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Division II
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NO. 54365-6-II

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

**LOST LAKE RESORT CONDOMINIUM ASSOCIATION, a Washington
nonprofit corporation,**

Appellant,

vs.

**LOST LAKE RESORT, LLC, a Washington limited liability corporation; LOST
LAKE DEVELOPMENT, LLC, a Washington limited liability corporation;
BRENT McCAUSLAND and JANE DOE McCAUSLAND and the marital
community composed thereof; and DAVID BLOCK and JANE DOE BLOCK, and
the marital community composed thereof,**

Respondents.

**APPEAL FROM PIERCE COUNTY SUPERIOR COURT
Honorable G. Helen Whitener, Judge**

REPLY BRIEF OF APPELLANT

REED McCLURE

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I. INTRODUCTION

The Association had authority to institute litigation to toll the statute of limitations. The phrase “and which involve” has a meaning of inclusion, not limitation. Defendants failed to establish the absence of a genuine issue of material fact concerning whether costs of suit exceeded \$5,000. Further, defendants’ motion for summary judgment did not request a decision on the merits or dismissal with prejudice. The superior court should not have dismissed the action at all, much less with prejudice.

II. ARGUMENT

A. OBJECTION TO CITATION TO UNPUBLISHED OPINION.

Defendants cite a 2005 unpublished Washington Court of Appeals opinion. (Respondents’ Brief at 11) GR 14.1(a) provides that unpublished court of appeals decisions have no precedential value. Only unpublished decisions filed on or after March 1, 2013 may be cited as non-binding authorities. Defendants’ citation to a 2005 unpublished opinion was improper. The Court should not consider the citation and order it stricken from the brief.

B. DEFENDANTS’ BURDEN WAS TO SHOW THE ABSENCE OF AN ISSUE OF MATERIAL FACT.

Defendants assert, without any supporting authority, that their initial burden on summary judgment was to make out a “prima facia [sic] showing”, and that doing so would shift the burden to the Association.

(Respondents' Brief at 22) This is incorrect. Defendants had the burden to show the absence of a genuine issue of material fact. If they failed to do so, summary judgment could not be granted.

The party moving for summary judgment has the burden to show there is no genuine issue of material fact. *Hash v. Children's Orthopedic Hosp. and Medical Center*, 110 Wn.2d 912, 915, 757 P.2d 507 (1988) (quoting CR 56(c)). The court must consider all facts and all reasonable inferences from facts in the light most favorable to the nonmoving party. *Scott v. Pacific West Mountain Resort*, 119 Wn.2d 484, 487, 834 P.2d 6 (1992). The court will scrutinize affidavits of the moving party with care and particularity. *Meadows v. Grant's Auto Brokers, Inc.*, 71 Wn.2d 874, 879, 431 P.2d 216 (1967). The motion should be granted only if reasonable minds could reach but one conclusion. *Hash*, 110 Wn.2d at 915.

If the moving party does not sustain its burden, summary judgment should not be granted, regardless of whether the nonmoving party has submitted affidavits or other evidence in opposition to the motion. Only after the moving party has met its burden of producing factual evidence showing that it is entitled to judgment as a matter of law does the burden shift to the nonmoving party to set forth facts showing that there is a genuine issue of material fact.

Hash, 110 Wn.2d at 915 (citations omitted).

As discussed in Appellant's Brief at 13-14, defendants' evidence failed to show the absence of a genuine issue of material fact regarding

whether “costs of suit” exceeded \$5,000. Summary judgment therefore should not have been granted.

C. DEFENDANTS DID NOT REQUEST DISMISSAL WITH PREJUDICE IN THEIR MOTION.

Defendants’ motion for summary judgment did not request dismissal with prejudice. (CP 14-29) Since defendants were moving based on failure of a condition to bringing suit, and not based on the merits, the Association had no reason to expect that dismissal would be with prejudice.

Importantly, defendants concede that “the Trial Judge did not reach the merits of the substantive contract claims”. (Respondent’s Brief at 9) It is therefore undisputed that defendants did not request dismissal with prejudice in their motion, and the trial court did not rule on the merits. Yet after the motion was fully briefed, after counsel argued the motion, and after the trial court orally stated its decision, defendants’ attorney presented a proposed order with the words “with prejudice”.

