BUSINESS ASSOCIATIONS

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During the *Survey* period, which ran from June 1, 2009 to May 31, 2010, Michigan state courts reported only two decisions[1] concerning the law of business associations.[2] However, there were several interesting unpublished decisions, which are discussed in Part III of this article. The

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1. In addition, Potter v. McLeary, 484 Mich. 397 (2009), could be characterized as a "business associations" case. In *Potter*, the Michigan Supreme Court held that if a professional corporation (PC) is a defendant in a medical malpractice action because of potential vicarious liability due to the actions of one its shareholder-service providers, the plaintiff must provide the PC with a notice of intent to sue ("NOI") under MICH. COMP. LAWS ANN. § 600.2912b (West 2000). *Potter* 484 Mich. at 425. However, it is not necessary that the plaintiff's NOI specifically state either (1) the legal relationship between the PC and the shareholder-service provider or (2) that the PC may be liable on a vicarious liability theory. *Id.* at 420.

2. This small number of reported decisions is typical of recent *Survey* periods. *See, e.g.*, Michael K. Molitor, *Business Associations, 2010 Ann. Survey of Mich. Law*, 56 WAYNE L. REV. 131 (2010) (discussing one reported decision issued during the June 1, 2008 to May 31, 2009 *Survey* period) [hereinafter Molitor 2010]; Michael K. Molitor, *Business Associations, 2009 Ann. Survey of Mich. Law*, 55 WAYNE L. REV. 81 (2009) (discussing two reported decisions issued during the June 1, 2007 to May 31, 2008 *Survey* period); Michael K. Molitor, *Business Associations, 2008 Ann. Survey of Mich. Law*, 54 WAYNE L. REV. 27 (2008) (discussing two reported decisions issued during the June 1, 2006 to May 31, 2007 *Survey* period); Michael K. Molitor, *Business Associations, 2007 Ann. Survey of Mich. Law*, 53 WAYNE L. REV. 113 (2007) (discussing two reported decisions issued during the June 1, 2005 to May 31, 2006 *Survey* period); Shawn K. Ohl, *Business Associations, 2006 Ann. Survey of Mich. Law*, 52 WAYNE L. REV. 355 (2006) (discussing three cases decided during the June 1, 2004 to May 31, 2005 *Survey* period); Thomas M. Schehr, *Business Associations, 2005 Ann. Survey of Mich. Law*, 51 WAYNE L. REV. 571 (2005) (discussing one reported decision issued during the June 1, 2003 to May 31, 2004 *Survey* period); Thomas M. Schehr, *Business Associations, 2004 Ann. Survey of Mich. Law*, 50 WAYNE L. REV. 341 (2004) (discussing one reported decision issued during the June 1, 2002 to May 31, 2003 *Survey* period).

legislature was also quiet on the statutory front during the *Survey* period: there were no amendments to the Michigan Business Corporation Act (BCA),[3] the Michigan Limited Liability Company Act,[4] the Michigan Professional Service Corporation Act,[5] the Michigan Uniform Partnership Act,[6] or the Michigan Revised Uniform Limited Partnership Act.[7]

I. THE CORPORATION BY ESTOPPEL AND DE FACTO CORPORATION DOCTRINES APPLY TO LIMITED LIABILITY COMPANIES

In *Duray Development, L.L.C. v. Perrin*,[8] the court of appeals held that the de facto corporation doctrine and the corporation by estoppel doctrine apply not only to corporations but also to limited liability companies (LLCs).[9] Before turning to the facts of the case, it may be useful to understand these two doctrines because they are sometimes confused for one another. As the court neatly summarized them:

> [T]he de facto corporation doctrine allows a defectively formed corporation to attain the legal status of a corporation. The corporation by estoppel doctrine prevents a party who dealt with an association as though it were a corporation from denying its existence. Stated another way, the de facto corporation doctrine establishes the legal existence of the corporation.[10] By contrast, the corporation by estoppel doctrine merely prevents one from arguing against it, and does nothing to establish its actual existence in the eyes of the rest of the world.[11]

Four elements are necessary to invoke the de facto corporation doctrine: the incorporators of the corporation "[1] proceeded in good

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3. MICH. COMP. LAWS ANN. §§ 450.1101 - .2099 (West 2002 & Supp. 2009).
4. MICH. COMP. LAWS ANN. §§ 450.4101 - .5200 (West 2002 & Supp. 2009).
5. MICH. COMP. LAWS ANN. §§ 450.221 - .235 (West 2002 & Supp. 2009).
6. MICH. COMP. LAWS ANN. §§ 449.1 - .48 (West 2002 & Supp. 2009).
7. MICH. COMP. LAWS ANN. §§ 449.1101 - .2108 (West 2002 & Supp. 2009).
8. 288 Mich. App. 143 (Mich. Ct. App. 2010).
9. *Id.* at 161.
10. However, the Michigan Supreme Court noted in a prior case that, even if the de facto corporation doctrine is successfully invoked, which means that a "*de facto* corporation is an actual corporation," the state government may still claim that the corporation is not a *de jure* corporation. *See* Tisch Auto Supply Co. v. Nelson, 222 Mich. 196, 200 (1923) ("As to all the world, except the state, [a *de facto* corporation] enjoys the status and powers of a *de jure* corporation." (quoting BURRITT HAMILTON, THE MICHIGAN CORPORATION CODE § 83 (3d ed. 1923)).
11. *Perrin*, 288 Mich. App. at 153.

