NOT DESIGNATED FOR PUBLICATION

No. 124,376

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

LESLIE A. HESS and
STEVEN J. HESS,
*Appellants*,

v.

DOUGLAS W. PHELPS ,
*Appellee.*

MEMORANDUM OPINION

Appeal from Pottawatomie District Court; JEFFREY R. ELDER, judge. Opinion filed April 28, 2023. Appeal dismissed.

*Charles H. Herd*, of Coldwater, and *Leslie A. Hess*, of Evergreen, Colorado, for appellants.

*John H. Hutton*, *Amanda S. Vogelsberg*, and *Kara L. Eisenhut*, of Henson, Hutton, Mudrick, Gragson & Vogelsberg, LLP, of Topeka, for appellee.

Before ISHERWOOD, P.J., ATCHESON, J., and TIMOTHY G. LAHEY, S.J.

PER CURIAM: Leslie A. Hess and her husband Steven J. Hess joined with her brother Douglas W. Phelps in a real estate development venture in north-central Kansas. They set up a limited liability company—Wildcat Woods, LLC—and installed Phelps as manager because he lived in the vicinity and the Hesses resided in Colorado. Their business association ran amok. The Hesses sued in Pottawatomie County District Court to oust Phelps from Wildcat Woods, and he reciprocated with a like counterclaim against them.

Against that backdrop of continuing litigation, the Hesses have asked us to review the district court's order denying their request to enforce a vote of the Wildcat Woods' members to remove Phelps as manager and to kick him out of the company. The appeal requires us to consider how to fit a substantive square peg into a procedural round hole. We cannot accomplish that feat and, therefore, dismiss the appeal for lack of jurisdiction because we would be dealing with an interlocutory ruling rather than a final order of the district court.

When they set up Wildcat Woods in 2016, the Hesses and Phelps signed an operating agreement that treats the Hesses jointly as one member with one vote. Phelps—the only other member of the company—also has one vote. The operating agreement includes no dispute resolution mechanism if the members deadlock. Wildcat Woods secured a $1.75 million loan from an area bank, a large portion of which has been paid down, to finance the residential real estate development.

For reasons neither fully apparent from the appellate record nor particularly relevant to the issues before us, disagreements flared between the Hesses, on the one hand, and Phelps, on the other. We can say one point of contention arose from Phelps' decision to automatically allocate a portion of the purchase price of each lot Wildcat Woods sold to reduction of the bank loan rather than putting the full amount in the company's operating account. The Hesses filed this civil action in the district court in September 2020 alleging Phelps engaged in self-dealing and breached various fiduciary duties. They want the district court to remove Phelps as the manager of Wildcat Woods and to expel him as a member. As we have indicated, Phelps has counterclaimed, making allegations of misfeasance against the Hesses and seeking their expulsion from the company. Wildcat Woods has been nominally identified as a defendant, but everybody has agreed the company need not participate as an active party in the litigation.

In March 2021, the bank loan was coming due, and the balance of almost $667,000 had to be extended or paid. The Hesses have asserted Phelps was doing nothing and failed to respond to their requests that he act. They sent an email to Phelps calling a meeting of the membership. Without Phelps' participation, the Hesses issued a capital call on behalf of the company to pay the loan balance. They tendered their share; Phelps did not. The Hesses contend their capital contribution to Wildcat Woods commensurately increased their voting rights, effectively giving them majority control. About a month later, the Hesses called another membership meeting. Phelps participated by telephone. The Hesses ostensibly voted Phelps out as manager over his objection and then voted to expel him as a member again over his objection.

Based on those circumstances, the Hesses filed an application under K.S.A. 2022 Supp. 17-7671 in this case asking the district court to approve the votes removing Phelps as the manager of Wildcat Woods and expelling him as a member. That is the substantive square peg in this appeal. Phelps filed an objection. The district court held a hearing, reviewed exhibits, and received a limited proffer of testimony bearing on the application. The district court concluded there were unresolved questions about the sufficiency of the notice of the March membership meeting—the operating agreement requires notice be "personally delivered" or sent by United States mail—and denied the application for that reason. The Hesses have appealed the district court's ruling. That is the procedural round hole.

