]** of what is or is not sound business judgment" in place of the board's judgment. Additionally, "approval of a transaction by a majority of independent, disinterested directors almost always bolsters [the] presumption that the business judgment rule attaches to transactions approved by a board of directors that are later attacked on grounds of lack of due care."

....

HN14 In order to state a claim, a shareholder plaintiff has the "heavy burden" of alleging and proving facts - not merely legal conclusions - that overcome the business judgment rule presumption. The business judgment rule presumption thus "is a **[***30]** rule of evidence that places the initial burden of proof on the plaintiff" challenging the board's decision. "If a shareholder plaintiff fails to meet this evidentiary burden, the business judgment rule attaches to protect corporate officers and directors and the decisions they make." "To rebut the presumption, a shareholder plaintiff assumes the burden of providing evidence that the board of directors, in reaching its challenged decision, breached any one of its triad of fiduciary duties: good faith, loyalty or due care." "If the plaintiff fails to rebut the presumption that the directors acted in good faith, in the corporation's best interest and on an informed basis, the business judgment standard protects both the directors and the decisions they make." [Footnotes omitted.]

1 Dennis J. Block, Nancy E. Barton & Stephen A. Radin, The Business Judgment Rule: Fiduciary Duties of Corporate Directors, at 4-5; 21-22; 25-27 (5th ed. 1998) (and cases cited therein).HN15 "As the name implies, a necessary predicate for the application of the business judgment rule is that the directors' decision be that of a ***business*** judgment and not a decision ... which construes and applies **[***31]** a statute and a corporate bylaw." *Lake Monticello Owners' Association v. Lake*, 250 Va. 565, 463 S.E. 2d 652, 656 (Va. 1995) (emphasis in original); *see also Grimes v. Donald*, 1995 WL 54441 (Del. Ch.), 20 Del. J. Corp. L. 757, 771, (Del. Ch. 1995), *affirmed* 673 A.2d 1207 (Del. 1996). The business judgment rule is widely recognized: *Michaud v. Morris*, 603 So. 2d 886 (Ala. 1992); *Shields v. Cape Fox Corporation*, 42 P. 3d 1083 (Alaska 2002); *Long v. Lampton*, 324 Ark. 511, 922 S.W.2d 692 (Ark. 1996); *Lamden v. La Jolla Shores Clubdominium Homeowners Association*, 21 Cal. 4th 249, 87 Cal. Rptr. 2d 237, 980 P.2d 940 (Cal. 1999); *Hirsch v. Jones Intercable, Inc.*, 984 P.2d 629 (Colo. 1999); *Rosenfield v. Metals Selling Corporation*, 229 Conn. 771, 643 A.2d 1253 (Conn. 1994); *McMullin v. Beran*, 765 A.2d 910 (Del. 2000); *Leppaluoto v. Warm Springs Hollow Homeowners Association, Inc.* 114 Idaho 3, 752 P.2d 605 (Idaho 1988); *G&N Aircraft, Inc. v. Boehm*, 743 N.E.2d 227 (Ind. 2001); *Whalen v. Connelly*, 593 N.W.2d 147 (Iowa 1999); **[***32]** *Burcham v. Unison Bancorp, Inc.*, 276 Kan. 393, 77 P. 3d 130 (Kan. 2003); *Security Trust Company v. Dabney*, 372 S.W.2d 401 (Ky. 1963); *Salley v. Salley*, 661 So. 2d 437 (La. 1995); *Rosenthal v. Rosenthal*, 543 A.2d 348 (Me. 1988); *Werbowsky v. Collomb*, 362 Md. 581, 766 A.2d 123 (Md. 2001); *Harhen v. Brown*, 431 Mass. 838, 730 N.E.2d 859 (Mass. 2000); *Janssen v. Best & Flanagan*, 662 N.W.2d 876 (Minn. 2003); *Omnibank of Mantee v. United Southern Bank*, 607 So. 2d 76 (Miss. 1992); *Daniels v. Thomas, Dean & Hoskins, Inc.*, 246 Mont. 125, 804 P.2d 359 (Mont. 1990); *Sadler v. Jorad, Inc.*, 268 Neb. 61, 680 N.W.2d 165 (Neb. 2004); *In re PSE&G Shareholder Litigation*, 173 N.J. 258, 801 A.2d 295 (N. J. 2002); *White ex rel. Banes Company Derivative Action v. Banes Company*, 116 N.M. 611, 866 P.2d 339 (N. M. 1993); *40 West 67th Street Corporation v. Pullman*, 100 N.Y.2d 147, 790 N.E.2d 1174, 760 N.Y.S.2d 745 (N. Y. 2003); *Riverside Park Condominiums Unit Owners Association v. Lucas*, 2005 ND 26, 691 N.W.2d 862 (N. D. 2005); **[***33]** *Stepak v. Schey*, 51 Ohio St. 3d 8, 553 N.E.2d 1072 (Ohio 1990); *Warren v. Century Bankcorporation, Inc.*, 1987 OK 14, 741 P.2d 846 (Okla. 1987); *Cuker v. Mikalauskas*, 547 Pa. 600, 692 A.2d 1042 (Pa. 1997); *Mueller v. Cedar Shore Resort, Inc.*, 2002 SD 38, 643 N.W.2d 56 (S. D. 2002).

