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DIVISION II

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STATE OF WASHINGTON

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No. 495741-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

DONALD LEO,
Appellant,

v.

DIANA COURT OWNERS' ASSOCIATION, an unincorporated association and VISTA VILLAGE RECREATIONAL AND MAINTENANCE ASSOCIATION, a not-for-profit corporation,
Respondents.

BRIEF OF RESPONDENT DIANA COURT

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ORIGINAL

TABLE OF CONTENTS

I. ASSIGNMENTS OF ERROR 1

A Assignments of Error 1

B Issues Pertaining to Assignments of Error 2

II. STATEMENT OF THE CASE. 3

III. SUMMARY OF ARGUMENT 3

IV. ARGUMENT 5

A Paragraph 21 Of The Diana Court Declaration Utilizes Mandatory Langauge And Therefore Is A Requirement Under Rcw 64.34.360(3). 6

B Appellant's Policy Arguments Are Unpersuasive Due To The Clear Language Of The Diana Court Declaration 14

V. ATTORNEY FEES AND COSTS 15

VI. CONCLUSION 16

TABLE OF AUTHORITIES

Washington Cases

Bogomolov v. Lake Villas Condo. Ass'n of Apartment Owners, 131 Wash. App. 353, 361, 127 P.3d 762, 766 (2006).....7

City of Spokane ex rel. Wastewater Mgmt. Dep't v. Dep't of Revenue, 145 Wash.2d 445, 454, 38 P.3d 1010 (2002).....8

Cooper v. State Dep't of Labor & Indus., 188 Wash. App. 641, 651, 352 P.3d 189, 194 (2015).....15

Lake v. Woodcreek Homeowners Ass'n, 169 Wash.2d 516, 243 P.3d 1283 (2010).....13

Skimming v. Boxer, 119 Wash.App. 748, 756–57, 82 P.3d 707, *review denied*, 152 Wash.2d 1016, 101 P.3d 108 (2004).....15

Stiles v. Kearney, 168 Wash. App. 250, 267, 277 P.3d (2012).....15

Tiger Oil Corp. v. Dep't of Licensing, 88 Wash.App. 925, 938, 946 P.2d 1235 (1997).....15

Tingey v. Haisch, 159 Wash. 2d 652, 658, 152 P.3d 1020, 1023 (2007).....8

Washington Statutes

RCW 4.84.030 15

RCW 4.84.185 15

RCW 64.32.090 10

RCW 64.32.010 (11).....10, 11

RCW 64.32.140 14

RCW 64.34.020. 11

RCW 64.34.204(2).....11

RCW 64.34.204(4).....11

RCW 64.34.208(3).....12

RCW 64.34.276 15

RCW 64.34.360(3).....6, 7

RCW 64.34.360(3)(b) 11

Washington Court Rules

RAP 14.1.....15

RAP 18.1.....15

I. ASSIGNMENTS OF ERROR

A. Assignments of Error (AOE)

(1) Paragraph 11 of the Diana Court Condominium Declaration provides that bylaws for the Diana Court Condominium Owners' Association can be approved by the affirmative vote of a majority of the owners living in the Diana Court condominiums. However, paragraph 21 of the Diana Court Condominium Declaration explicitly states members of Diana Court will accede to bylaws passed by Vista Village Recreation and Maintenance Association (VVRMA). In response to a motion for summary judgment, the trial court correctly ruled that the later provisions of the Diana Court Condominium Declaration were controlling. The court did not err in so ruling.

(2) RCW 64.34.360(3) provides expenses associated with the operation, maintenance, repair or replacement of limited common areas shall be paid by the owner of or assessed against the units for which they are specifically assigned. The unambiguous language of paragraph 21 of the Diana Court Condominium Declaration requires such expenses be individually levied against owners as determined by VVRMA. The trial court correctly determined the mandatory nature of paragraph 21 is what

requires limited common areas to be paid by the owners of individual units. The trial court did not err in so ruling.

