No. 76099-8-I

96042-9

COURT OF APPEALS, DIVISION I,
OF THE STATE OF WASHINGTON

MELVIN E., KAREN and MARY STRUCK

Petitioners,

V.

SHANGRI-LA COMMUNITY CLUB, INC.,

a Washington Nonprofit Corporation,

Respondent

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioners, the Strucks, own property in a plat called Shangri-La on the Skagit. There is a private corporation that provides certain services, primarily water, to the plat, the Shangri-La Community Club, Inc. ("the Club"). The Shangri-La Community Club is a private corporation formed for the primary purpose of providing water to the residents of the Shangri-La on the Skagit plat.

Petitioner Struck were sued by the Club when it sought to foreclose a lien for water charges, refused to provide water, and charged rates far higher than provided for in the governing documents.

Petitioner Struck asks this Court to grant review of the Court of Appeals, Division One, decision set forth in Part B.

B. DECISION

Division One issued its opinion on April 16, 2018. A copy of the opinion is at Appendix A. Division One denied Struck's motion for reconsideration on June 5, 2018. A copy of the order is at Appendix B. The trial Court decision is attached as Appendix C.

C. ISSUES PRESENTED FOR REVIEW

1. Should this Court take review to protect homeowners when quasi-governmental homeowners' associations improperly act without following their By-Laws, action that effects a growing segment of the public?

2. Should this Court take review where a private corporation, acting in violation of its own rules obtained judgment and used the courts in its effort to collect funds?

D. STATEMENT OF THE CASE

(1) Factual Background and Superior Court Judgment

The Shangri-La Community Club, Inc. brought this case seeking to force the Strucks to pay for water it never provided.

The Shangri-La Community Club is a private corporation formed for the primary purpose of providing water to the residents of the Shangri-La on the Skagit plat. The Articles of Incorporation state, at page 1, Article 3, that the purpose of the Club is to "…hold and manage property to provide water and other services for ...the owners of property in the plat of Shangri la on the Skagit." Under the Declaration of Restrictive Covenants (CCRs) Shangri-La is obligated to provide water to its members. (CP. 127, Ex. 1 p. 1, pp. 2).

The 1968 CCRs provide that Shangri-La can bill property owners $10 per annum for water service. (CP. 127, Ex. 1, p. 2 pp 5.) The 1968 CCRs have never been amended.

The Strucks paid the water bills from the Club for Lot 16 from the time they purchased Lot 16 in 1995 until 2005. They did not receive any water at Lot 16 during this time. (RP p. 58, l. 13-18.)

The Strucks sought water service from Shangri-La. There were further conversations and correspondence between the parties in which the Strucks asked for water. No water was provided. (RP p. 60, l. 1-

10.) (CP 128). After 10 years of paying for water that was not being provided and after repeated requests the Strucks stopped paying the Club for the nonexistent water after August 31, 2005. (CP 128).

a. By-Law Authority

From 1995 through the present the Association has alleged it had the authority to shut off water to a nonpaying owner. From 1995 to 2009 there was no CCR, Bylaw or statute that gave the Board the right to withhold water. On November 14, 2009, the club claims it adopted a Bylaw giving the Board the power to withhold water. (CP 128).

The 2006 Bylaws, the operative Bylaws in force in 2009, state:

"The directors shall hold quarterly meetings beginning on the second Monday beginning in September and each quarter thereafter. A quarterly letter with agenda, place, and time of the quarterly meeting shall be sent with a summary of the previous meeting to the memberships." (CP 127, Ex. 12, p. 2, sec. 4.)

The 2006 Bylaws, further state:

"Article 4 Amendments. These bylaws may be amended by a majority vote of the directors of the corporation at a quarterly / annual meeting thereof and ratified by members presence *[sic]*." (CP127, Ex. 12, p. 3.)

No evidence exists of the required notice to the members for the November 14, 2009 board meeting.

The operative By Laws, adopted August 12, 2006, state in Section 4 that the Club's fiscal year start on September 1st and end August 31st. (CP127, Ex. 12, p. 3.) After the annual meeting,

scheduled August 22, 2009, the next board meetings would have been: 1st Quarter Meeting, September 14, 2009. 2nd Quarter Meeting, December 14, 2009. The November meeting was not a quarterly meeting.

The Shangri-La Board held a (Special) Board Meeting on November 14, 2009 to amend the Shangri-La By-Laws without notification to the membership of agenda, time, place of the meeting, or a summary of previous meeting to the membership.

b. Water Charges.

The original CCRs set the water charge at $10 per year, unless changed by a vote of 60 percent of the Board. (CP 127, Ex 1, p. 2 sec. 5.) Shangri-La seeks to collect from Struck at the rates of $240 and $390 a year. There is no record of adoption of any increase to the water charges. (CP 128.)

The Club's president Chet Parker in his deposition testified that he had "never seen any documents that showed the change." (CP 124, p. 21:10 to 21:18). The Club's Vice President, John Tellesbo in his testimony was unable to identify when or how rates were raised to the amounts sought by the Club in this case. (RP p. 24 l. 5 -7.)

When asked at trial the basis for the water charges the Club seeks to collect Mr. Heweitt, Shangri-La's secretary/treasurer for 2009 through fiscal year 2012, testified that water rates were in effect at the beginning of his records and "That's all I had, how they came to that

number, I don't know." (RP 33.)

(2) The Court of Appeals

a. Failure to Provide Water.

