Circuit Court for Harford County
Case No. 12-C-17-000355

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1023

September Term, 2021

THOMAS BARTENFELDER

v.

KIMBERLY BARTENFELDER

Berger,
Nazarian,
Albright,

JJ.

Opinion by Albright, J.

Filed: October 25, 2022

This case stems from an ongoing dispute between an estranged husband and wife, Thomas Bartenfelder and Kimberly Bartenfelder, regarding the management of two close corporations and one limited liability company (collectively, "the companies"). The companies are solely owned and operated by the Bartenfelders. In 2017, Ms. Bartenfelder filed a civil complaint in the Circuit Court for Harford County naming Mr. Bartenfelder and the three companies as defendants. Ms. Bartenfelder requested the appointment of a receiver, and Mr. Bartenfelder replied by seeking a forced buy-out of Ms. Bartenfelder's interest in the companies. After an appraisal, the circuit court set a price for the buy-out, Ms. Bartenfelder appealed, and we reversed the circuit court's appraisal- and buy-out orders. *Bartenfelder v. Bartenfelder*, 248 Md. App. 213, 252-53 (2020) ("*Bartenfelder I*").

In 2018, before the appeal, Ms. Bartenfelder amended her complaint, dropping all three companies as defendants among other changes. In 2021, Ms. Bartenfelder requested that her future attorney's fees and expert witness fees be paid from the companies' funds on an ongoing basis. The circuit court granted her motion. Mr. Bartenfelder then filed this interlocutory appeal, presenting three questions for our review, which we have rephrased and consolidated into a single question:[1]

[1] Mr. Bartenfelder phrased the questions as:

1. Did the Circuit Court commit reversible error when it ordered that Ms. Bartenfelder's attorneys' fees and expert witness fees be paid without a contractual or statutory fee shifting provision, in violation of the American Rule?

2. Did the Circuit Court commit reversible error when it ordered an unspecified amount of Ms. Bartenfelder's attorneys' fees and expert

> Did the circuit court err in ordering that Ms. Bartenfelder's attorneys' and expert witness fees be paid from company funds, where there was no contractual or statutory fee-shifting provision authorizing such an award, where the court did not determine the amount of fees incurred and the reasonableness of those fees, and where the companies were not parties to the litigation?

Ms. Bartenfelder, who filed an opposition brief, has also moved to dismiss this appeal, asserting that Mr. Bartenfelder lacks standing to request relief on behalf of the companies.

For the reasons that follow, we decline to reach Ms. Bartenfelder's motion to dismiss and the merits of the parties' contentions on appeal. Instead, we will vacate the circuit court's order granting Ms. Bartenfelder ongoing fees.

BACKGROUND[2]

Mr. Bartenfelder and Ms. Bartenfelder are the sole stockholders of two close corporations, Bartenfelder Sanitation Service, Inc. ("Sanitation") and Bartenfelder Landscape Service, Inc. ("Landscape"). They are also the sole members of a third

---

> witness fees be paid without first determining what fees had been incurred or the reasonableness of those fees?
>
> 3. Did the Circuit Court commit reversible error when it ordered non-parties to pay Ms. Bartenfelder's on-going attorneys' fees and expert witness fees in this litigation?

[2] Ms. Bartenfelder's amended complaint was her operative pleading at the time she filed the motion that is the subject of this interlocutory appeal. The factual background we provide is based in part on the allegations in Ms. Bartenfelder's amended complaint, together with the exhibits she attached to it. For our purposes, we assume that Ms. Bartenfelder's allegations are true and that the attached exhibits are genuine.

company, 3340 Forge Hill LLC ("Forge").[3] Ms. Bartenfelder owns 51% of the outstanding stock of Sanitation; 50% of the outstanding stock of Landscape; and a 50% membership interest in Forge. Mr. Bartenfelder owns 49% of the outstanding stock of Sanitation; 50% of the outstanding stock of Landscape; and a 50% membership interest in Forge. Sanitation and Landscape are Maryland close corporations. As its name suggests, Forge is a limited liability company, also organized under the laws of Maryland.