B. Issues Pertaining to Assignments of Error

(1) Paragraph 11 of the Diana Court Condominium Declaration allows owners of living units in the Diana Court condominiums to amend their bylaws when a majority of the owners affirmatively approve them. Paragraph 21 of the Declaration delegates to VVRMA as a "master association" the power to amend and enforce bylaws with respect to all five governed Condominium Owners' associations.

a. Does paragraph 11 of the Diana Court Condominium Declaration give Diana Court members a unilateral veto to override bylaws lawfully passed by VVRMA? **Short Answer: No.**

b. Does VVRMA as master association have the authority to bind Diana Court to bylaws voted upon by a majority of the members of VVRMA? **Short Answer: Yes.**

(2) In accordance with RCW 64.34.360(3), when required, the costs of limited common areas are to be paid by owners of individual condominium units. Does the mandatory language of paragraph 21 constitute a requirement under RCW 64.34.360(3)? **Short Answer: Yes.**

II. STATEMENT OF THE CASE

The First Amended Complaint of Plaintiff was filed on February 2, 2016. CP at 04. Defendant Diana Court filed its Answer to the First Amended Complaint on March 2, 2016. *See* Designation of Clerk Papers at 1. On July 21, 2016, Appellant filed a Motion for Partial Summary Judgment accompanied with the Declaration of Donald Leo. *See* Designation of Clerk Papers at 1. *See also*, CP 295-296. Defendant Diana Court filed a response to Appellant's Motion for Partial Summary Judgment on September 9, 2016. Designation of Clerk Papers at 1. Defendant Vista Village filed a nearly identical responsive pleading on September 12, 2016. *Id.* The lower court denied Appellant's Motion for Partial Summary Judgment on September 23, 2016. *Id.* at 2. Appellant brought a Motion for Reconsideration on September 29, 2016 accompanied with a Motion for the Entry of Final Judgment. *Id.* The Court denied Appellant's Motion for Reconsideration and entered an order for Final Judgment on 10/07/2016. *Id.*

III. SUMMARY OF ARGUMENT

As argued to the lower court, the complexity of this case is perhaps best summarized by analogy. In international politics, there is what is known as a "supranational union". A supranational union is a type of multinational political union where negotiated power is delegated to an

authority by governments of member states. A chief example of a supranational union is the European Union; a union of 28 member states on the European Continent. Each member state foregoes certain amounts of sovereignty to promote channels of uniform trade, monetary systems, etc. The European Union has its own forming documents and creates laws and regulations that apply equally to all member states. Uniformity and pooling of resources are meant to provide benefits to the member states.

Similarly, this case involves an overarching governing body consisting of five Condominium Owner Associations. The Uniform Condominiums Act refers to this type of entity as a "Master association". *See generally* RCW 64.34.276. Diana Court owners have the ability to change their own by-laws or Declaration, but that right is subject to an overriding ability of Vista Village Recreation and Maintenance Association (henceforth VVRMA") to implement policies and regulations affecting all five condominium members. Appellant erroneously asserts this as a case where a Declaration provision overrides a bylaw. However, this case involves two conflicting Declaration provisions whereby members of the Diana Court have ceded authority to VVRMA allowing VVRMA to require the assessment of individual liability for limited common areas.

The Diana Court Declaration incorporates by reference amendments to the by-laws of VVRMA. When the VVRMA votes to collect fees of each of the lower courts, nothing in the Diana Court Declaration gives them the right of unilateral veto. To put in the terms of the Appellant, nothing in paragraph 11 of the Diana Court Declaration reserves a right to reauthorize lawfully passed bylaws of VVRMA.

