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THE COURT OF APPEALS, DIVISION II

State of Washington

North Oakes Manor Condominium Association,

Appellant,

Vs.

2nd Half LLC, Jeffrey Alan Graham, Stephen Roy Dawson,
and John Stafford Mills and Julie Mills,

Respondents.

**JOINT RESPONSE BRIEF OF
DEFENDANTS MILLS & DAWSON**

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Statutes

RCW 64.34.268:

Termination of condominium.

(1) Except in the case of a taking of all the units by condemnation under RCW 64.34.060, a condominium may be terminated only by agreement of unit owners of units to which at least eighty percent of the votes in the association are allocated, or any larger percentage the declaration specifies: PROVIDED, That the declaration may specify a smaller percentage only if all of the units in the condominium are restricted exclusively to nonresidential uses.

(2) An agreement to terminate must be evidenced by the execution of a termination agreement or ratifications thereof, in the same manner as a deed, by the requisite number of unit owners. The termination agreement must specify a date after which the agreement will be void unless it is recorded before that date and shall contain a description of the manner in which the creditors of the association will be paid or provided for. A termination agreement and all ratifications thereof must be recorded in every county in which a portion of the condominium is situated and is effective only upon recording. A termination agreement may be amended by complying with all of the requirements of this section.

(3) A termination agreement may provide that all the common elements and units of the condominium shall be sold following termination. If, pursuant to the agreement, any real property in the condominium is to be sold following termination, the termination agreement must set forth the minimum terms of the sale.

(4) The association, on behalf of the unit owners, may contract for the sale of real property in the condominium, but the contract is not binding on the unit owners until approved pursuant to subsections (1) and (2) of this section. If any real property in the condominium is to be sold following termination, title to that real property, upon termination, vests in the association as trustee for the holders of all interests in the units. Thereafter, the association has all powers necessary and appropriate to effect the sale.

Until the sale has been concluded and the proceeds thereof distributed, the association continues in existence with all powers it had before termination. Proceeds of the sale must be distributed to unit owners and lienholders as their interests may appear, in proportion to the respective interests of unit owners as provided in subsection (7) of this section. Unless otherwise specified in the termination agreement, as long as the association holds title to the real property, each unit owner and the owner's successors in interest have an exclusive right to occupancy of the portion of the real property that formerly constituted the owner's unit. During the period of that occupancy, each unit owner and the owner's successors in interest remain liable for all assessments and other obligations imposed on unit owners by this chapter or the declaration.

(5) If the real property constituting the condominium is not to be sold following termination, title to all the real property in the condominium vests in the unit owners upon termination as tenants in common in proportion to their respective interests as provided in subsection (7) of this section, and liens on the units shift accordingly. While the tenancy in common exists, each unit owner and the owner's successors in interest have an exclusive right to occupancy of the portion of the real property that formerly constituted the owner's unit.

(6) Following termination of the condominium, the proceeds of any sale of real property, together with the assets of the association, are held by the association as trustee for unit owners and holders of liens on the units and creditors of the association as their interests may appear. No such proceeds or assets may be disbursed to the owners until all of the creditors of the association have been paid or provided for. Following termination, creditors of the association holding liens on the units, which were recorded or perfected under RCW 4.64.020 before termination, may enforce those liens in the same manner as any lienholder.

(7) The respective interests of unit owners referred to in subsections (4), (5), and (6) of this section are as follows:

(a) Except as provided in (b) of this subsection, the respective interests of unit owners are the fair market values of their units, limited common elements, and common element interests immediately before the termination, as determined by one or more independent appraisers selected by the association. The decision of the independent appraisers shall be distributed to the unit owners and becomes final unless disapproved, within thirty days after distribution, by unit owners of units to which twenty-five percent of the votes in the association are allocated. The proportion of any unit owner's interest to that of all unit owners is determined by dividing the fair market value of that unit owner's unit and common element interest by the total fair market values of all the units and common elements.

(b) If any unit or any limited common element is destroyed to the extent that an appraisal of the fair market value thereof before destruction cannot be made, the interests

of all unit owners are their respective common element interests immediately before the termination.

(8) Except as provided in subsection (9) of this section, foreclosure or enforcement of a lien or encumbrance against the entire condominium does not of itself terminate the condominium, and foreclosure or enforcement of a lien or encumbrance against a portion of the condominium, other than withdrawable real property, does not withdraw that portion from the condominium. Foreclosure or enforcement of a lien or encumbrance against withdrawable real property does not of itself withdraw that real property from the condominium, but the person taking title thereto has the right to require from the association, upon request, an amendment excluding the real property from the condominium.

(9) If a lien or encumbrance against a portion of the real property that is withdrawable from the condominium has priority over the declaration, and the lien or encumbrance has not been partially released as to a unit, the purchaser at the foreclosure or such purchaser's successors may, upon foreclosure, record an instrument exercising the right to withdraw the real property subject to that lien or encumbrance from the condominium. The board of directors shall reallocate interests as if the foreclosed portion were condemned.

(10) The right of partition under chapter 7.52 RCW shall be suspended if an agreement to sell the property is provided for in the termination agreement pursuant to subsection (3) of this section. The suspension of the right to partition shall continue unless and until no binding obligation to sell exists three months after the recording of the termination agreement, the binding sale agreement is terminated, or one year after the termination agreement is recorded, whichever first occurs.

[1992 c 220 § 12; 1989 c 43 § 2-118.]

INTRODUCTION

North Oakes Manor was a condominium located in Tacoma's North End. The controlling board members at the time, George and Heather Rankos, had been involved in years of conflict, animosity, and litigation with another unit owner, 2nd Half LLC. CP 17, 135.

In 2017, the condominium was terminated and all the buildings and grounds sold because it was discovered that the value of the owner's units could be essentially doubled if the condominium was terminated and the property converted to a rental apartment complex and sold. CP 136.

The owners had different reasons to terminate the condominium. Most owners simply wanted to double the value of their units and get separated from all the fighting.

But, for 2nd Half, ending all the expensive litigation driven by the Rankos-controlled board was its highest priority. Ending all the litigation was financially much more valuable to 2nd Half than selling its two units. CP 137-38.

