Rel: March 27, 2020

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2019-2020

1180262

Ex parte 4tdd.com, Inc., et al.

PETITION FOR WRIT OF MANDAMUS

(In re: Sheila Hale, individually and on behalf of the shareholders of Bay Area Nutrition, Inc.

v.

4tdd.com, Inc., et al.)

(Mobile Circuit Court, CV-16-902502)

STEWART, Justice.

4tdd.com, Inc. ("4tdd"), Thomas Todd Martin III, and Martin & Associates Consulting Company, LLC ("MACC"), petition this Court for a writ of mandamus instructing the Mobile

Circuit Court ("the trial court") to dismiss a derivative shareholder action filed against them by Sheila Hale, individually and on behalf of the shareholders of Bay Area Nutrition, Inc., on the ground, inter alia, that Hale did not satisfy the requirement of Rule 23.1, Ala. R. Civ. P., that she allege with particularity in her complaint the efforts she had made to obtain the requested relief from the corporate directors of Bay Area Nutrition, Inc. ("BAN"), before filing an action against them. For the reasons stated below, we grant the petition and issue the writ.

Facts

In 2009, Jenny Neese incorporated BAN, an Alabama corporation that provided diet and other nutrition-related services, and she served as BAN's president at all times pertinent to this case. Hale alleges that, between 2011 and 2012, she purchased a total of 130,000 shares of BAN stock, which constituted 13% of the total outstanding shares of the company.

In July 2012, BAN entered into a financial-services agreement with Martin and MACC, Martin's financial-management firm. In an effort to provide BAN with needed capital, Martin,

along with other investors, incorporated 4tdd as a separate entity, and Martin used 4tdd as a vehicle to loan BAN a total of $457,062.54 over a period from July 2012 to August 2014. In April 2014, BAN executed, with Neese's approval, a promissory note in favor of 4tdd, promising to repay the loan, plus accrued interest, within six months ("the 2014 promissory note"). Neese also executed a security agreement on behalf of BAN pledging all assets of BAN to 4tdd as security for the note.

On November 17, 2014, Neese, individually, filed a petition under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Southern District of Alabama ("the bankruptcy court"), which the bankruptcy court ultimately converted to a Chapter 7 bankruptcy. In December 2014, 4tdd foreclosed on the security agreement and acquired all of BAN's assets. 4tdd filed an adversary complaint against Neese in the bankruptcy action in which it sought an exception from the discharge of Neese's debts under 11 U.S.C § 523(a)(2), (4), and (6) and asserted certain state-law claims against Neese. Neese filed counterclaims against 4tdd and "cross-claims" against Martin, MACC, and others in the

adversary proceeding, alleging fraudulent misrepresentation, conspiracy, breach of contract, and breach of fiduciary duty.

In January 2016, Neese, on behalf of BAN and other entities owned by Neese that are not parties to this case, entered into a mutual release and a settlement and noncompetition agreement with 4tdd ("the mutual release"). In the mutual release, the parties agreed to release all claims they had against each other in connection with the matters pertinent to the settlement of the adversary proceeding. The bankruptcy court approved the mutual release. According to the complaint in this case, the bankruptcy court granted Neese a discharge from bankruptcy on November 1, 2016.

On November 23, 2016, Hale sued 4tdd, Martin, MACC, and BAN in the trial court, asserting two claims of ultra vires acts, a breach-of-fiduciary-duty claim, and a breach-of-contract claim. In support of her first ultra vires claim, Hale alleged that Neese's approval of the 2014 promissory note was beyond the scope of her authority as BAN's president and should have required authorization from BAN's board of directors or a majority of BAN's shareholders. Hale requested that the trial court declare the 2014 promissory note void,

award damages to BAN's shareholders for the alleged deprivation of BAN's assets resulting from foreclosure of the security agreement, and award court costs and attorney fees. Hale also requested that the trial court grant injunctive relief as to that ultra vires claim, but she did not specify the acts she sought to enjoin. In her second ultra vires claim, Hale alleged that Neese's approval of the mutual release on behalf of BAN also was an ultra vires act in that the mutual release should have required approval of BAN's board of directors or a majority of BAN's shareholders. Hale requested that the trial court declare the mutual release void "and of no effect as to BAN." In the claim of breach of fiduciary duty, Hale alleged that 4tdd, Martin, and MACC breached their fiduciary obligations to BAN. In addition, Hale alleged in her breach-of-contract claim that Martin and MACC "breached their contract with BAN in that they failed and refused to find financing for BAN," that Martin and MACC "availed themselves of the opportunity to finance BAN," and that Martin and MACC "caused BAN to enter into a Security Agreement whereby the entirety of the assets of BAN were jeopardized [and] ultimately lost, thereby proximally [sic] causing damage to BAN."

