Court of Appeal No. 51770-1-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

KENT L. and LINDA DAVIS; and SUSAN MAYER, derivatively on behalf of OLYMPIA FOOD COOPERATIVE,

Appellants,

v.

GRACE COX; ROCHELLE GAUSE; ERIN GENIA; T.J. JOHNSON; JAYNE KASZYNSKI; JACKIE KRZYZEK; JESSICA LAING; RON LAVIGNE; HARRY LEVINE; ERIC MAPES; JOHN NASON; JOHN REGAN; ROB RICHARDS; JULIA SOKOLOFF; and JOELLEN REINECK WILHELM,

Respondents.

APPELLANTS' MOTION FOR RECONSIDERATION

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I. IDENTITY OF MOVING PARTIES AND RELIEF SOUGHT

Under RAP 12.4, Appellants Kent Davis, Linda Davis, and Susan Mayer, respectfully ask the Court to reconsider its decision terminating review, filed on February 19, 2020.

II. INTRODUCTION

The Court erred in concluding that the business judgment rule shelters directors who violate corporate rules; in holding that a breach of loyalty requires a showing that board members had financial interests at stake in the boycott; and in dismissing the plaintiffs' claims for prospective relief without first allowing them an opportunity to seek leave to amend their complaint. For these reasons, Plaintiffs respectfully request that the Court reconsider its opinion.

The Olympia Food Co-op was founded on principles of collective management, cooperative organization, and consensus decision making—principles that attracted those who paid dues in exchange for their membership. *See* CP 74. Those same principles informed the boycott policy providing that the Co-op would only adopt a boycott when the staff agreed to do so. The board disregarded this policy when it purported to adopt the Israel boycott despite a lack of staff consensus. Because the board had no authority to proceed absent staff consensus, its action was invalid and open to member challenge. For this reason, the business

judgment rule does not apply. The board's act was not in the "authority of management," a prerequisite for applying the rule's protections, even if it was within the "power of the corporation"—an important distinction the Court's opinion did not appreciate.

Even if the directors had authority to ignore the boycott policy, the business judgment rule would not apply because the directors breached their duty of loyalty. For a nonprofit corporation like the Co-op, loyalty is breached when a director fails to consider whether the action will promote the corporation's interests and fails to act in good faith. Particularly in the nonprofit context, such a breach is not limited to circumstances involving economic self-interest as the opinion suggests. Because the evidence, viewed in the plaintiffs' favor—at it must be at this stage—would enable a rational jury to find such a breach, summary judgment was not warranted.

Finally, it was clear from the complaint that the plaintiffs brought their injunctive claims against "the Board"—i.e., its members in their corporate, not individual, capacities. Before the trial court, the plaintiffs indicated that they would seek leave to amend to add current board members, CP 428 & n.12, and the trial court suggested that amendment may be warranted, CP 609. Plaintiffs made the same argument to this Court in their briefing and at oral argument. App. Reply Br. at 3.

This Court should have remanded to allow the trial court to determine, in the first instance, whether to permit amendment. For all these reasons, the Court should reconsider its opinion, reverse the trial court, and remand for further proceedings.

III. GROUNDS FOR RECONSIDERATION AND ARGUMENT

A. The Business Judgment Rule Does Not Apply Because the Israel Boycott Was Enacted in a Manner Beyond the Authority of Management

It is bedrock corporate law that bylaws form a binding contract between a corporation and its shareholders or members having an interest in the entity. The directors and officers are beholden to those members and may exercise only the authority they have been delegated, consistent with the entity's articles and bylaws. When the board disregards its own rules for regulating or managing the corporation's affairs, as the Co-op board did here, members may bring claims for breach of duty, injunctive relief, or declaratory judgment. Summary judgment dismissal of the claims here was improper.

The Court erred in agreeing with Division One's prior, reversed opinion holding that the board was not bound to follow Co-op policies. Indeed, the Supreme Court explicitly rejected that holding.[1] This Court

[1] In footnote 2 of the unanimous Supreme Court opinion, the Court concluded that "one disputed ***material*** fact in this case is whether a boycott of

concluded that the boycott policy "never removed from the board its general authority to manage the Co-op, including its authority to adopt boycotts." Slip op. at 12. But the boycott policy *itself*, once adopted, functioned as a bylaw and bound the board, which to this day has never succeeded in amending or repealing the boycott policy, despite having attempted to do so. CP 376, 385.[2] The Court's determination that the board could permissibly ignore the boycott policy was erroneous.

1. Background on Corporate Governance

"Statutes, articles of incorporation and bylaws define the powers of the corporation's board of directors." 2 FLETCHER CYCLOPEDIA OF THE LAW OF CORPS. § 505 ("Under most statutes, the directors are entrusted with the control and management of the business of the corporation. This

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Israel-based companies is a 'nationally recognized boycott,' as the Cooperative's boycott policy requires for the board to adopt a boycott." *Davis v. Cox*, 183 Wn.2d 269, 281 n.2 (2015) (emphasis added). The Court then observed that Division One had contrarily "reasoned that this is an ***immaterial*** fact, on the theory that the Cooperative's board is not bound by its adopted policies because its inherent authority to manage the affairs of the corporation includes the authority to disregard its adopted policies." *Id.* (emphasis added). By rejecting Division One's conclusion that this fact was immaterial, the Court clearly disapproved its reasoning that the Co-op was free to disregard its adopted policies.

[2] Indeed, there is record evidence that the board members understood they were so bound. *See* CP 376 (testimony of board member Sokoloff) (**Q**: And that meant your Board, unless you amended the policy, was bound by the boycott policy, bound to follow it? **A**: Or we could change it. **Q**. Right. But you didn't change it. Can we agree on that? **A**. Correct. **Q**. Alright. So you were bound by the boycott policy? **A**. (Nodding head). **Q**. Correct? **A**. Okay. **Q**. Am I right? **A**. Yes.).

empowers the directors to do whatever is necessary to manage the ordinary business of the corporation, subject to any express restrictions in the charter, bylaws, or the general law."). Corporate bylaws may limit directors' powers, and "the corporation's directors cannot … do other acts that are beyond the powers conferred on the corporation by its charter or bylaws." 2 FLETCHER CYCLOPEDIA OF THE LAW OF CORPS., §§ 510, 511; *Moore v. Los Lugos Gold Mines*, 172 Wash. 570, 586, 21 P.2d 253 (1933) ("When a corporation certifies that the shares represented by a certificate are nonassessable, that provision becomes part of the contract between the corporation and the stockholder. The corporation is powerless to levy an assessment on those shares in violation of the contract.").

