99457-9
Court of Appeals No. 80853-2

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

GENE and MARALEE BOUMA,

Appellants,

v.

SILVERADO COMMUNITY ASSOCIATION,

Respondent

APPELLANTS' PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

The Petitioners, Gene and Maralee Bouma (Appellants), requests that this Court grant review of the below identified appellate decision under RAP 13.4(b)(1), (2) and (4).

II. CITATION TO COURT OF APPEALS DECISIONS

At issue is the Court of Appeals decision in *Bouma v. Silverado Community Assoc.*, Division 1 No. 80853-2-1 (unpublished) filed on November 23, 2020, and the order denying reconsideration filed on December 28, 2020. These orders are attached as Exhibits A and B, respectively.

III. ISSUES PRESENTED FOR REVIEW

The substance of the Boumas' petition for review addresses (1) decisions on summary judgment that conflict with the standards set forth by the Supreme Court and published appellate cases; (2) conflict with existing law in the Court of Appeals' finding that the original covenants reserved the right for a majority of members to create new covenants, not just change existing ones; (3) the conflict with existing law in the Court of Appeal's finding that the amendments were reasonable and consistent with the general plan of development, and not disproportionately impactful on the Boumas' lots; and (4) allowing attorney's fees and costs under a

covenant provision that allowed fees only for enforcement actions, not actions seeking to determine the validity of a covenant.

IV. STATEMENT OF THE CASE

Petitioners/Appellants Bouma (Boumas) brought this suit against the Silverado Community Association (Silverado) challenging the validity of amendments to the original covenants governing the Silverado development. There are two plats that make up the Silverado community, “West” and “East”. CP 112-14 (West Plat recorded in 2000); CP 132-134 (East Plat recorded in 2010). There were two separate sets of covenants recorded. CP 115-122 (West CCRs, omitting exhibit and well and other agreements not directly pertinent here); CP 147-155 (East CCRs, omitting exhibit and well and other agreements not directly pertinent here). There were eight lots in each of the subdivisions. Lots 1-7 in both plats were 1-acre lots. Lots 8 were 30-acre lots that lay across a river on rolling topography with extensive timber and other features not found in the clusters of 1-acre lots. CP 114 (West Plat); CP 134 (East Plat); *see also for illustration* aerial pictures CP 115-116 (looking at the large lots in the middle of the aerials, starting at the south side of the visible road and extending straight south).

The original CCRs provided for changes in the covenants by a 60% majority vote, but without any express reservations or

statements of rights for a majority of members to add new covenants unrelated to the existing covenants. *See* CP 121 ¶ 61 (West CCRs); CP 152 ¶ 6.1 (East CCRs). Both sets of CCRs contained separate provisions that allowed for bylaws, rules and regulations "as [deemed] necessary or advisable for transaction of business." CP 119 ¶ 3.3 (West CCRs); 151 ¶ 3.3 (East CCRs). Such bylaws, rules and regulations were incorporated into the covenants by reference. *Id.* The original CCRs both provided for attorneys' fees and costs "[i]n any action to enforce" any provisions of the covenants. CP 121 ¶ 5.2 (West CCRs); CP 153 ¶ 5.2 (East CCRs). The covenants only cursorily referenced assessments, by providing that there would be no diminution or abatement of assessments for any alleged failures of the Association. CP 119 ¶ 3.2 (West CCRs); CP 150 ¶ 3.2 (East CCRs). There was no particular provision for penalties or fines, and no provision for liens, only a general right of enforcement for violations of the covenants. CP 121 ¶ 5.2 (West CCRs); CP 153 ¶ 5.2 (East CCRs).

In 2008 Gene Bouma Development, Inc. (GBDI, the developer) filed an amendment to the West CCRs (CP 165-169) that, among other more minor provisions, expressly added an exception to the livestock restrictions to allow Lot 8 to have livestock with certain restrictions. CP 167 ¶ 2.6. There were no

changes to the amendment, assessment or enforcement provisions.

GBDI transferred ownership of Lots 8 in both the West and East divisions to the Boumas in their personal capacity.

In 2015 the association members voted on a single set of covenants to replace the original separate West and East CCRs. CP 175-CP 212 (omitting exhibits)(2015 CCRs). These covenants made sweeping and extensive changes, titled “Amended and Fully Restated Declaration of Covenants, Conditions and Restrictions of the Subdivisions of Silverado West and Silverado East”. The 2015 CCRs were signed by all but the Boumas, whose signature pages were “intentionally left blank”. There was no signature by anyone authorized to speak on behalf of the members as a whole (such as the President or other officer). The covenant’s recording sheet named Gene Bouma Development, Inc. (GBDI) as the grantor. GBDI did not own any of the relevant properties.

The Boumas brought this suit challenging the validity of the 2015 CCRs for the lack of any authorized persons or entity signing on their behalf, or in any representative capacity representing the association or owners as a whole; challenging the validity due to the lack of any authority for a majority of members to add new covenants unrelated to the existing covenants; and the

reasonableness of several provisions that were inconsistent with the general plan of development.

The Boumas brought a motion for summary judgment. The Boumas sought a decision granting their requests for relief as a matter of law. The trial court denied their motion in its entirety. CP 318-330 (July 12, 2018). It issued a lengthy decision that incorporated several findings that should have fallen to the fact finder (a common thread being a determination of intent relevant to interpretation of the covenants, and credibility of witnesses). The trial court improperly designated several questions as to the validity of the covenants (not application of the covenants) as non-justiciable. The trial court found that various inapplicable provisions of the existing covenants constituted an express reservation of authority for a majority of members to create new covenants unrelated to the existing covenants. This conclusion was contrary to the plain language of the covenants. In these findings, the trial court's decision (and thus later appellate decision affirming the trial court) ran contrary to established authority in conflict with Supreme Court and published appellate decisions.

The Association later brought its own motion to dismiss the Boumas' claims. The trial court granting the motion in its entirety in a simple order. CP 382-383 (November 12, 2019). There was never

any analysis of the claims with the facts looked at in the light most favorable to the Boumas, now the non-moving party, in conflict with long-standing standards of review on summary judgment.

The Association then brought an untimely motion for attorney's fees. The trial court granted the request in its entirety, accepting the attorney declarations at face value without any findings or conclusions or analysis. CP 510-14. The trial court's finding of excusable neglect in allowing the untimely filing was in conflict with Supreme Court and published appellate opinions that expressly reject the same set of circumstances as excusable neglect. The trial court decision also conflicts with uniform long-standing caselaw by failing to engage in or enter the necessary record for review (no evidence of the necessary analysis, and none of the necessary elements in its award).

On appeal, the Boumas challenged all three decisions. In an order entered November 9, 2020, the Court of Appeals upheld the trial court's holdings. The Court of Appeals' order was substantially comprised by accepting the trial court's decision wholesale, using a lengthy quote of the trial court's decision on the Boumas' motion for summary judgment as the bulk of its opinion without independent analysis.

Upon the Association's motion for reconsideration regarding the fees, which the Court of Appeals decision had not addressed, the Court of Appeals entered a revised order on December 28, 2020. (Exhibit A). The Boumas filed a timely motion for reconsideration, which was denied by order entered December 28, 2020. (Exhibit B).

V. ARGUMENT

This Court may grant review where a decision of the Court of Appeals conflicts with a decision of the Supreme Court or a published decision of the Court of Appeals, or involves an issue of substantial public interest that should be determined by this Court. RAP 13.4(b)(1), (2) and (4).

This case involves several issues that meet these criteria. The decision of the Court of Appeals conflicts with Supreme Court and published appellate decisions on several core issues. Several of the core issues are also of substantial public interest as they have a fundamental impact on the basic governance of community associations, which in turn impacts thousands of homeowners in Washington. The decision regarding attorney's fees likewise also impacts all homeowners and associations as it conflicts with the prior caselaw delineating what types of claims subject the parties in any association disputes to attorney's fees and costs under the

language found in these covenants, which is also strongly resembles that in the relatively new Washington Uniform Common Interest Ownership Act (WUCIOA), RCW 64.90.685 – reinforcing the need for clarity on what types of claims this language covers.

The precedent set by the appellate decision with respect to standards of review on summary judgment and the timeliness of motions for attorney's fees and costs also conflicts with a long line of Supreme Court and appellate decisions and creates confusion.

A. Decision of Court of Appeals is in conflict with decisions of the Supreme Court and published appellate cases – Procedural Issues.

The Court of Appeals decision is in direct conflict with Supreme Court and unpublished appellate decisions on several basic tenets of a summary judgment analysis.

