UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2603

September Term, 2014

COMMUNITY VOLUNTEER FIRE CO., INC. OF DISTRICT NO. 12

v.

DOUGLAS MOYERS, ET AL.

Wright,
Kehoe,
Berger,

JJ.

Opinion by Wright, J.

Filed: December 23, 2015

Appellant, the Community Volunteer Fire Company, Inc. of District No. 12 (the "Fire Company"), is a nonstock, membership corporation located in Fairplay, Maryland. It was formed in 1948 for the purpose of "extinguishing, preventing and/or suppressing fires" in the Fairplay community. On May 16, 2013, appellees, Douglas Moyers, Stephanie Clipp, Mark Kopp, and Cory Lescalleet, filed a Petition for Dissolution and Appointment of Receiver pursuant to Md. Code (1975, 2014 Repl. Vol.), §§ 3-413(b)(2) and 5-208(a) of the Corporations & Associations Article ("C&A"), in the Circuit Court for Washington County. On July 1, 2013, the Fire Company moved to dismiss appellees' petition. The court denied that motion on September 24, 2013.

On July 10, 2014, the Fire Company filed a motion for summary judgment, which it amended on July 14, 2014. After hearing argument on August 25-26, 2014, the circuit court denied the Fire Company's motion. On October 14-15, 2014, the court conducted a two-day trial on appellees' claims. The circuit court then requested post-trial memoranda and heard closing arguments on January 5, 2015. On February 3, 2015, the court issued a memorandum opinion[1] detailing its factual findings and conclusions of law before ruling that "[w]hile dissolution of the [Fire Company] is not appropriate . . . the appropriate equitable remedy is to appoint a receiver to ensure fair election of officers."

On February 10, 2015, the Fire Company filed an interlocutory appeal. On February 17, 2015, the circuit court held a hearing on the appointment of a receiver and

[1] This memorandum opinion was not docketed until February 12, 2015.

the specification of the receiver's duties. On February 23, 2015, the court issued an order appointing a receiver and defining his authority.

Questions Presented

The Fire Company asks:

1. Did the Circuit Court err in concluding that Appellees Kopp and Lescalleet had standing to sue under [C&A § 3-413], even though they were not members of the Fire Company when they brought suit?

2. Should the equitable doctrine of laches have barred Appellee[s'] claims where the Circuit Court concluded [that] Appellees waited an unreasonable length of time to bring suit and evidence was lost because of the delay?

3. Did the Circuit Court err in concluding that [the Fire Company's] leadership engaged in oppressive conduct where the leadership acted in accordance with its Bylaws and [Appellees] Kopp and Lescalleet continue to fight fires in the Fairplay community?

Along with their brief, appellees filed a motion to dismiss this appeal "on the ground that the appeal is premature." According to appellees, because no appealable order existed at the time that the Fire Company noted its appeal, and because the Fire Company did not file a notice of appeal from the circuit court's February 23, 2015 order, then Md. Rule 8-602 "does not save [this] appeal."

Pursuant to Md. Rule 8-602(e)(1)(D), this Court may "treat the notice of appeal as if filed on the same day as, but after, the entry of the judgment" in cases where the "final judgment was entered by the lower court after the notice of appeal was filed." *See also Appiah v. Hall*, 183 Md. App. 606, 618-21 (2008) ("we have discretion . . . to retroactively enter a final judgment to avoid imposing hardship on the parties or based on

a finding that the parties had no intent to circumvent the final judgment rule") (citation omitted), *aff'd*, 416 Md. 533 (2010). And, pursuant to Md. Code (1973, 2013 Repl. Vol.), § 12-303(3)(iv) of the Courts & Judicial Proceedings Article, a party may appeal from an interlocutory order "[a]ppointing a receiver but only if the appellant has first filed his answer in the cause." In this case, however, the Fire Company noted its appeal after the circuit court determined that a receiver should be appointed by way of a memorandum opinion but *before* any order was prepared or docketed by the court. *Cf. Shapiro v. Greenfield*, 136 Md. App. 1, 13 (2000) (allowing appeal to proceed where appellants appealed from an *order* appointing a receiver, though not necessarily from the order actually appointing "a particular receiver"). Thus, we have discretion to dismiss this case.