Bylaws are a binding part of the contract between a corporation and its members. *See City of Providence v. First Citizens BancShares, Inc.*, 99 A.3d 229, 234 (Del. Ch. 2014); *Airgas, Inc. v. Air Prod. & Chem., Inc.*, 8 A.3d 1182, 1188 (Del. 2010). The bylaws serve as the private law of the corporation. *State v. Goldsmith Dredging Co.*, 150 Wash. 366, 369, 273 P. 196 (1928) ("The by-laws of this corporation, requiring as they do that the secretary keep a book containing the names and addresses of stockholders, have all the force and effect of a statute."). "The fundamental purpose of a corporation's bylaws is not to mandate how the board should decide specific substantive business decisions, but rather to

define the process and procedures by which those decisions are made." 18A AM. JUR. 2D CORPS. § 252. Unless it is repealed, a bylaw is a continuing rule for the corporation. *Schraft v. Leis*, 236 Kan. 28, 35, 686 P.2d 865 (1984). It is well established that directors must obey the corporate governance rules, including bylaws, until they are amended or repealed by regular process. *See St. Yves v. Mid State Bank*, 50 Wn. App. 95, 748 P.2d 633 (1987) ("[I]f the bylaws provide otherwise, the directors have no power to dismiss officers at pleasure."), *rev'd on other grounds*, 111 Wn.2d 374 (1988).[3]

Bylaws, which are rules of action to be applied on future occasions, may be contrasted with resolutions, which are enactments applying to a single act of the corporation. *See Aldrich v. State ex rel. Cox*, 658 S.W.2d 323, 327 (Tex. App. 1983) (citations omitted); *Brennan v. Minneapolis Soc. for Blind, Inc.*, 282 N.W.2d 515, 523 (Minn. 1979) ("[B]ylaws are the laws adopted by the corporation for the regulation of its actions and the rights and duties of its members."); *Budd v. Multnomah Street Ry. Co.*, 15 Or. 413, 15 P. 659, 662 (1887); 8 FLETCHER CYCLOPEDIA OF THE LAW OF CORPS. § 4167 (equating a bylaw to "a

[3] Bylaws can be waived, but doing so requires the members to consent. *See Bay City Lumber Co. v. Anderson*, 8 Wn.2d 191, 204, 111 P.2d 771 (1941) ("If [a corporation] acts or contracts in disregard of a by-law with the consent or acquiescence of the stockholders or members, that is a waiver of the by-laws").

relatively permanent and continuing rule that is general in its operation and nature and is to be applied on all future occasions to all persons, affairs or situations of the class affected by it"). It is well established that a board resolution cannot override a bylaw. *Hollinger Int'l, Inc. v. Black*, 844 A.2d 1022, 1080 (Del. Ch. 2004) ("[A] board cannot override a bylaw requirement by merely adopting a resolution.").

2. Corporate Decisions that Violate Procedural Requisites, Like the Israel Boycott, Are Beyond the Authority of Management

The business judgment rule protects only business decisions, and therefore does not apply unless the decision "is within the power of the corporation and the authority of management." *Scott v. Trans-System, Inc.*, 148 Wn.2d 701, 709, 64 P.3d 1 (2003). Here, the decision to adopt the Israel boycott was—at a minimum—outside the authority of management because it violated the boycott policy.

The Court held differently in this case, relying on *Hartstene Pointe* for the proposition that "a challenge to the procedure with which the boycott was adopted does not undermine the power of the corporation or the authority of management to amend Co-op policies." Slip op. at 12 (citing *Hartstene Pointe Maint. Ass'n v Diehl*, 95 Wn. App. 339, 345, 979 P.2d 854 (1999)). This reading overextends *Hartstene*'s rule. Read properly, *Hartstene* clearly recognized that an act can be within the

"power of the corporation" but outside "the authority of management"—a crucial distinction that the Court neglected to draw here.

In *Hartstene*, the Court considered an appeal seeking to invalidate sanctions imposed on a homeowner for cutting down a tree, thereby violating a decision of the homeowner association's architectural control committee. 95 Wn. App. at 341. On appeal, this Court agreed that the homeowner could not be sanctioned because the five-member committee was not properly composed under the declaration, which required it to consist of three members appointed by the board. *Id.* at 343.

The Court easily dismissed the association's argument raising the statutory defense to ultra vires claims under RCW 24.03.040, which in turn provides that no corporate act "shall be invalid by reason of the fact that the corporation was without capacity or power to do such act."[4] In rejecting this defense, the Court gave the following explanation:

> Diehl does not contend that the [association] lacked authority to regulate the architectural development of the community. Rather, he argues only that the way in which such control was exercised in his case did not conform with the governing documents of the corporation. This is not a challenge to the authority of the corporation, but only to the method of exercising it.

[4] The defense applies to third parties (i.e., a vendor cannot seek to invalidate its own contract with a company on the basis that the company lacked power to enter into the contract), but members (individually or in a derivative capacity) or the corporation itself may raise an ultra vires claim against directors for exceeding their authority. RCW 24.03.040(2)–(3).

Id. at 345. This language does *not* mean that procedural or "method challenges" cannot invalidate corporate action. Indeed, *Hartstene* ultimately *did* invalidate the sanctions at issue there, observing that to find the homeowner's challenge to be "barred by ultra vires would be to hold the regularly adopted corporate procedures a nullity" and would enable the corporation "to disregard its own bylaws that prescribe the make-up of committees." *Id.* at 345 ("In short, the corporate articles and bylaws would be largely meaningless."). Nothing in *Hartstene* suggests that failures to comply with corporate procedures are somehow immune from challenges brought by shareholders.

