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NO. 66514-6

COURT OF APPEALS
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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,

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.

RESPONDENTS' BRIEF

Lawrence A. Costich, WSBA #32178
Milton A. Reimers, WSBA #39390
Averil Rothrock, WSBA #24248
SCHWABE, WILLIAMSON & WYATT, P.C.
U.S. Bank Centre
1420 5th Avenue, Suite 3400
Seattle, WA 98101-4010
Telephone 206.622.1711
Fax 206.292.0460
Attorneys for Defendants/Respondents

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I. INTRODUCTION

Appellants Gary and Pamela Roats (the "Roats") sued their homeowners association and its board members (Blakely Island Maintenance Commission and the individually named Board of Directors, collectively referred to as the "Association") to restrict the Association's actions to "maintenance" of "water," "road," and "landing strip" based on the 1961 *Articles of Incorporation.* As the trial court correctly determined, the narrow interpretation sought by the Roats conflicts with authority established in the other two governing documents (*By-Laws* and *Covenants*) and repeated decisions made by the Association's membership. Recently adopted amendments to the *Articles of Incorporation* and *By-Laws,* moreover, make the Roats's challenge moot. This Court should affirm the trial court's dismissal of the Roats's claims.

The trial court properly awarded fees to the Association for successfully pursuing the Roats's delinquent assessment. The Association defends its right to those fees. The trial court, however, did not go far enough. This Court should reverse and remand for award of additional fees and costs.

The Association is located on Blakely Island, San Juan County, Washington. Since the inception of the Association, its membership has collectively made decisions about the Association's responsibilities to

include many activities which do not fit exclusively within "water," "road," and "landing strip maintenance." Over the last 50 years, the membership has established a fire department service, as well as garbage and recycling services. The membership has also built and maintained community recreation facilities at Horseshoe Lake, to include a dock, boats, and a beach. These are examples of actions taken by the Association at the direction of its membership over the years. The membership has authorized these actions under the authority of the governing documents in the interest of having an association which meets the needs and desires of the community.

More recently, the membership decided in 2005 to manage Blakely Island's only public marina after the marina's owner announced that he would no longer operate it. Blakely Island is not served by the Washington State Ferry System. The marina allows for access to the island by boat and includes a dock, boat moorage, fuel dispensers for boats and cars, and a general store, the only such amenities on Blakely Island.

The membership authorized the Association to create a subsidiary to manage the marina and has reaffirmed that decision many times since 2005. For their part, the Roats did not want the Association to manage the marina. They filed this lawsuit in 2009, seeking to invalidate the covenants and overturn the memberships' past decisions.

The trial court entered summary judgment against the Roats, validating the *Covenants* and concluding that the Association acted within its scope of authority in managing the marina. The trial court also awarded the Association a portion of the attorney fees and costs the Association sought. This Court should affirm those decisions. In addition, the Association seeks relief as to the basis for and amount of the fees reasonably incurred to defeat the Roats's claims and recover their delinquent assessment. It was entitled to a larger fees and costs award.

The Roats's challenge is moot. After the trial court rulings, the membership amended its *Articles of Incorporation* and *By-Laws* at its July 2011 annual meeting to expand the enumerated purposes of the Association. These recent amendments moot the Roats's challenge to the Association's scope of authority as a matter of law.

This Court should conclude that the trial court correctly dismissed the Roats's claims when it determined that the Association's governing documents are valid and that the Association acted within its scope of authority with regard to the marina. Affirmance is also proper because the Roats's challenge is moot. The membership has amended the governing documents in question to leave no doubt that the Association can sulease the marina. This Court should affirm to end this costly and unfortunate litigation among neighbors. It should reverse only the limited attorney

fees and cost award to the Association and remand to the trial court for the award of more fees and costs, including those reasonably incurred by the Association to successfully defend against the Roats's claims.

II. ASSIGNMENTS OF ERROR

The Association makes these assignments of error.

1. The trial court erred as a matter of law in its order of August 22, 2011 when it confined the Association's attorney fee award to only those fees and costs authorized by the *By-Laws*, and failed to recognize the Association's right to fees and costs pursuant to the Association's *Covenants* and the Homeowners' Association statute (chapter 64.38 RCW) for successfully defeating the Roats's claims and recovering the delinquent assessment in July 2010.

2. As to its award under the *By-Laws*, the trial court erred as a matter of law or abused its discretion when it determined that after May 14, 2009, the litigation was no longer about the Roats's delinquent assessment, *see* CP 3530-3531, and therefore the Association was entitled to no fees and costs incurred after that date, when the majority of the litigation took place between May 14, 2009, and July 2010, and the Roats did not pay their delinquent assessment to the Association until July 2010.

III. STATEMENT OF THE ISSUES

1. Is the Roats's request for declaratory relief challenging the scope of authority of the Association under the former governing documents moot due to the membership's adoption of amendments which broadened the scope of authority set forth in the *Articles of Incorporation* and *By-Laws*? (Roats's Assignment of Error #1)

2. Should this Court affirm the trial court's determination that the Association acted within its scope of authority by leasing the marina and levying related assessments because the actions were expressly and impliedly authorized by the governing documents, and repeatedly approved by the membership? (Roats's Assignments of Error #1 and #2)

3. Is the Roats's challenge to the validity of the *Covenants* barred by the statute of limitations where the relevant facts of accrual do not concern a 2002 event as the Roats argue, but where the claim accrued in 1995 and the Roats failed to litigate until 2009? Should the Court affirm dismissal of the claim on the alternate grounds determined by the trial court of laches and equitable estoppel which the Roats fail to challenge on appeal? (Roats's Assignment of Error #3)

4. Should the Court affirm the denial of attorney fees to the Roats arising from their fifth claim concerning open meetings, because: (i) the majority of this claim was dismissed; (ii) the Roats did not succeed in

obtaining any material remedy or damages for the few meetings found to have been procedurally deficient; and (iii) the trial court correctly determined that the Association is the prevailing party? (Roats's Assignment of Error #4).

5. Did the trial court commit legal error when it confined the Association's attorney fee award to only those fees and costs authorized by the *By-Laws* and failed to recognize the *Covenants* and the Homeowners' Association statute (RCW 64.38.050) as authority supporting the award of additional fees and costs? If so, should this Court reverse the trial court's order that unduly restricts the recoverable fees and costs, and remand for consideration of additional amounts under these authorities? (Association's Assignment of Error #1).

6. Did the trial court err in concluding that the Roats ceased to dispute the validity of the delinquent assessment on May 14, 2009 and/or in confining the Association's attorney fee award under the *By-Laws* (Article VIII, Section 9) to only those fees and costs incurred before May 14, 2009 when the Roats's delinquent assessment was not recovered until July 26, **2010**? If so, should this Court reverse the trial court's order, direct that reasonable fees incurred through July 26, **2010** are recoverable under the *By-Laws*, and remand for determination of additional amounts? (Association's Assignments of Error #2 and #3).

IV. STATEMENT OF THE CASE

This dispute concerns a homeowners association located in the San Juan Islands. Contrary to the Roats's assertion, the issues in this lawsuit involve decisions made by the membership of the Association—not its Board. The Board followed the directions given to it by the Association's membership in accordance with its authority. The Roats are discontented members of the Association, whose characterization of "abuse of power by the Board" is without support.

1. The Blakely Island Maintenance Commission homeowners' association

San Juan Aviation Estates is a residential subdivision located on Blakely Island in San Juan County, Washington. CP 3. Its plat was recorded in the late 1950's and early 1960's. At this same time, the lot owners incorporated the *Blakely Island Maintenance Commission, Inc.* homeowners association. CP 3. Over the years, the Association has adopted a number of governing documents that set forth the purpose, authority, and rules for the Association, including the *Blakely Island Covenants* CP 889-903, the *By-Laws*, CP 905-913, and the *Articles of Incorporation.* CP 1037-1046.

2. The Association's Governing Documents

The *Blakely Island Covenants*. In 1957, the original owners of the *San Juan Aviation Estates* recorded the *Declaration and Imposition of*

Restrictions (the "DIRs"). CP 3. The DIRs were the original covenants for the Association. CP 3.

In 1995, the Association enacted new covenants, the *Blakely Island Covenants* (the "*Covenants*"). As part of this process, the Association asked its members to sign an "Approval-Ratification" instrument, which "approve[d] and ratif[ied] the Blakely Island Covenants ... and agree[d] that these covenants shall be binding on all lots ... identified [in the document]." CP 353-355. On June 5, 1995, Gary Roats signed the Approval-Ratification document as a Trustee for one of the Roats's properties, Lot 128; Gary and Pamela Roats both signed the Approval-Ratification document as owners of the Roats's second property, Lot 129. CP 353-355. The *Covenants* were formally recorded with the San Juan County Auditor on June 30, 1995. CP 4. A title report for the Roats's property, Lots 128 and 129, indicates that the *Covenants* are identified and recorded against the property. CP 326.

The *Articles of Incorporation*. The *Articles of Incorporation,* the document that created the Association as a legal entity in the State of Washington, was filed with the Secretary of State in November, 1961. CP 1037-1046.[1] The Association amended its *Articles of Incorporation* on

[1] On pages 21-23 of their Amended Opening Brief, the Roats raise an argument related to non-applicable "Articles of Association." The relevance of this argument is unclear. The Association does not believe that this document

July 2, 2011. The *Articles of Incorporation* had not been previously amended for more than 50 years. CP 1037-1046. In contrast with the *Covenants*, the *Articles of Incorporation* were not required to be acknowledged by the property owners within the Association nor are they recorded. CP 1037-1046.

By-Laws. The *By-Laws* have been in effect since 1971. The Association's membership has made many revisions to the *By-Laws* over the years. *See* CP 1793-1800 (1971 version); CP 1802-1816 (1975 version); CP 1818-1831 (1978 version); CP 1833-1841 (1986 version); CP 1843-1851 (1987 version); CP 1853-1865 (1998 version); and CP 1867-1879 (2004 version). Most recently, the *By-Laws* were amended this past summer at the July, 2011 annual membership meeting, the same time that the *Articles of Incorporation* were amended. CP 3897-3907.

3. Operation of the Marina

Blakely Island is not served by the Washington State Ferry System, but the privately owned Blakely Island Marina allows for access to the island by boat. CP 884-887. The marina provides a dock, fuel dispensers for cars and boats, and a general store. CP 884-887. These amenities are the only ones of their kind on the island. CP 884-887. In

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represents the Association's Articles of Incorporation and the trial court never relied upon this document in making any of its determinations.

early 2005, the marina owner announced he would no longer operate the marina. CP 884-887. He offered to lease the marina to the Association if the membership was inclined to oversee its operation. CP 884-887.

In the summer of 2005, the Association considered whether to lease the marina. CP 884-887, 925. The Association created a committee consisting of any interested members to consider the alternatives for operating the marina. CP 884-887, 925. The Association also circulated a survey to gauge the importance of the marina to the membership. CP 884-887, 929-932. The survey results showed that the members considered the most important marina services were ingress/egress to the island and the availability of fuel. CP 884-887, 933-935. After reviewing the input received from the survey and considering the different options available for operation of the marina, the Committee offered its recommendation to lease the marina. CP 884-887, 936-939.

On November 26, 2005, the Association held a special meeting for the membership to determine whether the Association should lease the marina and create a subsidiary to oversee the operations of the marina. CP 955-56. During the meeting, a motion was made to authorize the Board "to undertake and conclude negotiations to lease certain portions of the [marina], (and form a wholly owned subsidiary for such purpose)[.]" CP

955-56 (parenthetical original). A majority of the membership approved this motion. CP 884-887.

In May 2006, consistent with the membership's vote, the Board formed the Blakely Community Facility, LLC (the "BCF"), a Washington limited liability company with the Association as its only member. CP 884-887. On June 30, 2006, the BCF entered into a lease with the owner of the marina. CP 884-887. Under the terms of the lease, the BCF agreed to lease the marina for 25 years at $1 per year. CP 884-887.

After creating the BCF and executing the lease, the Association authorized a series of expenditures related to the BCF and the marina. CP 884-887, 974-992. The membership approved each of these expenditures. CP 887, 976, 982-83, 995. The Association premised its authority to make each of these expenditures on the governing documents and the membership's repeated approval. *See* CP 884-998 (membership's approval of expenditures); CP 1037-1046 (*Articles of Incorporation*); CP 905-913 (*By-Laws*); CP 889-903 (*Covenants*).

In early 2009, the Association mailed its annual assessment to the membership as approved by the membership. CP 884-887. The assessment included BCF and marina-related expenses in 2008, the total of which was estimated to be $1,123.70 per lot. CP 884-887. The Roats refused to pay their assessment. CP 884-887. After multiple attempts to secure payment

from the Roats for their annual assessment, the Association threatened to file a lien against the Roats's property. CP 884-887.

4. Procedural Posture

The Roats filed a class action lawsuit in 2009 which included five claims against the Association. Shortly after filing their lawsuit, the Roats sought a temporary restraining order to enjoin the Association from filing any liens against the Roats's property for non-payment of their annual assessment. CP 130-131. The Association opposed the Roats's motion for a TRO. On May 14, 2009, the Roats deposited the overdue assessment amount into the San Juan County Court Registry. CP 279-280. In the notice accompanying the deposit, the Roats described the deposit as "representing the disputed portions of the unpaid 2008-2009 Annual Assessments[.]" CP 280 (emphasis added). Only after the Association prevailed on the Roats's first four claims did the Roats finally agree to pay in July 2010 their overdue assessment to the Association. CP 2877, 3085.

The Association prevailed in this lawsuit. The Roats's motion for class certification was dismissed. CP 816. Their first claim for declaratory relief contesting the validity of the *Covenants* was dismissed with prejudice on summary judgment. CP 815-816. Their second claim challenging the Association's scope of authority was dismissed with prejudice on summary judgment. CP 2146. Their third claim to quiet title

was dismissed by stipulation. CP 301-302. Their fourth claim for breach of duty of care was voluntarily dismissed. CP 852-853. Their fifth claim challenging the Association Board's meeting was partially dismissed, and to the extent the Roats's established a claim the trial court concluded the Roats had no available remedies or damages. CP 2147.

After denying the Roats any remedies for their lawsuit, the trial court awarded the Association a fraction of its expenditures in the litigation. The trial court awarded $13,797.42 based upon Article VIII, Section 9 of the *By-Laws*, which entitles the Association to recover "expenses, attorney's fees and costs reasonably incurred in enforcing the [delinquent assessment]." CP 911. The trial court permitted the Association to request only those fees and costs attributed to collection of the delinquent assessment up to May 14, 2009, excluding those amounts incurred to defeat the Roats's affirmative claims. CP 2556-2557. The trial court rejected other bases for additional fees and costs incurred by the Association in the litigation. CP 2556-2557.

5. Amendments to the Governing Documents

The Roats's Amended Opening Brief states that "[i]f there were such a compelling need [to operate the marina], and Blakely's residents agreed, [the Association] could have secured an appropriate amendment to its governing documents." Amended Opening Brief at 2. In fact, the

membership has done just that. On July 2, 2011, after the trial court had determined that the Association had acted within its scope of authority and dismissed the Roats's second claim on summary judgment, the Association's membership adopted amendments to both their *Articles of Incorporation* and *By-Laws* which set forth a purpose for the Association, in line with its endeavors over the past 50 years. CP 3897, 3924. The Roats's challenge and request for declaratory relief is based on the original 1961 Articles of Incorporation and prior *By-Laws*, which have now been superseded by new governing documents.

V. STANDARD OF REVIEW

An appellate court reviews a trial court's decision on summary judgment de novo. *Troxell v. Rainier Pub. Sch. Dist. No. 307*, 154 Wn.2d 345, 350, 111 P.3d 1173 (2005). CR 56(c) provides that summary judgment is appropriate where "there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law." Here, the Roats do not challenge the trial court's factual findings but have raised purely legal questions of law.

Review of a trial court's attorney fee award or lack thereof is generally reviewed for abuse of discretion. *Boeing Co. v. Sierracin Corp.*, 108 Wn.2d 38, 65, 738 P.2d 665 (1987). However, the basis for an attorney fee award is an issue of law reviewed de novo. *Blueberry Place*

Homeowners Association v. Northward Homes, 126 Wn. App. 352, 110 P.3d 1145 (2005) (availability of attorney fees on basis of equitable principles reviewed de novo; court declined to apply a more deferential standard of review). The trial court's determination to deny the Association an award on the basis of the Homeowners' Association statute and the *Covenants* should be reviewed *de novo*.

As to the trial court's determination that under the *By-Laws* the Association was entitled to only those fees incurred prior to May 14, 2009, the date that the Roats's deposited the still *disputed* assessment into the Court Registry (refusing to pay the Association directly), the standard of review is less clear. The trial court's characterization of the litigation should be reviewed *de novo* because this Court is in the same position as the trial court to review the claims at issue and characterize the litigation. *See Jenkins v. Snohomish County PUD No. 1*, 105 Wn.2d 99, 102, 713 P.2d 79 (1986) (an appellate court gives no deference to the trial court if the ruling on review was based on documentary evidence and no credibility issues or live witnesses were involved). If the Court reviews for abuse of discretion, it should review the record to determine whether the trial court's conclusion that the assessment was no longer disputed after Mary 14, 2009 is clear error. *See Gildon v. Simon Prop. Group, Inc.*, 158 Wn.2d 483, 494, 145 P.3d 1196 (2006).

VI. ARGUMENT

The trial court correctly dismissed the Roats's claims. This Court need not reach the majority of the Roats's issues on appeal, as the claims and the requested declaratory relief are now moot. If not moot, this Court should affirm the trial court's ruling dismissing the claims. The only relief this Court should grant is for revisiting the attorney fee award and costs due the Association. Additional fees and costs should have been awarded on additional legal grounds as a matter of law and under the *By-Laws*.

1. This Court Should Affirm the Trial Court's Dismissal on Summary Judgment of the Roats's Challenge to the Association's Authority to Operate the Marina (the Roats's Second Claim)

The trial court correctly granted summary judgment dismissing the Roats's second claim, which alleged that the actions taken by the Association related to the operation of the marina were outside of its scope of authority. Presented with cross-motions for summary judgment from both of the parties, the trial court dismissed this claim with prejudice. The parties agree that no facts are in dispute. The Roats challenge the legal ruling. It was correct. This Court should affirm. Additionally, the claim is moot because the membership amended its governing documents.

A. The Roats's Claim Challenging the Association's Scope of Authority is Moot

This Court need not entertain the Roats's claim for declaratory relief concerning the Association's authority to manage the marina. The

issue is moot. The claim is based on prior governing documents that have been amended. This Court, therefore, should affirm on the basis that the claims are moot.

On July 2, 2011, after the trial court already had determined that the Association had acted within its scope of authority and dismissed the Roats's second claim on summary judgment, the Association's membership adopted amendments to both their *Articles of Incorporation* and *By-Laws* which set forth a broad purpose for the Association. CP 3897, 3924. The membership's decision to revise the Association's stated purpose makes the Roats's challenge to the Association's scope of authority moot as a matter of law, with no effective relief available.

"A moot case is one which seeks to determine an abstract question which does not rest upon existing facts or rights." *Hansen v. W. Coast Wholesale Drug Co.*, 47 Wn.2d 825, 827, 289 P.2d 718 (1955) (the statute giving the plaintiff a tortious cause of action was repealed prior to entry of final judgment). "A case is moot if a court can no longer provide effective relief." *Orwick v. City of Seattle*, 103 Wn.2d 249, 253, 692 P.2d 793 (1984) (claim for declaratory and injunctive relief became moot upon dismissal of their traffic citations). The "[Washington Supreme] Court refuses to take jurisdiction of moot cases." *Hansen*, 47 Wn.2d at 827.

On July 2, 2011, the Association held its annual membership meeting (the "Annual Meeting") on Blakely Island, Washington. CP 3927-3936. During the 2011 Annual Meeting, the membership considered seven proposed amendments to the *Articles of Incorporation*. CP 3933-3935. Among the proposed revisions, the third amendment replaced the original "water," "road," and "landing strip maintenance" language with a more relevant statement, as follows:

> The Corporation may perform all functions of a homeowners association set forth in the recorded Articles of Incorporation, the Blakely Island Covenants (as may be amended from time to time, the "BIC's"), the Corporation's By-Laws (as may be amended from time to time, the "By-Laws"), and the HOA Act [chapter 64.38 RCW]. <u>The Corporation may engage in all such activities as are incidental or conducive to the attainment of the objectives of the Corporation and all other lawful business or activity permitted under the Washington Nonprofit Corporation Act, Chapter 24.03 RCW</u>, as may be amended from time to time.

CP 3921 (emphasis added). This amendment passed. CP 3934.[2] The revised *Articles of Incorporation* have been filed with the Washington Secretary of State. CP 3887, 3924-3925.

Also at the 2011 Annual meeting, the membership considered seven proposed amendments to the *By-Laws*. CP 3933-3935. Among the proposed revisions, the second amendment proposed language matching

[2] 77 out of 105 members' votes or proxies were cast on this measure. This equates to 73% of the members present approving passage of the amendments. Only 23 members voted to disapprove the amendments. CP 3885-3945. Proposed amendments to the *Articles of Incorporation* required at least two-thirds (or 66%) of the 105 votes present for adoption. *See* RCW 24.03.165

the new language in the *Articles of Incorporation* (set forth above). CP 3892, 3897. This amendment passed. [3]

Even after the favorable decision by the trial court dismissing the Roats's second claim, the membership expressed its will to update the purpose of the *Articles of Incorporation* and the *By-Laws* to clarify its approval of the Association's actions and responsibilities. In light of these adoptions, there is no possible relief available to the Roats under the existing facts. The Roats's challenge to the Association's former scope of authority is moot. The trial court's summary judgment dismissal of the Roats's second claim should be affirmed.

B. The Association Acted Properly Under the Former Purposes Set Forth in the Governing Documents

If these issues are not moot, this Court should affirm the trial court's correct dismissal the Roats's second claim under the former language of the governing documents. The Association had the express and implied authority to act in the manner that it did. Each of the underlying decisions to act was made by the Association's highest

[3] 78 members voted in favor of it, and 23 voting against, equating to 74% in favor. CP 3885-3945. The *By-Laws* require for amendment a majority vote of those present or represented by proxy. CP 3885-3945. The *By-Laws* also require that "a majority of... the members shall constitute a quorum for the transaction of all business". CP 3885-3945. The Association reached a quorum with 105 out of 139 total voting members participating in the Annual Meeting, either in-person or by proxy. CP 3885-3945.

authority: its general membership. The Roats's claim also is equitably barred because, after the Association's decision to take each one of these actions, the Roats failed to timely pursue means for redress as required under the Association's *By-Laws*. For any of these reasons, the Court should affirm the trial court's summary judgment dismissal of the Roats's second claim challenging the Association's scope of authority.

a. The Association Had the Express Authority To Create the BCF and Lease the Marina

The former scope of authority set forth in the governing documents provided the Association with the authority to enter into a lease to operate the marina. The Roats themselves acknowledge that "[w]here, as here, a homeowners association's articles of incorporation, bylaws, covenants, and deeds reference one another, they are 'correlated documents' that are to be construed together." *See* Amended Opening Brief, p. 27. As the Roats concede, the authority of the Association is not established exclusively in the *Articles of Incorporation*. Each of the governing documents—including the *By-Laws* and the *Covenants*—must be given effect and construed together. *Lake Limerick Country Club v. Hunt Mfg. Homes, Inc.*, 120 Wn. App. 246, 84 P.3d 295 (2004).

The former *By-Laws* provided general authority for a variety of activities and the authority to make additional rules and regulations as necessary:

> The purpose of these by-laws is to provide for the administration, maintenance, improvement, and protection of the properties, easements, access agreements, water rights, and equipment owned by the Association. Further, the Association may promulgate and enforce rules and regulations which are consistent with the [*Covenants*]... and make further rules and regulations which the Association from time to time may deem necessary.

CP 905. Consistent with the *Articles of Incorporation* and the *Covenants*, this former authority in the *By-Laws* was far-reaching and responsive; far-reaching in that it permitted the Association to take further action to meet its evolving needs or circumstances, and responsive in that it covered activities reasonably related to the Association's interests.

The Association's former *By-Laws* described its broad authority to act. The *By-Laws* provided that the Association "shall have the power to buy, hold, sell, mortgage or encumber real and personal property, to receive and disburse money, to enter into contracts, to accomplish its purpose and to act in all things to this end, as any individual might act, all in accordance with the laws of the State of Washington." CP 905 (*By-Laws* at Article III) (emphasis added). The *By-Laws* granted the

Association wide latitude to act on the membership's behalf in accomplishing the membership's objectives.

The *Covenants* also provided a wide scope of authority to the Association, including the power to incur indebtedness, finance improvements, and to execute legal documents with the approval of the members, as stated here:

> To have the power, through the [Association], after approval of its members, to incur indebtedness on behalf of the [Association], to finance said improvements and to maintain the same.
>
> <u>On behalf of the [Association], after approval of its members, to execute easements, licenses, conveyances and other legal documents to carry out the business interests of the [Association].</u>

CP 895-896 (*Covenants* at 11(B)(8) and (10) (emphasis added)).

Courts interpret covenants so as not to defeat their plain and obvious meaning. *The Lakes at Mercer Island Homeowner Association v. Witrak*, 61 Wn. App. 177, 180, 810 P. 2d 27 (1991). A court will not disturb the decision of an association so long as the association operates within its defined duties under the covenants. *See generally id.* at 181.

The Roats attempt to rely on a 1915 Georgia case that the Roats argue suggests a narrow reading of one portion of the governing documents. *See* Amended Opening Brief at 29, citing *Shiflett v. John W. Kelly & Company*, 84 S.E. 606 (1915). The Court should reject this

attempt. Washington courts "place special emphasis on arriving at an interpretation that protects the homeowner's collective interests." *See Lakes at Mercer Island*, 61 Wn. App. at 180. The Roats' out of state authority has no relevance.

As recognized by the Roats, the Washington Supreme Court in *Riss v. Angel* "explained that the court's primary objective was to give effect to the intent or purpose of the covenants' language." Amended Opening Brief at 32 (citing *Riss v. Angel*, 131 Wn.2d 612, 621, 934 P.2d 669 (1997). The clear intent of a covenant is determined by the purposes sought to be accomplished by the covenant. *Lakes at Mercer Island*, 61 Wn. App. at 179; *see also Riss*, 131 Wn.2d at 623, ("The court's goal is to ascertain and give effect to those purposes intended by the covenants.")

Each one of the governing documents read together—the *By-Laws*, the *Covenants,* and the *Articles of Incorporations*—provides sufficient authority for the Association to create the BCF and enter into a lease to operate the marina. The Association's governing documents are, as admitted by the Roats, "'correlated documents' that are to be construed together." *See* Amended Opening Brief at 27. The Court must keep in mind the origin and makeup of each of the documents. The former *Articles of Incorporation* (before the recent amendments), were filed over 50 years ago and are the instrument that created the Association as a legal

entity. The *Articles of Incorporation* are neither acknowledged by the property owners nor recorded on property titles. The *Articles of Incorporation* initiated the Association's existence but did not reflect the membership's interests or objectives.

The *Covenants* must be acknowledged by the property owners within the association and are recorded on the property titles. Prior to the adoption of the July 2, 2011 amendments, the *By-Laws* and *Covenants* had been updated much more recently than the fifty year old *Articles of Incorporation*. The *By-Laws* were last updated in 2004 and the *Covenants* in 1995. The more recently updated *Covenants* and *By-Laws* better reflect the membership's interests.

To the extent inconsistencies or ambiguities exist between the governing documents, the documents provide that the *Covenants* control. CP 902-903 (*Covenants* at Section 20). The provisions of the *Covenants* are "determinative of any inconsistency" between the Association's *Articles of Incorporation* and/or the *By-Laws*. CP 902-903 (*Covenants* at Section 20). If the governing documents are inconsistent, the *Covenants* recorded on each property owner's title are controlling and authorize the Association to lease the marina and collect related assessments.

The Roats suggest that *Meresse v. Stelma*, 100 Wn. App. 857, 999 P.2d 1267 (2000), supports their contention that the membership has not

validly approved the marina operations. *See* Amended Opening Brief, p. 38. This is incorrect. *Meresse* involved restrictive covenants that adversely affected the use of privately owned property. The instant case involves the scope of authority set forth in an association's *Articles of Incorporation* and *By-Laws* in a manner unrelated to a member's enjoyment of his or her private property.

If *Meresse* has any relevance, the case reaffirms that restrictive covenants which require less than 100 percent approval are valid if the restriction "is exercised in *a reasonable manner consistent with the general plan of the development*." *Meresse*, 100 Wn. App. at 866 (citation omitted). The Association's operation of the marina is consistent with the general plan of the development in that the marina, which as existed from the inception of the Association, is the island's only public marina, providing the membership with access to a dock for ingress/egress and fuel dispensers for cars and boats. The membership values the marina as evidenced by the membership voting repeatedly to lease the marina and approve expenditures for its operation. Although off point, *Meresse* actually supports the Association's position, not the Roats's.

The Roats argue that the *By-Laws* and *Covenants* are "controlling" and "correlated" documents which "must be construed together," but fail to recognize the Association's authority under these documents to execute

a lease of the marina and create a subsidiary to oversee the marina's operation. If the Roats's narrow interpretation were correct that every Association activity must strictly fit within "water," "roads," and "landing strip maintenance," this would eliminate the community's fire department service, garbage and recycling services, recreation facilities, and other services not explicitly identified in the former purpose of the *Articles of Incorporation*. The Roats, however, did not seek this relief. They may not pick and choose which activities of the Association approved by the membership they wish to continue and which they oppose. Rather, the membership's decisions over the last 50 years as to the activities and responsibilities of the Association should be maintained for the benefit of the community.

Reversal of the trial court's decision would be a detriment to the membership and contrary to their wishes. The reasonable interpretation that is consistent with all of the correlated governing documents and protects the collective interests of the membership is to recognize that the Association acted within the scope of authority set forth in the former governing documents in deciding to operate the marina. This Court should affirm.

b. The Association Had the Implied Authority to Act in the Manner that it Did

The Association not only had express authority for its disputed actions pursuant to the *Covenants, By-Laws, Articles* and votes of the membership, but it had implied authority because leasing the marina was incidental, or reasonably related, to the purpose of the Association. *See Jamieson & McFarland v. Joseph Heim*, 43 Wash. 153, 156, 86 P. 165 (1906) (holding the respondent had an implied power to act in a manner not expressly discussed in the articles of incorporation because it reasonably related to its underlying purpose).

The Roats do not dispute that the Association is entitled to act under implied powers. They acknowledge that the Association can operate in ways that are "incident" to its purpose even where not strictly related to "water," "roads," and "landing strip maintenance." Amended Opening Brief at 28. For example, the Roats concede that the Association can act in ways related to "fire prevention or extinguishment, grass-cutting, garbage collection, brush-clearing, maintenance sheds, vehicle engines and crews to perform these activities, water system operation, safety regulations at Horseshoe Lake (where swimming inevitably took place)." Amended Opening Brief at 28. The Roats recognize the propriety of these activities even though they are not expressly stated in

the 1961 Articles of Incorporation. The Roats acknowledge they are reasonably related and incidental to the purpose of the Association. *Id.*

In this case, the marina-related decisions also are incidental to the purpose of the Association, because they allow a member's access to and around the island. Notably, the Association is located on an island. CP 884-887. The fuel dispensers and the general store are the only amenities on Blakely Island. CP 884-887. Use of the marina, which has existed since the formation of the Association, and its fueling stations allows the membership to access the island by water and fuel their boats and cars.

When the owner of the marina announced that he would no longer operate it, he offered to lease the marina if the Association membership was inclined to oversee its operations. CP 884-887. In response, the membership began a process to consider whether to lease the marina. CP 885-886. The results of a survey revealed that the marina was critical to the membership, because it provided a point of access and important amenities and marina-related services that the members have long relied upon. CP 934-935. These services are fundamental to the purpose of the Association in that they enable a member's access to, and around, the island, as well as related needed services.

The Association acted within its implied authority, and each such action need not be explicitly spelled out in the *Articles of Incorporation.* Affirmance is proper due to the Association's implied authority.

C. The Roats's Claims Are Barred by Equity and Failure to Exhaust Their Remedies.

The Roats's claims fail not only because the disputed actions are expressly and impliedly authorized, but because the doctrines of laches and failure to exhaust remedies bar the claims. The Roats's challenge was untimely to the prejudice of the Association and inconsistent with the *By-Laws*. The Court should affirm on this additional basis.

The equitable doctrine of laches bars the Roats's claim for declaratory relief as a matter of law. Laches can be traced to "the familiar maxim that equity aids the vigilant, not those who slumber on their rights." *Arnold v. Melani*, 75 Wn.2d 143, 148, 449 P.2d 800 (1968). It is an "equitable principle that in a general sense relates to neglect for an unreasonable length of time, under circumstances permitting diligence, to do what in law should have been done." *Id.* at 147. Laches requires:

> "(1) knowledge or reasonable opportunity to discovery on the party of a potential plaintiff that he has a cause of action against a defendant; (2) an unreasonable delay by the plaintiff in commencing that cause of action; (3) damage to defendant resulting from the unreasonable delay."

Buell v. City of Bremerton, 80 Wn.2d 518, 522, 495 P.2d 1358 (1972).

First, the Roats had knowledge or a reasonable opportunity to discover any potential cause of action beginning in 2005 when the membership voted in favor of creating the BCF and leasing the marina. CP 955-956. They attended all of the membership meetings, including the November 2005 special meeting, and they received the minutes from all of the relevant annual meetings and Board meetings. CP 923-992. The Roats were fully aware that the Association was taking steps to create the BCF and lease the marina.

Second, the Roats brought this claim for declaratory relief almost three years after the BCF was created and a lease for the marina was signed. This is well past the 30 days that members are allowed to object to actions decided by the membership and executed by the Board, as required in the *By-Laws*. *See* CP 907. Despite acknowledging receipt of the minutes, the Roats failed to object to the Association's decisions of which they now complain. CP 887. Absent objections by members, the Board's actions are final. CP 907. The Roats's failure to object as prescribed by the *By-Laws* is fatal to their claim.

Third, the Roats's unreasonable delay would damage the Association since the membership has taken actions related to the marina for over five years. To unravel these decisions would irreparably harm the Association and upset the repeatedly expressed will of the membership.

By failing to object to any of the relevant minutes, the Roats also failed to exhaust their remedies. The exhaustion of remedies doctrine requires that procedures established by statute, contract, or governing document must be initiated and followed in certain cases before an aggrieved party may seek relief from the courts. *See Holderby v. International Union of Operating Engineers*, 45 Cal.2d 843, 846, 291 P.2d 463 (1955). As clearly expressed in other jurisdictions, "[i]t is the general and well established jurisdictional rule that a plaintiff who seeks judicial relief against an organization of which he is a member must first invoke and exhaust the remedies provided by that organization applicable to his grievance." *Holderby*, 45 Cal.2d at 846; *see also Junkins v. Communication Workers of America*, 241 Mo. App. 1029, 271 S.W.2d 71 (1954). "This rule is analogous to the rule requiring the exhaustion of administrative remedies as a condition precedent to resorting to the courts, and to the rule requiring the parties to a contract for arbitration of disputes to exhaust those remedies before seeking judicial relief." *Holderby*, 45 Cal.2d at 846.

By sleeping on their rights, failing to exhaust their remedies, and waiting to seek declaratory relief until now, the Roats are equitably barred under the doctrines of laches and the exhaustion of remedies. Having

failed to dispute the application of these doctrines in their Amended Opening Brief, the Roats's appeal must fail.

2. This Court Should Affirm The Trial Court's Dismissal On Summary Judgment Of The Roats's Claim That The Covenants Are Invalid (The Roats's Third Claim)

The trial court correctly dismissed the Roats's third claim challenging the validity of the *Covenants* as untimely under two statutes of limitations, as well as equitably barred under the doctrines of laches and estoppel. This Court should affirm on all or any one of these grounds

The trial court's findings, which the Roats have not disputed on appeal, supported dismissal of the Roats's claims, including the following:

1. The Blakely Island Covenants (the "*Covenants*") were adopted in June, 1995;
2. Plaintiffs signed and returned an approval-ratification form, which was recorded with the *Covenants* on June 30, 1995;

See CP 816.

The trial court went on to conclude that the Roats's claim for declaratory relief over 13 years after the enactment of the *Covenants* is barred by two statutes of limitations. *Id.*, *citing* RCW 4.16.080(2) and RCW 4.16.040(1). The statute of limitations time period begins to run from the time an action has accrued. *Rice v. Dow Chem. Co.*, 124 Wn.2d 205, 211, 875 P.2d 1213 (1994). A cause of action accrues when the party

has a right to apply to a court for relief. *U.S. Oil & Ref. Co. v. Department of Ecology*, 96 Wn.2d 85, 91, 633 P.2d 1329 (1981).

The factual record supports the trial court's ruling. For the past 13 years, the Roats have owned two parcels of real property that have been subject to the *Covenants*. CP 320-328. The Roats's right to file a cause of action accrued in 1995, when the *Covenants* were enacted by the Association and recorded with the San Juan County Auditor. Indeed, the trial court made a specific finding that the Roats signed the Approval-Ratification of the *Covenants* in 1995, which specifically states, "We hereby approve and ratify the Blakely Island Covenants dated July 1, 1995." CP 353, 355. The *Covenants* were then recorded and appear on their property title. CP 326. The Roats claim accrued at that time. The statute of limitations to challenge the validity of the *Covenants* has long since run, given the more than 13 years that have passed since the *Covenants* were enacted and recorded on their property.

The Roats mischaracterize the trial court's ruling dismissing their first claim when they argue that "[t]he basis for this ruling was an issue that arose in 2002." *See* Amended Opening Brief, pp. 42-43. In fact, the trial court did not base its decision on the *issue* that occurred in 2002 but did consider the statement made by Roats's attorney in 2002: "My clients believe ... that the CCR's [i.e., the *Covenants*] are and remain invalid....

All of said claims, and any other claims my clients might have against the [Association] were and are reserved at this time for later prosecution at such time as they may determine to proceed." CP 358. This statement demonstrates that the Roats believed the *Covenants* were invalid as of 2002. The Court determined the statute of limitations had expired under RCW 4.16.080(2), a 3-year statute of limitations, or RCW 4.16.040(1), a 6-year statute of limitations, making the particular 2002 issue cited by the Roats irrelevant.

The Roats wrongly contend that the statute of limitations does not apply in this case because the *Covenants* are void *ab initio*. *See* Amended Opening Brief, p. 43. On the contrary, Washington courts have held covenants to be void only under the most egregious of circumstances where the covenant is illegal or violates public policy. Such circumstances are limited to religious or racial discrimination[4], public policy considerations[5], or illegal conduct[6].

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[4] *Shelly v.* Kraemer, 334 U.S. 1, 68 S. Ct. 836 (1948) (invalidating covenants that bar racial minorities from ownership of land); *Riste v. E. Wash. Bible Camp*, 25 Wn. App. 299, 605 P.2d 1294 (1980) (restrictive covenant violated anti-discrimination laws); *see also* RCW 49.60.224 (statutory authority to invalidated written instruments containing racial restrictions).

[5] *Mains Farm Homeowners Ass'n v. Worthington*, 121 Wn.2d 810, 854 P.2d 1072 (1993) (covenants may be deemed void if against public policy although court held it was not void in this instance).

[6] *Brower v. Johnson*, 56 Wn.2d 321, 352 P.2d 814 (1960) (covenant not to compete void because underlying business was illegal).

No Washington court has held that covenants are void *ab initio* because of procedural shortcomings such as the Roats allege. Specifically, the Roats allege that 100 percent of property owners were required to sign the *Covenants* and that the notarization was done incorrectly. *See* Amended Opening Brief, pp. 9-10. Even if these allegations were correct or proved, which they were not, the Roats still were obliged to timely challenge the *Covenants* as *voidable*. *See, e.g., Stabbert v. Atlads Imperial Diesel Engine Co.,* 39 Wn.2d 789, 792, 238 P.2d 1212 (1951) (quoting Restatement of Contracts 12, § 13: "where one or more parties thereto have the power, by a manifestation of election to do so, to avoid the legal relations created by the contract; or by ratification of the contract to extinguish the power of avoidance.... Unless rescinded, however, a voidable contract imposes on the parties the same obligations as if it were not voidable"); *see also* BLACK'S LAW DICTIONARY (6th Ed., 1990) ("voidable exists when an imperfection or defect can be cured by the act or confirmation of him who could take advantage of it."). Instead, the Roats ratified the *Covenants*. To the extent the *Covenants* were voidable, the Roats failed to take timely action to challenge the *Covenants*.

In addition to the statute of limitations, the trial court also recognized the doctrines of laches and estoppel as alternative bases for its judgment. *See* CP 816. The Roats's have waived any challenge to these

rulings by failing to assign error or argue against these grounds. *See Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) ("When a party presents no argument on a claimed assignment of error, the assignment of error is waived.") *citing* RAP 10.3(a)(5) and *Smith v. King*, 106 Wn.2d 443, 451-52, 722 P.2d 796 (1986); *French v. Gabriel*, 116 Wn.2d 584, 596, 806 P.2d 1234 (1991) ("Where a party presents no argument or authority in support of review, the issue is not properly raised.") *citing* RAP 13.7(b). This compels affirmance.

For all, or any one, of the bases cited by the trial court (statute of limitations, laches, and equitable estoppel), this Court should affirm the dismissal of the Roats's third claim challenging the *Covenants'* validity.

3. The Roats' Fifth Claim Regarding Notice Of Board Meetings Did Not Warrant A Fee Award.

This Court should affirm the trial court's denial of the Roats's request for attorney fees related to their challenge of improper notice of the Association's meetings. The Roats fail to argue or support the conclusion that the determination was an abuse of discretion. It was not.

The Roats assert error in failing to award them fees despite the fact that the Homeowners' Association statute, RCW 64.38.050 (hereafter "HOA statute"), gives the trial court discretion whether to award fees, stating that the court "may" "in an appropriate case" award fees "to the prevailing party." While the trial court viewed the statute as applicable, he

declined to award fees under the circumstances where the Roats were afforded no relief, and where the Association prevailed overall. *See* CP 2556-2557; 2561-2563. This was not abuse of its discretion. The Roats fail to state any standard of review, and fail to argue that an abuse of discretion occurred. Affirmance is proper because the trial court determined: (i) the majority of the Roats' fifth claim was dismissed; (ii) as for the few Board meetings that were ruled procedurally deficient, there were no further remedies or damages awarded to the Roats; (iii) and the Association is the prevailing party.

