IN THE COURT OF APPEALS OF TENNESSEE
AT JACKSON
January 11, 2023 Session

GARY MILLER v. BARBARA MILLER

Appeal from the Chancery Court for Carroll County
No. 2021-CV-106 Vicki Hodge Hoover, Chancellor

No. W2022-00117-COA-R3-CV

A member of a limited liability company ("LLC") brought a suit on behalf of the LLC alleging a breach of fiduciary duties and constructive fraud by another member in regard to transfers of LLC property. The plaintiff admitted that no demand for corrective action was made on the defendant, nor was any demand made on the other members of the LLC to join in the litigation. The trial court granted the defendant's motion to dismiss, finding both that the plaintiff's complaint was outside the statute of limitations and that the plaintiff lacked standing to bring the derivative action. We agree with the trial court that the plaintiff's complaint was subject to dismissal because his complaint did not include allegations sufficiently particular to excuse his failure to meet statutory demand requirements. The remaining issues are therefore pretermitted.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed and Remanded

J. STEVEN STAFFORD, P.J., W.S., delivered the opinion of the court, in which KENNY ARMSTRONG and CARMA DENNIS MCGEE, JJ., joined.

Cory Hancock, Jackson, Tennessee, for the appellant, Gary Miller.

Dale Conder, Jr., and Adam C. Crider, Jackson, Tennessee, for the appellee, Barbara Miller.

OPINION

I. FACTUAL AND PROCEDURAL BACKGROUND[1]

[1] As this matter is before us after the trial court's granting of Appellee's motion to dismiss, "we assume the truth of factual allegations in the complaint." ***Cooper v. Mandy***, 639 S.W.3d 29, 31 n.1 (Tenn. 2022) (citing ***Effler v. Purdue Pharma, L.P.***, 614 S.W.3d 681, 687 (Tenn. 2020)). Therefore, the following

In August 2007, Paul Sanders formed the Paul Sanders Family LLC ("the LLC"), with himself as the sole member, and transferred nine parcels of his real estate to the LLC. One parcel (Parcel No. 6) was sold in June 2008. One parcel (Parcel No. 5) was transferred to Defendant/Appellee Barbara Miller ("Appellee") as trustee of the Paul Sanders Irrevocable Trust ("the Trust") in December 2010. Mr. Sanders then transferred an equal 16.66 percent membership interest in the LLC to six members, including both Appellee and Plaintiff/Appellant Gary Miller ("Appellant"). At this point, the LLC retained ownership of seven parcels (Parcel Nos. 1–4, 7–9).

On April 21, 2017, Mr. Sanders and Appellee sold Parcel No. 5, belonging to the Trust, and Parcel No. 8, belonging to the LLC. Appellee did not hold as trustee any profit from the sale of Parcel No. 8 for the LLC or its members. Then, on February 4, 2019, Appellee transferred one of the LLC's remaining parcels (Parcel No. 2) to herself, again without holding as trustee any profit for the LLC or its members. Appellee also rented out another of the LLC's parcels (Parcel No. 1) without holding as trustee any profit.

On April 27, 2021, Appellant filed a complaint against Appellee in the Carroll County Chancery Court ("the trial court"). Therein, Appellant alleged that Appellee's failure to hold as trustee any profit derived from these transfers and "her intentional misconduct of exceeding her authorization to act in the ordinary course of business of the LLC" amounted to a breach of the fiduciary duties of loyalty and care. Under the heading "Constructive Fraud," Appellant alleged that Appellee "breached her legal or equitable duty by fraudulently selling [Parcel No. 8], and transferring [Parcel No. 2] from the LLC to herself, deceiving others, injuring private confidence and injuring public interest." Based on the allegedly fraudulent transfers, Appellant sought an accounting by Appellee to the LLC of all actions since December 2010, the return of the amount received from the sale of Parcel No. 8, the setting aside of the transfer of Parcel No. 2, and damages from the renting of Parcel No. 1. Appellant also requested that the trial court order the winding up of the LLC. The complaint was captioned "Gary Miller Representative of [the LLC] v. Barbara Miller" but otherwise contained no assertion that that it was filed by Appellant on behalf of the LLC. Nor did the complaint indicate whether Appellant had discussed his intent to bring the action with the other members of the LLC prior to filing.

