**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A18-1256**
**A18-1390**

Kenneth Lloyd Morris, individually and derivatively
OBO Rural Energy Solutions, LLC,
Appellants (A18-1256),
Plantiffs (A18-1390),

David Jones, et al.,
Appellants (A18-1390),

vs.

Mychael Lee Swan, et al.,
Respondents.

**Filed June 10, 2019**
**Reversed and remanded**
**Halbrooks, Judge**

Steele County District Court
File No. 74-CV-17-1610

Kay Nord Hunt, Lommen Abdo, P.A., Minneapolis, Minnesota (for appellants Kenneth Morris, individually and derivatively OBO Rural Energy Solutions, LLC)

David J. Jones, Jones Law Firm, Rochester, Minnesota (attorney pro se)

Roger M. Stahl, RMS Law Firm, PLLC, Rochester, Minnesota (attorney pro se)

Phillip Gainsley, Minneapolis, Minnesota (for respondents)

Considered and decided by Halbrooks, Presiding Judge; Connolly, Judge; and Slieter, Judge.

## U N P U B L I S H E D  O P I N I O N

**HALBROOKS**, Judge

Appellant Kenneth Lloyd Morris challenges the dismissal of his complaint for failure to state a claim upon which relief can be granted, arguing that the complaint states a claim for violations of the Minnesota Limited Liability Company Act (MLLCA), Minn. Stat. §§ 322B.01-.975 (2014).[1] Morris and appellant-attorneys David Jones and Roger Stahl also challenge the award of attorney fees. We reverse and remand.

## FACTS

In December 2010, respondents Mychael Lee Swan and Michael Francis Driscoll formed Rural Energy Solutions, LLC (RES) with Morris. RES was organized under the MLLCA but did not file articles of incorporation. Morris and Swan each had a 49% interest in RES, and Driscoll had the remaining 2%. The parties then formed Agrinatural Gas LLC (ANG). RES served as the holding company for Swan's, Driscoll's, and Morris's interests in ANG. ANG was formed to build, manage, and operate pipeline utilities. In 2011, Heron Lake Bioenergy LLC (HLBE), through its wholly owned subsidiary HLBE Pipeline Company LLC, obtained a 73% interest in ANG. RES retained a 27% interest in ANG.

The relationship between Swan, Driscoll, and Morris deteriorated. On May 29, 2012, Swan and Driscoll voted to remove Morris from the position of chief financial officer (CFO) of RES, remove him as a signatory for RES, and notify ANG that Morris would no

[1] The MLLCA was repealed effective January 1, 2018. 2014 Minn. Laws ch. 157, art. 1, § 91, at 184. Because the conduct at issue occurred, and the lawsuit was filed, prior to January 1, 2018, the parties agree that the MLLCA applies to this case.

longer be the RES representative on the ANG board. On April 5, 2013, RES held a members[2] meeting. Morris did not attend. The meeting minutes indicate that those in attendance discussed the expansion of ANG through capital calls and/or bank debt. The discussion was based on concerns over the financial stability of HLBE and the need to diversify ANG's customer base. On June 5, 2013, the members passed a resolution that required each member to pay his share of the capital call if the member wanted to maintain an undiluted interest in RES. Morris attended the meeting and voted against the resolution. He did not pay his share of the capital call.

On September 27, 2013, RES held a members meeting. Morris did not attend. Swan and Driscoll voted to accept capital-call funds, including $147,000 from Planergy Acquisition Corporation (PAC). Swan and Driscoll subsequently directed Ann Tessier, RES's new CFO, to determine new ownership percentages "based on the appropriate capital accounts." Tessier determined that, based on the investments approved during the capital call, Morris's interest in RES was reduced from 49% to 19.69%. On December 29, 2015, the other members of RES voted to initiate a buyout of Morris's interest in RES.