According to the organizational documents attached to Ms. Bartenfelder's amended complaint, the Bartenfelders' ability to control the companies is not uniform company to company. Landscape operates without a board of directors, but its stockholders, Mr. Bartenfelder and Ms. Bartenfelder, manage the company[4] subject to bylaws and a unanimous shareholders' agreement. Thus, both Ms. Bartenfelder and Mr. Bartenfelder must approve the "disposal of the whole or any part of the business, undertaking, or assets of the Company outside the normal course of business[,]" among other things. Sanitation operates without a board of directors, but, apparently, has no

[3] In the record below, it appears that there is some dispute about whether Forge's formal name includes 3340 or 3341, possibly due to a change in that company's name. The difference is immaterial here.

[4] In 2011, Ms. Bartenfelder and Mr. Bartenfelder, as part of a stock purchase and shareholder agreement, agreed that both would serve as Landscape's sole directors. In 2013, apparently, Mr. Bartenfelder represented that he was Landscape's "only" director, dissolved Landscape's board, and represented that thereafter, Landscape's "stockholders [would take] over the duties of the Board of Directors."

shareholders' agreement.[5] Mr. Bartenfelder is the managing member of Forge, but Forge, apparently, has no operating agreement.[6]

In 2017, Ms. Bartenfelder filed a civil complaint against Mr. Bartenfelder and the companies, alleging that, among other things, Mr. Bartenfelder misused and misappropriated the companies' funds. Ms. Bartenfelder requested injunctive relief, declaratory relief, damages, and attorney's fees and costs. For each company, she designated Mr. Bartenfelder as the person to be served, and the circuit court issued summonses for the companies to be served on him. Four days later, apparently, Mr. Bartenfelder and the companies were served.

Less than a year later, Ms. Bartenfelder amended her complaint to, among other things, remove the companies as defendants and proceed solely against Mr. Bartenfelder. She set forth four causes of action in her amended complaint. *First*, she sought various injunctive and equitable relief related to the companies. *Second*, she sought declaratory relief regarding Ms. Bartenfelder's rights as president and majority shareholder of Sanitation. *Third*, she claimed that Mr. Bartenfelder breached Landscape's shareholder agreement and certain other fiduciary obligations by failing to allow Ms. Bartenfelder to take draws from the companies. And *fourth*, she claimed that Mr. Bartenfelder breached a

[5] Sanitation's bylaws are referenced in, but do not accompany, the organizational documents Ms. Bartenfelder attaches to her amended complaint.

[6] Ms. Bartenfelder alleges she, too, is a managing member of Forge. Mr. Bartenfelder contends that he is Forge's only managing member. The organizational document Ms. Bartenfelder attaches for Forge corroborates Mr. Bartenfelder's contention. Because Forge operates without an operating agreement, this dispute appears immaterial for now.

non-compete clause in Landscape's shareholder agreement. Throughout these various causes of action, Ms. Bartenfelder alleged that Mr. Bartenfelder had assumed control of the companies; had saddled the companies with debt; that his other actions had resulted in a loss of business and revenue for the companies; and that, if left unchecked, Mr. Bartenfelder would "completely deplete, waste, and/or transfer the value of the operations of the Businesses to third parties or himself."

Over the next few years, Ms. Bartenfelder and Mr. Bartenfelder filed many motions and other papers.[7] On July 30, 2021, Ms. Bartenfelder filed a "Motion for Payment of Attorneys and Expert Witnesses from Company Funds," which is the subject of this appeal. In that motion, Ms. Bartenfelder argued that, due to Mr. Bartenfelder's actions in denying her access to company funds, she was destitute and unable to pay her attorneys' fees or hire expert witnesses, all while Mr. Bartenfelder had continued " . . . to enjoy a high standard of living using income generated by the companies . . ." Ms. Bartenfelder also asked that she be "allowed to use the companies' assets to satisfy her financial obligations to counsel and to retain experts" and alleged that her rights would be prejudiced if she was not granted such access. Mr. Bartenfelder opposed the motion, arguing in part that the Ms. Bartenfelder's claims were derivative claims that would fail without the companies as necessary parties. Nonetheless, Ms. Bartenfelder did not seek to re-join the companies, nor

[7] Several of those filings resulted in orders that were later appealed to this Court in *Bartenfelder I.*

did she make any showing as to why the companies could not be joined or why the case should proceed in their absence.

