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No. 79264-4-I

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

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MATT SUROWIECKI, SR.,

Petitioner,

and

LARRY BANGARTER; ALEX AN ELENA BORROMEIO; CAMP FIRE  
SNOHOMISH COUNTY; CAROL BRITTEN; JAMES WAAK,  
individually and as lot owners and derivatively on behalf of HAT  
ISLAND COMMUNITY ASSOCIATION, a Washington non-profit  
corporation,

Plaintiffs,

v.

HAT ISLAND COMMUNITY ASSOCIATION, a Washington non-profit  
corporation, CHUCK MOTSON, an individual;

Respondents

and

KAREN CONNER, an individual, ALAN DASHEN, an individual,  
SUSAN DAHL, an individual; and JOHN DOES 1-10, individuals

Defendants.

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ANSWER TO PETITION FOR REVIEW

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Community Association

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**A. IDENTITY OF RESONDENT**

Respondent Hat Island Community Association (“HICA”) seeks review of the Court of Appeals decision set forth in Paragraph B.

**B. COURT OF APPEALS DECISION**

The Court of Appeals, Division One, published opinion was filed on September 21, 2020.

**C. ISSUES PRESENTED FOR REVIEW**

1. In holding that the business judgment rule applies only to limit the liability of individual directors and does not require judicial deference to board decisions made within the board’s authority, did the Court of Appeals commit error and announce new law that conflicts with prior holding of this Court that requires judicial deference to corporate actions if taken within the corporation’s authority and exercised reasonably?

2. Did the Court of Appeals correctly determine that Surowiecki failed to allege a breach of fiduciary duty claim against HICA and if he did, those claims were voluntarily dismissed?

**D. STATEMENT OF CASE**

Hat Island is a private island off the coast of Everett, Washington. The community currently consists of 974 lots and common areas including roads and a number of amenities, including its own water system, a marina, beaches, parks, a golf course, and a passenger ferry. CP 1984, 4872, 4873. HICA is a Washington nonprofit corporation and homeowner

association subject to RCW Chapter 24.03 and RCW Chapter 64.38. CP 4883.

HICA has expenses for the operation and maintenance of the community's amenities. The applicable covenants state that HICA:

shall have the power to charge and assess its members on an equitable basis for the operation and maintenance of the said facilities originally provided by Hat Island Development Company and to charge and assess its members on an equitable basis for such additional recreational or other facilities as shall be duly authorized by its membership for the mutual benefit of all its members.

CP 1984, 4891. The covenants put HICA members on notice of HICA's authority to "charge and assess its members on an equitable basis." HICA's bylaws authorize its Board to charge and assess HICA members through charges, annual operating assessments, and special assessments. CP 600-603. The bylaws include no restrictions or guidance as to how HICA should allocate expenses to its members, with the exception that special assessments need not be uniform. *Id.*

The difference between charges and assessments is key to understanding HICA's exercise of this authority. Charges are fees paid by members based on their use of HICA amenities and services. CP 571-572. These fees include green fees for golf, moorage fees for use of the marina, fees for water based on usage, fees charged only to lots with a water hook-up, sales of ferry tickets, and other various fee-based income sources (collectively referred to as "use-based fees"). CP 571. In contrast to use-based fees, assessments are levied equally against all lot owners,

irrespective of how much or how often they use of HICA's amenities or services. CP 571-572.

The HICA Board annually allocates the community's expenses to its members through a combination of use-based fees and assessments. CP 571-572. The board allocates expenses to use-based fees and assessments to in order to "balance the budget and maintain a financial structure that includes a combination of assessments against the lots and use-based fees that allocate more expenses to HICA members that use the amenities more often." Id.

Division One references the fact that HICA's board annually estimates income from use-based fees but makes no reference to the actual decision making process in which the board exercises considerable discretion to allocate expenses between use-based fees and assessments. Op. at 5. The Board's allocation of expenses to use-based fees and assessments is a decision that determines how much HICA members are charged to use certain amenities and how much they pay in assessments. CP 571-572, The Board currently allocates approximately half of HICA's expenses to use-based fees and half to assessments. Id.