To the contrary, *Hartstene* recognized the difference between acts that are ultra vires because they are beyond the *corporation's* powers, as opposed to acts that are merely beyond the *board's* powers. This point bears some explication. "Ultra vires" is a term of art that has caused much confusion. As a prominent corporate law treatise explains:

> There is possibly no legal term used as loosely and with so little regard to its strict meaning as the term "ultra vires." Unfortunately, this expression has often been used by courts and writers on corporation law as meaning several different things, and this has resulted in much confusion. Therefore, when the expression is used in the decision of a court, in order to interpret the decision correctly, it is necessary to ascertain the sense in which it is used by construing it with reference to the facts of the particular case. . . An ultra vires act or contract … according to the strict construction of the term, is one not within the express

> or implied powers of the corporation as fixed by its charter, governing statutes, or the common law.

7A FLETCHER CYCLOPEDIA OF THE LAW OF CORPS. § 3399. Thus, in this "strict" sense, an ultra vires act under RCW 24.03.040 is one the corporation cannot perform under its charter or governing law.[5]

However, the fact that an act is within the "power of the corporation," and therefore not ultra vires in this strict sense, does *not* mean it necessarily lies within the "power of the *directors*," or what cases refer to as the "authority of management." *See Scott*, 148 Wn.2d at 709; 7A FLETCHER CYCLOPEDIA OF THE LAW OF CORPS. § 3401 ("An act may be within the powers of a corporation and not within the powers of the directors, for the powers of the latter are derived, not from the legislature, like the powers of the corporation, but from the shareholders in their

[5] In any event, the Court's opinion erred in concluding categorically that "a challenge to the procedure with which the boycott was adopted" cannot implicate "the power of the corporation or the authority of management." Slip op. at 12. In the governmental context, whether a failure to follow procedural requisites renders governmental action ultra vires and void depends on whether the procedure itself advances the policy underlying the statute. *See South Tacoma Way, LLC v. State*, 169 Wn.2d 118, 125–26, 233 P.3d 871 (2010) (failure to notify abutting landowners did not void DOT's sale of land to company where no fraud or collusion was alleged, which was the purpose of providing notice); *compare Noel v. Cole*, 98 Wn.2d 375, 380, 655 P.2d 245 (1982) (failure to prepare environmental impact statement before selling timber rights voided sale, because procedural failure undermined SEPA's statutory purpose of considering environmental impacts). Extending this reasoning here, it is clear the purpose of requiring staff consensus for boycotts was to include staff in collective decision-making and proceed with a boycott only when consensus is achieved. The failure to follow this process undermined the policy behind consensus and collective authority. CP 74, 77.

corporate capacity.").[6] The board's acts outside its authority are voidable by the members or shareholders. 7A FLETCHER CYCLOPEDIA OF THE LAW OF CORPS. § 3402.

Thus, *Hartstene* is fully on-point here. Just as the homeowner there did "not contend that the [association] lacked authority to regulate the architectural development of the community," 95 Wn. App. at 345, neither do the plaintiffs here challenge the ability of the Co-op to adopt boycotts as a general proposition. Nor do they challenge the Co-op's ability to amend the boycott policy such that staff consensus is not necessary. Like the homeowner in *Hartstene*, the plaintiffs do not present "a challenge to the authority of the corporation, but only to the method of exercising it." *Id.* While the boycott policy is in effect, it limits the board's ability to

[6] This distinction between acts that are beyond the corporation's powers (or *ultra vires*), and acts that are beyond the authority of management has also been described by Delaware's Chancery Court as follows:

> The essential distinction between voidable and void acts is that the former are those which may be found to have been performed in the interest of the corporation but beyond the authority of management, as distinguished from acts which are *ultra vires* . . . . The practical distinction … is that voidable acts are susceptible to cure by shareholder approval while void acts are not.

Nevins v. Bryan, 885 A.2d 233, 245 (Del. Ch. 2005) (citation omitted). Because Delaware has extensive expertise with the law of corporations, Delaware decisions may be particularly persuasive. *In re F5 Networks, Inc.*, 166 Wn.2d 229, 239–40, 207 P.3d 433 (2009).

adopt boycotts—they must do so pursuant to the policy. The board has the power to amend and adopt policies—not ignore them.[7] CP 70.

3. The Boycott Policy Functions as a Bylaw Defining the Authority of Management, Which Was Exceeded by Adoption of the Israel Boycott

Bylaws are "the code or codes of rules adopted for the regulation or management of the affairs of the corporation irrespective of the name by which such group is designated in the articles or bylaws." RCW 24.03.005(4). Thus "what counts in determining the governing bylaws of a corporation have more to do with function than form." *Kitazato v. Black Diamond Hospitality Inv., LLC*, 655 F. Supp. 2d 1139, 1146 (D. Haw. 2009) (discussing identical Hawaiian statutory definition and determining that the declaration constitutes the bylaws); *New v. Kroeger*, 167 Cal. App. 4th 800, 822, 84 Cal. Rptr. 3d 464 (2008) (noting that similar statutory definition, in the context of a religious corporation, was "designed specially to permit bylaws …. to include other types of rules and regulations to be found in various religious documents such as canons, constitutions, or rules of other bodies; church traditions if sufficiently

[7] By way of analogy, the fact that the legislature is bound to obey its own effective statutes does not itself undermine the legislature's power or ability to repeal, amend, or enact new statutes.

ascertainable; rules of a religious superior; and similar sources") (citation omitted).

The Co-op's boycott policy functions as a bylaw. As a rule governing the management of the corporation, it conditions boycotts on staff consensus. *See* CP 77. The board has the authority to *amend* that policy, to be sure, but it cannot functionally revoke it by way of resolution without member consent—which is precisely what it tried to do by adopting the Israel boycott. *See Hollinger Int'l*, 844 A.2d at 1080. This decision was beyond the "authority of management," and therefore the business judgment rule cannot apply.

B. The Business Judgment Rule Does Not Apply Because Evidence Viewed in the Plaintiffs' Favor Shows a Breach of the Duty of Loyalty

The Court erred when it held that a "breach of the duty of loyalty canonically requires a showing that the director engaged in a self-interested transaction in which they were interested in an economic way." Slip op. at 12. This narrow formulation is not grounded in law. As a leading corporate law treatise explains, "[t]he duty of loyalty *takes no canonical form*. It is as complex as corporate interests and officer temptations and means of descent from grace." 3 FLETCHER CYCLOPEDIA OF THE LAW OF CORPS., § 837.60 (emphasis added).