1. Witness credibility on motion for summary judgment.

The trial court's decision incorporated a number of findings of fact and determinations of witness credibility. The Court of Appeals' decision adopted the trial court's decision wholesale. For example, the trial court made several determinations as to the credibility of a witness. *See, e.g.,* CP 323:23-24. The appellate decision conflicted with *Wilkinson v. Chiwawa* by ignoring what this Court directed to be considered in the "surrounding facts" inquiry: consideration of the general character of the rural community in

determining the homeowner's expectations. *Wilkinson v. Chiwawa*, 180 Wn.2d 241, 280, 327 P.3d 614 (2014).

There is also the interesting question of which standard of interpretation applies when the homeowner involved in the dispute was previously the developer. The analysis on intent and construction against the drafter is different when the action is between multiple homeowners jointly governed by the covenants. *See, e.g., Wilkinson*, 180 Wn.2d at 249-50, citing *Riss v. Angel*, 131 Wn.2d 612, 621-24, 934 P.2d 669 (1997). There does not appear to be any guiding caselaw on this, making it a point worthy of clarity.

2. Failure to afford a later summary judgment motion an independent reciprocal analysis.

A stark error in direct conflict with well-established summary judgment caselaw was the failure to reverse the standard of review when reviewing the Association's motion. The Court of Appeals simply referenced them as "competing motions", but they were not. On the Boumas' motion, it was proper to look at the facts in the light most favorable to the Association. But neither the trial court nor the Court of Appeals engaged in the reverse analysis on the Association's motion. Under the Court of Appeals' decision, an original moving party will not be given the opportunity to have the facts read in the light most favorable to them when the tables are later turned. This conflicts with basic precedential caselaw.

3. Allowance of an untimely motion contrary to the requirements of well-established caselaw.

The appellate decision contradicts explicit caselaw when it allowed the Association's untimely motion for attorney's fees and costs based upon a finding of excusable neglect. The Court of Appeals relied upon the fact that the then-present counsel was new to the case after entry of the summary judgment order. But that finding ignores the fact that the Association's attorneys had multiple opportunities. The Association's subsequent counsel had the time to file a motion to enlarge time under CR 6, and indeed filed other motions that date. A finding of excusable neglect under these circumstances conflicts with published caselaw. *See, e.g., Puget Sound Medical Supply v. Washington State Dept. of Social and Health Services*, 156 Wn. App. 364, 376 (2010)(multiple citations omitted)(where a party fails to seek additional time when it had the opportunity to do so there are no grounds for "excusable neglect). There is also a greater public purpose in holding counsel accountable: such a finding defeats the purpose of having rules that the parties can rely upon, and invites a casual disregard for such rules. Counsel could have done something. They simply chose not to. That does not warrant a departure from the law.

B. Decision of Court of Appeals is in conflict with decisions of the Supreme Court and published appellate decisions governing analysis of amendments to covenants: the language did not authorize a majority to

create new covenants, and the amendments were not consistent with the general plan of development.

The Appellate Court upheld the trial court's determination that the existing covenants expressly authorized creation of new covenants. This finding runs directly contrary to the line of Supreme Court and published appellate decisions explicitly holding that language such as that found in the covenants here authorize only *changes* to covenants, not *creation* of new covenants unrelated to the existing covenants. The decision also fails to recognize the contradiction of the new amendments with the general plan of development by way of conclusions that conflict with similar precedential cases.

1. *Wilkinson v. Chiwawa* and related cases.

a. The *Wilkinson* standard.

The touchstone case setting forth the analysis for determining whether an amendment to covenants is valid is *Wilkinson*, 180 Wn.2d. Two other primary cases involved in this analysis are *Shafer v. Bd. Of Trs. Of Sandy Hook Yacht Club Estates, Inc.*, 136 Wn.App. 787, 793, 150 P.3d 1163 (2007) and *Meresse v. Stelma*, 100 Wn. App. 857, 865-66, 999 P.2d 1267 (2000). The *Wilkinson* court also heavily incorporated the decision in *Lakeland Prop. Owners Ass'n v. Larson*, 121 Ill.App.3d 805, 249

N.E.2d 1164, 77 Ill.Dec. 68 (1984), which *Meresse* had incorporated into its decision as well.

There are three main components to the *Wilkinson* analysis, all resting upon prior precedential caselaw. The first question is whether the amendment created a new covenant or merely changed the existing covenants. There must be "an express reservation of power authorizing less than 100 percent of property owners within a subdivision to adopt new restrictions". *Shafer,* 76 Wn. App. at 273-74, quoted in *Meresse* at 100 Wn. App. at 865. If the existing covenants allow changes to, but not the addition of, the existing covenants, a majority vote "must be consistent with the general plan of development *and* related to an existing covenant." *Wilkinson*, 180 Wn.2d at 257 (emphasis retained). An amendment is invalid and improperly and seeks to deprive the minority homeowners of their property rights if it attempted to create a new covenant without authority to do so in the existing covenants. *Id.*

The court then looks to determining whether the amendment by majority vote created a new covenant within the general plan of development, or if it changed an existing one. A basic provision to "change or alter" the existing covenants allows *changes* but not the addition of *new* covenants unrelated to existing ones. *Wilkinson*, 180 Wn.2d at 256-57.

Finally, the amendment must be reasonable and consistent with the general plan of development. *Wilkinson*, 180 Wn.2d at 256-57; *Shafer,* 136 Wn.App. at 793; *Meresse*, 100 Wn. App. at 865-66.

The *Wilkinson* court emphasized the purpose behind limitations on a simple majority rule as set forth in *Meresse*: "This rule protects the reasonable, settled expectation of landowners by giving them the power to block " 'new covenants which have no relation to existing ones' " and deprive them of their property rights … '[t]he law will not subject a minority of landowner to unlimited and unexpected restrictions on the use of their land'." *Wilkinson* at 256.

Yet subjecting the minority of homeowners to the "unlimited and unexpected restrictions on the use of their land" is exactly what the Court of Appeals decision does here, in conflict with the above law. The appellate decision in this case blurs the line between covenants such as those in *Shafer* and those in *Wilkinson* and *Meresse* such that it ceases to exist altogether.

The distinction is important, and ignoring it conflicts with purposeful precedent in Washington. There is a recognized split between the states as to which fork in the road this analysis will take. *See, e.g., Adams v. Kimberley One Townhouse Owner's Association, Inc.*, 158 Idaho 770, 352 P.3d 492, 497 (2015). The

appellate court's decision takes Washington down the other fork of the road than the path set out by this Court in *Wilkinson*.

For example, in *Adams* the Idaho Supreme Court rejected the *Wilkinson* approach, finding that a homeowner had to expect any amendment, whether it created a new covenant or not. The Court of Appeals decision here results in an approach that follows the Idaho court in *Adam*. That directly conflicts with the path set by this Court in *Wilkinson*.

b. The Court of Appeals decision conflicts with *Wilkinson* and related caselaw.

In this case, the covenants provided that the declarations "may be amended in whole or in part signed by not less than Sixty percent (60%) of the owners of the lots affected by this Declaration." CP 122 (West CCRs ¶ 6.1), CP 154 (East CCRs ¶ 6.1).

To compare, in *Wilkinson* the covenants gave the members the power "to change these protective restrictions and covenants in whole or in part" by majority vote. *Wilkinson,* 180 Wn.2d at 246. In *Meresse,* the covenants were binding and effective until "majority vote of the then owners agree to change or alter them in full or in part." 100 Wn. App. at 859. In *Lakeland*, "the majority of the then owners of the lots in said subdivision [agrees] to change the said covenants in whole or in part." 459 N.E.2d at 1167.

The Court of Appeals decision conflicts with the reading of this language in *Wilkinson* and the like. The err rests largely in the improper and illogical extension of the provision allowing institution of *bylaws and rules and regulations* to be taken to authorize the adoption of new restrictions for the *covenants*.

The Court of Appeals decision also adopted the trial court's reasoning that allowance of a "supplemental" declaration in the enforcement section meant that the intent was to allow *new* restrictions. But aside from the fact that this reading contradicts the plain language of the covenants, none of this equates an *express* reservation of the right to create new covenants. Again, this conflicts with the *Wilkinson* and related caselaw. The covenant affirming that any "amended or supplemental declaration shall be enforceable" does not mean that such amended or supplemental declaration doesn't have to be properly amended to begin with.

