No. 97592-2
SUPREME COURT
OF THE STATE OF WASHINGTON

No. 79666-6-I
COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

TERRY HOY, an individual,

Petitioner,

v.

THE 400 CONDOMINIUM ASSOCIATION, a Washington nonprofit corporation,

Respondent.

AMENDED PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Petitioner Terry Hoy petitions for review of the Court of Appeals decision referenced in Section II below.

II. COURT OF APPEALS DECISION

Mr. Hoy requests review of the decision by Division One of the Court of Appeals in this case, cause no. 79666-6-I filed on July 1, 2019, which affirmed the trial court's summary judgment dismissal of Mr. Hoy's claims. The Court of Appeals denied Mr. Hoy's Motion for Reconsideration on July 29, 2019. A copy of the decision and the order denying the motion for reconsideration are attached to the Petition for Review.

III. ISSUES PRESENTED FOR REVIEW

The Petition raises the following issues warranting review:

Issue One: Is the decision of the Court of Appeals in conflict with a published decision of the Court of Appeals? (Yes)

Issue Two: Should condominium rules that do not treat owners uniformly be reviewed under a reasonableness standard? (Yes)

Issue Three: Should the Court reverse the Court of Appeals and the trial court because the Association's rule does not treat owners uniformly and is manifestly unreasonable? (Yes)

IV. STATEMENT OF THE CASE

Petitioner Terry Hoy is the owner of a condominium unit that is part

of The 400 Condominium complex located in Bremerton, Washington. In July 2014, Mr. Hoy submitted a request to the Board of Directors (the "Board") for The 400 Condominium Association (the "Association"), seeking approval for the installation of a heat pump ("HVAC System") in Mr. Hoy's unit. CP 362-63. The HVAC System would require access to and alteration to the Common Element wall adjacent to his unit, with an outside HVAC unit installed on the Limited Common Element patio designated for Mr. Hoy's exclusive use. Id. Numerous other units in the condominium had HVAC Systems that were installed during initial construction. CP 413.

The Board delayed any response to Mr. Hoy's request for nearly a year. On June 17, 2015, the Board authorized Mr. Hoy to install the HVAC System, while agreeing that a Memorandum of Understanding ("MOU") would be signed at a later date. CP 366-67 (Board meeting minutes). The Board and Mr. Hoy did not agree to the specifics of what the MOU would include. Mr. Hoy had the HVAC system installed soon thereafter.

On July 15, 2015, the Board adopted an "HVAC Rule," though it still had not finalized a MOU. CP 368 (Board meeting notes).

The Board approved a draft MOU in September 2015, but did not ask Mr. Hoy to sign it, and hired an attorney to review it. CP 370 (Board meeting notes). Over a year later, in October 2016, the Board changed the requirements and wanted Mr. Hoy to execute a covenant instead of a MOU.

CP 377-78 (Board meeting notes). In December 2016, Mr. Hoy received a proposed covenant, which would be recorded against his unit. CP 379-83. The covenant would impose individual liability on Mr. Hoy should his HVAC System cause any damage:

> To the fullest extent permitted by law, OWNER shall indemnify and hold harmless the ASSOCIATION from and against all claims, damages, liability, losses and expenses … arising directly or indirectly out of or incident to the construction, existence, use, maintenance or condition of the Work. This indemnity obligation shall apply regardless of whether or not such liability is caused in part by the ASSOCIATION, its agents or employees or another ASSOCIATION member….

CP 382 (proposed Covenant offered to Mr. Hoy). The covenant would "bind and burden" the property. Id. at 380.

The Association includes several other units that have HVAC systems that were installed during the original construction of the condominium. However, the Association did not require any of these other owners with HVAC systems to indemnify the Association for damages caused by their HVAC systems. Thus, Mr. Hoy questioned why the Association required only he sign such a covenant, but none of the other HVAC system owners, and whether such discrimination was lawful.

The Association threatened to remove the HVAC unit if Mr. Hoy did not sign the Covenant and Hold Harmless Agreement. CP 79-80. Mr. Hoy commenced an action in Kitsap County Superior Court, alleging that

the Board's actions breached its duty of ordinary and reasonable care, and that removal of Mr. Hoy's HVAC System was precluded by promissory estoppel. CP 5-6 (Complaint).

The Association moved for summary judgment dismissal of Mr. Hoy's claims, seeking dismissal of Mr. Hoy's breach of duty of care under RCW 64.34.308 because (1) the Board owed no duty of care to Mr. Hoy; (2) there were reasonable bases for the Board to make its decisions; and (3) Mr. Hoy could not show damages as a result of his breach. [1] CP 148-66 (Association's Motion for Summary Judgment). The trial court granted the Association's motion for summary judgment. CP 405-06. The court's order dismissed all of Mr. Hoy's claims, without making any findings of fact or conclusions of law. Id.

Mr. Hoy appealed the court's order. Division One of the Court of Appeals upheld the trial court's decision. See Appendix (Court of Appeals opinion). The Court determined, *inter alia*, that the business judgment rule protected the Board from Mr. Hoy's action. On July 29, 2019, the Court of Appeals denied Mr. Hoy's motion for reconsideration. Id. (Court of Appeals order denying motion for reconsideration).