[*P21] The rule is applicable here. [5] HN16 Whether a corporation should pursue **[**353]** a claim through litigation is a matter for the business judgment of the Board. *See Harhen*, 730 N.E.2d at 865-66; and *Cuker*, 692 A.2d at 1048. The Board's decisions to enter into a settlement agreement with Crittenden was a business judgment. [6] Appellants did not allege or establish any facts supporting a claim that the Board's actions were taken in bad faith or that any of the directors were not disinterested; they only complain that the Board's actions were

"unreasonable." HN17 Whether or not a particular action by a Board is "reasonable" is not for us to decide - that determination is vested in the discretion of the Board. A court does "not apply an objective reasonableness test in such a case to examine the wisdom of the decision itself. **[***34]** " 1 Block, Barton & Radin, *supra*, at 4-5; 21-22; 25-27. Certainly, the Board's decisions here can be "attributed to any rational business purpose" as the Board's own staff recommended in both Zimmer and Crittenden's cases to settle the matters because pursuing collection was not worth the cost of litigation. Appellants have not alleged facts sufficient to rebut the presumption of the business judgment rule that the Board's decisions were taken in good faith with the intent of serving the best interests of the corporation. We will not interfere with business decisions made by directors in good faith in what the directors believe to be in the organization's best interest. The district court's summary judgments on the claims against Zimmer, Crittenden, and the Association's Board are affirmed.

FOOTNOTES

5 The Wyoming Nonprofit Corporation Act is "based upon the Revised Model Nonprofit Corporation Act." The official comments to the Revised Model Nonprofit Corporation Act (the Model Act) state that HN18 the application of the business judgment rule is "consistent" with the standards of conduct established for directors and that "in the nonprofit context the business judgment rule should apply to discretionary matters voted upon by the board of directors[.]" Revised Model Nonprofit Corporation Act, § 8.30 at 216 (1988). **[***35]**

6 This analysis is equally applicable to the Board's decision to enter into the release with Zimmer.

Ultra vires claim against Zimmer & Crittenden

[*P22] The Association's bylaws provide that:

> **Subordinate Officers**. The Board of Directors may appoint and engage under personal service contracts a General Manager and Assistant Manager, and such other officers as the business of the Association may require, each of whom shall hold office for such period, have such authority and perform such duties as are provided in these By-laws and their personal service contracts, or as the Board of Directors may from time to time determine. Such officers may not be members of the Board of Directors.

By-laws of Star Valley Ranch Association, Article IX Section 3. The Association's Personnel Policies and Procedures also state that: "Because of the need for stability and continuity, the positions of General Manager and Assistant General Manager are further defined and filled through personal service contracts, while other positions are computed on a monthly or hourly **[***36]** basis." The parties agree that neither Zimmer nor Crittenden had a personal services contract during their tenures as general manager. In their complaint, Appellants alleged that the lack of a personal services contract rendered Zimmer and Crittenden's employment "ultra vires." Specific to Crittenden, Appellants allege that his employment was also ultra vires because the Association let him fulfill the duties of general manager while Crittenden remained a director of the Board when they created a "business agent" position in order to circumvent Association bylaws prohibiting a director from serving as general manager. Appellants seek restitution from Zimmer and Crittenden for the salaries paid to them while they served as general manager (or as business agent) on the grounds that they knew, or should have known, the provisions of the bylaws requiring a personal services contract for that position. The district court granted summary judgment without explanation of its reasoning.

[*P23] A simple review of our statutes shows that Appellants' claim is utterly devoid of merit. With respect to claims of ultra vires, the Wyoming Nonprofit Corporation Act provides:

Due to the file size restrictions of the Odyssey e-file system,

ADDITIONAL CITATIONS as part of a separate notice will follow.