The purpose of a motion is to give the other party notice of the relief sought. *Robbins v. Mason County Title Ins. Co.*, 195 Wn.2d 618, 635, 462 P.3d 430 (2020). Motions must state with particularity the relief or order

sought. *Id.* Since defendants did not request dismissal with prejudice, the trial court's order was improper.¹

D. THE ASSOCIATION HAD STANDING TO SUE FOR BREACH OF A CONTRACT TO WHICH IT WAS A PARTY.

Defendants assert the court ruled the Association had no “standing” to sue, and therefore dismissal was on the merits. However, defendants did not raise a standing argument in support of their motion for summary judgment. Defendants’ motion did not mention “standing”. Defendants’ Amended Memorandum in Support of Motion for Summary Judgment did not mention “standing”. The trial court did not rule the Association had no “standing”.

Defendants’ reply brief used the word “standing” once, in a heading, asserting that “plaintiff is without authority or standing”. (CP 88) They made no argument and cited no authorities supporting a lack of standing. Defendants’ failure to request dismissal based on lack of standing in their motion precluded dismissal on this basis. *See Robbins v. Mason County*

¹ Defendants filed an earlier summary judgment motion and memorandum on August 1, 2019. (CP 291-302) That motion was stricken and it was never heard. (CP 308; *See also* Respondents’ Brief at 3) The second summary judgment motion “was an entirely new motion supported by a new memorandum and . . . new declarations”. (CP 308) The first motion and supporting memorandum were not listed in the court’s summary judgment order. (CP 140-41) They were not called to the attention of the trial court. CR 56(h). This Court therefore may not consider evidence and issues raised in these documents. RAP 9.12.

Title Ins. Co., 195 Wn.2d 618. Even the reply brief did not alert the Association or the court that a standing argument was being made.

“The doctrine of standing prohibits a litigant from asserting another’s legal right”. Standing is a question of law reviewed de novo. *West v. Thurston County*, 144 Wn. App. 573, 578, 183 P.3d 346 (2008).

A party to a contract injured by its breach has standing to sue for breach of contract. *Floor Express, Inc. v. Daly*, 138 Wn. App. 750, 754, 158 P.3d 619 (2007). Defendants do not contest the existence of a contract between the Association and defendants. The Association alleged that it was injured by defendants’ breach of the contract. The trial court was not asked to decide the merits of the Association’s causes of action on summary judgment. It did not.

The Association had standing to sue defendants for breach of contract. The trial court did not decide the Association lacked standing. The trial court’s decision was not on the merits.

E. DEFENDANTS CONCEDE THE ASSOCIATION COULD FILE SUIT WITHOUT OWNER APPROVAL.

Defendants make an important concession. They concede that the Association could choose “to file this lawsuit” “without Unit Owner approval”. (Respondents’ Brief at 27) “[T]he Board’s filing of its underlying complaint was authorized by the Covenants”. (Respondent’s

Brief at 29) Since the Association properly filed the lawsuit, the trial court should not have dismissed it on summary judgment.

Defendants are correct. The Covenants, Conditions, Restrictions and Reservations (“the CC&Rs”) expressly authorize filing a lawsuit for the purpose of “satisfying [sic] a statute of limitation deadline”, without first satisfying the requirement of a vote of the owners. (CP 78) Regardless of whether or not the Association exceeded its authority by taking additional action, it is undisputed that commencing this lawsuit by filing a complaint was authorized. The trial court therefore should not have dismissed the lawsuit.

F. SECTION 10.12.2 DOES NOT LIMIT THE ASSOCIATION TO FILING THE COMPLAINT.

Defendants assert that the Association could take no action after filing the complaint, not even serve process on defendants! This construction lacks common sense, and is not required by the language of the CC&R’s.

The CC&R’s provide:

10.12.2 The provisions of this Section 10.12 shall not apply to Legal Proceedings, as a result of which the Association could not be held responsible for costs of suit (including fees for attorneys, experts, witnesses, investigations and other costs of suit) in a [sic] aggregate amount of not more than \$5,000 (including without limitation fees contingent on a result), **and which involve:**

...

(e) the filing of a complaint, answer or other pleading for the limited purpose satisfying [sic] a statute of limitation deadline, avoiding entry of a default order or judgement, or preventing personal injury or serious harm to the Condominium (if such purpose is certified in good faith by the Association's attorney), but except for this limited purpose the other conditions of Section 10.12 must be satisfied.