[1] The Association also sought dismissal of a promissory estoppel claim, termination of the preliminary injunction, and attorney fees and costs. These issues are not relevant for purposes of this appeal.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A. The Court of Appeals decision is in conflict with the published decision of another Court of Appeals decision.

In this case, Division One of the Court of Appeals determined that the Association's actions were protected by the business judgment rule. Opinion at 6. However, the business judgment rule should not apply in this case, and the Court of Appeals' opinion is in conflict with another Court of Appeals published opinion that adopts a "reasonableness" standard for reviewing such rulemaking. The Supreme Court has previously declined to address the standard of review for condominium actions, but should do so now. The standard for reviewing condominium rules that are not uniform on all condominium unit owners is an issue of substantial public interest. The Court should grant review and reverse. RAP 13.4(b)(2), (4).

1. The "business judgment" rule is not appropriate where parties are not seeking to impose individual liability on board members.

In support of its decision to apply the business judgment rule, the Court of Appeals quoted another appellate decision: "'Courts also apply the business judgment rule to actions of an owners association.'" Opinion at 6 (quoting Shorewood W. Condo. Ass'n v. Sadri, 92 Wn. App. 752, 757, 966 P.2d 372 (1998), *rev'd on other grounds*, 140 Wn.2d 47, 992 P.2d 1008 (2000)). But the Court of Appeals lopped off half of the quoted sentence, which in full demonstrated that the business judgment rule applies to

liability against board members, not as the standard of review of a new rule.

The "business judgment rule" is traditionally used as a defense against individual liability of board members making decisions for a corporation.

> Under the "business judgment rule," corporate management is immunized from liability in a corporate transaction where (1) the decision to undertake the transaction is within the power of the corporation and the authority of management, and (2) there is a reasonable basis to indicate that the transaction was made in good faith.

Scott v. Trans-Sys., Inc., 148 Wn.2d 701, 709, 64 P.3d 1 (2003).

The Court of Appeals in this case cited only the first half of the relevant sentence from Sadri, which states in full:

> Courts also apply the business judgment rule to actions of an owners association, holding its members liable for their decisions only if they benefited to the detriment of other owners.

Sadri, 92 Wn. App. at 757 (emphasis added).

Thus, although the Sadri court referenced the business judgment rule, it was only as it applies as a defense for board members from individual liability for their decisions. In this case, Mr. Hoy is not seeking to impose individual liability on board members for their decision, but is rather seeking to protect himself from a discriminatory decision by the board.

The Court of Appeals also cited Shinn v. Thrust IV, Inc., 56 Wn. App. 827, 833, 786 P.2d 285 (1990), to note that the rule requires directors

to act with "good faith" and with such care as an ordinarily prudent person would use. Opinion at 6. However, the Shinn court addressed the "business judgment" rule in the context of protecting management and corporate officers from liability. The Shinn case involved a lawsuit between partners of a partnership. "The business judgment rule does not appear to protect a defendant's conduct in Washington if the defendant did not exercise proper care, skill, and diligence." Shinn, 56 Wn. App. at 834-35.

The Court of Appeals also stated the proposition that "a court will not substitute its judgment for that of [the board members] unless there is evidence of fraud, dishonesty, or incompetence (*i.e.*, failure to exercise proper care, skill, and diligence)." Opinion at 6 (citing Riss v. Angel, 131 Wn.2d 612, 632, 934 P.2d 669 (1997) (internal citation omitted)). But the Riss case likewise involved the liability of individual members. Riss, 131 Wn.2d at 615 (affirming joint and several liability of individual HOA members for unreasonable and arbitrary rejection of construction plans, and remanding for determination of which members should be liable). Moreover, the Riss Court noted that "whether or not the business judgment rule should be applied to property owners associations, the decisions of these associations must be reasonable." Riss, 131 Wn.2d at 632 (emphasis added). The Riss Court stated even if the business judgment rule applied in that case, it would not exonerate the homeowners for their unreasonable

decision to reject the proposal. Id. at 633.

Thus, the Court of Appeals in this case erroneously relied upon a line of cases that deal with the business judgment rule and whether the rule protects individual officers, directors, and partners from liability for decisions they make. That is not the situation in this case. Instead, the Court should adopt the reasonableness standard for review of a condominium association's decisions, as previously outlined by Division Two.

2. A published decision from Division Two supports using a "reasonableness" standard for reviewing the validity of condominium rulemaking.

Not only does the Sadri opinion lack support for using the business judgment rule in this case, it actually noted that Washington has not yet adopted a standard to review condominium rules, and it subsequently adopted a "reasonableness" standard. Sadri, 92 Wn. App. at 756-57.

The Sadri court examined other jurisdictions, noting that some courts apply constitutional principles (such as equal protection or due process), others use contract theory, while still others use a business judgment rule to hold board members liable. Id. The Sadri court then noted that the most common approach "presumes the validity of restrictions in recorded documents, but tests rules adopted by a governing body for reasonableness." Id. at 757 (emphasis added).