The fifth claim in the Roats's First Amended Complaint alleged that the Board's "telephonic conference calls violate RCW 64.38.035, in that these phone calls are between the Board and they are not open for observation...". CP 225. The trial court concluded "that telephonic meetings by members of the Board of Governors do not constitute a violation of RCW 64.38.035." CP 2147. Realizing the infirmity of the original basis for their open meetings challenge, i.e. that telephonic meetings are improper, the Roats latched on to a new-founded allegation that the Board had not provided proper notice for some of its in-person meetings. *Compare* CP 225 and 1948-1949. The Roats alleged that the

Board conducted 35 Board meetings without providing proper notice.[7] CP 1948-1949. In their Amended Opening Brief, the Roats inaccurately state, "the Board met 28 times without providing any notice to members." Amended Opening Brief, p. 43. The trial court, however, in an unchallenged finding ruled that the Board did not provide notice for 18 of its Board meetings. CP 2563. And, the Court did not conclude that any of these violations were "deliberate" as alleged by the Roats. *See* 2561-2563.

The trial court refused to grant any additional relief to the Roats as a result of any notice deficiency. The Roats do not challenge the trial court's decision to deny them further relief with regard to their notice claim. The Roats, however, ask this Court to direct the trial court to award fees under the discretionary statute. The Roats do not argue why the trial court abused its discretion. The Association cannot respond to unarticulated argument.

The trial court declined to award fees and costs under the discretionary statute, and its reasons are logical and tenable. There is no basis for reversal. As noted above, the Homeowners' Association statute gave the trial court the discretion to decline a fee award. No abuse of

[7] The Roats's alleged defects in the notice process had been cured at the time they filed their Amended Complaint on May 14, 2010. The Association resumed providing notice of all its Board meetings beginning in May, 2009, which the Roats acknowledged in their interrogatory responses. CP 2431.

discretion has been shown. *See Gildon*, 158 Wn.2d at 494 ("A court abuses its discretion when its decision is manifestly unreasonable, or exercised on untenable grounds or for untenable reasons. . . .An abuse of discretion is found if the trial court relies on unsupported facts, takes a view that no reasonable person would take, applies the wrong legal standard, or bases its ruling on an erroneous view of the law."). The trial court properly exercised its discretion. The Roats have not met their burden to establish otherwise.

4. The Trial Court Correctly Awarded The Association Attorney Fees, But Erred In Rejecting Additional Bases For A Fee Award And In Unduly Limiting The Fees Awarded.

The trial court correctly awarded some fees to the Association. The Association, however, was entitled to more fees and costs as a matter of law after its success in the litigation. This Court should reverse and remand for consideration of further fees and costs to the Association.

First, in addition to the *By-Laws*, additional authority for a broader award of fees and costs existed. The fee provisions in the *By-Laws* are limited to the collection of delinquent assessments. The trial court's award exclusively on the basis of the *By-Laws* erroneously rejected the Association's right to fees and costs under these additional bases.

Second, the trial court erred in its construction and application of the fee provision in the *By-Laws* when it concluded that fees incurred after

May 14, 2009, were not part of the Association's effort to establish its right to the delinquent assessment. This Court should correct both errors and remand for additional fee proceedings. It should reject the Roats' assertion that the Association was not entitled to any fees under the *By-Laws*. The Association also is entitled to fees and costs on appeal. Finally, the fact of insurance is irrelevant to the fee award issues.

A. The Association Is Entitled to Recover its Attorney Fees and Costs Under RCW 64.38.050.

The trial court erroneously denied the Association recovery of fees and costs under RCW 64.38.050 (the "Homeowners' Association statute"). CP 2556-2557. This was an error of law and is subject to de novo review. *See Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998). This Court should reverse and remand for a determination of the fees and costs warranted under this statutory authority.

The HOA statute provides, "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." *See* RCW 64.38.050 (emphasis added). "[A] prevailing party is one who receives an affirmative judgment in his or her favor." *Riss*, 131 Wn.2d at 633 (citing *Schmidt v. Cornerstone Investments*, 115 Wn.2d 148, 164, 795 P.2d 1143 (1990)). "If neither wholly prevails, then the determination of who is a prevailing

party depends upon who is the substantially prevailing party, and this question depends upon the extent of the relief afforded the parties." *Riss*, 131 Wn.2d at 633-34 (emphasis added (citations omitted)). A "fee shifting provision [] serves the general purpose of most fee-shifting statutes, which is to punish frivolous litigation and to encourage meritorious litigation." *Eagle Point Condominium Owners Association v. Peter Coy*, 102 Wn. App. 697, 713, 9 P.3d 898 (2000).[8]

The trial court afforded the Roats no relief on any of their five claims, rejected their motion for a temporary restraining order, and their motion for class certification also failed. The Association prevailed on *all* of the substantive motions and claims. The HOA statute permits a prevailing party like the Association to recover attorney fees. The trial court, however, failed to recognize the Association's right to fees under the HOA statute. The Association requested statutory fees in multiple briefs to the trial court. CP 2266-2271; 2476-2479. The trial court

[8] The trial court considered the issue of attorney fees for homeowner associations in two unpublished opinions with facts very similar to the present litigation, which were cited not as binding authority but as an example of the analysis supporting the Association's fee request under the HOA statute. *See* CP 2269, citing *Hardy v. Fairwood Greens Homeowners' Association, Inc.*, 2004 Wash. App. LEXIS 335 at *26 (2004) (Division I awarded a homeowners association fees under the HOA statute even though the plaintiff homeowner prevailed on one of her claims); *Carlson v. The Innis Arden Club*, 2008 Wash. App. LEXIS 1199 at *31-32 (2008) (Division I explained that HOA statute does not limit an award of fees to aggrieved homeowners but does allow fees to the "prevailing party" including homeowners associations defending claims).

inexplicably failed to address or adopt RCW 64.38.050 as a basis for a fee award to the Association. *See* CP 2556-2557, 2561-2563.

This Court should rule that the Homeowners Association statute provides a basis for a fee award to the Association and reverse and remand for further fee proceedings.

B. The Association is Entitled to Recover Attorney Fees and Costs Under its *Covenants*

The trial court also incorrectly rejected the *Covenants* as a basis for recovery of the Association's attorney fees. CP 2556-2557. This, too, was legal error supporting reversal and remand for a determination of additional fees and costs due the Association. The *Covenants* entitle a prevailing party in a dispute regarding the *Covenants* to recovery of attorney fees. Under the *Covenants*' "General Enforcement Provisions and Penalties" section, the Association is expressly authorized to commence litigation and recover reasonable attorney fees: "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 897 (*Covenants,* ¶11.C(1)).

The lawsuit initiated by the Roats challenged the validity of the *Covenants* and the Association's scope of authority. The Association prevailed. The *Covenants* support an award of all reasonable attorney fees and costs incurred in the litigation. The Association sought fees and costs

under the Covenants. CP 2266-2271; 2476-2479. This Court should rule as a matter of law that the Covenants provide a basis for a fee award to the Association, and remand for determination of the amount.

C. The Association is Entitled to Recover Additional Amounts of Attorney Fees and Costs Under its *By-Laws* through July 26, 2010

The trial court correctly ruled that a fee award was justified under the *By-Laws*, but misapplied the *By-Laws*, erroneously applied the facts to the law, and/or committed clear error when it held that the *By-Laws* only authorized fees and costs incurred up to the time the Roats deposited their delinquent assessment in the Court registry. CP 3530-3531. There was no tenable basis to limit the fees where it is undisputed that the Association did not recover the Roats's delinquent assessment until July 26, 2010. It was only then—and not before—that the Roats stopped disputing the assessment and made payment.

The trial court awarded the Association $13,797.42 based upon Article VIII, Section 9 of the *By-Laws*. This provision entitles the Association to recover "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...." CP 3532-3535. Because the Roats' action challenged the authority for the marina assessment, the trial court was correct to consider applicable the *By-Laws'*

fee provision. But the trial court incorrectly cut off the award on May 14, 2009. CP 3530-3535. This was unjustified and requires reversal.

The trial court reasoned that once the Roats deposited their delinquent assessment into the San Juan County Court Registry on May 14, 2009, "the lawsuit was no longer about collecting unpaid assessments[.]" CP 3530-3531. This was an incorrect legal conclusion, a misapplication of the law to the facts or, alternatively, an unsupportable factual finding justifying reversal. *See Gildon, supra*, 158 Wn.2d at 494. The trial court erred in determining that the entire lawsuit was not part of the effort to collect the Roats's delinquent assessment and excluding the majority of the Association's legal expenses from consideration.

The Roats initially sought an injunction against the Association from filing liens for non-payment of the annual assessment. CP 130-131. The Association opposed the Roats's motion. CP 159-167. The Roats continued to avoid paying the assessment during the lawsuit and instead deposited it into the registry of the court. CP 279-280. When the Roats deposited the money into the registry, they plainly stated in their notice: "Plaintiffs shall, pursuant to CR 67, deposit with the court, the sum of $2,247.40, representing *the disputed portions* of the *unpaid* 2008-2009 Annual Assessments for Lots No. 128 and No. 129, Blakely Island

Aviation Estates." CP 280 (emphasis added). The Roats withheld the delinquent assessment and continued to dispute its validity.

It was error for the trial court to conclude that the dispute about the delinquent assessment ended on May 14, 2009. The record plainly demonstrates that the assessment continued to be disputed until the Association defeated the Roats claims in July 2010 and the Roats finally paid the delinquent assessment. CP 1016, 1946-1947, 1980-1988, 3085-3086. The earlier deposit of the delinquent assessment merely resolved whether the Association would file a lien on the Roats' property, which it did not after a source of payment was secured. Fees and costs incurred through July 2011 were due to the Association under the *By-Laws*.

D. This Court Should Award the Association Fees and Costs Incurred in the Appeal Under RAP 18.1(a) If the Association Prevails.

Pursuant to RAP 18.1(a), the Association requests fees on appeal if it prevails. As argued above, the Association is entitled to fees and costs under the Homeowners' Association statute, the *Covenants* and the *By-Laws*. On the face of the statute, recovery of fees is not limited to trial court proceedings but also applies to this appeal. The *Covenants* and *By-Laws* also apply to appellate proceedings. "A contractual provision for an award of attorney fees at trial supports an award of attorney fees on appeal." *Reeves v. McClain*, 56 Wn. App. 301, 311, 783 P.2d 606 (1989).

This appeal continues the parties' dispute and the Association's effort to defend it actions and establish its right to the assessment associated with the costs of the operation of the marina. This Court should award the Association fees on appeal if the Association prevails.

E. Insurance Coverage Does Not Alter the Association's Right to a Fee Award

The Court should reject the Roats's contention that the Association's fees are not recoverable to the extent they were paid by its insurer. Amended Opening Brief at 48-50. This Court should affirm the trial court's correct determination that it is immaterial that the Association had insurance coverage for the Roats's claims. The Roats present no authority or compelling argument for reversal.

Consistent with other jurisdictions across the nation, Washington has long-held that attorney fee coverage by a third-party payor including an insurance company is immaterial to an award of attorney fees. The Association's fee award should not be affected by the fact that some of the Association's fees were paid by their insurance carrier.

The Washington case most directly on-point is *PUD No. 1 of Grays Harbor v. Timothy Crea*, 88 Wn. App. 390, 945 P.2d 722 (1997). In that case, the plaintiff "argue[d] that the trial court should not have awarded attorney's fees... because [the defendant's] fees were paid by an insurer that was not party to the lawsuit." 88 Wn. App. at 396 (emphasis

added). The *Crea* court decisively rejected the argument, stating, "[t]his argument has no merit and ignores [Washington precedent] holding that a [third party payor] was immaterial to an award of attorney's fees." *Crea*, 88 Wn. App. at 396 (emphasis added). Accordingly, the *Crea* court affirmed the trial court's award of attorney fees despite the fact of insurance. *Crea*, 88 Wn. App. at 397. This Court should follow *Crea* and reject the Roats's argument.

The Roats's previous attempts to distinguish *Crea* fail. They argued that in *Crea* the authority for the fee award was based on a statute, as compared to the Association's governing documents in this case. This distinction is immaterial. The *Crea* court's holding did not hinge on the basis for the fee award; the court simply held that a fee award will not be affected by the involvement of an insurance company. *See Crea*, 88 Wn. App. at 396-97. The Washington Supreme Court declined to review *Crea* and granted an award of additional attorney fees for defending the appeal. *See PUD No. 1 v. Crea*, 134 Wn.2d 1021, 958 P.2d 316 (1998). *Crea* demonstrates that the Association is entitled to its full fee award regardless of the fact that its insurance company paid some of the fees.

Several other Washington state cases support this result, including *Tofte v. Department of Social and Health Services*, 85 Wn.2d 161, 165, 531 P.2d 808 (1975) ("no logical basis upon which to draw a distinction...

between privately retained counsel and [a third party payor]"). *See also Harold Meyer Drug v. Hurd*, 23 Wn. App. 683, 687-88, 598 P.2d 404 (1979) ("The fact that the [prevailing party] is represented by a public legal services corporation and the fact that she has paid no actual attorney's fees in this case is immaterial to the determination of reasonable legal fees."). In *Tofte*, the defeated party contended as the Roats have, "that because of the absence of the traditional contractual attorney-client relationship between [the prevailing party] and [the third party payor] and the absence of any actual fee expenditure or obligation on the part of [the prevailing party], a reasonable fee would be no fee at all[.]" *Tofte*, 85 Wn.2d at 165. The Washington Supreme Court rejected this argument and concluded that "[g]iven the underlying purpose of [] fee award[s], we see no logical basis upon which to draw a distinction in applicability of the provision between privately retained counsel and [a third party payor]." *Id.* (emphasis added). The *Tofte* court reversed the trial court's decision to deny a fee award and remanded for a determination of a reasonable fee award. *Tofte*, 85 Wn.2d at 165.

Courts in other jurisdictions similarly have rejected the argument that a party that is provided a defense through an insurance policy or other indemnification agreement may not recover costs or attorney fees when such a recovery is otherwise authorized. *See Mullins v. Kessler*, 83 P.3d

1203, 1204-05 (Colo. Ct. App. 2003) ("The arrangement between defendant and his liability insurer for the disbursement and repayment of those costs is of no consequence."); *Aspen v. Bayless,* 564 So.2d 1081, 1082-83 (Fla. 1990) (defendant can recover costs even where the defendant's insurance policy provides that the insurer will pay all costs); *Hale v. Erickson*, 23 P.3d 1255, 1257 (Colo. Ct. App. 2001) ("[w]hether it was the defendant or, instead, a third party, that actually paid those costs is irrelevant[.]"); *Ferrer v. Ngo*, 73 P.3d 73, 80 (Hawaii 2003); *Manor Healthcare Corp. v. Lomelo,* 929 F.2d 633 (11th Cir. 1991); *Hopkins v. Byrd*, 146 P.3d 864, 866 (Ok. Ct. App. 2006).

The Association is entitled to fully recover fees and costs incurred in successfully defending this lawsuit, regardless of the third-party payor.

VII. CONCLUSION

The Association respectfully requests that this Court reject the Roats's challenges and uphold the trial court's judgment that the Association acted within its scope authority and that the *Covenants* are valid. The Association has undertaken prudent measures in managing the activities, maintenance and operations of this island community and its essential facilities. The Roats inaccurately characterize the Association's actions as being unilaterally taken by the Board. Instead, the Board followed the directions given to it by the Association's membership in

accordance with its authority as prescribed by statute and the governing documents. This Court should affirm the judgment for these reasons, and because the majority of the claims are moot.

The Association further asks this Court to recognize the broader bases presented to the trial court for awarding it attorney fees and costs. The Court should remand for award of additional fees and costs under the HOA and the covenants. This Court also should affirm the Association's right to fees under the By-Laws, and reverse and remand for the award of fees incurred between May 14, 2009 and July 2010 which were improperly excluded by the trial court. As the prevailing party, the Association should be reimbursed for defending the Roats' lawsuit and its authority to issue the disputed assessment.

Respectfully submitted on this 26th day of September, 2011.

SCHWABE, WILLIAMSON & WYATT, P.C.

By: _____

Lawrence A. Costich, WSBA #32178
Milton A. Reimers, WSBA #39390
Averil Rothrock, WSBA #24248
Attorneys for Defendants/Respondents, Blakely Island Maintenance Commission, et al.

APPENDIX

A. Revised Articles of Incorporation

B. Revised By-Laws

C. Unpublished Washington Cases

D. Non-Washington Authorities

APPENDIX - A

Amendments to the BIMC Articles of Incorporation

Considered by the Board of Governors

March 10, 2011

First Amendment. Article I is amended in its entirety as follows:

"This corporation (the "Corporation") was initially formed as a nonprofit corporation under Chapter 24.04 RCW, the statutory provisions governing nonprofit corporations in effect in 1961. The Corporation is now therefore a nonprofit corporation governed by the current Washington Nonprofit Corporation Act, Chapter 24.03 RCW."

Second Amendment. Article II is amended in its entirety as follows:

"The name of the Corporation is Blakely Island Maintenance Commission, and its principal place of business shall be Blakely Island, Washington. Its duration shall be perpetual."

Third Amendment. Article III is amended in its entirety as follows:

"The Corporation is organized to act as a homeowners association pursuant to the Washington Homeowners' Associations Act, Chapter 64.38 RCW, as amended (the "HOA Act"), for the operation of that certain residential subdivision known as San Juan Aviation Estates in San Juan County, Washington. The Corporation may perform all functions of a homeowners association set forth in the recorded Blakely Island Covenants (as may be amended from time to time, the "BICs"), the Corporation's By-Laws (as amended from time to time, the "By-Laws"), and the HOA Act. The Corporation may engage in all such activities as are incidental or conducive to the attainment of the objectives of the Corporation and all other lawful business or activity permitted under the Washington Nonprofit Corporation Act, as may be amended from time to time.

The Corporation is intended to be a Homeowners Association as that term is used in Section 528 of the Internal Revenue Code of 1986 (as amended from time to time). No part of the Corporation's net earnings may inure to the benefit of any private member or individual. No part of the Corporation's assets may be used in any manner, and the Corporation may not participate in any activity, that would cause the Corporation to cease to qualify as an exempt organization under Section 528 of the Internal Revenue Code."

Fourth Amendment. Article IV is amended in its entirety as follows:

"The Corporation shall have and its business affairs shall be conducted by a board of seven (7) directors, which may be referred to in the By-Laws and/or the BICs as the "Board of Governors." The names, titles, and addresses of the current board of directors are as follows:

Name	Address
Sally Elliman	758 Marine Drive PO Box 5342 Blakely Island, WA 98222

Barb Sullivan	384 Eagle Bay Road Blakely Island, WA 98222
Jim Fergus	135 Marine Drive PO Box 5298 Blakely Island, WA 98222
Doug Davidson	159 Marine Drive Blakely Island, WA 98222
Roger Brown	876 Marine Drivew Blakely Island, WA 98222
Jim Dovey	59 Blakely Drive Blakely Island, WA 98222
Bob Breidenthal	22 Spencer Road Blakely Island, WA 98222

Fifth Amendment. Article V is hereby amended in its entirety as follows:

"The Corporation shall have all of the powers prescribed in RCW 24.03.035 and the HOA Act, and generally do all things necessary and proper to carry out the purpose of its creation, as any individual might do, all in accordance with the laws of the State of Washington."

Sixth Amendment. A new Article VI is added to read as follows:

"The Corporation may be dissolved in accordance with the provisions of the Washington Nonprofit Corporation Act; provided, however, that the Corporation shall not be voluntarily dissolved until the BICs have been terminated of record in accordance with the terms of the BICs. Upon voluntary dissolution, the Corporation will distribute its assets to its members in good standing at the time of such dissolution or to one or more organizations engaged in activities substantially similar to those of the Corporation. If the Corporation is involuntarily dissolved, or if the Corporation is voluntarily dissolved but the BICs remain in effect, the Corporation shall automatically be succeeded by an unincorporated association of the same name and having the same purposes. All assets, property, powers, and obligations of the Corporation existing prior to such dissolution shall thereupon automatically vest in the successor unincorporated association."

Seventh Amendment. A new Article VIII is added to read as follows:

"The street address of the Corporation's registered office and the name of its initial registered agent at that address is:

Cheryl Burkhart
6325 319th St NW
Stanwood, WA 98292"

APPENDIX - B

BY-LAWS

of the

BLAKELY ISLAND MAINTENANCE COMMISSION, INC.

ARTICLE I NAME

The name of the Association shall be the Blakely Island Maintenance Commission (the "Association" or the "BIMC"). Its principal place of business shall be Blakely Island, Washington.

ARTICLE II PURPOSE

The Association is organized to act as a homeowners association pursuant to the Washington Homeowners' Associations Act, Chapter 64.38 RCW, as amended (the "HOA Act"), for the operation of the San Juan Aviation Estates in San Juan County, Washington. The Association may perform all functions of a homeowners association set forth in the recorded Articles of Incorporation, the Blakely Island Covenants (as may be amended from time to time, the "BICs"), these By-Laws (as amended from time to time), and the HOA Act. The Association may engage in all such activities as are incidental or conducive to the attainment of the objectives of the Association and all other lawful business or activity permitted under the Washington Nonprofit Corporation Act, Chapter 24.03 RCW, as may be amended from time to time (the "Nonprofit Act"). The BIMC shall be operated for the mutual benefit of its members in accordance with the BICs.

ARTICLE III POWERS

This corporation shall have the power to buy, sell, mortgage or encumber real and personal property, to receive and disburse money, to enter into contracts, to accomplish its purpose and to act in all things to this end, as any individual might act, all in accordance with the laws of the State of Washington.

ARTICLE IV MEMBERSHIP

Section 1 Members of the Association shall consist only of incorporators and charter members, and such other individuals, marital communities, corporations, partnerships or associations (collectively "parties") as may be admitted to membership. All parties owning any lot, part or portion thereof, or parties who are contract vendees of such property shall be members of this Association; and no lot may be purchased or contracted to a purchaser, nor sold by any owner of any lot or lots unless and until said purchaser shall be accepted for membership in the Association. All applicants for membership shall be approved or disapproved by the Association, acting reasonably and in accordance with these by-laws.

Section 2 Any prospective acquirer of an ownership interest in property within the plat of San Juan Aviation Estates ("the Plat") including but not limited to intent to acquire by

purchase, contract to purchase, inheritance, gift, or foreclosure, shall file application with the Secretary of the Board of Governors of the Association in form prescribed by the Board, which application shall be approved or denied by the Board within 30 days of filing.

5.2.2 (7/98)

Failure of the Board to act by notice mailed to applicant's stated address within that 30-day period shall constitute approval. On approval, the new owner will become a member of the Association and the new member's predecessor in interest shall no longer be a member. Absent such approval, no stock transfer shall be of any force or effect, or serve to grant or vest any right, title or interest or right of use of any of the Association's property, facilities, or utilities. Membership in the Association shall be in the name of one single family or one entity (as defined in the BIC). For voting purposes, each entity or member family shall designate one person as the "voting member" who shall cast all votes. Membership in the Association shall specifically be subject to the provisions of paragraph 15 of the BIC.

Section 3

(a) There shall be no initiation fee or dues payable by any member, but each member shall pay an annual assessment to the Association for maintenance and necessary capital improvements for the ensuing year in such amount as may be determined by the membership at each annual meeting in accordance with the voting procedures set forth in Article VII hereof. Such determination shall be based upon an estimate of the amount required to accomplish the purposes set forth in the Articles of Incorporation, these By-Laws, and the BICs (and no more), and any surplus shall be disposed of as provided in Section 8 of Article VIII hereof.

(b) "Maintenance Assessments" are charges to members for improvements to property, normal maintenance, repair and operation of existing property. Items which in the past have been considered Maintenance Assessments will continue to be considered Maintenance Assessments and may include but shall not be limited to repairs to the water distribution system, fire truck, mechanical equipment and runway lights. Voting will be by each member who shall be entitled to one vote.

(c) "Capital Assessments" are charges to members for improvements to property which are not maintenance assessments and refer primarily to acquisition of new property or assets of a capital nature with a useful life exceeding one year. If a question arises whether a charge is for a Maintenance Assessment or a Capital Assessment, the Board may refer to past practices and, if it wishes, refer the determination of the nature of the assessment to an independent certified public accountant whose decision shall be conclusive, if a determination can be made in accordance with generally accepted accounting principles. Capital Assessments may be include but shall not be limited to Property Manager's residence, tennis court, water filtration plant, and fire fighting equipment.

Section 4 Each member shall file with the Secretary of the Association his or her post office address, and all notices of every kind required by the Association business shall have been properly delivered when mailed to such address. If any member shall fail to file such an

address or to file change of address, such member will be deemed to have waived any notice required to be sent in the business of the Association.

Section 5 No member shall lease, rent, or permit subletting of any tract owned by such member in said San Juan Aviation Estates, or any portion thereof, to any party other than a member of the Association without the prior written approval and consent of the Board of Governors.

Section 6 If any member shall fail to make any payment required of him hereunder or shall violate any of the terms of these by-laws, the BIC, or any rules and regulations adopted by the Board of Governors, the Board of Governors may pursue any remedies available at law or in equity, including without limitation the exercise of any rights, powers or remedies set forth in the BIC, and in addition may, after 30 days notice by mail to the address of said member appearing on the records, assess a fine in an amount determined by the Board, which if unpaid shall bear interest at the rate of twelve percent (12%) per annum, from the date assessed, and the Association, through its Board of Governors, may bring an action at law against the member personally obligated to pay the same and/or may institute an action to foreclose the lien against the lot or tract subject to the assessment, and there shall be added to the amount of such assessment all costs and expenses in connection with such suit, and also a reasonable sum as attorneys' fees, which sums shall be included in any judgment or decree entered in such suit.

ARTICLE V BOARD OF GOVERNORS

Section 1 The Board of Governors shall have supervision, control and direction of the affairs of the Association; shall determine its policies or changes therein, within the limits of the by-laws; shall have discretion in disbursement of its funds; shall adopt rules and regulations for the conduct of its business; and shall have all powers delegated to the Board of Governors pursuant to the BIC and all powers of the board of directors of a homeowners' association pursuant to RCW Chapter 64.38. The Board of Governors may, in the execution of any or all of the powers granted, appoint a Property Manager and other agents as it may consider necessary.

Section 2 There shall be seven (7) governors who shall be members of the Association. The governors shall be elected by the members for a three (3) year term, expiration of terms of office to be staggered so that the terms of no more than three Governors expire in any year. Governors may not serve for more than three (3) consecutive years at any one time.

Section 3 The Board shall fill any vacancies that occur on the Board for any reason until the following annual meeting of the membership. At that time an election will be held to fill the unexpired term, if any.

Section 4 The Board shall hold a meeting immediately following the annual membership meeting on the same day, and scheduled meetings throughout the year. Notice of regular Board of Governors' meetings must be made by providing each member with the adopted schedule of regular meetings for the ensuing year at any time after the annual meeting and at any time when requested by a member.

5.2.4 (7/98)

Section 5 The President of the Association or any two members of the Board may call Special Board Meetings, such call to be deposited with the Secretary.

Section 6 All actions of the Board of Governors shall be final unless revoked or modified by the members as follows: a copy of the minutes of the meeting of the Board of Governors shall be promptly sent to each member and if 15% of the members shall thereafter, and within 30 days from the issuance of said minutes, file written objections to any such action of the Board of Governors, then the Secretary shall call a special meeting of the membership to consider such action. Such action of the Board of Governors is thereupon suspended pending action by the members to be taken at such meeting.

Section 7 The Governors shall receive no compensation for their services, but may be repaid their actual expenses in transacting Association business.

Section 8 The Board of Governors shall be the general business manager of the Association and shall have and exercise all powers and authority of every kind and nature not specifically denied or restricted, provided that it may not borrow money nor pledge or assign any of the Association property or assets without the approval and consent of the members.

Section 9 The Board may remove a Governor from office only for good cause stated in written charges filed with the Secretary and after not less than 30 day's notice to the Governor being considered for removal.

Section 10 The Board of Governors is hereby authorized, subject to Article IV, Section 3 of these by-laws, to enter into contracts for improvements and maintenance of the Association properties as may be deemed proper by the Board and to do all things necessary to accomplish the purposes of this Association, and all members agree that in no event shall any member of the Board become liable to them or any of them for anything arising out of the transactions of the Board or any of its members or the performance or non-performance of any of their duties, save and except for embezzlement.

ARTICLE VI OFFICERS

Section 1 The officers of the Association shall be members of the Board of Governors and consist of a President, Vice-President, Secretary and Treasurer.

Section 2 The President shall preside at all meetings of the Governors and members, and shall have general charge of, and control of, the affairs of the Association, subject to the authority of the Board of Governors.

Section 3 The Vice-President shall perform such duties as may be assigned to him or her by the Board of Governors, and in case of the death, disability or absence of the President, he or she shall perform and be vested with the duties and powers of the President.

Section 4 The Secretary shall countersign all certificates of membership in the Association, shall keep a record of the minutes and proceedings of the meetings of the members and of the Board of Governors, and shall give notice as required by these by-laws of all meetings. The Secretary shall have custody of all books, records and papers of the Association.

Section 5 The Treasurer shall keep all accounts of all moneys and valuables in the name of and to the credit of the Association in such banks as the Board of Governors may designate. All checks for the payment of money shall be signed by the Treasurer or a Board member authorized by the Board.

Section 6 Any two offices may be held by one person, except the offices of President and Secretary.

Section 7 All officers shall be elected by and hold office at the pleasure of the Board of Governors, until the next annual meeting of the Board of Governors and until his or her successor shall be elected and qualified, and may be removed at any time, with or without cause. Any vacancy in office shall be filled by the Board of Governors.

ARTICLE VII VOTING AND ELECTION PROCEDURES

Section 1 Each individual member, and each voting member designated by an entity or member family, shall have one vote for each lot or tract owned by that member and for which that member is currently paying a whole or one-half (1/2) assessment pursuant to these by-laws or the BIC; provided, however, that if any such assessment is in arrears as of the date of the vote, the right to vote for that parcel shall be suspended and void for that election and any future election until the assessment is paid in full.

Section 2 Authorized written or faxed proxies submitted by members unable to attend an annual or special meeting shall be recognized. Such proxies shall be presented to the Secretary prior to the meeting by another member or an adult member of the immediate family.

Section 3 The Board shall appoint a Nominating Committee of three to select members to be elected to the Board. Only one committee member may be a Board member and the Committee shall elect a non-Board member Chairman. The names of people selected by the Committee and agreeing to serve shall be submitted to the Board for approval. After approval by the Board, the names shall be submitted to the membership in writing at least forty-five (45) days prior to the annual meeting.

Section 4 The annual meeting of the membership shall be held on the Saturday nearest July 4 each year at a designated location on Blakely Island.

Section 5 At least thirty (30) days and not more than sixty (60) days prior to the annual meeting, the President or Secretary shall cause notice of the meeting to be hand delivered or sent prepaid by first-class United States mail to the mailing address of each member or to any other mailing address designated in writing by the member. The notice of any meeting shall state the time and place of the meeting, the business to be placed on the agenda by the Board of Governors and shall include the following information/documents:

(a) Meeting agenda and notice of the time and place of the meeting;

(b) Preliminary financial statement for the fiscal year ended May 31st;

(c) Proposed operating and capital budget for the fiscal year beginning June 1st;

(d) President's and other Board members' reports on significant matters dealt with during the past year and plans for the year just beginning;

(e) Report of the Nominating Committee; and

(f) Proposals from members involving amendments to the BIC, these by-laws or any rule or regulation adopted by the Board, or any other significant matters requiring consideration by the full membership. Such proposals must be submitted in writing to the Board not later than April 1st.

Section 6 At least fourteen (14) days and not more than sixty (60) days prior to any special meeting, including a Board of Governors' meeting which has not been regularly scheduled, the President or Secretary shall cause notice of the meeting to be delivered in a manner consistent with the requirements of the HOA Act and these By-Laws.

Section 7 A majority of the Board, or of the members, shall constitute a quorum for the transaction of all business. A majority vote of those present or represented by proxy and eligible to vote shall be required to pass any issue submitted to the members, including but not limited to election or removal of the Board of Governors, approval of Capital Assessments and Maintenance Assessments, and all other general business matters of the Association; provided, however, that a quorum must exist of those present or represented by proxy in order to pass any issue.

Section 8 Any issue that can be voted on in person by any member of the Association or member of the Board of Governors can also be voted on by mail. If the vote is to be conducted

by mail, the President or Secretary shall mail all written material concerning the issue, including an appropriate ballot and a stamped return envelope, to each voting member at least thirty (30) days prior to the deadline for counting the votes. The Secretary shall keep all written ballots for at least two years after the date the voting is effective.

Section 9. **Telephonic Presence.** Members and Governors can participate in meetings by conference telephone or similar communications equipment so that all persons participating in the meeting can hear each other at the same time. Participation by that method constitutes presence in person at a meeting.

Section 10. **Notice by Electronic Transmission-When Effective.** Notice to members and Governors in an electronic transmission that otherwise complies with the requirements of the Nonprofit Act is effective only with respect to members and Governors who have consented, in the form of written notice, to receive electronically transmitted notices.

A member or Governor who provides consent, in the form of written notice to the Secretary of the BIMC, to receipt of electronically transmitted notices must designate in the consent the message format accessible to the recipient, and the address, location, or system to which these notices may be electronically transmitted. It is the ongoing obligation of the member to provide the Secretary of the BIMC with a valid email address.

A member or Governor who has consented to receipt of electronically transmitted notices may revoke the consent by delivering a revocation to the Association in the form of written notice.

Notice to members or Governors who have consented to receipt of electronically transmitted notices may be provided notice by posting the notice on an electronic network and delivering to the member or Governor a separate record of the posting, together with comprehensible instructions regarding how to obtain access to this posting on the electronic network.

Notice provided in an electronic transmission is effective when it (i) is electronically transmitted to an address, location, or system designated by the recipient for that purpose, and is made pursuant to the consent provided by the recipient; or (ii) has been posted on an electronic network and a separate record of the posting has been delivered to the recipient together with comprehensible instructions regarding how to obtain access to the posting on the electronic network.

ARTICLE VIII FEES AND CHARGES

Section 1 Before becoming a member each applicant shall pay his or her pro rata share of the annual amount determined as necessary for maintenance and capital improvements in accordance with Article IV, Section 3.

Section 2 Payment of the foregoing charges shall entitle each member to full membership privileges, including the use of water, airport, and other facilities of the Association, for a period

of one year, and in consideration of membership herein each member waives any right of action or claim of right of action individually or collectively which might result from denial of such member by the Association of the benefits of membership.

Section 3 The Board of Governors may fix higher rates for use of water for any member requiring greater service than an ordinary dwelling unit.

Section 4 The right is reserved by the Board of Governors to make additional assessments as may be necessary for payment of the obligations of the Association; provided, however, all Capital Assessments shall be subject to the approval of the members in accordance with the voting procedures set forth in Article VII hereof.

Section 5 All matters connected with the service rendered by this Association or the rates charged, and the status of properties and members, shall be first referred to the Board of Governors.

Section 6 The fiscal year of the Association shall be from October 1 of one year to September 30 of the following year.

Section 7 Any funds arising from the operation of the Association shall be considered surplus only after the payment of all obligations, expenses or construction, maintenance, repair, provision for depreciation and other costs or expenses, according to sound accounting practices. Books of the Association shall be kept under the supervision of a certified public accountant who shall prepare a financial report each year, to be presented at each annual meeting of the members.

Section 8 Any surplus shall be held as a reserve, to apply towards future expenses, in such sum as the Board of Governors may fix.

Section 9 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 corresponding membership, 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.

5.2.8 (7/98)

Section 10 Assessment policy for Maintenance Assessments and Capital Assessments effective the fiscal year beginning June 1, 1984 and each year thereafter;

(a) An improved lot will be subject to a full assessment. An improved lot is one that has a water service connection.

(b) An unimproved lot will be subject to one-half of a full assessment. An unimproved lot is one that does not have a water service connection.

(c) A lot under a contiguous lot agreement will be subject one-half a full assessment if unimproved and a full assessment if improved, plus $1.00 for each year the lot has been under the contiguous lot agreement. Accumulated deferred assessments on a contiguous lot will be payable on change of ownership of the continuous lot in accordance with the Plat restriction.

(d) A single tract resulting from the combining of a primary improved lot and an unimproved contiguous lot at present under a contiguous lot agreement, will be subject to only one full assessment if the following conditions are met:

(i) The primary and contiguous lots are combined into a tract for only one household in accordance with the Plat restriction.

(ii) The total accumulated deferred assessments on the contiguous lot are paid in full.

(e) Situations where there are more than one contiguous lot will be reviewed by the Board on a case-by-case basis.

(f) There exist some contiguous lot agreements; those will continue to be treated as outlined in that agreement. (See Directors Manual for the form.)

Section 11 Members shall observe all state and local building regulations pertaining to new construction and to modifications of existing structures. Any construction requiring a San Juan County Building Permit must be approved by the Board of Governors in accordance with the BIC.

Section 12 Each member desiring water service shall, in addition to all other charges, fees and rates required herein, pay individually all costs of installing connections to his or her property and the same may be installed only in accordance with the requirements and orders of the Board of Governors.

5.2.9 (last revision 7/03)

Section 13 Irrigation water:

(a) Irrigation water supply may be interrupted at any time at the sole discretion of the Board of Governors or its delegate.

(b) From June 15 to September 15, members are limited to using irrigation water as outlined in the water use restrictions promulgated by the Board.

ARTICLE IX PROPERTY AND EQUIPMENT

Section 1 The property and equipment owned and maintained by the Association includes but is not limited to the Property Manager's residence, airport landing strip, taxi-way, tie-down area, buffer strip, tennis court, all roads (except private) as designated on the Plat; the Fire House and underlying land; all water lines and easements in connection therewith from Horseshoe Lake to the Plat; including all pumps, tanks, water treatment system, buildings housing the equipment, easements for water lines both inside and outside the Plat, water rights to draw water from Horseshoe Lake, Parks at Driftwood Beach & South Runway, recycle center, and the 40' Beach access lot.

Section 2 The membership shall be governed by, and the Board of Governors shall enforce, the procedures and regulations found in the BUFFER STRIP RULES approved July 6, 1991, and as amended from time to time. Said Buffer Strip Rules and Amendments shall be recorded in San Juan County, and become a part of these by-laws.

ARTICLE X RULES

The membership shall be governed by, and the Board of Governors shall enforce, the covenants and restrictions found in the Blakely Island Covenants dated June 1, 1995 and as amended from time to time. Such covenants and restrictions are to run with the land and become a part of these by-laws.

ARTICLE XI MISCELLANEOUS

Section 1 These by-laws may be amended, repealed or added to by the Board of Governors or the membership, subject to the right of the members by an affirmative vote of a majority at a regular meeting to approve or disapprove any amendment recommended by the Board of Governors. The President or Secretary of the Association may prepare, execute, certify and record any approved amendment to these by-laws, the Articles of Incorporation or any other governing documents of the Association.

Section 2 The Association may have a seal bearing the inscription "Blakely Island Maintenance Commission."

Section 3 Reference made in these by-laws to "members" or "owners" shall refer to those who, in accordance with Article IV, Section 1, meet the requirements of being a member of this Association.

Section 4 A copy of these by-laws shall be made available to all members and the books and financial records of the Association shall be open to members at all reasonable times.

Section 5 **Parliamentary rules.** In the event of any dispute regarding the parliamentary procedure for any meeting, the Secretary of the Association may refer to the most current available edition of Robert's Rules of Order when not in conflict with the BIC's or the Association's governing documents. The failure by the BIMC to adhere to Robert's Rules of Order does not invalidate any meeting or other action.

Section 6 The Association shall indemnify every officer of the Association, every member of the Board of Governors, and every member of an Association committee, and his or her heirs, executors and administrators against all expenses and liabilities, including attorneys' fees, reasonably incurred by or imposed in connection with any proceeding to which he or she may be a party or in which he or she may become involved by reason of holding or having held the position of Board member, officer, or member of an Association committee, or any settlement thereof, whether or not he or she holds such position at the time such expenses or liabilities are incurred, except to the extent such expenses and liabilities are covered by insurance and except in cases wherein such person is adjudged guilty of willful misfeasance in the performance of his or her duties; provided that, in the event of a settlement, the indemnification shall apply only when the Board approves such settlement and reimbursement as being for the best interests of the Association. Nothing contained herein shall be deemed to obligate the Association with respect to any duties or obligations assumed or liabilities incurred by him or her as a member of the Association.

Section 7 To the extent there are any differences between the terms of these by-laws and the BIC, or in the event there exists any ambiguity between the provisions of these by-laws and the BIC, the provisions of the BIC shall control and be determinative of any inconsistency.

APPENDIX - C

JOYCE D. HARDY, a single person, Appellant, v. FAIRWOOD GREENS HOMEOWNERS' ASSOCIATION, INC., a nonprofit Washington corporation, Respondent.

No. 52283-3-I

COURT OF APPEALS OF WASHINGTON, DIVISION ONE

2004 Wash. App. LEXIS 335

March 8, 2004, Filed

NOTICE: [*1] RULES OF THE WASHINGTON COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE WASHINGTON RULES OF COURT.

PRIOR HISTORY: Appeal from Superior Court of King County. Docket No: 02-2-19922-4. Date filed: 04/11/2003.
Hardy v. Fairwood Greens Homeowners' Ass'n, Inc., 120 Wn. App. 1040, 2004 Wash. App. LEXIS 1033 (2004).

DISPOSITION: Affirmed in part, reversed in part.

COUNSEL: For Appellant(s): Brandi Lane Adams, Demco Law Firm PS, Seattle, WA, John W. Demco, Demco Law Firm PS, Seattle, WA.

For Respondent(s): Greg W. Haffner, Curran Mendoza PS, Kent, WA.

JUDGES: Authored by Ronald E. Cox. Concurring: C. Kenneth Grosse, Susan R. Agid.

OPINION BY: COX

OPINION

COX, A.C.J. -- Joyce Hardy appeals the order granting the Fairwood Greens Homeowners' Association's motion for summary judgment. She contends the trial court erred when it concluded that Fairwood did not exceed its authority under its governing documents or the Homeowners' Association Act, *Chapter 64.38 RCW*. Fairwood contends the merits of the appeal should not be considered because Hardy failed to comply with *RAP 10.3(a)(3)*. Fairwood also argues that Hardy's challenges to the amended bylaws are time barred under *RCW 4.16.080(2)*.

We conclude that Hardy did not violate *RAP 10.3(a)(3)*, but that Hardy's challenges to the amended bylaws are beyond the governing [*2] three year statute of limitations. We further conclude that the trial court properly granted Fairwood's motion for summary judgment with one exception. We affirm in part and reverse in part.