As a matter of law, Washington caselaw unambiguously provides that the Silverado original covenants allowed for *changes to* existing covenants, but not *creation* of covenants unrelated to the existing covenants. The language is the same as that in *Willkinson* and *Meresse*. The appellate decision is in conflict with that line of cases. Review is thus appropriate under RAP 13.4(b)(1) and (2).

Minimally, the question of intent should have remained a question of fact, as also necessary to remain in line with established precedent, as discussed above. If the existing caselaw did not clearly determine whether the language in the original covenants here allowed for adoption of new covenants, the appellate and trial court's cursory conclusion as to intention on a summary judgment motion is in conflict with that line of precedent.

The following sections reference some of the notable significant examples of new restrictions unrelated to the existing covenants to illustrate the inappropriate additions.

c. Liens

One of the most important and telling examples of imposing a new covenant in the 2015 CCRs, and thus the improper expansion of the Association's powers beyond that afforded by this Court and related precedential cases, is the power to lien. Under the Court of Appeals decision, a majority of members may impose the potential for a lien – and all its ramifications – upon an unsuspecting homeowner. There is nothing in the original covenants that allowed any such venue for enforcing the covenants, or collection of unpaid assessments. There is a huge public interest in determining this issues. No case in Washington has yet addressed the question of whether a majority of members

can manufacturer a right to lean out of whole cloth, absent an express reservation of rights to add new covenants unrelated to the original ones. Allowing the imposition of such power without express authority in the covenants would have a profound impact on unsuspecting homeowners.

The governing statutes illustrate that a lien is a decidedly separate avenue for enforcement than fines or other financial penalties, as every other statute governing associations provides for liens for unpaid assessments (RCW 64.32.200(2), RCW 64.34.364, RCW 64.90.485(1)). But there is no such provision in the homeowners' association statute, Chapter RCW 64.38. Instituting a right to lien and foreclose has no relation to the original covenants, and a homeowner would have no notice of such a right.

d. Easements.

Another notable problem with substantial consequences is the Court of Appeals decision affirming that changing the scope, location and nature of easements was permissible so long as a homeowner was generally aware of the association's right to make changes to the covenants. This is not only contrary to precedential cases on amending covenants, but contradictory to basic caselaw governing easements. Here, the 2015 CCRs expanded the scope and impact of the existing easements by merging them all to serve

for all purposes, including addition of other third-party beneficiaries. CP 180 ¶ 2.2. The Court of Appeals side-stepped the question with a cursory statement that there was no authority that easement law would apply in the context of association covenants. But the court gave no reason why there should be an exception in the association context.

e. Changes eliminating use of the lots for hobby farming, despite the existing covenant expressly allowing for such use on Lot 8 East.

An overt restriction on the property owners' rights is the elimination of the right of the owners of Lot 8 East to have livestock on the property for purposes of "hobby farming". This restriction of the owners' property rights is in in direct conflict with the *Wilkinson* decision (there, restricting rentals despite covenants that expressly allowed them without restrictions).

2. Reasonableness and consistent with the general plan of development.

As discussed above, even a validly passed amendment must be reasonable and consistent with the general plan of development. Here, the trial court and then the Court of Appeals decision ignored the evidence that imposition of suburban-like restrictions to *all* lots in the development, without any accommodation or allowance for the fundamentally different nature

of Lots 8, was unreasonable and inconsistent with the general plan of development.

C. Decision of Court of Appeals is in conflict with decisions of the Supreme Court and published appellate cases – Attorney's Fees.

The language in the covenants here, as in *Meresse*, allows for fees and costs to the prevailing party for actions *enforcing* the covenants, but not for actions regarding *validity*. The Court of Appeals attempted to distinguish this case with a finding that the *Meresse* provision is narrower. But that is incorrect. The Court of Appeals decision thus conflicts with *Meresse* and similar cases.

The original CCRs provided for attorneys' fees and costs "[i]n any action to enforce" any provisions of the covenants. CP 121 ¶ 5.2 (West CCRs); CP 153 ¶ 5.2 (East CCRs). In *Meresse*, the covenant provided for attorney's fees and costs for actions against persons "violating or attempting to violate any restrictions, reservations, covenants, or agreements" and seek injunctive relief or damages. 100 Wn. App. at 868. As stated in *Meresse*: the homeowners "were entitled to challenge the amended covenants, which exceeded [the other owners'] authority." The same applies here, as well as consistency with the plain language of the covenant.

The statutory scheme further illustrates the importance of clarity from this Court on this issue. Under the WUCIOA, for example, the attorney's fees provision is similarly for enforcement. If "enforcement" were broadened to include *any* dispute relating to covenants, that has a very different import.

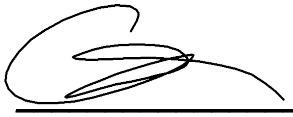
VI. CONCLUSION

The Boumas respectfully request that this Court accept review of this case. It presents several issues of importance to the thousands of families that live in common interest communities, and the increasing percentage of the population that is turning to association living. This case presents opportunity to both to reconcile the conflict between the Court of Appeals' decision and existing precedential law, as well as provide clear guidance on several key issues that associtations routeinly face.

Respectfully submitted this 27th day of January, 2021.

By:

GRYPHON LAW GROUP PS



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CERTIFICATE OF SERVICE

I certify that on the below date, I sent a copy of the above pleading via the Court's electronic service system to Martin J. Pujolar and William Chris Gibson of Forsberg & Umlauf, P.S., attorneys for Respondent Association at the addresses they have on file with the Court.

Dated this 27th day of January, 2021.

Carmen R. Rowe WSBA 28468

VII. APPENDIX

FILED
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Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

GENE and MARALEE BOUMA, husband and wife, Appellants, v. SILVERADO COMMUNITY ASSOCIATION, a Washington nonprofit corporation, Respondent.	No. 80853-2-I DIVISION ONE UNPUBLISHED OPINION

APPELWICK, J. — The Boumas appeal from summary judgment and an order awarding attorney fees to the Association. The Boumas contend the trial court erred in declining to grant their motion for summary judgment, granting the Association's motion for summary judgment, and granting the Association's motion for attorney fees. We affirm.

FACTS

Gene and Maralee Bouma own Gene Bouma Development, Inc. In the early 2000s, Bouma Development developed rural property in Whatcom County into two eight lot residential subdivisions, Silverado East and Silverado West. The Boumas sold off lots 1-7 on each property, which are each about one acre in size. They retained ownership of lot 8 in Silverado East and lot 8 in Silverado West. At 32 and 33 acres, the two lots are much larger and more rural than the lots the Boumas sold off.

Appendix A

In 2000 and 2001, as part of the initial development of the two subdivisions, Bouma Development recorded covenants, conditions, and restrictions (CC&Rs) for each subdivision. The Silverado West CC&Rs included restrictive covenants recorded on November 28, 2000 that created the Silverado Community Association (Association) and gave it certain authorities, such as maintaining common areas. The CC&Rs governing both subdivisions created identical procedures for amendment, providing that they "may be amended in whole or in part signed by not less than Sixty percent (60%) of the owners of the lots affected by [the CC&Rs]." Acting as declarant, Bouma Development adopted and recorded several amendments to the original CC&Rs in 2007 and 2008.

On May 22, 2015, the other members of the Association recorded a new set of comprehensive CC&Rs entitled "Amended and Fully Restated Declaration of Covenants Conditions, and Restrictions of the Subdivisions of Silverado West and Silverado East" (2015 CC&Rs). The Boumas did not agree to the new CC&Rs, however, they were signed by all other owners in the subdivisions.

On January 19, 2017, the Boumas filed a complaint against the Association. They asserted that the 2015 CC&Rs violated chapter 64.38 RCW, exceeded the authority granted in the original covenants, and clouded their title to lot 8 Silverado East and lot 8 Silverado West. They requested quiet title for both lots 8 and declaratory relief that the 2015 CC&Rs were void and unenforceable.

The Boumas then filed a motion for summary judgment on April 10, 2018, seeking to have the 2015 CC&Rs declared void in whole or in part.

On July 12, 2018, the trial court denied the Boumas' motion. The court held that the Association had the authority to adopt the 2015 CC&Rs and found the Boumas' claims regarding specific provisions to be unpersuasive and unsupported.

On January 10, 2019, the Association moved for summary judgment. On November 13, 2019, the trial court entered an order granting the motion and dismissing the Boumas' claims with prejudice. On December 9, 2019, the Association filed a motion for attorney fees and costs. The trial court granted the motion, holding the Boumas were liable under RCW 68.38.050 and the 2015 CC&Rs.