Surowiecki sought "judgment declaring the Association is in violation of its Governing Documents for failing to charge assessments on an equitable basis." CP 792. At the trial court, HICA moved for summary judgment to dismiss Surowiecki's assessment claims by submitting evidence of the decision making process employed by HICA's Board to determine the annual assessments. CP 608-609. In opposing HICA's

motion, Surowiecki never addressed and in fact never mentioned, the actual decision making process employed by HICA to determine the allocation of expenses to assessments.<sup>1</sup> CP 511-538, 26-268, 209-264, 180-189, 109-179, 105-108.

Without addressing the decision making process employed by HICA to determine assessments, Surowiecki offered the opinion testimony of individuals who disagree with the board's current allocation of assessments.<sup>2</sup> CP 183-184. The trial court found that the opinions fail to raise a material issue of fact for the jury to determine and dismissed Surowiecki's assessment claims based on the lack of any evidence that HICA had violated any duty. CP 202. In addition to the absence of

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<sup>1</sup> Consistent with prior submissions, instead of addressing the HICA Board's decision to allocate expenses so that all owners pay some of HICA's expenses through assessments and allocate more expenses to members that make more use amenities by imposing use-based fees, Surowiecki suggests the HICA has acted improperly by not conducting audits over the years. Importantly, however, the HOA Act allows the audit requirement to be waived *by a vote of the owners*, which is exactly what occurred. CP 93-94. RCW 64.38.045(3). Surowiecki also continues to suggest that HICA acted improperly in its decision to expand and improve its marina. In 2012, Surowiecki entered into a settlement agreement pursuant to which he waived "all claims that the vote adopting the Marina Improvement Assessment and the Marina Expansion Assessment was invalid or unenforceable at law or on grounds of equity" and agreed to pay the marina assessments over time. CP 3569-3574. Surowiecki also suggests HICA is acting improperly in light of the island's current water capacity. However, Surowiecki agrees that capacity of the current system could be expanded and HICA should not expand its water system at this time. CP 4484, 4495.

<sup>2</sup> This includes the opinion testimony of William Partin, CPA, an expert retained by Surowiecki, who opined that an assessment allocation based on taxed assessed values would be "fairer" or "more fair" than the Association's current allocation. CP 215.

evidence, the trial court dismissed Surowiecki's assessment claim relying on *Riss* for the proposition that a Court:

will not substitute its judgment for that of corporate directors "unless there is evidence of fraud, dishonesty, or incompetence (ie. Failure to exercise proper care, skill and diligence[.] *In re Spokane Concrete Prods., Inc.*, 126 Wn. 2d 269, 279, 892 P.2d 98 (1995) (emphasis added). Reasonable care is required. *Id.* (citing *Nursing Home Bldg. Corp. v. DeHart*, 13 Wash App. 489,498, 535 P.2d 137, review denied, 86 Wn. 2d 1005 (1975). *Riss*, at 632.

*Id.*

Division One reversed the trial court holding that the business judgment rule applies only to limit the liability of individual directors. Op. at 19.

#### **E. ARGUMENT WHY REVIEW SHOULD BE GRANTED**

***1. Courts should give deference to corporate decision made within the corporation's authority, so long as that authority is exercised reasonably.***

Washington recognizes that courts should not substitute their judgment for that of a corporate board of directors "unless there is evidence of fraud, dishonesty, or incompetence (ie. failure to exercise proper care, skill, and diligence). *In re Spokane Concrete Products*, 126 Wn. 2d 269, 279 (1995) citing *Seafirst Corp. v. Jenkins*, 644 F.Supp. 1152, 1159 (W.D. Wash. 1986); *Shinn v. Thrust IV, Inc.*, 56 Wn. App. 827, 834-35, 786 P.2d 285, review denied, 114 Wn.2d 1023, 792 P.2d 535 (1990). The rule does not require deference if a corporation fails to act



within its authority.<sup>3</sup> If a corporate act is within the authority of the corporation and the board, the business judgment rule may still not require judicial deference if the manner in which the decision was made was unreasonable. *Riss v. Angel*, 131 Wn.2d 612, 632, 934 P.2d 669 (1997).