In 1992, Fairwood membership voted to amend the original 1967 bylaws. In 1996, Hardy purchased property in the covenant neighborhood of Fairwood Park/Greens. The original 1967 bylaws were recorded with the title to Hardy's property at the time of purchase. Fairwood recorded the 1992 bylaw amendments in September 1997. In April 2002, Fairwood enacted rules governing recreational and other vehicles and aesthetics, including a provision for the assessment of fees for violations. In response to these new rules and regulations, Hardy filed a complaint for declaratory and injunctive relief. Both Hardy and Fairwood moved for summary judgment. The trial court granted Fairwood's motion.

Hardy appeals.

RAP 10.3(a)(3)

Fairwood argues that this panel should not consider the merits of Hardy's appeal because she failed to assign error to the orders of the trial court. We disagree.

RAP 10.3(a)(3) requires that an appellant state concisely each error that it claims the trial court made, along with [*3] the legal issue or issues pertaining to each alleged error. But *RAP 1.2(a)* calls for a liberal interpretation of the RAPs "to promote justice and facilitate the decision of cases on the merits. Cases and issues will not be determined on the basis of compliance or noncompliance with these rules except in compelling circumstances where justice demands...." Where the nature of the appeal is clear and the issues are apparent, so that the court is not inconvenienced and the respondent is not prejudiced, there is no compelling reason not to consider the merits of the case.

[1] Such is the case here. Furthermore, Fairwood does not contend that it has been prejudiced in any way.

1 *Viereck v. Fibreboard Corp., 81 Wn. App. 579, 582-83, 915 P.2d 581*, review denied, *130 Wn.2d 1009, 928 P.2d 414 (1996)* (citing *State v. Olson, 126 Wn.2d 315, 321, 893 P.2d 629 (1995)*).

Accordingly, we reach the merits of this appeal.

STATUTE OF LIMITATIONS

Fairwood contends that Hardy's [*4] challenges to the amended bylaws are barred under *RCW 4.16.080(2)*, which imposes a three-year statute of limitations on claims of this nature. [2] We agree.

2 "Within three years: ... (2) ... for any other injury to the person or rights of another not hereinafter enumerated..."

Fairwood argues that Hardy had constructive notice of the amended bylaws when they were recorded in 1997. [3] The purpose of recording such documents is to provide notice. [4] Hardy's written response to this argument is that she is challenging only the rules and regulations enacted pursuant to the amended bylaws, and not the bylaws themselves. Her briefing belies this assertion. Moreover, at oral argument, she appears to have properly conceded that the statute operates to bar her claim to the extent of her challenge to the amended bylaws. In any event, she has not provided any argument why the statute does not bar this claim. We conclude that Hardy's challenges to the 1992 amended bylaws, which were recorded in [*5] 1997, are barred by *RCW 4.16.080(2)*.

3 *Strong v. Clark, 56 Wn.2d 230, 232, 352 P.2d 183 (1960)* ("When the facts upon which the fraud is predicated are contained in a written instrument which is placed on the public record, there is constructive notice of its contents, and the statute of limitations begins to run at the date of the recording of the instrument.").

4 WASHINGTON REAL PROPERTY DESKBOOK, § 34.4(4) at 34-8 (1996) ("A properly recorded instrument supplies constructive notice of the rights created by the instrument and of the recitals in the instrument.").

GOVERNING DOCUMENTS

Hardy argues that the trial court erred when it granted Fairwood's motion for summary judgment because Fairwood did not have the authority to enact the 2002 rules and regulations, and they conflict with the governing documents. We conclude that summary judgment was proper, with one exception.

We may affirm an order granting summary judgment if there are no genuine issues [*6] of material fact and the moving party is entitled to judgment as a matter of law. [5] We review questions of law de novo. [6] The purpose of contract interpretation is to ascertain the parties' intent. [7] A contract provision is ambiguous when it is capable of more than one meaning. [8] The interpretation of the language in restrictive covenants is a question of law that is reviewed de novo. [9] The primary objective is to determine the intent of the parties to the agreement. [10]

5 *CR 56(c)*.

6 *Mains Farm Homeowners Ass'n v. Worthington, 121 Wn.2d 810, 813, 854 P.2d 1072 (1993)*.

7 *Shafer v. Board of Trustees of Sandy Hook Yacht Club Estates, Inc., 76 Wn. App. 267, 275, 883 P.2d 1387 (1994)*, review denied, *127 Wn.2d 1003, 898 P.2d 308 (1995)* (citing *Berg v. Hudesman, 115 Wn.2d 657, 663, 801 P.2d 222 (1990)*).

8 *Shafer, 76 Wn. App. at 275*.

9 *Parry v. Hewitt, 68 Wn. App. 664, 668, 847 P.2d 483 (1992).*

10 *Parry, 68 Wn. App. at 668* (citing *Burton v. Douglas County, 65 Wn.2d 619, 621, 399 P.2d 68 (1965)*).

[*7] Hardy contends that Fairwood exceeded the authority granted to it in its declaration when it adopted the amended bylaws and created rules concerning recreational and other vehicles and aesthetics in 2002. Hardy contends that Fairwood improperly relied on the broad grant of authority in *RCW 64.38.020*, and failed to comply with the limiting language in the articles of incorporation.

RCW 64.38.020 states in pertinent part:

Unless otherwise provided in the governing documents, an association may:

(1) Adopt and amend bylaws, rules, and regulations;

...

(12) Exercise any other powers conferred by the bylaws;

...

(14) Exercise any other powers necessary and proper for the governance and operation of the association.[11]

11 (Emphasis added.)

Hardy argues that the quoted language does not grant a homeowners' association broader powers than are contained in the governing documents. Hardy notes, however, "[t]he Homeowner's Association Act [*8] allows an Association to adopt and amend by-laws only if the Declaration does not address the issue." She further argues that language in the articles that Fairwood is to "perform all of the duties and obligations of the Association, as set forth in that certain Declaration of Covenants, Conditions and Restrictions..." is limiting language that "otherwise provide[s]" and restricts Fairwood's powers. This argument is not persuasive.

The better argument is that made by Fairwood. *RCW 64.38.020* authorizes it to adopt rules and regulations necessary for governance and that the language in the articles does not otherwise provide. Fairwood argues that when the governing documents are silent regarding a power provided by statute, this does not mean that the governing documents "provide otherwise" or prohibit that statutory power.[12]

12 Fairwood relies on *Wise v. Harrington Grove Comm. Ass'n., Inc. 151 N.C. App. 344, 566 S.E.2d 499 (N.C. App. 2002)*, reversed by, *357 N.C. 396, 584 S.E.2d 731 (2003)*. The court in Wise I reasoned that the language in the Planned Community Act that the power to fine an association member is "[s]ubject to the provisions of the articles of incorporation or the declaration and the declarant's rights therein" meant that "[w]hile the Declaration does not expressly provide for the power to fine, the PCA provides that additional power. We find no language in the Articles of Incorporation or the Declaration that limits or restricts the Association's power to fine, which is granted by the PCA." *Wise I, 151 N.C. App. at 352.*

But this precise reasoning was overturned on review before the North Carolina Supreme Court in 2003. *Wise II, 357 N.C. 396, 584 S.E.2d 731 (2003)*. That court concluded that "[i]nterpreted as a whole, this statute does not automatically grant the listed powers to all homeowners associations. Instead, it appears [the statute] merely allows the alteration of an association's declaration, articles of incorporation, and by-laws to permit the exercise of these powers by associations in existence prior to 1999." *Wise II, 357 N.C. at 403.*

[*9] The language cited by Hardy in the articles is not limiting language but a general statement of the purpose and powers of the Association. Fairwood is to "perform all of the duties and obligations of the Association as set forth in that certain Declaration of Covenants, Conditions and Restrictions..." This language is not ambiguous. Hardy's contention that Fairwood can only perform those duties and obligations specifically recited in the declaration makes no sense. The articles state that the Association may "have and ...exercise any and all powers, rights and privileges which a corporation organized under the Non-Profit Corporation Law of the State of Washington by law may now or hereafter have or exercise." *RCW 24.03.035(20)* provides that a nonprofit corporation may "have and exercise all powers necessary or convenient to effect [sic] any or all of the purposes for which the corporation is organized." Hardy's contention

that language in the articles limits Fairwood's ability to enact rules pursuant to *RCW 64.38.020* is not persuasive.

Hardy contends that the reasoning in Shafer is persuasive here. Hardy's reliance on [*10] *Shafer* is misplaced.

In Shafer, this court concluded 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..." [13]

13 *Shafer, 76 Wn. App. at 273-74.*

Hardy concludes that there was no similar, express reservation of power in Fairwood's governing documents and that Shafer compels the conclusion that the amended bylaws and rules and regulations are invalid. But Shafer does not require an express reservation of power as the only means by which an association is authorized to act, as Hardy contends. As discussed above, *RCW 64.38.020(14)* grants the power to adopt and amend bylaws, rules, and regulations and to "<cise">[e]xercise any other powers necessary and proper for the governance and operation of the association."

Hardy also argues that Shorewood West Condominium Association v. Sadri [14] is analogous to the [*11] present case. *Sadri* is inapposite.

14 *140 Wn.2d 47, 992 P.2d 1008 (2000).*

There, our supreme court held that the restriction on use that appeared in the association bylaws, which conflicted with the allowance of that use in the declaration, was not in accordance with the Horizontal Property Regimes Act, and that the association may not promulgate a restriction on leasing in a bylaw without first amending its declaration. [15] The declaration allowed the leasing of units for any period over 30 days. [16] The amended bylaws did not allow the leasing of any unit for any period of time. [17]

15 *Sadri, 140 Wn.2d at 49.*
16 *Sadri, 140 Wn.2d at 50.*
17 *Sadri, 140 Wn.2d at 50.*

Sadri was governed by the Horizontal Property Regimes Act, which required that use restrictions [*12] be included in the declaration. [18] The Homeowners' Association Act does not have a similar requirement. Furthermore, Hardy does not show that the rules and regulations conflict with the declaration. Thus the reasoning in Sadri is not applicable here.

18 *Sadri, 140 Wn.2d at 55.*

Hardy also relies on *Riss v. Angel.* [19] Riss does not address Hardy's challenge to the authority of Fairwood to enact rules when the governing documents are silent.

19 *131 Wn.2d 612, 934 P.2d 669 (1997).*

In Riss, members of the homeowners' association rejected the plaintiffs' building plans under a consent to construction clause in the association's restrictive covenants. [20] Our supreme court concluded that an association could not impose restrictions more burdensome, or beyond the stated maximum or minimum criteria [*13] in the covenants. [21] Here, there is simply no record of Hardy or anyone else applying to the governing body for permission and that body unreasonably exercising its power to deny permission.

20 *Riss, 131 Wn.2d at 615.*
21 *Riss, 131 Wn.2d at 625-26.*

Hardy also argues that the bylaws and 2002 rules amend the declaration, without the required approval of the owners. Hardy cites no authority for this contention and fails to brief this argument. We need not review an issue raised in passing or unsupported by authority or persuasive argument. [22]

22 See *State v. Johnson, 119 Wn.2d 167, 171, 829 P.2d 1082 (1992).*

We conclude that Fairwood could rely on the broad grant of authority in *RCW 64.38.020* to support the adoption of rules and regulations. The major requirement [*14] in adopting such rules and regulations is that they must not be inconsistent with the governing documents. Thus, the focus of our inquiry is whether the rules conflict with the governing documents.

2002 Rules and Regulations

Hardy contends that the rules and regulations on aesthetics conflict with the declaration. But the substance of her argument is that there is simply no authority in the declaration for the enactment of rules on aesthetics. The rules on aesthetics regulate yard maintenance, home exterior maintenance, and holiday decorations. There are

no contrary statements in the declaration; it is simply silent on these matters. The declaration only states that each homeowner must provide exterior maintenance on his or her lot. As discussed above, *RCW 64.38.020(14)* authorizes Fairwood to "exercise any other powers necessary and proper for the governance and operation of the association." There is nothing in the declaration that specifically or by necessary implication forbids Fairwood from adopting rules on aesthetics and there is no language that would indicate that the rules conflict with the declaration.

Furthermore, Hardy concedes that [*15] Fairwood has the authority to provide for the maintenance, preservation, and architectural control of the properties within the association, so long as the limits imposed by the governing documents are respected. Yet Hardy points to no limiting language in the governing documents. We conclude that the rules on aesthetics do not conflict with the declaration.

Hardy next argues that the rules and regulations on recreational vehicles are in conflict with the declaration because the declaration only prohibits vehicles in excess of 6,000 pounds to be parked on any residential lot, while the regulation prohibits all recreational vehicles, regardless of size. We agree that the regulation, as written, conflicts with the declaration.

Fairwood insists that there is nothing in the declaration that expressly prohibits the regulation of vehicles under 6,000 pounds. While this is true, it is equally true that its express regulation of vehicles *over* 6,000 pounds necessarily implies that vehicles below that weight are not regulated by the declaration. It is arguable that Hardy reasonably relied on this provision of the original declaration at the time she purchased her property. In short, this [*16] does at least create a genuine issue of material fact.

Fairwood's contention that the remaining portion of article IX, section 4 provides the authority to enact rules and regulations governing recreational vehicles under 6,000 pounds, while plausible, is not entirely persuasive. This provision states: "nor shall anything be done on any residential lot which may be or may become an annoyance or nuisance to the neighborhood." "Annoyance" is not defined in any of the governing documents. Fairwood contends that the rules on recreational vehicles are to prevent annoyances and are consistent with the statement of purpose of "enhancing and protecting the value, desirability, and attractiveness of the real property." Notwithstanding this argument, the provision to which Fairwood cites fails to overcome the necessary implication of the declaration that vehicles below the 6,000 pound limit are not subject to the regulations. Because Fairwood is not entitled to judgment as a matter of law with respect to the conflict between the declaration and its rules, this portion of the summary judgment may not stand.

Hardy next contends that the rules regarding vehicles are in conflict with the declaration. [*17] The rules prohibit on any lot vehicles in a state of disrepair or vehicles in long-term storage, evidenced by expired license plates or covered by a tarp that make them inoperable as they stand. When a violation is reported, the homeowner will be notified in writing and, if the situation is not corrected "in a timely manner," fines will be assessed.

Hardy first contends that the declaration authorizes the regulation of vehicles over 6,000 pounds only and that the rules are invalid because they regulate vehicles less than 6,000 pounds. Hardy is mistaken. The last paragraph of article IX, section 4, prohibits "any vehicle" in a state of disrepair, not just vehicles over 6,000 pounds.

Hardy also argues that the declaration allows such vehicles to remain parked for up to 48 hours while the rule states only that the violation must be corrected in "a timely manner." Hardy presents no argument or proof that Fairwood's determination of "a timely manner" actually conflicts with the 48 hour standard articulated in the declaration.

Amended Bylaws

Hardy next argues that Fairwood failed to manage the association in accordance with certain amended bylaws. These arguments are not persuasive.

[*18] Hardy argues that Fairwood failed to manage the association in accordance with amended bylaw VIII(f) by allowing the president to also serve as secretary. She points to three flyers published by Fairwood that list Martin Ritchie as both president and secretary. Fairwood argues that the flyer was not an accurate reflection of Ritchie's official status and that his name was inserted under the secretary designation because Fairwood was without a secretary during that

time. Ritchie was not elected as secretary and thus did not serve in two offices in contravention of bylaw VIII(f). Hardy fails to demonstrate any prejudice, and we conclude this argument provides no basis for relief.

Hardy also argues that Fairwood failed to comply with amended bylaw VI(a) requiring the creation of nominating committees for nominations to the Board. The bylaw states: "[n]omination to the Board shall be made by a Nominating Committee. Nominations may also be made from the floor at the Annual Meeting." The creation of a nominating committee is not the only way to present nominations to the board in compliance with the bylaw. In fact, the minutes of the September 2002 meeting indicate that a nominating **[*19]** committee did nominate candidates for the Board. Furthermore, Hardy fails to demonstrate prejudice. She is not entitled to relief.

Amended Bylaws Conflict with Declaration

Finally, Hardy contends that certain amended bylaws conflict with the Declaration and are invalid. Hardy concedes for the purpose of this appeal that the membership properly voted on and approved the amendments to the bylaws. Because we have already concluded that Hardy's challenges to the amended by laws are not timely under *RCW 4.16.080(2)* we shall not address these claims any further.

HOMEOWNERS' ASSOCIATION ACT

Hardy maintains that Fairwood violated *RCW 64.38.035(2)* concerning requirements for executive meetings, *RCW 64.38.045(2)* concerning record requirements, and *RCW 64.38.025* concerning the requirement to act with care and loyalty in the best interest of the association. We conclude that Hardy's arguments are not persuasive, she fails to show any harm or prejudice, and the trial court did not err in granting summary judgment.

RCW 64.38.035(2)

[*20] Hardy contends that Fairwood violated the executive meeting requirements at the September 2002 meeting. *RCW 64.38.035(2)* requires the board to take a vote in open meeting authorizing a closed meeting for the resolution of specific enumerated issues. We conclude that this argument is not persuasive.

The minutes of the September 2002 meeting indicate that no vote in open meeting to convene a closed session occurred. Fairwood concedes that it did not follow the statutory procedures. But Hardy concedes that Fairwood followed the procedures for the December 2002 and January 2003 meetings. Furthermore, Hardy fails to allege any harm or prejudice arising from Fairwood's failure to comply with *RCW 64.38.035(2)* on this one occasion. Hardy is not entitled to relief.

RCW 64.38.045(2)

Hardy next argues that Fairwood failed to comply with the record requirements articulated in *RCW 64.38.045(2)*. We conclude that this argument is not persuasive.

RCW 64.38.045(2) states:

All records of the association, including the names and addresses of owners **[*21]** and other occupants of the lots, shall be available for examination by all owners...on reasonable advance notice... The association shall not release the unlisted telephone number of any owner. The association may impose and collect a reasonable charge for copies and any reasonable costs incurred by the association in providing access to records.

Hardy relates that in 2001 she met resistance from Fairwood when she asked to review the association's records but that the matter was eventually resolved with Fairwood paying her legal fees. Hardy contends that Fairwood continues to make the record review process "difficult," but she does not allege any further violation of *RCW 64.38.045(2)*. Rather, she complains that Fairwood published a letter suggesting that the governing documents be amended to exempt certain personal information, like financial records, from review by Fairwood members. Hardy insists that this would be a violation of *RCW 64.38.045(2)*. But Hardy presents no evidence that *RCW 64.38.045(2)* was violated or that there has been any movement on the part of Fairwood to amend the governing documents **[*22]** as suggested. Hardy's argument is not persuasive.

RCW 64.38.025(1) and RCW 24.03.127

Finally, Hardy contends that Fairwood failed to act in the association's best interests by exposing the membership to legal liability by enacting rules that are in direct conflict with the declaration. We conclude that this argument is not persuasive.

RCW 64.38.025(1) provides "[i]n the performance of their duties, the officers and members of the board of directors shall exercise the degree of care and loyalty required of an officer or director of a corporation organized under *chapter 24.03 RCW*." *RCW 24.03.127* provides:

[a] director shall perform the duties of a director, including the duties as a member of any committee of the board upon which the director may serve, in good faith, in a manner such director believes to be in the best interests of the corporation, and with such care, including reasonable inquiry, as an ordinarily prudent person in a like position would use under similar circumstances.

Hardy points to the prior lawsuit Fairwood filed against her that cost [*23] Fairwood and the membership over $ 100,000. She also points to Fairwood's actions regarding her record request in 2001 that resulted in Fairwood's agreement to pay her legal fees. Hardy argues that Fairwood continues to expose the membership to legal liability by enacting rules and regulations that are in direct conflict with the declaration. While we conclude that summary judgment in favor of Fairwood was not proper as to the rules and regulations governing recreational vehicles under 6,000 pounds, this does not rise to the level of lack of due care contemplated by *RCW 64.38.025(1)* or *RCW 24.03.127*. Hardy is not entitled to relief.

ATTORNEY FEES

Fairwood argues that it is entitled to attorney fees on appeal under *RAP 18.1* and *RCW 64.38.050*. Hardy contends that if this court does award fees, it should only be for that portion of the issues presented that deal directly with Hardy's challenge to Fairwood's compliance with *RCW 64.38.035(2), .045(2) and .025(1)*. We conclude that Fairwood's request for fees should be granted because it substantially prevails.

RAP [*24] *18.1* allows this court to award fees if a statute allows it. Under *RCW 64.38.050*, "[a]ny 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." The general rule is that if neither party wholly prevails, "then the determination of who is a prevailing party depends upon who is the substantially prevailing party, and this question depends upon the extent of the relief afforded the parties." [23]

23 *Riss, 131 Wn.2d at 633-34* (citing *Marassi v. Lau, 71 Wn. App. 912, 916, 859 P.2d 605 (1993)*).

Fairwood is entitled to attorney fees as the substantially prevailing party. Hardy prevailed on only one of her numerous claims before this court. The only relief afforded Hardy was the denial of summary judgment in favor of Fairwood concerning one rule governing recreational vehicles less than 6,000 [*25] pounds.

Hardy argues that the reasoning in *Nordstrom, Inc. v. Tampourlos* [24] and *Schmidt v. Cornerstrone Investments, Inc.* [25] should be applied to this case to limit any award of fees to Fairwood. Hardy's argument is not convincing.

24 *107 Wn.2d 735, 733 P.2d 208 (1987).*
25 *115 Wn.2d 148, 795 P.2d 1143 (1990).*

In Nordstrom, our supreme court held that a recovery of attorney fees under the Consumer Protection Act could not include costs incurred in litigating breach of contract and property damage issues. [26] The court concluded that it would be an unfair benefit to award attorney fees for aspects of the suit that "had nothing to do with Consumer Protection Act violations." [27] Schmidt reaches the same conclusion, noting that 13 additional issues "not related" to the CPA claim could not be the basis of a fee award under the CPA. [28]

26 *Nordstrom, 107 Wn.2d at 743-44.*
[*26]
27 *Nordstrom, 107 Wn.2d at 744.*
28 *Schmidt, 115 Wn.2d at 170-71.*

But Hardy's claim that only a few issues in this appeal are related to violations of the Homeowners' Association Act is inaccurate. Her primary challenge concerns the authority that *RCW 64.38.020* grants Fairwood. The other issues raised by Hardy are inextricably linked. We conclude that an award of fees to Fairwood is appropriate and that the award should not be limited to time spent addressing only *RCW 64.38.035(2), .045(2) and .025(1)*.

We affirm in part and reverse in part the order granting Fairwood's motion for summary judgment.

WE CONCUR:

Positive
As of: Sep 26, 2011

ROBERT J. CARLSON ET AL., ***Appellants*****, v. THE INNIS ARDEN CLUB, INC., ET AL.,** ***Respondents*****, JOHN J. HOLLINRAKE, JR. ET AL.,** ***Defendants*****.**

No. 59878-3-I

COURT OF APPEALS OF WASHINGTON, DIVISION ONE

2008 Wash. App. LEXIS 1199

May 19, 2008, Filed

NOTICE: RULES OF THE WASHINGTON COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE WASHINGTON RULES OF COURT.

SUBSEQUENT HISTORY: Reported at *Carlson v. Innis Arden Club, Inc., 2008 Wash. App. LEXIS 1250 (Wash. Ct. App., May 19, 2008)*

DISPOSITION: [*1] We affirm.

COUNSEL: *Robert James Carlson*, for appellants.

Peter J. Eglick and *Josh Whited* (of *Eglick Kiker Whited, PLLC*); *Catherine Wright Smith* (of *Edwards Sieh Smith & Goodfriend, PS*); *John David Hollinrake Jr.* (of *Dorsey & Whitney, LLP*); *Michael John Rasch*; and *Andrew H. Salter* (of *Salter Joyce Ziker, PLLC*), for respondents.

John P. & Joanna A. Uberuaga, pro se.

JUDGES: LAU, J. WE CONCUR: Dwyer, A.C.J., Cox, J.

OPINION BY: LAU

OPINION

¶1 LAU, J. -- This case originated as a dispute between Michael and Cynthia Rasch and Robert and Janet Carlson regarding the enforceability of covenants governing tree height restrictions in the Innis Arden subdivision. The Rasches brought a covenant violation petition against the Carlsons pursuant to the Innis Arden Club's covenant compliance process. The Carlsons unsuccessfully sought a preliminary injunction to stay the process, and an outside arbitrator determined that six of the Carlsons' trees did not comply with the covenants. The Carlsons again filed suit, principally arguing that the Club's compliance process was invalid and that the Rasches could not enforce the tree covenants against the Carlsons. The trial court granted summary judgment to the Club and the Rasches and granted their request for attorney fees. We conclude that the Carlsons' challenge to the cross-enforceability of the covenants is barred by res judicata and that the Club compliance process is valid. Accordingly, we affirm and award attorney fees on appeal to the Club and the Rasches.

Facts

¶2 Bill and Bertha Boeing developed the Innis Arden

community in northwest [*2] King County in the 1940s. Innis Arden affords sweeping views of Puget Sound and the Olympic Mountains. The community was platted in three phases--Innis Arden in 1941, Innis Arden 2 in 1945, and Innis Arden 3 in 1949. Each plat was made subject to separately recorded but nearly identical restrictive mutual easements (covenants). [1] The covenants expressly attach to and pass with each parcel in that plat, binding all owners and their respective successors in interest. Boeing, as the original grantor, reserved the authority to enforce specified covenant provisions, including the power to review and approve plans and specifications for all buildings, improvements, and alterations (covenant 4); to grant or deny permission for maintenance of fences or hedges greater than six feet or such lesser height as the grantor may specify (covenant 10); and to make conclusive determinations regarding the removal of "spite or nuisance" walls, hedges, fences, or trees (covenant 11).

1 These restrictive mutual easements expressly run with the land and restrict its use by imposing vegetation height limits to preserve views and, thus, may be properly characterized as covenants. *20 Am. Jur. 2d Covenants, Conditions and Restrictions § 148.* [*3]

¶3 In 1950, the Innis Arden Club, Inc., was established as a community organization for the entire Innis Arden development. Each lot received one share in the Club. Boeing deeded the Innis Arden reserve tract, including open space and community facilities, to the Club. In 1960, the Boeing family signed and recorded an assignment that transferred the grantor's rights to the Club. This assignment expressly stated that Boeing, as grantor, had "established a general plan for the development, improvement, maintenance and protection of real property described" in the three Innis Arden plats. Since then, the Club has administered the covenants and maintained the reserve tracts and common facilities. The Club is governed by a board composed of and elected by Innis Arden homeowners.

¶4 Over the years, some lot owners' trees grew tall enough to obstruct views and disputes arose over enforcement of the covenants. Thus, in 1981 and 1982, each of the three Innis Arden subdivisions adopted by supermajority and recorded a view preservation amendment.

> In order to preserve the views of Puget Sound and the Olympic Mountains from lots in said subdivision, all trees, shrubs, brush and landscaping, whether native [*4] or planted, on residential lots in said subdivision shall be kept to a height no higher than the highest point of the roof surface nor higher than the height of the house on each lot, whichever is lower. For this purpose, the height of a house shall be measured from the highest point of the roof surface to the lot grade which shall be the average of the highest and lowest ground elevations at exterior walls of the house. This amendment shall apply only to those trees, shrubs and brush which in any way obstruct the view of the sound and Olympics from a neighboring lot or lots.

The operative language of this covenant is identical for each subdivision, with the exception of certain specified lots that cannot affect the views of other homes within Innis Arden.

¶5 Disputes immediately arose concerning enforcement of the view preservation amendment. In 1984, a group of Innis Arden homeowners filed a class action lawsuit. The plaintiff class consisted of homeowners seeking a declaration of validity and enforceability of the view preservation amendments, and the defendant class consisted of homeowners challenging the amendments. The case was certified as a class action pursuant to *CR 23(b)(1)* and [*5] *(2)*, and notice was given to all Innis Arden homeowners. The notice provided that Innis Arden homeowners could choose to join either the plaintiffs' class or the defendants' class. It also stated, "You may disregard this matter *but* you will be bound by the results of this litigation." The notice also stated that if the covenants were upheld, the litigation would proceed to a second stage where the individually affected properties of plaintiffs and defendants would be litigated.

¶6 In May 1987, the trial court granted summary judgment for the plaintiffs and ruled that "the Covenants, as amended, are valid and enforceable as to all lots within Innis Arden ... . " The court explained in its oral ruling that the amendments were reasonable, properly executed, and within the scope of the grantor's intent to preserve and maintain views. The court retained jurisdiction to appoint and oversee a special master to conduct factual

inquiries regarding the application of the view preservation amendments to individual parties. The order expressly stated that it was final.

¶7 The defendant class appealed the order. In an unpublished opinion, *Innis Arden Club, Inc. v. Binns*, noted at 50 Wn. App. 1064 (1988), [*6] Division One upheld the validity of the view preservation amendments.

> Protection of the area's marine and mountain views is eminently reasonable, and such views very obviously are and always have been one of the principal attractions of the Innis Arden development. The grantor's intent, as evidenced by the easements, was to protect homeowner views, and these amendments are clearly within that intent.

¶8 On March 8, 1990, the trial court issued an order on review of the special master's findings. The order "approved and affirmed" the special master's findings and conclusions with one exception.

> The reference to "neighboring lot or lots" in the Restrictive Mutual Easements was not intended by its drafters, nor by the adopting community members, to be restricted to contiguous or adjacent lots. Due to the geography of Innis Arden, including plat layout and slope, trees several lots distant may entirely block views. The intent of the covenant is to restore such views. However, "neighboring" lots must be such as to have an actual--and not *de minimus*--view obstruction. ...

¶9 Defendant class counsel was permitted to withdraw on the same date, "based upon the belief of the parties that no class issues [*7] remained for the Court's determination and that all remaining issues were individual enforcement matters for the Special Master."

¶10 The litigation then proceeded into the second stage, with the individual plaintiffs and defendants adjudicating their disputes concerning applicability of the view preservation amendments before the special master. During those proceedings, the parties raised the issue of cross-enforceability between Innis Arden subdivisions, and the special master transferred the matter to the trial court.

¶11 On July 9, 1990, the trial court issued written notice to all Innis Arden residents regarding cross-subdivision enforcement of the covenants. The notice stated that defendant class counsel had previously been permitted to withdraw, but it listed nine individual defendants who were either represented by counsel or were attorneys proceeding pro se. The notice stated, "*This pending issue may affect all residents and therefore the Court has published this notice.*"

¶12 On December 5, 1990, the trial court issued an order granting summary judgment to the plaintiff class and reiterating that the view preservation amendments are enforceable across Innis Arden subdivision boundaries. [*8] The court's order specified that this conclusion

> is implicit in the court's initial Order Granting Class Action Summary Judgment dated May 4, 1987, the issue of cross enforceability was raised before the court in that initial proceeding, and the doctrine of collateral estoppel bars raising the issue of cross enforceability in the second phase of the proceeding. The time to raise the issue of cross enforceability was in the initial phase, as that issue relates directly to the facial validity of the View Preservation Amendments.
>
> ....
>
> 5. The court explicitly reaffirms its earlier ruling regarding the enforceability of the View Preservation Amendments across subdivision boundaries. The intent of the View Preservation Amendments, in light of the surrounding circumstances made clear by undisputed facts in the record, requires the court to reach the conclusion that the View Preservation Amendments are enforceable across Innis Arden subdivision boundaries.

¶13 Although the trial court's ruling was based on collateral estoppel, its oral ruling also addressed the merits.

> With respect to the merits, however, it is my view that intent is the central question. It is not discernible from the face of [*9] any single amendment what intent there was to cross subdivision enforcement.
>
> The ambiguity is created not in the language of the amendment itself, but rather in the fact that there are three identical amendments which must be construed together because of the style and fashion of their adoption. They were essentially simultaneously adopted, they are essentially identical, and unless there is enforcement available across subdivision lines, there is neither sense nor fairness to the result.
>
> . ... Looking at the circumstances of the adoption of the amendments ... the surrounding circumstances, the topography of the property of all three subdivisions, and the fact that it is a single community[,] I conclude that the amendments are enforceable across subdivision lines.

¶14 In June 1992, the class action was terminated after more than 600 special master petitions had been decided. The *Binns* trial court judge suggested in a letter that a "community process must eventually be substituted" that "permit[s] recourse to the Court, but only after informal efforts among the parties and a community-based process for preliminary decision ... ."

¶15 In 1999, a supermajority of residents in each Innis Arden [*10] subdivision adopted covenant amendments providing for payment of mandatory dues to the Club. The Carlsons purchased a home in Innis Arden in June 2001. To close on the purchase, they had to sign an acknowledgement confirming that their property was subject to the covenants.

¶16 In 2002, faced with continuing covenant enforcement disputes, the Club Board drafted a bylaw amendment to create a formal mechanism for resolution of covenant compliance disputes. In 2004, the Board held an advisory vote of Innis Arden residents, and the proposal was rejected by a vote of 227 to 247.

¶17 But disputes continued regarding the Board's authority to resolve covenant violations. Thus, on April 12, 2005, the Board adopted bylaw IV.6, a modified version of the previous covenant compliance proposal. Under this procedure, initial compliance petitions are screened by a committee which, after giving the homeowner an opportunity to respond, makes a recommendation to the Board. If the petition has a sufficient basis to move forward, there is notice and a hearing before the Board on the merits. If the Board upholds the petition after a hearing, it sets a date for compliance and can impose fines if the homeowner does [*11] not comply. The bylaw provides, "Board members whose participation would genuinely compromise the fairness of the complaint resolution process shall not participate in it."

¶18 If a homeowner does not wish to have the determination made by the Board, the bylaw provides that he or she may select a qualified outside arbitrator from a list provided by the Club, who "shall function as the Board's representative in the compliance matter and render a decision for the Board." The party requesting arbitration is responsible for costs and fees of arbitration or the fees may be evenly split if both parties consent to arbitration. Once the Board or arbitrator renders a decision, the Board has authority to set a compliance deadline after which fines shall accrue. The bylaw further provides, "The Board or arbitrator's decision after an open hearing shall be binding and final. The accrual of fines and the compliance deadline established by the Board shall remain in effect unless a court with jurisdiction issues an injunction staying the fines and/or compliance pending review."

¶19 In November 2005, the Rasches wrote a letter advising the Carlsons that their trees blocked the Rasches' view and requesting that [*12] the Carlsons bring their trees into compliance with the covenants. The Rasches' home is located in Innis Arden 1, and the Carlsons' home is in Innis Arden 2. The Carlsons did not comply. The Rasches then submitted a covenant violation petition to the Board. In February 2006, the Carlsons filed in superior court a complaint and motion to stay arbitration, seeking to invalidate the Club's compliance procedure.

¶20 On March 6, 2006, even as they challenged the Club's compliance process, the Carlsons agreed to take the next step in that process by exercising their right to bypass a hearing before the Board and bring the dispute

before a professional arbitrator. The Carlsons then filed a motion for preliminary injunction and to stay arbitration, which the trial court denied. The arbitrator, after hearing the dispute and visiting the site, determined that the Board had the power to decide the dispute and that six of the Carlsons' trees violated the covenants. The Board set a compliance deadline of June 16, 2006, and notified the Carlsons that daily fines would begin to accrue 30 days later unless they brought their trees into compliance.

¶21 The Carlsons moved for summary judgment, arguing that the [*13] arbitrator's decision was unenforceable because the Club's compliance process was invalid and because the tree covenants were not cross-enforceable between Innis Arden subdivisions. The Rasches and the Club filed a cross-motion for summary judgment.

¶22 On January 2, 2007, the trial court granted partial summary judgment to the Rasches and the Club and denied summary judgment to the Carlsons on the tree covenant issues. The trial court found that the Club is a homeowners association pursuant to *chapter 64.38 RCW* with the authority to enact its covenant compliance process and that the validity and enforceability of the view preservation amendments was barred by res judicata and collateral estoppel. The trial court denied the Carlsons' request for attorney fees and instructed the Club to submit a motion seeking an award of attorney fees as the prevailing party.

¶23 The Rasches then filed a motion to enforce the arbitrator's decision. The trial court granted that motion, ruling that the Club process complied with substantive and procedural due process and that there was no showing of fraud, misrepresentation, or undue bias. The court's oral ruling emphasized that the Carlsons had a right to avail [*14] themselves of the trial court throughout the process and that until the court process is finalized, daily assessment of fines by the Club against the Carlsons may not occur. Accordingly, the court ruled that fines against the Carlsons would not begin to accrue until 60 days from the date of the court's oral ruling, unless the trees were brought into compliance or the Carlsons could demonstrate that they were prevented from doing so by the City of Shoreline. The court ruled that the fines would continue to accrue during the pendency of any appeal taken.

¶24 On March 27, 2007, the trial court granted the Club's motion for award of attorney fees as the prevailing party under *RCW 64.38.050* and set a further hearing for determination of the amount. The Club submitted a request for attorney fees of $88,794.15, and on May 15, 2007, the trial court granted a reduced award of $ 57,592.90. The Carlsons appeal.

Analysis

Cross-Enforceability of Covenants

¶25 The Carlsons argue that the trial court erred in granting summary judgment to the Club and ruling that their challenge to the validity and cross-enforceability of the view preservation amendments was barred by res judicata and collateral estoppel. This [*15] court reviews a trial court order granting summary judgment de novo. *Stalter v. State, 151 Wn.2d 148, 155, 86 P.3d 1159 (2004)*. Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *CR 56(c)*.

¶26 Res judicata ensures the finality of decisions. *Camer v. Seattle Sch. Dist. 1, 52 Wn. App. 531, 534, 762 P.2d 356 (1988)*.

> Res judicata, or claim preclusion, bars the relitigation of claims and issues that were litigated, or might have been litigated, in a prior action. Application of the doctrine requires identity between a prior judgment and a subsequent action as to (1) persons and parties, (2) cause of action, (3) subject matter, and (4) the quality of persons for or against whom the claim is made. Collateral estoppel, or issue preclusion, prevents relitigation of an issue after the party estopped has already had a full and fair opportunity to present its case. The requirements for application of the doctrine are: (1) the issue decided in the prior adjudication must be identical with the one presented in the second; (2) the prior adjudication must have ended in a final judgment on the merits; (3) the party [*16] against whom the plea is asserted was a party or in privity with a party to the prior adjudication; and (4) application of the doctrine must not work an injustice.

Pederson v. Potter, 103 Wn. App. 62, 69, 11 P.3d 833 (2000) (internal citations omitted). The party asserting res

judicata has the burden of proving that the claim was decided in the prior litigation. *Civil Serv. Comm'n v. City of Kelso, 137 Wn.2d 166, 172, 969 P.2d 474 (1999).*

¶27 The Carlsons argue that there was no final judgment in the *Binns* litigation operating against their predecessors in interest, the Berreths, that would give rise to collateral estoppel. They contend that the court's 1990 order on cross-enforceability was merely interlocutory and that there was no final judgment because the special master never ordered the Berreths to cut their trees. The Carlsons further argue that the court's 1987 order has no preclusive effect because (1) it did not address individual disputes, (2) it did not describe the members of the class, (3) the Berreths were not named parties or embraced within any description of class members, and (4) cross-enforceability of the tree covenants was not addressed in the 1987 order, but only **[*17]** in the 1990 order that was entered after defendant class counsel had withdrawn.

¶28 These arguments evince a fundamental misunderstanding of the class action process. The *Binns* litigation was certified as a class action under *CR 23(b)(1)* and *(2)*, under which potential class members do not have an automatic right to notice or absolute right of exclusion. *Reeb v. Ohio Dep't of Rehab. & Corr., 435 F.3d 639, 645 (6th Cir. 2006).* [2] Notice is a "safety valve" through which the court protects the rights of absent class members and safeguards against a possible future challenge to the res judicata effect of a *CR 23(b)(2)* action. 5 ALBA CONTE & HERBERT NEWBERG, NEWBERG ON CLASS ACTIONS § 16:17 (4th ed. 2002); *Sperry Rand Corp. v. Larson, 554 F.2d 868, 876 (8th Cir. 1977).*

> 2 Federal authority interpreting identical class action provisions in Washington law is "highly persuasive." *Pickett v. Holland Am. Lines-Westours, Inc., 145 Wn.2d 178, 188, 35 P.3d 351 (2001).*

¶29 When damages cannot be proved on a class-wide basis and damage proof by individual class members in a single proceeding would be beyond the administrative capabilities of the court, the court may adjudicate common issues to a final judgment **[*18]** and then appoint a special master to resolve questions of individual damages, with the benefit of res judicata on the common issues. 2 ALBA CONTE & HERBERT NEWBERG, NEWBERG ON CLASS ACTIONS § 4:33 (4th ed. 2002). As a general rule, when adequate representation is present, judgment in a class action lawsuit will bind absent members of the class described in that judgment with respect to common issues adjudicated. 1 ALBA CONTE & HERBERT NEWBERG, NEWBERG ON CLASS ACTIONS § 1:6 (4th ed. 2002); *RESTATEMENT (SECOND) OF JUDGMENTS § 41(1)(e)* (1982).

¶30 The threshold res judicata consideration with respect to class actions is whether the appellants were members of the class described in the final judgment. The next consideration is whether the initial proceedings complied with due process. The court applying res judicata must conclude that the class was adequately represented in the first suit. 5 CONTE & NEWBERG, *supra*, § 16:25. "Adequate representation is usually present when a class representative with typical claims and defenses has no conflict of interest with other members of the class, and the court is satisfied that the class action will be vigorously prosecuted." 2 CONTE & NEWBERG, *supra*, **[*19]** § 4:47 at 342. In the absence of representational adequacy, absent class members can collaterally attack the binding nature of any final judgment on them. *Id.* (citing *Hansberry v. Lee, 311 U.S. 32, 61 S. Ct. 115, 85 L. Ed. 22 (1940).*

¶31 We conclude that the *Binns* **[*20]** orders are binding on all Innis Arden homeowners, including the Carlsons. The notice issued by the court to all Innis Arden homeowners (for both the original class action lawsuit and the subsequent cross-enforceability challenge) stated that they could choose to join the plaintiffs' class, the defendants' class, or neither, but that all homeowners in Innis Arden would be bound by the decision. This created a somewhat unusual situation with respect to defining the class to which absent class members belonged--because the covenants run with the land and provide both a burden and a benefit, the absent class members did not fit neatly into either class. But this does not defeat the res judicata effect of both judgments on all Innis Arden homeowners and their successors, including the Carlsons, where there was no right of exclusion and the notice and judgment made it clear that the ruling on common questions would be binding on all.