faith, [2] under a valid statute, [3] for an authorized purpose, and [4] have executed and acknowledged articles of association pursuant to that purpose."[12] If these four factors are satisfied, then a defectively formed corporation will nonetheless be considered a "real" corporation (i.e., a *de jure* corporation) in the eyes of everyone except the state government.[13] This would mean that its shareholders will not be personally liable for its debts, unless veil-piercing or another exception to this general rule is present.

By contrast, the corporation by estoppel doctrine merely prevents *one particular person* from arguing that a corporation was not properly formed (and that its owner or owners should thus be personally liable for the corporation's debts).[14] According to the *Duray Development* court, this doctrine means that "[w]here a body assumes to be a corporation and acts under a particular name, a third party dealing with it under such assumed name is estopped to deny its corporate existence."[15] This would not preclude other persons from asserting that the "body" was not a corporation.

In *Duray Development*, on September 30, 2004, Duray Development LLC signed an excavating contract with (1) Carl Perrin, (2) Perrin Excavating, L.L.C., and (3) KDM Excavating, L.L.C..[16] Mr. Perrin apparently was the sole member of Perrin Excavating, L.L.C., and Dan Vining was apparently the sole member of KDM Excavating, L.L.C..[17] However, Messrs. Perrin and Vining were at that time in the process of forming a new excavating company to be called Outlaw Excavating, L.L.C. (Outlaw).[18] Nonetheless, because "Duray Development did not want to wait for Perrin to finish forming the [new] company before starting the excavation,"[19] the parties signed this contract knowing that it would only be temporary.[20]

On October 27, 2004, a new contract which was "intended to supersede the September 30, 2004 contract"[21] was signed. The only parties to this contract were (1) Duray Development and (2) Outlaw; Mr.

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12. *Id.* at 154 (quoting *Tisch Auto Supply*, 222 Mich. at 200) (brackets in original). The reference to "articles of association" may be better understood as the "articles of incorporation."

13. *Id.* at 154-55.

14. *Id.* at 153.

15. *Id.* at 159 (quoting Estey Mfg. Co. v. Runnels, 55 Mich. 130, 133 (1884)).

16. *Id.* at 146.

17. *Perrin*, 288 Mich. App. at 146.

18. *Id* at 147.

19. *Id.*

20. *Id.*

21. *Id.*

Perrin, Perrin Development, L.L.C., or KDM Excavating, L.L.C. were not parties to the new contract.[22] As the reader has probably guessed, the parties then disputed whether the excavation work was properly completed.[23] As such, Duray Development sued Mr. Perrin, Perrin Excavating, and Outlaw Excavating and obtained a judgment against Mr. Perrin (but not the other two defendants).[24] In part, this was because "Outlaw did not obtain a 'filed' status [from the state government] as a limited liability company until November 29, 2004,"[25] more than a month after the second contract was signed.

Mr. Perrin argued in a post-trial memorandum that he should not be personally liable on the contract.[26] Instead, he argued that Outlaw (and only Outlaw) should be liable on a de facto corporation theory.[27] In other words, although Outlaw was not technically formed until November 29, 2004, Outlaw should nonetheless be considered to have existed at the time of the contract. Therefore, according to Mr. Perrin, only Outlaw should be liable on the contract because members of an LLC usually are not personally liable on contracts that the LLC signs.[28] The trial court ruled against Mr. Perrin.[29] Interestingly, it found that if Outlaw had been a *corporation*, then the de facto corporation doctrine would have shielded Mr. Perrin from personal liability.[30] However, in the trial court's opinion, the fact that Outlaw was an LLC made the de facto corporation doctrine inapplicable because the Michigan Limited Liability Company Act superseded or preempted that doctrine.[31]

On appeal, Mr. Perrin argued that both the de facto corporation doctrine and the corporation by estoppel doctrine should prevent him from being personally liable on the contract.[32] As to the de facto corporation doctrine, the court of appeals agreed,[33] reasoning as follows. First, the Michigan Limited Liability Company Act provides that an

22. *Id.*

23. *Perrin*, 288 Mich. App. at 147.

24. *Id.* at 147-48. Perrin Excavating and Outlaw Excavating were not found to be in breach of the contract. *Id.* at 146.

25. *Id.* at 148.

26. *Id.*

27. *Id.*

28. *Id.* at 149.

29. *Perrin*, 288 Mich. App. at 148.