The Boumas appeal.

DISCUSSION

I. Competing Motions for Summary Judgment

This court reviews summary judgment rulings de novo, construing all facts and reasonable inferences from those facts in the light most favorable to the nonmoving party. Blue Diamond Grp., Inc. v. KB Seattle 1, Inc., 163 Wn. App. 449, 453, 266 P.3d 881 (2011). A trial court must grant a motion for summary judgment if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). The moving party has the initial burden to show the absence of genuine issues of material fact. Blue Diamond, 163 Wn. App. at 453.

This dispute involves two competing motions for summary judgment. The Boumas moved for summary judgment determining the 2015 CC&Rs were invalid.

The trial court denied their motion.[1] The Association then moved for summary judgment determining the CC&R amendments were valid, and the trial court issued an order granting their motion.[2] By virtue of filing their motions seeking summary judgment each party asserted there were no disputes over material facts. Thus, our consideration of the two motions involves a single analysis limited to questions of law as to the adoption and meaning of the amendments.

The Boumas argue the trial court erred on several grounds in denying their motion for summary judgment. They further argue the court erred in granting the Association's motion for summary judgment. These arguments are without merit.

A. Adoption of the 2015 CC&R Amendments

The CC&Rs governing both subdivisions created identical procedures for amendment, providing that they "may be amended in whole or in part signed by not less than Sixty percent (60%) of the owners of the lots affected by [the CC&Rs]."[3] The Association properly followed the amendment process. The 2015

[1] The Boumas contend the trial court erred in denying summary judgment on specific provisions that they argued were unreasonable, because the Association did not submit specific facts in rebuttal. But, the motion posed legal rather than factual questions.

[2] The Boumas argue it is improper to rely on the order denying the Boumas' motion in ruling on the Association's motion. Though the summary judgment motions were filed at separate times, the Boumas' response to the Association's motion for summary judgment listed the evidence they relied upon as "this brief, their brief in support of their earlier motion for summary judgment, the declaration of Gene Bouma, the second declaration of Gene Bouma, and all other pleadings and papers filed in this matter." The response brief mirrored their arguments in support of their earlier motion, and all other evidence had been previously available. There were no questions of material fact.

[3] The Boumas and their company, Bouma Development, drafted the original CC&Rs and were involved in the previous amendments to the CC&Rs. The language that we are interpreting to determine whether the amendments are proper is language that was originally drafted and prepared by the Boumas.

CC&Rs were signed by every owner in Silverado East and Silverado West aside from the Boumas, far surpassing the necessary 60% threshold.

The Boumas argue even if the Association was authorized to amend the restrictive covenants, it was not authorized to adopt new restrictions. The trial court considered the language of the existing CC&Rs, including section 5.2 that provides "any amended or supplemental declaration shall be enforceable," as evidencing the intent to allow new restrictions.[4] We agree.

Nonetheless, the Boumas contend the amendments were ineffective because their signatures were required. Absent their signatures, they argue the statue of frauds was violated. Under the statute of frauds for real estate, RCW 64.04.010, "[e]very conveyance of real estate, or any interest therein, and every contract creating or evidencing any encumbrance upon real estate, shall be by

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[4] In addition the trial court relied on section 3.3:

> The Court concludes that the covenants authorize the Association to adopt new restrictions. First, under paragraph 3.3, the covenants expressly provide for new restrictions, although in a technically infeasible way.
>
> > The Association may adopt bylaws and rules and regulations as it deems necessary or advisable for transaction of business. Such bylaws and rules and regulations are incorporated by reference as if fully set forth herein and each lot owner shall be required to abide by the rules and regulations.
>
> (Restrictive Covenants ¶ 3.3) ([emphasis] added). The [emphasized] language attempts to merge restrictive covenants with bylaws and rules and regulations, which is problematic. But significant here is that the Developer intended the Association to adopt new bylaws and rules that would then have the force of restrictive covenants. This is clear evidence that the Developer intended the Association to adopt new restrictions as the residential development evolved.

deed." Every deed "shall be in writing, signed by the party bound thereby, and acknowledged." RCW 64.04.020. The Boumas rely on Bakke v. Columbia Valley Lumber Company, 49 Wn.2d 165, 169, 298 P.2d 849 (1956), for the assertion that their signatures had to be on the CC&Rs. But, that case concerned an easement, that was held to have been properly voided by the respondent wife, who had not signed the instrument. Id. at 170-71. The other cases relied upon by the Boumas to argue that the 2015 CC&Rs are invalid for failure to satisfy the statute of frauds are similarly inapplicable. They do not cite to any caselaw involving CC&Rs amended by a homeowners' association following an expressly provided amendment process. This argument is without merit.

We affirm the trial court's conclusion that the Association had the authority to adopt the 2015 CC&Rs and that the amendment process was properly followed.

B. Specific Provisions

Amendments to restrictive covenants in Washington are subject to an additional requirement, even where power is exercised consistently and reasonably, whether the restriction is new or merely modified. Wilkinson v. Chiwawa Cmtys. Ass'n, 180 Wn.2d 241, 256, 327 P.3d 614 (2014). The Supreme Court has held that "when the general plan of development permits a majority to change the covenants but not create new ones, a simple majority cannot add new restrictive covenants that are inconsistent with the general plan of development or have no relation to existing covenants." Id. And, this court held in Shafer v. Board of Trustees of Sandy Hook Yacht Club Estates, Inc., 76 Wn. App. 267, 273-74, 883 P.2d 1387 (1994), that "an express reservation of power authorizing less than

100 percent of property owners within a subdivision to adopt new restrictions respecting the use of privately owned property is valid, provided that such power is exercised in a reasonable manner consistent with the general plan of the development."

The interpretation of language contained in a restrictive covenant is a question of law. Green v. Normandy Park Riviera Section Cmty. Club, Inc., 137 Wn. App. 665, 681, 151 P.3d 1038 (2007). Restrictive covenants are interpreted to give effect to the intention of the parties to the agreement incorporating the covenants and to carry out the purpose for which they were created. Id. at 683.

The Boumas assert that the amendments are not consistent with the general development plan and impose unreasonable disparate impacts on their property. The trial court addressed their challenges to individual sections of the amendments in its order denying summary judgment. It reasoned as follows:

> The Boumas next contend that various specific provisions are unreasonable and conflict with the general plan of development. The Court finds these arguments unpersuasive as a matter of law.
>
> 1. Listing [Bouma Development] as Grantor
>
> The Boumas argue that the 2015 covenants incorrectly list Gene Bouma Development, Inc. as a Grantor and Grantee for the recorded covenants, invalidating them. This is a scrivener's error and does not invalidate the covenants. Because the Boumas own their lots subject to covenants their company recorded, and the Association properly adopted amendments to these covenants, their property remains bound. The legal description of the property, not the name of the owner in the recording summary, determines the covenant's binding effect.

2. References To The Common and Recreation Easement Areas

The Boumas assert that the Association attempted to turn an easement into fee ownership in the 2015 covenants. This is an unreasonable reading of one paragraph in the covenants and ignores references to the easement elsewhere. In paragraph 1.4.2, the 2015 covenants identify the "common areas" within Lot 8 of the Silverado East Plat and Lot 8 of the Silverado West Plat. The Boumas claim that the Association is trying to assert full ownership of the areas, rather than the easement that currently exists. According to the Boumas, "the easement areas are not 'common areas' or 'common properties' owned by the Association." (Plaintiffs' Motion for Summary Judgment at 6). In its Response and at oral argument, counsel for the Association confirmed that the Association does claim ownership of the property or anything other than the recorded easements.

In the Plats for the Silverado East and West, the Developer conveyed over both Lots 8 "common and recreational easement area for the drainage, wells, and utilities purposes for both the Silverado West Plat and Silverado East Plat." These are not simply utility easements but rather are both common and recreational areas for the developments. If the purpose of the easements is ambiguous, any uncertainty comes from the original plats, not the 2015 covenants. The easement areas are listed as common areas, which the Association may use and must maintain.

Elsewhere in the 2015 covenants, the Association makes clear that it owns and maintains easements on Lot 8. (2015 Restrictive Covenants ¶ 2.5) ("use the Lot 8 Common Areas as a common and recreational easement area"). This description duplicates that on the Plats. The court therefore finds no grounds to invalidate the references to the "common and recreational easement area" as a common area.