Appellee filed a pre-answer motion to dismiss on July 2, 2021. Therein, she alleged that Appellant had failed to state a claim based upon the expiration of the statute of limitations and that Appellant lacked standing to bring a derivative action. Appellee asserted that because the events at issue in the complaint—namely the April 27, 2017 sale of Parcel No. 8 and the February 4, 2019 transfer of Parcel No. 2—occurred more than one year prior to the April 27, 2021 filing of the complaint, the statute of limitations period had expired. Appellee further argued that although the three-year statute of repose for a breach

account of the factual history of this case is a restatement of the allegations within Appellant's complaint.

of fiduciary duties action was tolled if fraudulent concealment was involved, Appellant had not alleged any fraudulent concealment. Appellee then noted that Appellant failed to comply with the requirements of a derivative action as set out in the Tennessee Rules of Civil Procedure and the Tennessee Revised Limited Liability Company Act ("TRLLCA"). According to Appellee, this failure meant that Appellant lacked standing to pursue the action on behalf of the LLC.

Appellant responded in opposition to Appellee's motion to dismiss on July 22, 2021. He argued that the one-year statute of limitations for breach of fiduciary duties actions was tolled because he did not discover Appellee's allegedly-tortious actions until Parcel No. 1 was listed for sale on April 10, 2021. Appellant used this later discovery of Appellee's actions as triggering the three-year limitations period for his constructive fraud action. Appellant also argued that his 2021 complaint fell within the three-year statute of repose for the breach of fiduciary duties action. Regarding the issue of his standing to bring the action, Appellant acknowledged that he did not discuss his intention to file the suit with either Appellee or the other members of the LLC prior to filing. Appellant stated that "he made no demands to [Appellee] because [he and Appellee] have not been on speaking terms for quite some time now and have been involved in various other legal disputes over the last several years." And Appellant "made no efforts to cause other members to bring this proceeding because such efforts were not likely to succeed due to [Appellant] and other members having a strained relationship due to them currently being involved in a legal dispute."

That same day, Appellant requested leave to amend his complaint. The proposed amendment added to the allegations in the original complaint statements regarding when Appellant discovered Appellee's allegedly tortious behavior and why he did not make demands to Appellee or request the other members of the LLC join the action. Specifically, in regard to the futility of making a demand on the other members, Appellant alleged in the amended complaint:

> 14. [Appellant] did not make any demands to [Appellee] because the two have not been on speaking terms in quite some time and have been involved in various legal disputes for the last several years.
>
> 15. [Appellant] did not request all members join in this action or bring action of their own because [Appellant] is currently involved in a legal dispute with other members of the LLC.

Additionally, the motion to deny Appellee's motion to dismiss, the motion for leave to amend the complaint, and the amended complaint itself now introduced Appellant as a representative of the LLC.

The motion to dismiss was heard by the trial court on December 2, 2021, and the trial court entered a letter ruling on December 8, 2021. The trial court stated that no testimony was presented and "[n]o exhibits were entered although counsel did present to

the Court certain copies of deeds which had been marked on."[2] The letter ruling began with a statement of the statutes of limitations and repose for breach of fiduciary duties actions, as well as the exception when fraudulent concealment has been alleged. The trial court noted that Appellant proposed that the date he actually discovered the allegedly tortious conduct of Appellee, April 10, 2021, should be used to toll the statute of limitations. Instead, the trial court found that Appellant was bound by the one-year "reasonable discovery" statute of limitations regarding the 2017 and 2019 transfers of LLC property because both were recorded with the Register's Office and thus, public record, prior to 2021. Additionally, the trial court found that Appellant had alleged constructive fraud but not fraudulent concealment on the part of Appellee.