Hale further stated in her complaint that "[t]he Directors of BAN are not known to [Hale]. Accordingly, she has been unable to request action be taken by the Board of Directors of BAN to resolve the issues raised herein." Hale also stated that she was "uncertain as to the exact number of other stockholders in BAN, but it may be a total of seven (7) excluding Jenny Neese."

Nearly two years after the filing of the complaint, Hale obtained service of process on 4tdd, Martin, and MACC, although, as of the date of the filing of the petition for a writ of mandamus, BAN had not been served. On September 19, 2018, 4tdd, Martin, and MACC filed a motion to dismiss the complaint or, in the alternative, for a summary judgment, in which they argued that Hale's complaint was due to be dismissed under Rule 12, Ala. R. Civ. P., for lack of subject-matter jurisdiction because, they argued, Hale did not have standing to bring a derivative shareholder action in that she failed to comply with the requirements provided in Rule 23.1, Ala. R. Civ. P., for filing a derivative shareholder claim. 4tdd, Martin, and MACC also asserted that they were entitled to a summary judgment because, they said, Hale's claims were barred by the mutual release and by the doctrines of res

judicata and collateral estoppel. 4tdd, Martin, and MACC further contended that Hale failed to state a claim upon which relief could be granted as to the ultra vires claims because, they alleged, BAN was the proper party against whom Hale, in her capacity as a shareholder of BAN, could bring an ultra vires claim. Hale did not file a response to the motion. After holding a hearing, the trial court entered an order denying 4tdd, Martin, and MACC's motion. 4tdd, Martin, and MACC filed a petition to this Court seeking a writ of mandamus directing the trial court to dismiss Hale's complaint or to enter a summary judgment in their favor. This Court entered an order staying the proceedings in the trial court pending mandamus review.

Standard of Review

A writ of mandamus is an extraordinary remedy available only when the petitioner can demonstrate: "'(1) a clear legal right to the order sought; (2) an imperative duty upon the respondent to perform, accompanied by a refusal to do so; (3) the lack of another adequate remedy; and (4) the properly invoked jurisdiction of the court.'" Ex parte Nall, 879 So. 2d 541, 543 (Ala. 2003) (quoting Ex parte BOC Grp., Inc., 823 So. 2d 1270, 1272 (Ala. 2001)).

Analysis

In their petition to this Court, 4tdd, Martin, and MACC contend that they are entitled to a dismissal of Hale's claims because, they contend, Hale's claims are derivative claims as to BAN and she did not satisfy the pleading requirements of Rule 23.1 by stating the efforts she had made to obtain the action she desires from BAN's directors or her reasons for not making such efforts. 4tdd, Martin, and MACC also contend that the trial court should have entered a summary judgment in their favor because, they argue, Hale's claims are barred by the mutual release and by the doctrine of res judicata.

I. Rule 23.1

When a plaintiff seeks recovery of damages that are incidental to his or her status as a shareholder in a corporation, "the claim is a derivative one and must be brought on behalf of the corporation." Pegram v. Hebding, 667 So. 2d 696, 702 (Ala. 1995)(citing McLaughlin v. Pannell Kerr Forster, 589 So. 2d 143 (Ala. 1991)). "The derivative form of action permits an individual shareholder to bring 'suit to enforce a corporate cause of action against officers, directors, and third parties.'" Kamen v. Kemper Fin. Servs., Inc., 500 U.S. 90, 95 (1991)(quoting Ross v. Bernhard, 396

U.S. 531, 534 (1970)). "[T]he purpose of the derivative action was to place in the hands of the individual shareholder a means to protect the interests of the corporation from the misfeasance and malfeasance of 'faithless directors and managers.'" Id. (quoting Cohen v. Beneficial Loan Corp., 337 U.S. 541, 548 (1949)). "It is only when a stockholder alleges that certain wrongs have been committed by the corporation as a direct fraud upon him, and such wrongs do not affect other stockholders, that one can maintain a direct action in his individual name." Green v. Bradley Constr., Inc., 431 So. 2d 1226, 1229 (Ala. 1983).

In order to maintain a derivative action on behalf of a corporation, the plaintiff must comply with the requirements set forth Rule 23.1, which provides:

> "In a derivative action brought by one or more shareholders or members to enforce a right of a corporation or of an unincorporated association, the corporation or association having failed to enforce a right which may properly be asserted by it, the complaint shall be verified and shall allege that the plaintiff was a shareholder or member at the time of the transaction of which the plaintiff complains or that the plaintiff's share or membership thereafter devolved on the plaintiff by operation of law. The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action the plaintiff desires from the directors or comparable authority and, if necessary, from the shareholders or members, and the

> reasons for the plaintiff's failure to obtain the action or for not making the effort. The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association. The action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to shareholders or members in such manner as the court directs."