The Sadri court analyzed the reasonableness rule by looking at two

cases from other jurisdictions. In Florida, the court differentiated between declarations and board rules. Hidden Harbour Estates, Inc. v. Basso, 393 So.2d 637 (Fla. Ct. App.1981). A restriction in the declaration is presumed valid, as each owner purchases the unit knowing of and accepting the restrictions imposed. Sadri, 92 Wn. App. at 757 (citing Basso, 393 So.2d at 639). "Such a restriction is akin to a covenant running with the land and will be upheld unless wholly arbitrary in application or in violation of public policy or a fundamental constitutional right." Id. at 757-58.[2]

With respect to rulemaking, the Basso court determined that "a governing body that promulgates a rule restricting some use "must show that the use is 'antagonistic to ... the health, happiness and peace of mind of the individual unit owners.'" Id. at 758 (quoting Basso, 393 So.2d at 640). "Such restrictions must be reasonable in both purpose and application." Id. (citing Board of Directors of 175 E. Del. Pl. Homeowners Ass'n v. Hinojosa, 223 Ill. Dec. 222, 679 N.E.2d 407, 411 (Ill. 1997)).

The Sadri court also looked at a Maryland case. Ridgely Condo. Ass'n v. Smyrnioudis, 660 A.2d 942, 949 (Md. App. 1995), *aff'd* 681 A.2d

[2] Thus, in this case the Board's attempt to force Mr. Hoy to sign a covenant regarding the HVAC System is akin to the Board amending the Declaration (as it only applies to Mr. Hoy) by a simple majority vote of the Board, instead of the super-majority as required by RCW 64.34.264 and the Declaration, CP 219 (Decl. Art. 26.2 (amendments require approval of 67% of owners to amend declaration; 90% to restrict use of unit)).

494 (Md.1996). In Ridgely Condominium, a bylaw amendment required clients visiting first floor professional offices to use exterior entrances, rather than the lobby. Id. at 942. The Ridgely Condominium court determined that the "relative ease" of amending bylaws supported a stricter review under the reasonableness standard to prevent discrimination against certain classes of owners. Id. at 949-50. It held the amendment invalid because it did not treat owners equally and was not reasonably related to the health, happiness, and enjoyment of unit owners. Id. at 951.

The Sadri court adopted the reasonableness test to review condominium rules, not the business judgment rule: "We find the reasoning in Basso and Ridgely Condominium persuasive and adopt a reasonableness requirement for both post-purchase amendments and rules promulgated by a governing body. This less deferential review is necessary to protect purchasers from unreasonable infringement on their property rights." Sadri, 92 Wn. App. at 759.

The Washington Supreme Court reversed Sadri on other grounds. Shorewood W. Condo. Ass'n v. Sadri, 140 Wn.2d 47, 57, 992 P.2d 1008 (2000) (finding bylaw invalid due to violation of Horizontal Property Regimes Act). The Shorewood[3] Court specifically noted that "[w]e leave

[3] To avoid confusion "Sadri" refers to the Court of Appeals opinion, while "Shorewood" refers to the Supreme Court opinion.

for another day the question of whether to adopt a standard of review for condominium association rules." Shorewood, 140 Wn.2d at 49-50.

Thus, it was erroneous for the Court of Appeals in this case to cite the Sadri decision to support its application of the business judgment rule to the Association's promulgated HVAC rule. In fact, the Sadri court adopted a reasonableness rule, and cited cases that require such rules to not only relate to the health, happiness, and enjoyment of unit owners, but to also treat owners equally. To the extent that Division One in this case adopted the business judgment rule, that conflicts with the different rule applied in a published Court of Appeals decision by Division Two, and review is warranted. RAP 13.4(b)(2). This case involves a rule adopted by the Board that applies to one class of unit owners, but not others, and affects their property rights. The correct standard of review of such rulemaking is of substantial public interest. RAP 13.4(b)(4).

B. Condominium rules that do not treat unit owners uniformly should be reviewed under the reasonableness standard.

The reasonableness standard is supported in both Washington and other jurisdictions, especially for non-uniform rules.

1. Washington courts support applying a reasonableness standard to review condominium rules that do not treat unit owners uniformly.

Although a condominium board may impose rules, they may not do

so with impunity. "[C]ondominium directors have a fiduciary responsibility to exercise ordinary care in performing their duties and are required to act reasonably and in good faith." Schwarzmann v. Ass'n of Apartment Owners of Bridgehaven, 33 Wn. App. 397, 403, 655 P.2d 1177 (1982). Officers and members of the board of directors are required to exercise "ordinary and reasonable care." RCW 64.34.308(1).

The reasonableness of an association's actions is a question of fact. Green v. Normandy Park, 137 Wn. App. 665, 693, 151 P.3d 1038 (2007). In Green, the court reviewed for substantial evidence the trial court's findings (after trial) that the community club (which enforced neighborhood covenants) acted reasonably in denying an owner's proposed building plans. Id. The Green court found the community club acted reasonably and in good faith because, *inter alia*, it did not attempt to impose more burdensome setback requirements than those imposed by the covenants, which apply uniformly to all owners. Id. at 694.