30. *Id.*

31. *Id.* at 148-49.

32. *Id.* at 149-50. The court of appeals held that Mr. Perrin had not properly preserved the corporation-by-estoppel issue. Therefore, the court would only review that issue on a plain-error basis. *Id.* at 150. By contrast, the de facto-corporation issue was reviewed on a *de novo* basis because it involved an issue of law. *Id.* at 149.

33. *Id.* at 156.

LLC's "existence" begins when its articles of organization are endorsed as "filed" by the Department of Consumer and Industry Services.[34] In this case, that date was November 29, 2004.[35] Further, any person who signs a contract on behalf of a company that does not yet exist becomes personally liable on that contract.[36] This would make Mr. Perrin, who signed the contract on behalf of Outlaw in October 2004, personally liable on it. However, Mr. Perrin would escape personal liability if "a de facto limited liability company existed, or limited liability company by estoppel applied."[37]

Turning more specifically to the de facto corporation doctrine, the court of appeals found that each of the four factors described above were present:

> Here, there is no question that elements (2), (3), and (4) were satisfied. First, the Limited Liability Company Act is a valid statute that allows for limited liability companies in Michigan. Second, Perrin and Vining presumably formed Outlaw for the purpose of starting a new excavation company, which is an authorized purpose. Third, Perrin executed the articles of organization on October 27, 2004, the same day the parties executed the second contract.[38]

Although it was "less obvious whether the first element of the doctrine—good faith—was satisfied"[39] due to the lack of instructive case law on this issue, the court found that Mr. Perrin was acting in good faith, primarily due to the lack of any sort of fraud or false representations.[40] Thus, the court of appeals agreed that the trial court was correct in finding that the de facto corporation doctrine would have applied if Outlaw had been a corporation.[41] However, as noted above, the trial court found that the Michigan Limited Liability Company Act superseded this doctrine as to LLCs.[42]

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34. *Id.* at 150-51 (citing MICH. COMP. LAWS ANN. §§ 450.4202(2), 450.4104 (West 2002)).

35. *Perrin,* 288 Mich. App. at 151.

36. *Id.* at 151 (citing Campbell v. Rukamp, 260 Mich. 43 (1932)).

37. *Id.* at 152 (citation omitted).

38. *Id.* at 155.

39. *Id.* at 155.

40. *Id.* at 155-56. In other words, good faith was more or less the absence of bad faith.

41. *Perrin,* 288 Mich. App. at 156.

42. *Id.* at 148-49.

The court of appeals disagreed, holding that de facto corporation doctrine also applies to LLCs.[43] The BCA is similar to the Michigan Limited Liability Company Act on the issue of when a corporation comes into existence.[44] Thus, because these two statutes "relate to the common purpose of forming a business and because both statutes contemplate the moment of existence for each, they should be interpreted in a consistent manner."[45] Despite the fact that the BCA contemplates that a corporation does not exist until its articles of incorporation have been successfully filed, this did not prevent the Michigan Supreme Court in *Newcomb-Endicott Co. v. Fee*[46] from applying the de facto corporation doctrine with respect to a corporation that entered into a contract in 1908 but was not technically incorporated until 1909.[47] In other words, the *Newcomb-Endicott Co.* court found that the statute did not preclude the application of the de facto corporation doctrine. Given this case, as well as the similarities between the BCA and the Limited Liability Company Act, the *Duray Development* court concluded that "it would be arbitrary to conclude ... that the de facto corporation doctrine applies to corporations but not to limited liability companies."[48]

The court of appeals also held that the corporation by estoppel doctrine applies to LLCs, writing:

> [T]he corporate structure has little impact on the equitable principles at stake. In other words, there is no reason or purpose to draw a distinction on the basis of corporate form. Furthermore, like [the] de facto corporation [doctrine], because [the] corporation by estoppel [doctrine] coexists with the Business Corporation Act, so too can it coexist with the Limited Liability Company Act.[49]

Under the facts of the case, this doctrine was clearly applicable because Duray Development "dealt with the second contract as though Outlaw were a party"[50] even though it had not been successfully organized by that time, and afterwards continued to deal with Outlaw and not Mr. Perrin personally. However, because Mr. Perrin had not properly preserved this issue for appeal, the standard of review was plain error,

43. *Id.* at 159.
44. *See* MICH. COMP. LAWS ANN. §§ 450.1221, .1331 (West 2002).
45. *Perrin*, 288 Mich. App. at 159 (citations omitted).
46. 167 Mich. 574 (1911).
47. *Id.* at 581-82.
48. *Perrin*, 288 Mich. App. at 158.
49. *Id.* at 160.
50. *Id.* at 161.

and the court of appeals did not believe that the trial court's failure to apply the doctrine to the case was plain error.[51]

II. LIABILITY OF LLC MEMBER/MANAGER FOR CONVERSION OF FUNDS BY LLC

In *Department of Agriculture v. Appletree Marketing, L.L.C.*,[52] the supreme court held that the sole member and manager of an LLC who converted funds was personally liable for the conversion.[53] This case involved the Michigan Agricultural Commodities Marking Act (ACMA),[54] which created the Michigan Apple Committee, an agency within the Michigan Department of Agriculture. To fund the committee's operations, the price charged by apple producers to apple distributors includes certain assessments.[55] When paying apple producers for their products, apple distributors deduct these assessments, which they then hold in trust and remit to the Apple Committee periodically.[56] (Or at least they are supposed to do so.)