¶32 The Carlsons contend that there is no order with preclusive effect on the cross-enforceability question because the 1987 order did not address that issue and because the defendant class was unrepresented when the 1990 order was issued. But the 1990 order ruled **[*21]** that the cross-enforceability question was barred from

further challenge because it had been implicitly addressed in the 1987 order. In so ruling, the court noted that the cross-enforceability issue had actually been raised and argued in the original litigation. Accordingly, the 1987 order does have preclusive effect on that issue. Furthermore, even though defendant class counsel dropped out prior to the 1990 order, the court's notice shows that nine individual defendants continued to be represented by counsel. It is highly likely that all of the represented defendants had the same motivation to vigorously challenge the cross-enforceability of the covenants.

¶33 The Carlsons further mischaracterize the 1987 and 1990 orders as interlocutory. The *Binns* court properly bifurcated the proceedings by adjudicating the common question first--the validity and applicability of the covenants--and then appointing a special master to address individual disputes. The court's 1987 order stating, "The Covenants, as amended, are valid and enforceable as to all lots within Innis Arden," and the court's 1990 order ruling that the cross-enforceability question was barred by the preclusive effect of the 1987 [*22] order, were final and binding on the Carlsons' predecessors in interest, the Berreths. The nature and extent of the Berreths' participation in the special master process is irrelevant to the preclusive effect of the 1987 or 1990 orders on the Carlsons with respect to the common questions.

¶34 Because we conclude that the Carlsons' challenge to the validity and cross-enforceability of the view preservation amendments was barred by res judicata and collateral estoppel, we need not reach the merits of that claim. [3]

3 We observe, however, that *Save Sea Lawn Acres Ass'n v. Mercer, 140 Wn. App. 411, 166 P.3d 770 (2007)* is factually distinguishable from this case.

Club Covenant Compliance Process

¶35 The Carlsons argue that the trial court erred in granting summary judgment for the Club and ruling that its compliance process was valid. They acknowledge that the covenants expressly allow the Club to access the court's "proceedings in law or equity" to resolve a covenant dispute. But they argue that the Club has no inherent or statutory authority to circumvent the court by forcing its residents to submit to a hearing process or to levy fines. [4] The Club contends that its compliance process is authorized [*23] by its covenants and bylaws, as well as by statute.

4 The Carlsons argued for the first time in their reply brief, without analysis or citation to authority, that under this court's ruling in *Binns*, the Club has no inherent authority to enforce the original covenants. Arguments not supported by authority or analysis, as well as arguments raised for the first time in the reply brief, need not be considered. *Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992)*. Accordingly, we disregard this assertion.

¶36 The interpretation of a restrictive covenant is a question of law, reviewed de novo. *Parry v. Hewitt, 68 Wn. App. 664, 668, 847 P.2d 483 (1992)*. Questions of statutory construction are reviewed de novo. *State v. Votava, 149 Wn.2d 178, 183, 66 P.3d 1050 (2003)*. "The primary goal of statutory interpretation is to ascertain and give effect to the legislature's intent and purpose." *In re Seattle Popular Monorail Auth., 155 Wn.2d 612, 627, 121 P.3d 1166 (2005)*. We read the statute as a whole to give effect to all language used. *In re Pers. Restraint of Skylstad, 160 Wn.2d 944, 948, 162 P.3d 413 (2007)*.

¶37 The Carlsons argue that the Club's compliance process is contravened [*24] by the Innis Arden covenants, which explicitly provide the right to enforce the covenants in court. They further contend that *chapter 64.38 RCW*, the homeowners' association act, [5] limits a homeowners association's (HOA) powers to those enumerated in the statute. Because *RCW 64.38.020(11)* [6] expressly permits HOAs to hold hearings and levy fines for "violation of the bylaws, rules, and regulations" but not for violations of covenants, the Carlsons argue that the Club's process is also unauthorized by statute.

5 The HOA act was passed in 1995. It is based on the Uniform Common Interest Ownership Act (UCIOA) as drafted by the National Conference of Commissioners on Uniform State Laws in 1994.

6 *RCW 64.38.020(11)* provides that a HOA may "[i]mpose and collect charges for late payments of assessments and, after notice and an opportunity to be heard by the board of directors or by the representative designated by the board of directors and in accordance with the procedures as provided in the bylaws or rules and regulations

adopted by the board of directors, levy reasonable fines in accordance with a previously established schedule adopted by the board of directors and furnished to the owners for [*25] violation of the bylaws, rules, and regulations of the association."

¶38 The general rule, as summarized in the *RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) § 6.8 cmt. b* (2000), favors the Club's compliance process. [7]

> Fines, penalties, late fees, and withdrawal of privileges to use common recreational and social facilities may be used unless prohibited by statute or the governing documents. ... Fines and penalties are commonly used to deter violations of use restrictions ... . The power to impose fines or penalties has been sometimes denied common-interest communities on the ground that only the government may exercise such powers, but the prevailing view regards fines and penalties as legitimate tools of the common-interest community. The amounts must be reasonable, and the procedures adopted must provide property owners with notice of their potential liabilities and a reasonable opportunity to present the facts and any defenses they may have.

7 The restatement cites *Glen Devin Condo. Ass'n v. Makhluf, 1994 Mass. App. Div. 227 (1994)*, where the court held that a condominium association had inherent authority under its governing documents to impose fines. Carlson argues that the *Glen* [*26] *Devin* court acknowledged that its opinion was overruled by statute. That is incorrect. The opinion actually stated that the condominium's process was now expressly authorized by statute, but because the statute was not retroactive, the court had to analyze the case in terms of inherent authority.

¶39 The Carlsons' argument that the Innis Arden covenants expressly contravene the Club's process is not persuasive. The Club's process does not purport to bar an aggrieved homeowner from bringing the dispute to court. Instead, it is a community-based process that allows for an initial evaluation of the dispute, with notice and a hearing, prior to judicial review. The *Binns* trial court judge recommended that Innis Arden develop such a process. Moreover, the original Innis Arden covenants gave express authority to the grantor (whose powers are now invested in the Club) to make a final determination regarding the permissible height of walls, fences, and hedges and the removal of "spite or nuisance" hedges or trees. These covenants further provide inherent authority for the Club's process, subject to judicial review.

¶40 The Carlsons argue that even if the Club once had inherent authority to enforce covenants, [*27] its powers have been expressly limited by the HOA act to those enumerated in *RCW 68.34.020*--particularly where *RCW 68.34.020(11)* expressly grants the authority to hold hearings and impose fines for violation of "bylaws or rules and regulations" but not covenants. We disagree. Nothing in the HOA act expressly overrides the Club's inherent authority to enforce covenant compliance under its governing documents. Rather, *RCW 68.34.020* enumerates a list of powers that an HOA may exercise "[u]nless otherwise provided in the governing documents," including the power to "[a]dopt and amend bylaws, rules, and regulations;" "levy reasonable fines ... for violation of the bylaws, rules, and regulations of the association" after notice and an opportunity to be heard; "[e]xercise any other powers conferred by the bylaws;" and *(14)* "[e]xercise any other powers necessary and proper for the governance and operation of the association." *RCW 68.34.020(1), (11), (12), (14)*. The HOA act's definition of "governing documents" [8] is broad and expressly includes covenants and bylaws. The Innis Arden bylaws authorize the Club's process and do not purport to restrict the homeowner's right to seek judicial review [*28] of the final determination issued by the Board or the outside arbitrator.

8 "Governing documents" is defined as "the articles of incorporation, bylaws, plat, declaration of covenants, conditions, and restrictions, rules and regulations of the association, or other written instrument by which the association has the authority to exercise any of the powers provided for in this chapter or to manage, maintain, or otherwise affect the property under its jurisdiction." *RCW 64.38.010(2)*.

¶41 *Wimberly v. Caravello, 136 Wn. App. 327, 149 P.3d 402 (2006)* does not compel a different result. In

Wimberly, an HOA's board declined to enforce a building restriction covenant. The affected homeowner sued, and the trial court enjoined the building. The building owner appealed, arguing that *chapter 64.38 RCW* expresses the legislature's intention that boards exercise the authority granted by their bylaws and that judges cannot substitute their judgment for that of the board. The court disagreed.

> But the homeowners' association act begins, "*Except as provided in the association's governing documents* ... ." And the governing documents here clearly do provide otherwise. The Association's bylaws and covenants [*29] provide that individuals may invoke the jurisdiction of the court to resolve covenant disputes. And that is what the Wimberlys did. By definition, "jurisdiction" is the power of a court to impose its judgment on the parties and subject matter of litigation.

Wimberly at 335-36 (internal citation omitted).

¶42 The Carlsons assert that *Wimberly* stands for the proposition that an HOA has no authority to decide covenant disputes if the covenants provide for judicial review. This is incorrect. *Wimberly* held that a homeowner may bring suit to enforce a covenant that an HOA declines to enforce where the governing documents expressly provide that right. Nothing in *Wimberly* prevents an HOA from creating a covenant compliance procedure as a community-based precursor to judicial review.

¶43 The Carlsons also argue that the trial court should have issued an order staying arbitration, because the Carlsons and the Rasches never entered into a written arbitration agreement as required by *RCW 7.04.070(2)* and because neither the Club nor the arbitrator had the authority to adjudicate the dispute.

¶44 We disagree. The bylaw expressly states that it is authorized by the HOA act and the Club's inherent authority under [*30] its governing documents. It makes no reference to *chapter 7.04A RCW* as a source of authority. The bylaw further provides that the arbitrator shall "function as the Board's representative in the compliance matter and render a decision for the Board," thereby acknowledging that the outside decisionmaker has no more authority than the Board. The bylaw's use of the term "arbitrator" to refer to the outside decisionmaker does not convert the Club's covenant compliance process into an arbitration under the purview of *chapter 7.04A RCW*.

¶45 The Carlsons further argue that the court erred in ruling on summary judgment that the Club was an HOA because there were questions of material fact regarding whether the Club's mandatory dues amendments and parallel bylaws were validly adopted. We disagree. *RCW 64.38.010(1)* defines a "homeowners' association" as

> a corporation, unincorporated association, or other legal entity, each member of which is an owner of residential real property located within the association's jurisdiction, as described in the governing documents, and by virtue of membership or ownership of property is obligated to pay real property taxes, insurance premiums, maintenance costs, or [*31] for improvement of real property other than that which is owned by the member.

The Club is a nonprofit corporation whose members are homeowners in Innis Arden. The Club has the authority through its bylaws and through *chapter 64.38 RCW* to impose fees for community expenses. Accordingly, it meets the definition of an HOA, regardless of any purported flaws in the adoption of the mandatory dues amendments.

Attorney Fees

¶46 The Carlsons argue that the trial court erred in granting attorney fees to the Club pursuant to *RCW 64.38.050* because that statute authorizes a fee award only for aggrieved homeowners, not for homeowners' associations. The question of whether a party is entitled to attorney fees is an issue of law reviewed de novo. *Tradewell Group, Inc. v. Mavis, 71 Wn. App. 120, 126-27, 857 P.2d 1053 (1993).*

¶47 We disagree. *RCW 64.38.050* states, "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." On its face, the statute does not limit an award of fees to aggrieved homeowners but does allow fees to the

"prevailing party." This [*32] allows HOAs, which are funded by the community as a whole, to recoup expenses incurred in defending against nonprevailing homeowners.

¶48 The Carlsons next argue that the trial court erred in finding that the Club was the prevailing party. The trial court's award of attorney fees is reviewed for abuse of discretion. *Taliesen Corp. v. Razore Land Co., 135 Wn. App. 106, 141, 144 P.3d 1185 (2006)*. The determination of the prevailing party is a mixed question of law and fact that is reviewed under an error of law standard. *Sardam v. Morford, 51 Wn. App. 908, 911, 756 P.2d 174 (1988)*. The prevailing party is the party who receives an affirmative judgment in their favor, *Riss v. Angel, 131 Wn.2d 612, 633, 934 P.2d 669 (1997)*, or who substantially prevails, *Hertz v. Riebe, 86 Wn. App. 102, 105, 936 P.2d 24 (1997)*. If both parties prevail on a major issue, neither party is a prevailing party. *Id.*

¶49 The Club prevailed on all of the major issues, including the Carlsons' quiet title claim--their challenge to the validity of the covenant compliance process, including the imposition of fines; the Club's status as an HOA, and the cross-enforceability of the covenants. The trial court did rule that the Carlsons' [*33] challenge to the Club's remodel procedures and policies was reserved for a further hearing and that fines against the Carlsons would not begin to accrue until 60 days after the entry of its oral ruling. Nevertheless, given the scope of the Club's success on the major issues, we conclude that the trial court did not abuse its discretion in awarding fees to the Club as the prevailing party.

¶50 Carlson further argues that the court erred in entering an award of attorney fees without entering findings of fact or conclusions of law that would establish a record to review the award, as required by *Mahler v. Szucs, 135 Wn.2d 398, 435, 957 P.2d 632 (1998)*. But the record shows that the Club extensively documented the basis for its request, and the court's order contained findings and conclusions. The attorney fee award was proper.

¶51 The Club requests attorney fees for costs incurred on appeal based on *RAP 18.1(a)*, which permits an award of fees where "applicable law grants to a party the right to recover reasonable attorney fees on review ... . " Here, the applicable law is *RCW 64.38.050*, which allows fees to the prevailing party for a dispute concerning violations of *chapter 64.38 RCW*. Because [*34] the Club is the prevailing party under this statute below and on appeal, we grant the Club's request for attorney fees under *RAP 18.1*. [9]

9 We need not decide the Club's alternative request for attorney fees based on *RAP 18.9* or *CR 11*.

¶52 The Rasches also request attorney fees on appeal based on *RAP 18.1*. But the Rasches made only a bare request, with no argument or citation to authority regarding the appropriate grounds for an award of fees. This is insufficient under *RAP 18.1(b)*, which requires a party to devote a section of its brief to its request for attorney fees. "Argument and citation to authority are required under the rule to advise us of the appropriate ground ... for the award." *Wilson Court Ltd. P'ship v. Tony Maroni's, Inc., 134 Wn.2d 692, 710 n.4, 952 P.2d 590 (1998)*. The absence of any supporting argument in the Rasches' brief is particularly problematic where, as here, the trial court denied the Rasches' request for attorney fees below. Accordingly, we deny the Rasches' request for attorney fees on appeal.

¶53 We affirm.

DWYER, A.C.J., and COX, J., concur.

APPENDIX - D

ROBERT A. HOLDERBY, Respondent, v. INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL UNION NO. 12 (an Unincorporated Association) et al., Appellants

L. A. No. 23488

Supreme Court of California

45 Cal. 2d 843; 291 P.2d 463; 1955 Cal. LEXIS 373; 37 L.R.R.M. 2449; 29 Lab. Cas. (CCH) P69,693

December 29, 1955

PRIOR HISTORY: [***1] APPEAL from a judgment of the Superior Court of Los Angeles County. Clarence M. Hanson, Judge.

Action seeking reinstatement in a union as a member in good standing, and for damages resulting from unlawful exclusion.

DISPOSITION: Reversed. Judgment for plaintiff reversed.

HEADNOTES

CALIFORNIA OFFICIAL REPORTS HEADNOTES

(1) Associations--Intervention of Courts--Conditions Precedent. --Generally, a plaintiff who seeks judicial relief against an organization of which he is a member must first invoke and exhaust the remedies provided by that organization applicable to his grievance.

(2) Id.--Intervention of Courts--Conditions Precedent. --It is only when an organization violates its rules for appellate review or on a showing that it would be futile to invoke them that further pursuit of internal relief is excused; the violation of its own rules which inflicts the initial wrong furnishes no right for direct resort to the courts.

(3) Id.--Intervention of Courts--Conditions Precedent. --Violation of other laws and wrongs done within an organization are intended to be conciliated and corrected by the appellate machinery provided therein if properly invoked by an aggrieved party and applied by the organization, and if recourse to such appellate machinery is not sought an aggrieved party foregoes his right to a judicial review regardless of the breach of its own rules by the organization in causing the grievance in the first instance.

(4) Labor--Remedies--Conditions Precedent. --When an internal appeal is open to a member of a union, after its executive board has denied him reinstatement as a member in good standing, he has no right to invoke the aid of the courts where he has made no attempt to obtain such appeal and there is nothing to indicate that an appeal would not have been accorded him in which to seek redress for the alleged wrongs.

COUNSEL: Parker, Stanbury, Reese & McGee and Raymond G. Stanbury for Appellants.

Aaron Sapiro for Respondent.

JUDGES: In Bank. Shenk, J. Gibson, C. J., Edmonds, J., Traynor, J., Schauer, J., and Spence, J., concurred. Carter, J., dissents.

OPINION BY: SHENK

OPINION

[*844] [**464] This is an appeal by the defendant Local Union Number 12 of the International Union of Operating Engineers from a judgment for the plaintiff Robert A. Holderby in an action in which the plaintiff sought and obtained reinstatement as a member in good standing in the union and damages resulting from his alleged unlawful exclusion therefrom.

The plaintiff became a member of the union in October, 1952. From November, 1952, until March, 1953, he was delinquent in his dues and for that reason was suspended from membership by the executive board of the union on February 5, 1953. Thereafter he applied for reinstatement and assigned illness as the [***2] reason for his delinquency. On March 17, 1953, the executive board addressed a letter to him stating the conditions of his reinstatement as follows: ". . . it was the recommendation of the Advisory Board, concurred in by the Executive Board, that you be granted the privilege of Reinstating your membership by the payment of back Per Capita tax, Reinstatement Fee of $ 5.00, dues for the current month, and three months dues in advance." The executive board waived certain of the above items [**465] and gave a credit for $ 10 paid prior to March 17. It stated in its letter that there remained a balance of $ 19 due and that in addition it required the plaintiff to furnish a doctor's certificate substantiating his illness. It appears that the requirements for reinstatement were consistent with the union's constitution. On April 29 a report certifying that the plaintiff had been a patient at a veterans' hospital was mailed to the financial secretary of the union. On May 27 the plaintiff made final payment of the amount required for reinstatement plus dues to that date. Soon thereafter he was issued a referral slip for a work assignment on which the notation "dues paid rein 12" appeared. [***3] It may be assumed that the notation was in recognition of the payment of dues and the plaintiff's reinstatement in Local 12.

On June 6, 1953, the executive board of the union met and purported to reject the plaintiff's application for reinstatement. The minutes of its meeting state that "A motion was made, seconded and carried that all previous action of [*845] the Executive Board in the case of Robert A. Holderby be rescinded. A motion was made and seconded that the application for reinstatement of Robert A. Holderby be rejected and that all moneys paid into the Local Union by him be refunded. On the motion it was thoroughly established that Holderby was not a qualified engineer and that his actions during the past six months had marked him as an individual undesirable for membership in this Union." The plaintiff received a letter from the union advising him of his rejection and enclosing a check for $ 138.60 as "the total amount paid in by you on Initiation Fee, Dues, Permits, etc."

On July 1, 1953, the plaintiff commenced the present action. Article XVII, section 1(a) of the union's constitution provides in part as follows: "Any General Officer who shall have filed in [***4] a Local Union charges against a member thereof, and any officer or member of a Local Union, may appeal to the General Executive Board from the adoption of any action by said Local Union, or from any decision rendered by the General President. Any Local Union, or member thereof which belongs to a local, State or Provincial Organization or Joint Executive Board may appeal to the General Executive Board from any act or decision of said local, State or Provincial Organization or Joint Executive Board. . . ." Section 3 of that article states: "No suit or other action at law or equity shall be brought in any court by any member, officer or subdivision of the International Union of Operating Engineers until and unless all rights, remedies and provisions for hearing, trial and appeal within the Organization shall have been properly followed and exhausted by the member, officer or subdivision complaining. . . ." Prior to commencing this action the plaintiff did not avail himself of the remedies provided in the constitution for a review by the general executive board of the action taken against him.

The plaintiff claims that on May 27, after he had fully complied with the requirements on [***5] which his reinstatement was conditioned, he automatically became fully reinstated to membership in the union; that thereafter the purported denial of his application for reinstatement was in realty an exclusion from membership without compliance with procedures established in the union's constitution, and that he was improperly deprived of valuable rights conferred upon him as a member of the union. (See *Lawson v. Hewell, 118 Cal. 613 [50 P. 763, 49 L.R.A. 400].*) There is no question [*846] but that provisions in the union constitution for the expulsion of members were not followed. That document requires that formal charges be filed and a hearing be had.

The trial court agreed with the plaintiff, specifically

finding that "in accordance with the said letter of March 17, 1953, the reinstatement of the plaintiff had been completed by May 28, 1953"; that he was a member in good standing on June 6, 1953, the date the alleged exclusionary action took place; that "he was entitled to all the rights and privileges of membership at the said time," and that, "by reason of said action on the part of the Executive Board, **[**466]** plaintiff was thereby in effect, expelled **[***6]** from the defendant Local Union No. 12. . . ."

The foregoing findings of the court are supported by substantial evidence, and on appeal may not be successfully controverted by the defendant. However, it is contended that the plaintiff failed to exhaust the remedies available within the union and that he is not now entitled to judicial relief.

(1) It is the general and well established jurisdictional rule that a plaintiff who seeks judicial relief against an organization of which he is a member must first invoke and exhaust the remedies provided by that organization applicable to his grievance. (*Lawson v. Hewell, supra, 118 Cal. 613; Levy v. Magnolia Lodge No. 29, I.O.O.F., 110 Cal. 297 [42 P. 887].*) This rule is analogous to the rule requiring the exhaustion of administrative remedies as a condition precedent to resorting to the courts (see 2 Cal.Jur.2d 304), and to the rule requiring the parties to a contract for arbitration of disputes to exhaust those remedies before seeking judicial relief. (See *Cone v. Union Oil Co., 129 Cal.App.2d 558 [277 P.2d 464]*, and cases collected at p. 563.) Such rules are based on a practical approach to the solution of internal **[***7]** problems, complaints and grievances that arise between parties functioning pursuant to special and complex agreements or other arrangements. They make possible the settlement of such matters by simple, expeditious and inexpensive procedures, and by persons who, generally, are familiar therewith. Such internal remedies are designed not only to promote the settlement of grievances but also to promote more harmonious relationships, and the courts look with favor upon them.

The plaintiff claims that an exception to the general rule made it unnecessary that he pursue the internal remedies **[*847]** for review before commencing this action. In *Weber v. Marine Cooks' & Stewards' Assn., 93 Cal.App.2d 327 [208 P.2d 1009]*, it is stated at page 338 that "where an organization has violated its own laws and arbitrarily violated a member's property rights the rule of exhaustion of remedies by appeal to a higher body within the organization need not be adhered to before direct resort to a judicial tribunal." (See *Harris v. National Union etc. Cooks & Stewards, 98 Cal.App.2d 733 at 736 [221 P.2d 136].*) If such an exception is construed as broadly as the quoted language would **[***8]** permit, it would make it unnecessary for any party with a justified grievance involving personal and property rights against an organization of which he is a member, including the plaintiff in the present case, to have the matter corrected internally by the machinery provided before resorting to the courts. The exception in such a case would swallow the rule, a result clearly not intended by the cases relied on as authority for the broad interpretation sought by the plaintiff to justify this action. (2) It is only when the organization violates its rules for appellate review or upon a showing that it would be futile to invoke them that the further pursuit of internal relief is excused. The violation of its own rules which inflicts the initial wrong furnishes no right for direct resort to the courts.

The statement of the exception in the Weber case, discussed only incidentally with other points considered determinative, is said to have resulted from a holding in *Simpson v. Salvation Army, 49 Cal.App.2d 371 [121 P.2d 847]*. In that case the court set forth the exception in almost identical language, with citations, and then stated at page 375: "Obviously, that exception is not **[***9]** here involved." In one of the two cases there relied on (*Neto v. Conselho Amor Da Sociedade, 18 Cal.App. 234 [122 P. 973]*) the court stated the exception, citing the other case as authority therefor, but refused to apply the exception. Thus the authority for the quoted language is easily traced to that other case, *Schou v. Sotoyome Tribe, No. 12 (1903), 140 Cal. 254 [73 P. 996]*. The holding in that case, however, does not justify the interpretation the plaintiff in the present case would place upon it. There relief was sought by the plaintiff Mrs. Schou in behalf of her husband, a member of the Sotoyome Tribe of **[**467]** the Improved Order of Redmen of California, a fraternal and benevolent organization. His application for sick benefits was refused on the ground that the affliction for which he sought relief **[*848]** was caused by intemperance. The constitution of the organization provided that "should any person feel aggrieved at the action of a tribe for failing to pay benefits that may be claimed to be due, such person must appeal from such action by giving the tribe notice thereof within 20 suns after said action; whereupon the sachem shall without **[***10]** delay appoint a suitable member of the order as

a commissioner to take such testimony as either party may offer in relation to the case." For five months after the denial of his application, Mrs. Schou, his legal guardian, made vigorous but unavailing efforts to obtain information of the tribe's decision. The opinion then relates that "Thereafter she was informed by the tribe that 'she would have to take the case before the great sachem." In response to this, her attorneys wrote to the great sachem asking him for information as to the proper procedure, and were by the great sachem informed simply that he had no jurisdiction in the matter. Finally, Mrs. Schou's attorneys gave the tribe notice of an appeal 'to the great sachem and great council,' and sent an appeal to the great council, but, so far as she or her attorneys were advised, neither the tribe nor the great council paid any attention to these appeals. No commissioner was appointed to take evidence, no 'ten suns' notice, nor any notice at all, was given, nor was Schou, nor Mrs. Schou upon his behalf, ever allowed to present any evidence. In this condition of affairs, not knowing whether or not she was to be allowed to prosecute **[***11]** her appeal, or if it would be entertained by the great council of the state, and having had no opportunity at all to present her evidence as to Schou's right to the sick benefits" she resorted to court action.

The foregoing account of Mrs. Schou's inability to obtain an appeal within the machinery provided, although she herself complied with all requirements made known to her, caused the court to conclude it to be "perfectly clear" that she "was relieved from further compliance, or attempt at compliance, with the regulations and procedure of the order touching appeals. . . . Before an order can hold a member to strict observance of its rules regulating procedure on appeal it must show that in all matters touching his substantial rights it has itself observed these regulations, and this the defendant did not do. Its dereliction in this regard excuses a claimant from exhausting his remedy within the rules of the order."

It is apparent from the foregoing that the court in the **[*849]** Schou case excused the plaintiff's further attempt at compliance with internal rules of appeal because the organization itself arbitrarily refused to comply with and be governed by those same internal **[***12]** rules of appeal and for all practical purposes it became impossible for the plaintiff to obtain a review of the prior action claimed to be improper. Accordingly, the statement in the Weber case relating to an exception to the general rule "where an organization has violated its own laws," can have reference only to its rules on appeal, the violation of which in effect prevented an aggrieved party from seeking redress thereunder. **(3)** A violation of other laws and wrongs done within the organization are intended to be conciliated and corrected by the appellate machinery provided therein, if properly invoked by an aggrieved party and applied by the organization. If recourse to such appellate machinery is not sought an aggrieved party foregoes his right to a judicial review regardless of the breach of its own rules by the organization in causing the grievance in the first instance. If the organization fails to apply its appellate machinery after it is properly invoked and in effect prevents an appeal from being taken, the aggrieved party, under the Schou case, need not pursue such an appeal further. Any implications in the statement of the exception to the general rule in the cases heretofore **[***13]** cited are accordingly limited.

(4) In the present case the plaintiff made no attempt to obtain an internal appeal, and there is nothing to indicate that an appeal would not have been accorded him in which to seek redress for the alleged wrongs. He **[**468]** falls squarely within the rule that when an internal appeal is open to him he has no right to invoke the aid of the courts.

The judgment is reversed.

DISSENT BY: CARTER

DISSENT

CARTER, J. I dissent.

The majority in this case holds that a member of a union cannot obtain relief in the courts when he has been expelled without the notice or hearing required by the union's constitution and by-laws because he did not appeal the expulsion to a higher authority in the union which he had the right to do under the circumstances. This exhaustion of remedies within the union is the universal rule on the subject but there are exceptions to it, one of which is that it does not apply where **[*850]** the union has violated its own law with respect to expulsions. The majority states that there is no reason for the exception, and that to apply it completely wipes out the rule, and mentions some of the cases upholding the exception, and, in effect, **[***14]** disapproves them, but it does not do so expressly. It has been held in this state that where the union or other unincorporated association

fails to give notice and hearing for an expulsion, the member need not exhaust a remedy by appeal under the constitution of the association. (*Swital v. Real Estate Comr., 116 Cal.App.2d 677 [254 P.2d 587]*; *Ellis* v. *American Federation of Labor*, 48 Cal.App.2d 440 [*120 P.2d 79]*; *Stoica v. International etc. Emp., 78 Cal.App.2d 533 [178 P.2d 21]*; *Weber v. Marine Cooks' & Stewards' Assn., 93 Cal.App.2d 327 [208 P.2d 1009]*; *Smetherham v. Laundry Workers' Union, 44 Cal.App.2d 131 [111 P.2d 948]*.) The exception is nearly universally recognized. It is said in 168 A.L.R. 1462, 1468, citing cases from California, Georgia, Indiana, Missouri, Nevada, New Jersey, New Mexico, New York, Pennsylvania and the federal courts: "Where the provisions of the constitution and the bylaws as to suspension or expulsion are not complied with, as where no notice or hearing is given to the member, no written charges are preferred against him as required by the constitution and the bylaws, or where the decision for expulsion **[***15]** is contrary to the constitution and bylaws of the union, or the offense with which the member is charged is not a ground for expulsion, or where the expulsion or suspension is void for lack of authority or jurisdiction in the body or person conducting the trial or rendering the decision for suspension or expulsion, or is otherwise irregular, the requirement that the internal remedies within the union must first be exhausted will not be insisted upon as a condition to grant of equitable relief for reinstatement, as in all these cases the action of expulsion or suspension is not the authorized action of the union, and the member's duty to exhaust first the internal remedies within the union is generally understood as contemplating an action of the union which is authorized under its constitution and the bylaws. In other words, the rule as to exhaustion of internal remedies pre-supposes a legal and regular proceeding for suspension or expulsion." (See also *20 A.L.R.2d 531, 565*; *id., 344, 386*; 4 Am.Jur., Associations & Clubs, § 31.) There should be given a definitive reason why those authorities are wrong. Moreover the plaintiff -- expelled member -- sought damages as well as reinstatement. **[***16]** The appellate body in **[*851]** the union has no authority to award damages, and inasmuch as it is clear that plaintiff was illegally expelled, it would appear that his right to damages would not be affected by his failure to appeal.

In a case like the one here an appeal would be an idle act and thus unnecessary, for the majority states: "There is no question but that the provisions in the union's constitution for the expulsion of members were not followed. That document requires that formal charges be filed and a hearing be had." That being true the appellate body could do nothing else but reverse the expulsion; if it did not a court would do so. In effect the appeal could serve no useful function.

Finally, it should be remembered that the constitution and by-laws of the union constitute a contract between the members and the association and one of the reasons for **[**469]** the rule that an expelled member must pursue his remedy within the association before resorting to the courts is that the contract requires him to do so. However, where the member has been expelled in violation of that contract the association has repudiated it and it is no longer binding on the member. **[***17]** A breach of contract or a refusal to perform by one of the parties excuses the other party, not at fault, from performance on his part. (*Twomey v. People's Ice Co., 66 Cal. 233 [5 P. 158]*; *Gold Min. & Water Co. v. Swinerton, 23 Cal.2d 19 [142 P.2d 22]*; *Central Oil Co. v. Southern Refining Co., 154 Cal. 165 [97 P. 177]*.) Hence in this case plaintiff was excused from performance of the contract requiring an appeal to a higher authority in the union because of the union's repudiation and violation of the contract requiring a notice and hearing.

I would, therefore, affirm the judgment.

John M. Junkins, Respondent, v. Local Union No. 6313, Communication Workers of America et al., Appellants

[NO NUMBER IN ORIGINAL]

COURT OF APPEALS OF MISSOURI, SPRINGFIELD DISTRICT

241 Mo. App. 1029; 271 S.W.2d 71; 1954 Mo. App. LEXIS 187; 27 Lab. Cas. (CCH) P68,803

August 9, 1954, Delivered

PRIOR HISTORY: [***1] Appeal from Circuit Court of Barton County; Hon. O. O. Brown, Judge.

DISPOSITION: Affirmed.

HEADNOTES

Appeal and Error. In equity actions, Court of Appeals reviews the record de novo and gives such judgment as a trial court should have given. *Section 512.160 RSMo 1949*, V. A. M. S.

Associations. It is the duty of a member of an organization to exhaust his remedies, by appeal or otherwise within the association, before resorting to courts for redress.

Associations. Courts will protect a member of an association against illegal expulsion, but the field of judicial interference is narrow, extending only to the clearest kind of showing, either that constitution and rules were violated, or that remedies are nonexistent or unreasonable.

Labor Relations. By uniting with a union, a member assents to and accepts the constitution and impliedly binds himself to abide by decision of such board as that instrument provides for the determination of disputes arising within the association.

Associations. Decisions of tribunals established by the constitution of an association are of a quasi judicial character, and are no more subject to collateral attack [***2] for mere error than the judgments of a court of law, and courts will only investigate whether proceedings were pursuant to the constitution and bylaws, whether they were in good faith, whether charges were substantial, and whether member had fair notice and opportunity to be heard.

Labor Relations. A court will not review the decision of a labor union tribunal in suspension or expulsion of a member in accordance with constitution and rules by appropriate officers acting in good faith and in conformity with natural justice, even though it may appear that there has been an honest error of judgment, an innocent mistake, or a failure to secure all information available.

Contracts. Where contracting parties either agree or are required by law to resort to a designated tribunal for the adjustment of controversy, they must exhaust such remedy before resorting to the courts for redress.

Labor Relations. A labor union has the right to make and adopt reasonable rules and by-laws governing the conduct of its members, and such are valid so long as they relate to matters in which no one except the union and its members are interested, and violate no right of [***3] a third person and no rule of public policy.

Labor Relations. The articles of agreement of a labor union constitute a contract between the members which the courts will enforce, if not immoral or contrary to public policy or the law, but a rule which violates a statute is illegal.

Labor Relations. The obligations or pledges of members of a labor union on their initiation must be construed with reference to the declared purposes of the organization, and are binding only in so far as their purposes are lawful and are to be attained by lawful means.

Labor Relations. Inferred or implied powers of a voluntary, unincorporated labor union must rest upon some provision in its constitution.

Associations. Where an association has not acted strictly within the scope of its powers, or fraud, oppression or bad faith is shown, or where it appears that an appeal within organization would have been vain and useless, member's failure to avail himself of remedies within organization will not bar his resort to courts.

Labor Relations. Under contract between union and employer, employer had right to make lateral transfer of a member without consent [***4] of union, and member's acceptance of the transfer was not a violation of the contract.

Labor Relations. Where contract between union and employer permitted employer to make lateral transfers, purported union policy requiring members to refuse to accept such transfers violated the rights of members and of employer, and was against public policy and invalid.

Labor Relations. Where contract between union and employer permitted employer to make lateral transfers, union had no power, under its constitution, to discipline a member who accepted a lateral move.

Labor Relations. Under labor union constitution, international board of union had no authority, on appeal from local union trial wherein member was disciplined, to remand cause back to local for retrial, and local had no power to institute a new trial after reversal by international board.

Labor Relations. Where it appeared that union had no power to discipline a member for having accepted a lateral move which was authorized under contract between union and employer, and that union, under its constitution, had no power to institute a second action after first action had been reversed by [***5] international board, and that remedies provided by union to member would have been unavailing, injunction would lie to prevent disciplinary action.

Labor Relations. Transition from a three-level to a two-level structure within labor union was an administrative change, and the same substantial labor organization continued in existence.

COUNSEL: *Daniel J. Leary*, for Appellants.

I. Since the authorities are in accord that a voluntary member of an unincorporated association must exhaust his remedies within the organization before reporting to the courts for relief, the Court erred in granting relief to plaintiff. *Hall v. Morrin, 293 S. W. 435, Mo. App. , 168 A. L. R. 1462. T. W. A. v. Koppal, 79 S. Ct. 906.*

II. The exceptions to the exhaustion rule do not apply in the Junkins case for the reason that the record contains no facts to justify the application of the exceptions. *Robinson v. Nick, 235 Mo. App. 461, 136 S. W. (2d) 374.*

A. An appeal through the Union procedure would not be futile, as is illustrated by the favorable results to Junkins in his first appeal.

B. The Executive Board had authority to return the first record for a new trial, and [***6] this action did not impair any rights of Junkins.

C. The Union has acted within its powers as provided in its Constitution.

D. The Union showed their good faith in admitting their discrepancy in the date of the March 15 letter relating to Job Vacancies.

E. The Union attempted to answer Junkins' undated letter of November, 1951, as well as possible and wanted Junkins fully prepared for the trial.

F. The fine imposed in this type case is merely a token one.

G. The Union Court was composed and the first trial was processed in a proper manner.

H. The actions thus far taken regarding the second trial

have all been proper.

I. The Plant Agreements with Southwestern Bell Telephone Company are not the basis of any charges against Junkins.

III. The transition from the three-level to the two-level structure within the Union was an administrative change and the same substantial labor organization continued in existence. *Citizens Mutual Insurance Society v. Schoen, 105 S. W. 2d 43. Wilson v. Kings Lake Drainage & Levee District, 257 Mo. 266, 165 S. W. 734; 176 Mo. App. 470, 158 S. W. 931. Winkelman v. Levee District, 171 Mo. App. 49, 153 S. W. 539.*

IV. The conduct [***7] of the trial by defendants met the standards of fair play and good faith. *State ex rel. Mayfield v. St. Louis Medical Society, 91 Mo. App. 76.*

V. The Articles in the Constitution of the State of Missouri, 1945, relating to due process, Constitutional Courts and Fines by Administrative Agencies are unconstitutional as applied in this case.

Stanley P. Clay, for Respondent.

I. Respondent comes within the exceptions of the so-called "exhaustion" rule as appellant union in its conduct toward respondent is acting oppressively, outside the scope of its powers and jurisdiction; in such bad faith as to operate as a fraud upon respondent and it would be futile for respondent to further attempt to exhaust his remedies within the structure of the union. *Mulroy v. Knights of Honor, 28 Mo. App. 463*, l. c. 472, 474. *Hall v. Morrin, 293 S. W. 435*, l. c. 440. *Robinson v. Nick, 136 S. W. 2d 374* l. c. 387. "Internal Affairs of Unions; Government Control or Self-Regulation," University of Chicago Law Review, Summer, 1951 issue, p. 729, l. c. 740, 741, 744, 745. *State v. Grand Lodge, 70 Mo. App. 456* l. c. 107. Webster v. Rankin, 50 S. W. 2d l. c. 746 l. c. *749 Swaine v. Miller, 72 Mo.* [***8] *App. 446* l. c. 454. *Ludowski v. Benevolent Society, 29 Mo. App. 337*, l. c. 339.

A. Respondent did attempt to exhaust his union remedies but such efforts became futile due to the illegal acts of appellant union.

B. Appellant union has not acted strictly within the scope of its powers. *Dille v. Hospital, 196 S. W. 2d 615*, l. c. 619. Webster's Unabridged Twentieth Century Dictionary (Definition of "policy", p. 1270).

C. The good faith of the appellant union is impeached by attempting to prosecute respondent for the violation of an alleged policy set forth in a letter dated March 15, 1950, and purportedly read at a union meeting on March 10, 1950. *Froelich v. Musicians Assn. 93 Mo. App. 383*, l. c. 389, 390. *Leo v. Local Union No. 612, etc., 174 Pac. 2d 523*, l. c. 531.

D. Appellant union did not accord respondent the procedural formalities ordinarily accorded a defendant in a criminal court and thereby appellant union did not act strictly within the scope of its powers.

E. Appellant union exceeded the scope of its powers in adopting a constitutional provision making it possible to assess a fine upon respondent that has no maximum or minimum. *Article I, Section 31, Missouri* [***9] *Constitution*, 1945.

F. Appellant union trial procedure is so incomplete, imperfect and unfair that it was clearly operating outside its jurisdiction and the scope of its powers.

G. Respondent had undergone one unfair union trial and was not required to submit to a second union trial that promised to be equally unfair.

II. The exhaustion of remedy rule applicable to voluntary, fraternal societies is outmoded and unfair when applied to dealings between labor unions and their members. "Union Democracy and Union Discipline" New York University Fifth Annual Conference on Labor, p. 443, l. c. 455, 456, 457, 460.

III. Under appellant union's contract with the Southwestern Bell Telephone Company, lateral moves to fill job vacancies are permissible and said appellant union has no right to breach said contract by prohibiting respondent from accepting a lateral move. 31 C. J. S., p. 347. *McFarland v. McFarland, 211 S. W. 23. Rhodus v. Geatley, 147 S. W. 2d 631.*

IV. The alleged offense of respondent was committed while respondent was a member of Local 3135 and in no manner represents an offense against Local No. 6313, the appellant herein, which is the union prosecuting respondent. [***10] *Konta v. Stock Exchange, 189 Mo. 26*, l. c. 37, *87 S. W. 969. Miller v. International Union, 48 S.E. 2d 252 (Va., 1948).*

V. The proposed second trial of respondent by appellant union will be unjust, illegal, oppressive and part and parcel of a conspiracy among appellants to injure respondent and deprive him of his personal and property rights. Sec. 556.120, V. A. M. S., 1949. *Rogers v. Poteet, 199 S. W. 2d 378*, l. c. 384, 386, 387.

VI. Respondent's dependence upon further union trial and appellate procedure would be vain, futile and useless.

VII. The proposed second trial of respondent would be violative of the statutes and *Constitution of the State of Missouri and of the United States of America. Woolley v. Mears, 125 S. W. 1112, 226 Mo. 41. Missouri Constitution, Article, I, Section 2. Missouri Constitution, Article I, Section 10. Missouri Constitution, Article I, Section 13. Missouri Constitution, Article I, Section 14.* Missouri Constitution, Article I, Section 18. Missouri Constitution, Article I, Section 22, *Missouri Constitution, Article I, Section 28.*

Daniel J. Leary, for Appellants. (Reply)

I. Respondent does not come within the exceptions to the [***11] "exhaustion" rule. *Mulroy v. Knights of Honor, 28 Mo. App. 463. Hall v. Morrin, 293 S. W. 435. Robinson v. Nick, 136 S. W. 2d 274.*

II. Respondent did not exhaust his union remedies after the first trial, nor has he done so with regard to the pending trial.

III. The Union has acted strictly within the scope of its powers. *Froelich v. Musicians Association, 93 Mo. App. 383. Leo v. Local Union No. 612, etc., 174 Pac. 2d 523.*

IV. The positions of respondent to the effect that the appellant union did not accord respondent proper procedural formalities, that the Constitution provided no limitations as to fines, that the trial procedure of the Union is incomplete, imperfect and unfair, and that the conduct of a second trial would be unfair are without citation of authority and should not be considered by this court.

