

Circuit Court for Baltimore County
Case No. C-03-CV-22-002456

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 1933
September Term, 2022

No. 1372
September Term, 2024

CONSOLIDATED CASES

MICHAEL P. O'MALLEY

v.

MATTHEW J. O'MALLEY, ET AL.

Arthur,
Shaw,
McDonald, Robert N.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Arthur, J.

Filed: October 24, 2025

*This is an unreported opinion. It may not be cited as precedent within the rule of stare decisis. It may be cited as persuasive authority only if the citation conforms to Maryland Rule 1-104(a)(2)(B).

This case involves a dispute between two brothers who own interests in several family-owned businesses. The brothers acquired most of their interests in the businesses after their father’s death.

The appellant, Michael P. O’Malley, claims that his brother, appellee Matthew O’Malley, is mismanaging the companies and enriching himself at Michael’s expense. Michael requested relief in the circuit court.

The court dismissed the complaint. It dismissed much of the complaint in light of Michael’s assent to a settlement agreement in the Orphans’ Court for Baltimore County. It dismissed the balance of the complaint on the ground that the claims belong to the companies, not to Michael himself.

Michael appealed the circuit court’s dismissal on both grounds. We affirm.

FACTUAL AND PROCEDURAL HISTORY

The parties’ father, Michael O’Malley, died on July 23, 2016. He had four children: Michael P. O’Malley; Matthew J. O’Malley; Peter O’Malley; and Paul O’Malley.¹

Until March 2016, the decedent was the sole owner of five family businesses: The P.T. O’Malley Lumber Company, Inc.; O’Malley Timber Products LLC; O’Malley Wood Products, Inc.; Chickweed Corporation; and Chickweed LP. The parties refer to these

¹ In the interest of clarity, we shall refer to all members of the O’Malley family by their first names. Because the decedent and his son, Michael P., share both a first and last name, we shall refer to Michael P. as “Michael” and to his late father as the “decedent.” We intend no disrespect.

five companies as the “O’Malley Entities.” They refer to a subset of three of the companies—The P.T. O’Malley Lumber Company, Inc., O’Malley Timber Products LLC, and O’Malley Wood Products, Inc.—as the “O’Malley Operating Companies.”²

The decedent appears to have conveyed a portion of his interest in the three O’Malley Operating Companies to Matthew and Michael in March 2016.

On July 5, 2016, a few weeks before the decedent’s death, he executed a last will and testament. The will created trusts for Peter and Paul and appointed the decedent’s friend, Mark Foster, as the trustee for the trusts. The trusts contained interests in the three O’Malley Operating Companies.

The decedent’s will included a plan for the distribution of the ownership interests in the O’Malley Operating Companies. Specifically, the will gave each of the O’Malley Operating Companies an option to purchase Peter’s and Paul’s ownership interests in those companies, which were held in the trusts. If the companies did not exercise those options, the will gave Matthew and Michael options to purchase Peter’s and Paul’s beneficial ownership interests in the O’Malley Operating Companies. The will envisioned that, after the exercise of the options, Matthew would own 60 percent of each of the O’Malley Operating Companies and that Michael would own 40 percent.³

² Chickweed Corporation and Chickweed LP—the “O’Malley Entities” that are not among the “O’Malley Operating Companies”—are real estate holding companies.

³ Both parties later informed the circuit court that Michael and Matthew have, in fact, exercised the options, giving Matthew a 60 percent stake and Michael a 40 percent stake.

The Orphans’ Court for Baltimore County admitted the decedent’s will to probate on August 17, 2016. The will appointed Matthew and his stepmother, Patricia O’Malley, as the personal representatives of the estate.

Litigation ensued. The brothers and their stepmother spent much of the next five years in the orphans’ court.

Michael alleges that, while Matthew was acting as the co-personal representative of the decedent’s estate, he “was responsible for managing the affairs of the O’Malley Entities.” Michael also alleges that Foster was a director of each of the O’Malley Operating Companies during some or all of the time in which the estate was open. According to Michael, Matthew directed that one or more of the O’Malley Operating Entities employ Foster.

Michael alleges that, while the estate was open, he objected that he “was given the least of his ownership interests in the most valuable of the O’Malley Operating Companies.” He alleges that he would own more than 80 percent of Chickweed LP and Chickweed Corporation but only 40 percent, at most, of the three O’Malley Operating Companies. Michael claims that Matthew “repeatedly assured [him] that it would all ‘wash out’ once the O’Malley Operating Companies exercised the options, and Matthew and Michael would own 60% and 40% respectively in each of the O’Malley Operating Companies.”