On August 11, 2021, after shortening Mr. Bartenfelder's time to respond, the circuit court entered a written order granting Ms. Bartenfelder's motion. That order stated that Ms. Bartenfelder's "attorney['s] fees and expert witness fees, reasonably incurred in connection with this action, shall be paid from assets of one or more of the companies, with the decision as to which company's (or companies) assets will be used left to the consensus business judgment of the parties." It contained no findings about why the companies could not be joined as parties or why the case should proceed in the companies' absence. This timely interlocutory appeal followed.[8]

SCOPE AND STANDARD OF REVIEW

An appellate court will generally only consider issues properly raised by the parties, except when the issue concerns the jurisdiction of the trial or appellate court. *Moats v. City of Hagerstown*, 324 Md. 519, 524–25 (1991). Appellate courts, however, have discretion to consider issues that are not properly raised. *Id.* at 525. And we may also address *sua sponte* "a narrow category of issues which come to our attention even though not raised by an appellant [or appellee], and which may require a reversal of the judgment below." *Joseph H. Munson Co. v. Sec'y of State*, 294 Md. 160, 169 (1982), *aff'd* sub nom. *Sec'y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947 (1984). An issue concerning the necessary parties, for instance, "may be raised for the first the time

[8] We have jurisdiction over this interlocutory appeal pursuant to § 12-303(3)(v) of the Courts and Judicial Proceedings Article of the Maryland Code.

on appeal, *Bodnar v. Brinsfield*, 60 Md. App. 524, 532 (1984), or even *sua sponte* by the appellate court." *Serv. Transp., Inc. v. Hurricane Exp., Inc.*, 185 Md. App. 25, 34 (2009) (citation omitted). In determining whether a party is "necessary," we have declined to determine whether to apply an abuse of discretion or a *de novo* standard of review, as the result is typically the same. *Serv. Transp., Inc.*, 185 Md. App. at 37. That observation also applies here.

DISCUSSION

Mr. Bartenfelder argues that the circuit court erred in ordering that Ms. Bartenfelder's ongoing attorneys' fees and expert witness fees be paid from the companies' coffers, asserting that the court did not have the power to issue such an order because—at all relevant times—the companies were not parties to the litigation. Separately, he points out that the "American Rule" would prevent an award of fees here because no contract or statute provides for such an award in this context.

Ms. Bartenfelder, however, argues that Mr. Bartenfelder's appeal should be dismissed because he does not have standing to request relief on behalf of the companies. On the merits, Ms. Bartenfelder argues that the "American Rule" does not apply here because the circuit court's order does not shift fees among adverse parties. She also contends that the circuit court was sitting as a court of equity, and that it had the power to grant the relief requested because doing so was "clearly in the interests of justice."

We hold that the companies were "necessary parties" that needed to be joined in the amended complaint before Ms. Bartenfelder moved for an award of ongoing fees from the

companies' assets. That failure to join is a fatal defect given that Ms. Bartenfelder's claim for ongoing fees directly affects the companies' interests. It necessarily follows, then, that the circuit court's award of attorneys' fees and expert witness fees must be vacated. Consequently, we need not address Ms. Bartenfelder's motion to dismiss or the merits of the parties' various arguments.

Required joinder of parties is governed by Maryland Rule 2-211. Under that rule:

> [A] person who is subject to service of process shall be joined as a party in the action if in the person's absence (1) complete relief cannot be accorded among those already parties, or (2) disposition of the action may impair or impede the person's ability to protect a claimed interest relating to the subject of the action or may leave persons already parties subject to a substantial risk of incurring multiple or inconsistent obligations by reason of the person's claimed interest.[9]

Md. Rule 2-211(a). "The primary purposes of the requirement that necessary parties be joined are to assure that a person's rights are not adjudicated unless that person has had his day in court and, to prevent multiplicity of litigation by assuring a determination of the entire controversy in a single proceeding." *Mahan v. Mahan*, 320 Md. 262, 272 (1990) (citations and quotations omitted). "Necessary parties must be made parties to the proceeding." *Bender v. Secretary, Md. Dept. of Personnel*, 290 Md. 345, 350 (1981). "Failure to join a necessary party constitutes a defect in the proceedings that cannot be waived by the parties, and may be raised at any time, including for the first time on appeal." *Mahan*, 320 Md. at 273.

