No. 99138-3

SUPREME COURT
OF THE STATE OF WASHINGTON

MATT SUROWIECKI, SR.,

Petitioner,

and

LARRY BANGERTER; ALEX AND ELENA BORROMEO; 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; KAREN CONNER, an individual; ALAN DASHEN, an individual; SUSAN DAHL, an individual; and JOHN DOES 1-10, individuals,

Respondents.

MOTION FOR STAY OF TRIAL COURT PROCEEDINGS

George A. Mix, WSBA #32864
Mix Sanders Thompson, PLLC
1420 Fifth Avenue, Suite 2200
Seattle, WA 98101-1346
(206) 521-5989

Philip A. Talmadge, WSBA #6973
Aaron P. Orheim, WSBA #47670
Talmadge/Fitzpatrick
2775 Harbor Avenue SW
Third Floor, Suite C
Seattle, WA 98126
(206) 574-6661

Attorneys for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Table of Cases

Washington Cases

Rules and Regulations

Other Authorities

1. Identity of Moving Party

Petitioner, Matt Surowiecki, Sr., asks for the relief designated in Part 2.

2. Statement of Relief Sought

Stay of the proceedings in Snohomish County Cause Number 20-2-04736-31, pursuant to RAP 7.3 and 8.3, where respondent Hat Island Community Association ("HICA") seeks to foreclose on lot assessments which Surowiecki challenges in the present appeal and that were vacated by Division I's opinion.

3. Facts Relevant to Motion

As noted in the petition for review and Respondent's answer to same in this case and in Cause No. 99139-1, this case involves a dispute over lot assessments imposed by HICA, a homeowners association under RCW 64.38, on lot owners residing within its jurisdiction on Hat Island. Hat Island is a small private island off the coast of Everett. Of the 974 lots on the island, only 286 of them have houses; the remaining 706 are undeveloped. The majority of those 706 will never be developed due to the unavailability of water and other resources/essential services. To make matters worse, HICA's annual assessments alone exceed twenty percent (20%) of the tax assessed value of these undeveloped "dirt" lots.

Despite binding language in the Covenants Conditions &

Restrictions ("CC&Rs"), requiring lot assessments to be "equitable" and "for the mutual benefit of all Its members," HICA assesses lots on the largely undeveloped island at a uniform rate regardless of whether the lot is developed, undeveloped, or even developable.

HICA's assessments are particularly inequitable because the owners of developed lots are responsible for essentially all the burden on the island's facilities and essential resources. According to paragraph nine of the CC&Rs, lot owners are prohibited from using temporary structures such as tents, trailers, barns, or outbuildings, either temporarily or permanently, as a residence. As a result, owners of undeveloped lots cannot reside on or largely make use of their lots until developed, and most lots will never be developed. The owners of undeveloped lots like Surowiecki subsidize the owners of the developed lots under HICA's rate structure.[1] Former HICA board members attested to this fact and the inequity of HICA's rate structure on undeveloped lots. CP 347, 1602-06, 2151, 2229.

Beginning in the mid-2000s, HICA imposed significant special

---

[1] Surowiecki presented expert testimony from William Partin, an economist and CPA who has worked on numerous cases involving community associations. CP 124-79. He opined that HICA's assessments were inequitable, violating its governing documents. *Id.* His report concluded assessments based upon county assessed values, rather than HICA's flat rate per lot method, would more equitably distribute HICA's costs to property owners who actually own developed lots and/or benefit from the Island's services and amenities. *Id.* Partin concluded that Surowiecki overpaid assessments to HICA by $2,446,420.00. *Id.* The trial court ignored this evidence and ruled as a matter of law that HICA's assessments were equitable and benefitted all members.

assessments to fund a multi-million-dollar marina project, which would benefit only the 30 or so full-time Island residents and select owners with developed lots. This was in stark contrast to the intent of the Association's founders who believed that Hat Island could be a private island for buyers of modest means with very low lot assessments. HICA was able to push though this regressive agenda because voting rules in HICA's articles and bylaws allowed each owner on the Island a single vote, regardless of how many lots he or she owned.[2]

Surowiecki, who owns 270 lots on the Island just four of which are developed, along with several other lot owners, sued HICA to put an end to HICA's inequitable assessments.[3] HICA moved for summary judgment twice, before convincing the trial court to grant partial summary judgment in its favor, upholding the assessments. Surowiecki appealed that decision, posting $1.165 million in security to supersede enforcement of the trial

---

[2] HICA also denied voting rights on budgets and assessments to those owners who were delinquent in paying assessments, thereby depriving the owners who disputed the regressive assessment structure a meaningful opportunity to have an "equal voice" in voting on Association matters as required by HICA's governing documents.