On June 10, 2021, the parties to the estate litigation, including Michael and Matthew, placed a settlement on the record in the orphans’ court. According to an order

approving the settlement, “All counsel indicated their agreement with the settlement terms[.]” As part of the agreement, Michael waived any exceptions to a fifth and final administration account. The orphans’ court approved the settlement on June 23, 2021, and approved the fifth and final administration account the following day.

The orphans’ court’s order referred to an exhibit that the parties had presented to the court at the hearing on June 10, 2021. In that exhibit, the beneficiaries of the will, including Michael, released Matthew and his stepmother, “in their individual capacities and as Personal Representative[s], from any and all liabilities arising in connection with any mistake of fact or law or negligent or careless act or omission by them or either of them in connection with the administration of the Estate up to [the date of the exhibit].”

Michael alleges that he was a paid employee of one or more of the O’Malley Operating Companies from 2002 until March 14, 2022, when, he says, Matthew fired him. Michael also alleges that at a shareholders’ meeting on June 14, 2022, Matthew announced that Foster, the trustee of the trusts for Peter and Paul, had resigned from the board of directors of two of the O’Malley Operating Companies. According to Michael, Matthew “used his majority votes at the meeting to elect two new directors and to effectively remove Michael as a member of the board of [those companies.]”

On June 22, 2022, two days before the first anniversary of the closure of his father’s estate, Michael filed this lawsuit in the Circuit Court for Baltimore County. As defendants, he named Matthew and Foster.

The complaint contains five counts. The first count alleged that Michael was “entitled to an accounting from Matthew of all assets, funds, revenues, profits, transactions, payments, costs, expenses[,] and indebtedness with respect to the [decedent’s] [e]state and each of the O’Malley Entities from July 23, 2016 to the present.” The second count alleged that “Matthew breached the fiduciary duties . . . that he owed to Michael” as an officer or managing member of the O’Malley Entities and as a co-personal representative of their father’s estate. The third count alleged that Matthew and Foster “ha[d] been unjustly enriched.” The fourth count alleged that Foster “aided and abetted Matthew in his breach of fiduciary duties” that he owed as an officer or managing member of the O’Malley Entities and as a co-personal representative of the decedent’s estate. The final count alleged that Matthew and Foster “conspired together to breach each’s fiduciary duty to the [O’Malley Operating Companies] and their shareholders/members, including Michael.”

In support of these counts, the complaint sets forth a three-page, single-spaced account of Matthew’s allegedly “nefarious conduct.” Some of the allegations touch on Matthew’s administration of the decedent’s estate. Most of the allegations assert that Matthew favored one O’Malley Entity over another, paid himself excessive compensation, paid his personal lawyers out of company funds, wasted assets, or otherwise abused his authority to serve his own interests.

A central allegation seems to be that Matthew prevented the O’Malley Operating Companies from exercising their options to purchase the shares owned by Peter and Paul,

so that Michael and Matthew were required to exercise their options and purchase the shares with their own funds.

The complaint summarizes the wrongful conduct as follows:

The purpose of Matthew’s conduct was fourfold: (a) to reduce the actual and apparent value of the O’Malley Entities in which Michael has larger ownership shares, and larger relative ownership shares, than Matthew, while increasing the value of the O’Malley Entities in which Matthew has larger ownership shares, and larger relative ownership shares, than Michael; (b) to engineer decisions by the O’Malley Operating Companies not to exercise the options, though such decisions were contrary to the clear best interests of the O’Malley Operating Companies and contrary to what had been represented to Michael; (c) to increase his own liquidity and reduce Michael’s liquidity so that—once the O’Malley Operating Companies declined to exercise the options—Matthew would be able to exercise his option to purchase assets from the Trusts[] [for Peter and Paul,] but Michael would be unable to do the same; and (d) to fraudulently reduce the value of the O’Malley Entities to justify a “lowball” buyout offer of Michael’s interests.

Matthew moved to dismiss Michael’s complaint. As exhibits to his motion, Matthew attached copies of the decedent’s will, as well as a number of other documents that had been filed in the orphans’ court proceeding, including: the order approving the settlement, the exhibit in which Michael and others had released certain claims against Matthew in his capacity as personal representative, and the order approving the fifth and final administration account. Citing *Advance Telecom Process LLC v. DSFederal, Inc.*, 224 Md. App. 164, 175 (2015), and Maryland Rule 5-201(d) (concerning judicial notice), Matthew asserted that the court could consider these documents without transforming his motion to dismiss into a motion for summary judgment.

In his motion, Matthew argued that the circuit court lacked subject matter jurisdiction over the claims concerning the administration of the estate, that collateral estoppel barred Michael from asserting those claims, that Michael had waived any right to exceptions to the final administration account, and that Michael had expressly released Matthew, individually and as personal representative, “from any and all liabilities arising in connection . . . with the administration of [the decedent’s] Estate.”