We choose, however, to address the merits.[2] In that regard, we answer all three of the Fire Company's questions in the negative and affirm the circuit court's judgment.[3]

Facts

The Fire Company's Bylaws provide that "officers of the company shall be a President, two (2) Vice-Presidents, a Secretary, a Treasurer, a Standing Committee of

[2] In reaching this conclusion, we deny appellees' Motion to Strike Appellant's Reply Brief "on the ground that it was not timely filed," as appellees suffered no prejudice from the delay. *See Bowman Grp. v. Moser*, 112 Md. App. 694, 702-03 (1996) ("In view of the fact that the late filing did not cause any inconvenience to the Court or the parties, we exercise our discretion to deny this motion.").

[3] Therefore, regardless of whether we dismiss the appeal or entertain it, appellees would prevail.

five (5) members, a Chief, a Deputy Chief, and Assistant Chief." In addition, it states that there "will be an Executive Committee that will consist of company officers from President down to Chief." The Executive Committee is empowered to review memberships "[f]rom time to time . . . and decide whether to offer a membership renewal." The Executive Committee can initiate such a review "[a]t the request of a committee member."

Under a section entitled "Discipline," the Bylaws provide, in pertinent part:

> SECTION I; The President, Head of the Standing Committee and the Chief Officers shall have the power to suspend any member for up to thirty (30) days for the following offenses[:] acting in a disorderly manner at a fire or on any Company property, disobeying the rules and regulations of the Company, refusing to obey said Officers at any time, or doing any other act which would reflect discredit upon or tend to injure the company or the fire service in general . . . .
>
> SECTION II; Should at any time charges in writing signed by three or more members . . . be handed to the President of the company accusing any member of [the acts listed in SECTION I]; the President shall thereupon appoint a committee of three (3) members to investigate such charges or refer said complaint directly to the Executive Committee.

The Bylaws then lists procedures to be followed, including notifying the accused and allowing him or her to "present any pertinent information," and allowing the accused to appeal from an adverse decision.

Pursuant to the Bylaws, "[n]ominations to fill these offices from President down to Assistant Chief shall be made at a meeting to be held on the first Tuesday in November every other year, starting in 1998." William Pennington, Jr. has served continuously as President of the Fire Company for 30 years, Paul Brown has held office for over 41 years

(40 years as Secretary and subsequently as a member of the Executive Committee), and Leonard Heller and David Grabill have been Chief and Treasurer, respectively, for about 20 years.

On November 11, 2008, before the Fire Company's general membership meeting, the Executive Committee decided not to renew the memberships of appellees Kopp and Lescalleet, as well as those of two other individuals who are not parties to this appeal. Kopp had been a member since October 2003, while Lescalleet had been a member since 2001. According to Pennington, Kopp was insubordinate to Heller, while Heller stated that Kopp "was the big part of" "getting other members . . . just against everyone." Heller similarly testified that Lescalleet was insubordinate when Lescalleet "ma[de] a disturbance out in the engine bay about people getting throwed out [sic]." Additionally, Pennington testified that Lescalleet had been "yelling and, and out of control" during an "altercation" with Heller earlier that morning, although Pennington admitted that he was not there to witness the incident. The following day, Kopp joined a neighboring volunteer fire company, which Lescalleet also joined subsequently. Neither Kopp nor Lescalleet attempted to rejoin the Fire Company.

On May 16, 2013, appellees filed their Petition for Dissolution and Appointment of Receiver, alleging that the 2008 membership terminations led to the appellees' inability "to nominate a slate of candidates to challenge" the present leadership, and that the "persons in control of [the Fire Company]" engaged in "oppressive conduct." During

a two-day trial on October 14-15, 2014, the circuit court heard testimony from all four appellees and nine additional witnesses.

Kopp testified that, on the day his membership was terminated, he was sitting in the general membership area waiting for the meeting to begin when he was approached by Brown, who told him that Pennington wanted to see him in the executive board meeting room. Upon entering the room, Kopp was told that "due to [his] being a negative influence, [the Fire Company was] not renewing [his] membership for the organization." Kopp stated that he received no prior notice that his membership was in jeopardy, and that his request for written confirmation of the Fire Company's decision was refused.

