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COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

GARY C. ROATS, Trustee for the Real property LOT 128; GARY C. ROATS and PAMELA A. ROATS, husband and wife, owners for the real property: LOT 129, SAN JUAN AVIATION ESTATES, on their own behalf and on behalf of a class of similarly situated individuals,

Plaintiffs/Appellants/Cross-Respondents,

v.

BLAKELY ISLAND MAINTENANCE COMMISSION, INC., a Washington non-profit corporation; ELLEN ROTH, ANNE MALMO, JIM FERGUS, DICK DEMERS, SCOTT BURKHARD, DEBORAH DAVEY, and GAIL LIGHT, in their capacity as Governors of the Board of the Blakely Island Maintenance Commission, Inc. and in their individual capacities,

Defendants/Respondents/Cross-Appellants.

**APPELLANT'S/CROSS-RESPONDENT'S REPLY/RESPONSE
BRIEF**

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ORIGINAL

TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. LEGAL ARGUMENT	8
A. The Trial Court Erred By Dismissing the Roats’ Claim 2 on Summary Judgment; Respondent’s Actions Were <i>Ultra Vires</i>	8
1. The Recent Amendment of the BIMC's Articles Has No Bearing on This Appeal	8
a. The Alleged Amendment Has No Impact on Existing Claims or Actions.....	9
b. A Unanimous Vote is Required to Impose the Substantial Financial and Liability Burdens of Marina Operations on all Members.....	10
2. The Response Ignores the Key Language of the Governing Documents	12
a. DIRs and BICs	12
b. By-Laws and Articles	16
3. The Roats May Choose which of BIMC’s <i>Ultra Vires</i> Actions to Address.....	18
4. Respondent's Laches and "Failure to Exhaust" Defenses Are Fatally Flawed	19
a. Respondent's Laches Defense Fails: The Roats Acted Promptly and Respondent Has Not Shown Prejudice	20

b.	The Roats Did Not Fail to Exhaust their Remedies	23
B.	Respondent Has Not Appealed the Trial Court’s Ruling on the Roats’ Claim 5; Respondent's Persistent Violations of the HOA Open Meeting Statute Are Conclusively Established	26
C.	The Trial Court Abused Its Discretion By Failing to Award the Roats their Fees Incurred In Connection with Claim 5	26
D.	The Trial Court’s Award of Fees to Respondent under the Bylaws Should Be Vacated.....	29
1.	The Trial Court Properly Barred Recovery of Any Fees Incurred After May 14, 2009 – When the Roats Were “Considered Current” on their Assessments.....	29
2.	The Trial Court Committed Error By Awarding Respondent <i>All</i> Fees Incurred Prior to May 14, 2009	32
a.	The Trial Court Committed Error By Awarding Fees that Respondent Acknowledged Were Not Incurred to Enforce An Assessment	33
b.	The Trial Court’s Award of Fees Paid by BIMC’s Insurance Carrier Violated Washington's Anti- Subrogation Rule	33
E.	The Trial Court Did Not Err In Rejecting Respondent’s Claim for Fees under the HOA and BICs.....	39
1.	The HOA Provides No Basis for	

Respondent's Attorney Fee Claim.....39

2. The BICs Provide No Basis for
Respondent's Attorney Fee Claim.....41

IV. CONCLUSION.....43

TABLE OF AUTHORITIES

	Page
<i>Am. Nat'l Fire Ins. Co. v. Hughes</i> , 658 N.W.2d 330, 2003 ND 43 (2003)	35, 36
<i>Bennett v. Troy Record Co.</i> , 25 A.D.2d 799, 269 N.Y.S.2d 213 (1966)	34
<i>Blueberry Place Homeowners Ass'n. v. Northward Homes</i> , 126 Wn. App. 352, 110 P.3d 1145 (2005).....	40
<i>Boguch v. Landover Corp.</i> , 153 Wn.App. 595, 224 P.3d 795 (2009).....	29
<i>Bollengier v. Doctors Medical Center</i> , 272 Cal.Rptr. 273 (Cal.App. 1990).....	24
<i>Carle v. Earth Stove, Inc.</i> , 35 Wn. App. 904, 670 P.2d 1086 (1983).....	34
<i>Cascade Trailer Court v. Beeson</i> , 50 Wn. App. 678, 749 P.2d 761 (1988).....	35, 36
<i>Doyle v. Raley's Inc.</i> , 158 F.3d 1012 (9th Cir. 1998)	24
<i>Energy Northwest v. Hartje</i> , 148 Wn.App. 454 (2009)	19
<i>Fireman's Ins. Co. of Newark v. Wheeler</i> , 165 A.D.2d 141, 566 N.Y.S.2d 692 (1991).....	35, 37
<i>General Ins. Co. of America v. Stoddard Wendle Fort Motors</i> , 67 Wn.2d 973, 410 P.2d 904 (1966).....	35
<i>Holderby v. Int'l Union of Operating Engineers</i> , 45 Cal. 2d 843, 291 P.2d 404 (1979).....	24, 25

<i>Johnson v. Ubar, LLC</i> , 150 Wn.App. 533 (2009)	25
<i>Lopp v. Peninsula School Dist. No. 401</i> , 90 Wn.2d 754 (1978)	20
<i>Meresse v. Stelma</i> , 100 Wn. App. 857, 999 P.2d 1267 (2000)	9, 10, 11, 12, 17, 18
<i>Neal v. Neal</i> , 219 Mich. App. 490, 557 N.W.2d 133 (1996)	34
<i>Prosperity Realty, Inc. v. Haco-Canon</i> , 724 F. Supp. 254 (S.D.N.Y. 1989)	34
<i>Prudential Property and Cas. Ins. Co. v. Lawrence</i> , 45 Wn.App. 111, 724 P.2d 418 (1986)	34
<i>Sahlolbei v. Providence Healthcare, Inc.</i> , 5 Cal.Rptr.3d 598 (Cal.App. 2004)	25
<i>Shafer v. Board of Trustees of Sandy Hook Yacht Club Estates, Inc.</i> , 76 Wn. App. 267, 273-74, 883 P.2d 1387 (1994)	11
<i>Sutton v. Jondahl</i> , 532 P.2d 478 (Okla. App. 1975)	35
<i>State ex rel. Citizens Against Tolls v. Murphy</i> , 151 Wn.2d 226 (2004)	20, 23
<i>Terre Du Lac Ass'n, Inc. v. Terre Du Lac, Inc.</i> , 737 S.W.2d 206 (Mo.App. 1987)	12
<i>United Fire & Cas. Co. v. Bruggeman</i> , 505 N.W.2d 87 (Minn. App. 1993)	35
<i>Waite v. Aetna Cas. & Surety Co.</i> , 77 Wn.2d 850, 467 P.2d 847 (1970)	32

Statutes

RCW 24.03.04025, 39

RCW 24.03.1809

RCW 64.38.0354, 21, 26, 39, 41

RCW 64.38.035(2).....26, 40

RCW 64.38.05026, 39

RCW 64.3826

I. INTRODUCTION

The hallmark of Respondent's Brief is the consistent failure to acknowledge or discuss the material facts controlling the outcome of this appeal and a stunning failure to cite, quote or discuss the *applicable* provisions of the governing documents and *statutes*.

The Articles of Incorporation ("Articles"), Bylaws, and Covenants ("BICs") spell out the improvements that BIMC is empowered to "maintain" and the activities it is empowered to undertake in doing so. The BICs and the Articles specifically identify *all* of the improvements that fall under BIMC's power. The Marina, which existed when both were enacted, is not on the list in either document. No lot owner could possibly infer from these governing documents that she faced a risk of fuel spill liability and financial risks of losses from BIMC's operating the Marina and store. Even if a majority of lot owners had supported BIMC's incurring these risks and obligations--and in fact a majority opposed them--unanimous consent is required to embark on costly and high risk activities not contemplated by the governing documents.

Respondent's Brief deals with these fatal obstacles to its position mainly by ignoring them. Respondent argues that the Bylaws expand on

the power set forth in the Articles of Incorporation¹ but does not acknowledge that the Bylaws cannot trump the Articles² and does not *even mention* the critical Bylaw limitation on BIMC's power: Article IV, Sec. 3(a). BIMC assessed members for Marina operations, but had no authority to do so because under Bylaw Article IV it may assess members only for the "purposes set forth in Article III of the Articles"³ Marina operation is not among them.