Matthew argued that the remaining claims, which concern his conduct as a fiduciary of the family businesses, were “not direct claims[.]” but rather “derivative claims,” which “[could] be brought only by or on behalf of the [O’Malley Operating Companies[.]]” Accordingly, Matthew argued that Michael needed to plead either that he had made demand on the directors or managers to bring suit or that demand was excused. *See generally Werbowsky v. Collomb*, 362 Md. 581 (2001); *Nathanson v. Tortoise Cap. Advisors LLC*, 267 Md. App. 1 (2025).

Matthew requested that Michael’s suit be dismissed in its entirety. In the alternative, he requested that the suit be stayed to allow the O’Malley Operating Companies to form a special litigation committee to evaluate Michael’s claims.

Foster also moved to dismiss Michael’s complaint. Like Matthew, Foster argued that Michael’s claims were derivative claims disguised as direct claims and that the circuit court did not have subject matter jurisdiction over the claims concerning the administration of the estate.

Michael opposed the motions. He argued that, under section 10-103(a) of the Estates and Trusts Article (2001, 2022 Repl. Vol.), a person has one year after the close of an estate to assert a claim against the personal representative (and has even longer to assert a claim for fraud).⁴ He observed, however, that, under section 5-407 of the Estates and Trusts Article, “[a] judicial probate may be reopened and a new proceeding held” only upon “request by an interested person [that is made] within 18 months from the death of the decedent[.]”⁵ Because he filed suit within a year after the estate was closed

⁴ Section 10-103(a) provides as follows:

(a)(1) If no action or proceeding involving the personal representative is pending one year after the close of the estate pursuant to § 5-709 of this article or § 10-101 of this subtitle, the personal representative shall be discharged from any claim or demand of any interested person.

(2) The rights so barred do not include rights to recover from a personal representative for fraud, material mistake, or substantial irregularity.

Section 5-709 states that “[a]n estate under modified administration shall close not later than 13 months from the date of appointment, if a verified final report under modified administration is filed and all probate fees and inheritance taxes are paid.” Section 10-101(a)(1) states that “[t]he final approval of the final account automatically closes the estate.”

⁵ Section 5-407 provides as follows:

A judicial probate may be reopened and a new proceeding held if, following a request by an interested person within 18 months from the death of the decedent, the court finds the existence of any fact which would permit the holding of a proceeding pursuant to § 5-304(b) of this title.

Section 5-304(b) provides as follows:

but more than 18 months after the decedent’s death, Michael argued that the circuit court must have subject matter jurisdiction over his claims—otherwise, he would have no forum in which to pursue them.

Michael denied that he had released his claims against Matthew in his capacity as a fiduciary of their father’s estate, but he did not offer much detail about whether he had waived those claims by consenting to the fifth and final administration account and the closing of the estate. Michael claimed not to have released his claims against Matthew as personal representative, and he denied that collateral estoppel barred those claims. Finally, Michael argued, briefly, that he had asserted direct, not derivative, claims against Matthew in his capacity as a fiduciary of the O’Malley Operating Companies. Michael asked that the court grant him leave to amend the complaint if it concluded that he had asserted direct rather than derivative claims.

An administrative probate may be set aside and a proceeding for judicial probate instituted if, following a request by an interested person within 18 months of the death of decedent, the court finds that:

- (1) The proponent of a later offered will, in spite of the exercise of reasonable diligence in efforts to locate any will, was actually unaware of the existence of a will at the time of the prior probate;
- (2) The notice provided in § 2-210 of this article was not given to such interested person nor did the interested person have actual notice of the petition for probate; or
- (3) There was fraud, material mistake, or substantial irregularity in the prior probate proceeding.

Michael did not dispute Matthew’s assertion that the court could consider the exhibits to Matthew’s motion without transforming it into a motion for summary judgment.

After a hearing, the circuit court issued a written decision. In brief, the court dismissed the claims pertaining to the estate with prejudice but dismissed the claims pertaining to the O’Malley Operating Companies without prejudice and with leave to amend.

In Count I, Michael had sought an accounting of the decedent’s estate and the O’Malley Operating Companies. Insofar as Count I sought an accounting of the estate, the court concluded that it was defective because Michael had failed to join a necessary party—his stepmother, the co-personal representative. In addition, the court characterized the request for an accounting of the estate as “an impermissible end-run around” the orphans’ court. The court dismissed Count I with prejudice insofar as it sought an accounting of the estate.

Insofar as Count I sought an accounting of Matthew’s interactions with the O’Malley Entities, the court concluded that it was a derivative claim and that, “if it [could] be asserted at all,” it “should [have been] asserted on behalf of the O’Malley [Operating Companies], not [Michael] individually.” The court dismissed that part of Count I without prejudice and with leave to amend, so that Michael could “plead compliance with the derivative demand requirement or an applicable exception.”

