

COURT OF APPEALS
DIVISION II

12 JAN 13 PM 3:43

STATE OF WASHINGTON
BY _____
DEPUTY

No. 42287-5-II
COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

HAROLD GENE DAVIS and DELIA M. DAVIS,

Appellants,

vs.

PLEASANT FOREST CAMPING CLUB,

Respondents.

APPELLANT'S REPLY BRIEF

Jon E. Cushman
Kevin Hochhalter
Cushman Law Offices, P.S.
924 Capitol Way South
Olympia, WA 98501

360-534-9183

Attorneys for Appellants

ORIGINAL

TABLE OF CONTENTS

I. INTRODUCTION 1

II. ARGUMENT 1

 A. The Club Utterly Failed to Follow its Own Procedures In Terminating the Davises’ Membership 1

 B. The Club Deprived the Davises of a Valuable Property Right Without Notice or Opportunity to Defend. 5

 C. The Superior Court Erred in Dismissing the Davises’ Other Claims .. 6

 D. The Superior Court Erred in Awarding Attorneys Fees Without a Lodestar Analysis 7

III. CONCLUSION 8

TABLE OF AUTHORITIES

Table of Cases

Allen v. Office Emp. Int’l Union, 53 Wn.2d 1, 329 P.2d 205 (1958) 2

Anderson v. Enterprise Lodge No. 2, 80 Wn.App. 41, 906 P.2d 962 (1995) 2, 5, 6

Garvey v. Seattle Tennis Club, 60 Wn.App. 930, 808 P.2d 1155 (1991) 2, 4, 5, 6

Mahler v. Szucs, 135 Wn.2d 398, 957 P.2d 632 (1998) 7, 8

Spokoiny v. Wash. State Youth Soccer Ass’n, 128 Wash.App. 794, 117 P.3d 1141 (2005) 2

Wash. Local Lodge No. 104 of Int’l Broth. of Boilermakers, Iron Ship Builders & Helpers of Am. v. Int’l Broth. of Boilermakers, Iron Ship Builders & Helpers of Am., 33 Wn.2d 1, 203 P.2d 1019 (1949) 5, 6

Other Jurisdiction

Jackson v. Am. Yorkshire Club, 340 F.Supp. 628, 633 (N.D. Iowa, 1971) 2

Rules

CR 52 8

I. INTRODUCTION

As the Club pointed out in its response, this case is not about whether the court would vote in favor of the Davises' termination. This case is about whether the Club followed the procedures set forth in its bylaws for termination of membership. On the undisputed facts, the Club utterly failed to follow its own procedures. The superior court erred in holding otherwise. This court should reverse.

II. ARGUMENT

A. **The Club Utterly Failed to Follow its Own Procedures In Terminating the Davises' Membership.**

The Davises' opening brief set forth in detail the Club's multiple failures to follow the strict procedures set forth in the Club's bylaws for termination of membership. In response, the Club has not offered a single argument that its actions fit within the bylaws.

Instead the Club argues that the process and the decision were "fair". The Club points out that the Davises knew the rules when they joined the Club. The Club drags Gene Davis through the mud in hopes that the court will see him as a mean-spirited man who deserved to lose his membership. The Club asserts that the members knew Gene's behavior and voted overwhelmingly to terminate him. The Davises were even given

the opportunity to appeal the decision and be represented by counsel.

However, the law requires much more than some nebulous concept of “fairness” in the result. When a court intervenes in the affairs of a private association, the court’s duty is to ensure that the club has followed its own procedural rules. *Anderson v. Enterprise Lodge No. 2*, 80 Wn. App. 41, 46-47, 906 P.2d 962 (1995); *Garvey v. Seattle Tennis Club*, 60 Wn. App. 930, 933, 808 P.2d 1155 (1991). Termination of membership contrary to the reasons or procedures set forth in the bylaws is a breach of the membership contract, enforceable by the courts. *Allen v. Office Emp. Int’l Union*, 53 Wn.2d 1, 5, 329 P.2d 205 (1958); *Spokoiny v. Wash. State Youth Soccer Ass’n*, 128 Wash. App. 794, 801, 117 P.3d 1141 (2005); *Jackson v. Am. Yorkshire Club*, 340 F.Supp. 628, 633 (N.D. Iowa, 1971). This court can only affirm the decision of the superior court if the Club followed the procedures set forth in its bylaws.

