REL: March 23, 2018

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2017-2018

1151071

Steven R. Nichols et al.

v.

HealthSouth Corporation

Appeal from Jefferson Circuit Court
(CV-03-2023)

MENDHEIM, Justice.

Steven R. Nichols, Deborah Deavours, Terry Akers, Thomas Dryden, and Gary Evans appeal from the Jefferson Circuit Court's dismissal of their action against HealthSouth Corporation ("HealthSouth"). We reverse and remand.

I. Facts

Nichols, Deavours, Akers, Dryden, and Evans (hereinafter referred to collectively as "the employee shareholders") at one time were all HealthSouth employees and holders of HealthSouth stock. On March 28, 2003, the employee shareholders sued HealthSouth, Richard Scrushy, Weston Smith, William Owens, and the accounting firm Ernst & Young,[1] alleging fraud and negligence. The action was delayed for 11 years for a variety of reasons, including a stay imposed until related criminal prosecutions were completed and a stay imposed pending the resolution of federal and state class actions.

In their original complaint -- and in several subsequent amended complaints -- the employee shareholders alleged that HealthSouth and several of its executive officers

> "published financial statements of Healthsouth from 1987 forward. Those representations were made ... with the intent that investors such as [the employee shareholders] would rely upon them in making decisions to buy, sell, or hold HealthSouth stock. [The employee shareholders] relied upon the false statements about HealthSouth's financial condition in making those decisions. As a result of that

[1]Scrushy, Smith, Owens, and Ernst & Young are no longer parties to this action.

> reliance, [the employee shareholders] suffered damage[]."

When the employee shareholders filed their action, this Court's precedent held (1) that "[n]either Rule 23.1[, Ala. R. Civ. P.,] nor any other provision of Alabama law requires that stockholders' causes of action that involve the conduct of officers, directors, agents, and employees be brought only in a derivative action," and (2) that claims by shareholders against a corporation alleging "fraud, intentional misrepresentations and omissions of material facts, suppression, conspiracy to defraud, and breach of fiduciary duty" "do not seek compensation for injury to the [corporation] as a result of negligence or mismanagement," and therefore "are not derivative in nature." Boykin v. Arthur Andersen & Co., 639 So. 2d 504, 508 (Ala. 1994) (emphasis omitted).

This Court overruled Boykin, however, in Altrust Financial Services, Inc. v. Adams, 76 So. 3d 228 (Ala. 2011). The plaintiffs in Altrust brought securities-fraud claims against Altrust, Peoples Bank of Alabama, and related defendants. Discussing Boykin, the Court noted:

> "[T]he main opinion in Boykin failed to discuss how the damage suffered by the plaintiffs as the result of the alleged fraud by officers, directors, and accountants differed from the damage suffered by other shareholders and whether the plaintiffs suffered an injury unique to them."

76 So. 3d at 245. This Court further explained:

> "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 (emphasis added).[2]

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[2]Altrust was decided before this Court decided Ex parte BAC Home Loans Servicing, LP, 159 So. 3d 31, 44 (Ala. 2013), in which it explained that "the concept [of standing] 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

In the present case, in an effort to ensure that the claims they were asserting were direct claims against HealthSouth, the employee shareholders filed their eighth amended complaint on November 25, 2014, and recast their factual allegations of fraud in a way they believed satisfied the law as declared in Altrust. Specifically, they alleged:

> "1. ... [D]efendant HealthSouth, by and through its Chief Operating Officer Richard Scrushy and other HealthSouth employees, made fraudulent statements to these particular plaintiffs as to the financial status of the company.
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> "....
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> "10. The plaintiffs in this case had multiple in-person contacts with HealthSouth CEO Richard Scrushy personally. As an example, plaintiff Nichols was a physician practicing at HealthSouth's sole full-service hospital located in Birmingham, Alabama. The other plaintiffs also worked at that hospital. Scrushy, who apparently viewed the hospital as a pet project of the company, was often at the hospital, either alone or with various other HealthSouth executives.
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> "11. During these visits, Scrushy and other HealthSouth executives would speak to plaintiffs. During the time from 1997 until the end of 2002, Scrushy and other HealthSouth employees would make statements directly to the plaintiffs such as 'the company is doing great,' 'the company is making tons of money,' 'don't listen to any rumors you may hear, the company is doing great,' 'you shouldn't sell any

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and 'controversy' sufficient to justify judicial intervention."