Appletree Marketing, L.L.C. was one such distributor.[57] Although it collected assessments for 2004 and 2005, it did not remit those assessments to the committee; instead, it used the money to pay its other debts.[58] Appletree Marketing later went bankrupt.[59] Afterwards, the Apple Committee and the Department of Agriculture sued the LLC and its sole member and manager, Steven Kropf, for violations of the ACMA as well as statutory and common law conversion.[60] The "[d]efendants consented to a judgment of $55,184.64 against Appletree [Marketing] to settle plaintiffs' ACMA claim."[61] However, the defendants argued for the dismissal of the statutory and common law conversion claims because the ACMA provided the exclusive remedy for failing to remit the assessments to the committee.[62] Both the trial court and the court of appeals agreed with this argument.[63] The court of appeals reasoned that these conversion claims would not exist without the ACMA and

51. *Id.* at 161-62.
52. 485 Mich. 1 (2010).
53. *Id.*
54. MICH. COMP. LAWS ANN. §§ 290.651 *et seq.* (West 1989).
55. *Appletree*, 485 Mich. at 5.
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.*
61. *Appletree*, 485 Mich. at 5.
62. *Id.* at 5-6.
63. *Id.* at 6.

therefore the ACMA provided the only remedy for a violation.[64] Further, the court of appeals found that no personal liability existed for Mr. Kropf under the ACMA.[65]

The supreme court disagreed, holding the ACMA did not abrogate the plaintiffs' statutory and common law conversion claims.[66] That left the issue of whether the plaintiffs could pursue these conversion claims against Mr. Kropf personally. According to the court, "Michigan law has long provided that corporate officials may be held personally liable for their individual tortious acts done in the course of business, regardless of whether they were acting for their personal benefit or the corporation's benefit."[67] Furthermore, corporate officers "may be held individually liable when they personally cause their corporation to act unlawfully,"[68] regardless of whether the illegal act benefited the officer personally.[69] Mr. Kropf also argued that no personal liability existed unless the plaintiffs could "pierce the corporate veil."[70] The supreme court disagreed, observing that "we have never required that a plaintiff pierce the corporate veil in order to hold corporate officials liable for *their own* tortious misconduct, and thus it is unnecessary to pierce the corporate veil in this case."[71]

Appletree Marketing does not appear to break any new ground in *corporate* law; the court cited several prior cases in support of its conclusion that personal liability could exist for Mr. Kropf on the conversion claims.[72] However, these cases all involved claims against officers of corporations rather than LLCs.[73] Although the outcome is certainly correct, it would have been helpful if the court had taken some time to discuss whether a manager of an LLC is akin to an officer of a corporation for purposes of this rule; instead, the court seems to have

64. *Id.* (citing Dept. of Agric. v. Appletree Mktg., L.L.C., 280 Mich. App. 635, 645 (2008)).

65. *Id.*

66. *Id.* at 8-17.

67. *Appletree*, 485 Mich. at 17 (citations omitted).

68. *Id.* at 17-18 (quoting Livonia Bldg. Materials Co. v. Harrison Constr. Co., 276 Mich. App. 514, 519 (2007)).

69. *See id.* at 18.

70. *Id.*

71. *Id.* Somewhat confusingly, however, the court suggested in the next sentence that this rule only applies to intentional torts and criminal conduct (as opposed to negligent conduct), writing: "Conversion is an intentional tort, and piercing the corporate veil is not necessary to a determination of personal liability for intentional torts: regardless of the corporate form, officers remain personally liable for their intentional and criminal conduct." *Id.* (citation omitted).

72. *Id.* at 17-19

73. *See Appletree*, 485 Mich. at 17-19.

summarily treated Mr. Kropf as an "officer" of the LLC and to have assumed that the rules applicable to corporations on this issue should also apply to LLCs.[74] Similarly, its discussion of veil piercing could leave a reader somewhat perplexed. Courts typically permit veil-piercing to impose personal liability on a shareholder (or shareholders) rather than an officer.[75] Thus, the court's statement that "we have never required that a plaintiff pierce the corporate veil in order to hold corporate officials liable for *their own* tortious misconduct"[76] seems inappropriate, assuming the word "officials" is synonymous with "officers."