The court took a similar approach to Count II, which alleged that Matthew had breached his fiduciary duties to the estate and to the O'Malley Entities. Insofar as the count concerned Matthew's duties to the estate, the court characterized it as "an impermissible end-run" around the orphans' court. Insofar as the count concerned Matthew's obligations to the O'Malley Entities, the court concluded that it was a derivative claim. The court dismissed Count II with prejudice insofar as it concerned Matthew's duties to the estate but without prejudice and with leave to amend insofar as it concerned Matthew's duties to the O'Malley Entities.

The court took the same approach to: Count III, which alleged that Michael and Foster had been unjustly enriched; Count IV, which alleged that Michael and Foster had aided and abetted the other's breach of his fiduciary duties; and Count V, which alleged that Michael and Foster had conspired to breach their fiduciary duties. Insofar as those counts concerned the estate, the court characterized them as "an impermissible end-run around" the orphans' court. Insofar as the counts concerned the O'Malley Entities, the court concluded that they were derivative claims. The court dismissed Counts III, IV, and V with prejudice insofar as they concerned the estate but without prejudice and with leave to amend insofar as they concerned any of the O'Malley Entities.

Michael noted an appeal. In his responsive brief, Matthew asserted that Michael had no right to appeal at that time, because an order dismissing a complaint with leave to amend is not an appealable final judgment. *See, e.g., Makovi v. Sherwin-Williams Co.*, 311 Md. 278, 281 (1987). We stayed Michael's appeal to give him the opportunity to

obtain an order dismissing his complaint without further leave to amend. *See* Md. Rule 2-322(c).

Michael obtained an order to that effect on August 19, 2024. He appealed that order in a timely manner, and we consolidated his two appeals.

QUESTIONS PRESENTED

Michael presents two questions for our review, which we have rephrased as follows:

1. Did the circuit court err when it granted Matthew’s motion to dismiss the claims against the fiduciaries of the estate?
2. Did the circuit court err when it granted Matthew’s motion to dismiss the claims against the fiduciaries of the O’Malley Operating Companies?⁶

We answer “no” to both questions and affirm the circuit court’s judgment.⁷

⁶ Michael framed his questions as follows:

1. Whether Md. Code. Ann., Est. & Trusts § 10-103, when read in conjunction with Md. Code Ann., Est. & Trusts and § 5-107, vests the Circuit Court with jurisdiction to hear the claims related to the Estate or the administration thereof.
2. Whether Plaintiff’s claims related to the business entities are derivative in nature.

⁷ Mark Foster is an appellee in this case, but he did not file a brief. His failure to file a brief means that he could “not present argument except with permission of the Court,” but it does not prevent us from affirming the judgment in his favor. Md. Rule 8-502(d).

STANDARD OF REVIEW

On review of a grant of a motion to dismiss, an appellate court analyzes whether the trial court’s decision was legally correct and gives no deference to the trial court. *See, e.g., Chavis v. Blibaum & Assocs., P.A.*, 476 Md. 534, 551 (2021). We “may affirm the dismissal of a complaint on any ground adequately shown by the record, regardless of whether the trial court relied on that ground or whether the parties raised that ground.” *Bennett v. Ashcraft & Gerel, LLP*, 259 Md. App. 403, 451 (2023).

In general, “[i]f, on a motion to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 2-501[.]” Md. Rule 2-322(c). Nonetheless, if a document “merely supplements the allegations of the complaint, and the document is not controverted, consideration of the document does not convert the motion into one for summary judgment.” *Advance Telecom Process LLC v. DSFederal, Inc.*, 224 Md. App. 164, 175 (2015) (citing *Margolis v. Sandy Spring Bank*, 221 Md. App. 703, 710 n.4 (2015)). In addition, a court may take judicial notice of “public records such as court documents,” including the court orders and related documents that Matthew attached to

his motion to dismiss. *Abrishamian v. Washington Med. Grp., P.C.*, 216 Md. App. 386, 413 (2014); accord *In re H.R.*, 238 Md. App. 374, 401-02 (2018).

Michael does not contend that the circuit court transformed the motion to dismiss into a motion for summary judgment by considering the will and the public records that Matthew attached to his motion.

DISCUSSION

1. The Claims Against Matthew as a Fiduciary of the Estate

The circuit court dismissed Count I, the claim for an accounting against the estate, in part because Michael failed to join Matthew’s co-personal representative. The court recognized that a former co-personal representative is a necessary party in any action to reopen the estate and to obtain an accounting of the personal representatives’ conduct in administering it. *See* Md. Rule 2-211(a). As Michael does not argue otherwise, he has forfeited any right to contest that aspect of the circuit court’s ruling. *See, e.g., HNS Dev., LLC v. People’s Counsel for Baltimore Cnty.*, 425 Md. 436, 459 (2012). The court, however, should have granted leave to amend (by joining the absent stepmother) instead of dismissing the allegations outright. *See Bender v. Secretary, Maryland Dep’t of Personnel*, 290 Md. 345, 350 (1981).