Respondent does not address the clear limitations on power in the BICs, but simply asserts that they grant broad power. For example, Respondent relies on the BICs for authority to borrow, but simply ignores the key limitation: borrowing is allowed only in connection with "said improvements."⁴

Respondent argues that the BICs authorize Marina operations but ignores the key language of the BICs. Like the Articles, the BICs confine BIMC power to maintenance of specific, identified facilities ("roads, airports and airport facilities, water supply and all equipment, pipe lines, pumps, reservoirs, and easements in connection therewith"),⁵ and

¹ Respondents Brief, p. 21.

² RCW 24.03.025, discussed at Appellant's Brief, p. 30, n. 129.

³ Appellant's Brief, p. 7; CP 1069-1070 at Art. IV, §3(a).

⁴ CP 1097, Sec. 11.B(7).

⁵ CP 1097, § 11.B(3), discussed at Appellant's Brief, p. 34.

functions related to maintaining such facilities (“fire protection,”⁶ “garbage disposal,”⁷ and “water treatment”⁸), indicating a clear intent to exclude any substantial facility not listed. The functions of avoiding fire, garbage accumulation and dirty water are obviously incident to “maintaining” the listed improvements which would otherwise burn (airport), be inundated with refuse (airport and roads) or polluted (water).

The BICs, like Article IV of the Bylaws, reinforce the limiting effect of Article III of the Articles by referring back to the Articles as a limitation on assessment authority:

To levy assessments for operating and maintenance expenses . . . in accordance with the BIC and the BIMC Bylaws and Articles of Incorporation⁹

This limitation refers back to the specific improvements listed in Article III of the Articles (“water, road and landing strip maintenance”) and the mandate of Article IV of the Bylaws that assessments be limited to costs incurred in connection with the improvements listed in Article III of the Articles.¹⁰

⁶ CP 1097, § 11.B(4).

⁷ CP 1097, § 11.B(5).

⁸ CP 1097, § 11.B(6).

⁹ CP 1097, § 11.B(7).

¹⁰ CP 1041.

Respondent argues that in 2005 the membership approved BIMC's assuming the financial and liability burdens of taking over Marina operations, citing the resolution adopted on November 26, 2005. This argument blithely ignores the key provision of that resolution and BIMC's flagrant disregard of that provision:

*BIMC and its subsidiary [1] will not incur additional capital expenses . . . without first obtaining further consent of the BIMC membership [and] . . . [2] will not conduct retail operations of the store facility (other than sale of fuel products) in a manner which make it accountable for related inventories, or which place it at risk for the profitability of such operations.*¹¹

BIMC proceeded to violate both of these limitations by committing (at a secret meeting) to borrow money for Marina capital expenditures and retail store operations that included inventory risk.¹² Respondent does not take issue with these facts. After the borrowing, BIMC implicitly acknowledged its lack of authority to expend the funds it had raised by claiming that assessments to follow were “not funding the marina” but “repaying a debt.”¹³

¹¹ CP 956 (emphasis added.)

¹² Appellant's Brief, pp. 15-16. The BIMC Board decided to borrow \$100,000 at its May 3, 2006 meeting (CP 1668), one of the many meetings that was held without notice, in violation of RCW 64.38.035. CP 1952-1953 at ¶¶ 3-4. Effective June 30, 2006, BIMC's wholly-owned subsidiary, BCF, entered into a lease of the Marina and began operations. The lease activities included: “operation of facilities . . . including . . . vehicle and boat fueling systems . . . boat ramp, marina store . . .” CP 1686, ¶ H.

¹³ CP 1726. See Appellant's Brief, pp. 13-16.

Appellant's Brief provided a carefully documented history of BIMC's abuse of power through secret actions taken in spite of clearly expressed contrary wishes of the members. Respondent has ignored every key element of this presentation, substituting conclusory, unsupported assertions that a "majority of the membership approved" of the marina operation in 2005.¹⁴ This assertion is contrary to admitted facts. Respondent does not dispute (or mention in its Brief) its own contemporaneous admissions cited and quoted in Appellant's Brief: a) that at a September 2005 meeting it was "clear" that the "community is not interested in having BIMC be directly involved in store operations [including the Marina]"¹⁵ and b) that BIMC's taking over Marina operations "is not consistent with the community's preferences..."¹⁶

Respondent repeatedly makes sweeping assertions, supported by nothing in the record, and contradicted by clear evidence that Respondent simply does not address.

Respondent argues that it can do as it pleases in taking over the Marina because Blakely is an island and individual boat access is

¹⁴ Respondent's Brief, p. 11; *see also id.* at p. 30 ("in 2005 when the membership voted in favor of creating the BCF and leasing the marina").

¹⁵ CP 937.

¹⁶ *Id.*

important¹⁷—without acknowledging that the Marina owner, the Blakely Island Trust or “BIT” (owned by the Crowley family), had suggested alternatives to BIMC’s taking over all Marina operations. Even if no third party operator could be found, BIT said it would simply continue to lease slips.¹⁸ *I.e.*, any owner to whom boat access was important could rent moorage at the Marina from BIT – and, *in fact*, BIT has continuously provided moorage.¹⁹ If BIMC’s Marina operations – general store and fuel services – ceased, individual boat access to the island would not be impacted. Respondent’s statement that BIMC’s Marina-related operations “enable a member’s access to ... the island”²⁰ is simply false.

No doubt other owners arrive by float plane or by private aircraft landing at the island’s airstrip. The convenience of a particular method of access does not translate into authority for BIMC to facilitate that method of access by engaging in the float plane business, selling aviation fuel, or operating a general store and providing marine fueling services at the Marina. BIMC was not authorized to engage in these activities.

¹⁷ Respondent’s Brief, p. 9-10.

¹⁸ BIT specifically expressed its intention that it “would retain ownership of the entire facility, [and] retain control of the moorage...” CP 1661.

¹⁹ In the governing lease agreement, BIT explicitly reserved the right to rent out marina slips, regardless of whether BIMC took over operations of the marina store and fuel dock. CP 1685-86 (Lease Agreement, ¶ 5; “The moorage rents and profits received by Lessor from boat owners in connection with operation of the moorage facilities... shall be reserved exclusively by the Lessor”).

²⁰ Respondent’s Brief, p. 28.

When votes *were* taken regarding Marina operations, BIMC did not accept the negative outcome but manipulated the voting. When the membership, on July 5, 2008, initially voted against continuing fuel sales and incurring capital costs to do so, BIMC arranged a *series* of re-votes after opponents had left the meeting believing the issue was decided; only after three more attempts could it eke out a one-vote majority from those remaining at the meeting.²¹

In so doing, BIMC also flagrantly disregarded its own subsidiary's recommendation that the "sale of marine fuel be discontinued . . ." because of "liability."²² In spite of the initial (and only true) vote against continuing fuel sales, and contrary to its own subsidiary's recommendation to discontinue them because of liability exposure, BIMC forged ahead with its plan to repair the fuel lines and continue Marina and fuel operations.²³ And at two separate meetings BIMC misrepresented Marina liability risks.²⁴ Respondent's Brief does not dispute—or even mention—these events.

²¹ CP 1737-38.

²² CP 1758-59.

²³ CP 1737-38.

²⁴ See Appellant Brief, pp. 15-20 and text at notes 47 (CP 1952-1953) (secret meeting to effect \$100,000 loan); 52 (CP 1041) (repayment possible only via assessment on which no vote had been held); 54 (CP 1686 at ¶ 4) (BIMC indemnifying Marina owner); 66 (CP 1737) (members advised there would be no liability in case of a fuel spill); 69 (CP 1742) 72 (CP 1758-1759) (accurate legal opinions to the opposite effect).

The Roats filed this action after BIMC levied, and threatened to enforce via lien, an assessment to finance Marina operations in the spring of 2009. Before that confrontation (and violation of Article IV of the Bylaws), the Roats had simply been among the *majority* of the membership that was working within the normal community processes to forestall, and then to end, BIMC's risky venture. When BIMC finally demonstrated that it was prepared to ignore the majority and to levy capital assessments to enforce its will by assessment and lien, the Roats promptly filed this lawsuit.