[9] Maryland Rule 1-202(u) defines "person" to include a corporation.

In the corporate world, we have recognized one exception to the compulsory joinder rule: an absent closely-held corporation that is fully aware of the litigation (through the participation of its controlling owner), but that nonetheless chooses not to participate, may be deemed bound by a judgment in the litigation. Put another way, when an absent corporation consciously sits on its rights (or fully participates by proxy), we may treat the absent corporation as present for purposes of the necessary parties rule because "'it may be presumed that [the owners'] interests coincide with the corporation's interests and that one opportunity to litigate interests that concern them in common should sufficiently protect both." *See Bodner v. Brinsfield*, 60 Md. App. 524, 536 (1984) (quoting *Restatement 2d Judgments*, § 59, p. 99–100 (1982)); *see also Hall v. Barlow*, 260 Md. 327, 345 (1971).[10]

[10] Restatement 2d of Judgments, Section 59, describes this exception to the necessary parties rule in full:

> Except as stated in this Section, a judgment in an action to which a corporation is a party has no preclusive effects on a person who is an officer, director, stockholder, or member of a non-stock corporation, nor does a judgment in an action involving a party who is an officer, director, stockholder, or member of a non-stock corporation have preclusive effects on the corporation itself.
>
> . . .
>
> (3) If the corporation is closely held, in that one or a few persons hold substantially the entire ownership in it, the judgment in an action by or against the corporation or the holder of ownership in it is conclusive upon the other of them as to issues determined therein as follows:
>
> . . .
>
> (b) The judgment in an action by or against the holder of ownership in the corporation is conclusive upon the corporation except when relitigation of the issue is justified in order to protect the interest of another owner or a creditor of the corporation.

To determine whether the companies are "necessary parties" that must be joined here, we must first examine Ms. Bartenfelder's and Mr. Bartenfelder's respective roles in those companies, and the structure of the companies' themselves. Sanitation is a close corporation that apparently operates without a board of directors or the requirement of stockholder unanimity. Accordingly, as the majority stockholder, Ms. Bartenfelder effectively controls "the business and affairs" of Sanitation. *See* Md. Code Ann., Corps. & Ass'ns, § 4-303(1), (3) & (5). Mr. Bartenfelder cannot be liable for actions taken as a result of a stockholders' vote, unless he was entitled to vote on the action. *See* Md. Code Ann.,

---

Restatement (Second) of Judgments § 59 (1982). We recognize that there may be some inconsistency between the compulsory-joinder-rule exception of *Bodner* and *Hall* on the one hand, and Section 10-206 of Maryland's Business Occupations and Professions Article ("Bus. Occ. & Prof.") and Maryland Rule 2-131(a) on the other. Unfortunately, our discussion of this exception does not do much to resolve the inconsistency.

One rationale behind the compulsory-joinder-rule exception is that because a corporation can only "speak" through its owners, principals, and agents, the corporation should be bound by their statements and actions (or failures to act), *Hall v. Barlow*, 260 Md. 327, 345 (1971). At the same time, though, Section 10-206 and Rule 2-131(a) together require that a business entity involved in litigation in circuit court be represented by an attorney. *See* Md. Rule 2-131(a) ("Except as otherwise provided by rule or statute: (1) an individual may enter an appearance by an attorney or in proper person and (2) a person other than an individual may enter an appearance *only* by an attorney.") (emphasis added); *see also* Md. Code Ann., Bus. Occ. & Prof., § 10-206(a) ("Except as otherwise provided by law, before an individual may practice law in the State, the individual shall: (1) be admitted to the Bar; and (2) meet any requirement that the Court of Appeals may set by rule."). The exceptions in Section 10-206 of the Business Occupations and Professions Article are not pertinent here. *See* Md. Code Ann., Bus. Occ. & Prof., § 10-206(b).