For the dubious proposition that a breach of the duty of loyalty always requires economic self-interest, the opinion cites to *Rodriguez v. Loudeye Corp.*, 144 Wn. App. 709, 722, 189 P.3d 168 (2008), which purports to apply Delaware law and involved the duty in the context of a merger transaction, so is inapt here. Indeed, the Delaware Supreme Court has definitively rejected the proposition that a breach of the duty of loyalty requires economic self-interest. *See Stone ex rel. AmSouth Bancorporation v. Ritter*, 911 A.2d 362, 370 (Del. 2006) (noting that "the fiduciary duty of loyalty *is not limited to cases involving a financial or other cognizable fiduciary conflict of interest*," and "also encompasses cases where the fiduciary fails to act in good faith") (emphasis added).

Particularly in the nonprofit context, loyalty is not necessarily achieved simply because a director lacks economic self-interest in a transaction. *See Summers v. Cherokee Children & Family Servs., Inc.*, 112 S.W.3d 486, 504 (Tenn. Ct. App. 2002) (observing that "the duty of loyalty is defined somewhat differently" in the nonprofit context) ("A nonprofit public benefit corporation's reason for existence, however, is not to generate a profit. Thus, a director's duty of loyalty lies in pursuing or ensuring pursuit of the charitable purpose or public benefit which is the mission of the corporation."). For a non-profit, "the duty of loyalty requires that a director or officer faithfully pursue the interest of the

organization, and its nonprofit purpose, rather than his or her own financial or other interests, or *those of another person or organization*." *Id.* (citing Harvey J. Goldschmid, *The Fiduciary Duties of Nonprofit Directors and Officers: Paradoxes, Problems, and Proposed Reforms*, 23 IOWA J. CORP. L. 631, 541 (1998) (emphasis added) (noting that "nonprofit directors and officers must be principally concerned about the effective performance of the nonprofit's mission")).

Whether the duty of loyalty was breached is an inherently fact-intensive inquiry.[8] Here, there is evidence in the record from which a trier of fact could find that the board improperly elevated the interests of Olympia BDS—an organization devoted to boycotting and divesting from Israel—above the interests of the Co-op. CP 343. Moreover, the fact that the boycott was enacted in violation of policy and without considering its members' interests itself shows a lack of good faith. As one board member later admitted:

> The process was still not right. In a consensus organization, the opinions of a minority are valued and incorporated into every decision, even if that minority is only one person. That didn't happen in this case. Members with different opinions were not in the room at the time the decision was made. Also the coop staff's lengthy process about this issue

[8] "Whether a director or officer has properly discharged his or her duty of loyalty is a question of fact to be determined in each case in view of all the circumstances." 3 FLETCHER CYCLOPEDIA OF THE LAW OF CORPS. § 837.60.

> was not well represented or taken into account. Everyone involved should have known better.

CP 367. This admission alone, viewed in the plaintiffs' favor, is sufficient to bring the question of loyalty to trial. Moreover, evidence viewed in plaintiffs' favor shows that one Co-op board member, who co-founded Olympia BDS and was elected to the Co-op board after the boycott took effect, was involved in "the aftermath" of the boycott and did not—as she should have—recuse herself from such discussions based on her personal interest. This also shows breach of the duty of loyalty with respect to the claims relating to the failure to rescind the boycott, *see* CP 10–11, as the board was repeatedly asked to do. The evidence viewed in plaintiffs' favor requires a trial on the loyalty issue, and the Court should reconsider its contrary decision.

C. Dismissal On Appeal For Lack of Standing Is Not Warranted Where the Plaintiffs Indicated They Would Seek Amendment and the Trial Court Indicated It May Permit Amendment, Which Discretion Should Be Exercised by the Trial Court in the First Instance

Before the trial court, the plaintiffs expressed that they would "retain the right to amend the complaint to seek injunctive relief against the current Board." CP 428 & n.12 ("any 'mootness' of the injunctive relief remedy is cured by simple amendment of the complaint"). At the hearing on the summary judgment motions, the trial court noted it could not provide an injunctive remedy but explicitly "did not address this

argument in the context of any possible future amendment of the complaint," tacitly suggesting it would have permitted such an amendment had it not dismissed on other grounds. CP 608–09. The plaintiffs renewed their request to amend in briefing before this Court, Reply Br. at 3 ("Defendants ignore that Plaintiffs can and should be allowed to amend their complaint to add the current Co-op board members—as the trial court has recognized."), and again at oral argument.

Yet the Court held that the injunctive and declaratory claims should be dismissed. Slip op. at 9. This decision forecloses the plaintiffs from obtaining the relief they have fought for years to secure—erroneously, because it failed to consider whether amendment of the complaint might be appropriate. At a minimum, the Court should have remanded to allow the trial court to decide whether to allow the plaintiffs to amend.

Washington has a strong policy of determining cases on their merits "and not upon procedural niceties." *DeSantis v. Angelo Merlino & Sons, Inc.*, 71 Wn.2d 222, 225, 427 P.2d 728 (1967) (citation omitted). For this reason, under CR 15(a), leave to amend "shall be freely given when justice so requires." Here, justice so requires and the board members will face no prejudice from amending. The complaint made clear that the plaintiffs sued the board members in their corporate, not individual,

capacities on the injunction claims. CP 12 ("Plaintiffs therefore request that the Court permanently enjoin the Board from enforcing or otherwise abiding by the Israel Boycott and Divestment policies and order the Board to follow OFC's governing rules, procedures, and principles in the future."). By naming "the Board" as the party to be enjoined, the plaintiffs gave adequate notice that it was current board members who should be enjoined in their corporate capacities.