Contrast the Green opinion with the case at hand, where the Association created a rule that treated Mr. Hoy differently than other owners. Other owners could enjoy their HVAC system without any personal indemnification for damage their system may cause. However, Mr. Hoy could not enjoy a professionally-installed HVAC system without also signing and recording a covenant indemnifying the Association and making

Mr. Hoy (or any subsequent owner of that one unit) liable for any damages to common areas caused by the HVAC system. There is no logical basis for the distinction between owners, as any professionally-installed HVAC system could potentially leak and cause damage to common areas.[4]

Enacting a rule that affects only a subset of unit owners is similar to only enforcing restrictions against some owners. "Even when restrictions are considered reasonable they may not be selectively enforced." Sadri, 92 Wn. App. at 761 (citation omitted). "Uniform application is 'one factor that should weigh heavily in applying the reasonableness test.'" Id. (quoting Ridgely Condominium, 660 A.2d at 951) (emphasis added).

In another recent, unpublished Division Two opinion, the Court of Appeals addressed the propriety of a "House Rule" wherein a condominium board of directors attempted to change how rental of condominium units operated. Kawawaki v. Academy Square Condo. Ass'n, No. 42982-9-II, (Wash. Ct. App. Sept. 24, 2013) (unpub.) (persuasive authority, per GR

[4] Mr. Hoy is not contending the Board has no authority to regulate installation or operation of HVAC systems. Instead, he is contending that any such regulation should be reasonable and should not create separate classes of ownership. If the Board's proposed restriction was limited to just installation of an HVAC system (*e.g.*, installation by licensed installer, the proposed unit meeting certification and noise requirements, etc.), that would likely pass muster because presumably those HVAC systems installed during construction already meet those requirements. Thus, all unit owners would be treated uniformly. But the Association's proposed covenant goes beyond mere installation of an HVAC, and seeks to impose rules and indemnity with respect to the continued use, operation, and existence of HVAC systems for some unit owners, but not for other unit owners.

14.1). In Kawawaki, the condominium's declaration restricted rentals to 25% of the units, and, once fully rented at that level, required other owners to put themselves on a waiting list. The Kawawakis bought a condo unit and put themselves on the waitlist. They were first on the waitlist when another unit owner (who was also a board director) bought another unit used as a rental. The board subsequently adopted a "House Rule" that stated that any unit that qualifies as a rental unit could be sold or conveyed and still maintain that "rental unit" status. The Court of Appeals sided with the Kawawakis, finding that the House Rule was unreasonable. "Reasonableness of a house rule is a two-pronged analysis. We must first determine whether the [rule] … is reasonable in purpose and then we must determine whether it is reasonable in application." Id. (citing Sadri, 92 Wn. Ap. at 758). The Kawawaki court found, *inter alia*, that the effect of the house rule was "to create two classes of owners. Those in the 25 percent who will retain rental status and who can realize an additional benefit when selling to new investors and the other 75 percent of owners who will remain on the so-called 'first-come, first-served' waiting list. Accordingly, the House Rule is not uniformly applied and is not reasonable in application." Id. (citing Sadri, 92 Wn. Ap. at 761).

2. Other jurisdictions support applying a reasonableness standard to review condominium rules that do not treat unit owners uniformly.

Other jurisdictions review condominium rules and bylaw amendments for reasonableness, and examining whether owners are treated uniformly is a fundamental component of that inquiry.

> The first question in applying the test of reasonableness is whether the decision or rule was arbitrary or capricious. …
>
> The second question is whether the decision or rule is discriminatory or evenhanded. ... [W]e believe it protects against the imposition by a majority of a rule or decision reasonable on its face, in a way that is unreasonable and unfair to the minority because its effect is to isolate and discriminate against the minority. It provides a safeguard against a tyranny of the majority.
>
> The third question is whether the decision or rule was made in good faith for the common welfare of the owners and occupants of the condominium.

Worthinglen Condo. Unit Owners' Ass'n v. Brown, 566 N.E.2d 1275, 1277-78 (Ohio Ct. App. 1989) (emphasis added) (citation omitted).

"[A] procedurally correct and substantively reasonable amendment should not create invidious classifications or unfairly diminish the rights of some unit owners for the benefit of others." Thanasoulis v. Winston Tower 200 Ass'n, Inc., 519 A.2d 911, 917 (N.J. Super. Ct. App. Div. 1986), *rev'd*

542 A.2d 900 (N.J. 1988) (Cohen, J.A.D., dissenting) (citing Le Febvre v. Ostendorf, 275 N.W.2d 154 (Wis. Ct. App. 1979)).[5]

In Chin v. Coventry Square Condo. Ass'n, 637 A.2d 197, 200 (N.J. 1994), the court noted that "[t]he 'business judgment' rule contrasts sharply with the 'reasonableness' standard and with rule-making according to constitutional or administrative agency standards" Chin, 637 A.2d at 200 (noting Judge Cohen's dissent in Thanasoulis). The Chin court did not believe that the "business judgment" rule could sustain a higher parking stall fee for nonresidents, finding persuasive Judge Cohen's dissent that a bylaw should not create invidious classifications or diminish the rights of some unit owners for the benefit of others.