IV. ARGUMENT

VVRMA has been the only active governing incorporated entity since 2000. The following paragraphs of Diana Court's original Declaration are what authorize VVRMA to act on Diana Court's behalf:

> Every person or entity acquiring an ownership interest in a living unity under this Declaration **shall** become a member of the Vista Village Recreational and Maintenance Association, and by acquiring said ownership interest **shall become bound by the rules and regulations and By-laws as established by the Board of Directors of the Vista Village Recreational and Maintenance Association**; and further, said purchasers acknowledge that the benefits of membership in the Vista Village Recreational and Maintenance Association are covenants running with the land and that membership in said Association may be terminated only by selling the ownership interest created under the Declaration.
>
> Membership in the Vista Village Recreational and Maintenance Association **shall include the obligation to pay dues and assessments as established by the Board of Directors of said Association according to the By-Laws of the Vista Village Recreational and Maintenance Association.** (Diana Court Declaration, ¶ 21 *Emphasis Added*). CP at 21-22.

Further, VVRMA's articles of incorporation have always allowed for an amendment of the articles of incorporation by a two-thirds vote. (*See* Article XI of VVRMA's Articles of Incorporation) See also, CP at 54. Moreover, the Articles of Incorporation vest the Board of Directors with the ability to amend or adopt new by-laws. (*See* Article VIII of VVRMA's articles of incorporation). *Id.* At 54-58

A. PARAGRAPH 21 OF THE DIANA COURT DECLARATION UTILIZES MANDATORY LANGAUGE AND THEREFORE IS A REQUIREMENT UNDER RCW 64.34.360(3).

In Appellant's brief it is clear he wishes to read in words that simply do not exist. RCW 64.34.360(3) provides:

> (3) To the extent required by the declaration:
> (a) Any common expense associated with the operation, maintenance, repair, or replacement of a limited common element shall be paid by the owner of or assessed against the units to which that limited common element is assigned, equally, or in any other proportion that the declaration provides;
> (b) Any common expense or portion thereof benefiting fewer than all of the units must be assessed exclusively against the units benefited;
> © The costs of insurance must be assessed in proportion to risk; and
> (d) The costs of utilities must be assessed in proportion to usage.

The actions taken by VVRMA are clearly lawful, and unless the Declaration provides otherwise, mandatory. The central question in this case can be boiled down to this: Does the language of Paragraph 21, *supra*,

amount to a requirement under RCW 64.34.360(3)? When viewed in context, the answer to that question is unequivocally yes.

From its inception, the Diana Court Declaration has ceded authority to VVRMA. CP at 21-22. Appellant wishes to have all the benefits of having pooled resources of VVRMA acting as a governing agency, whilst wielding a unilateral veto to any action taken by VVRMA on behalf of all of the members. There is nothing in Diana Court's Declaration giving the Court or its members this authority.

The fact there is a paragraph for enacting By-laws in Diana Court's Declaration is only the beginning inquiry. Appellant's analysis seems to end upon the reading of paragraph 11 of Diana Court's Declaration. The entirety of the Declaration as a forming document must be considered. When interpreting a document, the preferred interpretation gives meaning to all provisions and does not render some superfluous or meaningless. *Bogomolov v. Lake Villas Condo. Ass'n of Apartment Owners*, 131 Wash. App. 353, 361, 127 P.3d 762, 766 (2006). Appellant erroneously asserts that allowing VVRMA to assess these costs will invalidate paragraph 11 of the Diana Court Declaration. In fact, exactly the opposite will be true should the court overturn the lower court's ruling. The later provision of paragraph 21 utilizes the mandatory language, "shall become bound by the rules and regulations and By-laws as established by the Board of Directors

of the Vista Village Recreational and Maintenance Association". *Supra.* Further, the Diana Court Declaration states, "Membership in the Vista Village Recreational and Maintenance Association shall include the obligation to pay dues and assessments as established by the Board of Directors of said Association…" *Id.* There is no exception in this provision. There is no section that states, "Unless the members of the Diana Court vote differently". Plainly, there is no discretion for the members of Diana Court to either ratify or reject such assessments.