Turning to the issue of standing, the trial court found that "[t]he only proof in the record" of the futility of requesting his desired action from the other members of the LLC was "[Appellant's] statement that he did not get along with the other members and has been involved in various other disputes with them." The trial court noted that obtaining the desired action "would not necessarily have involved personal interaction" and that "[Appellant's] opinion that it would be in vain is an opinion and not a matter of fact." Therefore, Appellant "ha[d] not fulfilled his duty in making an effort to contact the other members who are similarly situated."

Thus, Appellee's motion to dismiss was granted as to both the running of the statute of limitations and the standing of Appellant to bring the action. The trial court's final order incorporated the letter ruling and was entered January 11, 2022. Appellant timely appealed.

II. ISSUES PRESENTED

Appellant raises three issues on appeal, which are taken directly from his brief:

1. Whether the Chancery Court considering evidence outside of the pleadings made this a motion for Summary Judgment and erred by not making it known to the parties that the motion was turned into a motion for Summary Judgment; not allowing the parties to submit proof as they would for a motion for summary judgment; and dismissing [Appellant's] Complaint when there were disputed facts.
2. Whether [Appellee] filing the deeds put [Appellant] on notice to prevent tolling of the statute of limitations, although [Appellee] was under a duty to disclose her transferring of the property and she failed to do so, therefore, she fraudulently concealed the transfers.

[2] Copies of the deeds were not included in the record on appeal. At oral argument, counsel for Appellant stated that he had presented the deeds to the trial court.

3. Whether the Chancery Court erred by not finding the fact that [Appellant] did not contact other members in regard to joining/bringing action against [Appellee] because he believed an effort to do so would be futile, due to their estranged relationship as a sufficient reason for [Appellant] to not make reasonable efforts to contact other members, although this satisfies the statute; and by granting [Appellee's] motion, which was converted into a motion for summary judgment, when whether [Appellant] contacting other members in regard to joining/bringing action against [Appellee] would be futile was a disputed material fact.

Following our review, we conclude that Appellant's failure to comply with statutory pleading requirements is dispositive of this appeal.

III. STANDARD OF REVIEW

Appellant appeals from the trial court's granting of Appellee's motion to dismiss. In ruling on a motion to dismiss, "courts 'must construe the complaint liberally,' presume all alleged facts are true, and 'giv[e] the plaintiff the benefit of all reasonable inferences.'" ***Cooper v. Mandy***, 639 S.W.3d 29, 33 (Tenn. 2022) (quoting ***Ellithorpe v. Weismark***, 479 S.W.3d 818, 824 (Tenn. 2015)). The motion challenges only the legal sufficiency of the complaint and is resolved by examining the pleadings alone. ***Ellithorpe***, 479 S.W.3d at 824 (quoting ***Phillips v. Montgomery Cnty.***, 442 S.W.3d 233, 237 (Tenn. 2014)). Only if no set of facts can be proven to entitle the plaintiff to relief should the motion be granted. ***Id.*** (quoting ***Webb v. Nashville Area Habitat for Humanity, Inc.***, 346 S.W.3d 422, 426 (Tenn. 2011)). We review a trial court's decision on such a motion de novo without any presumption of correctness. ***Id.*** (citing ***Phillips***, 442 S.W.3d at 237).

The issue in this case also requires this Court's construction of the TRLLCA, which is a question of law, and which we review de novo with no presumption of correctness. ***Krajenta v. Westphal***, No. W2021-00832-COA-R3-CV, 2022 WL 4483412 (Tenn. Ct. App. Sept. 27, 2022) (citing ***In re Estate of Tanner***, 295 S.W.3d 610, 613 (Tenn. 2009)).