The circuit court dismissed Counts I through IV principally because it believed that Michael’s action was, in the court’s words, an “end-run” around the orphans’ court. In debating the merits of that decision, the parties spend a great deal of effort sparring

over whether the circuit court had “jurisdiction” over Michael’s claims concerning Matthew’s conduct as a personal representative of the decedent’s estate.

Section 1-501 of the Courts and Judicial Proceedings Article (1974, 2020 Repl. Vol.) describes the jurisdiction of the circuit courts:

The circuit courts are the highest common-law and equity courts of record exercising original jurisdiction within the State. Each has full common-law and equity powers and jurisdiction in all civil and criminal cases within its county, and all the additional powers and jurisdiction conferred by the Constitution and by law, except where by law jurisdiction has been limited or conferred exclusively upon another tribunal.

Section 1-501 implies that the circuit court would have jurisdiction over Michael’s common-law and equitable claims, unless “by law jurisdiction has been limited or conferred exclusively upon another tribunal.”

Citing section 1-202(a) of the Estates and Trusts Article and *Ibru v. Ibru*, 239 Md. App. 17, 34 (2018), Matthew argues that the administration of decedents’ estates is specially committed to the orphans’ courts. Citing *Kroll v. Fisher*, 182 Md. App. 55 (2008), and *Shapiro v. Ryan*, 233 Md. 82 (1963), Matthew goes on to argue that a circuit court may decide issues relating to the administration of an estate only when the orphans’ court cannot afford a complete and adequate remedy. Because the orphans’ court could order an accounting (or perhaps could have ordered one before it closed the decedent’s estate), Matthew concludes that the circuit court had no “jurisdiction” to order an accounting in this case.

Michael responds that section 10-103(a) of the Estates and Trusts Article envisions the possibility of an “action or proceeding involving the personal representative” that “is

pending one year after the close of the estate,” but that section 5-407 of the Estates and Trusts Article prohibits the reopening of judicial probate more than 18 months after the decedent’s death. He asserts that the circuit court must have jurisdiction to decide an action against the personal representative that is brought less than a year after the close of the estate but more than 18 months after the decedent’s death. In support of his contention, Michael cites *Villarreal v. Glacken*, 63 Md. App. 114 (1985), in which this Court tacitly assumed that the decedents’ heirs could pursue a fraud claim against the personal representative in circuit court more than 18 months after the decedent’s death but ultimately concluded that limitations barred the claims.

We need not decide whether the circuit court lacked jurisdiction to consider Michael’s challenges to his brother’s conduct as personal representative of their father’s estate. The order closing the decedent’s estate reflects that Michael agreed to the terms of a settlement and waived any objections to the fifth and final administration account and the closing of the estate. Michael waived any objections to the final account and the closing of the estate even though his complaint establishes that he knew of much of the conduct about which he now complains. In part because of Michael’s agreement to the terms of the settlement and his waiver of any objections, the orphans’ court approved the final account and closed the estate. In these circumstances, Michael has lost the right to challenge the conduct of his brother as personal representative. *Cf. Downtown Brewing Co. v. Mayor & City Council of Ocean City*, 370 Md. 145, 151 (2002) (holding that a

party waived right to appeal by accepting a condemnation award and acquiescing in a judgment).

Furthermore, because we may affirm the grant of a motion to dismiss ““on any ground adequately shown by the record, even one upon which the circuit court has not relied or one that the parties have not raised,”” *Monarc Constr., Inc. v. Aris Corp.*, 188 Md. App. 377, 385 (2009) (quoting *Pope v. Bd. of Sch. Comm’rs*, 106 Md. App. 578, 591, (1995)); *Sutton v. FedFirst Fin. Corp.*, 226 Md. App. 46, 74 (2015), we may examine whether res judicata barred Michael’s claims against Matthew in his capacity as a personal representative.

“[R]es judicata bars the relitigation of a claim if there is a final judgment in a previous litigation where the parties, the subject matter and causes of action are identical or substantially identical as to issues actually litigated and as to those which could have or should have been raised in the previous litigation.” *Anne Arundel Cnty. Bd. of Educ. v. Norville*, 390 Md. 93, 106-07 (2005). Res judicata applies not only to claims that were decided but also to those that “*could have been decided.*” *Id.* at 107 (emphasis in original).