Because we conclude that the compulsory-joinder-rule exception does not apply here, we need not look further into this apparent inconsistency. From what we can tell, counsel has never appeared on behalf of the companies in the circuit court. If Ms. Bartenfelder elects to pursue her request for fees again in circuit court, Section 10-206 and Rule 2-131(a) would require that the companies be represented by counsel.

Corps. & Ass'ns, § 4-303(8). Landscape is a close corporation managed by its stockholders, Mr. Bartenfelder and Ms. Bartenfelder. Because Mr. Bartenfelder and Ms. Bartenfelder are subject to a unanimity agreement, they cannot take action on behalf of Landscape unless they agree. Forge is a limited liability company that, like Sanitation, also appears to operate without an operating agreement. As members holding equal interests in Forge, Mr. Bartenfelder and Mrs. Bartenfelder must likewise agree on decisions "concerning the affairs of" Forge because neither holds a majority interest. *See* Md. Code Ann., Corps. & Ass'ns, § 4A-403(a) & (b).

Sanitation and Landscape are "distinct legal entit[ies], separate and apart from [their] stockholders.'" *Gosain v. Cty. Council of Prince George's Cnty.*, 420 Md. 197, 210 (2011) (cleaned up). The same is true of Forge. *See A Guy Named Moe, LLC v. Chipotle Mexican Grill of Colorado*, LLC, 223 Md. App. 240, 250 (2015) ("Although there are, to be sure, significant differences between an LLC and a corporation, an LLC, like a corporation, is a separate and distinct legal entity and possesses some of the features of a corporation—like protection against personal liability."). As such, the companies' assets are owned by the companies, not by Ms. Bartenfelder and Mr. Bartenfelder. *See, e.g.*, *Mona v. Mona Elec. Grp.*, 176 Md. App. 672, 695 (2007) ("The directors of a corporation do not own its property, the corporation itself owns it.'") (quotation and citation omitted); *Bassett v. Harrison*, 146 Md. App. 600, 609–10 (2002) ("The shareholders of a corporation do not own the property of a corporation; the corporation does."). Ms. Bartenfelder and Mr. Bartenfelder also owe certain fiduciary duties to the companies. *Bontempo v. Lare*, 217

Md. App. 81, 112 (2014), *aff'd* 444 Md. 344 (2015); *see also* Md. Code Ann., Corps. & Ass'ns, § 2-405.1; *Plank v. Cherneski*, 469 Md. 548, 572 (2020) ("[M]anaging members of an LLC owe fiduciary duties to the LLC and the minority members arising under traditional common law agency principles.")

In general then, courts should be wary of attempts by litigants to "blur the distinction between the corporations and the individuals owning the corporations." *Gosain*, 420 Md. at 210. Even when a shareholder and a corporation are on the same side of the litigation (either as plaintiffs or defendants), situations may arise in which their interests diverge, thus creating a conflict and potentially resulting in one person's interests being sacrificed for the sake of the other. *See Bontempo*, 217 Md. App. at 130. The same is true for limited liability companies. *See A Guy Named Moe, LLC*, 223 Md. App. at 250.

Against this backdrop, we conclude that the companies were "necessary parties" here because Ms. Bartenfelder effectively sought company assets while the companies were absent from the case. By seeking (and getting) an award of one or more of the companies' assets in their absence, Ms. Bartenfelder impeded the companies' ability to protect their interest in those assets. In essence, Ms. Bartenfelder denied the companies their day in court.

Additionally, the circuit court's order also potentially exposes Mr. Bartenfelder and Ms. Bartenfelder to multiple or inconsistent obligations. By its terms, the order appears to vary the fiduciary obligations that the Bartenfelders owe to the companies, and it also appears to vary the control of the companies in a way not expressly contemplated by each

company's organizational documents. Under those documents, each company is a separate legal entity that is owed fiduciary duties. But the circuit court's order appears to "lump" all three companies together, subjecting the allocation of their assets to the "consensus business judgment of the parties" to ensure that Ms. Bartenfelder's future fees are paid—a decision-making process that may make it hard to treat each company separately, and that appears to cause an inherent conflict between competing fiduciary duties. As to Sanitation, additionally, because the order speaks in terms of "consensus business judgment of the parties," the order appears to expand Mr. Bartenfelder's control of Sanitation to more than the 49%, i.e. the minority interest, that Sanitation's organizational documents give him.