V. The exhaustion rule is not "outmoded."

VI. The Plant Agreement as between the Union and Telephone Company does not govern the lateral transfer issue.

JUDGES: McDowell, P. J. *Blair* and *Stone, JJ.*, concur.

OPINION BY: McDOWELL

OPINION

[*1033] [**73] This appeal is from a judgment and decree in favor of plaintiff in an action to enjoin defendants, a [***12] Labor [*1034] Union, its officers and certain of its members from charging, trying and disciplining a member, plaintiff.

The appeal was to the Supreme Court where it was held that that court was without jurisdiction to hear and determine the cause and it was ordered that it be transferred to the Springfield Court of Appeals.

Plaintiff's first amended petition alleges that the defendants "notwithstanding that plaintiff was in good standing, entered into a conspiracy and actuated by malice and by a determination to deprive this plaintiff of his property and legal rights by a corrupt, arbitrary and illegal use and construction of the powers vested in them by the by-laws and constitution of their organizations hereinbefore referred to, have made unjust, illegal and unfounded charges against this plaintiff and have undertaken to try, fine and otherwise punish this plaintiff in an unjust, illegal and oppressive manner."

Plaintiff further alleged "that on or about January 30, 1951, plaintiff was offered a job promotion by his employer, the Southwestern Bell Telephone Company. After accepting said position, charges were filed against this plaintiff for willfully failing to comply [***13] with the policies of Division No. 20 CWA and Local 3135 in regard to filling job vacancies by means of lateral moves on the part of management. A trial ensued and plaintiff was found guilty and fined [**74] $ 50.00. Plaintiff appealed to the International Executive Board of CWA-CIO which set aside the finding of the Court created by the Local. On November 10, 1951, defendant Thomas M. Wright again formally accused plaintiff of the same offense, i.e., accepting a job transfer by a lateral move on the part of his employer. Plaintiff has now been ordered to appear before the local union trial court on Friday, December 14, 1951, at 8:30 p.m. at the Union Hall, 319 1/2 Main Street, Joplin, Missouri, to stand trial for said alleged and purported offense.

"Plaintiff further states that said purported trial will be unjust, illegal, oppressive and part and parcel of a complete conspiracy to injure the plaintiff and deprive him of personal and property rights in the following

manner and respects:"

The petition specifically stated thirty-two grounds to support the allegations above set out. Among such grounds it was alleged:

"(ee) Plaintiff states that said purported, pretended [***14] and illegal threatened trial will be held not for the purpose of dispensing justice or enforcing any reasonable rule of the Union but rather to serve as a vehicle for defendants to exhibit their jealousy, malice and hatred to this plaintiff in that the result of said alleged trial has already been determined by the election of the present supposed arbiters and will be no trial in reality at all.

"(ff) Plaintiff states that Local No. 6313 in attempting to place plaintiff on trial for the offense hereinabove menioned is operating [*1035] outside the scope of its power and has no jurisdiction over the person of plaintiff or the subject matter of the alleged offense for the following reasons, to-wit;" * * *

"(2) Because if there were a policy against lateral moves, it was adopted after the alleged offense was committed and is therefore, ex post facto. * * *

"(14) Because in the contract between the defendant Local 6313 and the Southwestern Bell Telephone Company, lateral moves are permissible and said defendant is now estopped from breaching said contract by prohibiting its members from accepting lateral moves. * * *

"(19) Because plaintiff is threatened with an unending series [***15] of litigation by Local No. 6313 to which his further contest would be futile."

The first amended answer was a general denial of the allegations of the petition and set up the defense that plaintiff had not exhausted his remedies within the Union.

The evidence shows that plaintiff was employed by the Southwestern Bell Telephone Company, (hereinafter referred to as "Company") at Joplin, as a cable repair man engaged in outside work repairing cables and was of the age of 44 years; that he had been working for the Company 23 years; that he was a member of Local No. 3135, District No. 20, Communications Workers of America, CWA, affiliated with the CIO; that the membership of the Local was composed of employees of company engaged in the installation, maintenance and repair of telephone communication service. Plaintiff continued his work as cable repair man until February 1, 1951. About January 12, 1951, Company offered to transfer plaintiff to a position as "test board man". Such transfer is sometimes called a "lateral move". It was and is the position of defendant that such a transfer is a violation of the Union's policy when the transfer is effected by the employer-company and [***16] employee without conferring and co-operating with the Union with the view of affording all of Company's employees in the district the opportunity to "bid" for the transfer on the basis of seniority and ability.

It is the position of plaintiff that defendant, Union, entered into a 1950 Plant Agreement with Company for the benefit of plaintiff and the other members of the Union whereby under Section 5, Article XIV, such lateral move was permissible. Section 5 reads as follows:

"The Company shall retain the right to make intercompany or intracompany transfers [**75] into or within the Plant Craft Group where justified by personal reasons affecting the employee, and the Company will notify the Union of such transfers."

Plaintiff accepted the lateral transfer position without notice to the Union and without any conference between the employer and the Union, and without any submission of the position for bidding in [*1036] compliance with the alleged policy of the Union. Plaintiff took over his new duties as "test board man" February 1, 1951. On that date Thomas M. Wright, Vice-Chairman of Local No. 3135, filed complaint with the Local against plaintiff charging him with [***17] wilful failure to comply with the alleged policy of District No. 20, Local No. 3135.

On February 9, 1951, plaintiff was tried on said charge and fined by the Local Union Tribunal. Plaintiff appealed to the Executive Board of Division No. 20. Meanwhile, there was in progress a transition or change in the structural organization of the CWA, CIO, from a "three level" to a "two level" organization, the change to become effective April 2, 1951. The new change in effect abolished this Division as part of the union organization, and the Local of CWA on the stated date became responsive to the Executive Board of the International Union, CIO. In the re-organization the local union at Joplin was designated Local Union 6313. Inasmuch as the Divisional Executive Board was to be

abolished April 2, 1951, plaintiff's appeal was forwarded to the International Union at Washington, which Board, upon review, set aside the decision of the local Tribunal and remanded the proceeding for a new trial.

It is contended by plaintiff that the Board of the International Union at Washington was invested with authority to affirm, or reverse, or reduce the penalty; that there was no authority to order a [***18] new trial as was done in the instant case.

At its next regular meeting after the remand, Local No. 6313 voted to again try plaintiff and, thereafter, on November 27, 1951, a second amended charge was filed, and a second trial was set for hearing before a local union Tribunal to be convened December 14, 1951. This trial was prevented by the present action filed December 7, 1951, in the Circuit Court of Jasper County, when a restraining order preventing the union proceedings was had.

The evidence shows that plaintiff accepted the transfer from a position as cable repairman, an outside job, to that of test board man, an inside job, because of the condition of his health. A Company supervisor advised the chairman of Local 3135 of the intended transfer. The evidence shows that the chairman of Local 3135 remonstrated with plaintiff for accepting such lateral move and that at a meeting of the local union January 26, 1951, plaintiff was told by defendant that his action, in accepting the lateral move, was a violation of union policy and that he was making himself liable for charges. Plaintiff became a member of Local 6313 and was a member of good standing at the time of the present [***19] charge.

In our opinion we will refer to appellants as defendants and to respondent as plaintiff.

In equity actions we review the record de novo and give such judgment as the trial court should have given. *Section 512.160* R. S. [*1037] Mo. 1949; *Handlan v. Handlan, Mo. Sup., 232 S. W. 2d 944*; *Milgram v. Jiffy Equipment Co., et al., Mo. Sup., 247 S. W. 2d 668, 671.*

Defendants' first allegation of error is that the trial court erred in granting relief to plaintiff because plaintiff failed to exhaust his remedies within the defendant-labor union before seeking relief in the courts.

The general rule is that it is the duty of a member of an organization to exhaust his remedies by appeal, or otherwise, within the order, before resorting to the courts for redress. This rule is declared in *Hall v. Morrin, et al., Mo. App., 293 S. W. 435*, cited by defendants.

[**76] In 168 A.L.R., page 1462, 1463, the law is stated:

"While the courts will protect a member of an association against illegal expulsion, it has been said that the field of judicial interference with the actions of voluntary associations as to controversies between their members as to the method and manner in [***20] which the rights of membership may be maintained and continued is and should be a very narrow one, and its boundary should be maintained with the utmost care, so that only upon the clearest kind of showing, either that the constitution and rules are violated by the decisions of the tribunals set up by them, or that the remedies provided by the parties in their agreements for appeal from or review of, the decisions of their own constituted tribunals are nonexistent or unreasonable, should the courts permit their jurisdiction to be invoked. Oakes, Organized Labor & Industrial Conflicts, Sec. 61.

"By uniting with the union the member assents to and accepts the constitution and impliedly binds himself to abide by the decision of such board as that instrument provides for the determination of the disputes arising within the association. The decisions of such tribunals, when organized under the constitution and lawfully exercising their powers, are of a quasi-judicial character, and are no more subject to collateral attack for mere error than are the judgments of a court of law. The courts will look into the record to ascertain whether the disciplinary proceedings were pursuant to the [***21] constitution and bylaws of the association, and whether the proceedings were in good faith, whether the charges were substantial, and whether the member has had fair notice and opportunity to be heard; but will not substitute their judgment for that of the organization. * * *

"Courts do not sit in review of decisions of tribunals of a labor union in suspension or expulsion of a member in accordance with the constitution and rules of the union by its appropriate officers acting in good faith and in conformity to natural justice, even though it may appear that there has been an honest error of judgment, an innocent mistake in drawing inferences or making observations, or a failure to secure all information available by a more acute and searching investigation.

Snay v. Lovely (1931) 276 Mass. 159, 176 NE 791."

[*1038] In *Reed v. St. Louis S. W. R. Co., Mo. App., 95 S. W. 2d 887, 889*, the law is stated:

"'It is well settled that, where contracting parties either agree or are required by law to resort to a designated tribunal for the adjustment of controversies, they must exhaust such remedy before resorting to the courts for redress. * * *'" (See cases cited.) *Koppal v. Transcontinental* [***22] *& Western Air, Inc., 199 Fed. 2d, 117, 122.*

In 31 Am. Jur. page 856, Sec. 43, the law is stated:

"A labor union has the right to make and adopt reasonable rules and bylaws governing the conduct of its own members. So long as the bylaws of a union relate to matters in which no one except the association and its members is interested, and violate no right of a third person and no rule of public policy, they are valid. The articles of agreement of a labor union, whether called a constitution, charter, bylaws, or any other name, constitute a contract between the members which the courts will enforce, if not immoral or contrary to public policy or the law of the land. A rule of a labor union which violates a statute is, of course, illegal. Moreover, the obligations or pledges of members of a labor union on their initiation must be construed with reference to the declared purposes of the organization, and are binding only in so far as their purposes are lawful and are to be attained by lawful means.

"The statutes of some jurisdictions expressly authorize labor unions to make bylaws and regulations. But a statute providing that labor unions may devise and adopt ways and means to [***23] make their rules, regulations, bylaws, and resolutions effective [**77] does not sanction rules, regulations, bylaws, or resolutions to commit wrong, nor does it authorize interference with the constitutional rights of others."

In 31 Am. Jur., page 860, Sec. 55, the law is stated:

"While it has been observed that the function of a trade union is to increase the individual bargaining power by collective action, and thus to promote the common interest of its members, the functions of a labor union do, in fact, cover a wide range. It has been said that the purpose of a labor union is generally social and not commercial, and that its function is to induce employers to establish usages in reference to fair wages and working conditions. * * * Labor unions frequently fix wage scales and issue notices to employers that the wage scale established by the union is to be the basis of contracts to be made with its members. Workmen have, in some instances, delegated to the labor unions with which they are connected the right to select a superintendent, and the right to make contracts in their behalf. Inferred or implied powers of a voluntary, unincorporated labor union must rest upon [***24] some provision in its constitution, since it embodies the association's whole plan of existence."

In *Robinson et al. v. Nick, et al., (Canavan et al., Interveners), Mo. App., 136 S. W. 2d 374*, the question presented to the court was [*1039] whether plaintiffs were barred from seeking redress in court by reason of their admitted failure to have exhausted the remedies provided within the organization, that is, by an appeal to the general Executive Board, and, from it, to the convention of International Alliance. On page 387 of the opinion the court states this law:

"It is indeed a well settled principle of law that in cases involving the internal affairs of an association such as a trade union, where no distinct property right is directly involved, a member who has a grievance must exhaust whatever remedies are provided within the organization before he may ask the courts to interfere. This for the reason that the relation between the member and the association is contractual; and so long as the constitution, rules, and by-laws of the association, which constitute the contract, do not contravene the laws of the land, and the affairs of the association are conducted fairly [***25] and honestly, the courts will refuse to interfere upon the theory that the decisions of the tribunals set up within the association are binding and conclusive upon the member. *It is no less true, however, that where the association has not acted strictly within the scope of its powers; or where fraud, oppression, or bad faith is shown; or where it appears that an appeal within the organization would have been a vain and useless step, then the failure of the member to have availed himself of the remedies within the organization will not be a bar to his right to ask judicial interference. Hall v. Morrin, Mo. App., 293 S. W. 435, 440*, and cases cited; 63 C. J. 689, 699; 7 C. J. S. Associations, Sec. 34." (Emphasis ours.)

The question presented to the court under this

assignment of error is, was plaintiff justified in seeking relief from the court without first exhausting administrative remedies provided by the Constitution and bylaws of the Union?

Plaintiff's petition alleges that the defendants, "Local 6313, the officers, executive committee and trial court, namely, Allen V. Ayres, Thomas M. Wright, David Chew, J. C. Sheldon, Jack Hurst, Howard Belk, Lloyd Piquard, Arthur Krieckhaus [***26] and George Fore, notwithstanding that plaintiff was in good standing, entered into a conspiracy and actuated by malice and by a determination to deprive this plaintiff of his property and legal rights by a corrupt, arbitrary and illegal use and construction of the powers vested in them by the by-laws and constitution of their organizations hereinbefore referred to, have made unjust, illegal and unfounded charges against this plaintiff and have undertaken to try, fine and otherwise punish this plaintiff in an unjust, illegal and oppressive manner."

[**78] The petition states that the action of the officers, the executive committee and trial court will not carry out the purposes for which defendant local 6313 was created but their actions would be a usurpation of power by them to oppress and unjustly and illegally deprive plaintiff of his properties by fining him and possibly depriving him of [*1040] fees and initiation fees paid by him to defendant-local and other property and legal rights.

Under these allegations plaintiff first offered evidence to show that there was no basis for the charge. It is admitted, in the evidence, that plaintiff was a member of defendant-local [***27] 6313, CWA, CIO, which was the successor to local 3135, under the new organization. Plaintiff had been employed by the Southwestern Bell Telephone Company for some 23 years and, at the time of the alleged lateral transfer, which defendant-union claimed violated its policy, was cable repairman doing outside work. In January, the Company offered to transfer plaintiff to an inside office job, "test board man". The Company told Mr. Ayres, an official of the union, of such offer. Mr. Ayres remonstrated with plaintiff about accepting this transfer and plaintiff was informed by the officers of local 3135 that if he did accept such transfer he would violate the policies of the union and would be subject to having charges filed against him. Plaintiff accepted the transfer February 1, 1951, and is now employed as test board man in the office.

We think the evidence is clear that the lateral transfer was in the same force group and did not increase the numerical size; that the transfer was accepted by plaintiff because of his age and health. The evidence shows that the work of cable repairman was outside work and had to be performed in all kinds of weather and that plaintiff was now 44 [***28] years of age and that the work of "test board man" was inside work.

Article XIV, Section 1 of the Plant Agreement provides:

"A vacancy, except when covered under Sections 4, 5, or 6 hereof, shall for the purpose of this Article be deemed to exist when (a) a Plant Craft position included under Force Group (1), (2), or (3), is vacated and where it is determined that such position is to be filled other than on a temporary basis or other than by transfer from within the same Force Group, or (b) when it is determined that the numerical size of a Force Group is to be increased other than on a temporary basis; * * * For the purpose of this Section each of the following shall be considered as a Force Group:

"(1) The total located Group 1 Craft force (excluding Cable Splicers' Helpers and Framemen) in a particular Exchange Operating Area within a Division.

"(2) The total located Group 2 Craft force in a particular Exchange Operating Area within a Division.

"(3) The total unlocated Group 1 Craft force (excluding Cable Splicers' Helpers) within a Division.

"Section 2. If and when a Vacancy exists as defined in Section 1 of this Article, the Company shall notify the Union of such [***29] fact at least 14 calendar days before the Vacancy be filled, other than on a temporary basis. Within 14 calendar days from the date of such notification the Company will accept for consideration from the Union a list of not more than five applicants for the position, such [*1041] applicants to be limited to Plant Craft employees located (or working in, if Unlocated Craft employees) in:

"(a) the Particular Operating Division involved, or

"(b) the Operating Area, if such Area contains no Operating Division. * * *

"Section 5. The Company shall retain the right to make intercompany or intracompany transfers into or within the Plant Craft group where justified by personal reasons affecting the employee, and the Company will notify the Union of such transfers. * * *

"Section 7. The decision of the Company on any of the matters under the foregoing Sections of this Article shall be controlling [**79] unless the Company is shown to have acted in bad faith. * * *"

By the terms of this agreement plaintiff was working in the same force group. There was no increase in the number of employees and, therefore, there was no vacancy. By the plain wording of the agreement between [***30] the union and the company, the company had the right to make the lateral transfer of plaintiff, which was an intracompany transfer within the Plant Craft Group and such transfer was not one which must be submitted to bids.

We think the evidence that plaintiff wanted to accept the position for health reasons met the contractual requirements that the same should be justified by personal reasons affecting the employee. The company did notify the officials of the union of the intended lateral transfer as required by section V of the Plant Agreement.

We think defendants admit that by the terms of the agreement, the company had the right to make such transfer without notice to the union and that plaintiff had the right to accept such transfer under such Plant Agreement.

On page 42 of defendants' brief, the following statement is made:

"We must make definitely certain that all parties understand that this case is between plaintiff Junkins as a member of the Union and the Union itself. The Southwestern Bell Telephone Company should not be involved in this case in any way. We reiterate that the existing plant agreement does not enter into the charges against Mr. Junkins. We have [***31] attempted to make clear from the beginning that certain types of lateral moves under certain conditions are permissible under the Plant Agreement. * * * However, the Union reserves the right to determine how it will handle its end of the Plant Agreement. The determination of the Union is just as binding upon plaintiff Junkins as it is upon every other member. The Court must remember there are many provisions which this labor union would desire to have incorporated in its Plant Agreement with the company, but which it cannot secure for economic reasons. All of the argument by plaintiff concerning his non-violation of the Plant Agreement is immaterial to this case. The Union never charged plaintiff Junkins with a violation of the Plant Agreement."

[*1042] An examination of the record in this case substantiates our finding that plaintiff was authorized, under the Plant Agreement between the Union and the Company, to accept the lateral transfer in question. This court asked counsel for defendants if plaintiff had the right, under the contract between the Union and the Company, to accept the job transfer in question and counsel informed the court that he did.

The evidence [***32] also shows that other lateral transfers, similar to the one herein made, had been made by the company without charges being filed by the Union.

The policy of the Union claimed to have been violated was adopted in March, 1950, at a regular meeting of the Union by reading a letter from Mr. Al DiProspere, District Director, stating that the local had been in error by agreeing to lateral moves. There was some dispute as to the date of this letter and the trial court seemed to have found that the date had been changed.

In 31 Am. Jur. page 856, Sec. 43, the law is stated:

"A labor union has the right to make and adopt reasonable rules and bylaws governing the conduct of its own members. So long as the bylaws of a union relate to matters in which no one except the association and its members is interested, and violate no right of a third person and no rule of public policy, they are valid. The articles of agreement of a labor union, whether called a constitution, charter, bylaws, or any other name, constitute a contract between the members which the courts will enforce, if not immoral or contrary to public policy or the law of the land. * * * Moreover, the obligations or pledges [***33] of members of a labor union on their initiation must be construed with reference to the declared purposes [**80] of the organization, and are binding only in so far as their purposes are lawful and are to be attained by lawful means."

Under Article III of the Constitution of defendant-union, introduced as plaintiff's exhibit 25,

entitled "Objects", it is stated:

"The objects of the union shall be:

"(a) To unite the workers within its jurisdiction in a single cohesive labor union for the purpose of collective effort;

"(b) To improve the conditions of the workers with respect to wages, hours, working conditions and other conditions of employment; * * *

"(e) To do all things which may be necessary or proper to secure for the workers the enjoyment of their natural rights."

Under Article XVII, it is provided:

"Section 1 - - Bargaining Authority.

"(a) The Communications Workers of America shall be the collective bargaining representative of the members of the Union.

"(b) Collective bargaining within the established bargaining unit or units shall be conducted under the direction of the Executive Board of the International Union and all contracts or agreements entered **[***34]** into **[*1043]** shall be in the name of the International Union and bear the signature of approval of an authorized agent or representative of the International Union."

The contract in question is admitted to have been made as provided by the Constitution of the Union. Under the terms of the Constitution the Plant Agreement between the Union and the Company was made for the purpose of improving the working conditions and other conditions of employment of the members thereof. The policy of the union requiring plaintiff to refuse the benefits of a contract with the company expressly made for the benefit of the members thereof and for the benefit of the company, violates plaintiff's right and also violates the rights of a third party, the company, plaintiff's employer, and is, therefore, invalid under the law above stated.

We hold that such a policy which prevents the members of a union from carrying out a contract made for their benefit, in fact, breaches the contract with the company and such a policy would be against public policy and invalid. *Robinson et al. v. Nick, et al., supra*, page 387.

The trial court was justified in finding that in the filing of charges by the union **[***35]** through its officials against plaintiff for the violation of its policy, which prevented plaintiff from accepting the benefits of a contract made by such union for his benefit, was not conducting the affairs of such union fairly and honestly and that the prosecution of such a charge constitutes oppression and bad faith on the part of the union. Such charge was beyond the power of the union to make. *Eversole v. La Combe, 231 P. 2d 945, 946*; *Hudson v. Cincinnati, etc. Ry. Co., 154 S. W. 47, 48, 49*, (Ky.); *Brooklyn Nat. L. Baseball Club v. Pasquel et al., 66 F. Sup. 117, 119, 120.*

The next question presented to the court under this allegation of error is, did defendant-union act within the scope of its power when it voted to re-try plaintiff on the same charge that he was first tried upon?

The remedies provided within the organization are set out in the Union's Constitution, in evidence, as plaintiff's exhibit 25.

Article VII, entitled "Governing Authority", Section 1 reads:

"The affairs of the Union shall be governed by its membership in the following manner:

"(a) By the Convention as the highest governing authority of the Union, subject to the right of referendum of the **[***36]** membership;

"(b) By the Executive Board exercising the authority of the Convention between Conventions, in accordance with the Constitution and the mandates of the Convention, subject to the right of appeal to the Convention, the referendum and the recall. Except as provided in Article XIII, Section **[**81]** 6, the decisions of the Executive Board must be complied with before the right to appeal can be exercised and such decisions shall remain in effect until reversed or modified;

[*1044] "(c) By the President as the principal executive officer of the Union, who shall have the authority to carry out the policies of the Union in accordance with the Constitution and the mandates of the Convention and the Executive Board, subject to the right of appeal to the Convention, the referendum and the recall;

"(d) By the Locals of the Union conducting their affairs in accordance with this Constitution and Local By-Laws and Rules which they may adopt so long as they do not contravene any provision of this Constitution."

Article XI, entitled "Districts" Section 1, provides:

"The Districts established under this Constitution shall be administrative units of the Union.

Article [***37] XIII, entitled "Locals" provides:

"Section 1 - - Charter.

"(a) A Local shall be a unit of the Union and shall be chartered by the Executive Board. * * *"

Section XIX, entitled "Charges Against Members", reads:

"Section 1 - - Specifications.

"Members may be fined, suspended or expelled by Locals in the manner provided in the Constitution for any of the following acts: * * *

"(c) Wilfully violating the Constitution of the Union, Local By-Laws or Rules; * * *"

Article XXI, under "Trials and Appeals - - General Membership and Officers of Locals."

"Section 1 - - Persons Subject to Trial.

"(a) Members of the Union, including Officers of Locals, shall be tried for any of the offenses listed in Article XIX as provided herein;

"(b) * * * The procedure for such trial shall be in conformity with the standards set forth in Sections 2, 3, and 4 of this Article.

"Section 2 - - Charges.

"(a) Charges made against a member of the Union or an officer of the Local shall be in writing, signed and sworn to by the accuser and filed with the recording officer of the Local of which the accused is a member. In the event the accused is such recording officer, the charges shall be filed [***38] with the President of the Local;

"(b) Charges must be submitted within sixty (60) days of the time the accuser becomes aware of the alleged offense;

"(c) Charges shall contain an allegation of the facts constituting the offense with which the accused is charged and the approximate date or dates said offense is alleged to have occurred.

"Section 3 - - Trials

"(a) The By-Laws or Rules of a Local shall specify the manner in which an accused person shall be tried and must conform with the following minimum standards:

[*1045] "(1) A court, composed of not less than three or more than seven persons, who shall be members of the Local, not parties to the proceeding, shall be selected by the governing body of the Local. The court shall be bound to render a decision and impose a penalty without bias or prejudice, based on all the evidence presented;

"(2) A prosecutor, who is a member of the Local, shall be appointed by the governing body of the Local to assist the accuser in the trial and present evidence;

"(3) The trial shall be held speedily with due notice to the accused;

"(4) The accused shall have the right to select a member of the Local as counsel, the right to produce [***39] witnesses and present [**82] documentary evidence and to be heard on his own behalf. He shall have the opportunity to cross-examine witnesses;

"(5) All witnesses shall testify under oath;

"(6) Notice of the decision and penalty, if any, shall be given to the person charged within five (5) days after the close of the trial;

"(7) A faithful record of the proceedings shall be made;"

"Section 4 - - Appeals

"(a) A member or officer of a Local upon being found guilty by a court may appeal as provided in this Section:

"(1) Have the right to refer the matter to a membership meeting of the Local, within thirty (30) days

after being found guilty by a court, which may affirm or reverse the decision or reduce the penalty;

"(2) Have the right to appeal from the final decision of the Local to the Executive Board of the Union within thirty (30) days after such final decision of the Local;

"(3) The appeal to the Executive Board of the Union shall be directed, in writing, to the Secretary-Treasurer of the Union, who shall obtain the record of the case. The Executive Board shall review the case and affirm or reverse the decision or reduce the penalty;

"(4) Have the right to appeal [***40] from the decision of the Executive Board of the Union to the next Convention by giving a notice of appeal in writing within thirty (30) days after the decision to the Secretary-Treasurer of the Union. If the Executive Board has failed to render a decision within thirty (30) days preceding the Convention, the accused may appeal directly to the Convention which may affirm or reverse the decision or reduce the penalty."

The by-laws of the CWA, CIO, Local 6313 were introduced into evidence as plaintiff's exhibit 27. Article VII, Section 1, of such by-laws provides that the affairs of the local shall be governed by the membership in accordance with the Constitution and policies of the Union.

Article XII of the by-laws provides that there shall be a local president, vice-president, secretary-treasurer who shall have the responsibility for the prosecution of grievances to the Grievance Committee.

[*1046] Article XVI provides that any accused person shall be tried under the provisions of Article XXI of the Union Constitution and that appeals will be allowed as provided in Article XXI, Section 4, of the Constitution.

Section 4 under said article provides that a trial court of [***41] the local shall be comprised of five persons who are members and not parties to the proceeding; that said members of the trial court shall be selected by the members in the membership meeting of the local.

Under the evidence plaintiff was first tried by Local 3135 and was found guilty and fined $ 50.00. He exercised his right to appeal to Division 20. Because of the change in the structural organization of the CWA, CIO, which became effective April 2, 1951, and which abolished Division No. 20, the appeal was sent to the International Executive Board at Washington where the judgment was set aside and remanded to Local 6313. Thomas M. Wright filed charges on November 10, 1951, for the same offense and the cause was set for trial December 14, 1951.

Robinson et al. v. Nick, et al., supra, states the law in Missouri on page 387 of the opinion as follows:

"* * * It is no less true, however, that where the association has not acted strictly within the scope of its powers; * * * then the failure of the member to have availed himself of the remedies within the organization will not be a bar to his right to ask judicial interference. *Hall v. Morrin, Mo. App., 293 S. W. 435, 440*, and [***42] cases cited; 63 C. J. 689, 699; 7 C. J. S., Associations, Sec. 34."

Under the constitution and by-laws the charge against plaintiff had to be [**83] filed in writing with the secretary-treasurer of the local, which was done. Plaintiff was tried and a judgment of a fine of $ 50.00 was set. The evidence shows that plaintiff appealed as provided by the constitution and by-laws to Division No. 20; that the appeal was then transferred to the International Executive Board at Washington, D. C. Under the constitution of the union, the only judgment that the International Board could render was to review the case and affirm or reverse the decision. There was no provision for the remanding of the cause back to the local for re-trial under the remedies within the organization. We have set out the provisions of the constitution and by-laws of the union pertaining to the union's right to discipline its members. The scope of authority of the local union, under the constitution and by-laws, was limited to the filing of charges and the trial of plaintiff. This, it did and when the appeal was taken from the local union its duties were finished and it had no authority to, again, institute [***43] proceedings against plaintiff on the same cause. The final decision of the case rested in the bodies to which the cause was appealed. There was an additional appeal allowable to the convention only with power to review the case and affirm or reverse the decision or reduce the penalty.

[*1047] We hold that under the law as declared in Missouri the Union has not acted strictly within the scope of its power; that local 6313 was without jurisdiction to, again, charge and try plaintiff on the same charge as was

involved in his trial by local 3135. Under such circumstances plaintiff was entitled to seek relief in a court of equity.

From the evidence it is apparent that the trial afforded plaintiff by local 3135 on February 9, 1951, was not held in accordance with the constitution of the union. When the International Executive Board remanded the case to local No. 6313 it gave strict instructions that a fair trial should be granted plaintiff and that the constitutional methods of trial be followed. In the trial some of the witnesses were sworn and some were not. A proper record was not made. All of this leads the court to believe that there was bias and prejudice by those in [***44] charge of the trial against plaintiff. It would seem that a second trial, even though the same was voted by the members of the union, which would be tried by the same local union group, and by members of such union who had heard or participated in the first trial, would be no trial at all. The evidence shows that Ayres, the judge in the first trial, stated that the only question submitted to the local union was the question of whether or not Junkins was guilty. Ayers testified that the Executive Board of the International Union wanted Junkins' case re-tried.

We think the testimony is clear and convincing that the policy of the union under which plaintiff was tried was void, if there were such a policy, because it deprived plaintiff the rights accorded him under a contract between the company and the union and not only affected the rights of plaintiff but those of a third party, the company. Having so held we find that Local 3135 had no right to make such a charge against plaintiff under its constitution and by-laws. We find that because such charges were made against this plaintiff by members of the local and were not filed against other violaters of the same alleged policy, [***45] likewise, shows bias and prejudice and that the affairs of the association were not conducted fairly and honestly. We further find that the charge involved here was beyond the scope and powers of the union to file and an attempt to re-try plaintiff was fraudulent and oppressive and showed bad faith on the part of the union. The fact that they submitted the question to the members of the union as to whether or not plaintiff should be re-tried and had them vote on the question whether he was guilty or not guilty was highly prejudicial to plaintiff and the further fact that the same man who filed the first charge made the charge now under consideration and the same parties who heard the first trial and participated in it were to take part in the last trial, convinces us that a re-trial would [**84] be a vain and useless step under the remedies provided by the union. We find against defendants on this assignment.

[*1048] Defendants' allegation of errors numbered II and IV are covered in our opinion under allegations of error numbered I.

We agree with defendants' contention under allegation of error numbered III, that the transition from the three-level to the two-level [***46] structure within the union was an administrative change and the same substantial labor organization continued in existence. *Citizens Mutual Insurance Society v. Schoen, et al., Mo. App., 105 S. W. 2d 43*; *Wilson v. Kings Lake Drainage & Levee District, Mo. App., 165 S. W. 734.*

Allegation of Error numbered V, relating to constitutional matters, is not within the jurisdiction of this court and was passed upon by the Supreme Court. Judgment affirmed. *Blair* and *Stone, JJ.*, concur.

GLADYS S. CONE, Appellant, v. UNION OIL COMPANY OF CALIFORNIA, Respondent

Civ. No. 20325

Court of Appeal of California, Second Appellate District, Division Two

129 Cal. App. 2d 558; 277 P.2d 464; 1954 Cal. App. LEXIS 1647; 27 Lab. Cas. (CCH) P68,923

December 15, 1954

PRIOR HISTORY: [***1] APPEAL from a judgment of the Superior Court of Los Angeles County. George Francis, Judge. *

* Assigned by Chairman of Judicial Council.

Action for damages for violation of a collective bargaining agreement.

DISPOSITION: Affirmed. Judgment for defendant affirmed.

HEADNOTES

CALIFORNIA OFFICIAL REPORTS HEADNOTES

(1) Judgments--Summary Judgments--Purpose. --Purpose of summary judgment procedure is to expedite litigation by avoiding needless trials, and, although it is not substitute for regular trial and does not authorize trial of any bona fide issues of fact which affidavits reveal, the procedure permits court to pierce allegations of pleadings to ascertain whether genuine cause of action exists and whether defense is sham.

(2) Id.--Summary Judgments--Affidavits. --If it appears from affidavits filed in support of, and in opposition to, motion for summary judgment that no triable issue of fact exists, and affidavit in support states facts which, if proved, would sustain judgment in favor of moving party, then summary judgment is proper. (*Code Civ. Proc., § 437c.*)

(3) Id.--Summary Judgments--Affidavits. --Propriety of granting or denying motion for summary judgment depends on sufficiency of affidavits filed.

(4) Id.--Summary Judgments--Affidavits. --If plaintiff fails to file affidavit in opposition to one filed in support of defendant's motion for summary judgment, court may accept as true the facts stated in affidavit filed in support which were within personal knowledge of affiant and to which he could competently testify.

(5) Id.--Summary Judgments--Affidavits. --Failure to file affidavit in opposition to motion for summary judgment, supported by affidavit, cannot be remedied by resort to pleadings.

(6a) (6b) Id.--Summary Judgments--Affidavits. --In employee's action charging employer with breaching collective bargaining agreement, employer's motion for summary judgment is properly granted, where it appears from affidavits filed by defendant that plaintiff failed to exhaust administrative remedies provided by the agreement, and where plaintiff fails to file affidavit in opposition to motion.

(7) Labor -- Collective Bargaining Contracts: Remedies -- Conditions Precedent. --Party to collective bargaining contract which provides grievance and

arbitration machinery for settlements of disputes within scope of contract must exhaust these internal remedies before resorting to courts, in absence of facts which would excuse him from pursuing internal remedies.

COUNSEL: Thomas D. Griffin for Appellant.

L. A. Gibbons, Douglas C. Gregg, A. Andrew Hauk, Sheldon C. Houts, and Ball, Hunt & Hart for Respondent.

JUDGES: Fox, J. Moore, P. J., and McComb, J., concurred.

OPINION BY: FOX

OPINION

[*559] [**465] This is an appeal by plaintiff from a summary judgment in favor of the defendant Union Oil Company.

Plaintiff seeks to recover damages for the alleged violation by the defendant of a collective bargaining agreement between the company and Local No. 128, Oil Workers International Union, C.I.O. Plaintiff claims that the company breached certain agreements settling a strike that began in September, 1948, and ended on January 10, 1949. She alleges that the company's breach consists of failing to employ her in accordance with the terms and conditions of this agreement and of employing others having less seniority than she had in job openings for which she could qualify. Plaintiff bases [***2] her suit on Exhibit A to the complaint, which is the strike settlement agreement with an addendum thereto. Plaintiff prays for wages allegedly accrued from January 10, 1949, to the date of filing her complaint and in addition for prospective loss of wages.

The company, in its answer, denies liability and alleges that it has scrupulously abided by all the terms and conditions [*560] of the strike settlement. The company also alleges that Exhibit A to plaintiff's complaint does not contain all of the addenda [**466] which were a part of the strike settlement agreement of January 10, 1949. The company also pleads that the failure of the plaintiff to perform certain conditions precedent in the strike settlement agreement and addenda bars the maintenance of this action.

Defendant moved for summary judgment. In support of the motion it submitted the affidavit of Kenneth E. Kingman, its vice president, who conducted all negotiations with the union at all times involved herein. The Kingman affidavit discloses that:

1. The collective bargaining agreement upon which plaintiff seeks recovery consists of the strike settlement agreement dated January 9, 1949 (effective January [***3] 10th), and three separate addenda thereto, all of which are attached as exhibits to the affidavit.

2. By agreement between the union, of which plaintiff was a member and which was authorized to represent her as her collective bargaining agent, and the company the grievance procedures set up in article VII of the prior collective bargaining agreement between the parties dated March 4, 1946, were incorporated in the strike settlement agreement for use in settling disputes.

3. These grievance procedures consisted of seven detailed and specific steps, from initiation of the grievance to final arbitration in the event settlement of the dispute should not be effected or decision rendered in the intermediate steps.

4. Plaintiff initiated grievance No. 13, raising the identical matters set forth in her complaint herein, and the grievance procedure was pursued through the first six steps.

5. Step seven of the grievance procedure provided as follows: "If the grievance is not decided by the procedure in paragraph 6 above, the representatives above mentioned shall stipulate the issues to be decided by an arbiter. The two representatives shall select a third person agreeable to both parties [***4] to decide the dispute. Should the two representatives fail to agree on a third party within seven (7) days then either party shall have the right to request the conciliation service of the U. S. Department of Labor to assign a third party to act as arbiter. The decision of the arbiter shall be final and binding upon both the Company and the Union. In no case shall the decision of an arbiter change or modify the terms of this agreement. The expense and compensation [*561] of the arbiter shall be shared equally by the Company and the Union."

6. Although the grievance was not settled or decided in the first six steps, neither plaintiff nor the union on her behalf requested the selection of a third arbiter to decide the dispute, nor did plaintiff or the union on her behalf request the conciliation service of the United States

Department of Labor to assign a third party to act as arbiter.

7. Plaintiff, and the union on her behalf, failed and neglected to exhaust the grievance procedures incorporated in the strike settlement agreement, and particularly those contained in said article VII of the 1946 collective bargaining agreement, in that plaintiff, and the union on her behalf, [***5] failed and neglected to pursue or utilize the seventh step in these grievance procedures. Furthermore, at no time did she, or the union on her behalf, present or submit to defendant any other grievance arising out of the application to her of any of the terms or provisions of the strike settlement agreement.

8. An additional procedure for the settlement of grievances, based upon the application of paragraphs 9 and 10 of the strike settlement agreement, was provided in paragraph 13 of that document, namely, reference of complaints to a special union-management committee, but at no time did plaintiff or the union, on her behalf, refer any complaint to this special committee.

9. Finally, at no time did the defendant ever fail, refuse or neglect to cooperate with plaintiff, or the union, with respect to exhausting, pursuing, continuing or complying with the grievance and arbitration procedures.

Plaintiff does not allege in her complaint that she ever made any demand on the [**467] union to exhaust, pursue or continue with the arbitration of said grievance, or any other grievance, on her behalf, either pursuant to the grievance and arbitration procedure provided in article VII of [***6] the 1946 agreement, or pursuant to the additional grievance procedure provided in paragraph 13 of the strike settlement agreement. Neither does she allege in her complaint that the defendant has refused to pursue or comply with the aforesaid grievance and arbitration procedures, nor does she charge that the company has ever failed, refused or neglected to cooperate with her or with the union in the pursuit or continuance of said grievance and arbitration procedures.

[*562] Plaintiff did not file any counteraffidavit, nor was any such affidavit filed on her behalf.

It is thus undisputed that plaintiff and the union on her behalf have failed and neglected to pursue and exhaust the remedies given by the collective bargaining agreement, namely, the grievance and arbitration procedures provided therein, and that the company was in no way in default or at fault in this regard.

(1) The obvious purpose to be served by the summary judgment procedure is to expedite litigation by avoiding needless trials. While it is not a substitute for a regular trial and does not authorize the trial of any bona fide issues of fact which the affidavits may reveal, it permits the court to pierce the allegations [***7] of the pleadings to ascertain whether a genuine cause of action in fact exists or whether the defense interposed is sham or feigned. (*Kelly v. Liddicoat, 35 Cal.App.2d 559, 561, 562 [96 P.2d 186].*)

Section 437c, Code of Civil Procedure, provides, *inter alia*, that if it is claimed that an action has no merit the defendant may, upon proper notice, make a motion, supported by an affidavit of any person having knowledge of the facts, that the complaint be dismissed and judgment entered. The plaintiff, however, "by affidavit or affidavits, shall show . . . such facts as may be deemed by the judge hearing the motion sufficient to present a triable issue of fact." **(2)** If it appears from an examination of the affidavits that no triable issue of fact exists, and that the affidavits in support of the motion state facts which, if proved, would support a judgment in favor of the moving party, then summary judgment is proper. (*Coyne v. Krempels, 36 Cal.2d 257, 261 [223 P.2d 244].*) **(3)** It is thus apparent that the propriety of granting or denying the motion depends upon the sufficiency of the affidavits that have been filed. (*Kimber v. Jones, 122 Cal.App.2d 914, 918* [***8] *[265 P.2d 922]; McComsey v. Leaf, 36 Cal.App.2d 132, 133 [97 P.2d 242]; Poochigian v. Layne, 120 Cal.App.2d 757, 760 [261 P.2d 738].*)

(4) Since plaintiff failed to file any affidavit in opposition to the affidavit filed on behalf of the defendant, the court was entitled to accept as true the facts therein stated, which were within the personal knowledge of the affiant and to which the affiant could competently testify. (*Coyne v. Krempels, supra, pp. 261-262*; see *Holland v. Lansdowne-Moody Co., (Tex.Civ.App.) 269 S.W.2d 478, 481.*) Plaintiff urges, however, that the pleadings herein raise particular [*563] issues of fact which preclude the granting of a motion for summary judgment. Plaintiff has fallen into the error of relying on her complaint as a means of disputing the affidavit filed on behalf of defendant. **(5)** The fallacy of this position is demonstrated in *Coyne v. Krempels, supra*

, and *Hardware Mut. Ins. Co. v. Valentine, 119 Cal.App.2d 125, 129 [259 P.2d 70]*, which lay down the rule that the failure to file counteraffidavits cannot be remedied by resort to the pleadings. As pointed out in the careful analysis of this question **[***9]** in the Coyne case, the sufficiency of the allegations of a complaint do not determine the motion for a summary judgment. Rather, it must be determined from the affidavits whether there exists a genuine issue as to any material fact. Often there is no genuine issue of fact, although such an issue is raised by the formal pleadings. Absent a genuine issue of fact as disclosed by the affidavits, a party is not entitled to proceed to trial and the court, applying the law to the uncontroverted material facts, may render a summary judgment. **(6a)** The sole question then **[**468]** is, is the defendant entitled to a summary judgment on the basis of the undisputed facts in the affidavit it filed in support of its motion? This question must be answered in the affirmative.