If this court were to rule otherwise, it would be nullifying unambiguous language that binds the members of Diana Court to decisions made by VVRMA. Merriam Webster's dictionary defines the word require as, "to demand as necessary or essential: have a compelling need for" and "to impose a compulsion or command". [a] When a term has a well-accepted, ordinary meaning, a regular dictionary may be consulted to ascertain the term's definition. *City of Spokane ex rel. Wastewater Mgmt. Dep't v. Dep't of Revenue*, 145 Wash.2d 445, 454, 38 P.3d 1010 (2002); *See also*, *Tingey v. Haisch*, 159 Wash. 2d 652, 658, 152 P.3d 1020, 1023 (2007). Require is not defined by RCW 64.34.360(3), therefore it is accorded its plain meaning. The aforementioned provision's utilization of the word "shall" leaves no question as to whether or not acceptance of the

[a] https://www.merriam-webster.com/dictionary/require

assessments at issue is legitimate. When asked to pay assessments under the terms outlined by VVRMA and its governing board, Paragraph 21 of the Diana Court Declaration commands the members to make payments. CP at 22. Diana Court members are still free to amend their own by-laws, subject to the determinations made by VVRMA.

To return to our European Union analogy, a member state is free to amend its laws or constitution within its own country. For instance, Greece can vote to change its banking laws, so long as it is not inconsistent with the European Union regulations. However, one party in the Greek parliament cannot unilaterally refuse to abide by new regulations promulgated by the European Union simply because they dislike them.

In the case at bar, Diana Court is free to amend its by-laws as it sees fit, so long as they are not inconsistent with the Declaration or relevant law. To Appellant's detriment, it just so happens that refusing to abide by VVRMA's properly executed by-laws is clearly inconsistent with Diana Court's Declaration. *Supra.* The ownership of a condominium in Diana Court is inextricably linked to membership in VVRMA. Members of Diana Court have the authority to amend their own by-laws in compliance with the Declaration, but nothing in the Declaration gives Diana Court the authority to reject amendments to VVRMA's by-laws.

As noted in Appellant's brief, Diana Court operated under by-laws duly passed for a 12 year period. CP at 30-31. Diana Court was subject to these by-laws under the terms of its own Declaration. *See* RCW 64.32.090.

The bulwark of dispute in this case surrounds costs allocated for repairs of limited common areas or limited common elements which are, generally speaking, areas or facilities reserved for the particular use of specific condominium unit owners. CP at 29-34. RCW 64.32.010 (11) defines limited common areas as follows: "Limited common areas and facilities" includes those common areas and facilities designated in the declaration, as it is duly recorded or as it may be lawfully amended, as reserved for use of certain apartment or apartments to the exclusion of the other apartments.

The Diana Court Declaration states:

> "Limited Common Area" shall consist of carports, carport storage pods, patios and the Living Unit Foundations, columns, girders, beams, supports, main walls, roofs, windows and entrances and exits, as identified in the Survey Map recorded herewith. The use and enjoyment of these 'Limited Common Areas' shall be limited to 'designated owners' as shown on the Map recorded herewith. Provided, however, that the use of the designated owner shall not interfere with the proper use of adjacent owners, particularly with reference to carport areas to the end that the use of the limited common area shall not be so exclusive as to deprive other owners from the use and enjoyment of their portion of the 'limited common areas'

(Diana Court Declaration, ¶ 1subsection (g)). CP at 36

RCW 64.34.020 augmented this definition as follows:

(27) "'Limited common element' means a portion of the common elements allocated by the declaration or by operation of RCW 64.34.204 (2) or (4) for the exclusive use of one or more but fewer than all of the units."