Thus, where a proposed rule or amendment does not apply uniformly to all owners, it should generally be held invalid. Restatement (Third) of Property: Servitudes § 6.10(2) (2000) ("Amendments that do not apply uniformly to similar lots or units … are not effective without the approval of members whose interests would be adversely affected unless the declaration fairly apprises purchasers that such amendments may be

[5] In Thanasoulis, a condominium board decided to charge nonresident owners a higher rate for parking stalls. Thanasoulis, 542 A.2d at 901. The New Jersey supreme court found Judge Cohen's dissent from the court of appeals opinion persuasive and agreed unresolved issues of material fact precluded summary judgment. Thanasoulis, 542 A.2d at 906-07.

made.").[6] *See also* Hinojosa, 679 N.E.2d at 410 ("Board rules must be objective, evenhanded, nondiscriminatory, and applied uniformly.") (citation omitted); Lee v. Puamana Comm'y Ass'n, 128 P.3d 874, 884 (Haw. 2006) (noting that "other courts have stated that nonuniform amendments … are invalid unless approved by every member whose interest is adversely affected."); Licker v. Harkleroad, 558 S.E.2d 31, 35 (Ga. Ct. App. 2001) (noting other jurisdictions that support the Restatement rule); Hughes v. New Life Dev. Corp., 387 S.W.3d 453, 478-79 (Tenn. 2012) (finding non-uniformity of amendment an important factor justifying application of reasonableness test); Villas at Hidden Lakes Condo. Ass'n v. Geupel Constr. Co., 847 P.2d 117, 122 (Ariz. 1992) (reviewing cases where attempted amendments held invalid for not treating all units uniformly), 125 ("Courts have regularly imposed a reasonableness standard on rules and regulations adopted by condominium homeowners' associations.").

C. The Court should reverse the Court of Appeals and the trial court, and remand this case because the Association's adopted HVAC rule does not treat owners uniformly and is manifestly unreasonable.

The Association adopted the rule requiring an indemnification from Mr. Hoy because having such a covenant would "protect the Association."

[6] The Restatement also imposes a duty upon an association to treat members fairly and act reasonably. Restatement (Third) of Property Servitudes § 6.13(1).

CP 252 (Decl. of Bob Johnson); Opinion at 8 ("Hoy knew that the Board … prioritized protecting the Association."). Although the Association has rule-making authority and a duty to look out for the Association, a problem arises when the Board's rules do not apply uniformly to all unit owners.

In this case, the Association's proposed covenant creates two classes of owners: those who had an HVAC installed during construction, and those who install an HVAC afterward. The Court of Appeals dismissed Mr. Hoy's argument that he was being treating differently, reasoning that "this argument lacks merit because of the different circumstances surrounding the HVAC Systems. The other HVAC Systems had been installed during construction. The board minutes clearly demonstrate that the Board never intended owners with HVAC Systems installed during construction to sign any document…" Opinion at 7. The Court of Appeals used this fact to show that the Board did not act in bad faith. Instead, however, it clearly demonstrates that the Board intended to create two classes of owners.

The date of installation of an HVAC system (*i.e.*, during construction or thereafter) by itself is meaningless. Who installed an HVAC system is a distinction without a difference. The issue before the Court is not who installed the system, but rather what happens after installation and

an HVAC system fails.[7] Any HVAC system is liable to malfunction or leak and cause damage. There is no evidence that one system is immune from failure or inherently more reliable than another system. The older HVAC systems installed during construction may be even more susceptible to breakdown. Moreover, many of these other HVAC systems were installed on the roof (vs. Mr. Hoy's first floor patio system), and a leak from one of those would likely cascade down and affect many other units and common and limited common elements.[8]

The Board could have adopted a rule that all owners of HVAC systems must indemnify the Association for potential damages. The Board would presumably have authority to pass such a rule, and that would treat all unit owners uniformly. Instead, here the Board passed a rule that would make some unit owners individually liable for damage caused by their HVAC system, while other unit owners face no such liability. The Board does not have authority to create disparate classes of ownership.

The rule adopted by the Board in this case does not treat owners uniformly. Such disparate treatment is unreasonable, as has been found in

[7] As discussed above, a rule geared solely to proper installation of an HVAC system would be qualitatively different. The proposed covenant in this case requires indemnification for any damages long after and unrelated to installation. *See supra* n.4.

[8] If there is any material difference in reliability between the HVAC systems, that is an issue of fact that precludes summary judgment in this case.

cases in Washington and numerous other jurisdictions. This is an issue of substantial public interest for all who own condominiums in Washington. RAP 13.4(b)(4). The Court should accept review of this case and reverse the Court of Appeals.

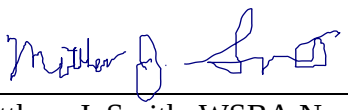
VI. CONCLUSION

The standard of review of condominium rule-making is an important issue, having been addressed in Washington and other jurisdictions. In this case, the opinion by Division One of the Court of Appeals differs from a published opinion by Division Two. The Court of Appeals focused on the HVAC installation without acknowledging the perpetual indemnification the Board required of only some owners. The covenant creates two classes of ownership, and the failure to treat owners uniformly is unreasonable.

For the foregoing reasons, this Court should accept review of Division One's opinion under RAP 13.4(b)(2), (4), and reverse and remand this matter to the trial court. Costs previously awarded should be reversed and costs on appeal should be awarded to petitioners.

Dated this 28th day of August, 2019.