As appears from the above facts, the correlative rights and obligations of the parties are governed by the strike settlement agreement and addenda which incorporated the grievance and arbitration procedures of Article VII of the prior collective bargaining agreement dated March 4, 1946. Plaintiff, and the union as her collective bargaining agent, have admittedly failed to complete and exhaust such grievance and arbitration **[***10]** procedures. She is therefore precluded from maintaining the present action. **(7)** It is the general rule that a party to a collective bargaining contract which provides grievance and arbitration machinery for the settlement of disputes within the scope of such contract must exhaust these internal remedies before resorting to the courts in the absence of facts which would excuse him from pursuing such remedies. (*Barker v. Southern Pac. Co., (9th Cir.) 214 F.2d 918*; *Wallace v. Southern Pac. Co., 106 F.Supp. 742* (N.D. Calif.); *Buberl v. Southern Pac. Co., 94 F.Supp. 11* (N.D. Calif.); *Ringle v. Transcontinental & Western Air, Inc., 113 F.Supp. 897, 899*; *Transcontinental & Western Air, Inc. v. Koppal, 345 U.S. 653 [73 S.Ct. 906, 97 L.Ed. 1325]*; *Reed v. St. Louis S.W.R. Co., (Mo.App.) 95 S.W.2d 887*; *Glass v. Hoblitzelle, (Tex.Civ.App.) 83 S.W.2d 796*; *In the Matter of* **[*564]** *Consolidated Aircraft Corp., 47 N.L.R.B. 694, 705-706*; 31 Am.Jur., Labor, p. 881, § 123.) This rule, which is analogous to the rule requiring the exhaustion of administrative remedies as a condition precedent to resorting to the courts (2 Cal.Jur.2d 304, **[***11]** § 184), is based on a practical approach to the myriad problems, complaints and grievances that arise under a collective bargaining agreement. It makes possible the settlement of such matters by a simple, expeditious and inexpensive procedure, and by persons who, generally, are intimately familiar therewith. (*Utah Const. Co. v. Western Pac. R. Co., 174 Cal. 156, 159 [162 P. 631]*.) The use of these internal remedies for the adjustment of grievances is designed not only to promote settlement thereof but also to foster more harmonious employee-employer relations. (*Myers v. Richfield Oil Corp., 98 Cal.App.2d 667, 671 [220 P.2d 973]*.) Such procedures, which have been worked out and adopted by the parties themselves, must be pursued to their conclusion before judicial action may be instituted unless circumstances exist which would excuse the failure to follow through with the contract remedies. (*Barker v. Southern Pac. Co., supra*; *Wallace v. Southern Pac. Co., supra*; *Buberl v. Southern Pac. Co., supra*; *Transcontinental & Western Air, Inc. v. Koppal, supra*; *Reed v. St. Louis S.W.R. Co., supra*.) **(6b)** In the instant case, plaintiff **[***12]** gives no facts or reasons for her failure to follow through the agreed procedure for settling her grievance. There is no denial that the matters involved in her grievance No. 13 are the same and identical with the matters which form the basis of her complaint in this suit. An examination of Kingman's affidavit discloses that he had been in charge of and personally conducted all negotiations with the union on behalf of the company during all the times mentioned in his affidavit. He thus made a sufficient showing of his competency to testify to the facts stated therein.

The trial court, correctly applying the law to the uncontroverted facts before it, properly granted defendant's motion for summary judgment. (*Coyne v. Krempels, 36 Cal.2d 257, 263 [223 P.2d 244]*; *Hardware Mut. Ins. Co. v. Valentine, 119 Cal.App.2d 125, 129 [259 P.2d 70]*.)

The judgment is affirmed.

SHELLEY ET UX. v. KRAEMER ET UX.

No. 72

SUPREME COURT OF THE UNITED STATES

334 U.S. 1; 68 S. Ct. 836; 92 L. Ed. 1161; 1948 U.S. LEXIS 2764; 3 A.L.R.2d 441

January 15-16, 1948, Argued
May 3, 1948, Decided

PRIOR HISTORY: CERTIORARI TO THE SUPREME COURT OF MISSOURI. *

* Together with No. 87, McGhee et ux. v. Sipes et al., on certiorari to the Supreme Court of Michigan.

No. 72. The Supreme Court of Missouri reversed a judgment of a state trial court denying enforcement of a private agreement restricting the use or occupancy of certain real estate to persons of the Caucasian race. *355 Mo. 814, 198 S. W. 2d 679*. This Court granted certiorari. *331 U.S. 803*. Reversed, p. 23.

No. 87. The Supreme Court of Michigan affirmed a judgment of a state trial court enjoining violation of a private agreement restricting the use or occupancy of certain real estate to persons of the Caucasian race. *316 Mich. 614, 25 N. W. 2d 638*. This Court granted certiorari. *331 U.S. 804*. Reversed, p. 23.

DISPOSITION: *355 Mo. 814, 198 S. W. 2d 679*, and *316 Mich. 614, 25 N. W. 2d 638*, reversed.

SUMMARY:

The judicial enforcement by state courts of covenants restricting the use or occupancy of real property to persons of the Caucasian race was held by six members of Court, in opinion by Vinson, Ch. J. (Reed, Jackson, and Rutledge, JJ., not participating), to violate the *equal protection clause of the 14th Amendment*. Conceding that the Amendment is directed against state action only and does not reach private conduct, however discriminatory, the opinion holds that judicial action, even for the enforcement of private agreements, is state action, and so within the Amendment's field of operation; and that the enforcement of restrictive covenants against certain races is none the less discriminatory because courts will enforce them against any race against whom they are directed, including the white race.

LAWYERS' EDITION HEADNOTES:

[*LEdHN1]**

CIVIL RIGHTS, §7

enforcement of restrictive covenants based on race or color as violation of constitutional rights. --

Headnote:[1]

While restrictive covenants as to ownership or occupancy of property, based on race or color, cannot in themselves be regarded as a violation of the *equal protection clause of the Fourteenth Amendment*, judicial enforcement by state courts of such covenants is inhibited by the *equal protection clause* of such Amendment, even though such courts stand ready to enforce restrictive covenants irrespective of the race of which exclusion is sought (distinguishing *Corrigan v. Buckley, 271 US 323, 70* L ed 969, *46 S Ct 621* and *Hansberry v. Lee, 311 US 32, 85* L ed 22, *132 ALR 741, 61 S Ct 115*).

[*LEdHN2]**

CONSTITUTIONAL LAW, §315

equal protection -- rights protected. --

Headnote:[2]

Among the civil rights intended to be protected from discriminatory state action by the *Fourteenth Amendment* are the rights to acquire, enjoy, own and dispose of property.

[*LEdHN3]**

CIVIL RIGHTS, §7

legislative restrictions on right to acquire or occupy property as violation of constitutional rights. --

Headnote:[3]

A state statute or local ordinance imposing restrictions based on color or race on the right to acquire or occupy property offends the *equal protection clause of the Fourteenth Amendment* (dictum).

[*LEdHN4]**

CONSTITUTIONAL LAW, §314

equal protection -- scope of Fourteenth Amendment -- state action and private conduct. --

Headnote:[4]

The action inhibited by the *equal protection clause of the Fourteenth Amendment* is only such action as may fairly be said to be that of the states. The Amendment erects no shield against merely private conduct, however discriminatory or wrongful.

[*LEdHN5]**

CONSTITUTIONAL LAW, §314

equal protection -- scope of Fourteenth Amendment -- judicial enforcement of private agreement as state action. --

Headnote:[5]

The action of state courts and of judicial officers in their official capacities, even though taken for the enforcement of private agreements, is state action within the provision of the *Fourteenth Amendment* that no state shall deny to any person within its jurisdiction the equal protection of the laws.

[*LEdHN6]**

CONSTITUTIONAL LAW, §865

police power -- discrimination based on race or color as not within. --

Headnote:[6]

Discriminations imposed by state courts in denying equal protection of property rights to a designated class of citizens of specified race and ancestry cannot be justified as proper exertions of the state police power.

[*LEdHN7]**

CONSTITUTIONAL LAW, §316

equal protection -- indiscriminate inequalities. --

Headnote:[7]

Equal protection of the laws required by the *Fourteenth Amendment* is not achieved through indiscriminate imposition of inequalities.

[*LEdHN8]**

CONSTITUTIONAL LAW, §488

judicial refusal to enforce racial covenants as unconstitutional discrimination. --

Headnote:[8]

Property owners who are parties to agreements restricting the occupancy of property to persons of a specified race are not denied the equal protection of the laws if denied access to the courts to enforce such agreements and to assert property rights which the state courts have held to be created thereby.

[*LEdHN9]**

CONSTITUTIONAL LAW, §314

property rights -- state powers as limited by the Fourteenth Amendment. --

Headnote:[9]

The power of the states to create and enforce property interests must be exercised within the boundaries defined by the *Fourteenth Amendment.*

[*LEdHN10]**

COURTS, §95

STATES, §15

duty of Supreme Court to declare state action unconstitutional. --

Headnote:[10]

Where the action of a state clearly violates the terms of the Federal Constitution, it is the duty of the Supreme Court of the United States so to declare.

[*LEdHN11]**

CONSTITUTIONAL LAW, §17

construction of Fourteenth Amendment with reference to historical background. --

Headnote:[11]

The historical context in which the *Fourteenth Amendment* became a part of the Constitution indicates that the matter of primary concern was the establishment of equality in the enjoyment of basic civil and political rights and the preservation of those rights from discriminatory action on the part of the states based on considerations of race and color; and the provisions of the Amendment are to be construed with this fundamental purpose in mind.

SYLLABUS

Private agreements to exclude persons of designated race or color from the use or occupancy of real estate for residential purposes do not violate the *Fourteenth Amendment*; but it is violative of the *equal protection clause of the Fourteenth Amendment* for state courts to enforce them. *Corrigan v. Buckley, 271 U.S. 323*, distinguished. Pp. 8-23.

(a) Such private agreements standing alone do not violate any rights guaranteed by the *Fourteenth Amendment*. Pp. 12-13.

(b) The actions of state courts and judicial officers in their official capacities are actions of the states within the meaning of the *Fourteenth Amendment*. Pp. 14-18.

(c) In granting judicial enforcement of such private agreements in these cases, the states acted to deny petitioners the equal protection of the laws, contrary to the *Fourteenth Amendment*. Pp. 18-23.

(d) The fact that state courts stand ready to enforce restrictive covenants excluding white persons from the ownership or occupancy of property covered by them does not prevent the enforcement of covenants excluding colored persons from constituting a denial of equal protection of the laws, since the rights created by *§ 1 of the Fourteenth Amendment* are guaranteed to the individual. Pp. 21-22.

(e) Denial of access to the courts to enforce such restrictive covenants does not deny equal protection of the laws to the parties to such agreements. P. 22.

COUNSEL: George L. Vaughn and Herman Willer argued the cause and filed a brief for petitioners in No. 72. Earl Susman was also of counsel.

Thurgood Marshall and Loren Miller argued the cause for petitioners in No. 87. With them on the brief were Willis M. Graves, Francis Dent, William H. Hastie, Charles H. Houston, George M. Johnson, William R. Ming, Jr., James Nabrit, Jr., Marian Wynn Perry, Spottswood W. Robinson, III, Andrew Weinberger and Ruth Weyand.

By special leave of Court, Solicitor General Perlman argued the cause for the United States, as amicus curiae, supporting petitioners. With him on the brief was Attorney General Clark.

Gerald L. Seegers argued the cause for respondents in No. 72. With him on the brief was Walter H. Pollmann. Benjamin F. York was also of counsel.

Henry Gilligan and James A. Crooks argued the cause and filed a brief for respondents in No. 87. Lloyd T. Chockley was also of counsel.

Briefs of amici curiae supporting petitioners were filed by Perry W. Howard for the Civil Liberties Department, Grand Lodge of Elks, I. B. P. O. E. W.; Isaac Pacht, Irving Hill and Clore Warne; Robert McC. Marsh and Eugene Blanc, Jr. for the Protestant Council of New York City; Herbert S. Thatcher and Robert A. Wilson for the

American Federation of Labor; Julius L. Goldstein for the Non-Sectarian Anti-Nazi League to Champion Human Rights, Inc.; Melville J. France for the General Council of Congregational Christian Churches et al.; Robert W. Kenny, O. John Rogge and Mozart G. Ratner for the National Lawyers Guild; Lee Pressman, Eugene Cotton, Frank Donner, John J. Abt, Leon M. Despres, M. H. Goldstein, Isadore Katz, David Rein, Samuel L. Rothbard, Harry Sacher, William Standard and Lindsay P. Walden for the Congress of Industrial Organizations et al.; Phineas Indritz, Irving R. M. Panzer and Richard A. Solomon for the American Veterans Committee; William Maslow, Shad Polier, Joseph B. Robison, Byron S. Miller and William Strong for the American Jewish Congress; Joseph M. Proskauer and Jacob Grumet for the American Jewish Committee et al.; William Strong for the American Indian Citizens League of California, Inc.; Francis M. Dent, Walter M. Nelson, Eugene H. Buder, Victor B. Harris, Luther Ely Smith and Harold I. Kahen for the American Civil Liberties Union; Earl B. Dickerson, Richard E. Westbrooks and Loring B. Moore for the National Bar Association; Alger Hiss, Joseph M. Proskauer and Victor Elting for the American Association for the United Nations; and Edward C. Park and Frank B. Frederick for the American Unitarian Association.

Briefs of amici curiae supporting respondents were filed by Roger J. Whiteford and John J. Wilson for the National Association of Real Estate Boards; Ray C. Eberhard and Elisabeth Eberhard Zeigler for the Arlington Heights Property Owners Association et al.; and Thomas F. Cadwalader and Carlyle Barton for the Mount Royal Protective Association, Inc.

JUDGES: Vinson, Black, Frankfurter, Douglas, Murphy, Burton; Reed, Jackson and Rutledge took no part in the consideration or decision of this case.

OPINION BY: VINSON

OPINION

[*4] [**838] [***1176] MR. CHIEF JUSTICE VINSON delivered the opinion of the Court.

These cases present for our consideration questions relating to the validity of court enforcement of private agreements, generally described as restrictive covenants, which have as their purpose the exclusion of persons of designated race or color from the ownership or occupancy of real property. Basic constitutional issues of obvious importance have been raised.

The first of these cases comes to this Court on certiorari to the Supreme Court of Missouri. On February 16, 1911, thirty out of a total of thirty-nine owners of property fronting both sides of Labadie Avenue between Taylor Avenue and Cora Avenue in the city of St. Louis, signed an agreement, which was subsequently recorded, providing in part:

". . . the said property is hereby restricted to the use and occupancy for the term of Fifty (50) years from this date, so that it shall be a condition all the time and whether recited and referred to as [*sic*] not in subsequent conveyances and shall attach to the land as a condition precedent to the sale of the same, that hereafter no part of said property or any [*5] portion thereof shall be, for said term of Fifty-years, occupied by any person not of the Caucasian race, it being intended hereby to restrict the use of said property for said period of time against the occupancy as owners or tenants of any portion of said property for resident or other purpose by people of the Negro or Mongolian Race."

The entire district described in the agreement included fifty-seven parcels of land. The thirty owners who signed the agreement held title to forty-seven parcels, including the particular parcel involved in this case. At the time the agreement was signed, five of the parcels in the district were owned by Negroes. One of those had been occupied by Negro families since 1882, nearly thirty years before the restrictive agreement was executed. The trial court found that owners of seven out of nine homes on the south side of Labadie Avenue, within the restricted district and "in the immediate vicinity" of the premises in question, had failed to sign the restrictive agreement in 1911. At the time this action was brought, four of the premises were occupied by Negroes, and had been so occupied for periods ranging from twenty-three to sixty-three years. A fifth parcel had been occupied by Negroes until a year before this suit was instituted.

On August 11, 1945, pursuant to a contract of sale, petitioners Shelley, who are Negroes, for valuable consideration received from one Fitzgerald a warranty deed to the parcel in question. [1] The trial court found that petitioners had no actual knowledge of the restrictive agreement at the time of the purchase.

1 The trial court found that title to the property which petitioners Shelley sought to purchase was held by one Bishop, a real estate dealer, who placed the property in the name of Josephine Fitzgerald. Bishop, who acted as agent for petitioners in the purchase, concealed the fact of his ownership.

[*6] On October 9, 1945, respondents, as owners of other property subject to the terms of the restrictive covenant, brought suit in the Circuit Court of the city of St. Louis praying that petitioners Shelley be restrained from taking possession of the property and that judgment be entered divesting title out of petitioners Shelley and revesting title in the immediate grantor or in such other person as the court should direct. The trial court denied the requested relief on the ground that the restrictive agreement, upon [***1177] which respondents based their action, had never become final and complete because it was the intention of the parties to that agreement that it was not to become effective until signed by all property owners in the district, and signatures of all the owners had never been obtained.

[**839] The Supreme Court of Missouri sitting *en banc* reversed and directed the trial court to grant the relief for which respondents had prayed. That court held the agreement effective and concluded that enforcement of its provisions violated no rights guaranteed to petitioners by the Federal Constitution. [2] At the time the court rendered its decision, petitioners were occupying the property in question.

2 *Kraemer v. Shelley, 355 Mo. 814, 198 S. W. 2d 679 (1946).*

The second of the cases under consideration comes to this Court from the Supreme Court of Michigan. The circumstances presented do not differ materially from the Missouri case. In June, 1934, one Ferguson and his wife, who then owned the property located in the city of Detroit which is involved in this case, executed a contract providing in part:

"This property shall not be used or occupied by any person or persons except those of the Caucasian race.

[*7] "It is further agreed that this restriction shall not be effective unless at least eighty percent of the property fronting on both sides of the street in the block where our land is located is subjected to this or a similar restriction."

The agreement provided that the restrictions were to remain in effect until January 1, 1960. The contract was subsequently recorded; and similar agreements were executed with respect to eighty percent of the lots in the block in which the property in question is situated.

By deed dated November 30, 1944, petitioners, who were found by the trial court to be Negroes, acquired title to the property and thereupon entered into its occupancy. On January 30, 1945, respondents, as owners of property subject to the terms of the restrictive agreement, brought suit against petitioners in the Circuit Court of Wayne County. After a hearing, the court entered a decree directing petitioners to move from the property within ninety days. Petitioners were further enjoined and restrained from using or occupying the premises in the future. On appeal, the Supreme Court of Michigan affirmed, deciding adversely to petitioners' contentions that they had been denied rights protected by the *Fourteenth Amendment.* [3]

3 *Sipes v. McGhee, 316 Mich. 614, 25 N. W. 2d 638 (1947).*

Petitioners have placed primary reliance on their contentions, first raised in the state courts, that judicial enforcement of the restrictive agreements in these cases has violated rights guaranteed to petitioners by the *Fourteenth Amendment of the Federal Constitution* and Acts of Congress passed pursuant to that Amendment. [4] Specifically, [*8] petitioners urge that they have been denied the equal protection of the laws, deprived of property without due process of law, and have been denied privileges and immunities of citizens of the United States. We pass to a consideration of those issues.

4 The first section of the *Fourteenth Amendment* provides: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

I.

[1]

Whether the *equal protection clause of the Fourteenth Amendment* **[***1178]** inhibits judicial enforcement by state courts of restrictive covenants based on race or color is a question which this Court has not heretofore been called upon to consider. Only two cases have been decided by this Court which in any way have involved the enforcement of such agreements. The first of these was the case of *Corrigan v. Buckley, 271 U.S. 323 (1926).* There, suit was brought in the courts of the District of Columbia to enjoin a threatened violation of certain restrictive covenants relating to lands situated in the city of Washington. Relief was granted, and the case was brought here **[**840]** on appeal. It is apparent that that case, which had originated in the federal courts and involved the enforcement of covenants on land located in the District of Columbia, could present no issues under the *Fourteenth Amendment*; for that Amendment by its terms applies only to the States. Nor was the question of the validity of court enforcement of the restrictive covenants under the *Fifth Amendment* properly before the Court, as the opinion of this Court specifically recognizes. [5] The only constitutional issue which the appellants had raised in the lower courts, and hence the only constitutional issue **[*9]** before this Court on appeal, was the validity of the covenant agreements as such. This Court concluded that since the inhibitions of the constitutional provisions invoked apply only to governmental action, as contrasted to action of private individuals, there was no showing that the covenants, which were simply agreements between private property owners, were invalid. Accordingly, the appeal was dismissed for want of a substantial question. Nothing in the opinion of this Court, therefore, may properly be regarded as an adjudication on the merits of the constitutional issues presented by these cases, which raise the question of the validity, not of the private agreements as such, but of the judicial enforcement of those agreements.

5 *Corrigan v. Buckley, 271 U.S. 323, 330-331 (1926).*

The second of the cases involving racial restrictive covenants was *Hansberry v. Lee, 311 U.S. 32 (1940).* In that case, petitioners, white property owners, were enjoined by the state courts from violating the terms of a restrictive agreement. The state Supreme Court had held petitioners bound by an earlier judicial determination, in litigation in which petitioners were not parties, upholding the validity of the restrictive agreement, although, in fact, the agreement had not been signed by the number of owners necessary to make it effective under state law. This Court reversed the judgment of the state Supreme Court upon the ground that petitioners had been denied due process of law in being held estopped to challenge the validity of the agreement on the theory, accepted by the state court, that the earlier litigation, in which petitioners did not participate, was in the nature of a class suit. In arriving at its result, this Court did not reach the issues presented by the cases now under consideration.

It is well, at the outset, to scrutinize the terms of the restrictive agreements involved in these cases. In the Missouri case, the covenant declares that no part of the **[*10]** affected property shall be "occupied by any person not of the Caucasian race, it being intended hereby to restrict the use of said property . . . against the occupancy as owners or tenants of any portion of said property for resident or other purpose by people of the Negro or Mongolian Race." Not only does the restriction seek to proscribe use and occupancy of the affected properties by members of the excluded class, but as construed by the Missouri **[***1179]** courts, the agreement requires that title of any person who uses his property in violation of the restriction shall be divested. The restriction of the covenant in the Michigan case seeks to bar occupancy by persons of the excluded class. It provides that "This property shall not be used or occupied by any person or persons except those of the Caucasian race."

It should be observed that these covenants do not seek to proscribe any particular use of the affected properties.. Use of the properties for residential occupancy, as such, is not forbidden. The restrictions of these agreements, rather, are directed toward a designated class of persons and seek to determine who may and who may not own or make use of the properties for residential purposes. The excluded class is defined wholly in terms of race or color; "simply that and nothing more." [6]

6 *Buchanan v. Warley, 245 U.S. 60, 73 (1917).*

[2]

It **[**841]** cannot be doubted that among the civil rights intended to be protected from discriminatory state action by the *Fourteenth Amendment* are the rights to acquire, enjoy, own and dispose of property. Equality in the enjoyment of property rights was regarded by the

framers of that Amendment as an essential pre-condition to the realization of other basic civil rights and liberties which the Amendment was intended to guarantee. [7] Thus, [*11] § 1978 of the Revised Statutes, derived from § 1 of the Civil Rights Act of 1866 which was enacted by Congress while the *Fourteenth Amendment* was also under consideration, [8] provides:

" All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." [9]

This Court has given specific recognition to the same principle. *Buchanan v. Warley, 245 U.S. 60 (1917).*

7 *Slaughter-House Cases, 16 Wall. 36, 70, 81 (1873).* See Flack, The Adoption of the *Fourteenth Amendment.*

8 In *Oyama v. California, 332 U.S. 633, 640 (1948)* the section of the Civil Rights Act herein considered is described as the federal statute, "enacted before the *Fourteenth Amendment* but vindicated by it." The Civil Rights Act of 1866 was reenacted in § 18 of the Act of May 31, 1870, subsequent to the adoption of the *Fourteenth Amendment.* 16 Stat. 144.

9 14 Stat. 27, 8 U. S. C. § 42.

It is likewise clear that restrictions on the right of occupancy of the sort sought to be created by the private agreements in these cases could not be squared with the requirements of the *Fourteenth Amendment* if imposed by state statute or local ordinance. We do not understand respondents to urge the contrary. In the case of *Buchanan v. Warley, supra,* a unanimous Court declared unconstitutional the provisions of a city ordinance which denied to colored persons the right to occupy houses in blocks in which the greater number of houses were occupied by white persons, and imposed similar restrictions on white persons with respect to blocks in which the greater number of houses were occupied by colored persons. During the course of the opinion in that case, this Court stated: "The *Fourteenth Amendment* and these statutes enacted in furtherance of its purpose operate to qualify and entitle a colored man to acquire [*12] property without state legislation discriminating against him solely because of color." [10]

10 *Buchanan v. Warley, 245 U.S. 60, 79 (1917).*

[***1180] In *Harmon v. Tyler, 273 U.S. 668 (1927),* a unanimous court, on the authority of *Buchanan v. Warley, supra,* declared invalid an ordinance which forbade any Negro to establish a home on any property in a white community or any white person to establish a home in a Negro community, "except on the written consent of a majority of the persons of the opposite race inhabiting such community or portion of the City to be affected."

[3]

The precise question before this Court in both the *Buchanan* and *Harmon* cases involved the rights of white sellers to dispose of their properties free from restrictions as to potential purchasers based on considerations of race or color. But that such legislation is also offensive to the rights of those desiring to acquire and occupy property and barred on grounds of race or color is clear, not only from the language of the opinion in *Buchanan v. Warley, supra,* but from this Court's disposition of the case of *Richmond v. Deans, 281 U.S. 704 (1930).* There, a Negro, barred from the occupancy of certain property by the terms of an ordinance similar to that in the *Buchanan* case, sought injunctive relief in the federal courts to enjoin the enforcement of the ordinance on the grounds that its provisions violated the terms of the *Fourteenth Amendment.* Such relief was granted, and this Court affirmed, finding the [**842] citation of *Buchanan v. Warley, supra,* and *Harmon v. Tyler, supra,* sufficient to support its judgment. [11]

11 Courts of Georgia, Maryland, North Carolina, Oklahoma, Texas, and Virginia have also declared similar statutes invalid as being in contravention of the *Fourteenth Amendment. Glover v. Atlanta, 148 Ga. 285, 96 S. E. 562 (1918); Jackson v. State, 132 Md. 311, 103 A. 910 (1918); Clinard v. Winston-Salem, 217 N. C. 119, 6 S. E. 2d 867 (1940); Allen v. Oklahoma City, 175 Okla. 421, 52 P. 2d 1054 (1936); Liberty Annex Corp.* v. *Dallas, 289 S. W. 1067 (Tex. Civ. App. 1927); Irvine v. Clifton Forge, 124 Va. 781, 97 S. E. 310 (1918).*

But the present cases, unlike those just discussed, do not involve action by state legislatures or city councils. [*13] Here the particular patterns of discrimination and the areas in which the restrictions are to operate, are determined, in the first instance, by the terms of

agreements among private individuals. Participation of the State consists in the enforcement of the restrictions so defined. The crucial issue with which we are here confronted is whether this distinction removes these cases from the operation of the prohibitory provisions of the *Fourteenth Amendment.*

[4]

Since the decision of this Court in the *Civil Rights Cases, 109 U.S. 3 (1883),* the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the *Fourteenth Amendment* is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful. [12]

12 And see *United States v. Harris, 106 U.S. 629 (1883); United States v. Cruikshank, 92 U.S. 542 (1876).*

We conclude, therefore, that the restrictive agreements standing alone cannot be regarded as violative of any rights guaranteed to petitioners by the *Fourteenth Amendment.* So long as the purposes of those agreements are effectuated by voluntary adherence to their terms, it would appear clear that there has been no action by the State and the provisions of the Amendment have not been violated. Cf. *Corrigan v. Buckley, supra.*

But here there was more. These are cases in which the purposes of the agreements were secured only **[***1181]** by judicial enforcement by state courts of the restrictive **[*14]** terms of the agreements. The respondents urge that judicial enforcement of private agreements does not amount to state action; or, in any event, the participation of the State is so attenuated in character as not to amount to state action within the meaning of the *Fourteenth Amendment.* Finally, it is suggested, even if the States in these cases may be deemed to have acted in the constitutional sense, their action did not deprive petitioners of rights guaranteed by the *Fourteenth Amendment.* We move to a consideration of these matters.

II.

That the action of state courts and judicial officers in their official capacities is to be regarded as action of the State within the meaning of the *Fourteenth Amendment,* is a proposition which has long been established by decisions of this Court. That principle was given expression in the earliest cases involving the construction of the terms of the *Fourteenth Amendment.* Thus, in *Virginia v. Rives, 100 U.S. 313, 318 (1880),* this Court stated: "It is doubtless true that a State may act through different agencies, -- either by its legislative, its executive, or its judicial authorities; and the prohibitions of the amendment extend to all action of the State denying equal protection of the laws, whether it be action by one of these agencies or by another." In *Ex parte Virginia, 100 U.S. 339, 347 (1880),* the Court observed: "A State acts by its legislative, its executive, or its judicial authorities. It can act in no other way." In the *Civil Rights Cases, 109 U.S. 3, 11, 17 (1883),* this Court pointed out that the Amendment makes void "State action of every kind" which is inconsistent with the guaranties therein contained, and extends to manifestations of "State authority **[**843]** in the shape of laws, customs, or judicial or executive proceedings." Language to like effect is employed **[*15]** no less than eighteen times during the course of that opinion. [13]

13 Among the phrases appearing in the opinion are the following: "the operation of State laws, and the action of State officers executive or judicial"; "State laws and State proceedings"; "State law . . . or some State action through its officers or agents"; "State laws and acts done under State authority"; "State laws, or State action of some kind"; "such laws as the States may adopt or enforce"; "such acts and proceedings as the States may commit or take"; "State legislation or action"; "State law or State authority."

Similar expressions, giving specific recognition to the fact that judicial action is to be regarded as action of the State for the purposes of the *Fourteenth Amendment,* are to be found in numerous cases which have been more recently decided. In *Twining v. New Jersey, 211 U.S. 78, 90-91 (1908),* the Court said: "The judicial act of the highest court of the State, in authoritatively construing and enforcing its laws, is the act of the State." In *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill, 281 U.S. 673, 680 (1930),* the Court, through Mr. Justice Brandeis, stated: "The federal guaranty of due process extends to state action through its judicial as well as through its legislative, executive or administrative branch of

government." Further examples of such declarations in the opinions of this Court are not lacking. [14]

14 *Neal v. Delaware, 103 U.S. 370, 397 (1881); Scott v. McNeal, 154 U.S. 34, 45 (1894); Chicago, Burlington and Quincy R. Co.* v. *Chicago, 166 U.S. 226, 233-235 (1897); Hovey v. Elliott, 167 U.S. 409, 417-418 (1897); Carter v. Texas, 177 U.S. 442, 447 (1900); Martin v. Texas, 200 U.S. 316, 319 (1906); Raymond v. Chicago Union Traction Co., 207 U.S. 20, 35-36 (1907); Home Telephone and Telegraph Co.* v. *Los Angeles, 227 U.S. 278, 286-287 (1913); Prudential Insurance Co.* v. *Cheek, 259 U.S. 530, 548 (1922); American Railway Express Co.* v. *Kentucky, 273 U.S. 269, 274 (1927); Mooney v. Holohan, 294 U.S. 103, 112-113 (1935); Hansberry v. Lee, 311 U.S. 32, 41 (1940).*

One of the earliest applications of the prohibitions contained in the **[***1182]** *Fourteenth Amendment* to action of state **[*16]** judicial officials occurred in cases in which Negroes had been excluded from jury service in criminal prosecutions by reason of their race or color. These cases demonstrate, also, the early recognition by this Court that state action in violation of the Amendment's provisions is equally repugnant to the constitutional commands whether directed by state statute or taken by a judicial official in the absence of statute. Thus, in *Strauder v. West Virginia, 100 U.S. 303 (1880),* this Court declared invalid a state statute restricting jury service to white persons as amounting to a denial of the equal protection of the laws to the colored defendant in that case. In the same volume of the reports, the Court in *Ex parte Virginia, supra,* held that a similar discrimination imposed by the action of a state judge denied rights protected by the Amendment, despite the fact that the language of the state statute relating to jury service contained no such restrictions.

The action of state courts in imposing penalties or depriving parties of other substantive rights without providing adequate notice and opportunity to defend, has, of course, long been regarded as a denial of the due process of law guaranteed by the *Fourteenth Amendment. Brinkerhoff-Faris Trust & Savings Co.* v. *Hill, supra.* Cf. *Pennoyer v. Neff, 95 U.S. 714 (1878).* [15]

15 And see *Standard Oil Co.* v. *Missouri, 224 U.S. 270, 281-282 (1912); Hansberry v. Lee, 311 U.S. 32 (1940).*

In numerous cases, this Court has reversed criminal convictions in state courts for failure of those courts to provide the **[**844]** essential ingredients of a fair hearing. Thus it has been held that convictions obtained in state courts under the domination of a mob are void. *Moore v. Dempsey, 261 U.S. 86 (1923).* And see *Frank v. Mangum, 237 U.S. 309 (1915).* Convictions obtained by **[*17]** coerced confessions, [16] by the use of perjured testimony known by the prosecution to be such, [17] or without the effective assistance of counsel, [18] have also been held to be exertions of state authority in conflict with the fundamental rights protected by the *Fourteenth Amendment.*

16 *Brown v. Mississippi, 297 U.S. 278 (1936); Chambers v. Florida, 309 U.S. 227 (1940); Ashcraft v. Tennessee, 322 U.S. 143 (1944); Lee v. Mississippi, 332 U.S. 742 (1948).*

17 See *Mooney v. Holohan, 294 U.S. 103 (1935); Pyle v. Kansas, 317 U.S. 213 (1942).*

18 *Powell v. Alabama, 287 U.S. 45 (1932); Williams v. Kaiser, 323 U.S. 471 (1945); Tomkins v. Missouri, 323 U.S. 485 (1945); De Meerleer v. Michigan, 329 U.S. 663 (1947).*

But the examples of state judicial action which have been held by this Court to violate the Amendment's commands are not restricted to situations in which the judicial proceedings were found in some manner to be procedurally unfair. It has been recognized that the action of state courts in enforcing a substantive common-law rule formulated by **[***1183]** those courts, may result in the denial of rights guaranteed by the *Fourteenth Amendment,* even though the judicial proceedings in such cases may have been in complete accord with the most rigorous conceptions of procedural due process. [19] Thus, in *American Federation of Labor v. Swing, 312 U.S. 321 (1941),* enforcement by state courts of the common-law policy of the State, which resulted in the restraining of peaceful picketing, was held to be state action of the sort prohibited by the Amendment's guaranties of freedom of discussion. [20] In *Cantwell v. Connecticut, 310 U.S. 296 (1940),* **[*18]** a conviction in a state court of the common-law crime of breach of the peace was, under the circumstances of the case, found to be a violation of the Amendment's commands relating to freedom of religion. In *Bridges v. California, 314 U.S. 252 (1941),* enforcement of the state's common-law rule relating to contempts by publication was held to be state action inconsistent with the prohibitions of the

Fourteenth Amendment. [21] And cf. *Chicago, Burlington and Quincy R. Co.* v. *Chicago, 166 U.S. 226 (1897).*

19 In applying the rule of *Erie R. Co.* v. *Tompkins, 304 U.S. 64 (1938)*, it is clear that the common-law rules enunciated by state courts in judicial opinions are to be regarded as a part of the law of the State.

20 And see *Bakery Drivers Local v. Wohl, 315 U.S. 769 (1942)*; *Cafeteria Employees Union v. Angelos, 320 U.S. 293 (1943).*

21 And see *Pennekamp v. Florida, 328 U.S. 331 (1946)*; *Craig v. Harney, 331 U.S. 367 (1947).*

The short of the matter is that from the time of the adoption of the *Fourteenth Amendment* until the present, it has been the consistent ruling of this Court that the action of the States to which the Amendment has reference includes action of state courts and state judicial officials. Although, in construing the terms of the *Fourteenth Amendment*, differences have from time to time been expressed as to whether particular types of state action may be said to offend the Amendment's prohibitory provisions, it has never been suggested that state court action is immunized from the operation of those provisions simply because the act is that of the judicial branch of the state government.

III.

Against this background of judicial construction, extending over a period of some three-quarters of a century, we are called upon to consider whether enforcement by state courts of the restrictive agreements **[**845]** in these cases may be deemed to be the acts of those States; and, if so, whether that action has denied these petitioners the equal protection of the laws which the Amendment was intended to insure.

[*19] We have no doubt that there has been state action in these cases in the full and complete sense of the phrase. The undisputed facts disclose that petitioners were willing purchasers of properties upon which they desired to establish homes. The owners of the properties were willing sellers; and contracts of sale were accordingly consummated. It is clear that but for the active intervention of the state courts, supported by the full panoply of state power, petitioners would have been free to occupy the properties in question without restraint.

These are not cases, as has been suggested, in which the States have merely abstained from action, leaving private individuals free to impose such discriminations as they see fit. Rather, these are cases in which the States have made available to such individuals the full coercive power of government to deny to petitioners, on the grounds of **[***1184]** race or color, the enjoyment of property rights in premises which petitioners are willing and financially able to acquire and which the grantors are willing to sell. The difference between judicial enforcement and non-enforcement of the restrictive covenants is the difference to petitioners between being denied rights of property available to other members of the community and being accorded full enjoyment of those rights on an equal footing.

The enforcement of the restrictive agreements by the state courts in these cases was directed pursuant to the common-law policy of the States as formulated by those courts in earlier decisions. [22] In the Missouri case, enforcement of the covenant was directed in the first instance by the highest court of the State after the trial court had determined the agreement to be invalid for **[*20]** want of the requisite number of signatures. In the Michigan case, the order of enforcement by the trial court was affirmed by the highest state court. [23] The judicial action in each case bears the clear and unmistakable imprimatur of the State. We have noted that previous decisions of this Court have established the proposition that judicial action is not immunized from the operation of the *Fourteenth Amendment* simply because it is taken pursuant to the state's common-law policy. [24] Nor is the Amendment ineffective simply because the particular pattern of discrimination, which the State has enforced, was defined initially by the terms of a private agreement. State action, as that phrase is understood for the purposes of the *Fourteenth Amendment*, refers to exertions of state power in all forms. And when the effect of that action is to deny rights subject to the protection of the *Fourteenth Amendment*, it is the obligation of this Court to enforce the constitutional commands.

22 See *Swain v. Maxwell, 355 Mo. 448, 196 S. W. 2d 780 (1946)*; *Koehler v. Rowland, 275 Mo. 573, 205 S. W. 217 (1918).* See also *Parmalee v. Morris, 218 Mich. 625, 188 N. W. 330 (1922).* Cf. *Porter v. Barrett, 233 Mich. 373, 206 N. W. 532 (1925).*

23 Cf. *Home Telephone and Telegraph Co.* v. *Los Angeles, 227 U.S. 278 (1913)*; *Raymond v. Chicago Union Traction Co., 207 U.S. 20 (1907).*

24 *Bridges v. California, 314 U.S. 252 (1941)*; *American Federation of Labor v. Swing, 312 U.S. 321 (1941).*

[6]

We hold that in granting judicial enforcement of the restrictive agreements in these cases, the States have denied petitioners the equal protection of the laws and that, therefore, the action of the state courts cannot stand. We have noted that freedom from discrimination by the States in the enjoyment of property rights was among the basic objectives sought to be effectuated by the framers of the *Fourteenth Amendment*. That such discrimination has occurred in these cases is clear. Because of the race or color of these petitioners they have been denied rights of ownership or occupancy enjoyed as a matter of course by **[**846]** other citizens of different race or **[*21]** color. [25] The *Fourteenth Amendment* declares "that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color." [26] *Strauder v. West Virginia,* **[***1185]** *supra at 307.* Only recently this Court had occasion to declare that a state law which denied equal enjoyment of property rights to a designated class of citizens of specified race and ancestry, was not a legitimate exercise of the state's police power but violated the guaranty of the equal protection of the laws. *Oyama v. California, 332 U.S. 633 (1948).* Nor may the discriminations imposed by the state courts in these cases be justified as proper exertions of state police power. [27] Cf. *Buchanan v. Warley, supra.*

25 See *Yick Wo v. Hopkins, 118 U.S. 356 (1886)*; *Strauder v. West Virginia, 100 U.S. 303 (1880)*; *Truax v. Raich, 239 U.S. 33 (1915).*

26 Restrictive agreements of the sort involved in these cases have been used to exclude other than Negroes from the ownership or occupancy of real property. We are informed that such agreements have been directed against Indians, Jews, Chinese, Japanese, Mexicans, Hawaiians, Puerto Ricans, and Filipinos, among others.

27 See *Bridges v. California, 314 U.S. 252, 261 (1941)*; *Cantwell v. Connecticut, 310 U.S. 296, 307-308 (1940).*

[7]

Respondents urge, however, that since the state courts stand ready to enforce restrictive covenants excluding white persons from the ownership or occupancy of property covered by such agreements, enforcement of covenants excluding colored persons may not be deemed a denial of equal protection of the laws to the colored persons who are thereby affected. [28] This contention does **[*22]** not bear scrutiny. The parties have directed our attention to no case in which a court, state or federal, has been called upon to enforce a covenant excluding members of the white majority from ownership or occupancy of real property on grounds of race or color. But there are more fundamental considerations. The rights created by the first section of the *Fourteenth Amendment* are, by its terms, guaranteed to the individual. The rights established are personal rights. [29] It is, therefore, no answer to these petitioners to say that the courts may also be induced to deny white persons rights of ownership and occupancy on grounds of race or color. Equal protection of the laws is not achieved through indiscriminate imposition of inequalities.

28 It should be observed that the restrictions relating to residential occupancy contained in ordinances involved in the *Buchanan, Harmon* and *Deans* cases, cited *supra*, and declared by this Court to be inconsistent with the requirements of the *Fourteenth Amendment*, applied equally to white persons and Negroes.