The Court of Appeal upheld the Trial court. The Trial court found Shangri-La unreasonably failed to provide water. Trial Court Opinion at 2. The Court of Appeals stated Shangri-La finally provided water to lot 16 in October 2009. Opinion at 2. However, the newly installed water meter had a "ON/OFF" valve that was pad-locked in the **OFF** position; hence no water has been provided to Struck's Lot 16 between October 2009 and today, June 28, 2018. The Court found that the Board had given itself authority through Amendment of the Bylaws in November 2009.

b. Shangri-La did not follow By-law amendment procedures.

"The Strucks specifically challenge the court's finding that "[n]otice was sent to the membership before the meeting (November 14, 2009) and a vote was taken." Opinion at P. 4.

"As a corporation, Shangri-La must act in accordance with its governing documents as well as general law. "Unless otherwise provided in the governing documents, an association may: (1) Adopt and amend bylaws, rules and regulations." Here, the 2006 bylaws state, "These bylaws may be amended by a majority vote of the Directors of the Corporation at a Quarterly/Annual meeting thereof and ratified by members presence [*sic*]." Opinion at P. 5.

There is no evidence of notice to the members prior to the

November 14, 2009 board meeting as required by the Club's governing documents.

The Court stated: "On August 22, 2009, membership passed a motion about water shutoff." Opinion at 4. However, as the Courts notes at page 6 the president of the Board specifically stated:

> "It was agreed by the majority that some or all of these changes have merit but require some thoughtful review and input from club members. A copy of these proposed changes will be mailed to all members so they may voice their opinion. **A vote on these proposed changes may be scheduled for a future meeting."**
>
> Opinion at 6.

The August 22, 2009 meeting was not the final action, nor was it an Amendment of the Bylaws. The Court of Appeals in its opinion was correct that a vote occurred, but it was not a vote to change the bylaws. The Court was in error.

On November 14, 2009, the Shangri-La board met and voted on the bylaw amendment. There is no evidence in the record that this meeting complied with the requirements of the Bylaws. It was not a regular quarterly board meeting. No notice was provided to the members as required by the 2006 By Laws.

The Court in its opinion conflates the annual meeting of August with the November board meeting. Opinion at P.6. Notice for one is not notice for both. There is no evidence for a notice of the November board meeting. There was **no** notice that By-Law were to be discussed at the August 22, 2009 annual meeting and there was **no** notice for the November 14, 2009 board meeting.

The Court further improperly shifts the burden of proof to Struck stating that: "Mr. Struck did not testify that he did not receive notice of this board." Opinion at 6 -7. The Club had the burden of proving its case that it acted properly and failed to meet that burden.

Substantial evidence exists if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise." *Bering v. SHARE*,106 Wn.2d 212, 220, 721 P.2d 918 (1986). Opinion at 3, ft note 2. No evidence cannot be substantial evidence.

In violation of the Bylaws and Sate law the Board did not send out information about the November 14, 2009 meeting. In fact, the board itself seemed to forget about this meeting and its vote, as it did not disclose the meeting in the litigation until the Fall of 2015 for the first time in response to a Motion for Summary Judgment the Club came up with the 2009 Bylaw that said the Club can turn off the water for nonpayment. CP 113 and 115.

b. No evidence supports Shangri La damage claim.

"[T]he Strucks challenge the trial court's finding about the annual water rates. The trial court found that the annual rates were $390 per year for 2005 and 2006 and $240 per year since 2007. It admitted, however, that no evidence showed how these amounts were established." Opinion at 8.

"The Strucks point out that no document in the record shows that Shangri-La had the authority to charge these amounts. The restrictive

covenants authorize the board to set assessment rates by a vote of 60 percent of the board." "No evidence in the record shows that any such vote occurred." Opinion at 8.

Mr. Heweitt, Shangri-La's secretary/treasurer for 2009 through fiscal year 2012, testified that water rates were in effect at the beginning of his records and "That's all I had, how they came to that number, I don't know." (RP 33.) That is not substantial evidence.

The Court of Appeals noted that the Strucks had paid for water. It then used that as proof of the rate. This is improper. Payment without objection is not evidence of properly adopted rates. Until the Club sought to foreclose on his property Mr. Struck had not reasons to question the bill, other than he was not receiving any water. Nor is testimony about the rate in force when the witness started on the board evidence that the rates were properly adopted.

The trial court and court of appeals held: "It admitted, however, that no evidence showed how these amounts were established." Opinion at 8. There is no evidence, much less substantial evidence to show that any rate was properly adopted or what that rate might be.

E. WHY REVIEW SHOULD BE GRANTED

1. By-Law Amendment lack of notice is fatal to claimed change

Shangri-La has only those powers the owners have agreed to grant it in the governing documents. The Court in error imputed to the

Club powers that were not granted by the governing documents and excused Shangri-La's failure to follows its own rules. The failure to follow rules is a breach of the governing documents and were Shangri-La a public government these would be due process violations.

It is black letter law that directors and officers of a homeowners' association have a duty to act in compliance with the law and the governing documents, to deal fairly with the association and its members, and to use ordinary care and prudence in performing their functions. Restatement (Third) of Property (Servitudes) § 6.14 TD No. 7 (1998).

The Club is organized as a corporation, and corporations must act in accordance with any formalities "prescribed by its charter, or by the general law." *Twisp Mining & Smelting Co. v. Chelan Mining Co.*, 16 Wn.2d 264, 294, 133 P.2d 300 (1943); RCW 64.34.300. It is also true that when a corporation acts beyond its corporate powers or its actions offend public policy, those actions are void. *Twisp*, 16 Wn.2d at 293-94.