Rule 23.1 does not provide for an independent cause of action under Alabama law; rather, it sets forth stringent pleading standards on a shareholder who files a derivative action on behalf of a corporation in Alabama courts. As an additional heightened pleading requirement of Rule 23.1, a shareholder's complaint seeking to assert a claim on behalf of the corporation must "allege with particularity the efforts, if any, made by the plaintiff to obtain the corporate action the plaintiff desires from the directors or comparable authority and, if necessary, from the shareholders or members, and the reasons for the plaintiff's failure to obtain the action or for not making the effort." This provision of Rule 23.1 is known as the "director demand."[1]

[1]In the 2019 Regular Legislative Session, the Alabama Legislature enacted Act No. 2019-94, which has an effective date of January 1, 2020, and which, according to its title, "substantially revises the Alabama Business Corporation Law to

Regarding the director demand, this Court has stated:

> "It has been noted that Rule 23.1 does not create a substantive demand requirement of any particular dimension and, on its face, speaks only to the adequacy of the shareholder representative's pleadings. Kamen v. Kemper Fin. Services, Inc., 500 U.S. 90, 111 S.Ct. 1711, 114 L.Ed.2d 152 (1991). However, the rule clearly contemplates both the demand requirement and the possibility that demand may be excused. Id. Thus, it is not a mere formality, but rather an important aspect of substantive corporate law that limits the respective powers of the individual shareholder and of the directors to control corporate litigation. Blasband v. Rales, 971 F.2d 1034 (3d Cir. 1992); Kamen, supra.
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> "'One of the reasons for the director-demand requirement is that it allows the derivative corporation, on whose behalf the action is brought in the first place, to take over the litigation, thus permitting the directors the opportunity to act in their normal status as conductors of the corporation's affairs.' Elgin[v. Alfa Corp., 598 So. 2d 807, 814 (Ala. 1992)], citing Shelton v. Thompson, 544 So. 2d 845, 849 (Ala. 1989). '"Practically speaking, the demand requirement promotes a form of 'alternative dispute resolution' --that is, the corporate management may be in a better position to pursue alternative remedies, resolving grievances without burdensome and

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reflect the national standards set by the Model Business Corporation Act of 2016 and the Delaware General Corporation Law." Section 1 of Act No. 2019-94, among other things, adds provisions to the Alabama Business Corporation Law pertaining to derivative proceedings. See § 10A-2A-7.40 through § 10A-2A-7.48, Ala. Code 1975. These new provisions retain a director-demand requirement. The matters at issue in this case predate the effective date of Act No. 2019-94; thus, the amendments effectuated by that act do not apply to this case.

> expensive litigation."' Shelton, 544 So. 2d at 850, quoting Kaufman v. Kansas Gas & Electric Co., 634 F.Supp. 1573, 1577 (D. Kan. 1986), citing Lewis v. Graves, 701 F.2d 245, 247 (2d Cir. 1983). See also Kamen, supra. Because the purpose of a demand upon the board of directors is to alert the board so that it can take corrective action, if it feels any is merited, the shareholder should allow sufficient time for the directors to act upon the demand before instituting a derivative action. Quincy v. Steel, 120 U.S. 241 (1887); Schlensky v. Dorsey, 574 F.2d 131 (3d Cir. 1978); Nussbacher v. Continental Illinois Nat'l Bank & Trust Co., 518 F.2d 873 (7th Cir. 1975), cert. den., 424 U.S. 928 (1976).
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> "Rule 23.1 requires the plaintiff to plead with particularity his or her efforts to obtain from the directors the actions desired or the reasons for the failing to make such efforts. At a minimum, the demand should identify the alleged wrongdoers, describe the factual basis of the wrongful acts and the harm caused to the corporation, and request remedial relief. Allright Missouri, Inc. v. Billeter, 829 F.2d 631 (8th Cir. 1987). However, demand on the directors may be excused if that demand would be futile. Elgin at 814. To show futility, the plaintiff shareholder must demonstrate such a degree of antagonism between the directors and the corporate interest that the directors would be incapable of performing their duty. Id. at 815. See also Cooper v. USCO Power Equip. Corp., 655 So. 2d 972 (Ala. 1995). A bare allegation that a majority of the directors are wrongdoers is insufficient, although a trial court may consider the facts underlying that allegation in support of a plaintiff's argument of futility. Elgin, supra."

Stallworth v. AmSouth Bank of Alabama, 709 So. 2d 458, 463-64 (Ala. 1997).

In their petition, 4tdd, Martin, and MACC argue that they have established a clear legal right to the dismissal of Hale's claims because, they say, those claims are derivative of BAN, because Hale did not make a sufficient demand to BAN's directors for the relief she requests, and because Hale was not otherwise excused from making a demand under the doctrine of futility.