IV. ANALYSIS

A limited liability company is a legal entity with the attributes of both a corporation and a partnership without fitting fully into either characterization.[3] ***Collier v. Greenbrier***

[3] Because LLCs are relatively new inventions, there does not exist the same wealth of caselaw as there is for corporations and partnerships. Instead, courts look to the origins of the particular aspect of the LLC that gives rise to the problem, whether corporation or partnership law, and turn to precedent from that area. ***Anderson v. Wilder***, No. E2003-00460-COA-R3-CV, 2003 WL 22768666, at *4 (Tenn. Ct. App. Nov. 21, 2003). Generally, an LLC "offers its members limited liability as if they were shareholders of a corporation, but treats the entity and its members as a partnership for tax purposes." Ann K. Wooster, Annotation, 43 A.L.R.6th 611 (2009). As the issue before us relates more to the relationship between the

Devs., LLC, 358 S.W.3d 195 (Tenn. Ct. App. 2009) (quoting 83 Am. Jur. 2d Limited Liability Companies §1 (footnotes omitted)). And although a limited liability company has a legal existence separate from its individual members, it can only act through its members, who are authorized by statute to execute documents and conveyances of LLC property ***Id.*** (citing 83 Am. Jur. 2d Limited Liability Companies §1 (footnotes omitted); Tenn. Code Ann. §§ 48-238-101–104, 48-249-401–402). Inevitably, some decisions made in furtherance of an LLC's business might come to affect the rights of certain members more than others or even compromise the rights of the entity as a whole. Therefore, actions relating to management decisions of LLCs may be brought by a member who is acting either on his or her own behalf in a direct action, or on behalf of the entity in a derivative action. *See* ***Keller v. Estate of McRedmond***, 495 S.W.3d 852, 867 (Tenn. 2016) (considering whether the plaintiffs had "standing to bring a direct claim for their injuries as shareholders or whether their claims are derivative in nature and must be brought on behalf of the corporation").

It was Appellant's position at oral argument that this case does not involve a derivative action because the LLC is closely-held. Appellant cites no authority for this proposition, nor does he make this argument in his brief. It is not this Court's responsibility to make the parties' arguments for them. ***Sneed v. Bd. of Prof'l Resp. of Supreme Court***, 301 S.W.3d 603 (Tenn. 2010). We do note, however, that this Court has previously been faced with a dispute between members of a closely-held family corporation and declined to "make an exception to the general rule prohibiting a shareholder from asserting a claim belonging to the corporation based on the fact that [it was] a subchapter S, closely-held corporation." ***Keller***, 495 S.W.3d at 881. Thus, the size and nature of an LLC has little bearing on the nature of the litigation. Instead, "a court should look to the nature of the wrong and to whom the relief should go." ***Id.*** at 876 (quoting ***Tooley v. Donaldson, Lufkin & Jenrette, Inc.***, 845 A.2d 1031, 1039 (Del. 2004)).

Direct actions are brought by members of LLCs when they have suffered an individual injury and are seeking an individual remedy. ***Id.*** at 868 (quoting Elizabeth J. Thompson, Note, *Direct Harm, Special Injury, or Duty Owed: Which Test Allows for the Most Shareholder Success in Direct Shareholder Litigation?*, 35 J. Corp. L. 215, 218 (Fall 2009) ("The purpose of a direct shareholder suit is to compensate a shareholder for suffering a harm that the corporation itself has not suffered.")). On the other hand, derivative actions are brought by members on behalf of an LLC for harms against the entity, with the benefit of the recovery belonging directly to the entity. ***House v. Estate of Edmondson***, 245 S.W.3d 372, 381–82 (Tenn. 2008) ("A derivative action is a suit brought by one or more shareholders on behalf of a corporation to redress an injury sustained by, or to enforce a duty owed to, the corporation."). A derivative action is an exception to the understanding that the best party to protect the entity's rights is the entity itself. ***Id.*** at 382;

LLC and its members than to tax considerations, we rely primarily on precedent from the realm of corporations to support our discussion.