II. LEGAL ARGUMENT

A. The Trial Court Erred By Dismissing the Roats' Claim 2 on Summary Judgment; Respondent's Actions Were *Ultra Vires*.

1. The Recent Amendment of the BIMC's Articles Has No Bearing on this Appeal.

According to Respondent, at the first annual meeting *after* the trial court's ruling on the *ultra vires* issue, an amendment of the Articles and Bylaws was proposed adding general language regarding BIMC authority. BIMC needed a 2/3 vote to amend the Articles.²⁵ BIMC did not ask for a vote on whether BIMC should operate a Marina or store. By statute, none of these alleged events may be considered on this appeal, but, even if they could be, the quoted resolutions do not alter BIMC's lack of power. Even

²⁵ See RCW 24.03.165

if a majority of lot owners had expressly voted in July, 2011, to authorize Marina operation,²⁶ a majority may not impose substantial financial burdens or liability risk on all properties and homeowners beyond the purview of existing covenants.²⁷

a. The Alleged Amendment Has No Impact on Existing Claims or Actions.

RCW 24.03.180 governs amendments of articles of incorporation and their effect. It provides that:

[n]o amendment shall affect any existing cause of action in favor of or against such corporation or any pending action to which such corporation shall be a party, or the existing rights of persons other than members. (Emphasis added.)

If an amendment of the Articles sufficed to authorize Marina operations, BIMC should have put the question to the membership in 2005. Any problems that BIMC may face if this Court holds its 2005-2011 actions to be *ultra vires* are its own creation. Under RCW 24.03.180, if the membership in fact voted this year to authorize Marina operations, that vote would not impact the earlier consequences of BIMC's actions or the question whether they were *ultra vires*.

²⁶ There is no evidence in the appellate record regarding what those attending the July 11, 2011, meeting were told about the consequences of the proposed amendments. There obviously has been no discovery on this issue.

²⁷ See *Meresse v. Stelma*, 100 Wn. App. 857, 866, 999 P.2d 1267 (2000) (discussed at Section A(1)(b), *infra*).

Even if the vote of 2011 had the *prospective* effect claimed,²⁸ there are numerous issues on this appeal that depend on whether BIMC had authority to act as it did between 2005-2011. These include BIMC's continuing insistence that it is entitled to recover fees of over \$200,000; the consequences of illegal secret Board meetings; and the potential impact on Blakely members' current views should they learn (as a result of this appeal) that BIMC has in fact been acting outside its authority in presenting members with *faits accomplis* for the past five years and has in fact been violating the open meetings law in order to do so.

b. A Unanimous Vote Is Required to Impose the Substantial Financial and Liability Burdens of Marina Operations on all Members.

A unanimous vote of lot owners is required to create financial obligations and liability risk beyond that discernible from the community's covenants.²⁹

In *Meresse*, the Court invalidated an amendment to covenants that was one vote short of unanimous because the

relocation of the access road is an unexpected expansion of the subdivision owners' obligations to *share in road maintenance*.³⁰

²⁸ It is also reasonable to infer that the trial court's erroneous ruling on the Roats' *ultra vires* claims may have influenced and tainted this vote.

²⁹ *Meresse v. Stelma*, 100 Wn. App. 857, 999 P.2d 1267 (2000)

³⁰ *Meresse*, at 866 (emphasis added).

The Court focused on the *economic burden* of road relocation foisted onto all owners by fewer than all, an issue Respondent (typically) ducks, arguing simplistically that *Meresse* involved “covenants that adversely affected the use of privately owned property.”³¹ Rather, the Court held the original covenants forewarned owners of a duty to share in *costs* of

ordinary types of maintenance such as the removal of snow and other hazards or obstruction as well as graveling, repairs, and additional constructions on the existing road. For example, the other lot owners could arguably include paving the existing gravel road under this provision. But this language does not place a purchaser or owner on notice that he or she might be burdened, without assent, by road relocation at the majority's whim...³²

The Court held that the “unexpected expansion of the subdivision owners' obligations to *share in road maintenance*”—*i.e.*, an unanticipated financial burden to pay for *road relocation*—could not be created without unanimous consent. The Court invalidated the amended covenant on the basis of this principle:

[A]n 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*.³³

³¹ Respondent's Brief, p. 25.

³² *Meresse*, 100 Wn. App. at 866-67 (emphasis added).

³³ *Id.*, at 865 (quoting *Shafer v. Board of Trustees of Sandy Hook Yacht Club Estates, Inc.*, 76 Wn. App. 267, 273-74, 883 P.2d 1387 (1994)).

In this case, as in *Meresse*, there is not a word in the original DIRs, the original Articles or the BICs to alert any buyer or owner that they will be assuming the financial burdens of (unprofitable) operations of a retail store and fuel sales, indemnification of a Marina owner from operating risks, or the potentially crippling liability of fuel spills.

2. **The Response Ignores the Key Language of the Governing Documents.**

a. DIRs and BICs.

Appellant hereby withdraws Assignment of Error Three, regarding the validity of the BICs.

The original DIRs, which expired in 1993,³⁴ did not reference the (yet-to-be-formed) BIMC but state that a “Board of Governors” would be formed to

prescribe and secure the enforcement of reasonable police regulations to secure the safety, comfort, and convenience of the various tract owners and occupants.³⁵

“[P]olice regulations” are not Marina operations, retail or fuel sales.

Rather, a homeowners' "association performs what is essentially a governmental function."³⁶

³⁴ CP 1627, ¶¶ 5-9.

³⁵ CP 1032, Sec. 9.

³⁶ *Terre Du Lac Ass'n, Inc. v. Terre Du Lac, Inc.*, 737 S.W.2d 206, 216 (Mo.App. 1987).

[O]ne clearly sees the association as a quasi-government entity paralleling in almost every case the powers, duties, and responsibilities of a municipal government. As a ‘mini-government,’ the association provides to its members, in almost every case, utility services, road maintenance, street and common area lighting, and refuse removal. In many cases, it also provides security services and various forms of communication within the community. There is, moreover, a clear analogy to the municipal police and public safety functions. All of these functions are financed through assessments or taxes levied upon the members of the community, with powers vested in the board of directors, council of co-owners, board of managers, or other similar body clearly analogous to the governing body of a municipality.³⁷

The DIRs were (Appellant assumes) replaced by the BICs in 1995. The BICs burden every lot, make every lot owner a BIMC member,³⁸ and from 1995 on were a key source of information for existing or new members to determine the potential burdens of ownership. The BICs were not amended in July, 2011.

The BICs begin by repeating the DIR provision for “reasonable police regulations.”³⁹ They then identify the improvements that BIMC may “maintain, repair and improve,” which are

Roads, airports and airport facilities, water supply and all equipment, pipe lines, pumps, reservoirs, and easements in connection therewith.⁴⁰

³⁷ *Id.* at 215 (citation omitted).

³⁸ “No lot may be purchased . . . unless and until said purchaser shall be accepted for membership in the BIMC.” CP 1094, Sec. 7.

³⁹ CP 1096, BICs, Sec. 11.B(1).

⁴⁰ CP 1097 Sec. 11.B(3).

They also expressly allow for “fire protection,”⁴¹ “garbage disposal,”⁴² and “water treatment,”⁴³ each of which is clearly part of “maintenance” of roads, airports and a water system: e.g., one could let garbage pile up and block the roads and then “maintain” them by removing it, or one could collect it regularly; one could let fire burn the airport facilities and then “maintain” them by rebuilding, or one could arrange to put out fires; one could let the water get polluted and then fix it or one could treat it in advance.

This listing also demonstrates a clear intent to be *specific* about what BIMC may do. The authors of this document did not accidentally omit “assume responsibility for Marina operations, run a retail store and sell fuel” from the list. No lot owner reading this document would expect to face exposure and regular annual loss from such activities.

The BICs also address borrowing authority. BIMC may borrow money “after approval of its members,” but only in connection with “said improvements.”⁴⁴ In a typical broad, wholly unsupported assertion, Respondent calls this provision a “wide scope of authority . . . including

⁴¹ *Id.*, Sec. 11.B(4).

⁴² *Id.*, Sec. 11.B(5).

⁴³ *Id.*, Sec. 11.B(6).

⁴⁴ *Id.*, Sec. 11B(8).

the power to incur indebtedness . . . ” failing even to mention the only relevant element: “said improvements.”⁴⁵ There is no Marina listed in “said improvements.”

