REL: October 18, 2019

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2019-2020

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Recherche, LLC, and Brooks Davis, individually and on behalf of all others similarly situated

v.

Baldwin County Electric Membership Corporation

Appeal from Baldwin Circuit Court
(CV-12-900820)

STEWART, Justice.

This appeal involves the interpretation of the patronage-refund requirements imposed on electric cooperatives by § 37-6-20, Ala. Code 1975. Recherche, LLC, individually and on

behalf of all other current and former members of Baldwin County Electric Membership Corporation ("the members"), filed a class-action complaint in the Baldwin Circuit Court ("the trial court") against Baldwin County Electric Membership Corporation ("Baldwin EMC"), seeking a judgment declaring the rights of the members to a return of "Patronage Capital" or "Capital Credits," which the members assert are "excess revenues" due to be distributed to the members under § 37-6-20. Brooks Davis subsequently filed a motion to intervene to represent all former members of Baldwin EMC. Recherche and Davis asserted that Baldwin EMC's method of allocating excess revenues to capital accounts violates § 37-6-20. The trial court dismissed the action, and Recherche and Davis appealed. We affirm.

Facts and Procedural History

The procedural history of the action underlying this appeal is lengthy; accordingly, we will discuss only those facts relevant to the issue of Baldwin EMC's distribution of excess revenues. Recherche, LLC, a domestic limited-liability company located in Baldwin County and a member of Baldwin EMC, initiated the underlying class action against Baldwin EMC in

June 2012. In May 2014, Davis filed a motion to intervene, which the trial court initially denied. On September 21, 2015, after Davis had appealed that determination, this Court vacated the trial court's order denying intervention and ordered the trial court to allow Davis to intervene. (Case no. 1140057.) Thereafter, Davis filed a class-action complaint in intervention.[1] Baldwin EMC amended its answer numerous times and filed multiple dispositive motions that were denied throughout the course of the underlying proceedings.

On May 3, 2018, Recherche and Davis filed a joint amended complaint to which they attached the Baldwin EMC bylaws. On June 7, 2018, Baldwin EMC filed a motion to dismiss and a supporting brief in which it argued that its method of allocating capital credits to members' capital accounts as provided in its bylaws complied with § 37-6-20 and that the following federal precedent supported the dismissal of the class action: Davis v. Central Alabama Electric Cooperative, No. 15-0131-WS-C, Sept. 8, 2015 (S.D. Ala. 2015)(not selected

[1]Baldwin EMC moved to dismiss Davis's intervention complaint, and the trial court denied Baldwin EMC's motion. On March 23, 2016, Baldwin EMC filed a petition for a writ of mandamus that this Court denied by order on June 9, 2016. (Case no. 1150669.)

for publication in F. Supp.), Caver v. Central Alabama Electric Cooperative, No. 15-0129-WS-C, Sept. 8, 2015 (S.D. Ala. 2015)(not selected for publication in F. Supp.)("Caver I"), and Caver v. Central Alabama Electric Cooperative, 845 F.3d 1135, 1141 (11th Cir. 2017)("Caver II"). Baldwin EMC attached to its motion the Baldwin EMC bylaws and copies of the opinions issued in Davis, Caver I, and Caver II. On July 16, 2018, Recherche and Davis filed a response in opposition to Baldwin EMC's motion. On July 24, 2018, the trial court denied Baldwin EMC's motion to dismiss.

On July 30, 2018, however, the trial court entered the following order withdrawing its July 24, 2018, order and granting Baldwin EMC's motion to dismiss:

> "The MOTION TO DISMISS [RECHERCHE AND DAVIS'S] AMENDED COMPLAINT PURSUANT TO RULE 12(B)[, Ala. R. Civ. P.,] is hereby GRANTED based solely upon the Caver arguments asserted by [Baldwin EMC]. The opinion of the Eleventh Circuit Court of Appeals in Caver v. Central Alabama Electric Cooperative, 845 F.3d 1135 (11th Cir. 2017), upheld Rule 12 orders of dismissal by the United States District Court for the Southern District of Alabama. While that opinion is not binding precedent on this Court, it is the only appellate opinion to interpret the subject statute. The Court is convinced that, given the number of identical cases pending in Alabama state courts, the Alabama Supreme Court's consideration of the statute is necessary to ultimately resolve the issue of how electric cooperatives must distribute

> excess revenues under the controlling statute. [Recherche and Davis's] appeal of this Order granting [Baldwin EMC's] motion will allow for just that. Accordingly, [RECHERCHE AND DAVIS'S] AMENDED COMPLAINT is hereby DISMISSED WITH PREJUDICE."