(CP 78) (emphasis added).

Defendants give this provision an absurd interpretation that it prohibits taking any action beyond filing the complaint. They argue the association may not serve process. It may not oppose defendants' summary judgment motion. It may not take action required by court rules and orders. Such an interpretation would require the Association to allow dismissal if a motion is brought. It would expose the Association and its counsel to possible sanctions. Fortunately, this interpretation is not required by the language of the CC&R's.

Defendants focus on the meaning of the phrase "and which involve". However, the word "involve" has a meaning of inclusion, not limitation. It means: "1. To contain or include as a part. 2. To have as a necessary feature or consequence". THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (New College ed. 1978) at 690. It means: "6.a : to have within or as part of itself : CONTAIN, INCLUDE . . . b : to require as a necessary accompaniment : ENTAIL, IMPLY". WEBSTERS THIRD NEW INT'L DICTIONARY OF THE ENGLISH LANGUAGE (1993) at 1191.

The Association commenced a legal proceeding which “includes as a part”, and has as a necessary feature, filing a complaint for the purpose of tolling a statute of limitations. The CC&R’s do not state that the Association cannot take other action to protect the interests of the owners and itself, such as serving the complaint and summons on the defendants, defending a motion for summary judgment, and complying with court rules and orders. The trial court erroneously dismissed the lawsuit.

G. DEFENDANTS FAIL TO ADDRESS THE DOUBLE NEGATIVE IN THE LANGUAGE OF SECTION 10.12.2.

Defendants fail to acknowledge that Section 10.12.2 does not say what they apparently thought it said. The provision is confusing because it contains a double negative. The provision actually authorizes filing of a suit where the Association could be held liable for more than \$5,000 in costs of suit.

10.12.2 The provisions of this Section 10.12 shall not apply to Legal Proceedings, as a result of which the Association **could not be held responsible** for costs of suit (including fees for attorneys, experts, witnesses, investigations and other costs of suit) in a [sic] **aggregate amount of not more than \$5,000** (including without limitation fees contingent on a result) . . .

(CP 78) (emphasis added).

Read properly, the provision authorizes filing of a lawsuit where the Association could be held liable for more than \$5,000 in costs of suit. This makes sense, because the provision creates an exception to the conditions

set forth in section 10.12.3 for instituting litigation “in order for the Association to become obligated in the aggregate sum in excess of \$5,000”. (CP 78)

The court’s dismissal was therefore in error. No litigation summary or vote of the members were required because the Association filed suit to toll the statute of limitations. The \$5,000 limitation did not apply.

H. THE CC&R’S DO NOT SET A TIME LIMIT FOR A VOTE OF THE OWNERS.

Defendants assert, relying on RCW 4.16.170, that the CC&R’s require that the Association prepare a litigation summary, hold a vote of the owners, and then serve process within 90 days of filing suit. The CC&R’s do not include such a time limit, nor do they cite RCW 4.16.170. Defendants’ assertion must be rejected.

I. THE COURT SHOULD CONSIDER THE ASSOCIATION’S ARGUMENTS.

Defendants assert that certain arguments raised by the Association were not raised below and should not be considered, relying on RAP 2.5(a). To the contrary, this Court should consider all of the Association’s arguments.

RAP 2.5(a) provides in part: “The appellate court may refuse to review any claim of error which was not raised in the trial court”. “[B]y using the term ‘may’, RAP 2.5(a) is written in discretionary, rather than

mandatory, terms.” *Roberson v. Perez*, 156 Wn.2d 33, 39, 123 P.3d 844 (2005). This Court therefore would have discretion to consider any argument not raised below.

Further, “RAP 1.2(a) mitigates the stringency of the rule, providing that the RAPs are to ‘be liberally interpreted to promote justice and facilitate the decision of cases on the merits’”. *State v. Robinson*, 171 Wn.2d 292, 304, 253 P.3d 84 (2011).

First, defendants assert that the Association did not object to the court signing defendants’ proposed order dismissing the action with prejudice. However, defendants did not request dismissal with prejudice in their summary judgment motion. They did not mention it in their reply brief. Only after the trial court orally stated she would grant the motion did defendants’ attorney sneak in a proposed order that would dismiss the action with prejudice. Fundamental justice requires that the court consider and correct this error. *See State v. Card*, 48 Wn. App. 781, 784, 741 P.2d 65 (1987).