II. Mandamus Review

As a threshold matter, we must first determine whether the trial court's denial of 4tdd, Martin, and MACC's motion to dismiss, as it pertains to their argument that Hale failed to make an adequate director demand under Rule 23.1, is reviewable by way of a petition for a writ of mandamus. 4tdd, Martin, and MACC correctly note that, under this Court's line of cases examining the requirements of Rule 23.1, this Court has analyzed the director-demand requirement as one that implicates a shareholder's standing to bring a derivative action as a jurisdictional concept. See, e.g., Ex parte Regions Fin. Corp., 67 So. 3d 45, 49 (Ala. 2010)("A trial court has no discretion to preside over an action when subject-matter jurisdiction is lacking; accordingly, we review de novo whether the shareholders' claims are derivative or

direct claims in order to determine whether the trial court erred by denying the defendants' motion to dismiss."). See also Stallworth, 709 So. 2d at 463 (discussing the failure to comply with the Rule 23.1 procedural requirements as a matter of "standing"). Citing these and other cases, 4tdd, Martin, and MACC contend that Hale lacks standing to assert her derivative claims because she failed to adhere to the demand requirements of Rule 23.1 and thus, they argue, the trial court lacks subject-matter jurisdiction over Hale's claims.

Since this Court's decision in Ex parte Regions, however, this Court has held that standing, as a jurisdictional concept, "appears to have no necessary role to play in respect to private-law actions, which, unlike public-law cases ... come with established elements that define an adversarial relationship and 'controversy' sufficient to justify judicial intervention." Ex parte BAC Home Loans Servicing, LP, 159 So. 3d 31, 44 (Ala. 2013). This Court has "rejected the notion that questions ... regarding the cognizability of the plaintiffs' legal theories, or claims, are 'standing' issues rather than 'cause of action' issues." Ex parte MERSCORP, Inc., 141 So. 3d 984, 992 (Ala. 2013). As explained above, in a derivative action, Rule 23.1 imposes a heightened pleading

standard requiring the shareholder plaintiff to plead with particularity in the complaint that a pre-suit demand on the board of directors of the corporation has been made or that the requirement to make a demand is excused as futile. As a consequence of failing to adhere to the requirements of Rule 23.1, the plaintiff can be prohibited from representing the interests of the corporation derivatively and the trial court can dismiss the derivative action. A plaintiff's failure to comply with the pleading requirements of Rule 23.1, however, does not have any bearing on the trial court's authority to preside over the subject matter of the shareholder's substantive claims. We, therefore, clarify today that, in light of this Court's decision in Ex parte BAC Home Loans Servicing, questions pertaining to the heightened pleading requirements of Rule 23.1 do not invoke the plaintiff's standing to bring the substantive claims and do not implicate the trial court's subject-matter jurisdiction; rather, Rule 23.1 imposes a procedural bar on a derivative action when the plaintiff fails to allege in the complaint that a sufficient director demand has been made or fails to demonstrate that making such a demand would be futile.

Because subject-matter jurisdiction is not implicated in this case, we next must determine whether the question of the sufficiency or futility of a director demand under Rule 23.1 is reviewable by way of a petition for a writ of mandamus. This Court has held that a mandamus petition is the proper method by which to review the issue whether a party should be allowed to proceed as the real party in interest, albeit in the context of issues arising from the trial court's determination pursuant to Rule 17, Ala. R. Civ. P. See Ex parte U.S. Bank Nat'l Ass'n, 148 So. 3d 1060, 1064 (Ala. 2014); Ex parte Jackson Hosp. & Clinic, Inc., 167 So. 3d 324, 329 n.1 (Ala. 2014); Ex parte Tyson Foods, Inc., 146 So. 3d 1041 (Ala. 2013) (reviewing on petition for a writ of mandamus the trial court's ruling on a motion seeking to add a real party in interest); and Ex parte Chemical Lime of Alabama, Inc., 916 So. 2d 594, 596-97 (Ala. 2005) (considering, on petition for a writ of mandamus, whether plaintiffs had timely moved to substitute defendant for a fictitiously named defendant). "'[T]he real party in interest principle is a means to identify the person who possesses the right sought to be enforced.'" Dennis v. Magic City Dodge, Inc., 524 So. 2d 616, 618 (Ala. 1988)(quoting 6 C. Wright & A. Miller, Federal

Practice & Procedure § 1542 (1971))). Invoking a similar notion, a shareholder who brings a derivative action asserts not an individual cause of action but, rather, an action on behalf of the corporation. The shareholder plaintiff in a derivative action stands in the stead of the corporation, and the corporation is the real party in interest "'on whose behalf the action is brought in the first place,'" Stallworth, 709 So. 2d at 463 (quoting Elgin v. Alfa Corp., 598 So. 2d 807, 814 (Ala. 1992), citing in turn Shelton v. Thompson, 544 So. 2d 845, 849 (Ala. 1989)). In Ex parte Tiffin, 879 So. 2d 1160, 1165 (Ala. 2003), this Court stated that shareholders in a derivative action are "'nominal plaintiff[s] representing the corporation,' which is the 'real party in interest.'" (Quoting Barrett v. Southern Connecticut Gas Co., 172 Conn. 362, 370, 374 A.2d 1051, 1055 (1977).) See also Ross v. Bernhard, 396 U.S. 531, 538 (1970)(holding that the corporation in a derivative action "is the real party in interest, the stockholder being at best the nominal plaintiff"); and Galbreath v. Scott, 433 So. 2d 454, 457 (Ala. 1983)("If the corporation refused to assert its cause of action, an action may be maintained by stockholders on behalf of the corporation. In such an action the corporation is the

real party in interest and would be the one in whose favor a judgment would be rendered.").