Lewis v. Boyd, 838 S.W.2d 215, 221 (Tenn. Ct. App. 1992) ("A derivative action is an extraordinary, equitable remedy available to shareholders when a corporate cause of action is, for some reason, not pursued by the corporation itself."). Because Appellant has offered no argument that he has suffered some individual injury as a result of Appellee's allegedly tortious conduct, but instead identified himself as a representative of the LLC seeking remedies on behalf of the LLC, we understand this case to involve a derivative action.

Tennessee has established procedural requirements for how a member of an LLC may bring a derivative action under the TRLLCA. *See generally* Tenn. Code Ann. § 48-249-101 *et seq.* As relevant here, the statute requires that a member purporting to bring a derivative action on behalf of an LLC make a demand on the other members to bring the action or otherwise show that it would have been futile to make such a demand. *See* Tenn. Code Ann. § 48-249-802 ("A complaint in a proceeding brought in the right of an LLC shall allege with particularity the demand made, if any, to obtain action by the directors, managers, officers, members or other persons with the authority to act, as applicable, and either that the demand was refused or ignored, or why the member or holder of financial rights, as applicable, did not make the demand.").[4]

"Tennessee's courts have recognized and imposed the demand requirement for over one hundred years." ***Lewis***, 838 S.W.2d at 221 (collecting cases). This requirement and the other "threshold preconditions on derivative suits" serve "to allow the directors to occupy their normal status as the conductors of the corporation's affairs, to encourage informal resolution of intracorporate disputes, and to guard against misuse of the derivative remedy." ***Id.*** However, a demand is not required in every case—the provision establishing its necessity contains an exception where courts are able to provide relief without a successful demand. *See* Tenn. Code Ann. § 48-249-801(b) (allowing a member to bring a derivative action if "persons with authority to do so have refused to bring the proceeding, or if an effort to cause those members . . . to bring the proceeding is not likely to succeed"). The exception requires that members of an LLC attempt to "to reform alleged abuses before involving the corporation and other shareholders therein in litigation; but it equally provides that when they have done this, and found themselves unable to obtain relief to which they are entitled, it will be given them by the courts." ***Krajenta***, 2022 WL 4483412, at *6 (quoting ***Akin v. Mackie***, 310 S.W.2d 164, 167–68 (Tenn. 1958)).

[4] The trial court based its ruling in part on Tennessee Rule of Civil Procedure 23.06, which, while relating specifically to derivative actions involving corporations and unincorporated associations, contains a similar demand requirement. *See* Tenn. R. Civ. P. 23.06 ("The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action desired 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."). Both parties focus on the TRLLCA, and, rather than tax the length of this Opinion, we follow their lead. Because the requirements of the TRLLCA and Rule 23.06 are similar, we consider caselaw applying both provisions as relevant to the case-at-bar.

Tennessee courts have established two main categories of derivative actions where a failure to show demand is not fatal: demand refused and demand excused. ***Id.*** Demand refused cases occur when a plaintiff has previously brought his or her demand for action to an LLC's management and been denied. ***Lewis***, 838 S.W.2d at 222. In demand excused cases, no demand is made to an LLC's management prior to the filing of a complaint based on an understanding that doing so would be futile. ***Id.*** Here, as Appellant has admitted that he did not consult with either Appellee or the other members of the LLC prior to initiating this suit, it appears that Appellant is relying on the "demand excused" exception to the pre-suit demand requirement.