SMITH MCBROOM, PLLC



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APPENDIX

Court of Appeals Decision

Order Denying Motion for Reconsideration

FILED
7/1/2019
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

TERRY HOY, an individual, Appellant, v. THE 400 CONDOMINIUM ASSOCIATION, a Washington nonprofit corporation, Respondent.	No. 79666-6-I DIVISION ONE UNPUBLISHED OPINION FILED: July 1, 2019

CHUN, J. — After Terry Hoy purchased his condominium (Unit), he sought approval from The 400 Condominium Association (Association) Board of Directors to install a heat pump (HVAC System). The Board agreed to allow Hoy to install the HVAC System on the condition that he sign a document to protect the Association. The parties dispute whether Hoy said he would sign any document or only a Memorandum of Understanding (MOU).

Hoy installed his HVAC System before he and the Board finalized an agreement. After consulting with an attorney, the Board sent Hoy a covenant to sign. Hoy refused, claiming that he had agreed to sign only an MOU. The Board took steps to remove Hoy's HVAC System.

Hoy then filed this action against the Association for breach of duty of ordinary and reasonable care and promissory estoppel. The trial court granted the Association's motion for summary judgment on both claims and awarded it

attorney fees under the Condominium Act.[1] Even when viewing the facts in the light most favorable to Hoy, both claims fail. We affirm.

I.
BACKGROUND

Hoy owns a Unit located within The 400 Condominium complex. The Condominium Declaration governs the properties within the complex and the Association, which manages it. Hoy wanted to modify his Unit by installing an HVAC System. Because the installation would require Hoy to cut through an exterior wall (a "common element") and the HVAC System would sit on his outside patio (a "limited common element"), the Declaration required him to obtain approval from the Association's Board of Directors.[2]

In the summer of 2014, Hoy submitted to the Board a request to install an HVAC System. The request noted, "As I understand it, this will be the first add-on HAVAC [sic] for the 400 Condominiums." The Board chose to wait to respond to Hoy's request until after it had researched potential noise and appearance issues.

Almost a year later, on June 17, 2015, Hoy attended a board meeting[3] at which the Board approved his request with the condition that he sign a forthcoming, binding agreement. The Board decided to "draft a Memo of Understanding (MOU) for any tenant who wishes to install [an HVAC System]." It

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[1] RCW 64.34 et seq.

[2] The Declaration provides the Association and Board broad powers over common and limited common elements. Common elements constitute all portions of the 400 Condominium complex aside from the property owners' individual units. Limited common elements are the portions of the common elements that one or more, but fewer than all, of the property owners may exclusively use.

[3] In February 2015, Hoy became a member of the Board.

further stated that Hoy would sign the MOU before his scheduled installation if it was available. Otherwise, Hoy would sign after installing his HVAC System. The parties intended the MOU to constitute a binding agreement. Although the board minutes discuss only the MOU, the Association submitted declarations attesting that Hoy agreed to sign any type of document the Board chose to require.

Hoy then installed an HVAC System. The parties present conflicting evidence as to whether Hoy began installing his HVAC System before or after the Board gave its conditional approval. The parties do not dispute, however, that Hoy did not sign any agreement prior to installation, as the Board did not have one ready.

During a meeting on July 15, 2015, the Board discussed each item in a draft MOU. At a meeting on September 16, 2015, the Board approved minor changes to the MOU and decided to have an attorney review it.

A year later, at a September 2016 meeting, the Board discussed how to protect the Association from liability when a property owner installs an HVAC System; it considered whether it should move forward with an MOU, a covenant, or an amendment to the Declaration. At the next meeting a month later, the Board elected to follow legal advice and use a covenant:

> Legal counsel has responded to question in regard to what is the best way to protect the condo association on this issue: Memo of Understanding? Covenant? Or is it already covered by the declaration? Counsel opined that covenant would be the best protection for the association for new HVAC. However, the covenant would not apply to units that had HVAC installed during construction of the building.

A board member then moved to have "counsel complete the legal technicalities for the covenant between the association and Terry Hoy."

On December 14, 2016, the Association sent a letter to Hoy asking him to sign the enclosed covenant. Hoy refused.

In March 2017, the Board held a hearing on whether it should use its authority under the Declaration to enter Hoy's Unit and remove the HVAC System. Hoy's attorney represented him at the meeting. The Board chose to take steps towards removal.

On April 17, 2017, the Association sent Hoy an MOU with the same language as the covenant, but Hoy again refused to sign. The next day, the Board sent Hoy a letter notifying him that it had decided to remove his HVAC System.

Hoy then filed this lawsuit against the Association on May 18, 2017. He claimed breach of duty of ordinary and reasonable care and promissory estoppel. The same day, Hoy also moved for a preliminary injunction to stop the Association from removing his HVAC System. The trial court granted Hoy's motion on June 2, 2017.

The Association moved for summary judgment on December 15, 2017. On January 29, 2018, the court granted the Association's motion and dismissed Hoy's claims.

On April 11, 2018, the Association requested attorney fees and costs pursuant to RCW 64.34.455. The court ordered Hoy to pay the Association $13,277.50 in fees and costs.

Hoy appeals.

II.
ANALYSIS

We review de novo a trial court's decision to grant summary judgment. Modumetal, Inc. v. Xtalic Corp., 4 Wn. App. 2d 810, 822, 425 P.3d 871 (2018). Courts grant summary judgment if no genuine issue exists as to any material fact. Modumetal, 4 Wn. App. 2d at 822. Courts draw all facts and reasonable inferences in the light most favorable to the nonmoving party. Modumetal, 4 Wn. App. 2d at 822. A court should grant summary judgment if reasonable people could reach only one conclusion. Modumetal, 4 Wn. App. 2d at 822-23.