> stock in the company, you should buy all you can buy,' and the price is going to keep going up because we are making tons of money.'
>
> "12. Indeed, Dr. Nichols and the other plaintiffs had more than one conversation with Scrushy about concerns about HealthSouth. In the time period 1997-2002, there were rumors in the Birmingham healthcare community concerning HealthSouth's financial well-being and about the amazing run the company's stock had had in the market. There were also rumors to this effect at the HealthSouth hospital where they all worked based on information not disclosed to the general stock-buying public. These plaintiffs worked closely with HealthSouth employees. The rumors were that the company could not possibly be doing as well as the public disclosures HealthSouth was making pursuant to federal securities laws. Scrushy told Nichols and the other plaintiffs on multiple occasions prior to their stock purchases not to listen to such rumors, that the company was doing great, and that Nichols should spend every spare dime he had on buying more HealthSouth stock."

In short, the employee shareholders alleged that "ultimately their decisions to buy and hold HealthSouth stock were made in reliance upon the personal reassurances of Richard Scrushy himself" and that this constituted a direct fraud upon them that did not affect other HealthSouth stockholders.

On December 10, 2016, HealthSouth filed a Rule 12(b)(6), Ala. R. Civ. P., motion to dismiss the employee shareholders' eighth amended complaint on the ground that -- under both

Alabama and Delaware law[3] -- the claims asserted in that complaint were derivative in nature rather than direct and were therefore due to be dismissed because the employee shareholders had "failed to comply with the demand-pleading requirements of Alabama Rule of Civil Procedure 23.1[, Ala. R. Civ. P.]." In the alternative, HealthSouth argued that regardless of whether the claims asserted in the eighth amended complaint were derivative or direct, the claims were barred by Alabama's 2-year statute of limitations for fraud claims because they presented new allegations based on actions that occurred between 1997 and 2002 -- over 12 years before the filing of the eighth amended complaint.

On April 8, 2016, the employee shareholders filed their response to HealthSouth's motion to dismiss the eighth amended complaint. The employee shareholders conceded that, if their claims were derivative in nature, the claims were due to be dismissed. They contended, however, that under either Alabama or Delaware law their claims were direct because, they argued, the wrongs alleged were unique to these particular plaintiffs and were not injuries to the corporation or to shareholders of

[3]HealthSouth is a Delaware corporation.

the corporation as a whole. The employee shareholders also contended that their claims were not barred by the two-year statute of limitations because, they said, the claims "arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading," and therefore, under Rule 15(c)(2), Ala. R. Civ. P., the claims related back to the date of the original complaint.

On May 26, 2016, the trial court entered an order dismissing the employee shareholders' complaint. The trial court reasoned:

> "This court has before dealt with similar kinds of claims. See Ex parte Morgan Asset Mgmt., Inc., 86 So. 3d 309, 317 (Ala. 2011); Ex parte Regions Fin. Corp., 67 So. 3d 45, 47 (Ala. 2010). If those cases applied, HealthSouth's motion would clearly have to be granted. The defendants in those actions were Maryland entities, however, while HealthSouth is a corporation organized under the laws of the State of Delaware. For the same reason, Altrust Fin. Servs., Inc. v. Adams, 76 So. 3d 228, 240 (Ala. 2011) -- which would also mandate the dismissal of this action -- does not govern since it applied Alabama law.
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> "The question is whether Delaware law leads to a different result under the particular circumstances of this case. The court concludes that it does not. Under Tooley v. Donaldson, Lufkin & Jenrette, 845 A.2d 1031 (Del. 2004), and its progeny, the focus i[s] on the nature of the plaintiffs' claimed injury, not on the nature of the wrongdoing, as the Tooley court described:

> "'That is, a court should look to the nature of the wrong and to whom the relief should go. The stockholder's claimed direct injury must be independent of any alleged injury to the corporation. The stockholder must demonstrate that the duty breached was owed to the stockholder and that he or she can prevail without showing an injury to the corporation.'