To effectively show that demand would be futile in a "demand excused" case, a plaintiff must allege that "(1) that the Board is interested and not independent and (2) that the challenged transaction is not protected by the business judgment rule." ***Lukas v. McPeak***, No. 3:11-CV-422, 2012 WL 4359437 (E.D. Tenn. Sept. 21, 2012), *aff'd*, 730 F.3d 635, 2013 WL 5272924 (6th Cir. 2013) (citing ***Lewis***, 838 S.W.2d at 222) (acknowledging that "it appears that the test for demand futility is that as stated above by ***Lewis*** and has been recited and followed by both state and federal courts"). Moreover,the TRLLCA requires a derivative-action plaintiff who relies on the "demand excused" exception to allege *with particularity* why demand was not made. *See* Tenn. Code Ann. § 28-249-802; *see also* ***In re Healthways, Inc. Derivative Litig.***, No. M2009-02623-COA-R3-CV, 2011 WL 882448, at *5 (Tenn. Ct. App. Mar. 14, 2011) ("[M]ere notice pleading is insufficient to meet the plaintiffs' burden to show demand excusal in a derivative case." (quoting ***Guttman v. Huang***, 823 A.2d 492, 499 (Del. Ch. 2003))). Thus, to successfully establish that demand on the other members of an LLC should be excused, a plaintiff must allege specific facts regarding the interest and independence of the members and whether the allegedly tortious action was made in good faith to further the LLC's best interests. ***Lewis***, 838 S.W.2d at 221–22. If demand is neither made nor excused, the complaint is subject to dismissal. *See* ***id.*** at 221 (including the demand requirement with the "threshold preconditions on derivative suits"); ***Keller***, 495 S.W.3d at 867 n.21 (same); ***Lukas***, 2012 WL 4359437, at *10; (granting defendants' motion to dismiss where plaintiff failed to adequately plead specific facts to excuse demand); ***In re Healthways, Inc. Derivative Litig.***, 2011 WL 882448, at *3 (considering similar Delaware demand requirement and noting that "when demand has not been made, as is the case here, the complaint is subject to dismissal unless the plaintiff can plead with requisite particularity why it would be futile to make a demand upon the board of directors"); *cf.* ***Diggs v. Lasalle Nat. Bank Ass'n***, 387 S.W.3d 559, 565 (Tenn. Ct. App. 2012) (citing Tenn. R. Civ. P. 9.02) (noting that Tennessee courts have held that dismissal is an appropriate action for a plaintiff's failure to plead a claim with particularity under a similar requirement applicable to fraud claims).

One circumstance where demand has been excused as futile is where the board members are "themselves guilty of the wrongs complained of." ***Krajenta***, 2022 WL 4483412, at *8 (quoting ***Boyd v. Sims***, 87 Tenn. 771, 11 S.W. 948, 950 (Tenn. 1889)). In other words, "courts have excused the demand requirement when the corporation's officers

and directors will themselves be defendants or when the officers and directors are in collusion with those who have injured the corporation." ***Lewis***, 838 S.W.2d at 221.

However, Appellant here offers little by way of explanation for his failure to request action by any of the other members of the LLC. Appellant stated in his amended complaint that he made no demand on Appellee "because the two have not been on speaking terms in quite some time and have been involved in various legal disputes for the last several years." Similarly, Appellant explained that he made no demand that "all members join in this action or bring action of their own because [Appellant] is currently involved in a legal dispute with other members of the LLC." Simply put, neither of these statements contain any specific facts at all, let alone particular allegations about the individual members of the LLC. Here, it is clear that Appellant alleges wrongdoing by Appellee. Yet nothing in the complaint suggests that the other four members of the LLC were also parties to the alleged wrongdoing. Indeed, the complaint contains no allegations that are in any way particular to the other four members of the LLC such that we can conclude that a demand they join in the litigation would have been futile and therefore should be excused.

The situation in this case is similar to a federal district court case out of Texas that was applying nearly identical law to the case-at-bar.[5] In ***Pedroli ex rel. Microtune, Inc. v. Bartek***, 564 F. Supp. 2d 683 (E.D. Tex. 2008), a shareholder sued a corporation under Federal Rule of Civil Procedure 23.1, which also requires that the plaintiff allege with particularity that a demand was made, refused, or excused. ***Id.*** at 694 (citing Fed. R. Civ. P. 23.1(b)(3) (requiring that the plaintiff "state with particularity . . . any effort by the plaintiff to obtain the desired action from the directors or comparable authority and, if necessary, from the shareholders or members; and . . . the reasons for not obtaining the action or not making the effort")). The plaintiff alleged that demand was futile because the entire board was liable for the wrongdoing. ***Id.***