Appellant's brief characterizes limited common areas as a subset of common areas without citation to authority. While Respondent staunchly disagrees with this characterization, such disagreement is immaterial because the Diana Court Declaration definition is controlling. RCW 64.32.010 (11) *Supra.*

Appellant brought this action because, *inter alia*, he did not agree that he should bear the costs of gutters being replaced on a covered space that he and two others owned. CP at 30-33. Carports and gutters affixed thereto are a limited common area. (Diana Court Declaration, ¶1 subsection (g)). CP at 36. This limited common area clearly is for the benefit of fewer than all units. RCW 64.34.360(3)(b). As is clear, VVRMA properly amended its own by-laws on April 17, 2014. This argument was explicitly made by both Respondents in the lower court. *See* CP at 187. VVRMA again amended its by-laws on October 21, 2015 without the signature of the President of Diana Court. CP at 90. The lack of signature from Diana Court did not negate the validity of this Amendment. *Id.* The amended by-laws of VVRMA, once properly executed, became

incorporated by reference via the Diana Court Declaration. The title of the relevant document is even named "Amended and Restated Vista Village Condominiums Bylaws of the Court Owners' Associations". CP at 76.

The Diana Court Declaration explicitly states, "Membership in the Vista Village Recreational and Maintenance Association shall include the obligation to pay dues and assessments … according to the By-Laws of the Vista Village Recreational and Maintenance Association." (Diana Court Declaration, ¶ 21, *supra.)* Therefore, this language makes acceptance of duly executed by-laws of VVRMA mandatory. The fact that Diana Court did not change its by-laws is immaterial; as Appellant has pointed out, when by-laws conflict with the Declaration, the Declaration is controlling. RCW 64.34.208(3).

Appellant asserts that nothing in the Diana Court Declaration authorizes expenses be imposed on individual unit owners for limited common areas. While it is technically true that nothing explicitly gives Diana Court this authority, it is not Diana Court who is assessing these costs directly. It is VVRMA which is assessing costs under the terms of its lawfully executed by-laws. This authority is vested to VVRMA under the aforementioned terms of Diana Court's Declaration. In essence, Diana Court ceded this authority to VVRMA as indicated by Diana Court's Declaration. Under the Horizontal Property Regimes Act (HPRA), each

owner, in exchange for the benefits of association with other owners, must give up a certain degree of freedom of choice which he or she might otherwise enjoy in separate, privately owned property. *Lake v. Woodcreek Homeowners Ass'n,* 169 Wash.2d 516, 243 P.3d 1283 (2010). Just as a country cedes certain parts of its sovereignty to benefit from a uniform system under the European Union, so too has Diana Court ceded this authority to VVRMA. *Id.*

Finally, Appellant relies on paragraph 14 of the Diana Court Declaration, but the controlling language supports respondent's position. Subsection (a) of paragraph 14 of the Diana Court Declaration reads:

> Within thirty (30) days prior to the beginning of each fiscal year, the Board shall estimate the net charges to be paid during such year, including a reasonable provision for contingencies and replacements (less any expected income in any surplus from the prior year's fund). In establishing each unit's share of the "estimated cash requirements", some costs will be allotted evenly, others by unit square footage, as the Board deems appropriate. If said sum estimated proves inadequate for any reason, including nonpayment of any owner's assessment, the Board may at any time levy a further assessment, which shall be assessed to the owners in like proportions, ***unless otherwise provided herein***. Each owner shall be obligated to pay assessments made pursuant to this paragraph to the Board in equal monthly installments on or before the first of each month during such year, or in such other reasonable manner as the Board shall designate. CP at 18.

The case at bar clearly falls under the ambit of "otherwise provided herein". Paragraph 21 of the Diana Court Declaration authorizes collection of fees and assessments under the terms of VVRMA by-laws. Nothing

gives Diana Court, or its members, the ability to essentially opt out because they wish to avoid the costs. This is tantamount to a default in payment outlined in paragraph 15 of the Diana Court Declaration. VVRMA has acted on behalf of Diana Court and its members for over forty years with authority being vested directly to VVRMA by Diana Court's Declaration. Appellant now wishes to unilaterally alter this arrangement to save himself costs in relation to limited common areas that benefit only him. Nothing in the Diana Court Declaration gives him this authority.