“[T]he elements of res judicata, or claim preclusion, are: (1) that the parties in the present litigation are the same or in privity with the parties to the earlier dispute; (2) that the claim presented in the current action is identical to the one determined in the prior adjudication; and, (3) that there has been a final judgment on the merits.” *Id.* Here, the parties to this case were among the parties to the orphans’ court proceeding, the claim for

an accounting is one that Michael could have litigated in the orphans’ court proceedings, and the order approving the fifth and final administration account was a final judgment. *See Schlossberg v. Schlossberg*, 275 Md. 600, 612 (1975). The orphans’ court’s judgment is, therefore, res judicata as to any claims that Michael “could have” raised in that proceeding, including his claim for an accounting from Matthew in his capacity as co-personal representative.⁸

2. The Claims Against the Fiduciaries of the O’Malley Operating Companies

All five counts of the complaint challenge Michael’s conduct as a fiduciary of the O’Malley Entities. At least three of those counts challenge Foster’s conduct in his capacity as a fiduciary of the O’Malley Operating Companies. The circuit court determined that those counts alleged derivative claims that belonged to the companies, not direct claims that belonged to Michael. Thus the court determined that Michael was obligated either to demand that the company’s fiduciaries bring the suit or to explain why demand was excused. The court dismissed the counts because Michael had failed to do so.⁹

⁸ In view of our disposition of this issue, we need not decide whether Michael released the claims in this case when he released Matthew only from any “liabilities arising in connection with any mistake of fact or law or negligent or careless act or omission . . . in connection with the administration of the Estate[.]” Nor do we need to decide whether the orphans’ court decided some issue of fact or law against Michael when it approved the settlement and approved the fifth and final administrative account, so that collateral estoppel might bar him from relitigating that issue in the current action.

⁹ Both parties lump the O’Malley Entities together when discussing Maryland’s demand requirement and the distinction between direct and derivative claims. Yet only one of the O’Malley Operating Companies—The P.T. O’Malley Lumber Company,

In general, the responsibility for the managerial oversight of a corporation lies with its directors. *Eastland Food Corp. v. Mekhaya*, 486 Md. 1, 22 (2023).

“Shareholders are not ordinarily permitted to interfere in the management of the company; they are the owners of the company but not its managers.” *Werbowsky v. Collomb*, 362 Md. at 599; *accord Nathanson v. Tortoise Cap. Advisors, LLC*, 267 Md. App. at 42.

“As a check on this broad managerial authority, directors are required to perform their duties in good faith, in a manner they reasonably believe to be in the best interest of the corporation, and with the care that an ordinarily prudent person in a like position would use under similar circumstances.” *Werbowsky v. Collomb*, 362 Md. at 599; *accord Eastland Food Corp. v. Mekhaya*, 486 Md. at 22-23; Maryland Code (1975, 2025 Repl. Vol.) § 2-405.1 of the Corporations and Associations Article. “That obligation runs,

Inc.—is actually a Maryland corporation. O’Malley Wood Products, Inc., is a Pennsylvania corporation, and O’Malley Timber Products LLC is a Maryland limited liability company. Nonetheless, the status of the companies does not affect the ultimate analysis, because Michael would need to satisfy a demand requirement in all instances. With regard to the Pennsylvania corporation, Pennsylvania recognizes the distinction between direct and derivative actions (*see, e.g., Vierling v. Baxter*, 141 A. 728, 729 (Pa. 1928); *Hill v. Ofalt*, 85 A.3d 540, 548-49 (Pa. Super. 2014)), and it has a more stringent demand requirement than does Maryland. *See Werbowsky v. Collomb*, 362 Md. at 615 (citing *Drain v. Covenant Life Ins. Co.*, 712 A.2d 273 (Pa. 1998); *Cuker v. Mikalauskas*, 692 A.2d 1042 (Pa. 1997)). With regard to the Maryland limited liability company, section 4A-801 of the Corporations and Associations Article states that a plaintiff “may bring a derivative action to enforce a right of a limited liability company . . . to the same extent that a stockholder may bring an action for a derivative suit under the corporation law of Maryland.”

however, to the corporation and not, at least directly, to the shareholders.” *Werbowsky v. Collomb*, 362 Md. at 599.

In *Waller v. Waller*, 187 Md. 185, 189-90 (1946), the Court discussed the distinction between direct claims, which belong to individual shareholders, and claims that belong to the corporation alone:

It is a general rule that an action at law to recover damages for an injury to a corporation can be brought only in the name of the corporation itself acting through its directors, and not by an individual stockholder, though the injury may incidentally result in diminishing or destroying the value of the stock. The reason for this rule is that the cause of action for injury to the property of a corporation or for impairment or destruction of its business is in the corporation, and such an injury, although it may diminish the value of the capital stock, is not primarily or necessarily a damage to the stockholder, and hence the stockholder’s derivative right can be asserted only through the corporation. The rule is advantageous not only because it avoids a multiplicity of suits by the various stockholders, but also because any damages so recovered will be available for the payment of debts of the corporation, and, if any surplus remains, for distribution to the stockholders in proportion to the number of shares held by each.