The rule applies to limit the liability of individual directors but it is also applied to require judicial deference to board decisions. *Nursing Home Building Corp., v. DeHart*, 13 Wn. App. 489, 498-99, 535 P.2d 137 (1975) (“Courts are reluctant to interfere with the internal management of corporations and generally refuse to substitute their judgment for that of the directors.”)

This Court has applied the rule to prevent courts from substituting their judgment for that of a board of directors, without referencing the business judgment rule. *In re Spokane Concrete Products*, 126 Wn. 2d 269, 279 (1995). This Court has also discussed the rule in tandem with application of the business judgment rule. *Riss v. Angel*, 131 Wn.2d 612,

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<sup>3</sup> See eg., *Twisp Mining & Smelting Co v. Chelan Mining Co.*, 16 Wn.2d 264, 294, 133 P.2d 300 (1943) (When a corporation acts beyond its corporate powers or its actions offend public policy, those actions are void.); *Club Envy of Spokane v. Ridpath Tower Condominium Assoc.*, 184 Wn. App. 593, 337 P.3d 1131 (2014) (If a corporation fails to comply with statutory requirements that failure can render a corporate action void.); *Wilkinson v. Chiwawa*, 180 Wn. 2d 24, 327 P.3d 614 (2014) (If a homeowner association exceeds the common law limitations on amendments to covenants the amendment is invalid.) *Hartsene Pointe Maintenance Assoc. v. Diehl*, 95 Wn. App. 339, 345, 979 P.2d 854 (2006) (If a homeowner association’s fails to comply with its charter in forming committee rendered decisions made by the committee “invalid.”)

632, 934 P.2d 669 (1997). Division One previously held that the business judgment rule applies to corporate decisions and courts will not question a board decision made within its authority absent evidence of fraud, dishonesty or incompetence. *Davis v. Cox*, 180 Wn. App. 514, 325 P.3d 255 (2014) review *granted*, 182 Wn.2d 1008, 345 P.3d 784 (2014), *rev'd on other grounds*, 183 Wn.2d 269, 351 P.3d 862 (2015). Division Two has recognized, in dicta, that the business judgment rule applies to the actions of a homeowner association. *Shorewood West Condominium Ass'n v. Sadri*, 92 Wn. App. 752, 966 P.2d 372 (1998), *reversed on other grounds*, 140 Wn. 2d 47, 992 P.2d 1008 (2000). These cases conflict with Division One's holding "that the business judgment rule limits only personal liability of individuals."

Division One's holding "that the business judgment rule limits only personal liability of individuals" is a pronouncement of new law that conflicts with this Court's prior decisions and calls into question its Washington's recognition of common law judicial deference to corporate actions, not just for homeowner associations but all corporations. The business judgment rule is well founded common law wherein the management of a corporation:

generally enjoys a presumption of sound business judgment and its decisions will not be disturbed by a court substituting its own notions of what is or is

not sound business judgment if the board's decisions can be attributed to any rational business purpose.

Official Comment to Model Business Corp. Act § 8.31 (2016 Revision).

Deference to the *decisions* made by a board of directors requires more than just limiting the personal liability of the directors. This Court should grant review to prevent judicial interference into the lawful acts of corporations in Washington State. RAP 13.4(b)(4).

After holding that the business judgment rule applies only to limit the liability of individuals, Division One correctly recognizes that when governing documents require the association to charge and assess its members on an equitable basis the exercise of that authority requires discretion. Op. at 20 (citing, *Ackerman*). As stated by Division One, “*Riss* clearly holds that this type of discretionary decision is subject to review only for its reasonableness” and “whether a homeowner association’s decision to adopt any particular assessment structure is reasonable depends not on the substance of the decision but rather on the “process employed and the facts considered.” Op. at 20 (citing, *Green v. Normandy Park*, 137 Wn. App. 665, 695, 151 P.3d 1038 (2007)). These holdings correctly recognize that corporate management decisions, particularly those requiring the exercise of discretion, are entitled to

deference, provided they are made within the scope of the corporate authority and that authority is exercised reasonably.