To resolve this appeal, we first turn to settled principles governing our appellate jurisdiction. In civil cases, our jurisdictional authority is purely a product of statutory grant; it is neither a vested right nor a constitutional mandate. *Wiechman v. Huddleston*, 304 Kan. 80, 86-87, 370 P.3d 1194 (2016). Under K.S.A. 2022 Supp. 60-2102(a)(4), we have the authority to review "a final decision" of a district court. A final decision disposes of all of the claims of all of the parties. *In re Estate of Butler*, 301 Kan. 385,

395, 343 P.3d 85 (2015); see *Ayalla v. Unified Government of Wyandotte County/Kansas City*, No. 116,972, 2017 WL 2901201, at *3 (Kan. App. 2017) (unpublished opinion). In other words, the district court's determination fully resolves the legal dispute and leaves nothing more to be decided. *Plains Petroleum Co. v. First Nat'l Bank of Lamar*, 274 Kan. 74, 82, 49 P.3d 432 (2002); *Pioneer Operations Co. v. Brandeberry*, 14 Kan. App. 2d 289, Syl. ¶ 1, 789 P.2d 1182 (1990). The district court's ruling here plainly does not amount to a final judgment. The underlying claims of breach of fiduciary duty prompting the action in the first place remain unresolved. Moreover, the district court did not expressly direct entry of a final judgment under K.S.A. 2022 Supp. 60-254(b) on the Hesses' application—an exception permitting appeal of one claim when others remain unresolved.

Apart from final judgments, we may also review limited categories of other rulings: (1) orders altering provisional remedies; (2) orders pertaining to injunctions or relief in mandamus, quo warranto, or habeas corpus; and (3) orders appointing a receiver or related to the winding up of a receivership. K.S.A. 2022 Supp. 60-2102(a)(1)-(3). We don't have a decision that fits in any of those statutory provisions. Finally, a district court can certify for appeal an otherwise unappealable ruling because it presents a controlling question of law of some doubt that "may materially advance the ultimate termination of the litigation." K.S.A. 2022 Supp. 60-2102(c). Our court may then choose to consider a certified ruling. The district court didn't certify its denial of the Hesses' application for relief under K.S.A. 2022 Supp. 17-7671. So that doesn't furnish even a discretionary basis for us to consider this appeal.

In short, we see no basis in the statutes governing civil appeals for the Hesses' request that we now review the denial of their application in the midst of their ongoing litigation with Phelps over control of Wildcat Woods.

We next examine K.S.A. 2022 Supp. 17-7671, as the statutory basis for the Hesses' claim we have been asked to review. The exercise confirms our conclusion we lack jurisdiction for want of a final decision.

The statute is part of a comprehensive regulatory scheme known as the Kansas Revised Limited Liability Company Act (KRLLCA), K.S.A. 17-7662 et seq. The Act was adopted in 1999 and is closely modeled on Delaware's law. Companies formed under the Act combine the limited liability that corporations afford their shareholders with organizational flexibility and tax benefits that partnerships extend to their members. See Hecker, *The Kansas Revised Limited Liability Company Act*, 69 J.K.B.A. 16 (Nov./Dec. 2000). One of the hallmarks of that flexibility is statutory deference to provisions of a company's operating agreement in directing how the enterprise should be run and the ways in which members or managers exercise authority and otherwise interact. 69 J.K.B.A. at 20-21.

Under K.S.A. 2022 Supp. 17-7671(a), a member or manager of a limited liability company may make "application" to the district court to "hear and determine the validity" of the selection or removal of a manager or settle a dispute between persons each claiming the right to serve as a manager. And K.S.A. 2022 Supp. 17-7671(b) contains a parallel right to make application to the district court to "hear and determine the result of any vote of the members or managers" other than on a manager's installation or dismissal.

The statutory structure plainly contemplates a freestanding action based on a duly filed application. Both subsections of K.S.A. 2022 Supp. 17-7671 require service of the application on the resident agent of the limited liability company—notice comparable to what's required to commence a Chapter 60 civil action. See K.S.A. 2022 Supp. 60-304(e)(1). In the case of a disputed manager, the statute then requires the agent to give notice to the manger or ostensible managers. When the application concerns some other

vote, the district court may order additional notice as it sees fit. The district court must then adjudicate the disputed managership under subsection (a) or the contested vote under subsection (b). See *Investcorp v. Simpson Investment Co.*, 277 Kan. 445, 461-62, 85 P.3d 1140 (2003) (upon application under K.S.A. 17-7671[a], district court to resolve dispute over manager and enter appropriate "order or decree in any such case"); see also Hecker, 69 J.K.B.A. at 30 (any member or manager "may bring an action in the district court" under K.S.A. 17-7671[a]).