Accord Eastland Food Corp. v. Mekhaya, 486 Md. at 37-38.

“The rule is applicable even when the wrongful acts were done maliciously with intent to injure a particular stockholder.” *Waller v. Waller*, 187 Md. at 190; *accord Eastland Food Corp. v. Mekhaya*, 486 Md. at 38. “It is immaterial whether the directors were animated merely by greed or by hostility toward a particular stockholder, for the wrongdoing affects all the stockholders alike.” *Waller v. Waller*, 187 Md. at 191; *accord Eastland Food Corp. v. Mekhaya*, 486 Md. at 38.

A stockholder may “bring suit in his own name to recover damages from an officer of a corporation for acts which are violations of a duty arising from contract or

otherwise and owing directly from the officer to the injured stockholder, though such acts are also violations of duty owing to the corporation.” *Waller v. Waller*, 187 Md. at 192.

But to be entitled to maintain a direct action, stockholders must allege that they have suffered ““an injury that is separate and distinct from any injury suffered either directly by the corporation or indirectly by the stockholder[s] because of the injury to the corporation.”” *Oliveira v. Sugarman*, 451 Md. 208, 240 (2017) (quoting James J. Hanks, Jr., *Maryland Corporation Law* § 7.12(b), at 276.18 (1994, 2015 Supp.)); accord *Eastland Food Corp. v. Mekhaya*, 486 Md. at 38.

Thus, for example, a minority shareholder could maintain a direct action against the directors and majority shareholders of a closely-held family business where the directors and majority shareholders were alleged to have acted oppressively to thwart the minority shareholder’s reasonable expectation of employment, participation in corporate management, and a share of the earnings. See, e.g., *Eastland Food Corp. v. Mekhaya*, 486 Md. at 26-34. The minority shareholder, however, could not maintain a direct action against the directors and majority shareholders to recover the excessive compensation that they had alleged paid to themselves and corporate funds that they had allegedly diverted to their personal use. *Id.* at 39-41. “[T]he benefits of excessive compensation and funds for personal use came at the corporation’s expense, not [the minority shareholder’s] directly.” *Id.* at 41.¹⁰

¹⁰ For examples of other claims that Maryland courts have characterized as “derivative” rather than direct, see *Oliveira v. Sugarman*, 451 Md. 208, 244-45 (2017) (recognizing that allegations of share dilution may give rise to direct claims in some

If shareholders cannot show that they have suffered an injury that is separate and distinct from the injury suffered by the corporation, they must, before filing suit, either demand that the corporation act directly on its own behalf or plead facts sufficient to show that a demand would be futile. *Werbowsky v. Collomb*, 362 Md. at 620; *accord Eastland Food Corp. v. Mekhaya*, 486 Md. at 38 (stating that, if the shareholder does not allege an injury that is separate and distinct from the injury suffered by the corporation, “the claim belongs to the corporation, and if the directors improperly fail to pursue it, stockholders may pursue a derivative claim on the corporation’s behalf[]”).

The allegations of Michael’s complaint show that he does not claim to have suffered an injury that is separate and distinct from the injury suffered by the O’Malley Operating Entities. In the three-page, single-spaced indictment of Matthew’s allegedly “nefarious conduct” in his capacity as a corporate fiduciary, Michael asserts, among other things, that:

- Matthew caused two of the O’Malley Entities to enter into a lease that “favored” one “to the detriment of another”;
- Matthew obligated one O’Malley Entity to make payments to another pursuant to “sham loans”;

instances, but holding that the allegations in that case set forth only a derivative claim); *Waller v. Waller*, 187 Md. at 198-94 (holding that claims of mismanagement that resulted in a receivership were derivative claims); *Mona v. Mona Elec. Group*, 176 Md. App. 672, 705-06 (2007) (holding that allegation that majority shareholder received excessive compensation sought to recover for an injury to the company and, therefore, was a derivative claim); *Danielewicz v. Arnold*, 137 Md. App. 601, 616 (2001) (holding that claim alleging dilution of plaintiff’s interest through corporate transactions was a derivative claim).