Even if the real-party-in-interest concept is wanting in some respect, it would appear that Rule 23.1 logically requires a threshold determination, and an avenue for mandamus review, as to whether the derivative action may be maintained by the plaintiff before any decision is made regarding whether to proceed toward litigation on the merits. There is no procedure for appealing from a wrongful determination of that issue before the entry of a final judgment on the merits. In other words, the only alternative to mandamus review would be for the corporation whose rights are at issue to appeal after a final judgment has been entered on the merits. Such an appeal obviously is not adequate to protect the corporation's right to prevent the maintenance of a derivative action by one who does not fairly and adequately represent the interests of the shareholders because the action will have been maintained by the time the corporation can file an appeal. To hold that the review of that issue must await a determination of the merits would defeat the very right Rule 23.1 is designed to protect, namely the right to prevent the maintenance of

litigation on behalf the corporation by a plaintiff who does not "fairly and adequately represent the interests of the shareholders" of the corporation. We conclude, therefore, that an appellate court may review by way of a petition for a writ of mandamus a trial court's determination whether a plaintiff's complaint asserting a derivative claim is, or is not, compliant with the requirements of Rule 23.1. This conclusion should not be interpreted as expanding mandamus review; as noted above, this Court, before today, had discretion to review trial-court determinations pertaining to Rule 23.1 by way of a petition for a writ of mandamus, although such review was conducted under the concept of standing. In this case, we clarify that mandamus relief is available when it is demonstrated that a shareholder plaintiff in a derivative action, in which the corporation is the real party in interest, has not complied with the heightened pleading requirements of Rule 23.1.

III. Derivative Claims

We next must determine whether Hale's claims are derivative claims that must be brought on behalf of BAN. "[I]n analyzing whether a claim is derivative or direct, this

Court looks to the nature of the alleged wrong rather than the designation used by the plaintiff in the complaint." Baldwin Cty. Elec. Membership Corp. v. Catrett, 942 So. 2d 337, 345 (Ala. 2006). "It is only when a stockholder alleges that certain wrongs have been committed by the corporation as a direct fraud upon him, and such wrongs do not affect other stockholders, that one can maintain a direct action in his individual name." Bradley Constr., Inc., 431 So. 2d at 1229. In support of their argument that Hale's claims are derivative as to BAN, 4tdd, Martin, and MACC cite this Court's decisions in James v. James, 768 So. 2d 356 (Ala. 2000); Stallworth, supra; Altrust Fin. Servs., Inc. v. Adams, 76 So. 3d 228 (Ala. 2011); and Pegram, supra.

In James, a minority shareholder alleged individual claims of fraudulent suppression and oppression/squeeze out, in addition to a derivative claim of breach of fiduciary duty, against the majority shareholder. This Court held that the individual claims were also derivative, stating:

> "This Court has held that majority shareholders in a close corporation owe a duty to act fairly toward minority shareholders. Stallworth v. AmSouth Bank of Alabama, 709 So. 2d 458, 467 (Ala. 1997); Burt v. Burt Boiler Works, 360 So. 2d 327, 331 (Ala. 1978). However, it has also held that when a plaintiff's status as a shareholder is essential to

> his claims for damages, including damages based on claims of suppression and oppression, the claims are derivative claims and must be brought on behalf of the corporation. Pegram v. Hebding, 667 So. 2d 696, 702 (Ala. 1995); McLaughlin v. Pannell Kerr Forster, 589 So. 2d 143 (Ala. 1991). Therefore, 'a minority shareholder cannot parlay a wrong committed primarily against the corporation, which gives rise to a derivative claim only, into a personal recovery of damages under a squeeze-out theory by simply stating that the injury to the corporation is also "unfair" to him as well.' Stallworth, 709 So. 2d at 467.
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> "[The plaintiff] made claims for individual damages based on the harm he says was done to [the company]. The cause of this harm was [the defendant's] alleged mismanagement of [the company]. Therefore, any claims made by [the plaintiff] should have been derivative claims."