[3] Surowiecki has continuously paid assessments related to the developed lots he owns as well as the developable lots, in addition to other costs and fees imposed by HICA. Additionally, he has paid HICA approximately $1 million since 2012, as part of a settlement agreement related to special assessments for the marina project which Surowiecki also disputed. He continues to pay $10,000 per month as part of that agreement.

court's judgment.[4]

In its published opinion, Division I reversed the trial court's decision and remanded for trial on the issue of whether HICA's assessment scheme violated its governing documents. That decision is the subject of petitions for review[5] by both Surowiecki and HICA to clarify the scope of the trial on remand.[6]

Notwithstanding Surowiecki's supersedeas and Division I's decision, while Surowiecki's lawsuit was pending, HICA sued Surowiecki in Snohomish County Superior Court in Cause No. 20-2-04736-31 to foreclose on the assessments allegedly due from Surowiecki, which Surowiecki had refused to pay due to his lawsuit challenging their validity under the CC&Rs. HICA continued to press forward with that action, even though the question of whether the assessments are valid pursuant to the CC&Rs is still on appeal and a supersedeas has been posted.

---

[4] The trial court also awarded nearly one million dollars in costs and fees to HICA and its officers. Surowiecki posted security of $1.165 million to prevent enforcement of the trial court's judgment pending disposition of this appeal. Division I's opinion resulted in the vacation of a fee award to HICA in the amount of $668,000.

[5] There is a separate petition for review pertaining to assessments in Division J of the Island in Cause No. 99139-1.

[6] In short, Surowiecki seeks review of Division I's statement (in what arguably amounts to dictum) that the trial on remand is limited to whether HICA's regressive assessments are *procedurally* equitable, as opposed to whether they are *substantively* equitable within the meaning of HICA's governing documents. HICA seeks review, arguing that a non-profit homeowners' association with a contractual duty to impose assessments only on an equitable basis, should be immune from suit under the business judgment rule.

Surowiecki moved to stay the trial court's foreclosure proceedings in Cause No. 20-2-04736-31. The trial court agreed to do so only if Surowiecki posted another bond of $1.5 million, an amount that *assumed the validity* of HICA's assessments invalidated by Division I, ignoring RAP 7.2(a) and Surowiecki's existing supersedeas.[7]

4. Grounds for Relief and Argument

This Court has authority to stay a trial court's order under RAP 7.3 or RAP 8.3, and it should order a stay of the Snohomish County foreclosure action, pending resolution of the petitions for review in this case and Cause No. 99139-1.

(a) Surowiecki Is Entitled to a Stay under RAP 7.3

Under RAP 7.3, appellate courts have authority "to perform all acts necessary or appropriate to secure the fair and orderly review of a case." Under this rule, this Court has the authority to determine whether a matter is properly before the court, to perform those acts which are proper to secure fair and orderly review, and to waive the rules of appellate procedure when necessary to serve the ends of justice. *State v. Aho*, 137 Wn.2d 736, 975 P.2d 512 (1999). The Task Force that developed the rule recognized that the courts' authority to act was "broad." Karl B. Tegland, 2A *Wash.*

[7] This Court's Commissioner has authority to review that onerous supersedeas amount independent of the present actions under RAP 8.1(h).

Practice Rules Practice RAP 7.3 (8th ed.). For several reasons, this Court should grant a stay under RAP 7.3 to ensure fair and orderly review. First, an action to foreclose on assessments already invalidated by Division I and that are the subject of pending petitions for review in this Court divert the parties' time and effort from the central matter – review in this Court. Second, a foreclosure action is an unnecessary and premature action that puts the cart before the horse. A foreclosure action based on invalid assessments will only need to be undone. A stay at least while the case is pending review in this Court properly avoids the unnecessary expenditure of time and resources on a disorderly, collateral matter. Finally, it is worth noting that HICA can show little, *if any*, harm if a stay is granted. HICA is not so financially pressed that it needs the assessments from Surowiecki to transact necessary business.[8] A RAP 7.3 stay is merited.

(b) A RAP 8.3 Stay Is Merited

RAP 8.3 confers specific authority on this Court to enter such orders as are necessary to preserve the fruits of an appeal:

> . . . the appellate court has authority to issue orders, before or after acceptance of review . . . to insure effective and equitable review, including authority to grant injunctive or other relief to a party.

[8] HICA's own balance sheet at hatisland.org indicates that it has substantial case reserves of $440,000 and its total assets of $8.55 million far outstrip any liabilities it has.