During the 9-year pendency of this case, the board composition has changed many times, and it would have been impracticable to amend each time a board member rotated off and a new board member was elected, particularly since the case has spent so much of its life on appeal. It is clear that the corporation is aware of the suit, and adding or substituting current board members for the injunctive and declaratory claims would work no prejudice.[9]

When considering similar circumstances, the California Supreme Court held that the appellate court should remand a case to allow the trial court to determine whether to permit amendment to satisfy standing

[9] The policy favoring liberal amendment and deciding cases on their merits inspired the streamlined procedure in the Federal Rules of Civil Procedure, which provides for *automatic* substitution of a public officer's successor when the officer ceases to hold office while the action is pending. *See* Fed. R. Civ. P. 25(d). Washington has no analogous rule, but the same principles of liberal amendment, which give rise to Federal Rule 25(d)'s substitution procedure, apply to permit amendment under CR 15 in the circumstances here.

requirements. *See Branick v. Downey Savings & Loan Ass'n*, 39 Cal. 4th 235, 46 Cal. Rptr. 3d 66, 138 P.3d 214, 218 (2006) (holding that "because the decision properly belongs to the superior court in the first instance, the Court of Appeal correctly concluded the matter must be remanded to the superior court to determine whether, if plaintiffs do move to amend their complaint, the circumstances of this case warrant granting leave" to substitute a new plaintiff to meet standing requirements). And the Washington Supreme Court held that where a legal malpractice claim was filed by a purported assignee, which assignment was invalid, the court should allow the actual client to substitute in as the plaintiff and permit the amendment to relate back. *Kommavongsa v. Haskell*, 149 Wn.2d 288, 317–18, 67 P.3d 1068 (2003).

The Court should reconsider its decision affirming dismissal on the alternative basis of lack of standing, and instead should remand the matter so the trial court may decide whether to permit the plaintiffs to add the current board members as defendants.

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IV. CONCLUSION

For all the above-stated reasons, the Court should reconsider its opinion, reverse the trial court's determination that the case should be dismissed, and remand for further proceedings.

RESPECTFULLY SUBMITTED this 10th day of March, 2020.

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Appendix

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

KENT L. and LINDA DAVIS; and SUSAN MAYER, derivatively on behalf of OLYMPIA FOOD COOPERATIVE, Appellants, v. GRACE COX; ROCHELLE GAUSE; ERIN GENIA; T.J. JOHNSON; JAYNE KASZYNSKI; JACKIE KRZYZEK; JESSICA LAING; RON LAVIGNE; HARRY LEVINE; ERIC MAPES; JOHN NASON; JOHN REGAN; ROB RICHARDS; JULIA SOKOLOFF; and JOELLEN REINECK WILHELM, Respondents.	No. 51770-1-II UNPUBLISHED OPINION

GLASGOW, J.—In 2011, members of the Olympia Food Cooperative (Co-op) sued now former members of the Co-op's board of directors, arguing that the directors breached their fiduciary duties to the Co-op by adopting a boycott of Israeli goods in violation of the Co-op's internal governing policies. The plaintiffs asserted derivative status, suing on behalf of the Co-op. They sought declaratory judgment under the Uniform Declaratory Judgments Act, chapter 7.24 RCW (UDJA), an injunction ordering the defendants to suspend the Co-op's boycott, and monetary damages under a breach of fiduciary duties theory. The trial court granted summary judgment in favor of the defendants, and the plaintiffs now appeal.

The plaintiffs argue the trial court erred when it concluded that they lacked standing to bring their declaratory judgment and injunctive relief claims because they failed to show that the boycott actually harmed the Co-op. The plaintiffs also argue that the trial court erred when it held

that it could not grant effective injunctive relief because none of the named defendants remained on the Co-op's board of directors.

We hold that the trial court properly granted the defendants' motion for summary judgment. With regard to the declaratory judgment and injunctive relief claims, the plaintiffs do not have standing because they have failed to establish that the injury they assert can be redressed by the relief they request, namely an injunction against defendants who no longer govern the Co-Op. Moreover, the business judgment rule defeats all of the plaintiffs' claims, including their request for monetary damages. Accordingly, the trial court's dismissal with prejudice was proper. We affirm.

FACTS

The Co-op is a nonprofit corporation, incorporated under the Nonprofit Corporation Act, chapter 24.03 RCW. The Co-op operates two retail grocery stores in Olympia, Washington. The Co-op is subject to governing documents, including articles of incorporation, bylaws, a mission statement, and policies, which included a boycott policy. The boycott policy was adopted in 1993 and established procedures allowing the Co-op to participate in nationally or internationally recognized boycotts of certain products by refusing to sell those products in its stores. According to the boycott policy, Co-op staff had to unanimously consent before the Co-op would participate in a boycott. The Co-op's bylaws simultaneously stated that the board's powers included, but were not limited to, "adopt[ing] major policy changes," "adopt[ing] policies to foster member involvement," and "resolv[ing] organizational conflicts after all other avenues of resolution have been exhausted." Clerk's Papers (CP) at 255.

The events leading to this litigation began in 2009, when Co-op staff members began to consider adopting a boycott of Israeli goods. The staff did not reach consensus, so they initiated a

discussion about the boycott at a board of directors meeting in May 2010. The board sent the issue back to the staff for further discussion, but the staff was unable to come to consensus. During the Co-op's July 2010 board meeting, the board passed a unanimous resolution adopting the proposal to boycott products made in Israel. The board then made available to Co-op members information about the established process for obtaining a reversal of a board decision through petition, followed by a membership vote. The first step required gathering the signatures of 300 Co-op members.[1]

In 2011, 5 current and former Co-op members filed suit against 16 board members, asserting a derivative claim on behalf of the Co-op. *Davis v. Cox*, 180 Wn. App. 514, 525, 325 P.3d 255 (2014), *rev'd*, 183 Wn.2d 269, 351 P.3d 862 (2015) (*Davis* I). The defendants filed a motion to strike the plaintiffs' complaint based on RCW 4.24.525, Washington's Act Limiting Strategic Lawsuits Against Public Participation (anti-SLAPP statute). *Davis* I, 180 Wn. App. at 525. The Thurston County Superior Court granted the defendants' motion to strike. *Id.* at 526. Division One affirmed. *Id.* at 527.

In its analysis, Division One evaluated whether the plaintiffs were likely to succeed on the merits using a summary judgment standard. *Id.* at 527-28, 532-36. In doing so, Division One concluded that the adoption of the boycott was not ultra vires or outside the scope of the board's authority because the board had authority under the Co-op's bylaws to adopt the boycott. Division One also concluded that the business judgment rule applied. *Id.* at 535. The business judgment rule "cautions against courts substituting their judgment for that of the board of directors, absent

[1] There is conflicting evidence in the record as to whether signatures were gathered and if so, whether they were gathered in sufficient number to trigger a membership vote. *See* CP at 52, 618, 632.

evidence of fraud, dishonesty, or incompetence." *Id.* The court concluded that the rule weighed in favor of the defendants. *Id.* at 535-36.