The Board's attempt to amend the By Laws to get the Struck's "was void ab initio, or "void from its inception." *Club Envy*, 184 Wn. App. at 600-01. Actions that exceed the decision maker's authority are generally void. *S. Tacoma Way, LLC v. State*, 169 Wn.2d 118, 123, 233 P.3d 871 (2010).

The Court errored in its opinion determining that Club had

power to turn off Struck's water supply after August 2009. (Op.; p. 6). The Court is in error both factually and in law holding that the annual meeting on August 22, 2009 gave the Board the power to cut off water to members. The meeting as recorded in the meeting minutes shows explicitly that the vote at that time was not the final effective action, the Bylaws were explicitly to be amended after further review by the members and a vote. (CP 127, Ex. 30, p. 1.)

The record of that meetings unambiguously states:

> Mr. Mike Cucchetti was recognized and presented an amendment set of Bylaws that he proposed we adopt. A good discussion followed. **It was agreed by the majority that some or all of these changes have merit, but require some thoughtful review and input from club members.** A copy of these proposed changes will be mailed to all members so they may voice their opinion. ***A vote on these proposed changes may be scheduled for a future meeting.***
> Emphasis added. (CP 127, Ex. 30, p. 1, p. 3.)

The Board under the governing documents is to meet quarterly. The 2006 bylaws (the ones in effect prior to the alleged 2009 amendment), provided for amendment "by a majority vote of the Directors of the Corporation at a Quarterly/ Annual meeting thereof and ratified by members presence [sic]." (OP at 5; CP 127, Exhibit 12)

The same declarations define a "quarterly/ annual meeting" and set out the required notice that the Board shall give prior to the quarterly meeting. "A quarterly letter with agenda, place and time of the quarterly meeting shall be sent with summary of the previous meeting to the membership." Quarters begin in September (1st Quarter), December (2nd Quarter), March (3rd Quarter) and June (4th Quarter). Emphasis

added. (CP 127, Exhibit 12, Article Two, Section 4.)

2. A complete lack of evidence

For the critical November 14, 2009 no notices were sent. In addition, that meeting was not a quarterly Board meeting as is required under the Bylaws. (CP. 124 p. 30:19 to 31:5) and (CP 124 p. 36:7 to 36:13). (RP p. 29.)

The Club did not provide copies of the alleged Amended Bylaws of November 2009 to the members after the meeting. Again, violating its governing documents. In fact, the Board did not provide the alleged 2009 Amended Bylaws to Struck until the Club was challenged by the Strucks' Summary Judgment Motion in the fall of 2015 and the Club only produced a copy in its opposition to the Strucks' motion.

A homeowner's association is not empowered to violate its own governing documents. The Club is organized as a corporation, and corporations must act in accordance with any formalities "prescribed by its charter, or by the general law." *Twisp Mining & Smelting Co. v. Chelan Mining Co.*, 16 Wn.2d 264, 294, 133 P.2d 300 (1943).

It is black letter law that directors and officers of a homeowners' association have a duty to act in compliance with the law and the governing documents, to deal fairly with the association and its members, and to use ordinary care and prudence in performing their functions. Restatement (Third) of Property (Servitudes) § 6.14 TD No 7 (1998).

The Club's 2006 Bylaws Article four, Section 2 state: "Any issue, law or situation not covered by these bylaws the Revised Code of Washington RCW 64.38 Homeowners Associations shall prevail." (CP 127; Exhibit 12)

RCW 64.38.025 requires the directors of a homeowners' association to comply with their governing documents.

RCW 64.38.035 Association meetings—Notice—Board of directors.

(1) ….. The association must make available to each owner of record for examination and copying minutes from the previous association meeting not more than sixty days after the meeting. Minutes of the previous association meeting must be approved at the next association meeting in accordance with the association's governing documents.

(2) Not less than fourteen nor more than sixty days in advance of any meeting of the association, the secretary or other officers specified in the bylaws shall provide written notice to each owner of record by: …

(3) The notice of any meeting shall state the time and place of the meeting and the business to be placed on the agenda by the board of directors for a vote by the owners, including the general nature of any proposed amendment to the articles of incorporation, bylaws, ….

When a corporation acts beyond its corporate powers, those actions are void. *Twisp*, 16 Wn.2d at 293-94. Actions that exceed the

decision maker's authority are generally void. *S. Tacoma Way, LLC v. State*, 169 Wn.2d 118, 123, 233 P.3d 871 (2010). The Board's attempt to amend the By Laws to get the Strucks in November 2009 "was void ab initio, or "void from its inception." *Club Envy of Spokane, LLC v. Ridpath Tower Condo. Ass 'n*, 184 Wn. App. 593, 600-01. 337 P.3d 1131 (2014). When a meeting of a Washington nonprofit corporation is not in accordance with its bylaws, its proceedings are void. *E. Lake Water Ass'n v. Rogers*, 52 Wn.App. 425, 426, 761 P.2d 627 (1988).

The Court of Appeals in its decision improperly merges the August 22, 2009 meeting with its discussion of water shut-off authority and the November 19, 2009 meeting where a vote of the Board was taken.

In this case the Club attempted to make changes in its bylaws in an effort to get the Strucks. The ruling of the Court of Appeals should be reversed.

3. Water rates. No evidence

The Trial Court was error when it found that annual water rates were $390 per year for 2005 and 2006, and $240 per year since 2007. (Op. 8; Appendix A, p. 8.)