The proposed Termination Agreement, as drafted by the Association's lawyer, would have allowed the Association to control trust assets without any direct owner oversight. CP

137-38. 2nd Half exercised its right not to sign that draft of the Termination Agreement. Id.

Before it signed, 2nd Half insisted that the language be changed to assure that the owners held direct control over trust assets, including claims against 2nd Half. The final, signed Termination Agreement contract provided for direct owner control by requiring that any plan of payment and distribution of trust assets be authorized by 80% vote of the owners. CP 138-39.

2nd Half fully performed all its obligations under the Termination Agreement and cooperated fully in the sale. The entire project sold for \$1.3 million in September of 2017.

It's undisputed that within 24 hours after the sale was completed, the Rankos-board disbursed all net sale proceeds. CP 172-73. Once the Rankos had their money from the sale of their three units – again, having doubled their three units' value because of 2nd Half's cooperation in the termination sale – they immediately filed this action, continuing their litigation vendetta against 2nd Half. CP 98. The Association ignored the Termination Agreement contract and filed its Amended Complaint without even trying to obtain the

required 80% owner authorization for litigation. CP 139-40, 269-73.

The case was dismissed by the trial court as being unauthorized and the Rankos-board appeals. CP 462-470.

COUNTER-STATEMENT OF THE CASE

In 2016, the condominium owners, at the urging of the Rankos-board, amended the Declaration of Condominium to allow all units in the condominium to be rented. CP135-36. After 2016, all units were rented out; there were no owner-occupied units left in the condominium. This made it almost impossible to sell anyone's unit using bank financing because banks require a substantial owner-occupancy percentage before financing a condominium purchase. Id.

In the summer of 2017, the owners were faced with units essentially unsaleable as individual condominiums. They were also faced with constant bickering and expensive litigation between the Rankos-board and 2nd Half. CP 136.

To solve these intractable problems, 100% of the owners signed a written agreement to terminate the

condominium and sell the condominium as an apartment building. It was discovered that the complex, as an apartment building, was worth double the value per unit compared to its value as individual condominiums. CP 136.

Termination of a condominium is a very rare event and is controlled specifically by RCW 64.34.268.

Neither the Association nor its board have authority to terminate a condominium under any of the general provisions of Washington's Condominium Act. The specific statute on condominium termination vests exclusive authority to terminate a condominium in the owners of the condominium units. RCW 64.34.268(1).

The termination statute requires, at a minimum, that 80% of the unit owners must agree to termination and the owners' agreement must be in writing, must be notarized, must be recorded, and must provide for how creditors of the Association are to be paid. RCW 64.34.268(1) and (2). In this case, 100% of the owners signed the final written Termination Agreement pursuant to the statute which was recorded as required by law. CP 146-53, 366.

The termination statute provides that proceeds of sale along with all other assets of the Association must be placed

in an express trust for the benefit of owners and creditors. Express trusts are "[t]hose trusts which are created by contract of the parties and intentionally." *Farrell v. Mentzer*, 102 Wash. 629, 632, 174 P. 482 (Wash. 1918). "An express trust is one created by the act of the parties; and, where a person has, or accepts, possession of money, promissory notes, or other personal property with the express or implied understanding that he is not to hold it as his own absolute property, but to hold and apply it for certain specified purposes, an express trust exists." *Westview Investments, Ltd. v. U. S. Bank Nat. Ass'n*, 133 Wn.App. 835, 845-46, 138 P.3d 638, (Wash.App. Div. 1 2006), (internal quotation marks omitted) (quoting *State v. Southard*, 49 Wash.App. 59, 63 n. 3, 741 P.2d 78 (1987)). RCW 64.34.286(6).

Once termination occurs, the Association and its board have no further economic or financial interest in any of the express trust assets, only owners and creditors do.

The written Termination Agreement contract signed by 100% of the unit owners controls the termination process pursuant to RCW 64.34.268. The statute and its required owners' Termination Agreement contract governs exclusively

how creditors are paid and how assets are distributed to the former unit owners.

The Termination Agreement contract must contain a description of the manner in which the creditors of the association will be paid or provided for. RCW 64.34.268(2). In this case, the owners' Termination Agreement contract provided that, after sale of their property, "*Pursuant to a payment and disbursement plan that is agreed to by the unit owners to which at least eighty percent of the votes in NOM Association are allocated, NOM Association shall pay its creditors and disburse its remaining assets to the unit owners.*" CP 381.

As a result of their intensely negotiated Termination Agreement contract, 100% of the owners agreed that any plan to pay creditors and disburse their trust assets must be authorized by at least 80% of the owners. CP 381.

Post-termination, by operation of RCW 64.34.268 and pursuant to the express provisions of the owners' Termination Agreement contract, the proceeds of sale and all assets of the association, including any legal claims the Association might have had prior to termination, were

transferred into an express trust for the benefit of creditors and owners.

As specified by the termination statute, post-termination, the Association owns no assets. In this case, the Association's duty, as trustee was specifically defined by the owners'/trustors' Termination Agreement contract. As Trustee, the Association's duty was to obtain authorization from at least 80% of the owners before executing any "Plan of Payment and Disbursement" of trust assets.

A termination agreement may be amended only by agreement of 80% of the owners. RCW 64.34.268(2). The Termination Agreement contract in this case, signed by 100% of the owners, was never amended by the owners.

The Association and its board are totally subject to the authority and control of the owners on matters of terminating a condominium. When the condominium terminates, the board becomes merely a trustee obligated to follow the instructions of the owners as specified in their termination agreement contract. RCW 64.34.268(1) and (6). At its heart, this is an action by the trustee to amend or reform a trust instrument – the Termination Agreement contract, signed by 100% of the owners – because the trustee

doesn't like the restrictions placed on it by the trust instrument.

It's undisputed that to reach the requisite 80% owner approval required for termination and sale of a condominium under the termination statute, 2nd Half had to approve the termination and sale because 2nd Half owned 25% of the units. RCW 64.34.268(1).

It's undisputed that the Termination Agreement contract eventually signed by 100% of the owners, provided:

The remaining proceeds of sale and all other assets of NOM Association will be held by it as trustee for its creditors and the unit owners. Pursuant to a payment and disbursement plan that is agreed to by the unit owners to which at least eighty percent of the votes in NOM Association are allocated, NOM Association shall pay its creditors and disburse its remaining assets to the unit owners as their interests may appear.