The Delaware courts have construed the comparable section of their code in that way. See Del. Code Ann. tit. 6, § 18-110 (2008); *Elf Atochem North America, Inc. v. Jaffari*, 727 A.2d 286, 295 (Del. 1999) (Section 18-110 "grants the Court of Chancery jurisdiction to hear claims involving the election or removal of a manager"); *Llamas v. Titus*, No. 2018-0516-JTL, 2019 WL 2505374, at *15 (Del. Ch. 2019) (unpublished opinion). An action under § 18-110(a) entails a streamlined adjudication limited to the dispute over occupancy of the manager's position. *Llamas*, 2019 WL 2505374, at *15; see *Choice Hotels Intern., Inc. v. Columbus-Hunt Park DR. BNK Investors,L.L.C.*, No. 4353-VCP, 2009 WL 3335332, at *5 (Del. Ch. 2009) (unpublished opinion) ("purpose of the statute is 'to expeditiously resolve uncertainty' within the business entity") (quoting *Xpress Management, Inc. v. Hot Wings Intern., Inc.*, No. 2856-VCL, 2007 WL 1660741, at *5 [Del. Ch. 2007] [unpublished opinion]).

In short, the Hesses could have filed their application under K.S.A. 17-7671 as an independent action to have the district court determine the legal effect of their machinations in March and April 2021 to remove Phelps as manager and a member of Wildcat Woods. But they didn't. They submitted the application in this ongoing litigation alleging Phelps' breaches of fiduciary duty and other misfeasance. Presented in that manner, the application effectively functions as a supplemental pleading under K.S.A. 2022 Supp. 60-215(d) based on "transaction[s], occurrence[s] or event[s] that happened

after" the Hesses filed their petition. See *Schneider v. Washington National Ins. Co.*, 200 Kan. 380, 403, 437 P.2d 798 (1968) (supplemental pleading under K.S.A. 60-215[d] permitted in district court's discretion and should be "a mere addition to or continuation of the original pleading and must relate to the same cause of action and not to matters of a different nature"); Wright and Miller, 6A Fed. Prac. & Proc. Civ. § 1504 (3d ed. 2023).

The circumstances recited in the application have become alternative grounds or counts for ousting Phelps as the manager and a member of Wildcat Woods. The Hesses seek the same ultimate outcome and relief in the application as they do in their petition. In the course of this litigation, the district court's denial of the application is, as we have explained, an interlocutory ruling on less than all of the claims the Hesses have asserted against Phelps. It is not a final order and, as such, would be subject to revision as the litigation progresses. Likewise, it is not appealable.

To reiterate, we lack jurisdiction to consider the Hesses' appeal from the denial of their application.

We take up a second point both the Hesses and Phelps have raised in their briefing questioning the efficacy of an order of the district court directing the parties to agree upon a person to oversee the operation of Wildcat Woods during this litigation. The order, entered on May 12, 2021, directs the Hesses and Phelps, presumably through or under the guidance of their lawyers, to work together to select an individual without ties to them or Wildcat Woods to manage the company. The order characterizes the individual as a "receiver" and, in turn, instructs the parties to outline the scope of the receiver's duties and authority. The order states the district court will define the role of the receiver if the parties cannot agree, but, in no event, will the receiver be empowered to liquidate the company. Conversely, the order does not state that the district court would appoint a receiver if the parties fail to agree on a suitable candidate.

About two months later, the district court judge filed an order of recusal, apparently without having taken any action following up on the May 12 order. The incoming district court judge then entered an order on August 6 effectively staying further proceedings until this appeal has concluded. Again, nothing else had been done with respect to the May 12 order.

In their briefing to us, the parties question the district court's authority to appoint a receiver in these circumstances. Under K.S.A. 60-1301, a district court may appoint a receiver to "manage all property and protect any business" during proceedings that could result in a final judgment affecting those interests. An "aggrieved" party may immediately appeal a district court's appointment of a receiver or its denial of a request to appoint a receiver. K.S.A. 2022 Supp. 60-1305.

The record on appeal establishes that the district court has neither appointed a receiver nor refused to do so. It is less than obvious from the language of the May 12 order that the district court even intended to name a receiver if the parties could not agree on a candidate. Accordingly, there is no ruling arising from or related to the May 12 order over which we have jurisdiction.

We dismiss this appeal for lack of jurisdiction.