Clipp testified that she was "currently a member" of the Fire Company, and had been a member since 2004. She explained that prior to the 2008 membership terminations, she and other members planned on making nominations in order to get "a new set of leadership" for the Fire Company, but were not able to do so because "several of those members . . . their memberships weren't renewed." Clipp also testified that in January 2013, she was reported in the media as saying, "if you're showing an opinion that does not vote well for the membership or for the higher ups, they find a way to get you out." She stated that, thereafter, during the February 2013 meeting, "everything was very vague." In particular, Clipp noted that no reports were given and "[t]he meeting literally lasted five minutes." The group recited the Lord's Prayer, which usually meant that the meeting was about to adjourn, though no motion for adjournment was ever made.

Subsequently, Clipp and her father, Kevin Clipp, who was a member of the Executive Committee, left while everyone else stayed behind.

Kevin Clipp testified at trial where he was shown minutes from the February 2013 meeting. He stated that most of the business reported in the minutes did not occur while he and his daughter were present. In addition, he recalled driving past the Fire Company an hour after he and his daughter left that night and saw that "all the cars were still there. And it was obvious they were still having a meeting." Kevin Clipp, also testified about the events that took place on November 11, 2008. He stated that he received a call from Heller that afternoon and was told that there would be an Executive Committee meeting before the general meeting. According to Kevin Clipp, Brown informed the Executive Committee that there were "some people that's causing trouble, we have to get rid of them," but "[t]here was very little discussion" and "[t]here was never a vote taken."

Moyers testified that he became a member of the Fire Company in 1989, and remains a member, although he was considered a "member not in good standing in 2012" and since then has not been allowed vote or enter the building. As a result of this designation, in December 2012, Moyers was asked to turn in any routine paperwork by placing them in a box mounted outside the building. When Moyers asked the Treasurer, Grabill, over the phone why he was not considered to be in good standing, Grabill said, "you know why, and he hung up the phone." While testifying, Moyers recalled that in July 2012, he had stated during a public meeting of the Washington County Board of Commissioners that the Fire Company needed new leadership.

In a memorandum opinion dated February 3, 2015, the circuit court concluded that "the actions taken by the Executive Board on November 11, 2008 constitute[d] 'oppressive conduct' under [C&A §] 3-413(b)(2)." Specifically, the court noted that "Kopp and Lescalleet received no notice of the contemplated Board action and were not afforded a hearing with an opportunity to defend," although the Bylaws provided these rights. According to the court, "[t]hat oppressive conduct was exacerbated by the reasonable inference that those in control of the Fire Company knew of the proposed slate of new officers and therefore took immediate preemptive action to remove members of the Fire Company whom the Executive Board believed were behind the insurrection." With regard to Clipp and Moyers, the circuit court found that the Fire Company's actions against them did not amount to "oppressive conduct," but "support[ed] the inference that the leadership of the Fire Company intentionally tried to suppress any opposition to those in control of the Fire Company."

In its memorandum opinion, the circuit court rejected the Fire Company's argument that Kopp and Lescalleet had no standing because they were not members at the time that the petition was filed. Citing *Ettridge v. TSI Grp., Inc.*, 314 Md. 32, 41 (1988), the court ruled that Kopp and Lescalleet had standing because "[t]he relevant inquiry is whether the petitioner was a member of the organization at the time the salient events occurred."

Likewise, the circuit court rejected the Fire Company's argument that Kopp and Lescalleet's claims were barred by laches. Although the court found that their delay in

filing was "unreasonable," the court concluded that the Fire Company failed to demonstrate that it was prejudiced by such delay. Specifically, the court noted that "[t]he witnesses of the November 2008 events were able to testify to all of the relevant details," and the Fire Company "failed to demonstrate that [evidence, which it alleged had been lost,] would have been available if [the] action had been brought in three years as opposed to five."

Additional facts will be included as they become relevant to our discussion below.

Discussion

I. Standing

The Fire Company first argues that Kopp and Lescalleet lacked standing to sue under the relevant dissolution statute because they were not members of the Fire Company when they filed suit in 2013. According to the Fire Company, the dissolution statute was meant to be read narrowly, and the circuit court erred in concluding that a petitioner need only be a member of the organization at the time that the salient events occurred.

In response, appellees contend that Kopp and Lescalleet had standing because they were members who were "entitled to vote in the election of directors at the time of the oppressive conduct." Citing *Bontempo v. Lare*, 217 Md. App. 81 (2014), *aff'd*, 444 Md. 344 (2015), appellees aver that the Fire Company's argument is flawed because it "ignores a critical difference between a stockholder and a member."