CP 350.

It's undisputed that because 2nd Half owned 25% of the voting power (as Judge Murphy observed) that all owners knew, when they negotiated and signed the Termination Agreement, that **no** plan of payment and disbursement would be approved by 80% of unit owners if the plan included continued litigation against 2nd Half.

All the owners knew that 2nd Half would never authorize litigation against itself when they signed the Termination Agreement.

When negotiating and signing the Termination Agreement contract, all the owners made arms-length choices that were economically beneficial to themselves.

2nd Half signed to end the litigation. Other owners made an economic decision to trade the uncertainty and expense of a lawsuit against 2nd Half, which if totally successful might have returned \$10,000 per unit, (CP 428-29, 109) for the sure doubling of their unit's value by selling as an apartment building.

These were logical and practical arms-length economic decisions, and 100% of the owners signed the Termination Agreement contract as finally drafted.

It's undisputed that the express language of the owners' written Termination Agreement contract requires that 80% of the owners authorize any plan for the disbursement of trust assets, which include any claims against 2nd Half. The statute and Termination Agreement contract both require that all assets be placed in an express trust for benefit of the owners and creditors.

This case was dismissed by the Superior Court as unauthorized. It is ***undisputed*** that 80% of the owners did not authorize prosecution of this lawsuit. CP 426-46.

The Superior Court found that the Termination Agreement was a binding contract between all the owners and it complied with RCW 64.34.268.

The Superior Court found that no action had been authorized by the required 80% of owners and dismissed the case as unauthorized. CP 469-70.

There was no error and the Superior Court's decision should be affirmed.

APPLICABLE LAW AND ARGUMENT

Appellant makes four assignments of error and identifies six issues associated with its assignments of error.

The four assignments of error and six issues identified by appellant seems to respondents not to be all logically connected. The argument sections and headings seem, in places, convoluted and confusing.

Accordingly, respondents believe it is more logical to organize the response brief by first addressing the four assignments of error, then separately addressing appellant's six identified issues.

APPELLANT’S FOUR ASSIGNMENTS OF ERROR.

Appellant’s first assignment of error is not well taken. The trial court properly concluded that, pursuant to RCW 64.34.268 and the condominium Termination Agreement contract signed by 100% of owners, that proceeds of the condominium sale along with all other assets of the Association were to be transferred into an express trust when the condominium terminated.

Appellant’s first assignment of error is:

The trial court erred by ruling on February 27, 2018, that under RCW 64.34.268 and the Termination Agreement the condominium property’s sale proceeds and all the other assets of the Association were placed in a trust.

The condominium termination statute – RCW

64.34.268(6) – says specifically:

Following termination of the condominium, the proceeds of any sale of real property, together with the assets of the association, are held by the association as trustee for unit owners and holders of liens on the units and creditors of the association as their interests may appear.

The plain language of the statute, identifying the Association as “trustee” of all assets post-termination, clearly intends that all assets be placed in an express trust. *See e.g.* Restatement 2nd Trusts 3(3) (“Trustee. Person holding property in trust.”) ***A trustee holds trust assets.***

It's not error to follow the express provisions of the specific statute controlling termination of a condominium in determining that post-termination, the Association holds all assets as trustee of an express trust. See RCW 64.34.268(6).

The Termination Agreement contract required by the termination statute, and signed by 100% of the owners, specifically says:

The remaining proceeds of the sale and all other assets of NOM Association will be held by it as trustee for its creditors and the unit owners.

The Termination Agreement contract also identifies the Association as trustee. It should be undisputed that a trustee holds trust assets. It's not error to follow the clear and unequivocal provisions of the owners' Termination Agreement contract signed by 100% of the owners creating an express trust for all assets.

The owners' Termination Agreement contract establishing the express trust is completely consistent with the statutory provisions on terminating a condominium. The statute also requires that all assets of the Association be placed in trust after termination and sale. RCW 64.34.268(6). It's not error to follow the statute and the Termination

Agreement contract, both of which establish an express trust for the assets.

At page 16 of appellant's brief, appellant asserts that:

RCW 64.34.376, titled "Association as Trustee," expressly limits the application of doctrines from the statutory and common law of trusts when a condominium association is holding insurance proceeds or termination sale proceeds for unit owners, lien or mortgage holders, and creditors.

However, RCW 64.34.376 only addresses third-persons dealing with an association as trustee. It says absolutely nothing about limiting the statutory or common law of trusts.

RCW 64.34.376 actually says:

With respect to a third person dealing with the association in the association's capacity as a trustee, the existence of trust powers and their proper exercise by the association may be assumed without inquiry. A third person is not bound to inquire whether the association has power to act as trustee or is properly exercising trust powers. A third person, without actual knowledge that the association is exceeding or improperly exercising its powers, is fully protected in dealing with the association as if it possessed and properly exercised the powers it purports to exercise. A third person is not bound to assure the proper application of trust assets paid or delivered to the association in its capacity as trustee.

There's simply no fair reading of this statute allowing the conclusion that the law of trusts does not apply to the trustee when a condominium terminates. Nowhere does RCW

64.34.376 limit in any way the application of trust law to any aspect of any condominium termination.

The statute cited by appellant (RCW 64.34.376) only applies to third persons dealing with an Association acting as trustee, and simply allows a third person to assume an Association is properly exercising trust powers when it purports to act as a trustee.

At page 16 of appellant's brief, it's asserted that:

RCW 64.34.268 and .352 serve merely to extend the fiduciary duties owed by a condominium association's board always to its own members to sometimes include other parties.

Condominium boards sometimes owe duties to parties not members of the association. However, that doesn't change the explicit language of RCW 64.34.268 stripping the Association of any beneficial ownership interest in assets, and directing that the Association hold all assets after termination as a trustee only.

Before termination the Association owned and controlled assets in its own name, including the right to sue 2nd Half for allegedly unpaid dues. *After termination*, because the termination statute strips the Association of all beneficial ownership of its assets, including the right to sue

2nd Half, the statute transforms the Association from an owner of assets to a mere Trustee of an express trust.