"Tooley, 845 A.2d at 1039. Here, while Scrushy is alleged to have committed fraud against these plaintiffs, in truth he committed fraud against all shareholders of his company. As alleged in the plaintiffs' various complaints, Scrushy and other executives devised a scheme of hiding the company's true financial condition from everyone. The fraud was global in nature, and all shareholders ultimately suffered as a result.

"The court therefore agrees with HealthSouth that under Delaware law, a shareholder may not pursue a direct claim based on the diminution in stock value that all other shareholders suffered. HealthSouth's motion is accordingly granted. This action is dismissed with prejudice, with costs taxed as paid."

The shareholder employees filed a timely appeal.

II. Standard of Review

> "'On appeal, a [trial court's ruling on a motion to dismiss] is not entitled to a presumption of correctness. Jones v. Lee County Commission, 394 So. 2d 928, 930 (Ala. 1981); Allen v. Johnny Baker Hauling, Inc., 545 So. 2d 771, 772 (Ala. Civ. App. 1989). The appropriate standard of review under Rule 12(b)(6) is whether, when the allegations of the complaint are viewed most strongly in the pleader's favor, it

> appears that the pleader could prove any set of circumstances that would entitle her to relief. Raley v. Citibanc of Alabama/Andalusia, 474 So. 2d 640, 641 (Ala. 1985); Hill v. Falletta, 589 So. 2d 746 (Ala. Civ. App. 1991). In making this determination, this Court does not consider whether the plaintiff will ultimately prevail, but only whether she may possibly prevail.'"

American Suzuki Motor Corp. v. Burns, 81 So. 3d 320, 323 (Ala. 2011) (quoting Nance v. Matthews, 622 So. 2d 297, 299 (Ala. 1993)).

III. Analysis

The two issues presented in this appeal are: (1) whether the employee shareholders' claims are direct or derivative in nature; and (2) whether the claims asserted in the employee shareholders' eighth amended complaint relate back to the filing of their original complaint so that they are not barred by Alabama's two-year statute of limitations for fraud claims. The trial court addressed only the first issue, but, because this Court may affirm the judgment of a trial court on alternative valid legal grounds, we must examine both issues. See, e.g., Warren v. Hooper, 984 So. 2d 1118, 1121 (Ala. 2007) ("'This Court may affirm a trial court's judgment on "any valid legal ground presented by the record, regardless of whether that ground was considered, or even if it was rejected, by the trial court."'" (quoting General Motors Corp. v. Stokes Chevrolet, Inc., 885 So. 2d 119, 124 (Ala. 2003), quoting in turn Liberty Nat'l Life Ins. Co. v. University of Alabama Health Servs. Found., P.C., 881 So. 2d 1013, 1020 (Ala. 2003))).

A. Do the Claims Asserted in the Employee Shareholders' Eighth Amended Complaint Relate Back to the Original Pleading?

The parties do not dispute that Alabama's statute of limitations for fraud actions applies in this case.[4] They likewise agree that the applicable limitations period is two years.[5] The parties' dispute concerns whether the employee

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[4] "As to matters of procedure, ... Alabama applies its own procedural law, i.e., the law of the forum. Middleton v. Caterpillar Indus., Inc., 979 So. 2d 53, 57 (Ala. 2007) ('Although lex loci delicti governs substantive law, lex fori -- the law of the forum -- governs procedural matters.'). This Court has also held that, in most instances, statutes of limitations are procedural matters."

Precision Gear Co. v. Continental Motors, Inc., 135 So. 3d 953, 957 (Ala. 2013).

[5] "Claims of fraudulent misrepresentation and suppression are subject to a two-year statute of limitations. Ala. Code 1975, § 6-2-38(l)." Foremost Ins. Co. v. Parham, 693 So. 2d 409, 417 (Ala. 1997).

shareholders' claims in their eighth amended complaint "relate back" to their original complaint under Rule 15(c)(2), Ala. R. Civ. P., which provides, in pertinent part:

> "(c) Relation back of amendments. An amendment of a pleading relates back to the date of the original pleading when
>
> "....
>
> "(2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading ...."