On the other hand, perhaps these are distinctions without a difference, as Mr. Kropf was both the manager and the sole member of Appletree Marketing, as well as the person alleged to have converted the funds.[77] Indeed, earlier in the opinion the court framed the issue as whether the plaintiffs could pursue the claims against "Appletree's principal"[78] and noted that Mr. Kropf was the "sole member and manager of Appletree."[79] Putting together the two rules that the court cited, it would not matter in what capacity Mr. Kropf was being sued. If he were being sued in his capacity as an officer/manager, he could be held liable for his own tortious conduct, and if he were being sued in his capacity as a shareholder/member but for his own actions, veil piercing would not be necessary.

III. NOTABLE UNPUBLISHED DECISIONS

There were also a few interesting—but unpublished—opinions from Michigan courts involving business associations during the *Survey* period.[80] In *Howell v. John R. Howell, Inc.*,[81] Thomas Woods was the court-appointed receiver for an insolvent corporation, John R. Howell, Inc.[82] One of the corporation's creditors, Dan's Excavating, Inc., appealed the trial court's order that it remit to the receiver amounts that Dan's Excavating owed to John R. Howell, Inc. under three contracts.[83]

74. *Id.*

75. *See generally* STEPHEN H. SCHULMAN ET AL., MICH. CORP. L. & PRAC. § 3.9(c), at 60-69 (2010 Supp.).

76. *Appletree*, 485 Mich. at 18.

77. *Id.* at 17.

78. *Id.*

79. *Id.*

80. Under the Michigan Court Rules, an "unpublished opinion is not precedentially binding under the rule of stare decisis." MICH. CT. R. 7.215(c). Subsection (b) of this rule lists the situations in which an opinion must be published.

81. No. 288058, 2010 WL 446548 (Mich. Ct. App. Feb. 9, 2010).

82. *Id.* at *1.

83. *See id.*

One of the arguments that Dan's Excavating raised was that it had a right of set-off with respect to these contracts, and therefore could assert the set-off amounts as a partial defense to the receiver's claim.[84] Although the court of appeals agreed that Dan's Excavating would have a right of set-off at common law, it held that the BCA superseded this right because the BCA is a "comprehensive statute [that] prescribes in detail a course of conduct to pursue and the parties and things affected"[85] by a corporate dissolution, and the BCA does not provide for a right of set-off. Instead, Section 841a(3) of the BCA provides that an existing claim against a dissolved corporation will be barred if either (1) a claimant who had written notice of the dissolution did not deliver its claim by the deadline set forth in the notice or (2) the dissolved corporation rejects the claim and the claimant did not sue to enforce the claim within ninety days afterwards.[86] In this case, Dan's Excavating failed to submit its claims to the receiver within the deadline; therefore, the court barred the claims.[87] Consequently, these claims could not be used as a set-off against amounts that Dan's Excavating owned the dissolved corporation.[88]

Andreozzi v. Stony Point Peninsula Association[89] concerned the interplay between the BCA and the Summer Resort Owners Corporation Act.[90] The latter statute provides that ten or more property owners "who may desire to form a summer resort owners corporation for the better welfare of said community . . . may, with their associates and successors, become a body politic and corporate"[91] by filing articles of incorporation under the statute (and not the BCA). However, the BCA states that it applies to "summer resort associations" to the extent it is consistent with the statute under which they were formed.[92] As such, to the extent that

84. *Id.* at *2.

85. *Id.*

86. *See* MICH. COMP. LAWS ANN. § 450.1841a(3) (West 2002).

87. *Howell*, 2010 WL 446548, at *4.

88. Dan's Excavating also argued that it was allowed a set-off under MICH. COMP. LAWS ANN. § 600.5235 (West 2000). *Howell*, 2010 WL 446548 at *4. Although this provision, by allowing a set-off, conflicts with the BCA, the court held that the provisions of the BCA should prevail because the BCA is more specific to the subject matter of a corporate dissolution and was enacted more recently. *Id.*

89. No. 281113, 2009 WL 1567359 (Mich. Ct. App. June 4, 2009).

90. MICH. COMP. LAWS ANN. §§ 455.201 - .220 (West 2002).

91. MICH. COMP. LAWS ANN. § 455.201 (West 2002).

92. Despite this difference in language of "summer resort owners corporations" in the Summer Resort Owners Corporation Act and "summer resort associations" in the BCA, the *Andreozzi* court found that the BCA applies to associations formed under the Summer Resort Owners Corporation Act (to the extent that the BCA is not inconsistent with that statute). *See Andreozzi*, 2009 WL 1567359 at *3.

the Summer Resort Owners Corporation Act does not answer a statutory question, the BCA will supply the answer.