It is clear from the undisputed facts that the Club failed to follow its bylaws in every step of the termination process.

- The petition did not allege violation of any bylaws as cause for termination.
- The members improperly campaigned for petition signatures.

- The petition failed to garner the number of valid signatures required to call a membership vote on termination.
- The notice letter for the special meeting was not based on the text of the petition.
- The Club president has no power to call a membership vote on termination.
- The Board has no power to call a membership vote on termination.
- The Board knowingly chose not to follow the procedures required prior to a Board vote on termination.
- The August 11 special meeting was not held in accordance with the notice of special meeting.
- The last-minute change in voting procedure of the August 11 special meeting violated the absentee voting rights of the members.

All of these violations of the Club's bylaws rendered the August 11 meeting invalid and the membership vote void. The Davises were not terminated in accordance with the bylaws. The superior court should have granted summary judgment in favor of the Davises on their claim for wrongful termination.

The Club relies on the *Garvey* case, claiming that it presents a similar fact pattern, but in doing so the Club entirely ignores the fact that its own bylaws require much more than those of the Seattle Tennis Club (“STC”). The STC bylaws provided for expulsion of a member for “unbecoming conduct upon the premises” after a hearing and a two-thirds vote of the Board of Trustees. *Garvey*, 60 Wn. App. at 931. STC’s first attempt at expelling the Garveys was invalid because there was no hearing and only a majority vote. *Id.* at 931, 934. STC then re-initiated the expulsion proceedings, giving Garveys notice of a hearing at which the board voted unanimously for expulsion. *Id.* at 931-32. The court held that this second set of proceedings complied with the bylaws and cured any infirmity in the original proceedings. *Id.* at 934.

In stark contrast, the Club here never initiated a new set of proceedings in compliance with the bylaws. The Club’s bylaws set strict requirements for initiating membership termination proceedings. The Board can initiate proceedings with an investigation by committee followed by written notice to the member of a special meeting of the Board. (CP at 45.) Alternatively, the members can initiate proceedings by petition calling for a vote of either the members or the Board. (CP at 45.) The Board never initiated termination proceedings in accordance with the

bylaws. The petition failed. Even if the petition was valid, the Board intervened and improperly called a special meeting different from that called for by the petition. Even if the special meeting was properly called, it was not held in accordance with the notice or the bylaws. The only thing that could have cured these multiple procedural infirmities under *Garvey* would have been for the Club to start over at the beginning and follow the procedures set forth in the bylaws from beginning to end of the termination process. *Garvey* requires no less. The Club never cured its failure to follow its own procedures.

B. The Club Deprived the Davises of a Valuable Property Right Without Notice or Opportunity to Defend.

In addition to ensuring that a club follows its own procedures, the courts will intervene when the acts of a club affect the property rights of members. *Anderson*, 80 Wn. App. at 46-47. A club cannot deprive a member of a valuable property right without first giving the member notice of specific charges and providing the member an opportunity to defend themselves. *Wash. Local Lodge No. 104 of Int'l Broth. of Boilermakers, Iron Ship Builders & Helpers of Am. v. Int'l Broth. of Boilermakers, Iron Ship Builders & Helpers of Am.*, 33 Wn.2d 1, 74, 203 P.2d 1019 (1949) (“*Boilermakers*”).