HealthSouth contends that the employee shareholders' claims do not relate back because "[t]he eighth amended complaint 'attempts to state a cause of action that was not stated in [their] original complaint.'" HealthSouth's brief, p. 25 (quoting Carter v. Liberty Nat'l Life Ins. Co., 849 So. 2d 977, 983 (Ala. Civ. App. 2002)). They note that the eighth amended complaint asserted facts that were not discussed in any of the employee shareholders' previous complaints. Specifically, in previous complaints the employee shareholders alleged that financial statements issued by HealthSouth misled the employee shareholders into believing that HealthSouth was in a financially sound position when, in fact, HealthSouth had grossly overstated its assets and earnings. In contrast, for the first time in the eighth amended complaint the employee shareholders alleged that they were fraudulently induced to purchase more HealthSouth stock or to hold onto the stock they already owned through personal representations made to them by Richard Scrushy. HealthSouth argues that because the facts are new, the claims asserted in the previous complaints are not dependent upon those facts and that, therefore, the employee shareholders "filed a wholly new complaint under the guise of an amendment." Healthsouth's brief, p. 25.

HealthSouth's argument goes too far in characterizing the allegations in the eighth amended complaint. The gravamen of the cause of action stated in the eighth amended complaint is the same as that stated in the previous complaints, i.e., fraud perpetrated by HealthSouth upon the employee shareholders. The difference in the eighth amended complaint is the form the fraud took. In other words, the eighth amended complaint represents a refinement of the employee shareholders' claims. "'[W]here the amendment is merely a more definite statement, or refinement, of a cause of action set out in the original complaint, the amendment relates back to the original complaint in accordance with A[la]. R. Civ. P. 15(c).'" McCollough v. Warfield, 523 So. 2d 374, 375 (Ala. 1988) (quoting Cooper v. Thomas, 456 So. 2d 280, 283 (Ala. 1984)).

> "[A]n alteration of the modes in which the defendant has broken the contract or caused the injury is not an introduction of a new cause of action. The test is whether the proposed amendment is a different matter, another subject of controversy, or the same matter more fully or differently laid to meet the possible scope of the testimony."

Knox v. Cuna Mut. Ins. Soc'y, 282 Ala. 606, 613, 213 So. 2d 667, 673 (1968) (emphasis added).

The eighth amended complaint is not raising a different matter or something entirely distinct from the HealthSouth fraud alleged in the original complaint. It refined how that fraud was perpetrated. The change is similar to that described in Rodopoulos v. Sam Piki Enterprises, Inc., 570 So. 2d 661 (Ala. 1990), in which the original complaint alleged that the defendants told the plaintiffs, prospective buyers of a restaurant business, that they could "expect to gross approximately $12,000.00 per week." 570 So. 2d at 663. The plaintiffs also alleged that they told the defendants that "in order to break even the [restaurant] would need to gross at least $7,000.00 a week" and that the defendants "assured the Plaintiffs that this gross figure would be no problem." Id. In an amended complaint, the plaintiffs added allegations that the defendants were "'under a duty to disclose to the Plaintiffs the fact that the only two [restaurants] that the Defendants operated had grossed between $4,000 and $5,000 a week.'" They also added an allegation that, after they had been operating the restaurant for a year and had not grossed the amounts necessary to break even, the defendants "gave them assurances that the business would turn around. However, the business did not turn around." 570 So. 2d at 664. This Court concluded that "this amendment is merely a more definite statement, or a refinement, of the fraud cause of action set out in the original complaint. The amendment, therefore, relates back to the original complaint, and the trial court correctly allowed the amendment." 570 So. 2d at 665.

The plaintiffs in Rodopoulos clearly added new allegations in their amended complaint based on facts that were not previously presented, but the amendment was deemed to relate back to the original complaint because the new allegations were part of the same overall fraud alleged against the defendants concerning the kind of financial success the plaintiffs could expect from operating the restaurant business. In the same way, the new facts alleged by the employee shareholders were part of the same fraud originally alleged against HealthSouth concerning the false financial strength of the corporation. Accordingly, we conclude that the eighth amended complaint relates back to the original complaint; therefore, it is not barred by the two-year statute of limitations.