3. Paragraph 2.1, Reservation of Easements

The Boumas claim that paragraph 2.1 of the 2015 covenants "attempts to broadly combine all easements together for all purposes and broaden their scope overall." (Plaintiffs' Summary Judgment Motion at 7). In paragraph 2.1 the 2015 covenants identify the existence of easements "on the face of the Plat" and do not attempt to create or convey additional or expanded easements. The Court finds no grounds to invalidate this paragraph.

4. Paragraph 2.3, Drainage Easement

The Boumas allege that Paragraph 2.3 creates drainage easements over any portion of any lot, outside the current areas set aside for the stormwater system and drainage. The Court agrees that the first sentence of paragraph 2.3 is broad in the abstract, but that any dispute over its meaning is hypothetical. The Boumas provide no evidence that the Association has attempted to create a drainage area or easement outside the current system, and without an actual justiciable dispute, the Court will not presume an invalid use of the covenant.

5. Paragraph 2.5, Lot 8 Common Areas

The Boumas argue that paragraph 2.5 of the 2015 covenants improperly expands the easements over Lots 8 to include "signage, lighting, and electrical purposes." In the original covenants, the Association has responsibility to maintain and repair street lights and decorative lights located within common areas, and in each of the shared well agreements, the Association has authority to make emergency repairs to the water systems on Lots 8, including the pump houses. Furthermore, in sections 6 and 7 of the 2015 covenants, the Association has responsibility to repair and maintain the water systems serving the various lots.

Maintenance implies both access and the ability to install necessary lights, signs and electrical systems. Like any grant of easement, however, the scope of the rights depend on the purpose of the easement. Since the Boumas provide no evidence that the Association has installed lights, signs or electrical systems unrelated to its maintenance obligations, the Court will not speculate on whether the Association has acted outside the scope of the easement grants.

6. Paragraph 3.2, Recreational Vehicles

The Boumas complain that the 2015 covenants restrict the ability of an owner to live in an RV [(recreational vehicle)] on a lot, "if it complied with the county codes." (Plaintiffs' Summary Judgment Motion at 12). Under paragraph 3.2 owners may keep RVs on their property as long as they are reasonably screened from view. The covenants limit out-of-county guests to a 6-week stay in an RV parked at an owners' home. Because Silverado is a residential development, not an RV park, the Court fails to see how the restrictions on permanent RV living violates the general plan of development. There are no grounds to find it invalid.

7. Paragraph 3.4, Animals

The Boumas assert that Paragraph 3.4 of the 2015 covenants contain more extensive restrictions on animals that the original covenants. The original covenants banned keeping any livestock or poultry, but the Association later amended the covenants to allow the Boumas on Lot 8 "for personal use, hobby and activity raise and keep farm animals". (2008 Amendment to ¶2.6). The 2015 covenants do not include this amendment, which is within the authority of the Association to approve or deny. If the Boumas want to keep farm animals on Lot 8, they should persuade their fellow owners to approve an amendment, as they did before. The Court finds no grounds to invalidate this covenant.

8. Paragraphs 3.9 & 3.10, Fencing

The Boumas complain that the 2015 covenants impose restrictions that "are much more onerous and limit a lot of owner's ability to use and fence their property how they choose." (Plaintiffs' Summary Judgment Motion at 13). The original covenants required Architectural Control Committee approval for any proposed fencing and limited an owner's right to install fences of any height or composition. The 2015 covenants further refine these limits. This is no reason to invalidate the covenant.

9. Paragraphs 3.12, 3.14, 3.15, 3.18, and 3.23

The Boumas raise general objections to use restrictions in section 3, arguing that [they] restrict the owners' freedom to use their property how they choose. (Plaintiff's Summary Judgment Motion at 14). Yet that is the effect of a restrictive covenant. The Developer obtained plat approval for Silverado East and West—and sold the lots—based on this being a planned residential development, protected by a homeowners' association. The fact that the Association now imposes restrictions that the Boumas do not like does not invalidate the plan of development or the Association's authority. Like any owner in Silverado, the Boumas have the right and responsibility to participate in the Association by amending the covenants or assuring they are enforced fairly. The Court finds no grounds to invalidate these covenant sections.

10. Paragraphs 4.2.1, 4.2.3, and 4.5

The Boumas Object to restrictions on garages, outbuildings, and landscaping, arguing they are more detailed and restrictive. They also contend that even though a 2008 amendment placed restrictions on Lot 8 east, the 2015 covenants cannot place similar

restrictions on Lot 8 west. None of these arguments are persuasive or invalidate the respective covenants.

11. Section 5, Architectural Control Committee

The Boumas complain that the 2015 covenants change the composition of the Architectural Control Committee [(ACC)] and expand its powers. Other than asserting that this is a fundamental change in the scheme of development, they do not prove how these changes are unreasonable or specify how they contradict the general plan of development. The purpose of an ACC is to assure that all construction contributes to, rather than detracts from, the harmony of the residential neighborhood. The Court finds no grounds to invalidate these amendments.

12. Consolidating Maintenance [o]f [t]he Water Systems

The Boumas take issue with the owners' desire to have the Association, rather than each lot owner, maintain the various shared wells serving the development. Much like individual owners hiring a company to service and maintain the wells, the owners can reasonably have the Association take responsibility for the system maintenance and assess themselves to pay for it. The Court finds these provisions reasonably adopted and consistent with the general plan of development. There are no grounds to invalidate them.

13. Paragraph 6.3, Building on the Lot 8 Easement Areas

The Boumas object to the 2015 covenant provision that prohibits construction of any single family residence on the Lot 8 common areas. In 2008, the Association amended paragraph 2.2 to prohibit building and "outbuilding on lot 8 . . . north of deer creek OR within 200 feet to the south of Deer Creek." (2008 Amendment at 2). The Boumas did not object to this restriction and in fact recorded the amendment for the Association. Here the Boumas argue that the Association cannot unilaterally place such a restriction on the Bouma Lots. Because current easements over the Lot 8 common and recreational easement area most likely foreclose constructing any structures on the area, the Court declines to rule on this provision. Any dispute remains hypothetical.

14. Section 7, Association Powers

Finally, the Boumas object to the expanded powers of the Association, worrying that it would "allow the Association to come onto any lot, anywhere, and do almost anything." (Plaintiffs' Summary Judgment Motion at 19). The Court disagrees. The

> provisions in Section 7 are standard for homeowners' associations under RCW 64.38.020, and permit the Association to fund its obligations under the covenants. In paragraph 3.2 of the original covenants, the Declarant provided "no diminution or abatement of assessments shall be claimed or allotted by reason of any alleged failure of the association to take some action or perform some function required to be taken or performed by the Association under this Declaration." (Restrictive Covenants ¶ 3.2) (emphasis added). The ability to assess its members was implied.
>
> The Court finds no grounds to invalidate these covenant provisions.

(Last alteration in original.)

We share the view of the trial court, that the Boumas failed to show as a matter of law that any portion of the amendments were inconsistent with the general development plan, imposed unreasonable disparate impacts on their property, or were otherwise invalid.

We affirm the denial of summary judgment to the Boumas and the grant of summary judgment to the Association.

II. Attorney Fees and Costs

Finally, the Boumas argue the trial court awarded attorney fees and costs to the Association in error. They argue the Association filed an untimely motion, did not file a motion to enlarge time, it did not do so due to excusable neglect, and that there were no claims subject to the attorney fees provision in the 2015 CC&Rs.

The issue of whether a party is entitled to fees is a question of law we review de novo. O'Neill v. City of Shoreline, 183 Wn. App. 15, 21, 332 P.3d 1099 (2014). The amount of an award of reasonable attorney fees is a matter within the trial court's discretion. Boeing Co. v. Sierracin Corp., 108 Wn.2d 38, 65, 738 P.2d 665 (1987). A trial court abuses its discretion only when its decision is manifestly

unreasonable, or when its discretion is exercised on untenable grounds or for untenable reasons. TMT Bear Creek Shopping Ctr., Inc. v. PETCO Animal Supplies, Inc., 140 Wn. App. 191, 214, 165 P.3d 1271, (2007).

CR 54(d)(2) states,

> Claims for attorneys' fees and expenses, other than costs and disbursements, shall be made by motion unless the substantive law governing the action provides for the recovery of such fees and expenses as an element of damages to be proved at trial. Unless otherwise provided by statute or order of the court, the motion must be filed no later than 10 days after entry of judgment.

CR 6(b) provides procedures for enlarging the time specified in this rule. Where the motion is made after the expiration of the temporal limitation, the court may "permit the act to be done where the failure to act was the result of excusable neglect." CR 6(b)(2).