At page 18, appellant asserts that:

Nothing in the WCA or the WNCA permits a group of non-director members/owners, even 80% of them, to limit the authority and responsibility of a board of directors to manage the corporation's assets and liabilities.

But, RCW 64.34.268 tells us that post-termination, the Association holds no assets except as a trustee. There are no assets beneficially owned by the Association for its board "to manage" post-termination.

At page 18, appellant asserts that:

If the termination of a condominium caused an association to be governing by TEDRA [Sic] while holding title and other assets before a sale, or holding proceeds and other assets after a sale, the conflicts between the provisions of the WCA, the WNCA, and TEDRA would be irreconcilable.

The problem with this assertion is that it ignores the explicit language of the termination statute directing that, from the time the Termination Agreement is signed and recorded, the Association holds all assets **as a trustee only**. The Association no longer owns, in its own right, any beneficial interest in any asset. Trustees are clearly governed by Washington's trust law.

There's no conflict between the RCW 64.34.268, the termination statute, and Washington's law of trusts because at termination, the Association becomes simply a trustee of an express trust.

Title 11 is a codification of Washington's law on trusts. RCW 11.97.010 indicates that the specific provisions of any trust instrument governs over the law generally identifying a Trustee's powers. It says:

The trustor of a trust may by the provisions of the trust . . . alter or deny any or all of the privileges and powers conferred by those provisions; or may add duties, restrictions, liabilities, privileges, or powers to those imposed or granted by those provisions. If any specific provision of those chapters is in conflict with the provisions of a trust, **the provisions of the trust control.**

(Emphasis added.)

There is no statute or case authority granting a Trustee the right to bring litigation in the trustee's own name to amend or reform the instructions or limitations imposed on a trustee by trustors.

As trustee, the Association is limited in its authority by the terms of the owners'/trustor's Termination Agreement contract, which in this case requires an 80% owner authorization for any litigation. See RCW 11.97.010.

RCW 64.34.268 mandates that a Termination Agreement provide a plan for paying creditors. The plan may or may not limit the authority of the Association as Trustee.

If the Termination Agreement *does* limit the Association's authority over trust assets, then RCW 11.97.010 makes clear that the Termination Agreement contract supersedes the Association's general powers as trustee under Washington's Trust Act.

In this case, the Termination Agreement signed by 100% of the owners/trustors limits the Trustee's authority, prohibiting execution of any plan for payment and disbursal of trust assets that is not authorized by 80% of the owners. That's not in *conflict* with RCW 11.97.010, it's *consistent* with Washington's codified trust law.

It's not error for the Superior Court to hold that the Association, when acting as Trustee in this case, must abide by the instructions in the Termination Agreement contract, signed by 100% of the owners/trustors. That Termination Agreement contract requires that any plan or action regarding the trust assets be authorized by 80% vote of the owners.

Appellant's Second assignment of error is not well taken because the trial court properly dismissed this case when appellant admitted it could not secure an 80% vote of owners authorizing this lawsuit as required by the owners' Termination Agreement contract.

Appellant's second assignment of error is:

In response to 2nd Half's CR 12(b)(6) motion, the trial court erred on January 5, 2018, by initially staying the proceeding, and on February 17, 2018, by dismissing the Association's complaint for the reason that it was not authorized by a vote of former unit owners to whom 80 percent of the votes in the Association were allocated.

This is a meritless claim of error because, as to staying the proceedings on January 5, 2018, the Association had not even tried to obtain authorization from 80% of owners to litigate. The trial court could have dismissed the action at that time, but instead stayed proceedings to allow the Association an opportunity to secure authorization from 80% of the owners to litigate. No harm resulted to the Association from that stay.

By February 8, 2018, the Rankos stated in writing that they absolutely refused to even meet with 2nd Half to develop a plan of payment and disbursement, continuing a years-long feud with 2nd Half. CP 428. As a result of that refusal to even meet, the Association admitted it could not get authorization from 80% of the owners to litigate as required

by the Termination Agreement. Accordingly, there's no error in dismissing the action as unauthorized on February 17, 2018.

The Association has made a raft of scurrilous claims against the defendants in their appellate brief. But, this action was dismissed because the trial court found that the Association is not authorized to bring **any** claims without approval from 80% of the owners against **any** defendant.

The owners contracted away the right to file lawsuits without 80% owner approval in order to get 2nd Half's agreement to terminate and sell the condominium because they knew selling would double the value of their units.

Appellant, having no substantial defense to the question of authority to litigate, has focused the majority of it's briefing on describing what it calls "meritorious claims." The Association paints defendants as the villains, but spends little time addressing the fundamental question of whether the owners contracted away the right to sue defendants because of their desire to double the value of their units.

The Association really doesn't have credible arguments on the authorization issue, and so spends the bulk of its brief restating the underlying claims asserted in its

complaint. All these claims were considered by the trial court. The merits of those claims are irrelevant to the basis for dismissal – the Association’s fundamental lack of authority to file claims without approval from 80% of the former unit owners.

Appellant’s third assignment of error is not well-taken because post-termination, the Association owned no funds; all assets of the Association were transferred to trust.

Appellant identifies its third assignment of error as:

The trial court erred on December 1, 2017, by barring the Association from controlling its own funds.

The court did not err because when the condominium was terminated and all real estate sold, pursuant to RCW 64.34.268 and pursuant to the written Termination Agreement contract signed by 100% of the owners, the sale proceeds and all other assets of the Association were transferred to an express trust held for the benefit of the owners. No funds at that point were any longer owned beneficially by the Association.

The Association was never barred from “controlling its own funds,” because the Association owned no funds after the condominium terminated.

Appellant’s fourth assignment of error is moot because the appointment of a receiver at this juncture serves no purpose as there are no rents to interdict because all of the condominiums have been sold.

The appellant last identifies as error:

The trial court erred on March 17, 2017, by denying the Association’s motion to appoint a receiver for 2nd Half’s units to collect and apply its tenants’ rents to 2nd Half’s delinquent assessments.

RCW 64.34.364(10) allows the court to appoint a receiver to collect rents from a tenant in a unit not owner-occupied to satisfy an association’s lien for unpaid dues.