B. Are the Employee Shareholders' Claims Direct or Derivative Claims?

The employee shareholders contend that the trial court erred in concluding that their claims are derivative in nature and that the claims therefore are due to be dismissed because the employee shareholders failed to fulfill the procedural requirements of Rule 23.1, Ala. R. Civ. P., for bringing such claims. Initially, the employee shareholders argue that the trial court erred in applying Delaware law when analyzing this issue. They eventually argue, however, that their claims are direct claims under either Alabama law or Delaware law because, they say, they are claims that cannot be brought by the corporation based on the personal nature of the fraud perpetrated against them.

In a footnote in its brief, HealthSouth acknowledges that it contended in the trial court that Delaware law applies to this issue, but it insists on appeal that "[t]his Court need not determine which state's law applies, for the Employee Shareholders argue only that their claims are direct under Alabama law; and, under Alabama law, they are wrong." This assertion is incorrect in two ways. First, although the employee shareholders primarily argue that Alabama law applies and that under Alabama law their claims are direct claims, they also contend that Delaware law supports the same conclusion. Second, this Court cannot avoid the choice-of-law question; we must discuss and apply the law that governs the parties' dispute.

This Court previously has stated that "the determination whether the shareholders' claims are derivative or direct must ... be made in accordance with" the law of the state of incorporation. Ex parte Regions Fin. Corp., 67 So. 3d 45, 49 (Ala. 2010) (citing Kamen v. Kemper Fin. Servs., Inc., 500 U.S. 90, 108-09 (1991); and Massey v. Disc Mfg., Inc., 601

So. 2d 449, 454-55 (Ala. 1992)). See also Ex parte Morgan Asset Mgmt., Inc., 86 So. 3d 309, 317 (Ala. 2011). The Massey Court noted that "[t]he established rule of conflicts law is that 'the internal corporate relationship is governed by the law of the state of incorporation.' See P. John Kozyris, Corporate War and Choice of Law, 1985 Duke L.J. 1, 15 (1985)." 601 So. 2d at 454. This is also known as the "internal affairs doctrine."

> "'"[W]here the act complained of affects the complainant solely in his capacity as a member of the corporation, whether it be as stockholder, director, president, or other officer, and is the act of the corporation, whether acting in stockholders meeting, or through its agent, the board of directors, that then such action is the management of the internal affairs of the corporation."'"

Ex parte Bentley, 50 So. 3d 1063, 1071 (Ala. 2010) (quoting In re Chalk Line Mfg., Inc. (Bankr. No. 93-42773, Adv. No. 94-40003, July 26, 1994) (Bankr. N.D. Ala. 1994) (not published in Bankruptcy Reporter), quoting in turn Ellis v. Mutual Life Ins. Co., 237 Ala. 492, 502, 187 So. 434, 442 (1939)). See also Bagdon v. Bridgestone/Firestone, Inc., 916

F.2d 379, 382 (7th Cir. 1990) ("The choice between derivative and direct litigation is a choice about how (and by whom) the internal affairs of the firm are managed. If the suit is derivative, the board may have an opportunity to control or dismiss the litigation.").

HealthSouth is incorporated in Delaware. The trial court was correct in concluding that Delaware law applied to the issue whether the employee shareholders' claims are derivative or direct in nature. The trial court, however, erred in concluding that Delaware law categorizes the present action as derivative in nature.

The trial court relied upon Tooley v. Donaldson, Lufkin & Jenrette, Inc., 845 A.2d 1031 (Del. 2004), in concluding that the focus in determining whether a claim is derivative or direct is "the nature of the plaintiff's claimed injury, not on the nature of the wrongdoing." The Tooley court stated: "[The] issue [whether a stockholder's claim is derivative or direct] must turn solely on the following questions: (1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually)?" Tooley, 845 A.2d at 1033. As the trial court noted, the Tooley court went on to explain:

> "[A] court should look to the nature of the wrong and to whom the relief should go. The stockholder's claimed direct injury must be independent of any alleged injury to the corporation. The stockholder must demonstrate that the duty breached was owed to the stockholder and that he or she can prevail without showing an injury to the corporation."