(Capitalization in original.) Recherche and Davis timely filed a notice of appeal to this Court.

Standard of Review

The trial court stated that it based its decision "solely upon" Baldwin EMC's reliance on Caver v. Central Alabama Electric Cooperative, 845 F.3d 1135 (11th Cir. 2017). Although Baldwin EMC attached its bylaws to its motion to dismiss, Recherche and Davis had already submitted a copy of those bylaws as an exhibit to their amended complaint. "Exhibits attached to a pleading become part of the pleading." Ex parte Price, 244 So. 3d 949, 955 (Ala. 2017) (citing Rule 10(c), Ala. R. Civ. P.). Accordingly, because the trial court did not consider evidentiary matters outside the pleadings so as to convert Baldwin EMC's motion to dismiss to a motion for a summary judgment, we apply the standard of review applicable to Rule 12(b)(6), Ala. R. Civ. P., motions.

> "'The appropriate standard of review of a trial court's [ruling on] of a motion to dismiss 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 [the pleader] to relief." Nance v. Matthews, 622 So. 2d 297, 299 (Ala. 1993); Raley v. Citibanc of Alabama/Andalusia, 474 So. 2d 640, 641 (Ala. 1985). ...'
>
> "Lyons v. River Road Constr., Inc., 858 So. 2d 257, 260 (Ala. 2003)."

Liberty Nat'l Life Ins. Co. v. University of Alabama Health Servs. Found., P.C., 881 So. 2d 1013, 1017 (Ala. 2003).

Discussion

The statute at issue -- § 37-6-20 -- is entitled "Disposition of Excess Revenues" and provides:

> "Revenues of a cooperative for any fiscal year in excess of the amount thereof necessary to defray expenses of the cooperative and of the operation and maintenance of its facilities during such fiscal year; to pay interest and principal obligations of the cooperative coming due in such fiscal year; to finance or to provide a reserve for the financing of, the construction or acquisition by the cooperative of additional facilities to the extent determined by the board of trustees; to provide a reasonable reserve for working capital; to provide a reserve for the payment of indebtedness of the cooperative maturing more than one year after the date of the incurrence of such indebtedness in an amount not less than the total of the interest and principal payments in respect thereof required to be made during the next following fiscal year; and to provide a fund for education in cooperation and for the dissemination of information concerning the effective use of electric energy and other services made available by the cooperative shall be distributed by the cooperative to its members as, and in the manner, provided in the bylaws, either as patronage refunds prorated in accordance with the

> patronage of the cooperative by the respective members paid for during such fiscal year or by way of general rate reductions, or by combination of such methods. Nothing contained in this article shall be construed to prohibit the payment by a cooperative of all or any part of its indebtedness prior to the date when the same shall become due."

Recherche and Davis argue that § 37-6-20 requires that Baldwin EMC's "distributions must be in cash or by general rate reductions or a combination of both methods." (Recherche and Davis's brief at 28.) Recherche and Davis argue that the language of § 37-6-20 does not permit Baldwin EMC to allocate excess revenue to capital accounts and later "retire" or pay out those funds, because, they assert, allocation and retirement are not among the exclusive manners of distribution recognized in the statute, which are limited to patronage refunds, rate reductions, or a combination of both methods.

Baldwin EMC first argues that the "patronage capital" it allocates to the members' accounts is different from "excess revenues" under § 37-6-20. Baldwin EMC explains that it calculates the amount distributed to the members' capital accounts by subtracting only the cost of providing power, whereas the "excess revenues" contemplated by § 37-6-20 are the revenues remaining after expending the revenues in the multiple ways envisioned by the statute. Baldwin EMC's method

of calculation aside, it is undisputed that Baldwin EMC is allocating to the members' capital accounts credits at least equal to any excess revenues. Accordingly, the only question is whether Baldwin EMC's allocation of capital credits to the members' capital accounts each year satisfies the requirement of distributing "patronage refunds" under § 37-6-20.