The party seeking damages bears the burden of proof to prove their claim. The trial court stated: "Although there is **no evidence** showing when and how those amounts were established, …" *Emphasis added* (OP at 8CP 128, p. 2, paragraph 5; Appendix B). Shangri-La did not

provide any evidence that new water rates were adopted as required in the CCRs by a 60 percent vote of the Board as required. As the moving party has the burden of proof to show evidence supporting the elements of its claims. Shangri-La failed to meet its burden of proof.

It is well established that " damages must be proved with reasonable certainty." *Lewis River Golf, Inc. v. O.M. Scott & Sons*, 120 Wn.2d 712, 717, 845 P.2d 987 (1993). *Mutual of Enumclaw Insurance Co. v. Gregg Roofing, Inc*., 178 Wn. App. 702, 315 P.3d 1143, (Div. 2 2013). However, the fact that the amount of damages need not be proved with precision does not allow a claimant to present no evidence regarding the amount. See *Bunch v. King County Dep't of Youth Servs*., 155 Wn.2d 165, 180, 116 P.3d 381 (2005) (" there must be evidence upon which the award [of damages] is based"). Although the precise amount of damages need not be shown with mathematical certainty, " 'competent evidence in the record'" must support the claimed damages. *Fed. Signal Corp. v. Safety Factors, Inc*., 125 Wn.2d 413, 443, 886 P.2d 172 (1994) (quoting *Interlake Porsche + Audi, Inc. v. Bucholz*, 45 Wn.App. 502, 510, 728 P.2d 597 (1986)). A claimant has the burden of proof on the amount of damages and must come forward with sufficient evidence to support a damages award. *O'Brien v. Larson*, 11 Wn.App. 52, 54, 521 P.2d 228 (1974). "

An appellate court can overturn an award of damages if it is " 'outside the range of substantial evidence in the record.'" *Bunch*, 155

Wn.2d at 179 (quoting *Bingaman v. Grays Harbor Cmty. Hosp.*, 103 Wn.2d 831, 835, 699 P.2d 1230 (1985)).

The Court in approving Shangri-La's damage claim without evidence establishing evidence to support the amount claimed is contrary to law and common sense. The Court of Appeals was in error when in its opinion it stated there was substantial evidence.

Here the CCRs obligate the Club to supply water. The Club did not provide water to the Struck lots. The rate was set at $10 per year in the CCRs. There is no record of any change, nor is there substantial evidence of a change made following the requirements of the CCRs. The ruling of the Court of Appeals should be reversed.

Shangri-La brought this action to foreclose on the Strucks' property claiming it was owed money for water it did not provide. To prove its damages the Club must produce evidence of the amount of the water rates it seeks to collect.

F. CONCLUSION

Shangri-La's actions were violations of the governing documents.

To rule that the Board may enforce the Bylaws against Struck, while excusing the violations by Shangri-La, has no basis in law and sets a dangerous precedent. The Court of Appeals opinion should be reversed.

The Court of Appeals' published opinion fails to address a central issue, improperly tilts the balance of power between homeowners and neighborhood associations in favor of those governing bodies.

Homeowners' associations wield tremendous power over individual property rights. *Concepts of Liability in the Development and Administration of Condominium and Home Owners Associations,* 12 Wake Forest L. Rev. 915, 961 (1976). They are, in essence, quasi-governmental bodies:

> [O]ne clearly sees the association as a quasi-government entity paralleling in almost every case the powers, duties, and responsibilities of a municipal government. As a 'mini-government,' the association provides to its members, in almost every case, utility services, road maintenance, street and common area lighting, and refuse removal. …All of these functions are financed through assessments or taxes levied upon the members of the community, with powers vested in the board of directors, council of co-owners, board of managers, or other similar body clearly analogous to the governing body of a municipality.

Id. at 918. In addition to these services, these associations have the power "to exert tremendous influence on the bundle of rights normally enjoyed as a concomitant part of fee simple ownership of property." *Id.* at 917.

The boards of such powerful bodies are not unaccountable. They are subject to the state law and their governing documents:

> (1) *Except as provided in the association's governing documents* or this chapter, the board of directors shall act in all instances on behalf of the association. In the performance of their duties, the officers and members of the board of directors shall exercise the degree of care and loyalty required of an officer or director of a corporation organized under chapter 24.03 RCW.

RCW 64.38.025 (emphasis added). This is simple accountability that is black-letter law. *Restatement (Third) of Property (Servitudes)* § 6.14 TD No. 7 (1998) (directors and officers of a homeowners' association have a duty to act in compliance with the law and the governing documents).

Although no Washington court has yet acknowledged it, many other states recognize that homeowners' associations are quasi-regulatory bodies with significant power that can harm property rights if they violate statutes and/or their governing documents. *Damon v. Ocean Hills Journalism Club*, 85 Cal. App. 4th 468, 475, 102 Cal. Rptr. 2d 205 (2000); *Woodward v. Bd. of Directors of Tamarron Ass'n of Condo. Owners, Inc.*, 155 P.3d 621, 624 (Colo. App. 2007); *Baldwin v. North Shore Estates Ass'n,* 384 Mich. 42, 52, 179 N.W.2d 398 (1970); *Terre Du Lac Ass'n, Inc. v. Terre Du Lac, Inc.*, 737 S.W.2d 206, 216 (Mo. Ct. App. 1987); *Adams v. Starside Custom Builders, LLC*, 16-0786, 2018 WL 1883075 at *5 (Tex. Apr. 20, 2018).[4] (*Adams is a recently published Texas State Supreme Court decision that has not yet been codified in the official reporter*.)