A. Duty of Ordinary and Reasonable Care

Hoy argues the Association breached its duty to exercise ordinary and reasonable care by "[a]ttempting to force an association member to execute a covenant recordable against the member's unit as a condition for that member to be able to continue his use of a [Board]-approved modification to the member's unit." The Board claims the business judgment rule protects its decision. We agree with the Board.

When the unit members of a condominium association elect the officers and members of the board of directors, the Condominium Act requires those officers and members to exercise ordinary and reasonable care in performing

their duties. RCW 64.34.308(1). Whether a board member exercises ordinary and reasonable care under particular circumstances generally constitutes a question of fact. See Hertog v. City of Seattle, 138 Wn.2d 265, 275, 979 P.2d 400 (1999). Courts may dismiss a claim on summary judgment in the absence of an issue of fact as to reasonableness. See Cascade Auto Glass, Inc., v. Progressive Cas. Ins. Co., 135 Wn. App. 760, 767-71, 145 P.3d 1253 (2006).

The business judgment rule protects the decisions made by a board tasked with managing a corporation. Davis v. Cox, 180 Wn. App. 514, 535, 325 P.3d 255 (2014), rev'd on other grounds, 183 Wn.2d 269, 351 P.3d 862 (2015). "Courts also apply the business judgment rule to actions of an owners association." Shorewood W. Condo. Ass'n v. Sadri, 92 Wn. App. 752, 757, 966 P.2d 372 (1998) rev'd on other grounds, 140 Wn.2d 47, 992 P.2d 1008 (2000). "[T]he rule not only requires directors to act with 'good faith,' but also requires them to act with such care as an ordinarily prudent person in a like position would use under similar circumstances." Shinn v. Thrust IV, Inc., 56 Wn. App. 827, 833, 786 P.2d 285 (1990). Thus, under the rule, "a court will not substitute its judgment for that of [the board members] '[u]nless 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) (quoting In re Spokane Concrete Prods., Inc., 126 Wn.2d 269, 279, 892 P.2d 98 (1995)).

Here, the Declaration provides the Board with broad powers ("the Board may exercise all powers of the Association, except as otherwise provided in the

Condominium Act, Declaration, or the Bylaws"). Additionally, RCW 64.34.304 grants virtually identical powers to the Board. These powers include the ability to "[r]egulate the use, maintenance, repair, replacement, and modification of Common Elements and Limited Common Elements." See also RCW 64.34.304(1)(f) (stating a board has power to regulate common elements). To "regulate" means "to bring under the control of law or constituted authority: make regulations for or concerning." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1913 (2002). Because installing an HVAC System requires the use of common and limited common elements, the Board has the power to make rules for installing such units. This power, however, is not unlimited, as the Board must exercise ordinary and reasonable care in carrying out its duties.

We determine the business judgment rule protects the Board's decision as a matter of law. First, the record lacks any evidence that the Board did not act in good faith. Though Hoy contends that the Board treated him differently from other property owners with HVAC Systems, this argument lacks merit because of the different circumstances surrounding the HVAC Systems. The other HVAC Systems had been installed during construction. The board minutes clearly demonstrate that the Board never intended owners with HVAC Systems installed during construction to sign any document—MOU, covenant, or otherwise. In contrast, Hoy was admittedly the first to install an add-on HVAC System. As such, the Board's treatment of Hoy does not demonstrate bad faith.

Second, the Board acted as a reasonably prudent board of directors would under like circumstances, without evidence of fraud, dishonesty, or incompetence. Hoy knew that the Board—in making efforts to develop an agreement with homeowners seeking to install HVAC Systems—prioritized protecting the Association. Hoy further accepted the risk of installing his HVAC before knowing of all the Association's proposed terms. The Board exercised proper care, skill, and diligence by seeking legal advice to create an agreement for HVAC System installations. It then followed the advice that a covenant would best protect the Association. The Board acted reasonably and in good faith. Therefore, the business judgment rule protects its decisions regardless of the factual disputes that Hoy identifies—i.e., whether Hoy installed the HVAC system before or after the Board gave its approval and whether he originally agreed to sign any document or only an MOU. Thus, the disputed facts do not preclude summary judgment on this issue.

Because the business judgment rule protects the Board's decision to require Hoy to sign the covenant or remove the HVAC System, we will not second-guess its actions. See Davis, 180 Wn. App. at 535; Shorewood, 92 Wn. App. at 757. We conclude that the trial court properly granted summary judgment in the Board's favor on Hoy's breach of duty claim.

B. Promissory Estoppel

Hoy next argues the trial court erred by dismissing his promissory estoppel claim because he meets all of the required elements. According to the

Association, the claim fails because it granted Hoy a revocable license which cannot be enforced through promissory estoppel. We conclude that the trial court properly dismissed the claim.