845 A.2d at 1039.

If Tooley was the only guidance we had for Delaware law on this issue, we would agree with the trial court's conclusion. But, two days after the trial court issued its final order, the Delaware Supreme Court decided Citigroup Inc. v. AHW Investment Partnership, 140 A.3d 1125 (Del. 2016), in which it clarified when the Tooley test should be applied. The plaintiffs in Citigroup were all affiliates of Arthur and Angela Williams, who owned stock in Citigroup.[6] The plaintiffs sued Citigroup and eight of its officers and directors. The plaintiffs alleged that

> "they and their financial advisors developed a plan in May 2007 to sell their 17.6 million Citigroup shares. On May 17, 2007, the Williamses sold one

[6]The Williamses had transferred their Citigroup stock into "AHW Investment Partnership, MFS Inc., and seven grantor-retained annuity trusts, all of which the Williamses controlled." 140 A.3d at 1128.

> million shares at $55 per share. But, the Williamses halted their plan to sell all of their Citigroup stock because, based on Citigroup's filings and financial statements, they concluded that there was little downside to retaining their remaining 16.6 million shares. The Williamses allegedly held those shares for the next twenty-two months, finally selling them on March 18, 2009 for $3.09 per share, which is much less than $55 per share."

140 A.3d at 1128. In their complaint the plaintiffs asserted that "their decision not to sell all of their shares in May 2007, and their similar decisions to hold on at least three later dates, were due to Citigroup's failure to disclose accurate information about its true financial condition from 2007 to 2009." Id. The plaintiffs pleaded claims of "negligent misrepresentation" and "common law fraud" against the Citigroup defendants. Id.

The plaintiffs filed their action in the United States District Court for the Southern District of New York ("the federal district court"). Citigroup moved to dismiss the action on the ground that the plaintiffs' claims were derivative and that they had failed to follow the procedure required to file such claims. The federal district court applied New York substantive law to the case, and it concluded that, because Citigroup was incorporated in Delaware, Delaware law governed whether the plaintiffs' claims were derivative or direct. The federal district court concluded that the plaintiffs' claims were direct in nature. It dismissed the negligent-misrepresentation claim because New York law requires "special privity" between the plaintiff and the defendant to sustain such a claim; it dismissed the fraud claim as "'impermissibly speculative' because the [plaintiffs] 'do not allege how long thereafter Williams cancelled the remaining sales, nor when he had planned to execute the sales before the alleged misstatements caused him to reverse course.'" 140 A.3d at 1130 (quoting AHW Inv. P'ship v. Citigroup Inc., 980 F. Supp. 2d 510, 526 (S.D. N.Y. 2013)).

The plaintiffs appealed the decision to the United States Court of Appeals for the Second Circuit. Citigroup cross-appealed, contending that the federal district court erred in concluding that the claims were direct rather than derivative. The Second Circuit agreed with the federal district court that, under New York substantive law, the law of the state of incorporation determines whether a claim is derivative or direct. Rather than interpret Delaware law on the issue for itself, the Second Circuit submitted the following certified question to the Delaware Supreme Court: "'Are the claims of a plaintiff against a corporate defendant alleging damages based on the plaintiff's continuing to hold the corporation's stock in reliance on the defendant's misstatements as the stock diminished in value properly brought as direct or derivative claims?'" 140 A.3d at 1126 (quoting AHW Inv. P'ship v. Citigroup, Inc., 806 F.3d 695, 705 (2d Cir. 2015)).

The Delaware Supreme Court began its analysis by agreeing with the Second Circuit's categorization of the plaintiffs' claims as "holder claims," which it defined as "'a cause of action by persons wrongfully induced to hold stock instead of selling it.'" 140 A.3d at 1132 (quoting Small v. Fritz Cos., 30 Cal. 4th 167, 171, 132 Cal. Rptr. 2d 490, 492, 65 P.3d 1255, 1256 (2003)). The court then proceeded to dispel the notion that its test in Tooley initially should be used to examine whether such a claim is derivative or direct in nature.