On September 5, 2017, Morris, on his own behalf and on behalf of RES, initiated this lawsuit against Swan and Driscoll. The complaint alleged that Swan and Driscoll improperly voted to accept the capital-call contribution and therefore impermissibly diluted Morris's interest in RES. Morris also alleged that Swan and Driscoll had not fairly valued RES when calculating the new ownership interests following the contribution from PAC.

[2] Morris, Swan, and Driscoll are the only members of RES.

He requested that the district court set aside the 2013 resolution accepting the capital-call contribution and restore his original 49% interest in RES.

Swan and Driscoll moved to dismiss the complaint on the pleadings. They argued that Morris was alleging a derivative action and that the complaint failed to properly set forth facts to maintain a derivative action. They also asserted that Morris failed to join an indispensable party because he did not join PAC and failed to state a claim upon which relief could be granted. Following a hearing, the district court granted the motion and dismissed the complaint with prejudice. The district court further determined that Morris had attempted to hide his lack of a colorable claim by relying on law that was plainly not applicable and that Swan and Driscoll were therefore entitled to attorney fees under Minn. Stat. § 322B.833, subd. 7 (2018), and Minn. R. Civ. P. 11.03. The district court ultimately awarded Swan and Driscoll $35,320.75 in attorney fees and ordered that judgment be entered against Morris and his attorneys, Jones and Stahl. Morris appealed the dismissal of his complaint and the award of attorney fees, and Jones and Stahl separately appealed the award of attorney fees. This court consolidated the cases.

## D E C I S I O N

### I.

A district court may dismiss a complaint when a plaintiff fails to state a claim upon which relief can be granted. Minn. R. Civ. P. 12.02(e). "We review de novo whether a complaint sets forth a legally sufficient claim for relief. We accept the facts alleged in the complaint as true and construe all reasonable inferences in favor of the nonmoving party." *Walsh v. U.S. Bank, N.A.*, 851 N.W.2d 598, 606 (Minn. 2014) (citation omitted). "A claim

is sufficient against a motion to dismiss for failure to state a claim if it is possible on any evidence which might be produced, consistent with the pleader's theory, to grant the relief demanded." *Id.* at 603.

Morris argues that the district court erred in dismissing the complaint for failure to state a claim upon which relief could be granted. He argues that under the MLLCA, only the board of governors of a limited liability company (LLC) is authorized to accept a new capital contribution. He asserts that RES did not have a board of governors and therefore the only method by which RES could vote to accept the new capital contribution was by unanimous affirmative vote of the members. The district court determined that Morris's assertion that there was no board of governors was without merit because the owners of RES—Morris, Swan, and Driscoll—constituted the "governing body" and were, therefore, the board of governors. The district court further determined that because RES had a board of governors, the vote to accept the new capital contribution did not have to be unanimous.

We first address Morris's assertion that RES did not have a board of governors. Minn. Stat. § 322B.606, subd. 1, provided:

> The business and affairs of a limited liability company is to be managed by or under the direction of the board of governors, subject to the provisions of subdivision 2 and section 322B.37. The first board of governors may be named in the articles of organization or a member control agreement or elected by the organizers pursuant to section 322B.60 or by the members.

Morris argues that Minn. Stat. § 322B.606, subd. 1, outlined the permissible methods by which the board of governors may be established and that none occurred in this case. We agree. The RES articles of organization did not name a board of governors. Morris, Swan,

and Driscoll did not elect a board of governors in their capacities as owners or members or agree to a member control agreement. Accordingly, RES never established a board of governors by any of the methods permitted by Minn. Stat. § 322B.606, subd. 1.

Swan and Driscoll contend that, because the articles of organization did not name a board of governors and no election was ever held, the statutory definition of "governing body" controls. The term "governing body" is defined as "the body of an organization that has been charged with managing or directing the management of the business and affairs of the organization . . . . In the case of a domestic limited liability company, the governing body is the board of governors." Minn. Stat. § 322B.03, subd. 23.