The dissolution statute at issue states:

> (b) Except as provided in subsection (d) of this section, *any stockholder entitled to vote in the election of directors of a corporation* may petition a court of equity to dissolve the corporation on grounds that:
>
> > (1) The stockholders are so divided that they have failed, for a period which includes at least two consecutive annual meeting dates, to elect successors to directors whose terms would have expired on the election and qualification of their successors; or
> >
> > (2) The acts of the directors or those in control of the corporation are illegal, *oppressive*, or fraudulent.

C&A § 3-413 (emphasis added). In turn, a "stockholder" is defined to include "a member of a corporation organized without stock." C&A § 1-101(z). Here, we must determine whether the circuit court correctly concluded, as a matter of law, that pursuant to C&A § 3-413(b), "stockholder" includes any member who was eligible to vote in the election of directors "at the time that the salient events occurred." *See Clickner v. Magothy River Ass'n Inc.*, 424 Md. 253, 266 (2012) ("When the trial court's decision involves an interpretation and application of Maryland statutory and case law, our Court must determine whether the lower court's conclusions are legally correct . . . .") (Citation omitted). We hold that it did.

Like the circuit judge in this case, we find *Ettridge* to be instructive. In *Ettridge*, 314 Md. at 39, the defendant corporation argued that the plaintiff "had no standing to seek relief," in part because "he was not a stockholder at the time of the wrongs alleged." There, the plaintiff became a stockholder after the salient events occurred. *Id.* The circuit court denied the plaintiff interlocutory relief, and plaintiff appealed. *Id.* at 40.

Before this Court could entertain the appeal, however, the Court of Appeals granted certiorari and vacated the lower court's judgment. *Id.*

According to the *Ettridge* Court, "the trial judge erred . . . in concluding that [the plaintiff] could not rely upon continuing or subsequent illegal, oppressive, or fraudulent acts in support of his claim for relief." *Id.* at 44. The Court further noted that, when considering the corporation's conduct as a basis for relief, "'what must be decided is when the specific acts of alleged wrongdoing occur, and not when their effect is felt.'" *Id.* at 44-45 (quoting *Schreiber v. Bryan*, 396 A.2d 512, 516 (Del. Ch. 1978)). If those statements were deemed applicable to the plaintiff in *Ettridge*, who became a shareholder *after* the alleged wrongs occurred, then they are certainly applicable to Kopp and Lescalleet, who were shareholders *at the time of* the alleged wrongs. Thus, the circuit court did not err in finding that Kopp and Lescalleet had standing.

The Fire Company challenges the circuit court's conclusion by relying on 16A Fletcher Cyc. Corp. § 8080, which states:

> Standing to sue is determined by the status of the shareholder at the time of the proceeding. The petitioner for dissolution must hold an interest in the corporation . . . . A shareholder divested of his or her interest in a corporation does not have standing to bring a proceeding to dissolve the corporation. Thus, a shareholder lacks standing to petition for dissolution after termination of his or employment with the corporation where termination requires surrendering all of the shareholder's shares.

A treatise, however, is a secondary source, and the Court of Appeals has previously stated:

> The primary sources of public policy (and where typically we look to divine it) are the State's constitution, statutes, administrative regulations,

> and reported judicial opinions. *Adler v. Am. Standard Corp.*, 291 Md. 31, 45, 432 A.2d 464, 472 (1981) (quoting *Md.-Nat'l Capital Park & Planning Comm'n*, 282 Md. at 605-06, 386 A.2d at 1228). Although courts are not confined to these emanations of public policy in their search, secondary sources are perceived generally as less persuasive. *See Adler*, 291 Md. at 45, 432 A.2d at 472.

Port v. Cowan, 426 Md. 435, 449-50 (2012). Accordingly, we are not bound by this treatise, especially when there is ample Maryland case law to support our conclusion. *See Ettridge*, 314 Md. at 44-45; *see also Bontempo*, 217 Md. App. at 114-15 (stating that stockholder whose employment with corporation was terminated had "standing to seek relief" pursuant to C&A § 3-413); *Edenbaum v. Schwarcz-Osztreicherne*, 165 Md. App. 233, 237 (2005) (allowing dissolution claim to proceed where plaintiff was a shareholder and former employee of closely held corporation).