The Washington Supreme Court accepted review and struck down the anti-SLAPP statute, RCW 4.24.525, on state constitutional grounds. *Davis v. Cox*, 183 Wn.2d 269, 275, 351 P.3d 862 (2015) (*Davis* II). The court also held that Division One incorrectly applied a summary judgment standard as if there were no genuine issues of material fact, rather than weighing evidence to determine the probability that the plaintiffs would prevail on the merits of their claims. *Id.* at 280-82, 288. The Supreme Court reversed and remanded the case to the superior court. *Id.* at 275.

In 2016, the plaintiffs amended their complaint, ultimately bringing four claims and seeking damages, as well as declaratory and injunctive relief. First, the plaintiffs alleged that the former board of directors breached its fiduciary duties by adopting the boycott in violation of the Co-op's "governing rules, procedures, and principles." CP at 10. The plaintiffs asserted the defendants were personally liable for damages under this claim. Second, the plaintiffs claimed that the board's adoption of the boycott was ultra vires and therefore null and void because the board acted "without authority and in violation of [the Co-op's] governing rules, procedures, and principles, and/or . . . in violation of their duties to the Co-op." CP at 11-12. Third, the plaintiffs requested declaratory judgment establishing that the board acted without authority in adopting and failing to rescind the boycott and that the adoption of the boycott was ultra vires and "unenforceable, null, and void." CP at 12. Finally, the plaintiffs requested equitable relief in the form of a permanent injunction against the board preventing it from "enforcing or otherwise abiding by the Israel Boycott and Divestment policies," and ordering the board "to follow [the Co-op]'s governing rules, procedures, and principles in the future." CP at 12.

After conducting discovery, the parties filed cross motions for summary judgment in 2018. In the meantime, the membership of the Co-op's board of directors was changing, and by 2017 the board membership had changed entirely. None of the defendants remained on the board of directors.

The superior court granted summary judgment to the defendants, holding that the plaintiffs lacked standing because they failed to sufficiently allege injury in fact. The trial court explained that the plaintiffs had only provided evidence that three Co-op members and former members were no longer shopping at the Co-op as a result of the boycott. This was not sufficient to defeat summary judgment. The trial court also held it could not provide effective relief through an injunction in any event because none of the named defendants were still members of the Co-op's board of directors. For the same reasons, the trial court denied summary judgment to the plaintiffs. The trial court explained that there were genuine issues of material fact that precluded summary judgment on some remaining issues, and it did not need to reach other issues, without identifying which issues involved genuine issues of material fact. The plaintiffs appeal.

ANALYSIS

A. Summary Judgment Burden and Standard of Review

In reviewing a grant of summary judgment, appellate courts apply the same standard as trial courts. Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c); *see also DeVeny v. Hadaller*, 139 Wn. App. 605, 616, 161 P.3d 1059 (2007). We consider the evidence and the reasonable inferences therefrom in the light most favorable to

the nonmoving party. *Sutton v. Tacoma Sch. Dist. No. 10*, 180 Wn. App. 859, 864, 324 P.3d 763 (2014). We review the trial court's conclusions of law de novo. *DeVeny*, 139 Wn. App. at 616.

B. Standing

The plaintiffs argue that the trial court improperly granted the defendants' motion for summary judgment based on standing. We agree with the trial court that the plaintiffs lack standing. The plaintiffs fail to show that any injury they assert can be redressed by a favorable court decision in this case. Because we hold that the plaintiffs have not established redressability, we do not consider other standing requirements.

1. Overview of Applicable Standing Tests

Washington courts generally apply a two pronged test to determine "whether a party has standing to bring a particular action." *Branson v. Port of Seattle*, 152 Wn.2d 862, 875, 101 P.3d 67 (2004). This two pronged standing test applies both to common law actions and claims brought under the UDJA. *See id.* at 875, 878.

The first prong of the test involves assessing "whether the interest asserted is arguably within the zone of interests to be protected by the statute or constitutional guaranty in question." *Id.* at 875. The second prong of the test requires us to decide "whether the party seeking standing

has suffered from an injury in fact, economic or otherwise." *Id.* at 876.[2] The injury in fact prong incorporates the requirement that the injury must be redressable. *See, e.g., Bavand v. OneWest Bank FSB*, 196 Wn. App. 813, 834, 385 P.3d 233 (2016).

Because the plaintiffs bring a claim under the UDJA, they must also meet four related justiciability requirements specific to UDJA claims. *To-Ro Trade Shows v. Collins*, 144 Wn.2d 403, 410-11, 27 P.3d 1149 (2001). First, there must be "'an actual, present and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement.'" *Id.* at 411 (quoting *Diversified Indus. Dev. Corp. v. Ripley*, 82 Wn.2d 811, 815, 514 P.2d 137 (1973)). Second, the controversy must be "'between parties having genuine and opposing interests.'" *Id.* (quoting *Diversified Indus.*, 82 Wn.2d at 815). Third, the controversy must involve interests that are "'direct and substantial, rather than potential, theoretical, abstract or academic.'" *Id.* (quoting *Diversified Indus.*, 82 Wn.2d at 815). Fourth, the controversy must be one in which "'judicial determination . . . will be final and conclusive.'" *Id.* (quoting *Diversified Indus.*, 82 Wn.2d at 815). "Inherent in these four requirements are the traditional limiting doctrines of standing, mootness, and ripeness." *Id.*

[2] Likewise the broadly applicable test for injunctive relief established in *Tyler Pipe* provides that a party seeking injunctive relief must also establish "'that the acts complained of are either resulting in or will result in *actual and substantial injury* to him.'" *Tyler Pipe Indus., Inc. v. Dep't of Revenue*, 96 Wn.2d 785, 792, 638 P.2d 1213 (1982) (emphasis added) (quoting *Port of Seattle v Int'l Longshoremen's & Warehousemen's Union*, 52 Wn.2d 317, 324 P.2d 1099 (1958)). Although *Tyler Pipe* concerned a preliminary injunction, Washington courts have extended this principle broadly to other kinds of injunctive relief. *See, e.g.*, *N. Quinault Props., LLC v. State*, No. 76017-3-I, slip op. at 12 (Wash. Ct. App. Jan. 30, 2017), http://www.courts.wa.gov/opinions/pdf/760173.pdf. and *Hood Canal Sand & Gravel, LLC v. Goldmark*, 195 Wn. App. 284, 307, 381 P.3d 95 (2016). Actual injury (and thus the associated requirement of redressability) is also a prerequisite for injunctive relief claims.