The appointment of a receiver was not relief requested in the appellant’s Amended Complaint because, as part of the owners’ negotiation for a Termination Agreement contract, the owners agreed to sell the condominium free and clear of all lien claims, including any claim on 2nd Half’s units for unpaid dues. CP 350.

Back on March 27, 2017, when a receiver was requested under appellant’s original complaint, the trial

court declined to appoint a receiver because the court believed there was a genuine dispute about whether 2nd Half owed any dues. (CP 13-15, 16-51.)

More importantly, all issues relating to a receiver are moot because 100% of the owners, in their Termination Agreement contract, agreed to sell the entire condominium complex. It has been sold and there are no longer any rents for a receiver to collect.

A case is moot if the court "cannot provide the basic relief originally sought... or can no longer provide effective relief " *Bavandu. One WestBank, FSB*, 176 Wn.App. 475, 510, 309 P.3d 636 (2013) (alteration in original) (internal quotations marks omitted) (quoting *Dioxin/Organochlorine Ctr. v. Pollution Control Hearings Bd.*, 131 Wn.2d 345, 350-51, 932 P.2d 158 (1997)).

There would be no point in reversing and directing the appointment of a receiver; there would be nothing for a receiver to do.

APPELLANT'S SIX ISSUES.

The body of law applicable to this case is the Washington Condominium Act, and particularly it's special section on terminating a condominium, along with the law of trust applicable to express trusts.

The appellant first identifies as an issue:

What body of law applies?" ("Issue #1")

The applicable body of law is the Washington Condominium Act ("WCA"); and specifically RCW 64.34.268, which controls the termination of condominiums.

The WCA has a *general* provision vesting the Board with authority to conduct the ordinary, routine business of the condominium. *See* RCW 64.34.308.

However, the WCA also has a *specific* provision applying to the rare process by which a condominium is terminated and it's real estate sold. RCW 64.34.268 controls termination. It directs how sales proceeds and all other assets of the association must be distributed.

The *specific* statute on termination governs this case because this case involves termination of a condominium. It's not a case about the ordinary operation of a condominium's business affairs. The legislature specifically provided special rules applicable to the unique process of

condominium termination and asset distribution. The special statutory provisions applicable to termination are different from the rules governing the general business operations of the condominium.

To the extent there is a conflict over control of assets, the *specific* termination statute, which vests control of the termination process exclusively with the owners, supersedes the *general* statute giving the board control over routine business activities. “When there is a conflict between one statutory provision which treats a subject in a general way and another which treats the same subject in a specific manner, the specific statute will prevail.” See *Pannell v. Thompson*, 91 Wash.2d 591, 597, 589 P.2d 1235 (1979) (citing *Olson v. University of Washington*, 89 Wash.2d 558, 562, 573 P.2d 1308 (1978); *Hama Hama Co. v. Shorelines Hearings Bd.*, 85 Wash.2d 441, 536 P.2d 157 (1975); *Johnston v. Beneficial Man. Corp.*, 85 Wash.2d 637, 538 P.2d 510 (1975); *Knowles v. Holly*, 82 Wash.2d 694, 513 P.2d 18 (1973); 2A Sutherland, Statutory Construction § 51.05 (4th ed. C. Sands 1973).

The Association is asserting that its board has authority to “manage” assets post-termination. They are

trying to apply the general rule of routine condominium business operation and ignore the specific rule governing termination of condominiums.

RCW 64.34.268 is the specific rule. It provides that owners control the termination process through their Termination Agreement contract. Here, the owners, who exclusively control termination, agreed that the owners had to authorize any plan of payment and disbursement of assets by 80% vote. The owners, by this 80% rule, intentionally restricted the general powers of the trustee over trust assets.

Litigating without approval from 80% of the owners usurps the owners' control over the termination process and particularly over asset distribution. 100% of the NOMCA owners agreed to the 80% authorization requirement.

Because the specific statute relating to termination supersedes the general statute on conducting routine Association business, it's the specific statute on Termination that controls, when analyzing a condominium's termination process and procedure.

The trial court did not err in determining that the owners' Termination Agreement contract should govern the termination process notwithstanding the condominium act's

general rule authorizing the board to act on routine business matters *other than* termination.

Both the statute controlling termination of condominiums and the Termination Agreement contract signed by 100% of unit owners converts the Association into a trustee of all assets when the condominium terminates.

Appellant identifies as its second issue:

Did the Termination Agreement render the Association and its board of directors merely a custodial trustee with no authority to manage its assets and possible liabilities, including litigating contested issues, except as directed by an 80-percent vote of the former unit owners? (Issue #2.)

Through its briefing, appellant regularly alludes to the assets “of the Association,” but, post-termination, the Association owns no beneficial interest in *any* asset. All assets of the association are placed in an express trust as required by operation of the termination statute (RCW 64.34.268) and by the plain language of the Termination Agreement contract.

The owners’ Termination Agreement contract establishes an express trust holding all proceeds of sale and all former assets of the Association. Post-termination there

can be no “management” by the Association of “***its assets***” because, post-termination the Association owns no assets.

The Termination Agreement signed by 100% of the unit owners establishes an express trust and provides: “*The remaining proceeds of the sale and all other assets of NOM Association will be held by it as trustee for its creditors and the unit owners.*” CP 350.

As a trustee, the Association is obligated to follow the specific instructions in the owners’/trustors’ Termination Agreement which is the instrument creating the express trust pursuant to the statutory termination process. See RCW 11.98.008.

Appellant’s position is that when the condominium terminated and the express trust was created, nothing of consequence happened regarding the board’s ability to manage assets held in the express trust post-termination.

Appellant’s position is apparently that the Association board continued in control just as if no termination had occurred. To sustain that position, appellant essentially asserts that the general statutory provisions on board management of routine business operations of the condominium supersedes the special, *specific* statutory

provision controlling termination of a condominium. RCW 64.34.268.

Because specific statutes supersede general statutes, the trial court did not err in following the specific termination statute and the clear language of the Termination Agreement contract signed by 100% of the owners. The trial court did not err in determining that, post termination, all assets of the Association were placed in an express trust to be disbursed only in accordance with a plan of payment and disbursement authorized by 80% of the owners.