The BICs also address assessment power, providing authority:

To levy assessments for operating and maintenance expenses, and to collect such assessments . . . in accordance with the BIC and the *BIMC Bylaws and Articles of Incorporation*.⁴⁶

The clear intent of this 1995 language was to incorporate the specification in Article III of the Articles of the improvements to be maintained along with the assessment limitation of Article IV of the Bylaws—which in turn refers to the specific improvements listed in Article III of the Articles.

But even without these references to the Bylaws and Articles, the BICs themselves list *every improvement* for which “operating” and “maintenance” assessments can be levied. The Marina is not on the list.

Respondent relies on Sec. 11.B(10),⁴⁷ which confers power to execute various “legal documents,” but only to “carry out the *business interests* of the BIMC.” Those interests are defined in the BICs by listing the improvements BIMC may operate/maintain and the related fire protection, water treatment and garbage collection activities it may

⁴⁵ Respondents’ Brief, p. 22.

⁴⁶ CP 1097 at Sec. 11.B(7) (*italics added*).

⁴⁷ Respondents’ Brief, p. 22.

perform. The limiting language of the BICs precludes BIMC's Marina adventure, and was not amended in 2011.

b. Bylaws and Articles.

Respondent's discussion of the Bylaws⁴⁸ omits any mention of Article IV, Sec. 3(a), which "correlates" the By-Laws and the Articles by limiting assessment power to the "purposes set forth in Article III of the Articles of Incorporation (and no more)."⁴⁹ Appellant's Assignment of Error 2 expressly relies on this provision. Respondent's failure even to *mention it*—an express limitation on its *assessment power* at the very heart of this appeal--is telling.

Respondent asserts that it can choose to operate the Marina and sell fuel because the Marina is useful for those who wish to access the island by individual boat without addressing a) why this means BIMC must operate the Marina and sell fuel; b) why residents' boat access depends on BIMC operation when the BIT/Crowley family would continue to rent slips to any owner needing individual boat access; c) why BIMC's opinion that a Marina is useful confers power not granted by any governing document.

⁴⁸ Respondents' Brief, pp. 21-26.

⁴⁹ CP 1070.

Article III of the Articles states that the corporation’s purposes are to

provide water, road and landing strip maintenance . . . and to promulgate and enforce rules and regulations necessary to insure equal and proper use of the same.⁵⁰

This statement contains two key limitations on power: 1) it names the improvements; 2) it permits their “maintenance.” Even rules and regulations must deal with the “same” improvements. The Articles do not remotely suggest that the corporation has the power to engage even in *maintenance* operations on other improvements—much less a major improvement like the Marina, which *existed* when the Articles were adopted and constituted a major business enterprise. It was not accidentally overlooked. It was deliberately omitted. The suggestion that a provision for maintenance of the three specified improvements is authority to lease and operate the Marina, run a retail store, assume the financial burdens of losses on such operations, and subject the community to liability risks from fuel spills is nonsensical.

In *Meresse*, the original document at least mentioned the improvement in question—the road. It even allowed for “additional construction.” The court declined to stretch those references into authority to require all members to pay to move the road. Here BIMC argues that

⁵⁰ CP 1041 (emphasis added) (discussed at Appellant Brief, pp. 5-6 and 27-28).

the Articles authorize operation of a facility that is not even mentioned in the grant of power, but which existed as big as life when the Articles were adopted. *Meresse* declined to impose the one-time cost of moving a road; BIMC seeks to impose the perpetual costs and risks of retail, fuel and Marina operations.

In *Meresse* a single lot owner objected. Here a majority of the membership repeatedly voiced opposition to BIMC's spending money on the Marina that it then proceeded to spend.

The Marina existed when BIMC was formed and continued to exist and function through the enactment of the BICs in 1995 and *never* made it onto the authorized list of improvements that BIMC could *maintain* (much less operate) in any governing document. When BIMC launched its Marina adventure in 2005, it made no effort to secure authorization by amending the governing documents. It was obvious from the various votes and opinion polls that *were* taken that any such effort would have been defeated.

3. The Roats May Choose which of BIMC's *Ultra Vires* Actions to Address.

Respondent argues without citing authority that the Roats cannot object to *any* improper act of the BIMC without challenging them all.⁵¹ A

⁵¹ Respondent's Brief, p. 26 ("They may not pick and choose which activities ... they wish to continue and which they oppose.").

Plaintiff may bring as many or as few claims as he chooses; *res judicata* safeguards against piecemeal litigation.⁵²

4. Respondent's Laches and "Failure to Exhaust" Defenses Are Fatally Flawed

Respondent argues that the trial court's dismissal of the Roats' *ultra vires* claim should be affirmed under its laches and "failure to exhaust" defenses.⁵³ Both theories are fatally flawed. Respondent also asserts without citation that the Roats "failed to dispute the application of these doctrines in the Amended Opening Brief[.]"⁵⁴ The trial court's ruling makes no reference to either doctrine.⁵⁵ Respondent does not claim otherwise, but simply makes an assertion without support. The trial court did not address these issues.

a. Respondent's Laches Defense Fails: The Roats Acted Promptly and Respondent Has Not Shown Prejudice.

⁵² See, e.g., *Energy Northwest v. Hartje*, 148 Wn.App. 454, 464 (2009) (claim in second action may be barred where there exists an "identity" with claim asserted in prior action, under four-part test).

⁵³ Respondent's Brief, pp. 29-32.

⁵⁴ Respondent's Brief, p. 32.

⁵⁵ CP 2145-47. The only reference to laches appears in an earlier ruling regarding the validity of the BICs. See CP 816. As noted above, the Roats are no longer pursuing that issue on appeal.

Laches “consists of two elements: (1) inexcusable delay and (2) prejudice to the other party from such delay.”⁵⁶ The main component is prejudice.⁵⁷ Whether a claim should be dismissed under the doctrine is highly factual.⁵⁸ Laches is not a summary judgment issue. Respondent did not seek, and did not obtain, a ruling on this issue below.

The Roats did not engage in "inexcusable delay" before bringing suit. BIMC levied assessments to fund Marina operations for the first time on September 15, 2008, as part of the 2008-2009 annual assessments.⁵⁹ The Roats paid all but the part of the assessment related to Marina operations - \$2,247.40.⁶⁰ In early 2009, the BIMC Board prepared lien documents, warning the Roats and others that liens would result from any unpaid assessments.⁶¹ The Roats sued on April 10, 2009.⁶²

In arguing that the Roats should have sued in 2005, BIMC relies again on the November 26, 2005, resolution, stating that the “membership

⁵⁶ *State ex rel. Citizens Against Tolls v. Murphy*, 151 Wn.2d 226, 241 (2004) (citations omitted).

⁵⁷ *Id.*

⁵⁸ *See, e.g., Lopp v. Peninsula School Dist. No. 401*, 90 Wn.2d 754, 759 (1978) (“Generally, laches depends upon the particular facts and circumstances of each case.”).

⁵⁹ CP 1010 and CP 1737-38.

⁶⁰ CP 1631-1632 and 1764.

⁶¹ CP 1766.

⁶² CP 1-129.

voted in favor of creating the BCF and leasing the marina,”⁶³ ignoring the provision of that resolution forbidding BIMC to

incur additional capital expenses related to BIGS [the Blakely Island General Store] without first obtaining the further consent of the BIMC Membership.⁶⁴

It was reasonable for the Roats to believe that this limitation on BIMC actions would be effective. There was no reason to sue. But BIMC proceeded to violate this restriction, starting with its decision to borrow \$100,000 at a secret meeting.⁶⁵ BIMC knew that an assessment would eventually be necessary to retire the notes—*i.e.*, it knew it was violating the November 26 resolution *and* that within a few years it would have to levy an assessment to repay the unauthorized borrowing. BIMC did not tell the Membership that it planned to borrow \$100,000 and did not seek authority to do so as required by the Bylaws,⁶⁶ but merely reported the following at the next annual meeting:

The initial funding for the Marina will come from notes issued in \$5000 increments at 6% interest. These costs will help cover some repairs needed to the dock, funding for fuel, property taxes, permits and other expenses. The BCF will receive some revenues from fuel surcharges and barge

⁶³ Respondents’ Brief, p. 30.

⁶⁴ CP 1665.