> "The familiar two-pronged test we articulated in Tooley v. Donaldson, Lufkin & Jenrette, Inc., is not relevant to the analysis of whether the holder claims at issue here are direct or derivative. Rather, Tooley and its progeny deal with the narrow issue of whether a claim for breach of fiduciary duty or otherwise to enforce the corporation's own rights must be asserted derivatively or directly. Before evaluating a claim under Tooley, 'a more important initial question has to be answered: does the plaintiff seek to bring a claim belonging to her

> personally or one belonging to the corporation itself?' [NAF Holdings, LLC v. Li & Fung (Trading) Ltd., 118 A.3d 175, 180 (Del. 2015).] Because the holder claims at issue here belong to the holding stockholders under the state laws that govern the claims, and are not fiduciary duty claims or claims otherwise belonging to the corporation, Tooley does not affect our answer to this certified question."

140 A.3d at 1126-27 (emphasis added). The court later restated its holding this way: "[T]he Holder Claims are direct claims because they belong to the holders and are ones that only the holders can assert, not claims that could plausibly belong to the issuer corporation, Citigroup." 140 A.3d at 1138.

The court distinguished the plaintiffs' claims from those that would be considered derivative:

> "If the [plaintiffs] were asserting a holder claim in which they were alleging that Citigroup's officers and directors were their fiduciaries and owed them a heightened duty, that claim would be an internal affairs claim for breach of fiduciary duty. In that case, under the Commerce Clause and the Full Faith and Credit Clause, Delaware law would apply to the merits and we would have to decide whether that holder claim was cognizable at all and, if so, whether it was derivative or not. Likewise, any argument -- such as the one the [plaintiffs] made explicitly in the amended complaint -- that an issuer of stock owes special duties to the holders of its stock is just another way of arguing that the investors in a corporation are owed fiduciary duties by those who manage it. In other words, it is a way of saying that because of the relationship between the governed and the governors of a corporation, a

> special cause of action ought to exist. That kind of claim is governed by the laws of the state of incorporation exclusively under the internal affairs doctrine."

140 A.3d at 1134-35 (footnotes omitted).

The court also further explained what the test in Tooley was for, and why it did not apply to the plaintiffs' claims:

> "Just as a Tooley analysis was not needed to determine whether the commercial-contract claim in NAF Holdings [LLC v. Li & Fung (Trading) Ltd., 118 A.3d 175 (Del. 2015),] was direct or derivative, it does not apply here. Because directors owe fiduciary duties to the corporation and its stockholders, there must be some way of determining whether stockholders can bring a claim for breach of fiduciary duty directly, or whether a particular fiduciary duty claim must be brought derivatively on the corporation's behalf. We established Tooley's two-pronged test as a means of determining whether such claims are direct or derivative.
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> "But, as we explained in NAF Holdings, when a plaintiff asserts a claim based on the plaintiff's own right, such as a claim for breach of a commercial contract, Tooley does not apply. Here, the [plaintiffs] were the holders of Citigroup stock. Citigroup itself is not a holder, and at oral argument Citigroup's counsel was unable to identify any authority in New York or Florida law that would suggest that the issuer of stock should be the plaintiff in a holder claim lawsuit. Nor do the amended complaint or our referring courts' decisions suggest that is the case. That the holder claims under both New York and Florida law belong to the holder, not the issuer, alone is enough to make the [plaintiffs'] Holder Claims direct. Delaware law cannot convert a direct claim that another state's law has granted to securities holders by deciding that it actually belongs to the corporation that the

> securities holder is suing. Thus, because the Holder Claims here could not possibly belong to the corporation, Delaware law has nothing to do with what type of claims the [plaintiffs] are asserting. Their Holder Claims are direct, but a court need not engage in a Tooley analysis to arrive at that result."

140 A.3d at 1139-40 (footnotes omitted; emphasis added).

In concluding its lengthy analysis, the Delaware Supreme Court emphasized that any difficulties that accompany proving a holder claim do not affect its status as a direct claim, and it further noted that purchaser claims are direct as well.