Because homeowners' associations are quasi-governmental, their conduct is a matter of public interest. *Damon,* 85 Cal. App. 4th at 479; *Adams,* 2018 WL 1883075 at *5. Just as the constitutional due process violations of a city would be of public interest, so are the procedural violations of CC&Rs committed by a homeowners' association. The Court of Appeals by approving the Club's operations without the notice required by the governing documents makes mockery of the right under the Bylaws and Statute to have a court review the Board's actions.

Our Court of Appeals has previously held that an association's actions in violation of restrictive covenants are invalid. *Meresse v. Stelma*, 100 Wn. App. 857, 866, 999 P.2d 1267, 1273 (2000). In *Meresse*, a majority of members of a homeowners' association voted to amend its covenants to

relocate an access road, citing a covenant that allowed road maintenance. *Id.* Minority homeowners filed a declaratory judgment action seeking damages for the diminution of value to their property caused by relocation of the road, arguing that relocating the road was not "maintenance." *Id.* at 862. After a bench trial, the trial court invalidated the covenants, concluding that the "authority to amend restrictive covenants is restricted by the limitation that the amendment may not impose restrictions that are more restrictive or burdensome than those imposed by specific objective covenants." *Id.* at 863. The Court of Appeals upheld the invalidation, concluding that the Association had failed to follow the correct procedure for a major amendment to a restrictive covenant, which required a 100% vote of the homeowners. *Id.* at 866.

The Court of Appeals decision set out that an Association may freely violate procedural provisions in its governing CC&Rs. This is a matter of broad public interest and should be reviewed. The Court of Appeals fails to offer any actual legal guidance or analysis on the central issue, this Court should take review. RAP 13.4.

This Court should take review as Covenants and By Laws are commonly used in this state, and homeowners' associations wield substantial power over individuals' rights. This case raises important matters of public policy and standards for appellate review.

DATED this 2nd day of July 2018.

Respectfully submitted,

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Appendix A

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CASE #: 76099-8-I
Shangri-La Community Club, Inc., Respondent v. Melvin Struck, Appellant
Skagit County, Cause No. 09-2-02466-1

Counsel:

Enclosed is a copy of the opinion filed in the above-referenced appeal which states in part:

> "We affirm the trial court and award Shangri-La fees on appeal, subject to its compliance with RAP 18.1(d)."

Counsel may file a motion for reconsideration within 20 days of filing this opinion pursuant to RAP 12.4(b). If counsel does not wish to file a motion for reconsideration but does wish to seek review by the Supreme Court, RAP 13.4(a) provides that if no motion for reconsideration is made, a petition for review must be filed in this court within 30 days.

In accordance with RAP 14.4(a), a claim for costs by the prevailing party must be supported by a cost bill filed and served within ten days after the filing of this opinion, or claim for costs will be deemed waived.

Should counsel desire the opinion to be published by the Reporter of Decisions, a motion to publish should be served and filed within 20 days of the date of filing the opinion, as provided by RAP 12.3 (e).

Sincerely,

Richard D. Johnson
Court Administrator/Clerk
LAW

Enclosure

c: The Honorable Michael Rickert

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

SHANGRI-LA COMMUNITY CLUB, INC., a Washington nonprofit corporation, Respondent, v. MELVIN STRUCK & MARY STRUCK, h/w; KAREN STRUCK, as her separate property if married, Appellants.	No. 76099-8-I DIVISION ONE UNPUBLISHED OPINION FILED: April 16, 2018

LEACH, J. — Melvin, Mary, and Karen Struck appeal the trial court's decision and judgment for the Shangri-La Community Club Inc. They challenge the court's factual findings and legal conclusions about Shangri-La's authority to shut off water to their lot, water charges, and their claimed damages. Because substantial evidence supports the trial court's findings and those findings support the trial court's legal conclusions, we affirm.

BACKGROUND

Shangri-La is a homeowners' association. The association serves a residential subdivision known as "Shangri-La on the Skagit." The Strucks own two lots in the subdivision, lot 16 and lot 17.

As required by its governing documents, Shangri-La operates a system providing water to the lots within the subdivision. The Shangri-La declaration of restrictive covenants and reservations provides each lot in the subdivision with one hookup to the water system. Members pay annual assessments for the operation and maintenance of the water system. Each lot owner must pay to Shangri-La the charges assessed by the Shangri-La board of directors even if water is not used by the lot owner.

The Strucks paid the assessments from 1995 through August 2005. The Strucks stopped paying assessments for both lots after August 31, 2005. They claimed they did not receive water at lot 16 and need not pay for water that was not available to that lot. They stopped paying for lot 17 to get the association's attention.

The covenants authorize the association to record a lien for assessments remaining unpaid for 60 days. Shangri-La recorded a lien against lot 16 for unpaid water charges on October 30, 2006.

The Strucks asked Shangri-La for water for lot 16 in June 2006 and in June 2007. Shangri-La finally provided water to lot 16 in October 2009.

Shangri-La later notified the Strucks that the water supply for lot 16 would be shut off on July 21, 2010, due to nonpayment. Water to lot 16 was shut off on July 22, 2010.

Shangri-La filed a lawsuit to foreclose its lien and recover a judgment against the Strucks. The Strucks counterclaimed for damages. After a bench trial,

the trial court determined that Shangri-La is entitled to a judgment for unpaid annual water assessments since 2005 and to have the lien foreclosed. It decided, however, to offset against the judgment the charges from July 2006 to October 2009, when Shangri-La unreasonably failed to provide water. The trial court entered a judgment for Shangri-La. The Strucks appeal.