⁶⁵ The Board’s decision to borrow this substantial sum was made at its May 3, 2006 meeting (CP 1668), one of the many meetings that was held without notice, in violation of RCW 64.38.035. CP 1952-1953 at ¶¶ 3-4.

⁶⁶ CP 1074, Art. VIII, Sec. 4. (“all Capital Assessments shall be subject to the approval of the members in accordance with the voting procedures set forth in Article VII hereof.”).

landing fees. These revenue sources will help pay a portion of the ongoing BCF expenses at the Marina. An assessment will probably be necessary to retire the notes within the next 3 years.⁶⁷

The Roats participated in the subsequent struggle to rein in BIMC, which culminated in BIMC's vote manipulation in 2008.⁶⁸ Prior to the summer of 2008, the Roats also shared the understanding of other members—based on BIMC's representations—that fuel spills did not entail personal liability exposure,⁶⁹ advice that was not corrected until July, 2008,⁷⁰ leading in turn to BIMC's Marina's subsidiary's conclusion that fuel lines should be dismantled. When BIMC flagrantly disregarded the initial membership vote on this question, disregarded its own subsidiary's recommendation, and ultimately levied Marina assessments to support its actions, the Roats filed suit.

There was no “inexcusable delay,” and certainly none that could be found as a matter of law.⁷¹ Nor will there be any “prejudice” to BIMC

⁶⁷ CP 1719.

⁶⁸ CP 1630, ¶ 30 and CP 1737-38.

⁶⁹ Mark Droppert (the former Board president and the attorney whose firm had formed the BCF to operate the Marina), advised twice that there would be no such potential liability, once in November 2005 (CP 1661-63) and at the annual membership meeting on July 5, 2008 (CP 1737).

⁷⁰ CP 1742-1747; CP 1749-1756. On July 29, 2008, Lane Powell noted that damages and penalties could amount to \$20,000 *per day* for negligent spills and \$100,000 for intentional or reckless spills. CP 1750. Lane Powell also opined that individual Members could potentially be liable for clean-up costs related to any spill. CP 1749-50.

⁷¹ *State ex rel. Citizens Against Tolls v. Murphy*, 151 Wn.2d 226, 241 (2004) (citations omitted).

from an *ultra vires* ruling; any problems BIMC experiences as a consequence will stem from being held accountable for its own misconduct.

b. The Roats Did Not Fail to Exhaust their Remedies.

BIMC argues that the Roats' claims should be barred because they failed to “exhaust their remedies” before filing suit.⁷² The Roats’ purported “remedy” is a Bylaw provision that makes Board action final unless 15% of the members object within 30 days.⁷³

Respondent’s implicit argument is that the 5-member BIMC Board can do essentially whatever it wants and that any *ultra vires* action becomes unassailable unless a vigilant (and fully informed) 15% or more of the membership lodges a written objection within 30 days. *I.e.*, the argument is that the procedure for objecting to BIMC actions eviscerates the requirements for amending the governing documents if BIMC’s powers are to be expanded. It suffices for BIMC to usurp power and get through a 30-day period without a 15% member objection. No doubt usurpation occurring at secret meetings would reduce the likelihood of a

⁷² Respondent’s Brief, p. 31.

⁷³ Bylaws, Art. V, § 6 states:

All actions of the Board of Governors shall be final unless ... 15% of the members shall thereafter, and within 30 days from the issuance of said minutes, file written objections[.]

CP 1071.

timely objection.

In fact, the 30-day objection provision pre-supposes Board action that is otherwise authorized and permissible. But in any event the provision is not a “remedy” *for the Roats*; the Roats’ objection would be nugatory unless about 20 other members could be rounded up within 30 days who agreed to and did object. This requirement is fatal to their argument.

Respondent cites only *Holderby v. Int'l Union of Operating Engineers*⁷⁴, but the case does not support its extreme position. An internal remedy can be considered “adequate” only if it “afford[s] the individual fair procedure rights.”⁷⁵ A procedure that does not afford an *individual* right to challenge improper conduct is not “adequate” for purposes of exhaustion.⁷⁶ The need for 15% of the total membership to join in any objection renders *Holderby* inapplicable; the provision did not provide the Roats with an adequate individual remedy.

In any event, the Roats’ statutory right to sue to challenge *ultra vires* acts cannot be defeated by an association’s internal procedural rules:

⁷⁴ Respondent's Brief, p. 31. (citing *Holderby v. Int'l Union of Operating Engineers*, 45 Cal.2d 843, 291 P.2d 404 (1979).

⁷⁵ *Bollengier v. Doctors Medical Center*, 272 Cal.Rptr. 273, 280 (Cal.App. 1990) (discussing *Holderby*).

⁷⁶ See also *Doyle v. Raley's Inc.*, 158 F.3d 1012, 1015 (9th Cir. 1998) (“The majority of our sister circuits have held that collective bargaining agreements do not waive an individual employee's right to sue for statutory discrimination claims.”)

Even if exhaustion is required under *Holderby* ...
*exhaustion is not required where pursuing the internal
remedy would in effect deprive the member of a right
guaranteed by law independently of the internal rules.*⁷⁷

The Roats seek to establish that BIMC has acted *ultra vires* under RCW 24.03.040, which creates their right to bring such a challenge. This right could not be superseded even if the 15% Bylaw provision had created an individual (rather than a collective) right to object. Nor is the Bylaw provision a clear and conspicuous waiver of the Roats' individual claim or otherwise an effective release of BIMC's liability for its *ultra vires* acts, prerequisites for enforcing the provision *if* it otherwise could have the effect BIMC claims.⁷⁸

B. Respondent Has Not Appealed the Trial Court's Ruling on the Roats' Claim 5; Respondent's Persistent Violations of the HOA Open Meeting Statute Are Conclusively Established

Respondent has not appealed the trial court's ruling in the Roats' favor on Claim 5, regarding Respondent's numerous violations of the open meeting requirement of the Homeowners Association Act, RCW ch. 64.38 ("HOA"):

⁷⁷ *Sahlolbei v. Providence Healthcare, Inc.*, 5 Cal.Rptr.3d 598, 609 (Cal.App. 2004) (emphasis added) (citation omitted).

⁷⁸ See, e.g., *Johnson v. Ubar, LLC*, 150 Wn.App. 533, 537-38 (2009) (waiver/release will not be upheld where against public policy or provision was inconspicuous; whether provision is inconspicuous is a question of fact).

Plaintiffs' Motion for Summary Judgment is GRANTED in that the Court declares that the 18 Board of Governors meetings held after April 16, 2006 ... violated the requirements in RCW 64.38.035(2) that all meetings be open for observation by all owners of record.⁷⁹

Accordingly, it is conclusively established that Respondent repeatedly violated RCW 64.38.035.

C. The Trial Court Abused Its Discretion By Failing to Award the Roats their Fees Incurred In Connection with Claim 5.

RCW 64.38.050 provides the trial court with authority to award attorney's fees where a violation of the HOA has been established:

Any violation of the provisions of this chapter entitles an aggrieved party to any remedy provided by law or equity. The court, in an appropriate case, may award reasonable attorneys' fees to the prevailing party.

Respondent's violation of the HOA's open meeting requirement made its program of taking unauthorized actions and presenting them as *faits accomplis* (see Pages 4-8, *supra*) possible. Respondent ended this approach only as a result of the Roats' lawsuit, an effort that has had a tangible benefit to the entire BIMC membership and brought critical transparency to a previously shrouded decision-making process.

The secret meeting approach of BIMC was a key part of their strategy for acting beyond their authority. They simply usurped power, taking actions they had acknowledged in writing were contrary to the

⁷⁹ CP 2563.

wishes of the members (the “community is not interested in having BIMC be directly involved in store operations [including the Marina]”;⁸⁰ BIMC’s taking over Marina operations “is not consistent with the community’s preferences . . .”).⁸¹ After writing these statements, BIMC borrowed money and launched its Marina operation, entering into the Lease and undertaking store inventory risk.⁸² These actions were also in direct violation of the limitations imposed in the November 26, 2005, resolution and in direct contradiction to BIMC’s representations to the members.

After the trial court ruled against BIMC on the open meetings issue, BIMC proceeded to organize a process of seeking ratification of the many actions it had taken without notice.⁸³ BIMC then sought to charge the Roats for all of the fees incurred in this process, which were substantial, as reflected in the invoices of its counsel submitted in support of its fee request.⁸⁴

⁸⁰ CP 937.