On November 13, 2019, the court filed the order granting summary judgment in favor of the Association. By this time, counsel of record for the Association had changed jobs. New counsel learned of the November 13, 2019 order on November 20, 7 days after it was filed. The Association offered a declaration to this effect in support of its motion for attorney fees and costs. The Association filed its motion for attorney fees on December 9, 2019, 26 days after the summary judgment order.

The parties dispute whether the Association, as the prevailing party, had to file a motion for an award of attorney fees within 10 days in compliance with CR 54(d). Our Supreme Court recently held that a summary judgment order resolving all substantive legal claims constitutes a "final judgment" pursuant to RAP

2.2(a)(1). Denney v. City of Richland, 195 Wn.2d 649, 651, 462 P.3d 842 (2020). Further, the Denney court reasoned that Washington courts have held a summary judgment order to be a final judgment despite later entry of a money judgment in previous cases. Id. at 656. It reasoned, an order granting summary judgment "falls within this court's definition of final judgment." Id. at 657. We hold the order granting summary judgment to the Association was a final judgment for the purposes of CR 54(d)(2).

A court may enlarge deadlines after they have passed only if the party's lateness was the result of excusable neglect. Clipse v. Commercial Driver Servs., Inc., 189 Wn. App. 776, 787, 358 P.3d 464 (2015). The Boumas argue the "excusable neglect" exception is unavailable, because the Association never filed a motion to enlarge time under CrR 6(b). However, in Corey v. Pierce County, 154 Wn. App. 752, 774, 225 P.3d 367 (2010), this court held that a party's claim was barred by the 10 day filing limitation in CR 54(d) where she had not shown "excusable neglect or reason for delay" in filing for attorney fees, contemplating the standard absent a CR 6(b) motion. An attorney quitting because he changed jobs is outside of the Association's control. The Association provided declarations to this effect demonstrating the reason for the delay. We hold the trial court's decision to rule on the motion despite the delay was reasonable in light of showing of excusable neglect by the Association.

The Association was awarded fees under RCW 64.38.050 and the 2015 CC&Rs. The Boumas argue this is not an enforcement case, and therefore relief

under the CC&Rs is inappropriate.[5] The Boumas rely on Meresse v. Stelma, 100 Wn. App. 857, 999 P.2d 1267 (2000), to support their argument against a fee award. The Meresses, the original plaintiffs, alleged the subdivision owners had adopted amendments to the restrictive covenants that were invalid. Id. at 868-69. They sought attorney fees against their homeowners' association. Id. They were not entitled to fees where the homeowners' association exceeded its authority, but were not in violation of the instrument. Id. at 869. Nor was the homeowners' association entitled to attorney fees where it was rightly challenged for exceeding its authority. Id. at 868-69. Meresse is distinguishable. The applicable attorney fee provision was narrower in Meresse.

The 2015 CC&Rs provide, "the prevailing party in any litigation involving the enforcement of any provision of this [2015 CC&R] shall be entitled to judgment and any remedy in law or equity . . . and for the reasonable attorneys' fees and costs incurred in such litigation but such prevailing party." The Boumas argue that this is not an enforcement case, and therefore the court is unable to award attorney fees under this provision. But, the CC&Rs also say, "The provisions contained in [the CC&Rs] or any amended or supplemental declaration shall be enforceable by proceeding for prohibitive or mandatory injunction." Bouma's complaint sought declaratory relief. It sought enforcement of the preamendment CC&Rs. The trial

[5] The Boumas raise the issue of lack of claims subject to the provisions in the 2015 CC&Rs for the first time on appeal, which they acknowledge. This court may refuse to review any claim of error which was not raised in the trial court. RAP 2.5(A). However, we may nonetheless address the issue if we so choose. Smith v. Shannon, 100 Wn.2d 26, 38, 666 P.2d 351 (1983).

court did not err in concluding that the CC&Rs provide an appropriate basis to award fees.

Chapter 64.38 RCW relates to homeowners' associations. The Boumas' motion for summary judgment sought a ruling, as a matter of law, that the 2015 CC&Rs were invalid and unenforceable, brought pursuant to chapter 64.38 RCW. RCW 64.38.050 provides that "any violation of the provisions of this chapter entitles an aggrieved party to any remedy provided by law or in equity. The court, in an appropriate case, may award reasonable attorneys' fees to the prevailing party." Neither the Association nor the trial court identified a violation of the chapter by the Boumas in bringing their challenge to the amendments. An award of fees under the statute was error, but has no consequence given the award was also under the 2015 CC&Rs.

The Boumas further argue the trial court record does not support the attorney fees. The court held the Boumas were liable under the 2015 CC&Rs and RCW 64.38.050 in the amount of $32,434.50. The Boumas did not object to the hourly rate provided by the Association. The Boumas requested that the fees should "should be reduced by $1,066.00 for time spent on an unsuccessful motion to compel and $6,585.00 for time for [Brad] Swanson that it has failed to prove is reasonable." They argued it was not clear that Swanson's time was spent on work related to the lawsuit. The court awarded the amount requested by the Association. The Boumas do not demonstrate any abuse of discretion by the trial court regarding the amount awarded.

The trial court did not err in the award of attorney fees.

III. Attorney Fees on Appeal

As the prevailing party on appeal, the Association is entitled to an award of attorney fees and costs pursuant to the CC&Rs. The Association's request for attorney fees and costs on appeal is granted.

We affirm.

Leppelwick, J.

WE CONCUR

Smith, J.

Mann, C.J.

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

GENE and MARALEE BOUMA, husband and wife,

Appellants,

v.

SILVERADO COMMUNITY ASSOCIATION, a Washington nonprofit corporation,

Respondent.

No. 80853-2-I

ORDER DENYING MOTION FOR RECONSIDERATION

The appellants, Gene and Maralee Bouma, have filed a motion for reconsideration of the opinion filed on November 23, 2020. The panel has determined that the motion should be denied; now, therefore, it is hereby

ORDERED that the motion for reconsideration denied.

Appelwick, J.

Appendix B

RCW 64.32.200

Assessments for common expenses—Enforcement of collection—Liens and foreclosures—Liability of mortgagee or purchaser.

(1) The declaration may provide for the collection of all sums assessed by the association of apartment owners for the share of the common expenses chargeable to any apartment and the collection may be enforced in any manner provided in the declaration including, but not limited to, (a) ten days notice shall be given the delinquent apartment owner to the effect that unless such assessment is paid within ten days any or all utility services will be forthwith severed and shall remain severed until such assessment is paid, or (b) collection of such assessment may be made by such lawful method of enforcement, judicial or extra-judicial, as may be provided in the declaration and/or bylaws.

(2) All sums assessed by the association of apartment owners but unpaid for the share of the common expenses chargeable to any apartment shall constitute a lien on such apartment prior to all other liens except only (a) tax liens on the apartment in favor of any assessing unit and/or special district, and (b) all sums unpaid on all mortgages of record. Such lien is not subject to the ban against execution or forced sales of homesteads under RCW 6.13.080 and may be foreclosed by suit by the manager or board of directors, acting on behalf of the apartment owners, in like manner as a mortgage of real property. In any such foreclosure the apartment owner shall be required to pay a reasonable rental for the apartment, if so provided in the bylaws, and the plaintiff in such foreclosures shall be entitled to the appointment of a receiver to collect the same. The manager or board of directors, acting on behalf of the apartment owners, shall have power, unless prohibited by the declaration, to bid on the apartment at foreclosure sale, and to acquire and hold, lease, mortgage, and convey the same. Upon an express waiver in the complaint of any right to a deficiency judgment, the period of redemption shall be eight months after the sale. Suit to recover any judgment for any unpaid common expenses shall be maintainable without foreclosing or waiving the liens securing the same.

(3) Where the mortgagee of a mortgage of record or other purchaser of an apartment obtains possession of the apartment as a result of foreclosure of the mortgage, such possessor, his or her successors and assigns shall not be liable for the share of the common expenses or assessments by the association of apartment owners chargeable to such apartment which became due prior to such possession. Such unpaid share of common expenses of assessments shall be deemed to be common expenses collectible from all of the apartment owners including such possessor, his or her successors and assigns.

[2012 c 117 § 201; 1988 c 192 § 2; 1965 ex.s. c 11 § 6; 1963 c 156 § 20.]

RCW 64.34.455

Effect of violations on rights of action—Attorney's fees.

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.

[1989 c 43 § 4-115.]

RCW 64.90.485

Liens—Enforcement.