Courts may use the promissory estoppel doctrine to enforce a promise made without mutual assent or consideration. Havens v. C & D Plastics, Inc., 124 Wn.2d 158, 173, 876 P.2d 435 (1994). To prevail on a claim for promissory estoppel, a plaintiff must prove five elements:

> (1) A promise which (2) the promisor should reasonably expect to cause the promisee to change [their] position and (3) which does cause the promisee to change [their] position (4) justifiably relying upon the promise, in such a manner that (5) injustice can be avoided only by enforcement of the promise.

Klinke v. Famous Recipe Fried Chicken, Inc., 94 Wn.2d 255, 259 n2, 616 P.2d 644 (1980). Under Washington law, however, a plaintiff cannot use promissory estoppel to enforce a revocable license. Hathaway v. Yakima Water, Light, & Power Co., 14 Wn. 469, 472, 44 P. 896 (1896) (a "parol license to be exercised upon the land of another creates an interest in the land . . . and may be revoked by the licensor at any time, no matter whether or not the licensee has exercised acts under the license, or expended money in reliance thereon"); see also Showalter v. City of Cheney, 118 Wn. App. 543, 549, 76 P.3d 782 (2003) ("Implicit in the nature of a license is the licensee's presumed knowledge that permission may be withdrawn. Consequently, funds expended in reliance on a mere license do not create a valuable, compensable property right.").

When determining whether a grantor conveyed a revocable license or a permanent property right, courts consider the evidence as a whole. See

Groeneveld v. Dean, 40 Wn.2d 109, 111, 241 P.2d 443 (1952). Additionally, the "presence of consideration is helpful," with a lack of consideration suggesting a revocable license. Lee v. Lozier, 88 Wn. App. 176, 183, 945 P.2d 214 (1997).

For condominiums, RCW 64.34.348(1) and (2) prohibit the conveyance of any permanent property right without an agreement executed in the same manner as a deed and ratified by the requisite number of unit owners. Neither requirement was satisfied here. Moreover, the Board did not support its approval of Hoy's installation with any consideration. As noted above, a lack of consideration suggests a revocable license. Thus, viewing the evidence as a whole, we determine as a matter of law that the Association granted Hoy a revocable license to use the common and limited common elements for his HVAC System.

Because the undisputed facts show that Hoy obtained a revocable license, he may not invoke the promissory estoppel doctrine. See Hathaway, 14 Wn. at 472; Showalter, 118 Wn. App. at 549. Thus, it again does not matter whether the trier of fact would resolve the factual disputes in Hoy's favor. Accordingly, the trial court properly granted summary judgment in favor of the Association on Hoy's promissory estoppel claim.

C. Attorney Fees

Both Hoy and the Association request attorney fees on appeal under the Condominium Act. RCW 64.34.455 provides for attorney fees to the prevailing party:

> If a declarant or any other person subject to this chapter fails to comply with any provision hereof or any provision of the declaration or bylaws, any person or class of persons adversely affected by the failure to comply has a claim for appropriate relief. The court, in an appropriate case, may award reasonable attorney's fees to the prevailing party.

"Where a statute authorizes fees to the prevailing party, they are available on appeal as well as in the trial court." Eagle Point Condo. Owners Ass'n v. Coy, 102 Wn. App. 697, 716, 9 P.3d 898 (2000).

Because the Association prevails on appeal, we award it such fees, subject to its compliance with RAP 18.1.

Affirmed.

Chun, J.

WE CONCUR:

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

TERRY HOY, an individual, Appellant, v. THE 400 CONDOMINIUM ASSOCIATION, a Washington nonprofit corporation, Respondent.	No. 79666-6-I ORDER DENYING MOTION FOR RECONSIDERATION

Appellant, Terry Hoy, filed a motion for reconsideration of the opinion filed on July 1, 2019. Respondent, The 400 Condominium Association, has not filed a response. A panel of the court has determined that the motion should be denied.

Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

FOR THE COURT:

Chun, J.

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the United States of America and the State of Washington that on the date specified below, I filed and served the foregoing Amended Petition for Review as follows:

Court of Appeals, Division I Clerk's Office 600 University St. Seattle, WA 98101 Phone: (206) 464-7750	Personal Delivery ☐ First Class U.S. Mail ☐ Electronic Mail ☐ E-Filing ☒
Seth Chastain Counsel for Respondent Levy Von Beck Comstock, P.S. 1200 Fifth Ave., Ste. 1850 Seattle, WA 98101 Phone: (206) 673-2235 sechastain@levy-law.com	Messenger Service ☐ First Class U.S. Mail ☐ Electronic Mail ☒ E-Service ☒
John D. Burleigh Counsel for Respondent Burleigh Law Office PLLC 3202 Harborview Drive Gig Harbor, WA 98335 Phone: (253) 292-3844 john@burleighlegal.com	Messenger Service ☐ First Class U.S. Mail ☐ Electronic Mail ☒ E-Service ☒

DATED: September 4, 2019, at Renton, Washington.

/s/ Matthew J. Smith
Matthew J. Smith

SMITH MCBROOM, PLLC

September 04, 2019 - 4:18 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	97592-2
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Superior Court Case Number:	17-2-00867-4

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- sechastain@levy-law.com

Comments:

The petition filed earlier today was missing a signature. This Amended Petition for Review is signed. Thank you.

Sender Name: Matthew Smith - Email: matt@smithmcbroom.com
Address:
PO BOX 510
RENTON, WA, 98057-0510
Phone: 206-409-3828

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