Recherche and Davis raise the same statutory-interpretation arguments that were raised by the plaintiffs in the federal district-court cases of Caver I and Davis. In particular, Recherche and Davis argue that, when the language of numerous other states' statutes is compared to the language of § 37-6-20, it is evident that the Alabama Legislature intended to afford a higher level of protection for members of electric cooperatives by bridling the cooperative's discretion as to distribution of patronage refunds. For example, Recherche and Davis argue that Tennessee's statute (§ 65-25-112, Tenn. Code Ann.) expressly permits a capital-credits method in addition to distributing patronage refunds and general rate reductions, whereas § 37-6-20 does not. We are tasked, however, with interpreting the Alabama statute as it is written, and, as the federal district court succinctly expressed in Caver I:

> "[T]he Tennessee statute went into effect in 1988, whereas the Alabama statute was enacted in 1939. Plaintiffs do not explain how a 1988 Tennessee statute sheds light on the Alabama legislature's intent nearly a half century earlier. More broadly, plaintiffs identify no canon of statutory construction under which a legislature's intent may be gleaned from looking at statutes enacted by some other legislature at some other time, absent any evidence of 'common drafting heritage' beyond counsel's unvarnished say-so."

Caver I.

Recherche and Davis also rely on the language of § 2-10-103, Ala. Code 1975, regarding agricultural cooperatives. They assert that § 2-10-103 was drafted four years before § 37-6-20, that it expressly provided an agricultural cooperative's board of directors "wide-ranging authority" to exercise its discretion in refunding patrons, and that, therefore, the lack of similar language in § 37-6-20 denotes the legislature's intent to restrict the electric cooperatives' discretion. (Recherche and Davis's brief at 37.) Although we agree with Recherche and Davis's assertion that this Court is "required[] to compare statutes addressing 'related subject[s],'" Dunn v. Alabama State Univ. Bd. of Trs., 628 So. 2d 519, 523 (Ala. 1993), overruled on other grounds by Watkins v. Board of Trs. of Alabama State Univ., 703 So. 2d 335 (Ala. 1997), the two statutes are different. Section 2-10-103 addresses "patronage

dividends" rather than "patronage refunds," and it does not contemplate general rate reductions. Furthermore, as the federal district court explained when confronted with this argument:

> "[T]he agricultural cooperative statute does not provide the stark contrast that plaintiffs ascribe to it; rather, plaintiffs are comparing apples to oranges. Nothing in § 2-10-103 would support a reasonable inference that the Alabama legislature intended § 37-6-20 to mandate cash payouts. Much like in § 2-10-103, an Alabama statute governing electric cooperatives authorizes them '[t]o do and perform any and all other acts and things and to have and exercise any and all other powers which may be necessary, convenient or appropriate to accomplish the purposes for which the cooperative is organized,' Ala. Code [1975,] § 37-6-3(23), which is surely broad enough to include the issuance of patronage credits in members' capital accounts."

Caver I.

Recherche and Davis also assert that, even if the statute is not construed in their favor, Baldwin EMC breached its contractual obligations as contained in its bylaws. Recherche and Davis base their breach-of-contract claim on their assertion that the statute becomes part of the "contractual bylaws" and that Baldwin EMC has breached those contractual bylaws by allocating credits to the members' capital accounts rather than distributing patronage refunds in the form of cash or rate reductions.