Washington appellate courts have construed this authority broadly, taking their cue from the Task Force that drafted the rule in 1976: "This rule gives the appellate court broad discretionary authority to issue orders to insure effective and equitable review." Karl B. Tegland, 2A *Wash. Prac.* at 650. The stay provisions of the rule address the stay of trial court proceedings, as the rule was originally crafted to stay equitable decisions of the trial court to which RAP 8.1 did not apply. *Id.* at 649. The rule is now employed more broadly by Washington appellate courts.

This Court has granted stays under RAP 8.3 in *Confederated Tribes of Chehalis Reservation v. Johnson*, 135 Wn.2d 734, 759, 958 P.2d 260 (1998) (case related to public disclosure of assessments paid by tribes from gambling proceeds for community law enforcement and other impacts; appellate courts stayed disclosure under RAP 8.3 pending disposition of the appeal) and *Purser v. Rahm*, 104 Wn.2d 159, 177-78, 702 P.2d 1196 (1985) (Court denied stay of order requiring DSHS to apply Washington community property laws to eligibility for Medicaid, noting that a stay would be inequitable to elderly persons impacted by such a decision).

Two pre-RAP cases are additionally instructive on the breadth of this Court's authority under RAP 8.3. In *Shamley v. City of Olympia,* 47 Wn.2d 124, 286 P.2d 702 (1955), a *per curiam* opinion in an appeal from the dismissal of the appellant's action to enjoin the city and two of its

commissioners from accepting bids on the sale of timber from a city watershed, the Court entered an order temporarily barring the timber sale pending disposition of the appeal. In *Kenneth v. Levine*, 49 Wn.2d 605, 304 P.2d 682 (1956), the Court entered an order permitting a city transit commissioner to remain in office pending the disposition of his appeal from a trial court order dismissing his challenge to the authority of the city council to act on the mayor's request to remove him from that office. The Court emphasized that the issues presented in such appeal must be "debatable," and that its order was necessary "to preserve the fruits of the appeal in the event it should be successful." *Shamley*, 47 Wn.2d at 126. In *Kenneth*, the Court also noted that the equities of the case must require that the *status quo* be maintained. 49 Wn.2d at 607. *See also, Boeing Co. v. Sierracin Corp.*, 43 Wn. App. 288, 292, 716 P.2d 956 (1986), *aff'd*, 108 Wn.2d 38, 738 P.2d 655 (1987) (Court granted stay of trial court injunction pending appeal, noting that courts actually apply a sliding scale for RAP 8.3 relief, "the greater the inequity, the less important the inquiry into the merits of the appeal.").

In determining if a RAP 8.3 stay is merited, this Court looks to whether the issues are debatable, the stay is necessary to preserve the fruits of the appeal, and the stay is equitable. *Confederated Tribes*, 135 Wn.2d at 759. Here, Surowiecki's pending action presents, *at the very least*,

debatable issues. Plainly, Division I's opinion here that *reversed* the trial court's decision to uphold HICA's inequitable assessments levied upon Hat Island property owners like Surowiecki only confirms that the issues here are "debatable." They will be debated at trial.

Moreover, a stay is necessary to preserve the fruits of Surowiecki's appeal. If HICA's assessments are inequitable, as Division I posited, then a foreclosure action that assumes such assessments are *valid*, deprived Surowiecki of the fruits of his appeal.

Finally, the equities here support a stay. A foreclosure action based on *inequitable* assessments against the owners of undeveloped Hat Island lots like Surowiecki is itself an expression of inequity.

A RAP 8.3 stay is merited here.

(c) The Snohomish County Superior Court Lacks Authority to Foreclose on HICA's Inequitable Assessments

In addition to RAP 7.3/8.3, this Court should stay the trial court's foreclosure action where HICA's inequitable assessments upon which the foreclosure action is predicated are on review in the present action. RAP 7.2(a) deprived the trial court of jurisdiction to act. RAP 7.2(a) automatically limited the ability of the Snohomish County Superior Court to act in connection with the HICA inequitable assessments, once review proceeded in this case. RAP 7.2(a) permits trial court action only within

the enumerated categories in RAP 7.2(b)-(l). This is because RAP 7.2 and RAP 8.3 are "intended to keep a case from 'develop[ing] branches' in the absence of an appropriate order of the appellate court." *Burton v. Clark Cty.*, 91 Wn. App. 505, 513, 958 P.2d 343 (1988). The trial court in Cause No. 20-2-04736-31 lacked authority to act.

Surowiecki expects that HICA will contend that RAP 7.2(c) applies, but that is untrue. RAP 7.2(c) provides:

> [T]he trial court has authority to enforce any decision of the trial court and a party may execute on any judgment of the trial court. Any person may take action premised on the validity of a trial court judgment or decision until enforcement of the judgment or decision is stayed as provided in rules 8.1 or 8.3.