⁸¹ *Id.*

⁸² CP 1665-1666 (“BIMC and its subsidiary will not conduct retail operations of the store facility (other than sale of fuel products) in a manner which make it accountable for related inventories”).

⁸³ CP 2617, ¶¶ 6-8; CP 2672-84; CP 2813-2814.

⁸⁴ *See, e.g.*, CP 2976 (“research ratification by board of previous board resolutions as defense to claims of ‘open meeting’ violation claims”); CP 2977 (“outline matters needing ratification by the Board of Governors on action between 2004 and 2009”; “[e]xamine the decisions made during 2004-2009 Board of Governors’ meetings and compile them into a spreadsheet for the Board to review and ratify”; “[d]evelop strategy and draft correspondence to the Board of Governors regarding ratification strategy”; “research on procedures and validity of ratification for decisions made with improper notice”); CP

In short, the Roats' action corrected a long pattern of abuse of power through secret meetings; it made it more difficult for BIMC to run rampant in the future in the same way it had in the past; it uncovered a deliberate practice of usurpation by a Board that knew that, had it affirmatively sought the power it was exercising in 2005, the membership would have opposed it.

The open meeting violations the Roats established were not technical failures of procedure by a forgetful, informal homeowners association. They were part of an abuse of power that made the *ultra vires* actions at the heart of this appeal possible.

If this is not a case for a fee award under the HOA, then there is no such case. It was an abuse of discretion not to award fees to the Roats.

D. The Trial Court's Award of Fees to Respondent under the Bylaws Should Be Vacated.

If this Court agrees that the trial court committed error when it dismissed the Roats' *ultra vires* claim, the award of fees to Respondent must be vacated because there never was a valid assessment to collect.

Even if the *ultra vires* ruling is affirmed, at least a portion of the trial

2978 ("[f]inish listing of 2004 and 2009 Board decisions into a spreadsheet which can be reviewed by the current Board prior to ratification"); CP 2979 ("[d]raft letter to the Board of Governors detailing the motivation behind ratification of earlier Board decisions and the process for doing the same"; "[c]onduct a detailed review of the spreadsheet revealing each of the Board's decisions between 2004 and 2009"); CP 2980 ("[r]eview and revise compilation of board decisions for ratification and incorporate authority of board of directors under governing documents"); CP 2981 ("[d]raft instructions for the Board to follow in reviewing and ratifying earlier Board decisions"). *See also* CP 3163, ¶ 4.b.

court's award was an abuse of discretion.⁸⁵

BIMC's appeal of the trial court's failure to award a larger sum should be rejected; the trial court properly limited any award to fees incurred before May 14, 2009.

1. The Trial Court Properly Barred Recovery of Any Fees Incurred After May 14, 2009 – When the Roats Were “Considered Current” on their Assessments.

The trial court awarded Respondent \$13,797.42 in fees and costs under a Bylaw provision permitting recovery only of fees incurred to enforce payment of delinquent assessments.⁸⁶ This ruling is reviewed for abuse of discretion.⁸⁷

The trial court properly barred any recovery of fees incurred after the Roats were “considered current” on their assessments – May 14, 2009.⁸⁸

⁸⁵ *Boguch v. Landover Corp.*, 153 Wn.App. 595, 620, 224 P.3d 795 (2009) (“A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds.”) (citation omitted).

⁸⁶ CP 3534.

⁸⁷ Finding that an abuse of discretion standard “mirrors review of attorney fee awards in other contexts,” the Supreme Court held it would “adopt the abuse of discretion standard.” *Sanders v. State*, 169 Wn.2d 827, 866-67, 240 P.3d 120 (2010) (internal citations omitted).

⁸⁸ CP 3530 (“The Court hereby awards Defendants the sum of \$13,700.52 in attorney’s fees, being the amount incurred prior to the May 14, 2009 stipulation and deposit of unpaid assessments.”)

BIMC now argues it is entitled to most of its fees incurred in *defense* of the Roats' claims – in excess of \$200,000 - under the Bylaw provision on which the trial court relied:

All assessments shall be paid to the Association at its office within 60 days after the mailing of notice of such assessment to the member and the amount of each assessment and the amount of any other *delinquent assessments*, together with all expenses, attorney's fees and costs reasonably incurred in *enforcing same* shall be paid by the member, and *shall be a lien* upon the lot or tract subject to said assessment and the stock appurtenant thereto, superior to any and all other liens created or permitted by the owner of such lot or tract and *enforceable by foreclosure proceedings* in the manner approved by law for the foreclosure of mortgages, deeds of trust or liens upon land.⁸⁹

An assessment that is “current” is not “delinquent.” The Roats sought to remove any assessment issue from their larger effort to establish that BIMC was acting without authority, and they did so via a clear stipulation that BIMC would regard them as “current” based on the deposit into court. Nothing that happened in this case after May 14, 2009, constituted “enforcing same”—i.e., enforcing a “delinquent assessment.” The Bylaw provision for fees is clear and narrow; even when limited to the time before May 14, 2009, the actual award was excessive. After that date the Bylaw predicate of “enforcing” a “delinquent” assessment is absent by virtue of the stipulation.

⁸⁹ Respondent's Brief at 43; CP 1075 (Art. VIII, § 9) (italics added).

Had there been no stipulation, but merely a naked deposit into court, BIMC still could not recover fees under the Bylaws unless it expended them “enforcing” a “delinquent assessment.” BIMC has made no claim against the Roats in this case; it did not ask the Court to enforce anything or to enter an order that it receive the funds on deposit.

BIMC had good reasons not to make any claim against the Roats. First, it would have been frivolous and sanctionable in light of the stipulation. Second, it would have defeated BIMC’s effort to have an insurer underwrite the entire *defense* of the *Roats’ claims*. BIMC’s counsel told the trial court (and its client) that the fees it was incurring were defense costs and touted the successful effort to recover 100% of that defense expense from the carrier.⁹⁰ If BIMC had filed an affirmative claim, its carrier would not have covered legal expenses associated with that effort.⁹¹ Instead, after it had prevailed in *defending* against the Roats’ *ultra vires* claim, and after repeatedly characterizing the fees as defense costs, BIMC told the trial court that, rather than defending an *ultra vires*

⁹⁰ CP 2267 (“the Association hereby moves for summary judgment asking the Court to declare that the Association is entitled to costs related to defending this action.”) CP 2391-92 (“Members should be reminded that this firm has been retained and paid for by BIMC insurance coverage”); CP 2403 (“Defendant’s \$195,292 actual total trial fees and lawyer costs [have been] paid by Directors and Officers insurance . . .”)

⁹¹ See, e.g., *Prudential Property and Cas. Ins. Co. v. Lawrence*, 45 Wn.App. 111, 121, 724 P.2d 418 (1986) (insurer is liable for all costs of defense only where costs are not allocable between covered and non-covered claims); see also *Waite v. Aetna Cas. & Surety Co.*, 77 Wn.2d 850, 858-59, 467 P.2d 847 (1970).

claim, it had really been trying to collect an assessment.⁹² BIMC sought a fee award of about 100 times the sum it claimed to be collecting, including very large sums that could not possibly be recoverable on any theory (*e.g.*, the cost of defending the open meetings claim; the cost of interminable efforts to change that ruling and the form of order entered; and the cost of the ratification process that ensued after the trial court ruled against BIMC).⁹³

2. The Trial Court Committed Error By Awarding Respondent All Fees Incurred Prior to May 14, 2009.

The trial court abused its discretion by awarding Respondent all fees incurred prior to May 14, 2009, without regard to whether such fees were (a) incurred to enforce a delinquent assessment or (b) incurred by Respondent's insurance carrier and therefore un-recoverable under Washington's anti-subrogation rule. BIMC's effort on this appeal to expand the award founders on the same two rocks.

a. The Trial Court Committed Error By Awarding Fees that Respondent Acknowledged Were Not Incurred to Enforce An Assessment

BIMC's own evidence indicates that the majority of Respondent's fees prior to May 14, 2009 had nothing to do with recovery of a \$2,000

⁹² CP 3504.

⁹³ CP 3162-65.

assessment⁹⁴, but were fees that would have been incurred to defend against the Roats claims even if the assessment had been paid immediately and without protest.