29 *McCabe v. Atchison, Topeka & Santa Fe R. Co., 235 U.S. 151, 161-162 (1914)*; *Missouri ex rel. Gaines v. Canada, 305 U.S. 337 (1938)*; *Oyama v. California, 332 U.S. 633 (1948).*

[9]

Nor do we find merit in the suggestion that property owners who are parties to these agreements are denied equal protection of the laws if denied access to the courts to enforce the terms of restrictive covenants and to assert property rights which the state courts have held to be created by such agreements. The Constitution confers upon no individual the right to demand action by the State which results in the denial of equal protection of the laws to other individuals. And it would appear beyond question that the power of the State to create and enforce property interests must be exercised within the boundaries defined by the *Fourteenth Amendment*. Cf. *Marsh v. Alabama, 326 U.S. 501 (1946).*

[10]

The problem of defining the scope of the restrictions which the Federal Constitution **[**847]** imposes upon exertions of power by the States has given rise to many of the most persistent and fundamental issues which this Court has been called upon to consider. **[***1186]** That problem was foremost in the minds of the framers of the Constitution, **[*23]** and, since that early day, has arisen in a multitude of forms. The task of determining whether the action of a State offends constitutional provisions is one which may not be undertaken lightly. Where, however, it is clear that the action of the State violates the terms of the fundamental charter, it is the obligation of this Court so to declare.

[11]

The historical context in which the *Fourteenth Amendment* became a part of the Constitution should not be forgotten. Whatever else the framers sought to achieve, it is clear that the matter of primary concern was the establishment of equality in the enjoyment of basic civil and political rights and the preservation of those rights from discriminatory action on the part of the States based on considerations of race or color. Seventy-five years ago this Court announced that the provisions of the Amendment are to be construed with this fundamental purpose in mind. [30] Upon full consideration, we have concluded that in these cases the States have acted to deny petitioners the equal protection of the laws guaranteed by the *Fourteenth Amendment*. Having so decided, we find it unnecessary to consider whether petitioners have also been deprived of property without due process of law or denied privileges and immunities of citizens of the United States.

30 *Slaughter-House Cases, 16 Wall. 36, 81 (1873)*; *Strauder v. West Virginia, 100 U.S. 303 (1880)*. See Flack, The Adoption of the *Fourteenth Amendment*.

For the reasons stated, the judgment of the Supreme Court of Missouri and the judgment of the Supreme Court of Michigan must be reversed.

Reversed.

MR. JUSTICE REED, MR. JUSTICE JACKSON, and MR. JUSTICE RUTLEDGE took no part in the consideration or decision of these cases.

Lora M. Mullins, in her individual capacity and as surviving spouse of John Mullins, deceased, Plaintiff-Appellant, v. Randolph M. Kessler, M.D., Defendant-Appellee.

Court of Appeals No. 02CA2564

COURT OF APPEALS OF COLORADO, DIVISION FIVE

83 P.3d 1203; 2003 Colo. App. LEXIS 1931

December 18, 2003, Decided

SUBSEQUENT HISTORY: [**1] Released for Publication February 17, 2004.

PRIOR HISTORY: City and County of Denver District Court No. 00CV1675 Honorable Robert L. McGahey, Jr., Judge.

DISPOSITION: Order affirmed.

COUNSEL: Law Offices of Robert M. Fitzgerald, Robert M. Fitzgerald, Northglenn, Colorado; Benjamin Silva, III & Associates, P.C., Benjamin Silva, III, Lakewood, Colorado, for Plaintiff-Appellant.

Pryor Johnson Montoya Carney & Karr, P.C., Bruce A. Montoya, Scott S. Nixon, Elizabeth C. Moran, Greenwood Village, Colorado, for Defendant-Appellee.

JUDGES: Opinion by JUDGE CASEBOLT Piccone and Criswell * JJ., concur.

* Sitting by assignment of the Chief Justice under provisions of *Colo. Const. art. VI, § 5(3)*, and *§ 24-51-1105, C.R.S. 2003.*

OPINION BY: CASEBOLT

OPINION

[*1204] In this medical negligence action, plaintiff, Lora M. Mullins, appeals the trial court's order awarding costs in favor of defendant, Randolph M. Kessler, M.D. We affirm.

Plaintiff alleged that defendant's negligent care of her husband during surgery caused his death. A jury found in defendant's favor.

Defendant filed a bill of costs under *§ 13-16-105, C.R.S. 2003*, seeking recovery of $ 33,355.06 [**2] paid by his liability insurer. The trial court awarded all of the costs requested, and this appeal followed.

I.

Plaintiff contends the award is erroneous because defendant's liability insurer paid the costs and, therefore, defendant is not the real party in interest. We disagree.

Every action must be prosecuted in the name of the real party in interest. *C.R.C.P. 17(a).* A real party in interest is that party who, by virtue of substantive law, has the right to invoke the court's aid to vindicate the legal interest in question. *Goodwin v. Dist. Court, 779 P.2d 837 (Colo. 1989).*

Here, defendant, as the named party in this action and the party on whose behalf costs were incurred, has the substantive right to receive reimbursement for such costs. The arrangement between defendant and his liability insurer for the disbursement and repayment of those costs is of no consequence. *See City of Wheat Ridge v. Cerveny, 913 P.2d 1110 (Colo. 1996)*(a party need not be

obligated to pay attorney fees to be entitled to such an award as authorized by statute); *Hale v. Erickson, 23 P.3d 1255 (Colo. App. 2001)*(defendant does not have to pay or [**3] be liable for costs to recover them under the offer of settlement statute); *Little v. Fellman, 837 P.2d 197 (Colo. App. 1991)* (defendant has the right to seek attorney fees as the real party in interest even though [*1205] his insurance company paid such fees), *overruled on other grounds by In re Marriage of Aldrich, 945 P.2d 1370 (Colo. 1997)*; *see also Aspen v. Bayless, 564 So. 2d 1081 (Fla. 1990)*(litigation costs may be awarded to the prevailing party even when such costs have been paid by that party's insurance company).

Accordingly, the court properly awarded costs to defendant as the real party in interest.

II.

Plaintiff next contends that the Health Care Availability Act (HCAA), *§ 13-64-101, et seq., C.R.S. 2003*, precludes recovery of costs. We disagree.

When construing a statute, we must determine the General Assembly's intent. In doing so, we examine all statutes that pertain to the subject matter at issue, and we favor a construction that gives consistent and harmonious effect to all provisions. *Bontrager v. La Plata Elec. Ass'n, 68 P.3d 555 (Colo. App. 2003).*

Pursuant to *§ 13-16-105*, "in any action wherein [**4] the plaintiff . . . might have costs in case judgment is given for him and . . . a verdict is passed against him, then the defendant shall have judgment to recover his costs against the plaintiff." Likewise, *C.R.C.P. 54(d)* provides that costs shall be awarded to the prevailing party unless mandated otherwise by statute or court order.

The HCAA governs the substantive law of medical negligence claims. Its stated purpose is to contain the significantly increasing costs of malpractice insurance in order to assure the continued availability of adequate health care services. *Section 13-64-102, C.R.S. 2003.*

Plaintiff asserts that the HCAA provision creating a mechanism for insurers to assert their subrogation rights for medical benefits paid to a plaintiff implies the exclusion of a cost recovery process. *See § 13-64-402, C.R.S. 2003.* However, there is no indication that this provision is meant to supplant a prevailing party's right to recover costs. *See C.R.C.P. 54(d).*

Plaintiff also relies upon *§ 13-64-205(1)(b), C.R.S. 2003.* That provision requires a court, in determining what judgment to [**5] enter on a verdict finding for a plaintiff and awarding special damages, to specify the payment of attorney fees and litigation expenses in a manner separate from the periodic installments payable to a successful plaintiff. However, that provision is meant to protect plaintiffs' attorneys and to honor any agreement between a successful plaintiff and his or her attorney concerning payment and reimbursement of costs and attorney fees. It says nothing that would preclude or affect a prevailing defendant's right to recover costs and does not imply a repeal of *§ 13-16-105.*

Moreover, plaintiff's argument is inconsistent with the purpose of the HCAA. Because all Colorado physicians are required to carry liability insurance while practicing medicine, their insurers bear the responsibility of providing them with defenses against malpractice claims and indemnification of losses resulting therefrom. *See § 13-64-301(1)(a), C.R.S. 2003.* If recovery of costs were denied, liability insurers would be forced to absorb such expenditures, inevitably passing the losses on to their policyholders. Hence, physicians would face increased costs for malpractice insurance, [**6] contrary to the HCAA's objective. *See Hale v. Erickson, supra* (a statute should be read to give effect to its policy and objective and to avoid interpretations that nullify its purpose and intent).

Because the HCAA does not mandate otherwise, we construe it in harmony with *§ 13-16-105* and *C.R.C.P. 54(d)* to allow a prevailing defendant to recover costs in a medical negligence action.

III.

Plaintiff argues alternatively that the trial court erred by awarding defendant the full amount of his requested costs. She argues that defendant failed to show such expenses were reasonable or necessary. We disagree.

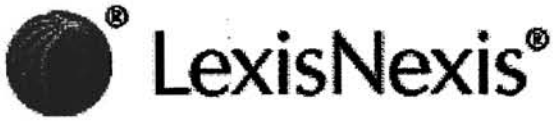
Generally, the award of costs to prevailing parties lies within the sound discretion of the trial court. In reviewing such [*1206] an award, we will not overturn that determination absent a clear abuse of discretion. *Ballow v. PHICO Ins. Co., 878 P.2d 672 (Colo. 1994).*

Here, the trial court found all the requested costs to be reasonable and necessarily incurred for the preparation and defense of his case. Upon review of the bill of costs,

we perceive no abuse of discretion in the trial court's determination. Therefore, we decline to disturb the [**7] award.

The order is affirmed.

JUDGE PICCONE and JUDGE CRISWELL concur.



KAREN JEANNE SMOLIC ASPEN, f/k/a KAREN JEANNE SMOLIC, Petitioner, v. BROOKE T. BAYLESS, Respondent. SANDRA HOUGH, etc., et al., Petitioners, v. JOSEPH W. HUFFMAN, Respondent

Nos. 75,107, 75,559

Supreme Court of Florida

564 So. 2d 1081; 1990 Fla. LEXIS 958; 15 Fla. L. Weekly S 403

July 26, 1990

PRIOR HISTORY: **[**1]** Application for Review of the Decision of the District Court of Appeal - Certified Great Public Importance - Two Cases Consolidated, Second and Fifth District - Case Nos. 2d DCA No. 89-00647 and 5th DCA Nos. 88-2447, 89-112, and 89-365, Pinellas and Brevard County.

COUNSEL: H. Shelton Philips of Kaleel & Kaleel, P.A., St. Petersburg, Florida, for Petitioner Aspen.

Andrew A. Graham, Maureen M. Matheson and Robert M. Moletteire of Reinman, Harrell, Graham, Mitchell & Wattwood, P.A., Melbourne, Florida, for Petitioner Hough, Petitioners.

T. Philip Hanson, Jr. of Greenfelder, Mander, Hanson & Murphy, Dade City, Florida, for Respondent Bayless; Robert L. Donald and H. A. Rigdon of Haas, Boehm, Brown, Ridgon & Seacrest, P.A., Tampa, Florida, for Respondent Huffman.

Janet DeLaura Harrison of Smalbein, Johnson, Rosier, Bussey, Rooney & Ebbets, P.A., Rockledge, Florida, for Respondent Woodling, Respondents.

Alan E. McMichael of Stripling & McMichael, P.A., Gainesville, Florida, Amicus Curiae for The Academy of Florida Trial Lawyers.

Jack W. Shaw, Jr. of Mathews, Osborne, McNatt & Cobb, P.A., Jacksonville, Florida, **[**2]** Amicus Curiae for Florida Defense Lawyers' Association.

Bonita L. Kneeland of Fowler, White, Gillen, Boggs, Villareal & Banker, P.A., Tampa, Florida, Amicus Curiae for The Florida Association for Insurance Review.

Donna E. Albert, Fort Lauderdale, Florida, Amicus Curiae for Watersports Claims Management, Ltd.

JUDGES: McDonald, J. Shaw, C.J., and Overton, Ehrlich, Barkett, Grimes and Kogan, JJ., concur.

OPINION BY: McDONALD

OPINION

[*1082] We have for review *Aspen v. Bayless, 552 So.2d 298 (Fla. 2d DCA 1989)*, and *Hough v. Huffman, 555 So.2d 942 (Fla. 5th DCA 1990)*. In *Aspen* the second district certified the following question as being of great public importance:

> Can a nonparty recover costs it has incurred on behalf of a named party under the rule and statutes regarding offers of judgment, or are costs recoverable under those provisions only by parties who have paid costs or incurred liability to do so?

552 So.2d at 301. In *Hough* the fifth district certified

conflict with *Aspen, Turner v. D.N.E., Inc., 547 So.2d 1245 (Fla. 4th DCA 1989)*, and *City of Boca Raton v. Boca Villas Corp., 372 So.2d 485 (Fla. 4th DCA 1979)*. We have jurisdiction pursuant to *article V, section 3(b)(4), Florida Constitution.* **[**3]** We hold that a party is not precluded from recovering costs under *Florida rule of Civil Procedure 1.442*, or after judgment in its favor, when someone other than the named party pays or advances those costs. Accordingly, we quash *Aspen* and approve *Hough*.

Bayless sued Aspen, seeking damages for personal injuries received in an automobile accident. Aspen, represented by her insurance carrier, filed an offer of judgment. After refusing that offer, Bayless received a judgment, but for less than the offer. The trial court denied Aspen's motion to tax costs under *rule 1.442* because Aspen's insurance policy provided that the carrier would pay all costs and she, therefore, neither paid the costs nor incurred any liability for them. The district court affirmed and held, although with some reservations, that under common law principles costs are in the nature of indemnification and, generally, are not awardable to nonparties.

In *Hough* a child's parents sued the driver of a car for injuries the child received in an accident. A jury found no negligence on Huffman's part, and the trial court awarded him costs, even though is costs had been paid by his insurance company. The district **[**4]** court affirmed and recognized conflict with the second and fourth districts' decisions.

The fifth district noted that a defendant's insurance carrier "may . . . be fully liable for the plaintiff's costs and expenses if the plaintiff prevails, and the plaintiff may, after obtaining a judgment against an insured defendant, join the insurer as a party." *Hough, 555 So.2d at 944.* Although costs are not recoverable by a nonparty as a general rule, the court reasoned that the general rule should be different when a nonparty, such as an insurance carrier, is liable for a prevailing party's costs. Applying that reasoning, the court stated:

> Insurance is a business "adventure." It "is not founded on any philanthropic or charitable principle." After an insurance company has paid a loss on behalf of its insured, it is entitled to subrogation either by express contract rights, or by equitable subrogation by operation of law. This right of subrogation would include rights against its own insured, if the insured were to recover and attempt to keep costs and expenses awarded in this case.
>
> Failure to allow a cost award to a prevailing defendant who is insured, because of the fact of insurance coverage **[**5]** **[*1083]** alone, gives the plaintiff, and/or the plaintiff's insurance carrier, an undeserved windfall. The defendant has paid premiums for such insurance coverage. Why should a nonprevailing plaintiff be afforded any fortuitous benefit from such circumstances?

Id. at 944-45 (citations omitted).

We agree with this analysis. Moreover, we are also persuaded that denying costs in *Aspen* would subvert the purpose and intent of *rule 1.442* and *sections 45.061*, and *768.79, Florida Statutes* (1987), i. e., to encourage parties to settle claims without going to trial. Most tort claims involve liability insurance companies which are contractually obligated to to pay litigation costs on behalf of, and to indemnify and pay costs assessed against, their insureds. If a named insured is unable to obtain costs under *rule 1.442*, there would be less incentive to accept an offer to settle and no penalty for failing to do so.

Further, we believe the *Aspen* court decided this issue on the erroneous premise that a party may not recover costs when the funds used to pay the costs were furnished by a third person without any obligation of repayment. Under this analysis, an indigent personal injury plaintiff **[**6]** who had paid the filing fee with funds given to him by a relative would not be able to recover the filing fee as par of his costs upon the successful completion of his lawsuit. It is unnecessary to inquire into the source of funds used for the initial payment of the costs in order to award taxable costs to the winning party. In the instant case, the costs were properly recoverable by Aspen even though they had been advanced by his insurance company. The fact that the insurance company can require Aspen to turn over the costs recovered from Bayless under principles of subrogation is of no moment in this suit in which Aspen is merely seeking a judgment for costs against Bayless.

We therefore approve *Hough* and quash *Aspen* and

direct the district court to remand the latter case for assessment of costs. We also disapprove *Turner* and *City of Boca Raton* to the extent of conflict with this opinion.

It is so ordered.

Carolyn Hale and Chere Kossick, Plaintiffs-Appellants, v. Laura Erickson, Defendant-Appellee.

Court of Appeals No. 00CA0043

COURT OF APPEALS OF COLORADO, DIVISION FOUR

23 P.3d 1255; 2001 Colo. App. LEXIS 551; 2001 Colo. J. C.A.R. 1633

March 29, 2001, Decided

SUBSEQUENT HISTORY: [**1] Released for Publication June 15, 2001.

PRIOR HISTORY: Adams County District Court. No. 97CV2325. Honorable C. Vincent Phelps, Judge.

DISPOSITION: JUDGMENT AFFIRMED.

COUNSEL: Wilcox & Ogden, P.C., M. Anne Wilcox, Ralph Ogden, Denver, Colorado, for Plaintiffs-Appellants.

Seaman & Giometti, P.C., Gregory R. Giometti, Karl A. Chambers, Denver, Colorado, for Defendant-Appellee.

JUDGES: Opinion by JUDGE DAVIDSON. Ruland and Kapelke, JJ., concur.

OPINION BY: DAVIDSON

OPINION

[*1256] Plaintiffs, Carolyn Hale and Chere Kossick, appeal from the entry of judgment awarding costs to defendant, Laura Erickson. We affirm.

Defendant's automobile collided with a vehicle occupied by plaintiffs. Plaintiffs filed a negligence action against defendant seeking damages for personal injuries allegedly sustained in the collision. Defendant admitted liability but denied that plaintiffs suffered any compensable damages.

Prior to trial, defendant submitted a $ 500 statutory offer of settlement to each plaintiff pursuant to *§ 13-17-202(1)(a)(II), C.R.S. 2000.* The initial trial resulted in a mistrial. At the conclusion of the second trial, the jury determined that neither [**2] plaintiff had proven that she had incurred the minimal statutory threshold level of damage required for recovery pursuant to § 10-4-714(1), C.R.S. 2000. Consequently, the jury returned a verdict in favor of defendant.

As a result of the verdict, defendant submitted a bill of costs pursuant to *§ 13-17-202(1)(a)(II), C.R.S. 2000,* and *C.R.C.P. 54(d).* Defendant requested costs totaling $ 32,368.88 and sought an order imposing joint and several liability for payment.

Plaintiffs filed an objection, arguing, *inter alia,* that defendant had not actually incurred the requested costs because they had been [*1257] paid by defendant's insurer and that their liability for the costs should not be joint and several.

The trial court entered an order requiring plaintiffs, jointly and severally, to pay defendant costs totaling $ 20,524.88.

I.

Section 13-17-202(1)(a)(II) provides:

If the defendant serves an offer of settlement at any

time more than ten days before the commencement of the trial that is rejected by the plaintiff and the plaintiff does not recover a final judgment in excess of the amount offered, then the defendant shall [**3] be awarded actual costs accruing after the offer of settlement to be paid by the plaintiff.

Plaintiffs argue that costs should not be awarded to a prevailing party pursuant to that statute when an insurance company has paid or advanced those costs.

However, *§ 13-17-202(1)(a)(II)* does not provide that to recover costs, a defendant must be liable for, or have paid, such costs. Instead, it requires payment of actual costs "accruing" after the offer of settlement. The purpose of this statutory provision, by the automatic imposition of an award of actual costs, is to penalize a nonsettling plaintiff. *See Carpentier v. Berg, 829 P.2d 507 (Colo. App. 1992)* (statute's intended purpose is to encourage settlement and curb protracted and fruitless litigation); *see also Centric-Jones Co. v. Hufnagel, 848 P.2d 942 (Colo. 1993)* (*§ 13-17-202* was designed to make the legal system more effective and efficient by discouraging the filing of unnecessary litigation, by encouraging settlement, and by encouraging more timely resolution of disputes). Whether it was the defendant or, instead, a third party, that actually paid those costs is irrelevant to that purpose.

[**4] A statute should be read to give effect to its policy and objective and to avoid interpretations that nullify the purpose and intent. *See Passamano v. Travelers Indemnity Co., 882 P.2d 1312 (Colo. 1994)*. If, as plaintiffs urge, we were to construe *§ 13-17-202(1)(a)(II)* to be inapplicable when an insurance company has funded defense costs, the intent of the statute would be severely thwarted. Insurance defense is common, and plaintiffs in such situations necessarily would have less incentive to settle.

Plaintiffs argue that, here, however, unlike in some cases, defendant has no obligation to reimburse her insurance company for the costs she recovers and that this results in an unfair windfall to her. We are unable to determine whether such a reimbursement obligation exists because defendant's insurance policy is not included in the appellate record. However, even if we assume that defendant's insurer is not entitled to reimbursement, allowing recovery of costs by defendant is more consistent with the statutory purpose than permitting plaintiffs to avoid paying costs solely because defendant happened to maintain insurance coverage.

Our conclusion that a defendant [**5] is entitled to recover costs even if those costs were actually paid by an insurance company is consistent with decisions by courts in other jurisdictions that have enacted settlement/costs statutes similar to *§ 13-17-202(1)(a)(II)*. *See Aspen v. Bayless, 564 So. 2d 1081 (Fla. 1990)* (party is not precluded from recovering costs under rule pertaining to offer of judgment when someone other than named party pays or advances those costs); *Butt v. Giammariner, 173 Mich. App. 319, 433 N.W.2d 360 (1988)* (despite fact that defendant's insurer actually incurred such costs, court properly awarded defendant costs necessitated by plaintiffs' failure to stipulate to entry of judgment).

Also, plaintiffs provide no authority prohibiting an award of costs under *C.R.C.P. 54(d)* to a defendant whose insurance company has actually paid or advanced such costs. Indeed, such an award appears to be proper. *See Manor Healthcare Corp. v. Lomelo, 929 F.2d 633 (11th Cir. 1991)* (determining that city could recover costs as the prevailing party under *Fed. R. Civ. P. 54(d)* notwithstanding fact that city's insurer actually paid such costs).

II.

Plaintiffs [**6] next contend that the trial court erred in taxing costs against them jointly and severally. We disagree.

[*1258] Although a trial court may allocate costs between various parties, *see Cobai v. Young, 679 P.2d 121 (Colo. App. 1984)*, it may also impose joint and several liability for such costs. The decision whether to allocate costs between parties or, instead, impose joint and several liability lies within the sound discretion of the trial court. *See Winkler v. Rocky Mountain Conference of United Methodist Church, 923 P.2d 152 (Colo. App. 1995)*.

Here, a review of the record reveals that a significant portion of the costs actually awarded were not clearly apportionable to one plaintiff or the other. Under these circumstances, we conclude that the trial court did not abuse its discretion in making the award of costs against plaintiffs joint and several. *See Winkler v. Rocky Mountain Conference of United Methodist Church, supra.*

The judgment is affirmed.

JUDGE RULAND and JUDGE KAPELKE concur.

FRANCISCO Q. FERRER, Plaintiff-Appellee/Cross-Appellant, v. DANIEL T. NGO, Defendant-Appellant/Cross-Appellee, and ALLSTATE INSURANCE COMPANY, Defendant-Appellee/Cross-Appellee

NO. 24822

INTERMEDIATE COURT OF APPEALS OF HAWAI'I

102 Haw. 119; 73 P.3d 73; 2003 Haw. App. LEXIS 194

June 20, 2003, Decided

SUBSEQUENT HISTORY: Released for Publication July 30, 2003.

PRIOR HISTORY: [***1] APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT. CIV. NO. 98-2563.

DISPOSITION: Affirmed in part and vacated in part; remanded for further proceedings.

COUNSEL: On the briefs:

J. Patrick Gallagher, Joelle Segawa Kane, Lynn B. K. Costales, Jacqueline W. S. Amai, Leah M. Reyes (Henderson, Gallagher & Kane) for Defendant-Appellant/Cross-Appellee Daniel T. Ngo. William Fenton Sink for Plaintiff-Appellee/Cross-Appellant.

Kevin P. H. Sumida, Lance S. Au, and Ward F. N. Fujimoto for Defendant-Appellant/Cross-Appellee Allstate Insurance Company.

JUDGES: BURNS, C.J., WATANABE AND FOLEY, JJ. OPINION OF THE COURT BY BURNS, C.J.

OPINION BY: BURNS

OPINION

[**75] [*121] OPINION OF THE COURT BY BURNS, C.J.

Defendant-Appellant/Cross-Appellee Daniel T. Ngo (Ngo) appeals and Plaintiff-Appellee/Cross-Appellant Francisco Q. Ferrer (Ferrer) cross-appeals from the December 11, 2001 Judgment on All Claims and Parties (December 11, 2001 Judgment). Pursuant to this December 11, 2001 Judgment, Ngo was the prevailing party regarding Ferrer's complaint and Ferrer was the prevailing party regarding Ngo's request for costs. [1] We affirm the judgment in favor of Ngo, vacate the judgment in favor of Ferrer, and remand. Specifically, we vacate the May 2, 2001 Judgment on Taxation and Assessment of Costs (May 2, 2001 Judgment [***2] on Taxation) denying Ngo's request for taxation of costs in the sum of $ 19,485.49 and remand for the award of reasonable costs consistent with this opinion. In all other respects, we affirm.

1 The word "costs" is defined as all actual disbursements deemed reasonable by the court. *Canalez v. Bob's Appliance Serv. Ctr., 89 Hawai'i 292, 306, 972 P.2d 295, 309 (1999).*

The most significant question presented is whether, in a tort case, the payment of the prevailing defendant's costs by the prevailing defendant's insurer pursuant to the insurance policy is a valid reason for the court to decide not to order the losing plaintiff to pay the costs reasonably incurred by the prevailing defendant. The

answer is no.

BACKGROUND

This case arises out of a September 4, 1996 collision between Ngo's automobile and Ferrer's automobile. Both drivers were insured by Defendant-Appellee/Cross-Appellee Allstate Insurance Company (Allstate). Allstate's policy insuring Ferrer provided for no-fault benefits and underinsured [***3] motorist (UIM) coverage. Ferrer alleged Ngo was liable for Ferrer's neck and back injury.

On April 24, 1998, Ferrer filed a complaint in the District Court of the First Circuit, Honolulu Division (district court), against Ngo and Allstate alleging that they negligently injured Ferrer in the September 4, 1996 automobile collision and refused to pay for Ferrer's damages. Ferrer prayed for judgment against Ngo and Allstate for damages proved, costs, and attorney fees.

[**76] [*122] *Hawai'i Revised Statutes (HRS) § 604-5* (Supp. 2002) states, in relevant part, as follows:

> **Civil jurisdiction.** (a) Except as otherwise provided, the district courts shall have jurisdiction in all civil actions where the debt, amount, or value of the property claimed does not exceed $ 20,000. . . .
>
> (b) The district courts shall try and determine all actions without a jury, subject to appeal according to law. Whenever a civil matter is triable of right by a jury and trial by jury is demanded in the manner and within the time provided by the rules of court, the case shall be transferred to the circuit court. If the demand is made in the complaint and the matter is triable of right by [***4] a jury, the action may be commenced in the circuit court if the amount in controversy exceeds $ 5,000.

On May 15, 1998, Ngo and Allstate filed a Demand for Jury Trial. Ngo and Allstate were represented by the same lawyers from the same law corporation.

On May 15, 1998, Allstate sought dismissal of Ferrer's complaint on the ground that a party claiming damages for an injury caused by the negligence of another party may not sue the other party's insurer directly. *Olokele Sugar Co. v. McCabe, Hamilton & Renny Co., 53 Haw. 69, 487 P.2d 769 (1971)*. Ferrer opposed the motion on the grounds that (1) he agrees with Justice Kazuko Abe's concurring opinion in *Olokele Sugar Co., 53 Haw. at 73, 487 P.2d at 771*, "that the insurance company here (which actually paid the claim and would have satisfied a judgment for the claim if the action had gone to trial and judgment was obtained against the defendant) is the real party in interest and pursuant to [Hawai'i Rules of Civil Procedure (HRCP)] *Rule 17(a)*, should be named as a party defendant"; (2) he had a claim for UIM coverage against Allstate and his naming of Allstate as a defendant avoided the applicable two-year [***5] statute of limitation; [2] and (3) when Allstate, as the insurer of both Ferrer and Ngo, did not settle Ferrer's claim against Ngo prior to Ferrer's filing of the complaint, Ferrer had a "first and third party bad faith case" [3] against Allstate and Ferrer's naming of Allstate avoided the applicable two-year statute of limitation. [4]

2 In a memorandum opposing Defendant-Appellee/Cross-Appellee Allstate Insurance Company's (Allstate) motion to dismiss the complaint, Plaintiff-Appellee/Cross-Appellant Francisco Q. Ferrer (Ferrer) contends, in relevant part, as follows:

> All UIM [underinsured motorist] claims have to be made within two years. While, as a practical matter, this is rather difficult given the nature of UIM benefits--which is that no one knows whether they kick in until after the third party case is settled--perhaps the courts were considering judicial economy. After all, there is no reason to

have two separate hearings for UIM benefits and third party benefits, so perhaps it makes sense to have all these cases brought together.

3 A "first-party" policy provides coverage for *loss or damage* sustained by the *insured* (*e.g.*, life, disability, health, fire, theft, and casualty insurance) whereby the insurer usually promises to pay money to the insured upon the happening of the risk insured against. A "third-party" policy, on the other hand, provides coverage for the insured's *liability to another* (*e.g.*, CGL [comprehensive general liability], directors' and officers' liability, and errors and omissions insurance) wherein the carrier generally assumes a contractual duty to pay judgments recovered against the insured arising from the insured's negligence. See generally, *Garvey v. State Farm Fire & Cas. Co., 48 Cal.3d 395, 770 P.2d 704, 257 Cal.Rptr. 292 (1989).*

Sentinel Ins. Co. v. First Ins. Co. of Hawai'i, Ltd., 76 Haw. 277, 289, 875 P.2d 894, 906 (1994).

[***6]

4 Ferrer contends that "it is improper for Allstate to wait until the case is over to determine whether there is bad faith; the moment that [Ferrer chooses] to do that Allstate will say that [Ferrer] did not act in a timely fashion, and assert latches [sic] or a statute of limitations defense."

Judge Kevin S. C. Chang's July 30, 1998 Order Granting Defendant Allstate Insurance Company's Motion to Dismiss Plaintiff Francisco Q. Ferrer's Complaint Filed on April 24, 1998 and Judge Linda K. C. Luke's May 2, 2001 Judgment for Allstate Insurance Company on All Claims and Disputes granted Allstate's motion and dismissed the Complaint against Allstate.

Thereafter, the case was referred to arbitration and, on May 3, 1999, an arbitration award was rendered in favor of Ferrer and against Ngo in the sum of $ 2,000.00 for special damages and $ 9,000 for general damages. Pursuant to *Rule 22 of the Hawaii Arbitration Rules* [**77] [*123] (2003) (HAR), Ngo rejected the award and requested a trial *de novo.*

On May 10, 1999, Ngo served Ferrer with an Offer of Judgment, good for ten days after service, in the amount [***7] of $ 3,000.00, "inclusive of costs accrued." Ferrer did not accept the offer and the matter proceeded to trial.

Judge Luke's November 1, 1999 pretrial decision became a written order in the November 15, 1999 Order Denying [Ferrer's] Motion In Limine to Permit the Introduction of Insurance. After a trial, the jury, by way of a special verdict rendered on November 15, 1999, decided that (1) Ngo was negligent and (2) Ngo's negligence was not the legal cause of injury to Ferrer.

On December 7, 1999, Ferrer filed Plaintiff's Motion for a New Trial, or Alternatively, Motion for Judgment Notwithstanding the Verdict (December 7, 1999 Motion for New Trial). On February 22, 2000, after a hearing on January 27, 2000, Judge Luke entered the Order Denying Plaintiff's Motion for New Trial or Alternatively, Motion for Judgment Notwithstanding the Verdict.

On December 13, 1999, Ngo filed Defendant Daniel T. Ngo's Motion for Entry of Judgment and Taxation and Assessment of Costs. Ngo sought costs in the amount of $ 19,485.49. After a hearing on January 27, 2000, Judge Luke entered the March 1, 2000 Order Denying Defendant Daniel T. Ngo's Motion for Entry of Judgment and Taxation and Assessment [***8] of Costs, which was repeated in the May 2, 2001 Judgment on Taxation.

NGO'S POINT ON APPEAL

Ngo contends that the May 2, 2001 Judgment on Taxation denying Ngo's request for taxation of costs in the sum of $ 19,485.49 should be reversed. We conclude that it should be vacated.

RELEVANT PRECEDENT, STATUTES AND RULES

HRS § 604-5(b) (Supp. 2002) states, in relevant part, as follows:

The district courts shall try and

> determine all actions without a jury, subject to appeal according to law. Whenever a civil matter is triable of right by a jury and trial by jury is demanded in the manner and within the time provided by the rules of court, the case shall be transferred to the circuit court. If the demand is made in the complaint and the matter is triable of right by a jury, the action may be commenced in the circuit court if the amount in controversy exceeds $ 5,000.

"No attorney's fees may be awarded as damages or costs unless so provided by statute, stipulation, or agreement." *Food Pantry v. Waikiki Business Plaza, Inc., 58 Haw. 606, 618, 575 P.2d 869, 878 (1978).*

HRS § 607-9 (1993) states as follows:

> No [***9] other costs of court shall be charged in any court in addition to those prescribed in this chapter in any suit, action, or other proceeding, except as otherwise provided by law.
>
> All actual disbursements, including but not limited to, intrastate travel expenses for witnesses and counsel, expenses for deposition transcript originals and copies, and other incidental expenses, including copying costs, intrastate long distance telephone charges, and postage, sworn to by an attorney or a party, and deemed reasonable by the court, may be allowed in taxation of costs. In determining whether and what costs should be taxed, the court may consider the equities of the situation.

HRCP Rule 54(d)(1) (2003), which prior to July 1, 2000, was *HRCP Rule 54(d)*, states, in relevant part, as follows: "Except when express provision therefor is made either in a statute or these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs[.]"

HAR Rule 25 (2003) states, in relevant part, as follows:

> (A) The "Prevailing Party" in a trial de novo is the party who (1) appealed and improved upon the arbitration award by 30% or more, ...
>
> (B) The "Prevailing [***10] Party" under these rules, as defined above, is deemed the prevailing party under any statute or rule of [**78] [*124] court. As such, the prevailing party is entitled to costs of trial and all other remedies as provided by law, unless the Court otherwise directs.

Although *HRS §§ 604-5* and *607-9*, *HRCP Rule 54(d)(1)*, and *HAR Rule 25* each allow the court some discretion over the allowance of costs, the court's discretion has limitations.

> Under *Rule 54(d)*, the trial court has considerable discretion over the allowance of costs. See *Harkins v. Ikeda, 57 Haw. 378, 557 P.2d 788 (1976)*; *Dade v. Kuhta, 3 Haw. App. 89, 641 P.2d 989 (1982)* (citing *Turner v. Willis, 59 Haw. 319, 582 P.2d 710 (1978)*). "However, the denial of costs to the prevailing party is in the nature of a penalty for some fault on his part in the course of litigation." *Bishop Trust Co., Ltd. v. Central Union Church, 3 Haw. App. 624, 656 P.2d 1353 (1983).* See also *Abreu v. Raymond, 56 Haw. 613, 546 P.2d 1013 (1976).*

Wohlschlegel v. Uhlmann-Kihei, Inc., 4 Haw. App. 123, 139, 662 P.2d 505, 515-16 (1983).

HRCP Rule 68 (2003) [***11] states, in relevant part, as follows:

> At any time more than 10 days before the trial begins, any party may serve upon any adverse party an offer of settlement or an offer to allow judgment to be taken against either party for the money . . . specified in the offer, with costs then accrued. . . . An offer not accepted shall be deemed withdrawn and evidence thereof is

> not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer.

HRCP Rule 68 does not allow the court any discretion over the allowance of costs incurred after the offer of judgment is made.

DISCUSSION

In this context, the word "costs" does not include unreasonable costs or costs unreasonably incurred. See *Canalez v. Bob's Appliance Serv. Ctr., 89 Hawai'i 292, 306, 972 P.2d 295, 309 (1999).* The questions whether a cost was unreasonable or unreasonably incurred are questions of law.

The trial court's decision pursuant to the above statutes and rules whether to order one party to pay or reimburse another party's costs will not be disturbed absent **[***12]** an abuse of its discretion. *Eastman v. McGowan, 86 Hawai'i 21, 27, 946 P.2d 1317, 1323 (1997).* An abuse of discretion occurs where the trial court has "clearly exceeded the bounds of reason or disregarded rules or principles of law or practice to the substantial detriment of a party litigant." *Amfac, Inc. v. Waikiki Beachcomber Inv. Co., 74 Haw. 85, 114, 839 P.2d 10, 26 reconsideration denied, 74 Haw. 650, 843 P.2d 144 (1992); State ex rel. Bronster v. United States Steel Corp., 82 Hawai'i 32, 54, 919 P.2d 294, 316 (1996).*

Ngo contends that because he was the prevailing party, the denial of his request for reimbursement of costs was an abuse of discretion and should be reversed.

During the hearing on the motion for taxation of costs, the attorney for Ferrer argued, in relevant part, as follows:

> But as to the public policy questions that got addressed, there are really two of those; one, is the question of whether this case should have gotten here at all; and, two, is whether Allstate having driven this case to this point should be the beneficiary of the recovery.
>
> As counsel implied, Mr. Ngo doesn't have a dog in this **[***13]** fight. Mr. Ngo has not paid anything. Mr. Ngo has premiums paid, but those have nothing to do with this litigation. Everybody pays premiums, that doesn't mean that they get involved in the litigation.
>
> This case was brought in the District Court. To remove it from the District Court the defense has to say the case is worth more than $ 5,000, or that the plaintiff isn't willing to take less than $ 5,000.
>
> . . . If there is a demand with the possibility of more than $ 5,000, the defense has the right to move it to a jury trial. Since the District Court can't do jury trials, the case has ended up in Circuit Court.
>
> **[**79]** **[*125]** And then this giant mushroom of discovery and work begins that would only have been -- would have been limited to a little -- very simplified process before a judge in District Court. That was what we asked for.
>
> Then forced to Circuit Court against our will we then went to a CAAP [Court Annexed Arbitration Program] arbitration. The arbitrator found an $ 11,000 award. We offered to settle for less than that arbitration. . . .
>
> Still dissatisfied with that and having followed this pattern throughout Allstate appealed that award. . . .
>
> So the defense -- and I hear this all **[***14]** the time -- says, oh, well, the reason for this is because we don't want these small cases brought. Allstate doesn't want these small cases brought. But
>
> Allstate then is holding the courts hostage to this. And these cases end up getting litigated instead of the cases that the courts really intended to have resolved.
>
> . . . .

The costs in this case were driven up for no purpose. All they had to do was leave it in the District Court or not appeal the arbitration award. All these costs came about because they insisted on taking this case to court and planned to as they made clear from the very beginning.

. . . .

So Allstate saying, gee, we aren't really the party here and they are. They were the party in the first place. They're the ones that didn't pay in the first place. They're the ones that brought this on themselves in the first place. And they shouldn't benefit from litigating cases and forcing cases to trial that should have been settled in an amount that they themselves said it was the most they were willing to offer $ 3,000. It would have been less than what was available if the case had stayed in District Court.

. . . .

I view that . . . what *[Wohlschlegel, 4 Haw. App. 123, 662 P.2d 505]* **[***15]** says is that the Court has the discretion to grant that. But that the Court needs to find that there was some active position, something done by the defense to drive the costs up. I mean, they didn't have to bring Dr. Carpenter in here and spend $ 9,000, three times what they offered to settle the case. They didn't have to bring Dr. Sheetz in here and pay him 5,000 or $ 6,000. None of that was necessary. It was -- it was an unnecessary expense to spend twice as much money in costs virtually as we offered to settle the case for.

. . . I think it's fair to assume there's probably $ 30,000 in attorney's fees spent in this case. Probably $ 50,000 in a case that could have been settled for one fifth that amount.

Now, we can argue over little theoretical debates, but if form is to have any significance over substance then you can say, well, maybe they had to do this if they wanted to put on this complete trial. But if substance is what matters, none of this should have happened in the first place.

. . . .

It wasn't just some of [the costs] were unnecessary, they were all unnecessary. And the only necessity came about because the defense and Allstate brought the case up to this court. **[***16]** And the reason they're doing it is because -- and we can debate this about why they're getting away with it, the reason that they're doing it is because they want to prevent these cases from being brought at all.

Stated in plain language, Ferrer contends that he should not be ordered to pay Ngo any costs because: (1) Ngo's insurer, Allstate, not Ngo, actually paid the costs; (2) if Ngo/Allstate settled the case in the district court for $ 10,000 as they should have, these costs would not have been incurred; (3) Ngo/Allstate unreasonably refused to settle because Allstate wants to prevent these cases from being brought at all; and (4) it was unnecessary to spend almost twice as much in costs as the amount for which Ferrer offered to settle the case.

Judge Luke agreed with reason (1). She ruled that "the Court is going to deny your motion for costs unless you can submit to the Court an affidavit that attests on behalf of Daniel T. Ngo what his actual out-of-pocket **[**80]** **[*126]** costs were since I construe that he is the individual party defendant who is making the claim." The question is whether she was right or wrong. We conclude that she was wrong.

In this case, pursuant to the Ngo/Allstate **[***17]** insurance policy, Allstate owed Ngo a duty to defend and a duty to cover. Allstate satisfied both duties. The question presented is whether, in a tort case, the payment of the prevailing defendant's costs by the prevailing defendant's insurer pursuant to the insurance policy is a valid reason for the court to decide not to order the losing plaintiff to pay the costs reasonably incurred by the prevailing defendant. The answer is no. The reasons for the precedent of Olokele Sugar Co. apply here. A plaintiff retains the right to sue for damages

notwithstanding the fact that those damages have been or will be paid by the plaintiff's insurer. When a party's insurer is providing defense and coverage, the party and the insurer are, to the limits of the coverage, one party defending under the name of the insured. The benefits flowing from a party's insurance coverage flow in favor of the insured party, not the adverse party.