- Matthew made a “sweetheart deal” that obligated one O’Malley Operating Company to pay a fee to another, “though no actual services were provided”;
- Matthew increased his pay and awarded himself bonuses without shareholder approval, even though he “repeatedly” claimed that the O’Malley Operating Companies were going through financial hardship;
- Matthew directed one O’Malley Operating Company to purchase lumber from another “at prices far in excess of fair-market prices” and to pay “for waste-wood that could not be used for any necessary business purpose”;
- Matthew prevented the O’Malley Operating Companies from exercising their options to purchase the shares held in trust for Peter and Paul even though “it was clearly against the interests of the [O’Malley Operating Companies] not to exercise the options”;
- Michael authorized “revolving door intra-corporate loans, not in writing and for no apparent reason or business purpose”;
- Matthew “improperly misappropriat[ed] assets of the O’Malley Entities to fund a lavish lifestyle that cannot be explained based on his salary or corporate distributions”;
- Matthew directed that one of the O’Malley Operating Companies pay the lawyer who represented him in his capacity as personal representative; and
- Matthew “wasted” the assets of the O’Malley Operating Companies “in return for [Foster’s] vote in favor of Matthew’s wishes.”

Each of these allegations concerns conduct that purportedly injured one or more of the O’Malley Entities. None of the allegations concerns conduct that purportedly injured Michael in any way that is separate and distinct from the purported injury to one or more of the O’Malley Entities. In particular, none of the allegations concern purported “violations of a duty arising from contract or otherwise and owing directly from

[Matthew] to [Michael].” *Waller v. Waller*, 187 Md. at 192. The allegations about excessive compensation indisputably belong to the companies alone under established law. *Eastland Food Corp. v. Mekhaya*, 486 Md. at 37; *Mona v. Mona Elec. Group, Inc.*, 176 Md. App. 672, 705 (2007). Even the allegation about the options is characterized as an offense “against the interests of the O’Malley Operating Companies,” and not as an offense against Michael himself (in that it required him to use his own funds to acquire the interests of Peter and Paul). To the extent that Michael claims to have suffered any injury at all, it is only because his interests may have declined in value as the companies have declined in value as a result of Matthew’s alleged misdeeds. The allegations, therefore, do not set forth a direct claim that belongs to Michael alone; they set forth a claim that belongs only to the allegedly injured entity itself.

In advocating for a contrary conclusion, Michael says that his claims “are virtually identical to that of the plaintiff in *Eastland*,” who was entitled to bring a direct action. To the contrary, the claims are not identical. In fact, they are not even similar.

In *Eastland* the plaintiff “alleged one count of stockholder oppression seeking equitable relief short of dissolution[.]” *Eastland Food Corp. v. Mekhaya*, 486 Md. at 11. He specifically alleged that the directors and majority shareholders had frustrated his reasonable expectation that he would have a job, participate in management, and share in the profits of a small, closely-held business. *Id.* at 15; *id.* at 31. He based his claim on earlier cases that recognize that a shareholder may seek the involuntary dissolution of the corporation when “[t]he acts of the directors or those in control of the corporation are

illegal, oppressive, or fraudulent[.]”¹¹ but may also seek forms of equitable relief short of dissolution, including an accounting. *Id.* at 26-34 (discussing *Bontempo v. Lare*, 444 Md. 344 (2015); *Edenbaum v. Schwarcz-Osztreicherne*, 165 Md. App. 233, 257 (2005)).

Michael’s complaint bears no resemblance to the complaint (more precisely, the proposed amended complaint) filed by the plaintiff in *Eastland*. Michael does not allege oppression of a minority shareholder. He does not claim that Matthew has frustrated his reasonable expectations. He asked for an accounting, but not as a form of equitable relief short of dissolution. He asserted claims, including claims for damages, that belong solely to the O’Malley Entities that, he says, have been injured by Matthew’s alleged misconduct.

In summary, Michael’s claims are not separate and distinct from those of the O’Malley Entities. Therefore, he has not brought a direct action. Rather, his claims are derivative of the claims of the O’Malley Entities that, he says, his brother has damaged. Before he could assert those claims, Michael was required either to demand that directors or managers of the entities cause them to assert the claims or to plead, “in a very particular manner,” that a majority of the directors or managers “are so personally and directly conflicted or committed to the decision in dispute that they cannot reasonably be

¹¹ Section 3-413(b)(2) of the Corporations and Associations Article.

expected to respond to a demand in good faith and within the ambit of the business judgment rule.” *Werbowsky v. Collomb*, 362 Md. at 620.¹²

Michael did not make demand, and he did not plead that demand was excused. The court, therefore, did not err in dismissing his claims against Matthew as a fiduciary of the O’Malley Entities and against Foster as a fiduciary of the O’Malley Operating Companies.

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

¹² And with respect to O’Malley Wood Products, Inc., which is a Pennsylvania corporation, Michael must make demand even if he could establish that demand was excused under principles recognized in Maryland law. *See Werbowsky v. Collomb*, 362 Md. at 615 (citing *Drain v. Covenant Life Ins. Co.*, 712 A.2d 273 (Pa. 1998); *Cuker v. Mikalauskas*, 692 A.2d 1042 (Pa. 1997)).