> "Finally, whatever analytical problems are involved in recognizing the Holder Claims as a species of common law fraud claim or negligent misrepresentation claim do not turn those Holder Claims into claims belonging to the issuer who is the primary defendant, or into claims governed by the internal affairs doctrine. As discussed above, holder claims are analytically indistinct from seller and purchaser claims, which are direct claims that are personal to the holder. Purchaser, seller, and holder claims all involve very difficult questions of proof and damages, and holder claims just entail proving the additional requirement of inducement. This admittedly can be said to compound, not just marginally add to, those complex questions of proof and damages. That is, a holder claim plaintiff must prove that she would have sold her securities in some particular time period had she had certain information at that time. Because securities holders may decide whether to hold or sell stock for various reasons, proving inducement is difficult. The speculation arguably inherent in this added element has led states to be rightly cautious about creating broad causes of action for securities holders, as opposed to sellers or

> purchasers, a caution our state law has shared. That issue, however, does not transmogrify a common law fraud or negligent misrepresentation claim belonging to the security holder under state law into one belonging to the issuer."

Id. at 1140–41 (footnotes omitted; emphasis added).

In sum, in Citigroup, the Delaware Supreme Court concluded that the plaintiffs' claims were direct claims because the plaintiffs personally held the stock and made the decision to continue to hold it allegedly based on misleading information from Citigroup. The court stated that the same principle held for purchaser claims because for such a claim the stock purchaser makes a personal decision to buy stock based on allegedly false information. The court emphasized that the plaintiffs did not base their claims on something related to internal corporate affairs such as fiduciary duties. Finally, the court declined to analyze the type of injury the plaintiffs sustained in assessing whether their claims were direct or derivative.

Citigroup is directly on point because the employee shareholders have asserted purchaser and holder claims in their eighth amended complaint. That is, they allege that they purchased additional stock in HealthSouth and continued to hold stock they already owned because of specific fraudulent misrepresentations from Richard Scrushy to them about the financial condition of HealthSouth. They do not allege that Scrushy was a fiduciary who owed them a heightened duty; they do not allege that HealthSouth itself owed a special duty to its shareholders when it issued stock. The employee shareholders simply allege common-law fraud claims based on direct, personal misrepresentations. As the employee shareholders contended in their brief: "[T]he claims of appellants could not have been brought by the corporation. The corporation itself was not induced to do anything by the fraudulent statements of its CEO."[7] Employee shareholders' brief, p. 12. Under Citigroup, because the rights allegedly infringed upon -- the right to choose to purchase and to hold

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[7]We recognize that the employee shareholders did not cite Citigroup in their briefs on appeal (nor, for that matter, did HealthSouth). The employee shareholders repeatedly argue, however, that their claims are personal to them and that the corporation could not bring such claims. Moreover, the Delaware Supreme Court is clear in Citigroup that it was clarifying its previous holdings, not stating a new rule. It cited several previous decisions that contained the same idea crystalized in Citigroup. In that vein, the employee shareholders did cite Anglo American Security Fund, L.P. v. S.R. Global International Fund, L.P., 829 A.2d 143, 149 (Del. Ch. 2003), in which that court stated that if a claim involves a "right of shareholders (or partners) that is independent of the entity's rights, the claim is direct." This is the same principle the court expanded upon in Citigroup.

HealthSouth stock -- personally belonged to the employee shareholders and not to the corporation, the claims are direct in nature. See, e.g., In re Activision Blizzard, Inc. Stockholder Litig., 124 A.3d 1025, 1056 (Del. Ch. 2015) (observing that "[q]uintessential examples of personal claims would include ... a tort claim for fraud in connection with the purchase or sale of shares"); 12B Fletcher Cyclopedia of the Law of Private Corps. § 5911, at 447 (2002 Supp. 2009) (noting that a claim "on a fraud affecting the shareholder directly" is a direct claim).

Based on the foregoing, we conclude that the employee shareholders' claims are direct rather than derivative and that, therefore, the trial court erred in dismissing the employee shareholders' claims for failure to comply with Rule 23.1, Ala. R. Civ. P.

IV. Conclusion

The employee shareholders' eighth amended complaint relates back to their original complaint and thus the claims asserted therein are not barred by the statute of limitations. The employee shareholders were not required to comply with the procedures of Rule 23.1, Ala. R. Civ. P., for filing a derivative action because, under Delaware law, their claims are direct in nature. Accordingly, the judgment of the trial court is due to be reversed and the cause is remanded for further proceedings.

REVERSED AND REMANDED.

Stuart, C.J., and Parker, Main, and Bryan, JJ., concur.