The Club responds by arguing that due process does not apply because there is no state action here. But the Club ignores the clear authority of *Anderson* and *Boilermakers* that the courts will require a private organization to provide notice and opportunity to be heard before depriving a member of a valuable property right. The Club relies again on *Garvey*, but fails to notice the distinction drawn by the *Garvey* court between a purely social situation, as was the case in *Garvey*, and a situation involving a deprivation of property rights, which “has constitutional overtones.” *Garvey*, 60 Wn. App. at 935, note 5.

The Club deprived the Davises of the valuable property right to use and exclude others from their membership lots, without providing notice of specific charges. Without notice of specific charges, it was impossible for the Davises to have a meaningful opportunity to be heard in their own defense. This is an additional, alternative reason for this court to reverse the erroneous decision of the superior court.

C. The Superior Court Erred in Dismissing the Davises’ Other Claims.

The Davises’ argued in their opening brief that the superior court erred in entering final judgment on all claims despite the fact that it had only ruled on the Davises’ wrongful termination claim. The Club responds

by raising facts outside of the record and arguments that it failed to raise in either of its summary judgment motions. The Club failed to place those issues before the superior court. The superior court never ruled on them. The superior court erred in entering final judgment when there were still claims that had not been disposed of. Even if this court affirms summary judgment on the wrongful termination claim, the court should reverse final judgment and remand for further proceedings on the remaining claims.

D. The Superior Court Erred in Awarding Attorneys Fees Without a Lodestar Analysis.

The Davises argued that the superior court erred in awarding attorney fees without engaging in a lodestar analysis and entering findings of fact and conclusions of law to support that analysis. The Club responds by arguing that the motion and declaration of the Club's counsel is a sufficient record to establish the fee award. However, the Washington Supreme Court clearly stated in *Mahler v. Szucs*, 135 Wn.2d 398, 435, 957 P.2d 632 (1998), that "findings of fact and conclusions of law *are required* to establish such a record" (emphasis added). The superior court failed to enter findings and conclusions.

The Club also questions whether findings and conclusions are required for a fee award after summary judgment, citing to CR

52(a)(5)(B), which provides that findings and conclusions are not required on decisions of summary judgment motions. However, it is clear from the context of the rule that it applies to decisions on the merits. The award of attorney fees is not a decision on the merits, and comes as the result of a separate motion after the final decision on the merits. The Washington Supreme Court has mandated findings and conclusions to support awards of attorney fees. This mandate should not change simply because a case was decided on summary judgment rather than at trial. In fact, *Mahler* itself involved two consolidated cases that had both been decided on summary judgment. *Mahler*, 135 Wn.2d at 407-08, 411. Even if this court affirms all of the other decisions, the court should remand with instructions to perform a proper lodestar analysis with findings of fact and conclusions of law.

III. CONCLUSION

For the reasons stated in the Davises' opening brief and above, this court should reverse the erroneous decisions of the superior court.

Respectfully Submitted this 13th day of January, 2012.

CUSHMAN LAW OFFICES, P.S.



Kevin Hochhalter, WSBA #43124
Attorney for Gene and Delia Davis

12 JAN 13 PM 3:43
 STATE OF WASHINGTON
 COUNTY OF KING
 DEPARTMENT OF REVENUE

CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the State of Washington, that on January 13, 2012, I caused to be served a true copy of the foregoing document, by the method indicated below, and addressed to each of the following:

original:	Court of Appeals Division II 950 Broadway, #300 Tacoma, WA 998402 253-593-2806	<input type="checkbox"/> U.S. Mail, Postage Prepaid <input checked="" type="checkbox"/> Legal Messenger <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Electronic Mail
copy:	Kenneth Ahlf 1230 Ruddell Rd SE, Suite 201 Lacey, WA 9503 ahlflaw@reachone.com	<input type="checkbox"/> U.S. Mail, Postage Prepaid <input checked="" type="checkbox"/> Legal Messenger <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Electronic Mail

DATED this 13th day of January, 2012 in Olympia, Washington.


 M. Katy Kuchno
 Paralegal to Jon E. Cushman
 & Kevin Hochhalter