STANDARD OF REVIEW

When reviewing a trial court's decision after a bench trial, we review the trial court's findings to determine if substantial evidence supports them.[1] "Substantial evidence exists if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise."[2] We treat unchallenged findings of fact as true on appeal.[3] We review the trial court's conclusions of law de novo.[4]

ANALYSIS

Obligation To Pay

First, the Strucks contend that they have no obligation to pay water assessments when they were not receiving water. But the Strucks do not make any arguments about their obligation to pay on appeal except to say that to require them to pay for water when they received no water is absurd. They do not challenge the trial court's finding that lot owners must pay water assessments even

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[1] Willener v. Sweeting, 107 Wn.2d 388, 393, 730 P.2d 45 (1986).
[2] Bering v. SHARE, 106 Wn.2d 212, 220, 721 P.2d 918 (1986).
[3] In re Estate of Jones, 152 Wn.2d 1, 8, 93 P.3d 147 (2004).
[4] Sunnyside Valley Irrig. Dist. v. Dickie, 149 Wn.2d 873, 880, 73 P.3d 369 (2003).

if they do not use water. And they acknowledge that the central dispute in this case is whether Shangri-La has the authority to shut off water for nonpayment. Because the Strucks do not provide any argument or citation to authority about this issue, we do not consider it.[5]

Right To Shut Off Water

The Strucks challenge findings related to the trial court's conclusion that Shangri-La had the authority to shut off the water.

First, the Strucks challenge the trial court's conclusion that "[t]he covenants grant the membership the right to change the covenants, and did so in granting the ability to shut off water to lots." We agree that this statement is incorrect because Shangri-La amended its bylaws and not its covenants to provide authority to shut off water service. Shangri-La asserts, however, that the trial court made a harmless mistake in wording its conclusion. We agree that this error is essentially a scrivener's error. A few sentences later, the trial court found that the board adopted amended bylaws about the authority to shut off water. Thus, from context, it is clear that the trial court meant to say that the covenants grant the right to change the bylaws.

Next, the Strucks challenge the trial court's conclusion that the bylaws gave Shangri-La the authority to shut off its water. The Strucks claim that the 2009

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[5] RAP 10.3(a)(6); Darkenwald v. Emp't Sec. Dep't, 183 Wn.2d 237, 248-49, 350 P.3d 647 (2015) ("'[I]ssues not supported by argument and citation to authority will not be considered on appeal.'" (alteration in original) (quoting State v. Farmer, 116 Wn.2d 414, 432, 805 P.2d 200 (1991))).

amended bylaws are not valid because Shangri-La did not properly adopt them. They assert that Shangri-La did not follow the existing bylaw amendment procedures. The Strucks specifically challenge the court's finding that "[n]otice was sent to the membership before the meeting and a vote was taken." We conclude that substantial evidence supports these findings.

As a corporation, Shangri-La must act in accordance with its governing documents as well as general law.[6] "Unless otherwise provided in the governing documents, an association may: (1) Adopt and amend bylaws, rules and regulations."[7] Here, the 2006 bylaws state, "These bylaws may be amended by a majority vote of the Directors of the Corporation at a Quarterly/Annual meeting thereof and ratified by members presence [sic]."

On August 22, 2009, membership passed a motion about water shutoff. The motion provided that

> [A]ny club member currently over one year past due on their account will be given a 30 day notice, then be subject to water shutoff. Furthermore, any club member whose account becomes six months past due in the future, be given a 30 day notice, then be subject to water shutoff.

On November 14, 2009, the Shangri-La board adopted amended bylaws that contained provisions concerning the water system. The November 14, 2009, board meeting minutes state, "The meeting began with review of proposed bylaws

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[6] Twisp Mining & Smelting Co. v. Chelan Mining Co., 16 Wn.2d 264, 294, 133 P.2d 300 (1943).

[7] RCW 64.38.020(1).

changes. The new bylaws were adopted unanimously." The amended bylaws state,

> The Board of Directors shall have the authority to collect through lien, foreclosure and or collection service, the past due amounts on any unpaid water assessment or dues accounts, including interest, penalties and legal fees. Furthermore, the board shall have the authority to shut off water to any member more than six (6) months past due after giving thirty (30) days' notice.

This is substantial evidence that the board voted and amended the bylaws.

The Strucks also challenge the trial court's finding that notice was sent to the membership before the board amended the bylaws in 2009. The bylaws provide that "[a] quarterly letter with agenda, place and time of the quarterly meetings shall be sent with summary of the previous meeting to membership." But the trial court determined notice was sent to membership, and substantial evidence supports this conclusion.

Specifically, the August 22, 2009, minutes state that notice would be sent to membership about the proposed changes. The August 22, 2009, annual meeting minutes state,

> Mr. Mike Cucchetti was recognized and presented an amended set of Bylaws that he proposed we adopt. A good discussion followed. It was agreed by the majority that some or all of these changes have merit, but require some thoughtful review and input from club members. A copy of these proposed changes will be mailed to all members so they may voice their opinion. A vote on these proposed changes may be scheduled for a future meeting.

The board president testified that the board had a practice of sending out notice of board meetings. The board's November 14, 2009, minutes show the bylaws were adopted. Mr. Struck did not testify that he did not receive notice of this board

meeting. Thus, substantial evidence supports the trial court findings that notice was sent and the board properly adopted the bylaws. These findings support the trial court's conclusion that Shangri-La had the right to shut off water.

The trial court concluded that Shangri-La gained the power to shut off water on August 22, 2009, the date of the annual membership meeting in which the members voted on a motion to shut off water if members failed to pay assessments. The board did not actually gain the power to shut off water until it amended its bylaws on November 14, 2009. The trial court's error on this point is harmless because Shangri-La shut off the Strucks' water in July 2010. Thus, Shangri-La did not shut off the water before it had the authority to do so.