This Court has admonished that a trial court exceeds its authority under RAP 7.2(c) when it decides "an entirely separate legal issue" and enters a decree with "independent legal effect." *Clallam County Deputy Sheriff's Guild v. Board of Clallam County Commissioners*, 92 Wn.2d 844, 853, 601 P.2d 943 (1979). The action to foreclose is precisely the type of collateral action metastasizing from the principal assessment lawsuit that RAP 7.2 was intended to foreclose.

Moreover, it is important to note the last line of RAP 7.2(c). Surowiecki posted a bond in the amount of $1.165 million to supersede enforcement of the trial court's assessment decision here. HICA is not

entitled to proceed as if the trial court's decision in this case on its inequitable assessments was valid both because the validity of the assessments has been stayed below by the posting of the supersedeas and, more practically, *Division I has specifically ruled that the assessments upon which HICA's foreclosure action in Cause No. 20-2-04736-31 were held to be illegitimate*. $668,000 of the fee judgment was abrogated by Division I, although the full $1.165 million bond in that case remains in place. This is more than sufficient security to protect HICA's interests should it ultimately prevail.

5. Conclusion

The Court should stay proceedings in the trial court in Snohomish County Cause No. 20-2-04736-31 while the petitions for review are pending before this Court.

DATED this 7th day of December, 2020.

Respectfully submitted,

Philip A. Talmadge

Philip A. Talmadge, WSBA #6973
Aaron P. Orheim, WSBA #47670
Talmadge/Fitzpatrick
2775 Harbor Avenue SW
Third Floor, Suite C
Seattle, WA 98126
(206) 574-6661

George A. Mix, WSBA #32864
Mix Sanders Thompson, PLLC
1420 Fifth Avenue, Suite 2200
Seattle, WA 98101-1346
(206) 521-5989

Attorneys for Petitioner

DECLARATION OF SERVICE

On said day below I electronically served a true and accurate copy of ***Motion for Stay of Trial Court Proceedings*** in Supreme Court Cause No. 99138-3 to the following:

George A. Mix, WSBA #32864
Mix Sanders Thompson, PLLC
1420 Fifth Ave, Ste. 2200
Seattle, WA 98101-1346

Mark P. Scheer, WSBA #16651
Jennifer L. Crow, WSBA # 43746
Diane H. Cornell, WSBA # 19866
Scheer Law Group LLP
107 Pike St., Ste. 2200
Seattle, WA 98101-2358

Jeremy L. Stilwell, WSBA #31666
Barker Martin PS
719 2nd Ave, Ste. 1200
Seattle, WA 98104-1749

Hozaifa Y. Cassubhai, WSBA #39512
Spiro Harrison
500 Union St., Ste. 800
Seattle, WA 98101-4051

Carol Britten
13705 Interlake Ave. N
Seattle, WA 98133

Alex Borromeo
Elena Borromeo
6106 NE 182nd St.
Kenmore, WA 98028

Original E-Filed with:
Supreme Court
Clerk's Office

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: December 7, 2020, at Seattle, Washington.

Frankie Wylde, Legal Assistant
Talmadge/Fitzpatrick

TALMADGE/FITZPATRICK

December 07, 2020 - 1:54 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	99138-3
Appellate Court Case Title:	Matt Surowiecki Sr. v. Hat Island Community Association, et al.
Superior Court Case Number:	14-2-04595-4

The following documents have been uploaded:

- 991383_Motion_20201207135110SC366534_9148.pdf
  This File Contains:
  Motion 1 - Stay Trial Court
  The Original File Name was Motion For Stay of Trial Court Proceedings.pdf

A copy of the uploaded files will be sent to:

- Aaron@tal-fitzlaw.com
- assistant@tal-fitzlaw.com
- george@mixsanders.com
- hozaifa@baileyduquette.com
- jen@scheer.law
- jeremystilwell@barkermartin.com
- kgawlowski@barkermartin.com
- lstoffel@barkermartin.com
- mark@scheer.law
- matt@tal-fitzlaw.com
- mhawkins@barkermartin.com

Comments:

Motion for Stay of Trial Court Proceedings

Sender Name: Frankie Wylde - Email: assistant@tal-fitzlaw.com
Filing on Behalf of: Philip Albert Talmadge - Email: phil@tal-fitzlaw.com (Alternate Email: matt@tal-fitzlaw.com)

Address:
2775 Harbor Avenue SW
Third Floor Ste C
Seattle, WA, 98126
Phone: (206) 574-6661

Note: The Filing Id is 20201207135110SC366534