II. Doctrine of Laches

Next, the Fire Company argues that the circuit court erred when it ruled that appellees' claim was not barred by the doctrine of laches. According to the Fire Company, the court correctly found that Kopp and Lescalleet waited an unreasonable length of time to bring suit, but incorrectly concluded that there was no prejudice to the Fire Company as a result of the delay. In particular, the Fire Company noted that because of the time that had lapsed before the suit was filed, important text messages reflecting insubordinate conduct by Kopp had become unavailable.

"The equitable doctrine of laches bars litigation of a claim when there is unreasonable delay in its assertion and the delay results in prejudice to the opposing party." *Lopez v. State*, 433 Md. 652, 653 (2013) (footnote omitted). Laches is an

affirmative defense, *Liddy v. Lamone*, 398 Md. 233, 242 (2007), and thus the defendant bears the burden of proving its elements. "[I]n reviewing the Circuit Court's decision, the issue of laches, in this case, is a mixed question of fact and law." *Id.* at 245. "Whether the elements of laches have been established is one of fact . . . while the question of whether in view of the established facts, laches should be invoked, is a question of law." *Id.* at 245-46 (citations omitted).

Here, we agree with the circuit court that the Fire Company failed to meet its burden of demonstrating that it suffered prejudice as a result of Kopp and Lescalleet's delay in filing suit. As appellees note in their brief, the individual who received Kopp's text messages, Brian Chaney, testified that the Nextel phone he used at the time was his "work phone," and it was surrendered to this employer "right after 2008-2009, 2010." When asked if he would have been able to produce the text messages in 2009, Chaney answered in the affirmative. His testimony, however, established that the text messages became unavailable in 2010. Therefore, even if Kopp and Lescalleet brought suit in January 2011 – just 14 months after the incident, or within "three years as opposed to five" – we cannot say that the text messages would have been available. As such, the circuit court did not err in concluding that appellees failed to demonstrate prejudice.

III. Oppressive Conduct

Finally, the Fire Company argues that the circuit court erred in concluding that the actions it took in November 2008 amounted to oppressive conduct. First, the Fire Company notes that its actions comported with the Bylaws and therefore "did not

frustrate any objectively reasonable expectations of appellees." Second, the Fire Company avers that its conduct "did not rise to the level of oppression necessary for action under the dissolution statute."

This Court has previously stated that "oppression should be deemed to arise only when the majority conduct substantially defeats expectations that, objectively viewed, were both reasonable under the circumstances and were central to the petitioner's decision to join the venture." *Edenbaum*, 165 Md. App. at 258 (citation omitted). We have also acknowledged that "oppression" can be defined as "conduct that substantially defeats the reasonable expectations of a stockholder" or "conduct that substantially defeats the 'reasonable expectations' held by minority shareholders in committing their capital to the particular enterprise." *Id.* at 256 (citations omitted).

"The standard we apply in reviewing the grant or denial of a petition for involuntary dissolution is whether the circuit court in rendering its decision abused its discretion." *Edenbaum*, 165 Md. App. at 254 (citing *Renbaum v. Custom Holding, Inc.*, 386 Md. 28, 43 (2005)). Under that standard, "we will not vacate a circuit court's judgment unless no reasonable person would take the view adopted by the [trial] court." *Id.* (citation omitted).

In this case, there was ample evidence to support the circuit court's finding that "the actions taken by the Executive Board on November 11, 2008 constitute[d] 'oppressive conduct' under [C&A §] 3-413(b)(2)" because they "substantially defeated the reasonable expectations of the members who were seeking to change the leadership of

the Fire Company." (Footnote omitted). During the trial, Kopp testified that when he joined the Fire Company, he expected "to be treated fairly, like everybody else. To have the right to vote and to have a say in the organization . . . . To have . . . access to equipment needed to mitigate any type of emergency situation." Similarly, Lescalleet testified that he "expected to be able to serve my community, my community that I lived in, and put out fires and help . . . . And I also expected . . . to be able to partake in fair elections and a fair process . . . . " Based on this, the circuit court did not abuse its discretion in finding that appellees' expectations were reasonable under the circumstances. The evidence was also sufficient to show that appellees' expectations were central to their decision to join the Fire Company, and that the "Executive Board's action . . . on November 11, 2008 constituted oppressive conduct." Finally, we agree with the circuit court that the Fire Company's oppressive conduct was exacerbated because it was taken to derail an election challenge to the leadership's control.

Thus, for all of the foregoing reasons, we affirm the judgment of the circuit court.

JUDGMENT OF THE CIRCUIT COURT FOR WASHINGTON COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.