768 So. 2d at 358-59. See also Stallworth, 709 So. 2d at 467 ("The lost value of a minority shareholder's stock resulting from director self-dealing or mismanagement could certainly be characterized as 'unfair' to the minority stockholder in some sense, but this is a quintessential derivative injury, merely incidental to one's status as a stockholder, and thus not a harm cognizable under a squeeze-out theory.").

In Altrust, shareholders asserted a fraudulent-suppression claim against the corporation, the corporation's bank, and officers and directors of the corporation and the bank alleging that the shareholders were induced to reject a

stock-purchase offer based on a proxy statement that, the shareholders alleged, contained misrepresentations and omissions by the defendants. In determining that the shareholders' claim was derivative, this Court stated:

> "We note that the damages the plaintiffs seek to recover here are incidental to their status as part of the remaining eligible shareholders in Altrust not covered by the mandatory repurchase provision. Where the damages sought to be recovered are incidental to the plaintiff's status as a shareholder, including damages based on a claim of fraudulent suppression, the claim is a derivative one and must be brought on behalf of the corporation. James[v. James], 768 So. 2d [356] at 358-59 [(Ala. 2000)], citing Pegram[v. Hebding], 667 So. 2d [696] at 703 [(Ala. 1995)]. Although the plaintiffs have cast their claim for damages as a fraudulent-suppression claim, the actual harm--the diminution of their Altrust stock based on the actual state of affairs at the company--was caused by the alleged mismanagement and wrongdoing of the Altrust officers and directors. This harm is not unique to the plaintiffs; rather, it is suffered equally by all remaining eligible shareholders in Altrust. Because the harm suffered by the plaintiffs also affects all other remaining eligible shareholders in Altrust, the plaintiffs do not have standing to assert a direct action."

76 So. 3d at 246.

In the present case, Hale, in part, seeks to set aside certain allegedly ultra vires acts taken by Neese on behalf of BAN, namely Neese's approval of the 2014 promissory note and the mutual release. But, as noted above, when determining

whether a claim is derivative or direct, this Court is required to look at the true nature of the claim rather than the plaintiff's designation of those claims. Baldwin Cty. Elec. Membership Corp., supra. As a part of the relief Hale seeks in her ultra vires claim pertaining to the 2014 promissory note, Hale requests damages for all shareholders to enable them to recover for the alleged deprivation of BAN's assets that were acquired by 4tdd when it foreclosed on the security agreement. Stated otherwise, Hale alleges that the harm she suffered as a result of the foreclosure on the security agreement affects not just her individually, but also all of BAN's shareholders, making her claim derivative in nature rather than direct. See Altrust, supra.[2] As to her ultra vires claim regarding the mutual release, Hale requests

[2]We note that, as a part of her ultra vires claim pertaining to the 2014 promissory note, Hale purports to request injunctive relief, presumably to prevent 4tdd, Martin, and MACC from acting on the promissory note. Although this Court has previously recognized that a shareholder may assert a direct ultra vires claim for prospective injunctive relief under § 10A-2-3.04(b)(1), Ala. Code 1975, see DeKalb Cty. LP Gas Co. v. Suburban Gas, Inc., 729 So. 2d 270 (Ala. 1998), Hale's request for injunctive relief attempts to prevent acts that have been consummated. Neese authorized the promissory note in 2014, well before Hale filed this action. We further note that neither side has raised § 10A-2-3.04(b)(1) or DeKalb in their briefs on mandamus review to this Court.

that the mutual release be declared "void and of no effect as to BAN." The requested recovery as to this claim does not allege an injury to Hale that is independent of BAN. Instead, Hale seeks to stand in the stead of BAN's board of directors to overturn Neese's approval of the mutual release. Regarding her breach-of-fiduciary-duty claim, Hale specifically alleges in her complaint that 4tdd, Martin, and MACC owed a fiduciary obligation to BAN and that their alleged breach of that duty caused BAN to suffer economic damage. As to her breach-of-contract claim, Hale alleged in the complaint that Martin and MACC breached the July 2012 financial-consulting contract with BAN and that the alleged breach caused economic damage to BAN.

Hale has alleged injuries in support of her claims that "'"fall[] directly on the corporation as a whole and collectively, but only secondarily, upon its stockholders as a function of and in proportion to their pro rata investment in the corporation."'" Regions Fin. Corp., 67 So. 3d at 55 (interpreting Delaware law and quoting In re Triarc Cos., 791 A.2d 872, 878 (Del. Ch. 2001), quoting in turn Donald J. Wolfe and Michael A. Pittenger, Corporate and Commercial Practice in the Delaware Court of Chancery § 9-2, at 516 (1998)). We, therefore, conclude that Hale's ultra vires claims, breach-of-

fiduciary-duty claim, and breach-of-contract claim are derivative claims that were asserted on behalf of BAN.