Respondent's counsel submitted a declaration that assigned only \$1,517.50 to the category of "Collection of Unpaid Assessment."⁹⁵ Not only was the trial court's award nearly 10 times this amount; but the supporting exhibit includes time entries *after* May 14, 2009 - the date on which Respondent agreed that the Roats were "considered current." This was an abuse of discretion.

b. The Trial Court's Award of Fees Paid by BIMC's Insurance Carrier Violated Washington's Anti-Subrogation Rule

Washington anti-subrogation principles bar recovery of fees paid by an insurer from a party for whose benefit the policy was purchased. Here, the Roats and the other members of BIMC (the lot owners) are implied co-insureds of BIMC. The trial court abused its discretion by forcing the Roats to reimburse Respondent for fees incurred by Respondent's insurance carrier. For the same reason, Respondent's

⁹⁴ CP 2876. After May 14, 2009, BIMC reduced the amount of the relevant marina-related assessment to approximately \$200 per lot. CP 2339; CP 1764 ("Something that may ease your concerns is that much of that money wasn't spent and the excess fuel line money will be rolled over into general expenses and be credited towards the 2009-2010 year assessment[.]") Accordingly, the contested assessment actually amounted to approximately \$400 (for Roats' two lots). CP 2339.

⁹⁵ CP 2876.

request for additional fees incurred after May 14, 2009 (almost exclusively paid by its carrier) was properly rejected on summary judgment.

BIMC is the named defendant but Continental (BIMC's insurer) is the real party in interest with respect to any request for fees.⁹⁶ Continental selected litigation counsel and, except for the deductible and minor early fees, has paid counsel to defend BIMC against all of Roats' claims.⁹⁷ Continental is seeking subrogation against the Roats for payments it made under the policy.⁹⁸

Subrogation against an insured is prohibited.⁹⁹ This "anti-subrogation" rule is not limited to named insureds but applies to "all for whose benefit the insurance was written."¹⁰⁰ Courts routinely recognize

⁹⁶ See *Prosperity Realty, Inc. v. Haco-Canon*, 724 F. Supp. 254, 257 (S.D.N.Y. 1989), citing C. Wright & A. Miller, *Federal Practice and Procedure* § 1546 at 656 (finding that insurer need not be named as a party in the lawsuit because "as a practical matter...the insurance company will control the prosecution no matter in whose name it is brought"); *Bennett v. Troy Record Co.*, 25 A.D.2d 799, 800, 269 N.Y.S.2d 213 (1966) (noting that even where the insurer is not named as a party, "the relationship between a defendant and an insurance company is so closely related as to the subject matter of the lawsuit that as a matter of fact, if not in law, the insurance company is the real and actual defendant, the real party in interest"); *Carle v. Earth Stove, Inc.*, 35 Wn. App. 904, 906, 670 P.2d 1086 (1983) (recognizing that insurer is the real party in interest where it "controlled the action" and "is the moving force behind the suit").

⁹⁷ CP 3113; CP 3094-3095.

⁹⁸ See *Neal v. Neal*, 219 Mich. App. 490, 494-96, 557 N.W.2d 133 (1996) (insurer's efforts to recoup defense costs incurred in defending suit were characterized as subrogation claims).

⁹⁹ *General Ins. Co. of America v. Stoddard Wendle Fort Motors*, 67 Wn.2d 973, 976, 410 P.2d 904 (1966); *Mahler*, 135 Wn.2d at 419 ("By definition, subrogation exists only with respect to rights of the insurer against third persons to whom the insurer owes no duty.").

¹⁰⁰ *Stoddard*, 67 Wn.2d at 979.

that parties are implied co-insureds where they helped provide the funds that were used to purchase the insurance.¹⁰¹ Courts have also recognized that an insurance policy naming only an entity precludes the insurer from subrogating against the entity's owners and officers, even where they are not named as co-insureds under the policy.¹⁰²

In *Beeson*, the court recognized that a landlord's insurer has no subrogation rights against the tenant arising out of a fire on the property that was negligently caused by the tenant, even though the tenant was not a named insured.¹⁰³ The court noted that the cost of insurance is generally taken into account in setting rent, so that part of a tenant's rent pays for the insurance.¹⁰⁴ Here BIMC members' assessments - including those of the Roats - *directly* pay the premiums along with all of BIMC's other expenses.¹⁰⁵ The court also noted that the tenant's possessory interest in the property covered by the policy gave rise to a reasonable expectation that the tenant's interests would be protected under the landlord's

¹⁰¹ *E.g.*, *Cascade Trailer Court v. Beeson*, 50 Wn. App. 678, 681-82, 749 P.2d 761 (1988); *United Fire & Cas. Co. v. Bruggeman*, 505 N.W.2d 87, 89 (Minn. App. 1993); *Sutton v. Jondahl*, 532 P.2d 478, 482 (Okla. App. 1975).

¹⁰² *See Am. Nat'l Fire Ins. Co. v. Hughes*, 658 N.W.2d 330, 2003 ND 43 (2003); *Fireman's Ins. Co. of Newark v. Wheeler*, 165 A.D.2d 141, 566 N.Y.S.2d 692 (1991).

¹⁰³ *Beeson*, 50 Wn. App. 678.

¹⁰⁴ *Id.*, at 681-82.

¹⁰⁵ CP 1069-1070, Sec. 3(a).

policy.¹⁰⁶ Here the damage takes the form not of property damage but of defense costs—in which BIMC members also have a direct interest because they would be liable under the Bylaws' indemnity provision to pay those costs but for the insurance coverage.¹⁰⁷ That same indemnity provision mirrors the anti-subrogation rule, barring reimbursement of costs incurred by the BIMC's insurer:

The Association shall indemnify every officer of the Association, every member of the Board of Governors, and every member of an Association committee ... against all expenses and liabilities, including attorney's fees, reasonably incurred by or imposed in connection with any proceeding ... *except to the extent such expenses and liabilities are covered by insurance[.]*¹⁰⁸

In *Hughes*, the corporation was the sole named insured under an insurance policy.¹⁰⁹ The corporation's owners and officers used the corporation's tools and facilities to do work on their personal vehicles. The corporation's property was damaged by a fire that broke out while the facility was being used by one of the officer's to repair his snowmobile. The corporation's insurer paid the claim, and then sought subrogation against the individual who had caused the fire. The court found that the insurer was precluded from seeking subrogation because the corporation's

¹⁰⁶ *Beeson*, at 687.

¹⁰⁷ CP 1077, Sec. 6.

¹⁰⁸ CP 1077, Sec. 6 (emphasis added).

¹⁰⁹ 658 N.W.2d at 332.

owners and officers were implied co-insureds under the policy. The court reasoned that permitting the insurer to pursue a claim against either the owners or officers would violate the anti-subrogation rule and lead to a conflict of interests between the insurer and its insureds.¹¹⁰

This case is a clearer one for invoking the implied co-insured rule than the foregoing authorities because: a) whereas rental rates are only inferentially affected by insurance costs, here the BIMC members' assessments fund all of its expenses--including premiums--so the Roats have literally paid their pro rata share of the premium for the insurance in question; b) Blakely residents (BIMC's members) are liable under the indemnity provision for the very defense costs covered by the insurance. The Roats are clearly among the intended beneficiaries of this coverage since they would otherwise be paying their pro rata share of the very defense costs for which BIMC is now pursuing them—the fact that the Roats are the plaintiffs would not alter their obligation to pay assessments for expenses incurred by BIMC in a proper exercise of its powers. The Roats claim that BIMC acted *ultra vires* in operating the Marina; there is

¹¹⁰ *Id.*, at 336-37. See also *Wheeler*, 165 A.D.2d at 145-46 (likewise precluding insurer from pursuing subrogation against majority shareholder and president of close corporation because individual was an implied co-insured under the corporation's insurance policy and to do so would lead to conflict of interests between insurer and insured).

no claim that they did so in defending against the Roats' claim by making use of insurance funds to do so.

Continental has paid nearly all of BIMC's litigation costs—including those incurred before May 14, 2009. As explained by the BIMC's bookkeeper, BIMC itself has paid only \$9,520.52.¹¹¹ The balance of the fees are not recoverable under Washington's anti-subrogation rule.