The trial court correctly interpreted the owners' termination agreement provision, and correctly applied its plain language requiring an 80% approval for any plan of payment and distribution of assets.

The Appellant identifies as its third issue:

If [sic] Termination Agreement's provision for 80-percent approval of a plan of liquidation was valid, did the court correctly interpret it? (Issue #3)

The trial court simply applied the plain language of the Termination Agreement contract signed by 100% of the owners and there is no plausible other "interpretation" of the Termination Agreement contract. The trial court did not err

in “interpreting” the agreement according to its plain language.

Appellant asserts that:

[N]o language in the Termination Agreement contract prevented the Association from continuing to manage its assets prior to making liquidating distributions pursuant to an agreed or court-ordered plan.

See page 23 of appellant’s brief.

As to that, again, the Association has no beneficial interest in any of the trust assets, so reference to “its assets” is improper. All assets are held in an express trust for the owners.

Next, the Termination Agreement contract established an express trust into which all assets were transferred; the Termination Agreement specifically provided: “*Pursuant to a payment and disbursement plan that is agreed to by the unit owners to which at least eighty percent of votes in NOM Association are allocated, NOM Association shall pay its creditors and disburse its remaining assets to the unit owners as their interests may appear, after which it shall dissolve.*” CP 350.

If the Association board makes unauthorized decisions affecting the assets – including whether to risk

assets by litigating – the board decision, *unauthorized* by 80% of the owners, necessarily usurps the owners’ control and right to negotiate among themselves a payment and disbursement plan.

An owners’ authorized plan for payment and disbursement, might include settling claims, abandoning contested claims, agreeing that some claims are totally meritless, hiring new counsel to litigate claims against new defendants, or hiring independent counsel to litigate claims made by creditors, to name some of many, many possibilities.

But, the choice belongs exclusively to ***the owners*** who alone are entitled to negotiate an authorized plan of payment and disbursement among themselves. The Association’s decision in this case to litigate without authorization from 80% of the owners as required by the Termination Agreement contract is a naked usurpation of the owner’s right to negotiate and authorize a plan for payment and disbursement of the trust assets.

At page 23 of its brief, Appellant concedes that the Termination Agreement reserved to the owners the exclusive authority to authorize a payment and disbursement plan. It

asserts, however, that somehow it still has authority to manage trust assets *before* owners decide on a final payment and distribution plan.

Appellant asserts that:

If the Association had held investment securities, no language in the Termination Agreement contract would have prevented it from selling those investments to obtain cash with which to make liquidating distributions pursuant to an agreed or court-ordered plan.

That, of course, is absurd; a sale of securities by the Association board would plainly prevent the owners from making a distribution in kind, or from selling the assets to the highest-bidding owner. A sale by the trustee without owner authorization would preclude a number of other options the owners have a right to consider. There could be many things the owners might want to do *other than* convert investment securities to cash at the direction of the Ranko-board. Specifically, the owners might want to organize a sale through professional stock brokers. The point is that the Termination Agreement contract, signed by 100% of the owners provides that *the owners* will negotiate and by 80% vote, authorize any plan of payment and disbursement. The Association's Rankos-controlled board is without authority

to impair or curtail the owners' ability to negotiate and then authorize a plan.

A written termination agreement is required as a condition of condominium termination by RCW 64.34.268. Only the owners can enter into an agreement to terminate the condominium – the board cannot. RCW 36.34.268. If the owners of the North Oakes Manor Condominium wanted to vest *the board* with authority to make its own plan of payment and disbursement without requiring 80% of the owners' authorization, then it would have been easy enough to do that.

It's critical that the original Termination Agreement drafted by the Association's counsel, but **not** signed by any owner, provided:

From the proceeds of the sale or other assets, NOM Association shall first pay all its creditors, and then it shall disburse all such assets to the unit owners and holders of liens on the units as their interests may appear.

CP 356-68.

This termination agreement language did **not** receive approval from the owners as required by RCW 64.34.268.

Negotiations continued.

Only after new language requiring 80% owner approval for any plan of payment and disbursement of trust assets was added to the Termination Agreement contract, did all owners finally sign off on the Termination Agreement contract.

The Termination Agreement contract actually signed by 100% of the owners (also drafted by the Association's counsel) was, in pertinent part, as follows:

Pursuant to a plan of payment and disbursement that is agreed to by the unit owners to whom eighty percent of the votes in NOM Association are allocated, NOM Association shall pay its creditors and disburse its remaining assets”

CP 350, 381. (Emphasis added.)

The change requires that any plan of payment and disbursement must be authorized by 80% of the owners. Clearly, the approved language prohibits the Association's board from executing a plan of payment and distribution **not** authorized by the required 80% of owners.

Without the provision vesting the owners directly with control over the plan of payment and disbursement of assets, 2nd Half would not agree to the termination and sale, the other owners would not have been able to sell, and would not have doubled the value of their units by terminating and

selling the property as a rental apartment. CP 365-66, 374-78.

After termination and sale of the real property, there was no effort on the part of the Rankos-board to convene a meeting of owners to negotiate a plan of payment and disbursement for owners' approval. The owners were not even contacted before the disbursal of their trust assets and the Amended Complaint was filed by the Rankos-Board. That's undisputed.

The trial court did not err in interpreting the Termination Agreement contract as requiring an 80% authorization of owners before the Association could lawfully file this action.

The trial court did not ignore principles of equity and there is no bad faith in simply enforcing the owners' termination agreement contract as written.

The fourth issue Appellant identifies is:

Did the trial court ignore principles of equity, contrary to the WCA's directive, by dismissing the Association's action against 2nd Half and its associates unless 2nd Half authorizes the action?
(Issue #4)

Appellant asserts that “a principle of equity is that courts should not reward parties for acting in bad faith.” See page 27 of appellant’s brief.

It’s not bad faith to enforce a contract as written.

Appellant asserts at page 27, that:

Defendant 2nd Half argues that the Association may not prosecute the meritorious claims against it and the other defendants unless the former owners of 80 percent of its units direct it to do so, and because 2nd Half held 25 percent it holds a veto over any such actions. Such an argument is inconsistent with the good faith requirement of RCW 64.34.090.

See page 27 of appellant’s brief.