Value of Loss of Use of Lot 16

The Strucks also challenge the trial court's finding that they did not prove the value of their loss of use of lot 16 from July 1, 2006, through October 4, 2009.

The trial court decided that Shangri-La was entitled to judgment for unpaid annual water assessments from September 1, 2005, with interest. It also decided the Strucks were entitled to an offset from the judgment for charges from July 1, 2006, the month after the initial request for water, to October 4, 2009, when the water was properly shut off, because Shangri-La unreasonably delayed providing water to lot 16. But the trial court found that the Strucks did not prove the value of the loss of their property during this time. The Strucks claimed that their losses were $500 per month in rental income. To show this loss, they introduced a 2007 letter from Melvin Struck to the board president stating, "The lack of community

water to Lot #16 has cost me $500 per month in lost rental income." They also introduced a residential lease agreement from 2013 that showed they would charge $500 in rent beginning in January 2014. The trial court found that this proposed lease and Struck's letter were not enough to prove the value of the loss. The trial court did not abuse its discretion in not finding this evidence persuasive.

Annual Water Rates

Next, the Strucks challenge the trial court's finding about the annual water rates. The trial court found that the annual rates were $390 per year for 2005 and 2006 and $240 per year since 2007. It admitted, however, that no evidence showed how these amounts were established.

The Strucks contend that Shangri-La failed to meet its burden to show damages. But the former Shangri-La treasurer testified that the dues were $390 in 2005 and 2006 and $240 since 2007. And the 2008 community meeting minutes also reflect the $240 charge. This constitutes substantial evidence to support the trial court's findings about the annual water rates.

The Strucks point out that no document in the record shows that Shangri-La had the authority to charge these amounts. The restrictive covenants authorize the board to set assessment rates by a vote of 60 percent of the board. No evidence in the record shows that any such vote occurred. But even without evidence that the board ever voted to increase the annual charges, the treasurer's testimony and the payment by most members without objection for many years support a reasonable inference that the board adopted these amounts.

Attorney Fees

Both parties request fees on appeal. The covenants and bylaws provide for Shangri-La's recovery of costs and attorney fees in a lawsuit to foreclose an assessment lien.[8] As the prevailing party in this appeal, Shangri-La is entitled to recover fees.

CONCLUSION

We affirm the trial court and award Shangri-La fees on appeal, subject to its compliance with RAP 18.1(d).

Leach, J.

WE CONCUR:

Spearman, J.

Cox, J.

[8] The declaration of restrictive covenants and reservations provides, "From and after recording such notice, such lot shall be subject to a lien to the community club as security for such assessment, interest and fees and such lien may be foreclosed in the manner of a mortgage on real estate, and in such action the community club shall recover all costs including costs of searching title and reasonable attorney fees."

Appendix B

RICHARD D. JOHNSON,
Court Administrator/Clerk

The Court of Appeals
of the
State of Washington

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June 5, 2018

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CASE #: 76099-8-I
Shangri-La Community Club, Inc., Respondent v. Melvin Struck, Appellant

Counsel:

Enclosed please find a copy of the Order Denying Motion for Reconsideration entered in the above case.

Within 30 days after the order is filed, the opinion of the Court of Appeals will become final unless, in accordance with RAP 13.4, counsel files a petition for review in this court. The content of a petition should contain a "direct and concise statement of the reason why review should be accepted under one or more of the tests established in [RAP 13.4](b), with argument." RAP 13.4(c)(7).

In the event a petition for review is filed, opposing counsel may file with the Clerk of the Supreme Court an answer to the petition within 30 days after the petition is served.

Sincerely,

Richard D. Johnson
Court Administrator/Clerk

LAW

Enclosure

c: Reporter of Decisions

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

SHANGRI-LA COMMUNITY CLUB, INC., a Washington nonprofit corporation, Respondent, v. MELVIN STRUCK & MARY STRUCK, h/w; KAREN STRUCK, as her separate property if married, Appellants.	No. 76099-8-I ORDER DENYING MOTION FOR RECONSIDERATION

Appellants Struck, having filed a motion for reconsideration herein, and the hearing panel having determined that the motion should be denied; now, therefore, it is hereby

ORDERED that the motion for reconsideration be, and the same is, hereby denied.

FOR THE COURT:

Leach, J

Judge

Appendix C

Skagit County Superior Court

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October 17, 2016

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Re: Shangri-La Community Club, Inc., vs. Melvin E. Struck
Cause No.: 09-2-02466-1

Dear Counsel:

This letter ruling comes after the bench trial held on September 7, 2016. Testimony was presented through witnesses and the admission of Exhibits 1 – 42. I have reviewed the deposition testimony of Chester Parker in lieu of his live appearance. These facts have been shown by a preponderance of the evidence:

1. Shangri-La Community Club (Shangri-La) is a homeowners' community association formed in 1983 (Ex. 2). It comprises approximately sixty members who own lots within the boundaries of the Shangri-La on the Skagit plat. Melvin and Mary Struck (Struck) own Lot 16.

2. Shangri-La operates a system providing water to lots within the plat. Shangri-La is obligated under its governing documents to provide water to its members.

3. The Shangri-La restrictive covenants state that each lot owner "shall be entitled to the use and enjoyment of the facilities and services of the community club subject to its rules, regulations and charges a as may now or hereafter be established by the community club...and shall abide by the rules and regulations of the community club as may be adopted from time to time incident to the use of its facilities " (Ex.1). The Shangri-La Articles of Incorporation contain similar language (Ex. 2).