Swan and Driscoll argue that, because no board of governors was ever elected, the members constitute the governing body. And because the members are the governing body, they are in turn the board of governors pursuant to Minn. Stat. § 322B.03, subd. 23. We disagree. Minn. Stat. § 322B.03, subd. 23, is a definitions section; it did not create an additional method of establishing the board of governors. Minn. Stat. § 322B.606, subd. 1, sets forth the methods by which the board of governors may be established, and it is undisputed that none of them occurred in this case. Accordingly, RES did not have a duly established board of governors.

We next turn to Morris's assertion that only the board of governors could vote to accept new capital contributions. Minn. Stat. § 322B.40, subd. 1, provided that an LLC may accept contributions "only when authorized by the board of governors or pursuant to a member control agreement." As previously noted, RES did not have a board of governors or a member control agreement. Morris contends that, because the acceptance of the capital

contribution was not authorized by a board of governors or member control agreement, the only method by which RES could vote to accept the contribution was pursuant to Minn. Stat. § 322B.606, subd 2. That statute provided that "[t]he owners of the membership interests entitled to vote for governors of the limited liability company may, by unanimous affirmative vote, take any action that this chapter requires or permits the board of governors to take." Minn. Stat. § 322B.606, subd. 2.

Swan and Driscoll argue that Minn. Stat. § 322B.346, subd. 1, which required only a simple majority to accept the contribution, controls. We disagree. The statute provided that the members shall take action by a simple majority of the membership interests "entitled to vote on that item of business" and expressly stated that the provision does not apply "where this chapter . . . require[s] a larger proportion." Minn. Stat. § 322B.346, subd. 1.

As discussed above, the MLLCA required the authorization of the board of governors to accept capital contributions, and Minn. Stat. § 322B.606 required a unanimous affirmative vote in order for the members to take an action that the MLLCA required the board of governors to take. Therefore, Minn. Stat. § 322B.346, subd. 1, did not grant the members of an LLC the authority to take an action required to be taken by the board of governors by simple majority vote. Rather, because RES did not have a board of governors or member control agreement, the only way in which it could accept a new capital contribution was by the unanimous affirmative vote of the membership interests entitled to vote pursuant to Minn. Stat. § 322B.606, subd. 2.

Finally, we note that the complaint asserts a claim for relief under Minn. Stat. § 322B.833, which permitted the grant of equitable relief that the court considers "just and reasonable" when "the governors or those in control of the limited liability company have acted fraudulently, illegally, or in a manner unfairly prejudicial toward one or more members." Morris asserted a colorable claim that Swan and Driscoll impermissibly authorized RES to accept a capital contribution which resulted in his interest in RES being reduced from 49% to 19.69%. Accordingly, he has asserted a claim that Swan and Driscoll acted in a manner that was unfairly prejudicial toward him by reducing his interest in RES through the acceptance of a capital contribution that they did not have the authority to accept. He has therefore brought a claim upon which relief could be granted under Minn. Stat. § 322B.833.

On this record, we conclude that the district court erred in dismissing Morris's complaint for failure to state a claim upon which relief could be granted. The district court's decision was based on its determination that RES had a board of governors, and therefore there was no requirement that the vote to accept the capital contribution had to be unanimous. Because we disagree with these determinations, we similarly disagree with the determination that Morris attempted to hide his lack of a colorable claim by relying on inapplicable law. We therefore reverse the district court's dismissal of the complaint and remand for further proceedings.

**II.**

Morris, Jones, and Stahl challenge the district court's award of $35,320.75 in attorney fees to Swan and Driscoll. We "will not reverse a [district] court's award or denial

of attorney fees absent an abuse of discretion." *Becker v. Alloy Hardfacing & Eng'g Co.*, 401 N.W.2d 655, 661 (Minn. 1987). Here, the district court based its award of attorney fees on its determination that Morris attempted to hide his lack of a colorable claim by relying on law that was "plainly not applicable." Because we determine that Morris has stated a claim upon which relief could be granted and did not inappropriately rely on law that was not applicable, we reverse the award of attorney fees.

**Reversed and remanded.**