An award to BIMC of fees paid by its insurer precludes recovery from the Roats for the independent reason that BIMC did not "incur" these fees. Bylaw Article III, Sec. 9 under which the trial court's fee award to BIMC was made (for collecting a delinquent assessment) calls for recovery of fees and costs "reasonably incurred in enforcing same" (the assessment). Except for its deductible, BIMC "incurred" no fees. The insurer paid counsel--and did so for "defense costs," not costs of any affirmative collection effort.

E. The Trial Court Did Not Err In Rejecting Respondent's Claim for Fees under the HOA and BICs.

1. The HOA Provides No Basis for Respondent's Attorney Fee Claim.

¹¹¹ CP 3113. According to the bookkeeper, BIMC has paid: \$3,950.52 to the BIMC's original counsel (*id.*, ¶ 4); a \$5,000 deductible to Continental Casualty Co. (*id.*, ¶ 5); and "also incurred \$570.00 in costs" for the bookkeeper's discovery-related work. CP 3113. The BIMC's carrier, Continental Casualty Co., paid the remaining attorney fees and costs to Schwabe Williamson & Wyatt. CP 3094-3096.

BIMC is not entitled to its fees under the HOA. The Roats brought their *ultra vires* claims under RCW 24.03.040, which permits any member to sue to establish that acts are *ultra vires* and has no fee-shifting provision. The Roats repeatedly cited RCW 24.03.040 as the basis for their *ultra vires* action.¹¹² The only action the Roats brought under the HOA was their successful claim for violating the open meetings law, RCW 64.38.035. BIMC brought no claims against the Roats at all, much less one for a violation by the Roats of the HOA.

Where there has been a violation of the HOA, RCW 64.38.050 makes an award of fees optional, and discretionary:

Any violation of the provisions of this chapter entitles an aggrieved party to any remedy provided by law or equity. The court, in an appropriate case, may award reasonable attorneys' fees to the prevailing party. (Emphasis added).

The trial court declined to award fees to BIMC under the HOA. This correct ruling would be reviewed for abuse of discretion *if* there were a legal basis at all for such an award, but there is not.¹¹³

The only HOA claims pursued in this case were the Roats' successful claims for violation of the open meetings laws. The Roats' ultra

¹¹² CP 1991 (“[BIMC’s] actions... are *ultra vires* and subject to challenge... [under] RCW 24.03.040”); *see also* CP 1992, 1019, and Report of Proceedings (“RP”) (10/01/2010), 33:10-34:5.

¹¹³ Whether a *basis* exists for a fee award is reviewed *de novo*. *Blueberry Place Homeowners Ass’n. v. Northward Homes*, 126 Wn. App. 352, 110 P.3d 1145 (2005).

vires claim was not brought under the HOA. The trial court held that BIMC had violated HOA's open meeting requirement:

Plaintiffs' Motion for Summary Judgment is GRANTED in that the Court declares that the 18 Board of Governors meetings held after April 16, 2006 ... violated the requirements in RCW 64.38.035(2) that all meetings be open for observation by all owners of record.¹¹⁴

This ruling then required a determination of whether the Roats were entitled to fees. The Court made clear that the Roats were the prevailing party on the secret meetings issue during one of the interminable efforts of Respondent to misconstrue clear trial court rulings:

Defendants erroneously conclude that the Court ruled partially in their favor because the letter ruling, after indicating it would enter an order declaring that 18 Board of Governors meetings violated RCW 64.38.035(2), stated that it would not grant Plaintiffs any further relief. As Plaintiffs correctly state -- the Court's ruling is intended to grant them declaratory relief with respect to their fifth claim for relief ... precisely as they requested in paragraph F of the prayer for relief in their First Amended Complaint.¹¹⁵

Respondent's effort to obfuscate this clear history continues on appeal, claiming that "[t]he trial court afforded the Roats no relief on any of their five claims," and that the BIMC "prevailed on all of the

¹¹⁴ CP 2563.

¹¹⁵ CP 2558 (emphasis added).

substantive motions and claims."¹¹⁶ On that basis, Respondent claims that the "HOA statute permits a prevailing party like the Association to recover attorney fees."¹¹⁷ Apart from trying to mischaracterize the ruling, Respondent has not challenged it.¹¹⁸

2. The BICs Provide No Basis for Respondent's Attorney Fee Claim.

The same approach of mischaracterizing clear language extends to Respondent's claim that the BICs entitle a "prevailing party in a dispute regarding the *Covenants* to recovery of attorney fees."¹¹⁹ The BIC section relied on, ¶ 11.C, contains no language calling for fee-shifting where the issue is the *meaning of the Covenants*. Instead, it provides for fees where BIMC follows a detailed process to remedy "an existing violation of the terms of the BIC" and allows only fees arising from "litigation designed to

¹¹⁶ Respondent's Brief, p. 41. Respondent repeatedly misstates the procedural history relating to the Roats' fifth claim, insisting (incorrectly) that *it* prevailed because the Roats were afforded *no relief*. See, e.g., Respondent's Brief, p. 13 ("the trial court concluded the Roats had no available remedies or damages"); p. 37 ("the Roats were afforded no relief... [the] fifth claim was dismissed). In their Complaint, the Roats sought a declaration that the Board was conducting meetings in violation of RCW 64.38.035. CP 226, ¶ F. The trial court granted the Roats the only relief they sought under claim five—a declaration that the Board was holding meetings in violation of RCW 64.38.035. CP 2562-63, ¶ 1.a. Respondent then filed a purposeless summary judgment motion seeking a ruling that there were "no additional remedies available" to the Roats under claim five. CP 2208, p. 1. The trial court denied Respondent's "no additional remedies" motion, since it had already granted the Roats the relief they sought. The trial court explained that "Defendants Motion... is DENIED in that the Court has granted the relief set forth in Paragraph 1.a above." CP 2563, ¶2.

¹¹⁷ Respondent's Brief, p. 41.

¹¹⁸ Respondent's Brief, p. 41-42.

¹¹⁹ Respondent's Brief, p. 42.

secure compliance.”¹²⁰ BIMC followed no such process,¹²¹ and did not “commence litigation to secure compliance,” which is a prerequisite to recovering fees incurred in such litigation. BIMC did not sue the Roats for any “violation,” or at all.¹²² There was no counterclaim in this case. The assessment issue was resolved by the agreement that the Roats were “considered current on their Annual Assessments” as of May 14, 2009.¹²³ Once that occurred BIMC lacked even a colorable basis to sue the Roats and, not surprisingly, never did so, removing even a colorable basis to recover litigation fees under the BICs.

III. CONCLUSION

For the foregoing reasons, and those detailed in Appellant's (Opening) Brief, the Roats respectfully request reversal and remand of the trial court's order on summary judgment relating to Claim 2, affirmance of the trial court's summary judgment order on Claim 5, reversal of the trial

¹²⁰ CP 1098, BIC, Sec. 11.C(2)b.

¹²¹ Following the process is a prerequisite to any fee recovery, which then arises only in case BIMC files suit. If an owner “fails to comply” with a request to cure a violation, the Board must then “provide written notice to the owner, by Certified Mail with Return Receipt Requested, of a formal demand to remedy the violation by a stated reasonable deadline and describing the action to be taken by the Board if the violation is not remedied by the stated deadline.” CP 1098, BICs Sec. 11.C(2). This did not happen, nor did BIMC file suit.

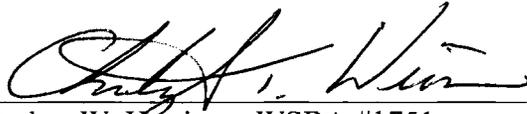
¹²² “In the event litigation is commenced, the owner who is in violation shall be obligated to pay all costs of such litigation, including the payment of reasonable attorneys’ fees.” CP 1098, BIC, Sec. 11.C(2)(b).

¹²³ CP 280. At that time, the Roats deposited the Marina-related assessment (\$2,247.40) into the court's registry, and the parties stipulated that the Roats were “considered current on their Annual Assessments.” CP 280.

court's award of fees to Respondent, and that the trial court be directed to award reasonable attorney fees to the Roats on Claim 5.

DATED this 26th day of October, 2011.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Arthur W. Harrigan", is written over a horizontal line.

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CERTIFICATE OF SERVICE

I hereby certify that on October 26, 2011, I caused a true and correct copy of the foregoing to be delivered to the following counsel of record in the manner indicated below:

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