Appellants give no example or explanation for why it’s “bad faith” to enforce the 80% rule. All the owners agreed to the 80% rule. Now that they have doubled their money, the Rankos-board doesn’t like the 80% rule that they had to agree to in order to get 2nd Half to sell, but it’s not bad faith for 2nd Half to insist on enforcement of the rule everyone approved.

Without real explanation, appellant merely asserts that enforcing the 80% rule is “bad faith.” But, it’s not bad faith to enforce the clear language of the Termination Agreement contract 100% of the owners negotiated and signed.

The Termination Agreement was signed by 100% of the owners (including all the Ranko-board members) for very sound economic reasons. Everyone who signed knew at the time they signed the Termination Agreement that 2nd Half held 25% of the voting power. All the owners knew that by requiring 80% approval for any plan of payment and disbursement that litigating claims against 2nd Half wasn't going to be part of any authorized plan. All the owners knew when they signed to double their money that they were essentially settling or waiving claims against 2nd Half in order to double the value of their units.

Appellant's argument amounts to this: Enforcing the Termination Agreement all the owners signed is somehow automatically bad faith because the Rankos-board still wants to pursue a lawsuit against defendants even though they can't get 80% owner approval for that plan. That's an argument unsupported by law because it's not bad faith to enforce the 80% rule as written.

Secondly, appellant argues that 2nd Half extracted an "inequitable amount" at closing when Mr. Dawson submitted what appellant claims to be an "inflated payoff figure." See page 28 of appellant's brief:

But Graham-Dawson's collusively inflated payoff figure caused the escrow agent to disburse for the benefit of 2nd Half more funds than 2nd Half equitably would be entitled, so Graham/2nd Half then would have no incentive to negotiate in good faith concerning the Association's claims.

As to appellant's second assertion of bad faith: that a pay-off figure was "collusively inflated," first, the duty of good faith and fair dealing "exists only in relation to performance of a specific contract term." *Badgett v. Sec. State Bank*, 116 Wn.2d 563, 570, 807 P.2d 356 (1991).

The Termination Agreement contract does not have any term specifying how much each owner is supposed to receive or leave for later disbursement.

Under the Termination Agreement contract, the Association is specifically *not authorized to determine how much each owner receives of the trust assets*. The amount each owner is entitled to receive depends on the plan for payment and disbursement authorized by 80% of the owners.

In crafting their plan of payment and disbursement, any owner might negotiate for more or concede to take less of the total assets held in trust. Without a plan of payment and disbursement authorized by 80% of the owners, it's legally impossible to support the assertion by the Association

that the amount 2nd Half received was “inflated” or “too much.”

Because the owners have never approved any plan of payment and disbursement, there can be no legally cognizable assertion by the Association and the Rankos-board that “too much” was extracted by way of a “collusively inflated” payoff figure. If that happened, its a claim that one or more of the *owners* might make *if* they cannot agree on a plan of payment and disbursement.

It is not – under any circumstances – a claim that the Association or its board can litigate because any plan of payment and disbursement is the prerogative solely of the owners, who alone, by 80% vote, authorize a plan.

One or more owners might believe a “collusively inflated” payoff figure was given . . . *or not*. But, that’s a decision for the owners, and never a claim that can be advanced by the Association and the Rankos-board without authority from 80% of the owners.

It’s certainly not a claim that can be brought before the owners have even met and tried to approve a plan for payment and disbursement. Accordingly, the trial court did not err in dismissing this case as an unauthorized filing.

To enable one to maintain a cause of action to enforce private contract rights it must be shown that plaintiff has some real interest in the cause of action. "His interest must be a present, substantial interest, as distinguished from a mere expectancy, or future, contingent interest, and he must show that he will be benefited by the relief granted." *State ex rel. Hays v. Wilson*, 17 Wash.2d 670, 672, 137 P.2d 105 (1943) (quoting 39 Am.Jur. 860); cf. *Denman v. Richardson*, 284 F. 592, 594 (1921) (applying former Rem. & Bal.Code § 179 (1910) (recodified as former RCW 4.08.010 (repealed 1985) and now found in CR 17)).

In some circumstances, a "third-party beneficiary" may file an action on a contract. A third party beneficiary is one who, though not a party to the contract, will nevertheless receive direct benefits therefrom. *McDonald Constr. Co. v. Murray*, 5 Wash.App. 68, 70, 485 P.2d 626, review denied, 79 Wash.2d 1009 (1971).

In determining whether or not a third party beneficiary status is created by a contract, the critical question is whether the benefits flow directly from the contract or whether they are merely incidental, indirect, or consequential. *McDonald*, 5 Wash.App. at 70, 485 P.2d 626.

An incidental beneficiary acquires no right to enforce, rescind, or reform the contract. *McDonald*, 5 Wash.App. at 70, 485 P.2d 626.

In this case, the Association is not even an incidental beneficiary.

The Association – appellant – is not a party to the Termination Agreement contract. The Association is not a “third party beneficiary” of the Termination Agreement contract. Under the termination statute, when termination of a condominium occurs, the Association is transformed into a mere trustee of assets with no beneficial interest in any asset after termination by operation of RCW 64.34.268.

The termination statute provides that there can be no beneficial interest of any kind to the Association no matter how assets are distributed because under no circumstances will the Association receive any part of any final distribution. It’s only the owners who have the beneficial interest in all assets, and only the owners who receive a final distribution.

The trial court ruled that the Association, as mere trustee, has no authority to bring any action without approval from 80% of the owners; that would include any

action to modify or reform the terms of the owners' Termination Agreement contract. That's not error.

If one of the **parties** to the Termination Agreement contract believes there was fraud, then that party to the contract is the party with standing to bring an action. The Association cannot bring any action to rescind or reform the owners' Termination Agreement contract because it is not a party or third-party beneficiary to the Termination Contract agreement.

In short, the Association, who is not a party to the Termination Agreement contract, lacks standing to assert that 2nd Half and Mr. Dawson "extracted too much" at closing or to assert that a payoff figure was "collusively inflated."

The trial court did not act arbitrarily, or bar the Association from controlling its own funds because post-termination, the Association doesn't own any assets, including funds from sale proceeds.