B. APPELLANT'S POLICY ARGUMENTS ARE UNPERSUASIVE DUE TO THE CLEAR LANGUAGE OF THE DIANA COURT DECLARATION

Appellant outlines various arguments concerning amendments to the Declaration pursuant to RCW 64.32.140. Given the history of VVRMA, these arguments are unavailing. Diana Court is an unincorporated entity, and has taken little to no action in forming or drafting bylaws over the history of these institutions. CP at 30. Moreover, the vesting of power in VVRMA has existed in the Declarations since their inception over thirty years ago. CP at 05-06. Appellant had clear notice that many of the powers traditionally held by any one court had been given to VVRMA. *Id.* There is nothing in the Declaration that gives authority to

reject actions taken by VVRMA. This was the benefit of the bargain when Mr. Leo purchased his condominium. The discretionary power of VVRMA as a master association is both lawful and explicitly outlined in the Diana Court Declaration. *See generally*, RCW 64.34.276.

V. ATTORNEY FEES AND COSTS

A prevailing party on appeal is entitled to costs and disbursements. RCW 4.84.030. *Cooper v. State Dep't of Labor & Indus.*, 188 Wash. App. 641, 651, 352 P.3d 189, 194 (2015); *See also*, RAP 14.1. Further, Respondent is entitled to attorney's fees when opposing a frivolous action or defense. RCW 4.84.185. "A lawsuit is frivolous when it cannot be supported by any rational argument on the law or facts." *Skimming v. Boxer*, 119 Wash.App. 748, 756–57, 82 P.3d 707, *review denied*, 152 Wash.2d 1016, 101 P.3d 108 (2004). (*quoting Tiger Oil Corp. v. Dep't of Licensing*, 88 Wash.App. 925, 938, 946 P.2d 1235 (1997)).

Appellant has failed to support any rational argument based on the facts of this case or the governing law therein. Frivolous appeals on a summary judgment motion entitle respondent to attorney's fees. RCW 4.84.185. Award of attorney's fees is supported by court rules and case law in this instance. RAP 18.1; *Stiles v. Kearney*, 168 Wash. App. 250, 267, 277 P.3d (2012).

VI. CONCLUSION

Appellant has presented no new or novel issues on appeal. Simply put, Appellant's analysis of the Diana Court Declaration appears to start and stop at paragraphs 11 and 14. When considered as a whole, it is clear that Diana Court members have ceded authority to VVRMA in order to pool their resources with the four other courts. While the authority to assess limited common areas individually has lain dormant for years, that does not make it any less valid. As a master association, VVRMA has now lawfully amended its bylaws and enacted new assessments against members of all five courts. Under the clear terms of paragraph 21 of the Diana Court Declaration, members are now required to pay these assessments. Because no other logical reading can follow, this Court should deny the appeal and award respondent's attorney fees.

Respectfully submitted this 23rd day of December, 2016.

Paul J. Boudreaux, WSB#49038
Attorney for Respondent Diana Court

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STATE OF WASHINGTON)
) ss.
COUNTY OF THURSTON)

CATHERINE HITCHMAN, being first duly sworn on oath, deposes and states:

That I am now and at all times herein mentioned was a citizen of the United States, a resident of the State of Washington, and over the age of eighteen (18) years and not a party to or interested in the above-entitled matter.

I certify that on the 29th day of December, 2016, I served a copy of the Brief of Respondent Diana Court, by ABC Legal Messenger and by email, on the following:

Matthew B. Edwards
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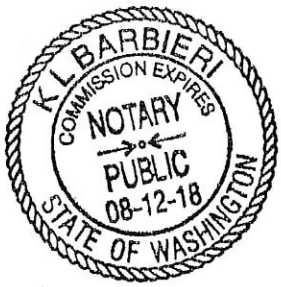
1115 West Bay Dr, Ste. 302
Olympia, WA 98502
Attorney for Plaintiff

DATED this 29th day of December, 2016.

Catherine Hitchman

Catherine Hitchman

SIGNED AND SWORN to before me this 29th day of December, 2016, by Catherine Hitchman.



K L Barbieri

NOTARY PUBLIC in and for the State of Washington, residing at Olympia.
My commission expires: 08-12-18