In dismissing the action below, the trial court expressly relied upon Caver II. In Caver II, Caver and other members of Central Alabama Electric Cooperative ("CAEC") brought a class action against CAEC in which they alleged that CAEC had violated § 37-6-20 and its own bylaws by not paying out its excess revenues in cash to its members annually. CAEC removed the case to federal court under 28 U.S.C. § 1442(a)(1). Although CAEC did not actually make cash distributions for many years, CAEC distributed patronage refunds to its members' capital accounts with CAEC. The federal district court granted CAEC's motion to dismiss the action against it, finding that CAEC's distribution method of crediting each members' capital account when the revenues exceeded its operating costs was compliant with § 37-6-20. Caver appealed to the United States Court of Appeals for the 11th Circuit. The 11th Circuit Court of Appeals conducted the following thorough analysis of the issue that is presently before this Court:

> "On appeal, as she did in the district court, Caver argues that CAEC must annually distribute 'patronage refunds' in the form of an annual cash payment to its members. Caver contends that CAEC's allocation of 'credits' to members' capital accounts does not constitute a refund because CAEC's members cannot access the credits. Caver describes § 37-6-20 as having a 'plain statutory requirement that excess

revenue be distributed through refund or rate reduction, not "crediting" and withholding.'

"Section 37-6-20 does not speak with the clarity that Caver wishes, and nowhere does that section require a cash payment, much less an annual one. Indeed, the statute does not even define the term 'patronage refund' or the word 'distributed.' Rather, the statute states plainly that the manner of distribution, whether by patronage refund or rate reduction, 'shall' be done 'as, and in the manner, provided in the bylaws.' CAEC's bylaws provide such an express manner for distribution. In the bylaws, CAEC treats its excess revenues as furnished by the patrons to CAEC and credits each patron's capital account for their proportional share of the excess revenues. Those credits are later retired as directed by CAEC's Board of Trustees. CAEC's bylaws thus use capital account credits as the manner for distributing patronage refunds.

"Telling too, the relevant portion of the statute does not use the words 'cash' or 'pay.' Nor does the statute expressly forbid CAEC from using methods other than a cash payment to make the required distributions. Other clauses in § 37-6-20 indicate when CAEC must 'pay' something rather than 'finance' or 'provide' for a fund or a reserve. § 37-6-20. For patronage refunds, the statute only says that the excess revenues shall be distributed 'as, and in the manner, provided in the bylaws.' Id. Nothing in the statute imposes the specific requirement that all patronage refunds be made in a cash manner. Caver offers no persuasive reasoning, such as a statutory, textual basis, for why a refund or distribution must be in a cash payment as opposed to a capital account credit. Instead, the statute allows each rural electric cooperative's bylaws to specify the 'manner' in which the cooperative makes distributions through patronage refunds, in effect giving each rural electric cooperative a measure of discretion in carrying out the statutory directives.

"The reasoning of at least two Alabama appellate decisions, though both are tax cases and the reasoning is dicta, support a rejection of Caver's reading of § 37-6-20. In the first case, the Alabama appellate court thoroughly reviewed § 37-6-20 and a rural electric cooperative's system of making refunds to patrons through capital account credits and approved the use of those credits, which created 'an obligation to the member against the assets of the cooperative.' State v. Pea River Elec. Coop., 434 So. 2d 785, 786 (Ala. Civ. App. 1983). In a subsequent tax case decided over a decade later, the Alabama appellate court, relying in large part on Pea River, again thoroughly examined § 37-6-20 and the use of capital account credits for refunds and found that § 37-6-20 'mandates that a cooperative return any excess advances to its members and allows those returns to be made in the form of patronage credits.' State Dep't of Revenue v. Mon-Cre Tel. Coop., Inc., 702 So. 2d 179, 182 (Ala. Civ. App. 1997). While these cases did not involve direct challenges to the use of capital account credits (as opposed to cash payments), their reasoning lends credence to CAEC's position in this case. Both Alabama appellate decisions, dating back to 1983, approved the use of capital account credits to distribute patronage refunds.

"Based on the foregoing Alabama law, we must reject Caver's claims that CAEC must distribute patronage refunds only in the form of annual cash payments. Caver's argument assumes, without support, that a refund must be paid in cash. Section 37-6-20 contains no such cash payout requirement. While § 37-6-20 requires that excess revenues be distributed, Caver's claims ignore how § 37-6-20 provides that the manner of distribution of patronage refunds is determined by a cooperative's bylaws. To be clear, our narrow holding here is that § 37-6-20 does not require CAEC to distribute patronage refunds only in a cash payment manner. Caver's complaint therefore fails to state a viable claim because cash payments are not required by the

> statute, and therefore there is no statutory violation, no breach of contract, and no basis for injunctive relief."