In *Andreozzi*, the association's board of directors decided that the association's canal required dredging.[93] At the association's 2004 annual meeting, the members of the association voted on a motion to "approve the canal dredging project for $110,000."[94] Two hundred and seventy votes were cast; 153 votes (56.7 percent) were in favor of the motion, and 117 (43.3 percent) were opposed.[95] The plaintiffs later filed suit, alleging that the canal project was a "special assessment" which, under the association's bylaws, required approval by two-thirds of the members.[96] Therefore, the plaintiffs argued, the association's board did not have authority to complete the project or collect the costs of the project from the association's members.[97] The trial court disagreed and granted summary disposition in favor of the defendants.[98]

Examining the plaintiffs' complaint, which "did not contain distinct and separately entitled causes of action,"[99] the court of appeals determined that the plaintiffs were seeking declaratory relief, as well as a finding that they had been oppressed within the meaning of Section 489 of the BCA.[100] Although Section 489 limits relief to *shareholders*,[101] the court of appeals observed:

> Although plaintiffs are members of a summer resort owners corporation, and are not in actuality "shareholder[s]" of a closely held business, they are certainly similar in many respects to minority shareholders of a closely held corporation. Specifically, the gravamen of plaintiffs' complaint was that the association's controlling members and directors had engaged in oppressive conduct by violating a supermajority voting requirement in the bylaws, and had thereby trampled upon the voting rights of the minority members. Similar conduct, if committed within the confines of a closely held business corporation, would likely

93. *Id.* at *1.
94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.*
98. *Andreozzi*, 2009 WL 1567359 at *2.
99. *Id.* at *4.
100. Section 489 of the BCA provides that a shareholders may sue to "establish that the acts of the directors or those in control of the corporation are illegal, fraudulent, or willfully unfair and oppressive to the corporation or to the shareholder." MICH. COMP. LAWS ANN. § 450.1489(1) (West 2002).
101. MICH. COMP. LAWS. ANN. §450.1489 (West 2002).

> give rise to a cause of action for oppression under [Section 489]. . . . [The BCA] applies to summer resort owners corporations to the extent that it is not inconsistent with the summer resort owners corporation act. Therefore, even though plaintiffs are not technically shareholders of a closely held business corporation, we conclude that they were entitled to sue for oppression-like conduct pursuant to [Section 489].[102]

This outcome is surprising, given how restrictively the court of appeals has previously interpreted section 489. In *Franchino v. Franchino*,[103] a 2004 case, a minority shareholder in a closely held corporation argued that he had been oppressed within the meaning of Section 489 when his employment was terminated and he lost his position on the board of directors.[104] Because Section 489 requires that the plaintiff-shareholder be oppressed "as a shareholder,"[105] the *Franchino* court held that Section 489 "does not allow shareholders to recover for harm suffered in their capacity as employees or board members."[106] This was because, according to the *Franchino* court, "employment and board membership are not generally listed among rights that automatically accrue to shareholders. Shareholder's rights are typically considered to include voting at shareholder's meetings, electing directors, adopting bylaws, amending charters, examining the corporate books, and receiving corporate dividends."[107] It is very surprising to see the court of appeals apply an expansive definition of "shareholder" in *Andreozzi* when it would not apply an expansive definition of the rights that shareholders have in *Franchino*.

Nevertheless, the *Andreozzi* court affirmed the grant of summary disposition to the defendants.[108] Turning to the claim for declaratory relief, the court first examined Stony Point's bylaws, which provided that

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102. *Andreozzi*, 2009 WL 1567359 at *4 (citations and footnote omitted).

103. 263 Mich. App. 172 (2004).

104. *Id.* at 173-75.

105. At the time of the *Franchino* case, Section 489 provided:

As used in this section, 'willfully unfair and oppressive conduct' means a continuing course of conduct or a significant action or series of actions that substantially interferes with the interests of the shareholder as a shareholder." After the *Franchino* case, Section 489 was amended to add the following sentence: "Willfully unfair and oppressive conduct may include the termination of employment or limitations on employment benefits to the extent that the actions interfere with distributions or other shareholder interests disproportionately as to the affected shareholder."

See MICH. COMP. LAWS ANN. § 450.1489(3) (West 2002).

106. *Franchino*, 263 Mich. App. at 186.

107. *Id.* at 184.

108. *Andreozzi*, 2009 WL 1567359 at *1.

the board may not by itself enter into any contract that exceeds five hundred dollars; instead, "[a]ll purchases in excess thereof must be approved . . . by a 2/3 vote of members and proxies present."[109] The court agreed with the plaintiffs that this specific provision trumped any general duty the board had to maintain the canal.[110] This was because Section 10 of the Summer Resort Owners Corporation Act provides that the board's power to manage the association is subject "to restrictions or limitations imposed by the by-laws of the corporation and any special restriction or limitation imposed by a vote of the members at any annual or regularly called special meeting."[111] However, the bylaws provision itself was inconsistent with Section 9 of the Summer Resort Owners Corporation Act, which provides that special assessments may be made by a *majority* vote of the association's members.[112] Because the Summer Resort Owners Corporation Act did not authorize supermajority provisions, and because bylaws may not contain provisions that are "inconsistent with law,"[113] that provision of Stony Point's bylaws was invalid.[114] As a result, the canal dredging project only required a majority vote (which it had in fact received). Without much discussion, the court also found that this outcome disposed of the plaintiffs' oppression claim under Section 489 of the BCA.[115]

Moody v. Lawson[116] involved an award of attorney fees in a derivative lawsuit involving a nonprofit corporation, the National Alliance of Black School Educators, Inc. (NABSE).[117] The plaintiffs, who were directors and members of NABSE, filed the derivative action against NABSE, its executive director, and several board members, claiming that NABSE was "mismanaged, financially and otherwise."[118] Eventually, the parties settled the case, but could not agree on whether the plaintiffs could recover from the defendants the fees that the

109. *Id.* at *5.