The district court disagreed that this established with sufficient particularity that demand was excused. ***Id.*** at 694 (applying Delaware substantive law as to futility). As part of its analysis, the court noted that bare "conclusory allegations regarding the directors as a group are insufficient to demonstrate demand futility." ***Id.*** Where the plaintiff "merely lump[ed] all [alleged insider trading] sales together," the court held that his allegations as to the directors were "boilerplate" and insufficient to satisfy the demand obligation. As a result, the court held that "this reason alone" was enough to dismiss the complaint. ***Id.***

The district court's analysis is consistent with Tennessee caselaw explaining the particularity requirement in this context. Specifically, this Court has held that the

[5] This court may consider persuasive authorities from other jurisdictions when they apply statutes similar to our own. *See* ***Shelby Cnty. Health Care Corp. v. Baumgartner***, No. W2008-01771-COA-R3-CV, 2011 WL 303249, at *12 n.14 (Tenn. Ct. App. Jan. 26, 2011).

particularity requirement means that averments "must 'relate to or designate one thing singled out among many.'" ***Diggs***, 387 S.W.3d at 565 (quoting *The New Lexicon Webster's Dictionary of the English Language* 954 (1993)) (original alterations omitted). In ***Diggs***, when faced with a requirement that fraud be pleaded with particularity, this Court concluded that the plaintiff's allegations were "unclear, conclusory, and generally insufficient" where the plaintiff failed to "particularly state" any of the elements of fraud against any of the defendants. ***Id.*** It is the same here—Appellant has not stated with any particularity the elements of demand futility: the interest and independence of the members or the reasonableness of the allegedly tortious conduct.[6] Instead, Appellant has lumped together all non-party LLC members and made boilerplate allegations about non-descript legal disputes. In sum, Appellant has made no effort to allege with particularity those circumstances necessary to establish this as a case where demand would be futile.

Because Appellant has failed to allege any specific facts to demonstrate the futility of making a demand, he has also failed to "adequately plead that his failure to make a prelitigation demand should be excused[.]" ***Lukas***, 2012 WL 4359437, at *10. And because Appellant has failed to meet the procedural requirements of a derivative action, Appellant has failed to comply with the "threshold preconditions of a derivative action," ***Lewis***, 838 S.W.2d at 221, and Appellant's complaint is subject to dismissal. ***Lukas***, 2012 WL 4359437, at *10; ***In re Healthways, Inc. Derivative Litig.***, 2011 WL 882448, at *3. We therefore affirm the trial court's granting of Appellee's motion to dismiss. In light of this conclusion, we determine the remaining issues raised by Appellant to be pretermitted. *See* ***In re Healthways, Inc. Derivative Litig.***, 2011 WL 882448 (not reaching the issue of whether the complaint stated a claim upon which relief could be granted).

V. CONCLUSION

The judgment of the Chancery Court of Carroll County is therefore affirmed, and this matter is remanded for further proceedings consistent with this Opinion. Costs of this appeal are taxed to Appellant Gary Miller, for which execution may issue if necessary.

S/ J. Steven Stafford

[6] Even acknowledging the fact that Appellee being the recipient of the transfer of Parcel No. 2 makes Appellee inherently interested in this action, Appellant has not alleged any interest of the other members. Nor has Appellant offered us any specific facts to show that the transfer was not in the best interest of the LLC. As the ***Lewis*** test is set out as a conjunctive analysis with the use of "and" rather than the disjunctive "or", without particular allegations regarding both the interest/independence and business judgment rule prongs, neither prong alone is satisfactory. *See* ***Lukas***, 2012 WL 4359437, at *10 ("[I]nasmuch as the demand excused test is presented . . . in the conjunctive ('and'), the plaintiff must satisfy both prongs in order to excuse the failure to make a pre-suit demand on the Board. The plaintiff's inability to meet the first prong of the test necessarily means the plaintiff cannot show that his failure to make a pre-suit demand on the Board should be excused.").

J. STEVEN STAFFORD, JUDGE