(1) The association has a statutory lien on each unit for any unpaid assessment against the unit from the time such assessment is due.

(2) A lien under this section has priority over all other liens and encumbrances on a unit except:

(a) Liens and encumbrances recorded before the recordation of the declaration and, in a cooperative, liens and encumbrances that the association creates, assumes, or takes subject to;

(b) Except as otherwise provided in subsection (3) of this section, a security interest on the unit recorded before the date on which the unpaid assessment became due or, in a cooperative, a security interest encumbering only the unit owner's interest and perfected before the date on which the unpaid assessment became due; and

(c) Liens for real estate taxes and other state or local governmental assessments or charges against the unit or cooperative.

(3)(a) A lien under this section also has priority over the security interests described in subsection (2)(b) of this section to the extent of an amount equal to the following:

(i) The common expense assessments, excluding any amounts for capital improvements, based on the periodic budget adopted by the association pursuant to RCW 64.90.480(1), along with any specially allocated assessments that are properly assessable against the unit under such periodic budget, which would have become due in the absence of acceleration during the six months immediately preceding the institution of proceedings to foreclose either the association's lien or a security interest described in subsection (2)(b) of this section;

(ii) The association's actual costs and reasonable attorneys' fees incurred in foreclosing its lien but incurred after the giving of the notice described in (a)(iii) of this subsection; provided, however, that the costs and reasonable attorneys' fees that will have priority under this subsection (3)(a)(ii) shall not exceed two thousand dollars or an amount equal to the amounts described in (a)(i) of this subsection, whichever is less;

(iii) The amounts described in (a)(ii) of this subsection shall be prior only to the security interest of the holder of a security interest on the unit recorded before the date on which the unpaid assessment became due and only if the association has given that holder not less than sixty days' prior written notice that the owner of the unit is in default in payment of an assessment. The notice shall contain:

(A) Name of the borrower;

(B) Recording date of the trust deed or mortgage;

(C) Recording information;

(D) Name of condominium, unit owner, and unit designation stated in the declaration or applicable supplemental declaration;

(E) Amount of unpaid assessment; and

(F) A statement that failure to, within sixty days of the written notice, submit the association payment of six months of assessments as described in (a)(i) of this subsection will result in the priority of the amounts described in (a)(ii) of this subsection; and

(iv) Upon payment of the amounts described in (a)(i) and (ii) of this subsection by the holder of a security interest, the association's lien described in this subsection (3)(a) shall thereafter be fully subordinated to the lien of such holder's security interest on the unit.

(b) For the purposes of this subsection:

(i) "Institution of proceedings" means either:

(A) The date of recording of a notice of trustee's sale by a deed of trust beneficiary;

(B) The date of commencement, pursuant to applicable court rules, of an action for judicial foreclosure either by the association or by the holder of a recorded security interest; or

(C) The date of recording of a notice of intention to forfeit in a real estate contract forfeiture proceeding by the vendor under a real estate contract.

(ii) "Capital improvements" does not include making, in the ordinary course of management, repairs to common elements or replacements of the common elements with substantially similar items, subject to: (A) Availability of materials and products, (B) prevailing law, or (C) sound engineering and construction standards then prevailing.

(c) The adoption of a periodic budget that purports to allocate to a unit any fines, late charges, interest, attorneys' fees and costs incurred for services unrelated to the foreclosure of the association's lien, other collection charges, or specially allocated assessments assessed under RCW 64.90.480 (6) or (7) does not cause any such items to be included in the priority amount affecting such unit.

(4) Subsections (2) and (3) of this section do not affect the priority of mechanics' or material suppliers' liens to the extent that law of this state other than chapter 277, Laws of 2018 gives priority to such liens, or the priority of liens for other assessments made by the association.

(5) A lien under this section is not subject to chapter 6.13 RCW.

(6) If the association forecloses its lien under this section nonjudicially pursuant to chapter 61.24 RCW, as provided under subsection (13) of this section, the association is not entitled to the lien priority provided for under subsection (3) of this section, and is subject to the limitations on deficiency judgments as provided in chapter 61.24 RCW.

(7) Unless the declaration provides otherwise, if two or more associations have liens for assessments created at any time on the same property, those liens have equal priority as to each other, and any foreclosure of one such lien shall not affect the lien of the other.

(8) Recording of the declaration constitutes record notice and perfection of the statutory lien created under this section. Further notice or recordation of any claim of lien for assessment under this section is not required, but is not prohibited.

(9) A lien for unpaid assessments and the personal liability for payment of those assessments are extinguished unless proceedings to enforce the lien or collect the debt are instituted within six years after the full amount of the assessments sought to be recovered becomes due.

(10) This section does not prohibit actions against unit owners to recover sums for which subsection (1) of this section creates a lien or prohibit an association from taking a deed in lieu of foreclosure.

(11) The association upon written request must furnish to a unit owner or a mortgagee a statement signed by an officer or authorized agent of the association setting forth the amount of unpaid assessments or the priority amount against that unit, or both. The statement must be furnished within fifteen days after receipt of the request and is binding on the association, the board, and every unit owner unless, and to the extent, known by the recipient to be false. The liability of a recipient who reasonably relies upon the statement must not exceed the amount set forth in any statement furnished pursuant to this section or RCW **64.90.640**(1)(b).

(12) In a cooperative, upon nonpayment of an assessment on a unit, the unit owner may be evicted in the same manner as provided by law in the case of an unlawful holdover by a commercial tenant, and the lien may be foreclosed as provided under this section.

(13) The association's lien may be foreclosed in accordance with (a) and (b) of this subsection.

(a) In a common interest community other than a cooperative, the association's lien may be foreclosed judicially in accordance with chapter **61.12** RCW, subject to any rights of redemption under chapter **6.23** RCW.

(b) The lien may be enforced nonjudicially in the manner set forth in chapter **61.24** RCW for nonjudicial foreclosure of deeds of trust if the declaration: Contains a grant of the common interest community in trust to a trustee qualified under RCW **61.24.010** to secure the obligations of the unit owners to the association for the payment of assessments, contains a power of sale, provides in its terms that the units are not used principally for agricultural purposes, and provides that the power of sale is operative in the case of a default in the obligation to pay assessments. The association or its authorized representative may purchase the unit at the foreclosure sale and acquire, hold, lease, mortgage, or convey the unit. Upon an express waiver in the complaint of any right to a deficiency judgment in a judicial foreclosure action, the period of redemption is eight months.

(c) In a cooperative in which the unit owners' interests in the units are real estate, the association's lien must be foreclosed in like manner as a mortgage on real estate or by power of sale under (b) of this subsection.

(d) In a cooperative in which the unit owners' interests in the units are personal property, the association's lien must be foreclosed in like manner as a security interest under chapter 62A.9A RCW.

(14) If the unit owner's interest in a unit in a cooperative is real estate, the following requirements apply:

(a) The association, upon nonpayment of assessments and compliance with this subsection, may sell that unit at a public sale or by private negotiation, and at any time and place. The association must give to the unit owner and any lessee of the unit owner reasonable notice in a record of the time, date, and place of any public sale or, if a private sale is intended, of the intention of entering into a contract to sell and of the time and date after which a private conveyance may be made. Such notice must also be sent to any other person that has a recorded interest in the unit that would be cut off by the sale, but only if the recorded interest was on record seven weeks before the date specified in the notice as the date of any public sale or seven weeks before the date specified in the notice as the date after which a private sale may be made. The notices required under this subsection may be sent to any address reasonable in the circumstances. A sale may not be held until five weeks after the sending of the notice. The association may buy at any public sale and, if the sale is conducted by a fiduciary or other person not related to the association, at a private sale.

(b) Unless otherwise agreed to or as stated in this section, the unit owner is liable for any deficiency in a foreclosure sale.

(c) The proceeds of a foreclosure sale must be applied in the following order:

(i) The reasonable expenses of sale;

(ii) The reasonable expenses of securing possession before sale; the reasonable expenses of holding, maintaining, and preparing the unit for sale, including payment of taxes and other governmental charges and premiums on insurance; and, to the extent provided for by agreement between the association and the unit owner, reasonable attorneys' fees, costs, and other legal expenses incurred by the association;

(iii) Satisfaction of the association's lien;

(iv) Satisfaction in the order of priority of any subordinate claim of record; and

(v) Remittance of any excess to the unit owner.