110. *Id.*

111. MICH. COMP. LAWS ANN. § 455.210 (West 2002). The court also concluded that the two-thirds vote requirement for special assessments was not invalid because it was set forth in the association's bylaws rather than its articles of incorporation. *See Andreozzi*, 2009 WL 1567359 at *6.

112. *See* MICH. COMP. LAWS ANN. § 455.219(2) (West 2002).

113. *See* MICH. COMP. LAWS ANN. § 450.1231 (West 2002).

114. *Andreozzi*, 2009 WL 1567359 at *7.

115. *Id.* Of course, section 489 provides that oppression does not include "conduct or actions that are permitted by an agreement, the articles of incorporation, the bylaws, or a consistently applied written corporate policy or procedure." MICH. COMP. LAWS ANN. §450.1489(3) (West 2002).

116. No. 287686, 2010 WL 989220 (Mich. Ct. App. Mar. 18, 2010).

117. *Id.* at *1.

118. *Id.*

plaintiffs had paid their attorneys.[119] After a hearing, the trial court awarded the plaintiffs more than $345,000 in attorney fees and more than $37,000 in costs.[120] The defendants appealed.[121]

The defendants' main argument was that the plaintiffs were not "successful" within the meaning of Section 493(1) of the Michigan Nonprofit Corporation Act and therefore were not entitled to reimbursement of their attorney fees and costs.[122] That section provides that if "an action brought in the right of the corporation [i.e., a derivative lawsuit] is successful, in whole or in part, . . . the court may award the plaintiff or claimant reasonable expenses, including reasonable attorney's fees . . . ."[123] After comparing the allegations of mismanagement that the plaintiffs alleged in their complaint to the many operational changes agreed to by NABSE in the settlement agreement (such as increased audit and disclosure requirements, the implementation of new policies, and the establishment of a compliance monitoring panel), the court of appeals found that the plaintiffs had been "successful."[124] Quoting the trial court, the court of appeals found that the plaintiffs "prevailed in a substantial way to the extent that they did obtain benefits for this nonprofit corporation, and benefits for the corporation that will [inure] for some period of time."[125]

In re Estate of Upjohn,[126] another unpublished decision, concerned the 1931 will of Dr. William Upjohn, who was the founder of the Upjohn Co.[127] The will established a trust which was to continue until "The Upjohn Company should cease to exist, or cease to function."[128] The primary issue in the case was whether "The Upjohn Company" still existed. If not, the trustee would distribute the assets to the Kalamazoo Foundation.

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119. *Id.*

120. *Id.*

121. *Id.*

122. *Moody*, 2010 WL 989220 at *1.

123. MICH. COMP. LAWS ANN. § 450.2493(1) (West 2002). The corresponding provision in the BCA is somewhat similar, providing that the court may order the "corporation to pay the plaintiff's reasonable expenses, including reasonable attorney fees, incurred in the proceeding if it finds that the proceeding has resulted in a substantial benefit to the corporation." MICH. COMP. LAWS ANN. § 450.1497(b) (West 2002).

124. *Moody*, 2010 WL 989220 at *3.

125. *Id.* at *3 (alteration in original). The court of appeals also rejected the defendants' arguments relating to the reasonableness of the hourly rates of the plaintiffs' attorneys and the number of hours that they devoted to the case. *Id.*

126. No. 278668, 2010 WL 624413 (Mich. Ct. App. Feb. 23, 2010).

127. *Id.* at *1.

128. *Id.*

Following Dr. Upjohn's death in 1932, the Upjohn Co. was involved in a series of mergers and reorganizations. In 1958, it merged into the Upjohn Company of Delaware, a Delaware corporation, which later changed its name to the Upjohn Co.[129] Although an argument could be made that this merger caused "The Upjohn Company" to no longer exist because it was not the surviving corporation in the merger, this issue was barred by *res judicata* due to a 1962 probate court proceeding.[130] On the other hand, even if this issue had not been barred by *res judicata* it is likely that the court would have held that "The Upjohn Company" continued to exist after this merger, because the merger merely changed the corporation's state of incorporation from Michigan to Delaware. Creating a new "shell" corporation in another state (such as The Upjohn Co. of Delaware, Inc.) and then merging an operating or "real" corporation into the shell corporation is a common device to change a corporation's state of incorporation.[131]