By announcing that the business judgment rule applies only to limit the liability of individual directors and then applying prior holdings that require courts to exercise judicial deference to corporate *decisions*, Division One's opinion creates potential ambiguity and uncertainty as to the when corporate actions are entitled to judicial deference, and when they are not. This ruling potentially impacts every Washington corporation and is of substantial public interest. RAP 13.4(b)(4).

In his complaint, Surowiecki sought a "judgment declaring the Association is in violation of its Governing Documents for failing to charge assessments on an equitable basis." CP 792. At the trial court, HICA pursued a standard defense motion for summary judgment to dismiss Plaintiffs' assessments claims for lack of evidence under *Young v. Key Pharm.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989), *overruled on other grounds by* 130 Wn.2d 160, 922 P.3d 69 (1996). CP 607-616. After pointing out the absence of evidence, the burden shifts to plaintiff to produce evidence in support of each essential element of its case. *Young*, 112 Wn.2d at 225.

In support of its motion for summary judgement, HICA set forth evidence of the discretionary decision making process that its board of

directors engages in to determine assessment amounts. CP 608-609. It is undisputed that the Board determines the amounts assessed to owners as part of its evaluation and balancing of use-based fees and assessments to generate a balanced budget. In opposing HICA's motion for summary judgment, Surowiecki did not challenge, address, or even mention, the "process employed and the facts considered" by HICA in determining the amounts assessed to owners. CP 511-538, 26-268, 209-264, 180-189, 109-179, 105-108. Instead, Surowiecki offered the opinions of individuals who disagree with HICA's allocation of assessments including William Partin, CPA who opined that an allocation based on taxed assessed values would be a "fairer allocation of Association expenses" and "more fairly distribute costs to property owners." CP 215. Mr. Partin did not challenge or even discuss HICA Board's allocation of expenses between use-based fees and assessments. CP 209-264.

The trial court recognized the opinion testimony, for what it is: a difference of opinion and not evidence that HICA exceeded its authority or breached some duty. CP 202. The trial court appropriately rejected this opinion testimony because courts will not substitute its judgment for a corporate board unless there is evidence of fraud, dishonesty, or incompetence (i.e., failure to exercise proper care, skill, and diligence). *Riss v. Angel*, 131 Wn.2d 612, 632, 934 P.2d 669 (1997). *Id.*

HICA does not take the position that courts must defer to an association's interpretation of its covenants. HICA's covenants and bylaws grant the association broad discretion in determining the allocation of charges and assessments to its members. HICA's covenants state that HICA "shall have the power to charge and assess its members on an equitable basis." CP 1984, 4891. Division One interpreted identical assessment authority language in *Ackerman v. Sudden Valley* and held:

The discretion vested in SVCA in assessing its members is limited only by the requirement that such assessments be on an equitable basis. Such broadly stated limitations on governmental authority are not uncommon in foundational documents, as can be seen from constitutional language such as "due process", "equal protection", and "unreasonable searches and seizures".

*Ackerman v. Sudden Valley Community Ass'n*, 89 Wn. App 156, 164, 944 P.2d 1045 (1997).

Interpreting HICA's governing documents, Division One correctly determined that "[t]he plain language of HICA's assessment provision requires annual operating assessments to be 'equitable.' It says nothing about them needing to be uniform." Op. at 21. This interpretation only confirms HICA's broad discretion in allocating assessments. HICA's governing documents do not require uniform assessments or non-uniform assessments. CP 1984, 4891. They also do not require the HICA to allocate expenses between use-based fees and assessments so that some

owners pay some portion of HICA's expenses and other owners pay more based on their usage – but this is the approach taken by HICA's board in the exercise of its considerable discretion. CP 571-572.

Division One seemingly ignored the HICA board's decision to allocate HICA expenses through a combination of use-based fees and assessments and instead considered whether or not HICA acted “unreasonably” by not adopting non-uniform assessments. Op. at 21-23. A prior version of HICA's bylaws required that all annual operating assessment be uniform and not exceed \$21.25 per lot. CP at 4922. The bylaws were amended to remove those restrictions leaving HICA's Board with broader discretion and no standards or guidance as to how it should allocate annual operating assessments to its members. Id.