Caver II, 845 F.3d at 1147–48 (footnotes omitted).

Recherche and Davis assert that the narrow holding in Caver II "is that § 37-6-20 does not require [an electric cooperative] to distribute patronage refunds only in a cash payment manner." 845 F.3d at 1147. Although that statement is contained in Caver II, the Caver II court also recognized that "§ 37-6-20 provides that the manner of distribution of patronage refunds is determined by a cooperative's bylaws." 845 F.3d at 1148. Recherche and Davis distinguish Caver II by asserting that they are not claiming that § 37-6-20 requires only cash payments; instead, they are claiming that Baldwin EMC is failing to distribute either direct patronage refunds or general rate reductions. Regardless of how Recherche and Davis attempt to frame their argument on appeal, as explained herein, the only issue in dispute is whether Baldwin EMC's allocation of equity to the members' capital accounts constitutes a permissible method of distributing patronage refunds under § 37-6-20.

"'Words used in a statute must be given their natural, plain, ordinary, and commonly understood meaning, and where

plain language is used a court is bound to interpret that language to mean exactly what it says.'" Blue Cross & Blue Shield of Alabama, Inc. v. Nielsen, 714 So. 2d 293, 296 (Ala. 1998) (quoting IMED Corp. v. Systems Eng'g Assocs. Corp., 602 So. 2d 344, 346 (Ala. 1992)). Section 37-6-20 requires that an electric cooperative's excess revenues each fiscal year that are not used for the numerous purposes permitted within the statute "shall be distributed" to the cooperative's members "either as patronage refunds ... or by way of general rate reductions, or by combination of such methods." The plain language of the statute does not require a cash payment to members. "Distribution" is defined as "[t]he act or process of apportioning or giving out." Black's Law Dictionary 597 (11th ed. 2019). Likewise, although "'patronage refund' is not defined in the statute, ... the plain ordinary meaning of a 'refund' encompasses concepts of distribution by either cash or credit." Davis. Furthermore, § 37-6-20 provides that the distribution of patronage refunds is to occur in the manner as "provided in the bylaws." Baldwin EMC's bylaws provide, among other things: "[Baldwin EMC] is obligated to pay by credits to a capital account for each patron all such amounts in excess of operating costs and expenses." Article VII, § 2. Baldwin

EMC's undisputed apportionment of equity to capital accounts qualifies as distributing patronage refunds under § 37-6-20.

Although we are not bound by Caver II, we agree with the reasoning of the 11th Circuit Court of Appeals, its reliance on State v. Pea River Electric Cooperative, 434 So. 2d 785, 786 (Ala. Civ. App. 1983), and State Department of Revenue v. Mon-Cre Telephone Cooperative, Inc., 702 So. 2d 179, 182 (Ala. Civ. App. 1997), and its interpretation of § 37-6-20.[2] Because it is undisputed that Baldwin EMC is distributing excess revenues to the members' capital accounts and because Baldwin EMC's method of distribution does not contravene § 37-6-20, Recherche and Davis's complaint fails to state a claim upon which relief could be granted. Furthermore, because the provisions in Baldwin EMC's bylaws for the distribution of excess revenue to the members is in compliance with § 37-6-20, Recherche and Davis's argument that Baldwin EMC has breached

[2]See, e.g., Rice v. Alabama Surface Mining Comm'n, 555 So. 2d 1079, 1081 (Ala. Civ. App. 1989)(citing Assured Investors Life Ins. Co. v. National Union Assocs., Inc., 362 So. 2d 228 (Ala. 1978), and Best v. State Dep't of Revenue, 417 So. 2d 197 (Ala. Civ. App. 1981))("This court has often stated that federal case law construing federal statutes upon which Alabama statutes were patterned will be given great weight as persuasive authority in determining construction of a state statute.").

the contract by breaching the statutory provisions incorporated in the bylaws is not a viable claim of breach of contract. Accordingly, the trial court properly dismissed Recherche and Davis's class-action complaint.

AFFIRMED.

Parker, C.J., and Bolin, Wise, and Sellers, JJ., concur.