In 1995, the Upjohn Co. (that is, the Delaware corporation) was involved in a merger in which a subsidiary of Bushwood, Inc. merged into it.[132] As a result, Bushwood became the parent corporation of The Upjohn Company.[133] Bushwood changed its name to Pharmacia & Upjohn, Inc. Furthermore, shares of the Upjohn Co. were converted into shares of Pharmacia & Upjohn.[134] In addition, in 1996, Pharmacia, Inc., which was a Minnesota corporation, merged into the Upjohn Co., which then changed its name to Pharmacia & Upjohn Co.[135] As with the 1958 merger, *res judicata* barred the issue of whether "The Upjohn Company" ceased to exist following these transactions.[136]

But there was more. If the reader has been following these events closely, she will see that the original "Upjohn Company" was, by 1996, Pharmacia & Upjohn Co. (a subsidiary of Pharmacia & Upjohn, Inc.).[137] In 2000, a subsidiary of Monsanto Co. merged with Pharmacia &

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129. *Id.*

130. *See id.* at *2, *4.

131. However, the BCA was recently amended to provide a somewhat simpler process: a corporation that is incorporated in Michigan may "convert" into a corporation that is incorporated in a different state (assuming that the other state's law permits such a conversion). *See* Molitor 2010, *supra* note 2, at 1.

132. *Estate of Upjohn*, 2010 WL 624413, at *2. Thus, the Upjohn Co. was the surviving corporation in this merger.

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.* at *4. At a probate court hearing in 1996, counsel for the Kalamazoo Foundation admitted that "[t]he Upjohn Company does still exist." *Id.* at *2.

137. *Id.* at *2.

Upjohn, Inc.[138] As a result, Pharmacia & Upjohn, Inc. became a subsidiary of Monsanto (which changed its name to Pharmacia Corp.).[139] However, Pharmacia & Upjohn Co. remained a subsidiary of Pharmacia & Upjohn, Inc.[140] As such, Pharmacia & Upjohn Company was not directly affected by this merger; therefore, the *Estate of Upjohn* court found that it continued to exist as a separate entity following this merger.[141]

In 2003, a subsidiary of Pfizer, Inc. merged into Pharmacia Corp. (the "grandparent" corporation of Pharmacia & Upjohn Company).[142] As a result, Pharmacia Corp. became a subsidiary of Pfizer (and Pfizer would thus be the "great-grandparent" corporation of Pharmacia & Upjohn Co.).[143] Not surprisingly, the court found that this merger did not affect the continued existence of Pharmacia & Upjohn Co.[144]

Finally, in 2004, Pharmacia & Upjohn Company was converted into a Delaware LLC named Pharmacia & Upjohn Co., L.L.C.[145] However, the court, after examining the relevant Delaware statutes, concluded that this conversion did not cause Pharmacia & Upjohn Co. to cease to exist.[146] This was because the statute provided that a corporation that converts into an LLC "shall continue to exist as a limited liability company"[147] and that such a conversion "shall not constitute a dissolution of [the] corporation and shall constitute a continuation of the existence of the converting corporation . . . ."[148]

Although *Estate of Upjohn* largely concerned Delaware law because "The Upjohn Company" became a Delaware corporation in 1958, it likely would have been decided in the same manner if all of the entities involved in the transactions had been incorporated or organized under Michigan law. For example, section 745 of the BCA[149] now allows a Michigan corporation to be converted into another type of "business organization" such as an LLC.[150] However, because the Michigan Limited Liability Company Act has not yet been similarly amended, a

138. *Estate of Upjohn*, 2010 WL 624413 at *2.
139. *Id.*
140. *Id.*
141. *Id.* at *5-6.
142. *Id.* at *3.
143. *Id.* at *3.
144. *In re Estate of Upjohn*, 2010 WL 624413, at *6.
145. *Id.* at *3.
146. *Id.* at *5.
147. *Id.* at *7 (quoting 8 Del. Corp. § 266(e)).
148. *Id.* (quoting 8 Del. Corp. § 266(f)).
149. MICH. COMP. LAWS ANN. § 450.1745 (West 2002).
150. MICH. COMP. LAWS ANN. § 450.1745(1) (West 2002).

Michigan corporation that wishes to convert into an LLC would have to convert into a *foreign* LLC.[151] Upon such a conversion, the "surviving business organization is considered to be the same entity that existed before the conversion and is considered to be organized on the date that the domestic corporation was originally incorporated."[152] Furthermore, unless the plan of conversion provides otherwise, "the domestic corporation is not required to wind up its affairs or pay its liabilities and distribute its assets on account of the conversion, and the conversion does not constitute a dissolution of the domestic corporation."[153]

151. *See* Molitor 2010, *supra* note 2, at 135-36.
152. MICH. COMP. LAWS ANN. § 450.1745(f) (West 2002).
153. MICH. COMP. LAWS ANN. § 450.1745(h) (West 2002).