The covenants state that each lot in the plat will be entitled to one hookup to the water system upon its installation. The hookup, including materials and labor shall be arranged and paid for by the owner of the lot (Ex. 1).

4. Each lot owner must pay to Shangri-La the charges assessed by the Shangri-La board of directors, even if water is not used by the lot owner.

5. Members pay annual assessments for the operation and maintenance of the water system. The annual rates were $390 per year for 2005 and 2006, and $240 per year since 2007. Although there is no evidence showing when and how those amounts were established, Shangri-La's vice president testified the amounts owed were accurate. Struck was also actively involved in the community as an officer and he attended many meetings during the relevant time period. Mr. Struck testified he assumed the accounts were correct. (It's noted that certain lots not having water connections were assessed charges of $65 annually in 2008 (Ex. 25)).

6. Struck paid the water charges from 1995 through August 31, 2005. Charges are assessed on September 1 each year. Struck has not paid water charges after August 31, 2005, claiming they need not pay for water that was not available to Lot 16.

7. Struck told the Shangri-La president after the June 2006 annual meeting of the desire to have water to Lot 16. The location of the water connection to Lot 16 was undetermined. Struck sent a letter to Shangri-La on June 14, 2007 requesting again that water be provided to Lot 16. The water connection valve finally located and uncovered by Shangri-La did not work to allow the provision of water to the lot (Ex. 15).

8. The covenants provide if water charges remain unpaid for 60 days after the due date, the community may record a lien (Ex. 1). Shangri-La recorded a lien against Lot 16 on October 30, 2006 (Ex. 14).

9. Several board and community meeting minutes, letters, and notes refer to water shutoff issues. However, not until the association's annual meeting on August 22, 2009 was a formal motion passed by the members regarding water shutoff. The motion approved provided "that any club member currently over one year past due on their account will be given a 30 day notice, then be subject to water shutoff. Furthermore, any club member whose account become six months past due in the future, be given a 30 day notice, then be subject to water shutoff" (Ex. 30). Mel

struck attended this meeting. The homeowner association made a good faith attempt to govern itself regarding the shut off issue. An August 1, 2009 agenda for the meeting addressed to the members contained an agenda item "Past due accts" (Ex. 29). The covenants grant the membership the right to change the covenants, and did so in granting the ability to shut off water to lots. Notice was sent to the membership before the meeting and a vote was taken. Melvin Struck attended the meeting. Shangri-La did not have the right to shut off water before August 22, 2009 as that right was not granted by statutes governing homeowners' associations and similarly sized water systems or Shangri-La's governing documents.

10. On September 4, 2009 the board sent a notice of delinquency to Struck stating if payment was not received in full within 30 days the water to his lot would be disconnected (Ex. 33).

11. The Shangri-La board adopted amended bylaws that contained provisions concerning the water system under Article Four on November 14, 2009 (Ex. 37). Section 3 of Article Four provides:

> The Board of Directors shall have the authority to collect through lien, foreclosure and or collection service, the past due amounts on any unpaid water assessment or dues accounts, including interest, penalties and legal fees. Furthermore, the board shall have the authority to shut off water to any member more than six months past due after giving thirty (30) days' notice.

12. A notice provided that water to Struck's Lot 16 would be shut off on July 21, 2010 (Ex. 38). Water to Lot 16 was disconnected on July 22, 2010 (Ex. 38).

13. Struck informally asked the Shangri-La board members to locate the water line and connection valve in June 2006; and made a written request by his June 14, 2007 letter. Shangri-La had an obligation under its governing documents to provide water to its members. Shangri-La unreasonably withheld information and did not provide access to the water system to Mr. Struck after several requests.

14. Shangri-La finally provided a water meter and workable connection valve to Mr. Struck in October 2009. Shangri-La had the right to shut off the water to Lot 16 for nonpayment after Shangri-La members passed the authorization to shut off water at the annual meeting on August 22, 2009.

15. Shangri-La is entitled to judgment for unpaid annual water assessments from September 1, 2005 through the present with interest.

16. Struck is entitled to an offset from that judgment for charges from July 1, 2006 (the month after his initial request for water) to October 4, 2009 (thirty days after the shutoff notice) because of Shangri-La's unreasonable delay in providing water to Lot 16 before it had the right to shut off water service. Struck did not prove the value of loss from July 1, 2006 through October 4, 2009 (when water was finally available, though properly shut off). A proposed lease dated December 13, 2013 is not sufficient to prove loss of value in years 2006 – 2009, although claimed by Mr. Struck in letters to Shangri-La (Ex. 15).

17. Shangri-La is entitled to have the lien foreclosed.

18. It has not been proven that the acts by Shangri-La had a capacity to deceive a substantial portion of the public to support a Consumer Protection claim.

Both parties have substantially prevailed on their respective claims. If either party is inclined to request attorney fees and costs, a motion to approve fees and costs should be noted when formal findings and conclusions are presented.

Sincerely,

Brian L. Stiles
Judge, Department One
Skagit County Superior Court

BLS:jr

LAW OFFICE OF WILLIAM WILLARD, PLLC

July 02, 2018 - 6:24 PM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	76099-8
Appellate Court Case Title:	Shangri-La Community Club, Inc., Respondent v. Melvin Struck, Appellant
Superior Court Case Number:	09-2-02466-1

The following documents have been uploaded:

- 760998_Petition_for_Review_20180702182308D1745986_6788.pdf
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