2. Waiver

The plaintiffs first argue that the defendants waived standing by not raising it in their earlier motion to dismiss. They suggest that standing can be waived because it is "not a matter of subject matter jurisdiction." Br. of Appellant at 23. We disagree.

Regardless of whether standing is a matter of jurisdiction, Washington law is clear that standing can be raised at any time, even for the first time on appeal. *See, e.g.*, *Int'l Ass'n of Firefighters, Local 1789 v. Spokane Airports*, 146 Wn.2d 207, 212 n.3, 45 P.3d 186, 50 P.3d 618 (2002); *see also* RAP 2.5(a)(1) ("A party may present a ground for affirming a trial court decision which was not presented to the trial court if the record has been sufficiently developed to fairly consider the ground."). Thus, either way, the defendants did not waive standing when they failed to raise it in their earlier CR 12 motion to dismiss.

3. Claims for Injunctive Relief and Declaratory Judgment

Without deciding whether the plaintiffs in this case can show actual harm, we hold the plaintiffs lack standing for both their injunctive relief and declaratory judgment claims because the injuries they allege do not meet the redressability component of Washington's standing test.

Under both the two pronged standing requirements and the four justiciability requirements of the UDJA, plaintiffs must show that the injuries they allege are likely to be redressed by the requested relief. *Bavand*, 196 Wn. App. at 834; *see also Patterson v. Segale*, 171 Wn. App. 251, 258-59, 289 P.3d 657 (2012) (incorporating redressability analysis into the injury in fact requirement for Administrative Procedures Act, chapter 34.05 RCW, standing requirement, which overlaps substantially with UDJA's justiciability requirements).

To the extent the plaintiffs in this case argue that their injunctive relief claims are redressable because an injunction against the named defendants (former board members) would

bind the Co-op's current board of directors, we disagree. It is undisputed that the defendants are former, not current, board members. Because the defendants are no longer members of the Co-op's board of directors, they have no current say in whether the Co-op continues to maintain the boycott that the plaintiffs seek to enjoin. The plaintiffs offer no authority for the proposition that injunctive relief against former directors binds the corporation as a whole, including the current board of directors.

Similarly, to the extent the plaintiffs argue that the court can redress their injuries because derivative plaintiffs can obtain an injunction against themselves that also enjoins the corporation, we reject this argument. Plaintiffs cite no case law that supports this proposition, and the cases they do cite are inapplicable here. *See, e.g.*, *In re Ezcorp Inc. Consulting Agreement Derivative Litig.*, 130 A.3d 934, 948 (Del. Ch. 2016) (addressing the binding effect of judgments in derivative actions on *potential future* plaintiffs); *LaHue v. Keystone Inv. Co.*, 6 Wn. App. 765, 778, 496 P.2d 343 (1972) (holding that joinder of the corporation is not always essential in a derivative suit without addressing whether an injunction against plaintiffs or former board members would be effective against the current directors of a corporation). Neither party has cited any case in which a court issued an injunction against a derivative plaintiff bringing suit on behalf of the corporation in order to bind the corporation.

The plaintiffs' claim for declaratory judgment also fails because it does not present a justiciable controversy as required by the UDJA. *To-Ro*, 144 Wn.2d at 411. "[T]he four justiciability factors must coalesce to ensure that the court will be rendering a final judgment on an actual dispute between opposing parties with a genuine stake in the resolution." *Id.* (internal quotation marks omitted). Redressability is incorporated into the justiciability test in the sense

that the opposing parties must have a genuine stake in the outcome and the court must be able to provide effective relief.

Here, it is undisputed that the defendants are all former board members and therefore they no longer have a genuine stake in the resolution of the dispute. Put another way, the requested injunction of declaratory judgment against the defendants would not provide effective relief because the requested relief would have no effect on the current board of directors. "Thus, a judicial determination of the issues raised herein would not conclusively resolve the parties' dispute." *See Pasado's Safe Haven v. Dep't of Agric.*, 162 Wn. App. 746, 761-62, 259 P.3d 280 (2011).[3]

We conclude that the plaintiffs' claims for declaratory judgment and injunctive relief are not redressable. Because the plaintiffs fail to demonstrate redressability, which is required to support their declaratory judgment and injunctive relief claims, we need not address whether the plaintiffs have met any other prerequisites to standing, including whether they have provided sufficient evidence to establish actual harm.

4. Damages Claim

The plaintiffs also brought a claim for monetary damages based on the argument that the defendants breached their fiduciary duties and are personally liable to the Co-op for resulting damages. At least one Washington case has acknowledged that a director of a nonprofit corporation governed by chapter 24.03 RCW can be liable to the corporation and its members under a negligence standard. *See Waltz v. Tanager Estates Homeowners Ass'n*, 183 Wn. App. 85, 92, 332 P.3d 1133 (2014). Decisions from other jurisdictions suggest that, while derivative plaintiffs

[3] Because an injunction against the named defendants would not provide effective relief, we need not also address the *Tyler Pipe* prerequisites to an injunction.

cannot sue former directors for injunctive relief, it may be appropriate to sue former directors for monetary damages caused by a breach of fiduciary duty. *See Davis v. Dyson*, 387 Ill. App. 3d 676, 680, 693, 900 N.E.2d 698 (2008) (citing cases from other states and holding that shareholder plaintiffs can bring derivative suits seeking monetary damages against "third parties who have allegedly wronged the corporation," including former directors). We recognize that the plaintiffs' claim for monetary damages does not suffer from the same lack of redressability that the claims for declaratory and injunctive relief do.