These risks are not theoretical. The circuit court's order awards Ms. Bartenfelder what amounts to an indeterminate sum of ongoing fees. While the parties are ordered to exercise their "consensus business judgment" to determine from which company's or companies' assets the fees are to be paid, payments must be made.[11] This may require liquidating company assets (though it is unclear). Ms. Bartenfelder alleges that at least as of 2017, the companies had "funds available for distribution." But she also alleges that Mr. Bartenfelder caused the companies to incur substantial debt for the purchase of equipment, debts that are so large as to have "substantially devalued the fair market value of the [companies] . . . ." Whether both allegations prove true or not, the circuit court's order and

[11] How these payments were to be characterized on the companies' books is unclear. "Distributions" that render a corporation "unable to pay indebtedness of the corporation as the indebtedness becomes due in the usual course of business" are not permitted. *See* Md. Code Ann., Corps. & Ass'ns, § 10-206(a)(1).

the companies' debts create the kinds of inconsistent (and multiple) obligations that Maryland Rule 2-211 is designed to avoid.

As to whether the companies can be made "necessary parties," we see no reason why they could not be joined here. *See* Md. Rule 2-211. Apparently, all three are business entities organized under the laws of, and maintaining principal places of business in, Maryland. *See* Md. Code, Cts. & Jud. Proc. § 6-102(a) ("A court may exercise personal jurisdiction as to any cause of action over a person . . . organized under the laws of, or who maintains his principal place of business in the State."). All three had been served with Ms. Bartenfelder's original complaint, and nothing in the record suggests that the three companies are no longer subject to service of process in Maryland. Ms. Bartenfelder's amended complaint also alleges no reason why the companies are not joined. Md. Rule 2-211(b). And this is not a class action. Md. Rule 2-211(d).

Finally, the compulsory-joinder-rule exception that appears in *Bodner* and *Hall* does not apply here. On whether her ongoing fees should be paid from company assets, Ms. Bartenfelder's personal interest and the companies' interests do not necessarily coincide. For Landscape and Forge, neither Ms. Bartenfelder nor Mr. Bartenfelder has the unilateral ability to speak for the company. Their disagreement over whether the companies should pay Ms. Bartenfelder's ongoing fees leaves Landscape's and Forge's positions on the issue unaccounted for. And as for Sanitation, Ms. Bartenfelder's request for fees might present the kind of self-dealing transaction that would not survive business judgment scrutiny, particularly in the face of Mr. Bartenfelder's opposition. Thus, even if

Ms. Bartenfelder has corporate control of Sanitation in general, she may not be able to exercise this control vis-à-vis her request for ongoing fees. For all these reasons, whatever presumption may apply to suggest that Ms. Bartenfelder or Mr. Bartenfelder "speaks" for the companies, it is overcome here.

In light of the above concerns, we hold that the companies were "necessary parties" pursuant to Maryland Rule 2-211. We therefore vacate the circuit court's order. If Ms. Bartenfelder elects to pursue her claim for ongoing fees from the companies' assets, she must amend her complaint again (or attempt to) in order to re-join the companies as parties.[12]

THE CIRCUIT COURT FOR HARFORD COUNTY'S AUGUST 11, 2021 ORDER REGARDING PAYMENT OF APPELLEE'S ATTORNEY'S FEES AND EXPERT WITNESS FEES IS VACATED. CASE REMANDED FOR FURTHER PROCEEDINGS NOT INCONSISTENT WITH THIS OPINION. COSTS TO BE PAID EQUALLY BY APPELLANT AND APPELLEE.

[12] We caution, however, that we do not hold that the failure to join the companies is the only impediment to Ms. Bartenfelder's request for fees. It is simply that, at this stage, the necessary parties issue resolves this appeal. We need not further address Mr. Bartenfelder's challenge to the fee award on the merits at this time.