Appellant's fifth issue is:

Did the trial court act arbitrarily on December 1, 2017, by barring the Association from controlling its own funds? (Issue #5)

A decision is arbitrary if it is "willful and unreasoning action, taken without regard to or consideration of the facts and circumstances surrounding the action." *Kendall v. Douglas, Grant, Lincoln & Okanogan Counties Pub. Hosp. Dist.* 6, 118 Wash.2d 1, 14, 820 P.2d 497 (1991) (quoting *Abbenhaus v. City of Yakima*, 89 Wash.2d 855, 858-59, 576 P.2d 888 (1978)).

Here, the trial court merely applied the plain language of the Termination Agreement contract signed by 100% of the owners, which required that any plan of payment and disbursement be approved by 80% of the owners. It's undisputed that 80% of the owners have approved no action and especially have not approved the filing of this lawsuit. The decision of the trial court is not arbitrary, but rather correctly and reasonably applies the plain language of the owners' agreement.

Also, again, it's important to point out that the court did not bar the Association from "from controlling its own funds." Post-sale, the Association owns no beneficial interest in any assets and has no funds of its own. The Association was required by the Termination statute and the owners' Termination Agreement contract to transfer all sale proceeds

and all other assets into an express trust for the benefit of owners and creditors. All of the assets could only be disbursed pursuant to a plan of payment and disbursement authorized by 80% of the owners. There were no funds owned by the Association.

The trial court dismissed the case as unauthorized until 80% of the owners authorize the litigation. That's not arbitrary, or a "willful and unreasoning action." The trial court simply applied the clear language of the Termination Agreement contract as written. That's not error.

All issues relating to a receiver are moot.

Appellants final issue is:

Did RCW 64.34.364(10) expressly require the trial court, upon the Association's motion, to appoint a receiver for 2nd Half's units? (Issue #6.)

Back when a receiver was requested under the original complaint, the court declined to appoint a receiver because the court believed there existed a genuine dispute as to whether dues were owed. CP 13-15; CP 52-80.

An Amended Complaint was filed after the condominium was terminated and sold. The appointment of a receiver was not even requested in appellant's Amended

Complaint because, as part of the owners' negotiation over the Termination Agreement contract, 100% of the owners agreed to sell the condominium free and clear of all lien claims, including any claim on 2nd Half's units for unpaid dues. CP 98-110.

In all events, the purpose of a receiver is to interdict rents from a delinquent owner's unit. As all the units of the North Oakes Manor Condominium have been sold. There are no units from which to collect rent even if the appellate court now thinks that a receiver should have been appointed.

Having waited until after the sale to seek review, there's no longer any effective remedy the appellate court can provide, so the issue is moot. An issue is moot if the court cannot provide the basic relief originally sought or can no longer provide effective relief. See *Bavandv. One WestBank, FSB*, 176 Wn.App. 475, 510, 309 P.3d 636 (2013). Appellant abandoned its request for a receiver in its Amended Complaint, and in all events, appointing a receiver now would be pointless as there are no rents to be seized.

Fees.

The Association has requested fees and costs, citing a number of legal basis for an award of fees to the prevailing party in this action.

If the Association prevails in this appeal, that would **not** make it the “prevailing party,” but only send the case back to the trial court for further action. The Association still could lose on all issues. See *Davis v. The Blackstone Corp.*, 71090-7-I Court of Appeals of Washington, Division 1 March 2, 2015 (“Pursuant to RAP 14.2, a party that “substantially prevails” on appeal is entitled to recover costs. Where the dismissal of a party's claim as a result of summary judgment is reversed on appeal, costs may be awarded. See, e.g., *Sorrel v. Eagle Healthcare. Inc.*, 110 Wn.App. 290, 300, 38 P.3d 1024 (2002). However, “[w]here a party has succeeded on appeal but has not yet prevailed on the merits,” an award of attorney fees should abide the ultimate resolution of the issues in the case. *Riehl v. Foodmaker. Inc.*, 152 Wn.2d 138, 153, 94 P.3d 930 (2004).”)

As in *Davis v. Blackstone*, *supra*, even if appellant prevails on this appeal, it hasn't yet prevailed on the merits, and any award of fees should abide a decision on the merits.

If, on the other hand, if respondents prevail on the appeal, that effectively ends the action at the Court of Appeals level, and respondents would then be the prevailing parties. All its fees to date should be be, in that case, awarded pursuant to the authority set out in appellant's brief: RCW 64.34.364(14) and RCW 64.34.455, the Association's Declaration of Condominium (CP 252 ¶ 19.1), and the Association's Bylaws.

CONCLUSION

This appeal is essentially an effort by the Association and its Rankos-controlled board to have the Court of Appeals amend or reform a contract to which it is not a party. The Association was never even a third-party beneficiary of the owners' Termination Agreement contract. It has no standing to bring the action until authorized by 80% of the owners as specified in the Termination Agreement contract signed by 100% of the owners.

The Association's sole role now is to hold the trust assets, and eventually distribute all trust assets pursuant to a plan of payment and disbursement authorized by 80% of the owners.

To *properly* discharge its duty as trustee, it must follow the direction of the owners/trustors as set out in their trust instrument, the statutorily mandated Termination Agreement contract.

The Rankos, who control the Association's board which is driving this litigation, have already received the benefit of their bargain – doubling the value of their three units – as a result of 2nd Half's full cooperation in terminating the condominium and selling the property as an apartment building.

Having received the benefit they bargained for, they want to continue litigation against 2nd Half, denying to 2nd Half the benefit of its bargain – and end to litigation.

The Association and its board want the Court of Appeals to reform the plain language of the owners' Termination Agreement contract eliminating the 80% owner authorization requirement for any plan of payment and disbursement of trust assets. The appellant wants that change so it can continue its litigation against 2nd Half without having to get any owner authorization.

That's fundamentally unfair, inequitable, and illegal.

The trial court determined that the Termination Agreement was a contract between the owners, complying with the requirements the termination statute, and that it required an 80% vote of the owners for any any disposition of assets.

The trial court dismissed the case because it was undisputed that 80% of the owners had not authorized any action by the Association.

That's not error given the undisputed facts, and the trial court should be affirmed.

DATED this 6th day of August, 2018.

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