Division One remanded to case to the trial court finding:

{A} trier of fact could conceivably find that the decision to retain [uniform assessments] was not well-founded legally and thus unreasonable. If, however, HICA retained this uniform structure because, after a thorough vesting at community meetings, the membership concluded the current structure is as equitable as any other, then a trier of fact could conclude that “the process employed and facts considered” were reasonable.

Op. at 23. The possibility that HICA members (numbering in the hundreds) may or may not have considered a potential alternative approach to exercising its broad authority is not a recognized basis for a

court to substitute its judgment for that of a board of directors acting within its authority. This Court should accept review to clarify the extent to which Washington courts will defer to corporate decisions and when it is appropriate for the court or a trier of fact to substitute their judgment for that of a board of directors.

***2. Surowiecki did not allege a fiduciary duty claim against HICA and if he did, he voluntarily dismissed it.***

Surowiecki's Third Amended Complaint includes a "Breach of Fiduciary Duty" claim that alleges, "by virtue of defendant Motson's position as manager, and other Individual Defendants' positions on the Board of Trustees (including Karen Conner, Alan Dashen, and Susan Dahl)..." CP 789. This clearly establishes that Surowiecki was alleging claims against individuals.... by virtue of their positions. This cannot apply to HICA. Division One appropriately held that Surowiecki did not bring this claim against HICA, the corporate entity. Op. at 25. Additionally, Surowiecki's Third Amended Complaint sets forth his requested relief which includes:

- A judgment declaring that the Association is in violation of its Governing Documents for failing to provide and maintain certain common areas and facilities in a fiscally responsible manner;
- A judgment declaring that the Association is in violation of its Governing Documents after failing to preserve and protect the real and intangible values of owners' personal and community properties; and



- That the Association be required to make a full and complete account of its financial records.

CP 792-793.

HICA never moved to dismiss any claim that it failed to provide and maintain certain common areas, failed to preserve and protect the real and intangible values of owners personal and community properties or Surowiecki demand for an accounting. Surowiecki voluntarily dismissed these claims. CP 23-24.

Surowiecki asks this court to review fiduciary duty claims based on his allegations that HICA failed to act in a fiscally responsible manner, failed to preserve and protect the real and tangible values of the Island owners' personal and community properties, and failed to complete audits or provide for an accounting. *See, Surowiecki Petition for Review* at 17-19. If Surowiecki had claims against HICA for the relief referenced in his Petition for Review, he voluntarily dismissed them. There was no trial court order for Division One to review and there is no order for this Court to consider for review.

**F. CONCLUSION:**

There is a substantial public interest and compelling need for this Court to review Division One's holding that the business judgment rule applies only to limit the liability of individual directors. Corporations, including homeowner associations, should be allowed to act within the

bounds of their corporate authority without fear of litigation. When given discretion, a corporation's exercise of that discretion should be given deference, absent evidence that discretion was exercised unreasonably. In this case, the HICA Board actively sought to allocate the community expenses so that all owners pay some, and some owners (those that use the amenities more often) pay more. The decision is within the scope of their authority and there is no evidence that they acted unreasonably in carrying out that authority. This Court should reverse the Court of Appeals and affirm the trial court's summary judgment order dismissing Surowiecki's claim that HICA is violation of its Governing Documents for failing to charge assessments on an equitable basis breached

Respectfully submitted this 20th day of November, 2020

BARKER MARTIN, P.S.

/s/ \_\_\_\_\_  
Jeremy Stilwell, WSBA No. 31666  
Marlyn K. Hawkins, WSBA No. 26639  
Attorneys for Respondent Hat Island  
Community Association

**DECLARATION OF SERVICE**

I certify under penalty of perjury under the laws of the State of Washington that on this day the undersigned caused a copy of this document to be sent to the attorney(s) of record listed below as follows:

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I declare under penalty of perjury, under the laws of the State of Washington and the United States, that the foregoing is true and correct.

DATED this 20<sup>th</sup> day of November, 2020.



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**BARKER MARTIN, P.S.**

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**Transmittal Information**

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