IV. Director Demand

Having concluded that all of Hale's claims are derivative claims belonging to BAN, we next review whether Hale's complaint alleged a proper director demand as required by Rule 23.1. Hale did not allege in her complaint that she made any efforts to obtain the relief she requests from BAN's directors. As noted above, however, a shareholder can be excused from making the director demand when the demand would be futile, including when the shareholder can "demonstrate such a degree of antagonism between the directors and the corporate interest that the directors would be incapable of performing their duty." Stallworth, 709 So. 2d at 464. A shareholder's pleading alleging incognizance of the composition of the corporation's board of directors as the basis for not making a director demand, as Hale alleged in her complaint, does not demonstrate any antagonism and fails to satisfy the futility exception in Rule 23.1. In her response to the petition for a writ of mandamus, Hale asserts only that she and other shareholders of BAN have been deprived of their

"financial rights and rights of control" and that discovery is needed to resolve the claims. Based on the requirements of Rule 23.1, "it is clear that the 'particularity' must appear in the pleading itself; the stockholder may not plead in general terms, hoping that, by discovery or otherwise, he can later establish a case." In re Kauffman Mut. Fund Actions, 479 F.2d 257, 263 (1st Cir. 1973).

We conclude that Hale failed to make a demand on BAN's directors and failed to show that a demand on BAN's directors would have been futile. Her claims, all of which are derivative as to BAN, are, therefore, barred by Rule 23.1. Accordingly, 4tdd, Martin, and MACC have demonstrated a clear legal right to dismissal of Hale's claims, and we grant their petition. Because we grant the petition on the ground that Hale failed to comply with Rule 23.1, we pretermit discussion of whether the trial court should have entered a summary judgment in favor of 4tdd, Martin, and MACC on Hale's claims on the basis of the doctrine of res judicata or the mutual release.

Conclusion

We grant 4tdd, Martin, and MACC's petition, and we direct the trial court to grant 4tdd, Martin, and MACC's motion to

dismiss on the ground that Hale asserts derivative claims and her complaint is not compliant with the heightened pleading requirements of Rule 23.1.

PETITION GRANTED; WRIT ISSUED.

Parker, C.J., and Bolin, Wise, Mendheim, and Mitchell, JJ., concur.

Shaw and Sellers, JJ., concur in the result.

Bryan, J., dissents.

SHAW, Justice (concurring in the result).

I concur in the result.

In arguing that the issues raised in this case may be reviewed in a petition for a writ of mandamus, the petitioners relied on precedent from this Court. In Ex parte Morgan Asset Management, Inc., 86 So. 3d 309, 321 (Ala. 2011), and Ex parte Regions Financial Corp., 67 So. 3d 45, 56 (Ala. 2010), we held that a party's failure to comply with the requirements of Rule 23.1, Ala. R. Civ. P., denies that party "standing" to assert derivative claims.[3] When a party without standing attempts to commence an action, the trial court does not obtain subject-matter jurisdiction; the denial of a motion to dismiss based on subject-matter jurisdiction is subject to mandamus review. Morgan Asset Mgmt., 86 So. 3d at 313.

Those decisions are precedent, they have not been overruled, and they have not been challenged. I do not believe that this Court should, on its own motion, overrule caselaw when there has been no request by the parties to do so. See Ex parte McKinney, 87 So. 3d 502, 509 n.7. (Ala. 2011) ("[T]his Court has long recognized a disinclination to

[3]See also Stallworth v. AmSouth Bank of Alabama, 709 So. 2d 458, 463 (Ala. 1997).

overrule existing caselaw in the absence of either a specific request to do so or an adequate argument asking that we do so."), and Moore v. Prudential Residential Servs. Ltd. P'ship, 849 So. 2d 914, 926 (Ala. 2002) ("Stare decisis commands, at a minimum, a degree of respect from this Court that makes it disinclined to overrule controlling precedent when it is not invited to do so.").

Further, although this Court has held that "standing" generally applies in public-law cases and not in private-law cases, I cannot conclude that the petitioners should have anticipated the ex mero motu application of that rule in this case; simply put, it is not always clear when this Court will enforce prior cases that have applied the "standing" doctrine in private-law situations.[4]

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[4]For example, in Ex parte Valley National Bank, [Ms. 1180055, December 13, 2019] ___ So. 3d ___ (Ala. 2019) (plurality opinion on application for rehearing), the Court held that a declaratory-judgment action by a tortfeasor seeking a declaration of nonliability was a nonjusticiable controversy. It relied in part on Harper v. Brown, Stagner, Richardson, Inc., 873 So. 2d 220, 224 (Ala. 2003), which held that an action for an "anticipatory claim" was not justiciable. But less than two months later, in Ex parte State Farm Fire & Casualty Co., [Ms. 1170760, January 31, 2020] ___ So. 3d ___ (Ala. 2020), this Court, on its own motion, held that State Farm Mutual Automobile Insurance Co. v. Brown, 894 So. 2d 643 (Ala. 2004), which relied on Harper and held that "anticipated" controversies were nonjusticiable,

Litigants should be able to depend on our caselaw. The petitioners in this case did so, and they thus should not be required to argue an alternate basis for review. Generally, this Court will not provide such a basis for a petitioner. Ex parte Simpson, 36 So. 3d 15, 25 (Ala. 2009) ("Arguments not made as a basis for mandamus relief are waived.").