(d) A good-faith purchaser for value acquires the unit free of the association's debt that gave rise to the lien under which the foreclosure sale occurred and any subordinate interest, even though the association or other person conducting the sale failed to comply with this section. The person conducting the sale must execute a conveyance to the purchaser sufficient to convey the unit and stating that it is executed by the person after a foreclosure of the association's lien by power of sale and that the person was empowered to make the sale. Signature and title or authority of the person signing the conveyance as grantor and a recital of the facts of nonpayment of the assessment and of the giving of the notices required under this subsection are sufficient proof of the facts recited and of the authority to sign. Further proof of authority is not required even though the association is named as grantee in the conveyance.

(e) At any time before the association has conveyed a unit in a cooperative or entered into a contract for its conveyance under the power of sale, the unit owners or the holder of any subordinate security interest may cure the unit owner's default and prevent sale or other conveyance by tendering the performance due under the security agreement, including any amounts due because of exercise of a right to accelerate, plus the reasonable expenses of proceeding to foreclosure incurred to the time of tender, including reasonable attorneys' fees and costs of the creditor.

(15) In an action by an association to collect assessments or to foreclose a lien on a unit under this section, the court may appoint a receiver to collect all sums alleged to be due and owing to a unit owner before commencement or during pendency of the action. The receivership is governed under chapter **7.60** RCW. During pendency of the action, the court may order the receiver to pay sums held by the receiver to the association for any assessments against the unit. The exercise of rights under this subsection by the association does not affect the priority of preexisting liens on the unit.

(16) Except as provided in subsection (3) of this section, the holder of a mortgage or other purchaser of a unit who obtains the right of possession of the unit through foreclosure is not liable for assessments or installments of assessments that became due prior to such right of possession. Such unpaid assessments are deemed to be common expenses collectible from all the unit owners, including such mortgagee or other purchaser of the unit. Foreclosure of a mortgage does not relieve the prior unit owner of personal liability for assessments accruing against the unit prior to the date of such sale as provided in this subsection.

(17) In addition to constituting a lien on the unit, each assessment is the joint and several obligation of the unit owner of the unit to which the same are assessed as of the time the assessment is due. A unit owner may not exempt himself or herself from liability for assessments. In a voluntary conveyance other than by foreclosure, the grantee of a unit is jointly and severally liable with the grantor for all unpaid assessments against the grantor up to the time of the grantor's conveyance, without prejudice to the grantee's right to recover from the grantor the amounts paid by the grantee. Suit to recover a personal judgment for any delinquent assessment is maintainable in any court of competent jurisdiction without foreclosing or waiving the lien securing such sums.

(18) The association may from time to time establish reasonable late charges and a rate of interest to be charged, not to exceed the maximum rate calculated under RCW **19.52.020**, on all subsequent delinquent assessments or installments of assessments. If the association does not establish such a rate, delinquent assessments bear interest from the date of delinquency at the maximum rate calculated under RCW **19.52.020** on the date on which the assessments became delinquent.

(19) The association is entitled to recover any costs and reasonable attorneys' fees incurred in connection with the collection of delinquent assessments, whether or not such collection activities result in a suit being commenced or prosecuted to judgment. The prevailing party is also entitled to recover costs and reasonable attorneys' fees in such suits, including any appeals, if it prevails on appeal and in the enforcement of a judgment.

(20) To the extent not inconsistent with this section, the declaration may provide for such additional remedies for collection of assessments as may be permitted by law.

(21) An association may not commence an action to foreclose a lien on a unit under this section unless:

(a) The unit owner, at the time the action is commenced, owes a sum equal to at least three months of common expense assessments; and

(b) The board approves commencement of a foreclosure action specifically against that unit.

(22) Every aspect of a collection, foreclosure, sale, or other conveyance under this section, including the method, advertising, time, date, place, and terms, must be commercially reasonable.

[**2019 c 238 § 211**; **2018 c 277 § 318**.]

RAP 13.4
DISCRETIONARY REVIEW OF DECISION TERMINATING REVIEW

(a) How to Seek Review. A party seeking discretionary review by the Supreme Court of a Court of Appeals decision terminating review must serve on all other parties and file a petition for review or an answer to the petition that raises new issues. A petition for review should be filed in the Court of Appeals. If no motion to publish or motion to reconsider all or part of the Court of Appeals decision is timely made, a petition for review must be filed within 30 days after the decision is filed. If such a motion is made, the petition for review must be filed within 30 days after an order is filed denying a timely motion for reconsideration or determining a timely motion to publish. If the petition for review is filed prior to the Court of Appeals determination on the motion to reconsider or on a motion to publish, the petition will not be forwarded to the Supreme Court until the Court of Appeals files an order on all such motions. The first party to file a petition for review must, at the time the petition is filed, pay the statutory filing fee to the clerk of the Court of Appeals in which the petition is filed. Failure to serve a party with the petition for review or file proof of service does not prejudice the rights of the party seeking review, but may subject the party to a motion by the Clerk of the Supreme Court to dismiss the petition for review if not cured in a timely manner. A party prejudiced by the failure to serve the petition for review or to file proof of service may move in the Supreme Court for appropriate relief.

(b) Considerations Governing Acceptance of Review. A petition for review will be accepted by the Supreme Court only:

(1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or

(2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or

(3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or

(4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

(c) Content and Style of Petition. The petition for review should contain under appropriate headings and in the order here indicated:

(1) Cover. A title page, which is the cover.

(2) Tables. A table of contents, with page references, and a table of cases (alphabetically arranged), statutes, and other authorities cited, with reference to the pages of the brief where cited.

(3) Identity of Petitioner. A statement of the name and designation of the person filing the petition.

(4) Citation to Court of Appeals Decision. A reference to the Court of Appeals decision which petitioner wants reviewed, the date of filing the decision, and the date of any order granting or denying a motion for reconsideration.

(5) Issues Presented for Review. A concise statement of the issues presented for review.

(6) Statement of the Case. A statement of the facts and procedures relevant to the issues presented for review, with appropriate references to the record.

(7) Argument. A direct and concise statement of the reason why review should be accepted under one or more of the tests established in section (b), with argument.

(8) Conclusion. A short conclusion stating the precise relief sought.

(9) Appendix. An appendix containing a copy of the Court of Appeals decision, any order granting or denying a motion for reconsideration of the decision, and copies of statutes and constitutional provisions relevant to the issues presented for review.

(d) Answer and Reply. A party may file an answer to a petition for review. A party filing an answer to a petition for review must serve the answer on all other parties. If the party wants to seek review of any issue that is not raised in the petition for review, including any issues that were raised but not decided in the Court of Appeals, the party must raise those new issues in an answer. Any answer should be filed within 30 days after the service on the party of the petition. A party may file a reply to an answer only if the answering party seeks review of issues not raised in the petition for review. A reply to an answer should be limited to addressing only the new issues raised in the answer. A party filing any reply to an answer must serve the reply to the answer on all other parties. A reply to an answer should be filed within 15 days after the service on the party of the answer. An answer or reply should be filed in the Supreme Court. The Supreme Court may call for an answer or a reply to an answer.

(e) Form of Petition, Answer, and Reply. The petition, answer, and reply should comply with the requirements as to form for a brief as provided in rules 10.3 and 10.4, except as otherwise provided in this rule.

(f) Length. The petition for review, answer, or reply should not exceed 20 pages double spaced, excluding appendices, title sheet, table of contents, and table of authorities.

(g) Reproduction of Petition, Answer, and Reply. The clerk will arrange for the reproduction of copies of a petition for review, an answer, or a reply, and bill the appropriate party for the copies as provided in rule 10.5.

(h) Amicus Curiae Memoranda. The Supreme Court may grant permission to file an amicus curiae memorandum in support of or opposition to a pending petition for review. Absent a showing of particular justification, an amicus curiae memorandum should be received by the court and counsel of record for the parties and other amicus curiae not later than 60 days from the date the petition for review is filed. Rules 10.4 and 10.6 should govern generally disposition of a motion to file an amicus curiae memorandum. An amicus curiae memorandum or answer thereto should not exceed 10 pages.

(i) No Oral Argument. The Supreme Court will decide the petition without oral argument.

[Originally effective July 1, 1976; amended effective September 1, 1983; September 1, 1990; September 18, 1992; September 1, 1994; September 1, 1998; September 1, 1999; December 24, 2002; September 1, 2006; September 1, 2009; September 1, 2010; December 8, 2015; September 1, 2016.]

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Transmittal Information

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Appellate Court Case Title:	Gene and Maralee Bouma, Appellants v. Silverado Community Association, Respondent
Superior Court Case Number:	17-2-00093-7

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