Next, defendants assert that the Association did not argue the \$5,000 spending limit was not exceeded. However, RAP 2.5(a) contains several express exceptions, including “failure to establish facts upon which relief may be granted”. On summary judgment, the appellate court will evaluate whether the moving party met their initial burden of showing the absence

of a genuine issue of material fact, regardless of whether or not the opposing party disputed the facts presented by the movant. *Graves v. P.J. Taggares Co.*, 94 Wn.2d 298, 302-03, 616 P.2d 1223 (1980). Parties opposing summary judgment need not object to affidavits where the deficiency pertains to a lack of proof rather than evidentiary problems. *Parkin v. Colocousis*, 53 Wn. App. 649, 652, 769 P.2d 326 (1989).

In *Graves*, the Supreme Court reversed summary judgment because the moving party's evidence was susceptible to more than one interpretation, even though the appellant filed nothing in opposition to the summary judgment motion and did not appear for argument. *Graves v. P.J. Taggares Co.*, 94 Wn.2d at 302-03. Similarly, here defendants' evidence is consistent with a conclusion that the Association did not spend more than \$5,000 on "costs of suit". Defendants' evidence failed to establish facts upon which relief may be granted. Summary judgment should not have been granted.

Next, defendants assert that the Association failed to argue to the trial court that it should have stayed the underlying lawsuit. The Association does not make such an argument now. The Association merely contends, as defendants now concede, that filing the lawsuit to toll the statute of limitations was authorized. Therefore, dismissal was improper. If defendants objected to further litigation activities, defendants' remedy

would have been to request a stay. Since they did not, the action was not stayed.

Next, defendants assert that the Association did not argue that the limitation on the Association's power to commence judicial action violated provisions in the Condominium Act. "However, a statute not addressed below but pertinent to the substantive issues which were raised below may be considered for the first time on appeal". *Bennett v. Hardy*, 113 Wn.2d 912, 918, 784 P.2d 1258 (1990). "This is particularly true 'when the question raised affects the right to maintain the action'". *Becker v. Pierce County*, 126 Wn.2d 11, 19, 890 P.2d 1055 (1995). The Association argued that it had authority to file the action. (CP 54-58) The Court therefore should consider the effect of the Condominium Act on the provision in the CC&R's limiting the Association's power to file suit.

J. RCW 64.34.455 DOES NOT AUTHORIZE AN AWARD OF ATTORNEY'S FEES INCURRED TO OBTAIN DISMISSAL OF BREACH OF CONTRACT CLAIMS.

Defendants request an award of attorney's fees based on the authority of RCW 64.34.455. They did not request attorney's fees below, and for good reason. This statute does not authorize an award of attorney's fees for prevailing on a breach of contract claim.

RCW 64.34.455 provides:

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

The Association did not plead claims under the Condominium Act, or under the Declaration or bylaws. As defendants concede, the Association pleaded only claims for breach of contract. “Those are not claims under the Condominium Act, but instead, pure third-party contract claims. . . . Again, the Board’s claims are pure third-party contract claims; there is no claim to enforce any provision of the Declarations or Bylaws addressed by the Condominium Act.” (Respondents’ Brief at 25)

Defendants’ summary judgment motion sought dismissal of claims for breach of contract. Their motion asserted “a defense to the plaintiff’s action, not a claim being brought by defendants”. (CP 86) Since the trial court did not decide any claim under the Condominium Act, or under the Declaration or bylaws, defendants may not recover attorney’s fees.

III. CONCLUSION

The action should not have been dismissed at all because the Association had authority to institute litigation to toll the statute of limitations. The phrase “and which involve” has a meaning of inclusion, not limitation. Defendants failed to establish that costs of suit exceeded \$5,000. Further, dismissal with prejudice was error when the superior court

did not consider the merits of the Association's cause of action. For these reasons, the Association requests that this Court reverse the summary judgment order.

Dated this 11th day of August, 2020.

REED McCLURE

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CERTIFICATE OF SERVICE

I hereby certify that on August 11th, 2020, copies of the following document were served on counsel as follows via the Washington State Appellate Court's Electronic Filing Portal:

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Dated this 11th day of August, 2020, at Seattle, Washington.

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