I believe that we should review this petition under the authority of Morgan Asset Management and Regions Financial. If they are due to be overruled, then they can be challenged in this Court at the appropriate time, allowing a party relying on them the opportunity to provide a valid, alternate basis authorizing this Court to hear the petition. Alternately, this Court's overruling of Morgan Asset Management and Regions Financial should be prospective only.

As to the substantive issue advanced by the petitioners and addressed by the main opinion, I agree that the writ should be granted. I therefore concur in the result.

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had improperly applied the doctrine of "standing." Further, this Court last year in a private-law action held that one who was not a party to the judgment below did not have "standing" to appeal. Phoenix East Ass'n, Inc. v. Perdido Dunes Tower, LLC, [Ms. 1170694, June 14, 2019] ___ So. 3d ___ (Ala. 2019). That idea, however, had obliquely been questioned in dicta in Lawler v. Johnson, 253 So. 3d 939, 945 n.3 (Ala. 2017).

BRYAN, Justice (dissenting).

4tdd.com, Inc. ("4tdd"), Thomas Todd Martin III, and Martin & Associates Consulting Company, LLC ("MACC")(collectively referred to hereinafter as "the petitioners"), have petitioned this Court for a writ of mandamus directing the Mobile Circuit Court ("the trial court") to dismiss an action filed against them by Sheila Hale.

> "'"'Mandamus is a drastic and extraordinary writ to be issued only where there is (1) a clear legal right in the petitioner to the order sought; (2) an imperative duty upon the respondent to perform, accompanied by a refusal to do so; (3) the lack of another adequate remedy; and (4) properly invoked jurisdiction of the court.'"' Ex parte Sears, Roebuck & Co., 895 So. 2d 265[, 268] (Ala. 2004)(quoting Ex parte Mardis, 628 So. 2d 605, 606 (Ala. 1993)(quoting in turn Ex parte Ben-Acadia, Ltd., 566 So. 2d 486, 488 (Ala. 1990))). 'The petitioner bears the burden of proving each of these elements before the writ will issue.' Ex parte Glover, 801 So. 2d 1, 6 (Ala. 2001)(citing Ex parte Consolidated Publ'g Co., 601 So. 2d 423 (Ala. 1992))."

Ex parte Vance, 900 So. 2d 394, 397 (Ala. 2004)(emphasis added).

As the majority notes, the petitioners argue that they have a clear legal right to mandamus relief because, they say, the trial court lacks subject-matter jurisdiction over this

action as a result of Hale's purported failure to demonstrate that she has standing to bring a shareholder derivative action on behalf of Bay Area Nutrition, Inc. As the majority also explains, however,

> "this Court has held that standing, as a jurisdictional concept, 'appears to have no necessary role to play in respect to private-law actions, which, unlike public-law cases ... come with established elements that define an adversarial relationship and "controversy" sufficient to justify judicial intervention.' Ex parte BAC Home Loans Servicing, LP, 159 So. 3d 31, 44 (Ala. 2013)."

____ So. 3d at ____. Therefore, the majority concludes, "subject-matter jurisdiction is not implicated in this case." ____ So. 3d at ____.

Thus, instead of basing its decision to issue a writ of mandamus in this case on the trial court's lack of subject-matter jurisdiction over this action, the majority issues the writ based on what appears to be a determination that Hale has failed to adequately demonstrate that she is the real party in interest. In so doing, the majority references Rule 17, Ala. R. Civ. P., and cites various cases addressing "the real-party-in-interest concept." ____ So. 3d at ____. By analogy to this concept, the majority appears to conclude that a party's compliance with the "director-demand" requirements of

Rule 23.1, Ala. R. Civ. P., is reviewable by way of a petition for a writ of mandamus.

The majority's analogy may have merit, but I dissent from the decision to issue a writ of mandamus because, in this case, the petitioners have not argued that they have a clear legal right to mandamus relief based on the analogy relied upon by the majority to grant that relief. In short, the petitioners have simply not argued that they are entitled to a dismissal of Hale's action based on "the real-party-in-interest concept," which is the basis upon which the majority grants mandamus relief. ____ So. 3d at ____.

As noted above, "[t]he petitioner[s] bear[] the burden of proving" that they have a clear legal right to the relief they seek. Ex parte Vance, 900 So. 2d at 397 (internal quotation marks omitted; emphasis added). Therefore, I would not issue a writ of mandamus under these circumstances, and I respectfully dissent from the majority's decision to do so.