Nevertheless, the business judgment rule is a barrier that defeats the plaintiffs' claims for damages, as well as their claims for declaratory and injunctive relief. We have held that "[u]nder the business judgment rule, corporate management is immunized from liability . . . where (1) the decision to undertake the transaction is within the power of the corporation and the authority of management, and (2) there is a reasonable basis to indicate that the transaction was made in good faith." *McCormick v. Dunn & Black, P.S.*, 140 Wn. App. 873, 887, 167 P.3d 610 (2007). The business judgment rule "cautions against courts substituting their judgment for that of the board of directors, absent evidence of fraud, dishonesty, or incompetence." *Davis* I, 180 Wn. App. at 535.

In considering the defendants' motion to strike under Washington's anti-SLAPP act, Division One applied the business judgment rule to the board's decision to adopt the boycott in order to explain why the plaintiffs were not likely to prevail.[4] *Davis* I, 180 Wn. App. at 532-33,

[4] The parties dispute whether Division One's decision in *Davis* I (granting defendants' motion to dismiss under Washington's then-existing anti-SLAPP statute) applies as the "law of the case," thereby limiting the parameters of our analysis in the present appeal. 180 Wn. App. 514. Because the Washington Supreme Court did reverse Division One's holdings on the merits to the extent it held that Division One applied an improper standard to the plaintiffs' claims, *Davis* II, 183 Wn.2d at 281-82, 296, and given that additional evidence has been added to the record since Division One's decision, we do not apply the law of the case doctrine.

535. Division One explained that the business judgment rule applies because the existence of the 1993 boycott policy never removed from the board its general authority to manage the Co-op, including its authority to adopt boycotts. *Id*. at 534-36. Moreover, Division One concluded that no evidence of fraud, dishonesty or incompetence was presented. *Id.* at 535.

Division One was correct. The Co-op was incorporated under chapter 24.03 RCW, which permits corporations to be organized for "any lawful purpose." *See* CP at 253; RCW 24.03.015. The Co-op's bylaws stated that the board's powers included, but were not limited to, "adopt[ing] major policy changes," "adopt[ing] policies to foster member involvement," and "resolv[ing] organizational conflicts after all other avenues have been exhausted." CP at 255. It is undisputed that the corporation had authority to adopt or amend policies through its board. Nothing in the bylaws, the boycott policy, or other governing documents suggested that the Co-op's board was powerless to adopt or reject a boycott itself if Co-op staff could not come to consensus under the policy.

A challenge to the procedure with which the boycott was adopted does not undermine the power of the corporation or the authority of management to adopt or amend Co-op policies. *See Hartstene Pointe Maint. Ass'n v. Diehl*, 95 Wn. App. 339, 345, 979 P.2d 854 (1999). And still no evidence has been presented after subsequent discovery suggesting that the defendants committed fraud or dishonesty. To the extent the plaintiffs argue that the business judgment rule should not apply here because the boycott was motivated by former board members' own political objectives, we conclude that breach of the duty of loyalty canonically requires a showing that the director engaged in a self-interested transaction in which they were materially interested in an economic way. *See, e.g.*, *Rodriguez v. Loudeye Corp*., 144 Wn. App. 709, 722, 189 P.3d 168 (2008). Here, there is no evidence that any directors had material financial interest in adopting the boycott.

As a result, we conclude that there is no reason to come to a different conclusion than Division One. The application of the business judgment rule means that, as a matter of law, the plaintiffs cannot prevail on their breach of fiduciary duty claims. There is no genuine issue of material fact preventing summary judgment with regard to this issue. Application of the business judgment rule is an independent basis supporting dismissal of all claims.

We need not reach the plaintiffs' remaining arguments. We affirm the superior court's decision to dismiss with prejudice.

C. Attorney Fees

The defendants request attorney fees under RAP 18.9(a), which authorizes the court to order a party who files a frivolous appeal to pay compensatory damages to the opposing party. The defendants also argue the plaintiffs should be sanctioned under RAP 18.9(a), which authorizes the court to order a party who files a frivolous appeal to pay sanctions to the court. Even though we affirm the trial court, the plaintiffs' appeal is not frivolous.

The defendants also request attorney fees and costs on the basis that we have the equitable power to order that "a shareholder who loses on his or her derivative claims [pay] reasonable expenses incurred by the corporation in its defense." Br. of Resp't at 39. RCW 23B.07.400 permits the court to award costs and fees to the defendants "if it finds that the proceeding was commenced without reasonable cause." RCW 23B.07.400 gives appellate courts discretion over whether to require the plaintiffs to pay defendants' reasonable expenses. The defendants prevail, but we do not conclude that the proceeding was without reasonable cause, and we decline to impose fees, costs, or expenses on the defendants.

CONCLUSION

The trial court properly granted the defendants' motion for summary judgment and dismissed the plaintiffs' claims with prejudice. We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Glasgow, J.

I concur:

Cruser, J.

MAXA, C.J (concurring) – I concur in the result and I agree with the majority opinion's analysis. However, I would resolve the case on a different basis: the plaintiffs' failure to show that the boycott decision caused injury in fact to the Olympia Food Co-op.

As noted in the majority opinion, one of the standing requirements is that "the party seeking standing has suffered from an injury in fact, economic or otherwise." *Branson v. Port of Seattle*, 152 Wn.2d 862, 876, 101 P.3d 67 (2004). Because the plaintiffs filed a derivative action on behalf of the Co-op, they were required to establish that the boycott decision caused injury in fact *to the Co-op*.

The only admissible evidence that plaintiffs submitted was that one person left the Co-op and two people stopped shopping there because of the boycott. But other evidence showed that total membership and total sales volume actually increased after the boycott decision. I do not believe that the evidence presented to the trial court established sufficient injury to satisfy the standing requirement of injury in fact.

Maxa, C.J.

Maxa, C.J.

DECLARATION OF SERVICE

On March 10, 2020, I caused to be served a true and correct copy of the foregoing **APPELLANTS' MOTION FOR RECONSIDERATION** to be served on counsel of record stated below, via the Washington Courts E-Portal:

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I declare under penalty of perjury under the laws of the United States of America and the State of Washington that the foregoing is true and correct.

DATED this 10th day of March, 2020, at Seattle, Washington.

s/Thao Do
Thao Do, *Legal Assistant*