Our decision is supported by *Aspen v. Bayless, 564 So. 2d 1081 (Fla. 1990)*, which agreed with the following conclusion of the Florida Fifth District Court of Appeal:

> Failure to allow a cost award to a prevailing defendant who is insured, because [***18] of the fact of insurance coverage alone, gives the plaintiff, and/or the plaintiff's insurance carrier, an undeserved windfall. Why should a nonprevailing plaintiff be afforded any fortuitous benefit from such circumstances?

Id. at 1082-83.

Similarly, a losing defendant retains the right to challenge the reasonableness of the prevailing plaintiff's costs notwithstanding the fact that the amount of costs the losing defendant will be ordered to pay to the prevailing plaintiff will be paid by the losing defendant's insurer.

Ferrer's reasons (2) (if Ngo/Allstate settled the case in the district court as they should have, these costs would not have been incurred) and (3) (Ngo/Allstate unreasonably refused to settle because Allstate wants to prevent these cases from being brought at all), also lack merit. In effect, Ferrer argues for a rule that, when a plaintiff and a defendant are insured by the same insurer and the costs the insured defendant predictably will incur in defense exceed the plaintiff's demand, the insured defendant must pay the plaintiff's demand and, if the insured defendant does not do so, the insured defendant will not be allowed to recover costs from [***19] the plaintiff when the insured defendant ultimately is the prevailing party.

Ferrer's argument ignores the fact that Ngo/Allstate had a constitutional right [5] to a jury trial, a right to require Ferrer to prove Ferrer's claim, and a right not to pay anything to Ferrer if Ferrer failed to prove his claim. The jury decided that Ferrer did not prove his claim. Ngo/Allstate's victory at the jury trial disproves Ferrer's allegation that Ngo/Allstate should have settled the case in the district court. It also disproves Ferrer's reason (4) (it was unnecessary to spend twice as much in costs as the amount for which Ferrer offered to settle the case). In light of the jury's verdict, the additional costs incurred by Ngo/Allstate were not necessitated by Ngo/Allstate's refusal to settle the case in the district court. They were necessitated by Ferrer's commencement and continuation of a claim he could not prove, and his failure to dismiss that claim.

> 5 The Hawai'i State Constitution specifies in *Article 1, Section 13*, that "in suits at common law where the value in controversy shall exceed five thousand dollars, the right of trial by jury shall be preserved."

[***20] Our review of the record discloses no fault on Ngo's part in the course of litigation authorizing the court to penalize Ngo when deciding whether to award costs to him.

FERRER'S POINTS ON APPEAL

A.

Ferrer contends the court reversibly erred (1) when it dismissed Allstate from the case and (2) when it did not allow evidence of [**81] [*127] Allstate's insurance of Ngo to be admitted for the jury's information.

As noted in footnote 3 above, a

> "first-party" policy provides coverage for *loss or damage* sustained by the *insured* (*e.g.*, life, disability, health, fire, theft, and casualty insurance) whereby the insurer usually promises to pay money to the insured upon the happening of the risk insured against. A "third-party" policy, on the other hand, provides coverage for the insured's *liability to another* (*e.g.*, CGL [comprehensive general liability], directors' and officers' liability, and errors and omissions insurance) wherein the carrier generally assumes a contractual duty to pay judgments recovered against the insured arising from the insured's negligence. See generally, *Garvey v. State*

Farm Fire & Cas. Co., 48 Cal.3d 395, 770 P.2d 704, 257 Cal.Rptr. 292 (1989). **[***21]**

Sentinel Ins. Co. v. First Ins. Co. of Hawaii, Ltd., 76 Hawai'i 277, 289, 875 P.2d 894, 906 (1994).

> The first-party relationship is distinguishable from the third party situation. In third party claims, the absolute control of trial and settlement is in the hands of the insurer. That control gives rise to a fiduciary relationship between the insurer and the insured. In first party claims the insurer is not in a position to expose the insured to a judgment in excess of policy limits through its unreasonable refusal to settle a case nor is the insurer in exclusive control of the defense. Although an insurer must make a good faith attempt to settle claims . . ., the insurer and insured in a first party relationship have an adversarial relationship, rather than a fiduciary relationship.

Best Place, Inc. v. Penn America Ins. Co., 82 Hawai'i 120, 129, 920 P.2d 334, 343 (1996) (quoting *Spencer v. Aetna Life & Cas. Ins. Co., 227 Kan. 914, 611 P.2d 149, 155 (1980)*).

Hawai'i Rules of Evidence (HRE) Rule 411 states as follows:

> Evidence that a person was or was not insured against liability is not admissible upon the issue whether **[***22]** the person acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.

In his opening brief, Ferrer stated, in relevant part, as follows:

> This is a first- and third-party bad faith case. . . .
>
> . . . .
>
> . . . The attorneys for [Ngo and Allstate] . . . stated, "Though [Ferrer] . . . expresses his concerns regarding the statute of limitations with respect to prospective underinsured motorist ('UIM') and bad faith claims against Allstate, no such claims have been alleged in [Ferrer's] Complaint . . . ." The problem is that [Ngo and Allstate] also contend that [Ferrer] cannot file a direct action under Olokele, so the defense blows hot and cold.
>
> . . . .
>
> Construed liberally or not, to state that [Ngo] refused to pay for [Ferrer's] damages and to name Allstate as a defendant should have been notice enough for a bad faith cause of action. In a first-party claim, refusal to pay damages is bad faith.
>
> . . . .
>
> . . . In Olokele Sugar, the insurer was the insurer of the defendant, not **[***23]** the plaintiff. Here, the plaintiff is bound by his own insurer to run up the costs of the litigation by Allstate' removel [sic]. As a policyholder, plaintiff has aright [sic] to have the case litigated as cheaply as possible.
>
> . . . .
>
> Furthermore, Allstate had both a first-and third-party relationship with [Ferrer].
>
> . . . [Ferrer] was willing to settle the case for $ 10,000. Allstate was unwilling to pay a penny over $ 3,000 because this was what Allstate called a MIST, which stands for Minor Impact Soft Tissue, case and they wanted to "set an example" for these types of cases. Thus, Allstate had no right to remove the case, since Allstate valued the case at less than $ 5000.00, the

jurisdictional limit of the District Court if either side requests a remand.

. . . **[**82]** **[*128]** Allstate was the insurer for [Ferrer] and acted against the best interests of [Ferrer] by driving up the costs of [Ferrer's] insurance. . . .

. . . .

In real life, a jury ought to know why the case was brought, when an insurance company is pulling the strings.

. . . The fact of insurance should have been allowed to be submitted before the jury in order to show the jury who was actually paying for the trial **[***24]** and who was actually in control. Juries do not like to see manini [small] cases like this, and insurance companies ought not be allowed to remove them.

. . . .

. . . In this case, it was [Allstate], not [Ngo] nor [Ferrer][,] who wished to go to trial. . . .

. . . .

Thus, the insurance issue was pertinent, not as an issue of negligence, but rather to show the jury that Allstate created the litigation. Allstate wanted the costs to litigate to rise so high, almost twice the amount that [Ferrer] was willing to settle for, just to prove a point. . . . It was only fair and equitable that the truth should have been made known to the jury.

. . . .

. . . The verdict was determined in favor of [Ngo] in spite of his liability.

. . . .

[Allstate] acted in bad faith by removing this case from the Honolulu District Court. By offering $ 3,000 to settle, Allstate felt all along that the value of the case was less than $ 5,000.00, the demand for a jury trial was in bad faith. Allstate should not have been dismissed in this case.

In his reply brief, Ferrer states, in relevant part, as follows:

> Over the years, for some reason, trial courts have prevented the fact **[***25]** that insurance is paying the legal freight from being brought before the jury. But why? *HRE 411* talks only about insurance being admissible [sic] on the issue of negligence or wrongful acts, not for who will pay the judgment. This "rule" - preventing mention of insurance for virtually all reasons - has no justification today.
>
> . . . .
>
> It really is a waste of the Circuit Court's time to have these kinds of cases being litigated in Circuit Court.

Ferrer's arguments, including his statement that "Allstate was the insurer for [Ferrer] and acted against the best interests of [Ferrer] by driving up the costs of [Ferrer's] insurance[,]" indicate that Ferrer's claim against Allstate was premised on the Ferrer/Allstate insurance policy, not the Ngo/Allstate insurance policy. It appears that Ferrer contends that Allstate acted in first- and third-party bad faith regarding the Ferrer/Allstate insurance policy when Allstate (a) pursuant to the Ngo/Allstate insurance policy, refused to compensate Ferrer for his alleged damages and (b) demanded a jury trial, thereby causing the case to be moved from the district court to the circuit court, thereby increasing costs and wasting the **[***26]** circuit court's time and resources.

The record shows that Allstate had a duty to defend and cover Ngo pursuant to the Ngo/Allstate insurance policy. Ferrer was the plaintiff. There is no evidence that, under the Ferrer/Allstate insurance policy, Allstate had a duty to defend or cover Ferrer. There was no evidence in the record of a reasonable possibility that Ferrer would have a UIM claim.

Ferrer's suggestions that, when an insurer is the insurer of both parties, (1) the insurer's duty to defend the defendant is less than it would be if the insurer insured

only the defendant or (2) the insurer owes a duty to the plaintiff not to incur costs in excess of the plaintiff's demand, have no basis in law.

As noted above, the costs incurred by Ngo/Allstate were not necessitated by Ngo/Allstate's refusal to settle the case in the district court. They were necessitated by Ferrer's commencement and continuation of a claim he could not prove, and his failure to dismiss that claim.

[83] [*129]** B.

Ferrer contends that the court reversibly erred when it denied his December 7, 1999 Motion for New Trial. His ground is that the jury verdict was against the weight of the evidence. He states, in relevant part, **[***27]** as follows:

> A directed verdict **should be** granted when, after disregarding conflicting evidence, giving plaintiff's evidence all the value to which it is entitled, and indulging every legitimate inference which may be drawn from plaintiff's evidence, it can be said there is no evidence to support a jury verdict in the **defendant's** favor. *Makaneole v. Gampon, 7 Haw. App. 448 [776 P.2d 402] (1989)*[.]

(Emphases added; other citations omitted.) This is a misquote. The actual quote is as follows:

> [A] directed verdict **may be granted only** when after disregarding conflicting evidence, giving to the plaintiff's evidence all the value to which it is **legally** entitled, and indulging every legitimate inference which may be drawn from the evidence in plaintiff's favor, it can be said there is no evidence to support a jury verdict in **his** favor.

Makaneole, 7 Haw. App. at 451, 776 P.2d at 405 (quoting *Wakabayashi v. Hertz, 66 Haw. 265, 271, 660 P.2d 1309, 1313 (1983)*) (emphases added). In context, the word "his" in the quote refers to the plaintiff, not the defendant.

The above quote erroneously suggests **[***28]** that directed verdicts may be awarded only in favor of plaintiffs. As noted in *Young v. Price, 48 Haw. 22, 395 P.2d 365 (1964)*, a case cited in Wakabayashi:

> On motions for a directed verdict, the evidence and the inferences which may be fairly drawn from the evidence must be considered in the light most favorable to the party against whom the motion is directed and if the evidence and the inferences viewed in that manner are of such character that reasonable persons in the exercise of fair and impartial judgment may reach different conclusions upon the crucial issue, then the motion should be denied and the issue should be submitted to the jury.

Id. at 24, 395 P.2d at 367.

When a directed verdict in favor of the plaintiff is at issue, the question

> is whether the evidence is such that, after giving to plaintiffs' evidence all value to which it is legally entitled, and indulging every legitimate inference which may be drawn from the evidence in plaintiffs' favor, it can be said that there is no evidence to support a jury verdict in plaintiffs' favor.

Lang v. Beech Aircraft Corp., 4 Haw. App. 237, 244, 663 P.2d 640, 644-45 (1983) **[***29]** (footnote and citation omitted). Therefore, Ferrer's citation of Makaneole does not support Ferrer's argument.

Moreover, when Ferrer did not cause a transcript of the trial to be made a part of the record on appeal, he failed his burden of establishing that the jury verdict was against the weight of the evidence. *Hawai'i Rules of Appellate Procedure (HRAP) Rule 10(b)(3)* (2003); *HRAP Rule 10(b)(2)* (1999); *Hawaiian Trust Co., Ltd. v. Cowan, 4 Haw. App. 166, 663 P.2d 634 (1983).*

CONCLUSION

Accordingly, we vacate the May 2, 2001 Judgment on Taxation and Assessment of Costs denying Ngo's request for taxation of costs in the sum of $ 19,485.49 and remand for the award of reasonable costs consistent with this opinion. In all other respects, we affirm the December 11, 2001 Judgment on All Claims and Parties.

MANOR HEALTHCARE CORP., Plaintiff-Appellant, v. John LOMELO, Jr., et al., Defendants, City of Sunrise, Defendant-Appellee. MANOR HEALTHCARE CORP., A Delaware Corporation, Plaintiff-Appellant, v. John LOMELO, Jr., John Montgomery, Defendants, City of Sunrise, Defendant-Appellee

Nos. 89-6203, 90-5459

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

929 F.2d 633; 1991 U.S. App. LEXIS 7137; 19 Fed. R. Serv. 3d (Callaghan) 612

April 25, 1991

SUBSEQUENT HISTORY: Rehearing En Banc Denied July 29, 1991, Reported at: *1991 U.S. App. LEXIS 32130.*

PRIOR HISTORY: [**1] Appeals from the United States District Court for the Southern District of Florida. No. 86-6607-CIV-WJZ; Zloch, Judge.

DISPOSITION: Affirmed.

COUNSEL: Arthur M. Wolff, Fort Lauderdale, Florida, Philip J. Montante, Jr., Pompano Beach, Florida, for appellant.

Stuart R. Michelson, North Miami, Florida, Edward Shuster, Pyszka, Kessler, Massey, Weldon, et al., Fort Lauderdale, Florida, for appellee.

JUDGES: Hatchett and Birch, Circuit Judges, and Roney, Senior Circuit Judge.

OPINION BY: HATCHETT

OPINION

[*635] HATCHETT, Circuit Judge

In this appeal, we affirm the district court's rulings (1) that a municipality is not necessarily liable, in a *42 U.S.C. § 1983* lawsuit, for a city official's criminal activities, although the activities are related to the city official's area of responsibility, and (2) that a prevailing party, under *Federal Rule of Civil Procedure 54(d)*, may recover costs, although the costs were paid by a non-party.

FACTS

Manor Health Care (Manor) is a Delaware corporation engaged in the business of building and operating nursing homes throughout the United States. In December, 1982, Manor submitted an application to the city of Sunrise, Florida, seeking a special exemption to the zoning laws to build a nursing home within the city. The Sunrise City Council initially scheduled a reading of Manor's request in January, 1983; however, the council postponed the reading due to community protests and petitions opposing the zoning application. Pursuant to the City of Sunrise Code, the proposed ordinance containing Manor's zoning change [**2] had to be read on at least two separate days at regular or special meetings prior to its enactment. *See* City of Sunrise, Florida, Code, § 3.12(2) (1972). The city council held this first meeting regarding Manor's request in April, 1983, and listened to protests from several residents of the community. In May, 1983, the council held the second reading amid protests from residents, and approved the ordinance by a three-to-two vote.

Following the council's approval, John Lomelo, Jr., Mayor of Sunrise, vetoed the ordinance citing opposition from abutting property owners and residents. Although the City Code provides that the city council may override a mayoral veto by a four-fifths vote of the city council, Manor did not seek such an override. Instead, Manor located a new site within the city and submitted a second application for zoning change. The city council unanimously approved the new site.

In accordance with the city charter, Manor's next step was to present the ordinance to the Planning and Zoning Commission. In June, 1983, prior to the ordinance's presentation to the zoning commission, Marvin Liebowitz, a registered lobbyist, told Manor's lawyer that for $ 50,000 Liebowitz [**3] would help Manor gain approval for its nursing home. Manor's lawyer responded that $ 50,000 was "ridiculous," but agreed to meet with Liebowitz and Mayor Lomelo. During the meeting, Lomelo reduced the $ 50,000 sum to $ 30,000. After expressing displeasure with the $ 30,000 fee, Manor's senior vice president, Steven Silver, proceeding under Federal Bureau of Investigation (FBI) directives, agreed to hire Liebowitz for $ 30,000.

On September 27, 1983, the City of Sunrise Planning and Zoning Commission unanimously approved the ordinance, and the city council granted the rezoning application on a five-to-zero vote. On September 29, 1983, Mayor Lomelo signed the ordinance.

Thereafter, Silver participated in an FBI investigation during which he taped several telephone calls and conversations with Mayor Lomelo and Liebowitz. Lomelo was later convicted of eight counts of mail fraud, conspiracy to commit mail fraud, and conspiracy to obstruct interstate commerce by extortion, not all of which are directly related to Manor. *See United States v. Lomelo, 792 F.2d 1124* (June 6, 1986) (unpublished opinion).

PROCEDURAL HISTORY

In July, 1988, Manor filed this lawsuit against Lomelo [**4] and the city of Sunrise under *42 U.S.C. § 1983* for deprivation of constitutional rights under the color of state law. The complaint alleged that Lomelo and John Montgomery, president of the Sunrise City Council, extorted $ 30,000 from Manor while acting on behalf of the city of Sunrise. The district court referred the case to a magistrate judge who recommended summary judgment in favor of the city of Sunrise. The district court adopted the magistrate judge's recommendation and granted the city of Sunrise's motion **[*636]** for summary judgment. Following the grant of summary judgment, the city filed a motion to tax costs. The district court awarded the city $ 2,339.39 in costs. Manor appeals the summary judgment ruling in case number 89-6203 and the cost award in case number 90-5459. This court consolidated the appeals.

ISSUES

Manor raises two issues on appeal: (1) whether the district court erred in granting the city of Sunrise's motion for summary judgment; and (2) whether the district court erred in awarding the city costs.

CONTENTIONS

Manor contends that the city of Sunrise should be held liable for Lomelo's actions because the city's charter and the de facto powers allotted to Lomelo made **[**5]** him the final policy-making authority with regard to the building and day-to-day operation of Manor's proposed nursing home. Additionally, Manor contends that the district court erred in awarding the city of Sunrise costs because the city's insurance carrier, Florida Insurance Guaranty Fund (FIGA), paid the cost of the litigation.

In response, the city contends that its charter did not give Lomelo final policy-making authority with regard to zoning, and it cannot be held liable based on the doctrine of *respondeat superior* in a *section 1983* action for Lomelo's criminal activities. Furthermore, the city of Sunrise contends that as the prevailing party, it was entitled to costs.

DISCUSSION

A. Municipal Liability

In reviewing the district court's grant of a motion for summary judgment, we apply the same legal standards applied by the district court. *Clemons v. Dougherty County, Georgia, 684 F.2d 1365 (11th Cir.1982). Federal Rule of Civil Procedure 56(c)* permits a summary judgment when the pleadings along with appropriate affidavits establish "no genuine issue as to material facts and the moving party is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 2552, 91 L. Ed. 2d 265 (1986).* **[**6]**

Although all justifiable inferences are to be drawn in favor of the nonmoving party, the moving party is entitled to judgment as a matter of law when the nonmoving party fails to make a sufficient showing of an essential element of the case. *Everett v. Napper, 833 F.2d 1507, 1510 (11th Cir.1987).*

Manor contends that the district court erred in concluding that Lomelo was not the final policy-making authority for the city of Sunrise. According to Manor, Lomelo was the chief executive and administrative officer of the city, and the city charter "clothed" him with final policy-making authority with respect to zoning. Manor further argues that Sunrise City Charter § 4.043(b) authorized Lomelo to direct and supervise the administration of "all departments, offices and agencies of the city," including the building and zoning department, public works, electrical inspectors, and plumbing inspectors. Furthermore, Manor argues that Lomelo had veto power over legislative ordinances and resolutions, including those from the zoning department. Accordingly, Manor contends that the scope and nature of Lomelo's authority, conferred upon him by the city charter, and his de facto [**7] powers, accumulated over eighteen years of continuous leadership as mayor of the city, made him in essence the alter ego of the city.

The district court found that the city charter did not give the mayor the legal authority to commit extortion or to promulgate an official policy or custom which binds the municipality for any acts of extortion its officials may commit in their individual capacities. Relying on *Pembaur v. City of Cincinnati, 475 U.S. 469, 106 S. Ct. 1292, 89 L. Ed. 2d 452 (1986)*, the district court reasoned that Manor failed to show that Lomelo was acting in his official capacity as a policy maker or that he established a municipal policy with respect to extortion. Therefore, the district court concluded that Manor failed to show an essential element of its case: that Lomelo [*637] acted as a final policy-making authority when he attempted to extort a bribe from Manor.

Section 1983 provides for the imposition of liability upon any person who, acting under color of state law, deprives another of rights or privileges secured by the Constitution or laws of the United States. *42 U.S.C. § 1983*. Although municipalities are considered "persons" [**8] within the meaning of *section 1983*, the constitutional deprivation must have its origin in what can fairly be said to be a policy of a municipality. *Monell v. City of New York Dept. of Social Services, 436 U.S. 658, 694, 98 S. Ct. 2018, 2037, 56 L. Ed. 2d 611 (1978).* Nonetheless, municipalities cannot be held liable on a theory of *respondeat superior. Monell, 436 U.S. at 691, 98 S. Ct. at 2036. See also Pembaur v. Cincinnati, 475 U.S. 469, 106 S. Ct. 1292, 89 L. Ed. 2d 452 (1986).*

In *Pembaur*, the Court articulated the following three-part test for determining when a single act of a municipal officer subjects the municipality to liability under *section 1983*: (1) acts which the municipality officially sanctioned or ordered; (2) acts of municipal officers with final policy-making authority as defined by state law; and (3) actions taken pursuant to a policy adopted by the official or officials responsible under state law for making policy in that area. *Pembaur, 475 U.S. at 480-83* & n. 12, *106 S. Ct. at 1298-1300* & n. 12. [**9] The Court also clarified the fact that a municipality is not liable merely because the official who inflicted that constitutional injury had the final authority to act on its behalf. Thus the Court stated:

> We hasten to emphasize that not every decision by municipal officers automatically subjects the municipality to *section 1983* liability. Municipal liability attaches only where the decision maker possesses final authority to establish municipal policy with respect to the action ordered. The fact that a particular official -- even a policy making official -- has discretion in the exercise of particular functions does not, without more, give rise to municipal liability based on an exercise of that discretion. *See, e.g., Oklahoma City v. Tuttle, 471 U.S. [808] at 822-24, 105 S. Ct. [2427] at 2435-2436 [85 L. Ed. 2d 791 (1985)].* The official must also be responsible for establishing final government policy respecting such activity before the municipality can be held liable.

Pembaur, 475 U.S. at 481-82, 106 S. Ct. at 1299-1300. See also City of St. Louis v. Praprotnik, 485 U.S. 112, 108 S. Ct. 915, 99 L. Ed. 2d 107 (1988); [**10] *Jett v. Dallas Independent School Dist., 491 U.S. 701, 109 S. Ct. 2702, 105 L. Ed. 2d 598 (1989).*

According to Manor, the city charter established a "strong mayor" type government and using these powers, Lomelo caused Manor to pay Liebowitz $ 30,000 to lobby and secure a special zoning exception for its nursing home. Thus, Manor contends that the powers given Lomelo under the city charter are just those powers the Supreme Court envisioned when it considered whether an official had final policy-making authority with respect to municipal liability in *Pembaur*.

Manor's analysis asks us to broadly construe municipal liability to include all acts of a municipal officer allegedly clothed with the ultimate power and responsibility for that municipality. We decline the offer. The teachings of *Monell* and its progeny specifically prohibit us from holding a municipality liable for all acts of a municipal officer. Indeed, the Sunrise city charter granted Lomelo the power to oversee and administer all departments and agencies of the city, including the planning and zoning department. The charter further gave the city council the power to override [**11] Lomelo's veto with regard to zoning matters. Thus, under the charter, Lomelo was not the ultimate policy-making authority regarding zoning issues in the city of Sunrise. *See City of St. Louis v. Praprotnik, 485 U.S. at 125, 108 S. Ct. at 924* (official's actions subject to review procedures do not amount to complete delegation of authority).

Although acknowledging that the city council could override Lomelo's veto by a four-fifths vote, Manor nonetheless argues that Lomelo's de facto powers caused the [*638] city council to defer in substantial part to his judgment. Thus, he was the final policy maker with regard to zoning. *See Berdin v. Duggan, 701 F.2d 909, 914 (11th Cir.1983); see also Bowen v. Watkins, 669 F.2d 979, 989-90 (5th Cir.1982).* Additionally, Manor argues that Lomelo and Sunrise were one and the same. Therefore, Manor concludes that Lomelo's policy of economic duress and monetary aggrandizement for his friends, such as Liebowitz, was characteristic during Lomelo's eighteen-year policy of administering the city of Sunrise with an iron hand.

We note that following Lomelo's veto of Manor's first [**12] zoning ordinance, Manor failed to seek an override of this veto from the city council. The Sunrise city charter, which authorizes a mayor-council form of government, does not permit the mayor alone to determine the policy of the city. Only the city council can make such determinations. Consequently, Manor cannot now contend that the city council would have deferred to Lomelo's judgment on all zoning issues since Manor failed to trigger the city council's authority.

We further note the decisions from two other circuits which support our holding. In *Worsham v. City of Pasadena, 881 F.2d 1336 (5th Cir.1989)*, the court held that the mayor's action of indefinitely suspending city employees was not the act of the city because the city council was empowered to review the decision of city officials. *Worsham, 881 F.2d at 1341.* The *Worsham* court further reasoned that the language in *Pembaur* and *Praprotnik* is significant in two respects:

> First, it indicates that policy-making authority in areas other than the one implicated is not sufficient to impose liability on the city. *Pembaur* established that no matter how much power an official has, [**13] no municipal liability exists if that official does not set the policy at issue. Second, the language indicates that the employee must have final policy-making authority in that area.

Worsham, 881 F.2d at 1340. Additionally, the Eighth Circuit in *Williams v. Butler, 863 F.2d 1398 (8th Cir.1988)* has also stated that an incomplete delegation of authority, i.e., where the right of review is retained, will not result in municipal liability. *Butler, at 1404.*

In light of these cases, it is clear that the city of Sunrise cannot be liable for Lomelo's alleged bribery and extortion. *Pembaur* clearly states that even if an official is vested with final policy-making authority regarding the subject matter in question, not every act of that official will subject the city to liability under *section 1983*. The city of Sunrise neither adopted nor ratified Lomelo's bribery and extortive activities. Lomelo conducted these activities to benefit himself and his friends, not the city. To hold the city liable for Lomelo's actions in this case would in essence subject the city to vicarious liability for Lomelo's personal acts. *Monell* and its progeny prohibit [**14] us from so holding.

Furthermore, Lomelo was not the city's alter ego with respect to planning and zoning. The city council had

the power to override Lomelo's veto and all zoning changes required approval from the city council, the planning and zoning commission and Lomelo, with the council having the final vote. The city did not develop a custom or practice which allowed Lomelo to function without any supervision or review with regard to zoning. *See Mandel v. Doe, 888 F.2d 783, 794 (11th Cir.1989)* (liability imposed where county initially contemplated supervision of physician assistants but developed practice authorizing the assistants to function without supervision or review). Additionally, Lomelo was not executing municipal policy when he acted contrary to controlling law regarding bribery and extortion. *See Starrett v. Wadley, 876 F.2d 808 (10th Cir.1989)*. Consequently, the district court's grant of summary judgment in favor of the city of Sunrise is affirmed.

B. Costs

Manor also contends that the district court erred in awarding the city of Sunrise costs because the Florida Insurance Guaranty Fund paid the city's litigation costs. According [**15] to Manor, under *Rule 54(d) of* [*639] *the Federal Rules of Civil Procedure*, costs are not recoverable if paid by a person or entity not a party to the proceeding.

In response, the city of Sunrise argues that it was the prevailing party in the lawsuit, and therefore, it is entitled to costs under *rule 54(d)*. The city acknowledges that FIGA paid the costs of the litigation and completely controlled the defense, but argues that had Manor prevailed in this case, FIGA would have been obligated to pay Manor's litigation costs. Consequently, the city contends that FIGA is a party to the litigation within the meaning of *rule 54(d)*, and thus the district court correctly awarded the city its litigation costs.

This court will not disturb an award of costs unless a clear abuse of discretion is demonstrated. *Tanker Management, Inc. v. Brunson, 918 F.2d 1524, 1527 (11th Cir.1990)* (citing *Studiengesellschaft Kohle v. Eastman Kodak, 713 F.2d 128, 131 (5th Cir.1983)*. Under the abuse of discretion standard, the proper inquiry is not how the reviewing court would have ruled if it had been considering the case in the first place, but whether the premise upon which the [**16] district court exercised its discretion was correct. *See Collins v. Seaboard Coastline Railroad Co., 681 F.2d 1333, 1335 (11th Cir.1982)*.

Federal Rule of Civil Procedure 54(d) states:

> Except when express provisions therefor is made either in a statute of the United States or in these rules, costs shall be allowed as a matter of course to the prevailing party unless the court otherwise direct. . . .

This language creates a presumption in favor of awarding costs to the prevailing party which Manor must overcome. *See Coyne-Delany Co., Inc. v. Capital Development Board of Illinois, 717 F.2d 385 (7th Cir.1983)*. The thrust of Manor's opposition to the cost award is that the city made no specific showing that it is obligated to reimburse FIGA. Therefore, according to Manor, an award of costs would be an unnecessary windfall to both the city and FIGA.

This court has not previously addressed whether a prevailing party to a lawsuit may recover costs paid by a person or entity not a party to the lawsuit. The Florida Supreme Court, however, recently addressed this issue in *Aspen v. Bayless, 564 So. 2d 1081 (Fla.1990)*. * In *Aspen*, the [**17] Florida Supreme Court held that a party was not precluded from recovering costs when someone other than the named party paid or advanced those costs. *Aspen, 564 So.2d at 1083*. The court reasoned that "it is unnecessary to inquire into the source of the funds used for the initial payment of costs in order to award taxable costs to the winning party." *Aspen, at 1083*.

> * The Florida Supreme Court reaffirmed its holding in *Aspen* in *Pine Island Lumber, Inc. v. Festa, 575 So. 2d 204 (Fla.1991)*.

Florida Supreme Court decisions are not binding precedent on this court. Nonetheless, we find the Florida Supreme Court's reasoning instructive and persuasive. We further agree with the city's argument that had Manor prevailed in this case, FIGA would be fully liable for Manor's litigation costs and expenses under the insurance contract, and Manor would, after obtaining a judgment against the city, seek an amendment to that judgment obligating FIGA to pay its litigation costs. *See Tanker Management, Inc. v. Brunson, 918 F.2d 1524, 1529 (11th*

Cir.1990). [**18] Thus, FIGA may be considered a party to the lawsuit for *rule 54(d)* purposes.

To adopt Manor's argument and prevent the city from regaining its costs would not only violate the presumption that a prevailing party is entitled to its costs under *rule 54(d)*, but would also allow plaintiffs to bring lawsuits against insured defendants without incurring litigation costs after losing on the merits. Additionally, the city paid the premiums for FIGA's insurance coverage. Thus Manor, as the nonprevailing party, should not benefit from the city's insurance coverage. Accordingly, we hold that the district court did not abuse its discretion in awarding the city its costs.

[*640] CONCLUSION

We hold that the mere empowering of a city official does not subject the city to *section 1983* liability for every act of that official, including unlawful acts. Additionally, we hold that the city of Sunrise may recover its costs although it did not pay them. Accordingly, the judgment of the district court is affirmed.

AFFIRMED.

LEANN HOPKINS, Plaintiff/Appellee, vs. AMANDA BYRD, Defendant/Appellant.

Case No. 101,887

COURT OF CIVIL APPEALS OF OKLAHOMA, DIVISION TWO

2006 OK CIV APP 132; 146 P.3d 864; 2006 Okla. Civ. App. LEXIS 104

September 26, 2006, Decided
October 31, 2006, Mandate Issued

SUBSEQUENT HISTORY: [***1] This Opinion has been Released for Publication by Order of the Court of Civil Appeals.

PRIOR HISTORY: APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY, OKLAHOMA. HONORABLE NOMA D. GURICH, TRIAL JUDGE.

DISPOSITION: AFFIRMED IN PART, REVERSED IN PART, AND REMANDED FOR FURTHER PROCEEDINGS.

COUNSEL: Holly Hefton, HOLLY HEFTON, P.C., Oklahoma City, Oklahoma, For Plaintiff/Appellee.

T.J. Shelton, LAWSON, KING & SHELTON, P.L.L.C., Oklahoma City, Oklahoma, For Defendant/Appellant.

Michael W. Brewer, HILTGEN & BREWER, P.C., Oklahoma City, Oklahoma, and Thomas D. Hird, RICHARDS & CONNOR, Tulsa, Oklahoma, For Amicus Curiae, The Oklahoma Association of Defense Counsel.

JUDGES: OPINION BY JANE P. WISEMAN, PRESIDING JUDGE. GOODMAN, J., and FISCHER, J., concur.

OPINION BY: JANE P. WISEMAN

OPINION

[**865] OPINION BY JANE P. WISEMAN, PRESIDING JUDGE:

[*P1] Defendant, Amanda Byrd, appeals an order of the trial court denying her request for an award of attorney fees against Plaintiff, Leann Hopkins, pursuant to *12 O.S. Rev. Supp. 2005 § 1101.1*. Plaintiff counter-appeals the award of costs to Defendant pursuant to *§ 1101.1* and *12 O.S.2001 § 942*. The issue on appeal is whether Defendant is entitled to [***2] costs and attorney fees even though her costs and attorney fees were paid by her liability insurer. We find that Defendant is entitled to an award of costs and attorney fees pursuant to *§ 1101.1*, and affirm in part, reverse in part, and remand for further proceedings.

[*P2] Plaintiff filed her action against Defendant seeking damages for personal injuries arising out of an automobile collision. Defendant offered to confess judgment, pursuant to *§ 1101.1*, in the amount of $ 5,000; the offer was deemed rejected for lack of response from Plaintiff. The case proceeded to trial and the jury returned a verdict for Defendant; a judgment was entered consistent with the jury's verdict.

[*P3] Defendant filed an application for costs pursuant to *12 O.S.2001 §§ 929, 942*, and *12 O.S. Rev. Supp. 2005 § 1101.1*, and for attorney fees pursuant to *§ 1101.1*. Plaintiff responded to Defendant's request by challenging the reasonableness of the attorney fees and the recoverability of some of the costs. The trial court ruled as follows:

> The Court . . . finds that costs in the amount of two thousand, three hundred fifteen dollars ($ [***3] 2,315.00) should be awarded pursuant to *12 O.S. § 942* and costs in the amount of five hundred eight dollars and thirty eight cents ($ 508.38) should be awarded pursuant to *12 O.S. § 1101.1*. As to the issue of attorney fees, the Court finds that the Defendant had in place a policy of liability insurance which by its terms provided Defendant with legal representation, either by an outside defense attorney or by an in-house attorney-employee of the insurance company. As a result, the Defendant did not incur attorney fees. Consequently, Defendant's Motion for Attorney Fees is denied in full.

Defendant appeals the denial of her request for attorney fees, and Plaintiff appeals the award of costs.

[*P4] The issue of whether Defendant is entitled to costs and attorney fees pursuant to *§ 1101.1* presents a question of statutory construction and is "subject to an appellate court's plenary, independent and nondeferential reexamination." *Twin Hills Golf & Country Club, Inc. v. Town of Forest Park, 2005 OK 71, P5, 123 P.3d 5, 6.*

[*P5] It is undisputed that Plaintiff demanded more than $ 100,000 in damages [***4] from Defendant; Defendant offered to confess judgment for $ 5,000 pursuant to *§ 1101.1(A)*; the offer was deemed rejected because Plaintiff did not file a response to it; and the jury returned a verdict in favor of Defendant. Pursuant to *§ 1101.1(A)(3)*, Defendant is "entitled to recover reasonable litigation costs and reasonable attorney fees incurred by [Defendant] from the date of filing of the final offer of judgment until the date of the verdict." In denying the request for attorney fees, the trial court focused on the word [**866] "incurred" and determined that, because Defendant's insurer, not Defendant, incurred attorney fees on behalf of Defendant, Defendant cannot recover fees. We disagree with the trial court's conclusion.

[*P6] "The goal of any inquiry into the meaning of a legislative enactment is to ascertain and follow its legislative intent." *Bronson Trailers & Trucks v. Newman , 2006 OK 46, P9, 139 P.3d 885, 890.* An appellate court will presume that the legislature expressed its intent in the plain language of the statute. *Id.* However, to understand accurately the legislative policy underlying a statute, it is proper and sometimes necessary to consider [***5] the history and the particular problem the statute was intended to address. *Tomahawk Res., Inc. v. Craven, 2005 OK 82, P5, 130 P.3d 222, 223.* An appellate court "will not adopt a construction which defeats the legislative intent as shown by other related enactments." *Id.*

[*P7] *Section 1101.1* was enacted in 1995 as part of the Tort Reform Law. Charles W. Adams, *Recent Developments in Oklahoma Law - Civil Procedure, 31 Tulsa L.J. 753, 754 (1996)* (citing 1995 Okla. Sess. Laws 287). It is similar to *12 O.S.2001 § 1101*, which governs offers of judgment in actions for the recovery of money and allows a recovery of costs, but not attorney fees, if a plaintiff fails to obtain a judgment for more than the defendant offered. The purpose of *§ 1101* is to promote "judgments without protracted litigation" by furnishing "additional incentives to encourage a plaintiff to accept a defendant's offer to confess judgment" and to encourage a defendant to offer to confess early so as to "avoid further increases in costs which may be incurred [for] trial preparation." *Dulan v. Johnston, 1984 OK 44, P10, 687 P.2d 1045, 1047.* [***6] The purpose of *§ 1101.1* is the same. *See Allen Farms, Inc. v. Broce Constr. Co., 2006 OK CIV APP 36, P21, 134 P.3d 852, 856-57.*

[*P8] For varying reasons, courts in other jurisdictions have rejected the idea that a party that is provided a defense through an insurance policy or other indemnification agreement may not recover costs or attorney fees pursuant to a statute that would allow such recovery. Most directly on point is *Aspen v. Bayless, 564 So. 2d 1081 (Fla. 1990)*, in which the Florida Supreme Court addressed the issue of whether, under an offer to confess judgment statute, a defendant can recover costs where the defendant's insurance policy provides that the insurer will pay all costs so the defendant never incurs any liability for them. The Florida Supreme Court answered "yes" to the question. It rejected the contrary rule, because (1) an insurance company's right of subrogation would include rights against its own insured if the insured were to recover and attempt to keep costs and expenses awarded in the case; (2) "[f]ailure to allow a cost award to a prevailing defendant who is insured, because of the fact of insurance coverage [***7] alone,

gives the plaintiff, and/or the plaintiff's insurance carrier, an undeserved windfall"; (3) a plaintiff should not be afforded a fortuitous benefit merely because the defendant has paid premiums for insurance; and (4) failure to allow recovery of fees would subvert the purpose and intent of the offer to confess judgment statute which is to encourage parties to settle claims without going to trial. [1] *Id. at 1082-83.*

1 With regard to the last reason, the Florida Supreme Court said, "Most tort claims involve liability insurance companies which are contractually obligated to pay litigation costs on behalf of, and to indemnify and pay costs assessed against, their insureds. If a named insured is unable to obtain costs under [the offer to confess judgment statute], there would be less incentive to accept an offer to settle and no penalty for failing to do so." *Aspen, 564 So. 2d at 1083.*

[*P9] In *Hale v. Erickson, 23 P.3d 1255, 1257 (Colo. Ct. App. 2001),* **[***8]** the Colorado Court of Appeals held that to prohibit a defendant from recovering costs under a similar statute would severely thwart the purposes of the statute, which are to penalize a nonsettling plaintiff, encourage settlement, curb protracted and fruitless litigation, and discourage the filing of unnecessary litigation. "Insurance defense is common, and plaintiffs in such situations necessarily would have less incentive to settle." *Id.* In *Ferrer v. Ngo, 102 Haw. 119, 73 P.3d 73, 80 (Haw. 2003),* the Supreme Court of Hawaii held:

> A plaintiff retains the right to sue for damages notwithstanding the fact that **[**867]** those damages have been or will be paid by the plaintiff's insurer. When a party's insurer is providing defense and coverage, the party and the insurer are, to the limits of the coverage, one party defending under the name of the insured. The benefits flowing from a party's insurance coverage flow in favor of the insured party, not the adverse party.

See also Mullins v. Kessler, 83 P.3d 1203 (Colo. Ct. App. 2003) ("The arrangement between defendant and his liability insurer for the disbursement and repayment of . . . costs is **[***9]** of no consequence."); *Public Utils. Dist. No. 1 of Grays Harbor v. Crea, 88 Wn. App. 390, 945 P.2d 722 (Wash. Ct. App. 1997)*; *Howard P. Foley Co. v. Employers-Commercial Union, 15 Ariz. App. 350, 488 P.2d 987 (Ariz. Ct. App. 1971)* (plaintiff is not entitled to benefit from defendant's insurance contract); *Safway Rental & Sales Co. v. Albina Engine & Mach. Works, Inc., 343 F.2d 129 (10th Cir. 1965)* (applying Oklahoma law) ("if there had been no insurance the insured would have had to pay the judgment, costs, and fees, and would have had a right to recover them").

[*P10] It is clear from the language of *§ 1101.1*, its history, and the interpretation placed on *§ 1101* that the intent of *§ 1101.1* is to encourage settlements prior to trial, lessen litigation costs, and decrease the number of baseless lawsuits. A plaintiff must seriously consider a defendant's settlement offer or face the possibility of being made to pay the defendant's costs and attorney fees. The trial court's interpretation of *§ 1101.1* would thwart these purposes, because it would limit the application of *§ 1101.1* to cases where the defendant is not insured. **[***10]** This would remove thousands of cases from the umbrella of *§ 1101.1* and would do little to encourage early settlement of cases. Moreover, a plaintiff would benefit from a defendant's fortuitous procurement of insurance. The trial court's interpretation of the language of *§ 1101.1* cannot be what the legislature meant.

[*P11] We also note, as pointed out in the *amicus* brief of the Oklahoma Association of Defense Counsel, that the trial court's interpretation could possibly affect other statutes that allow the recovery of attorney fees and costs *incurred* by a party. For instance, *12 O.S. Rev. Supp. 2005 § 2011* allows sanctions to be imposed against an attorney for filing frivolous pleadings, motions, and other papers. The sanction may include payment "of some or all of the reasonable attorney fees and other expenses *incurred* [by the moving party] as a direct result of the violation." (Emphasis added.) *See also 12 O.S. Rev. Supp. 2005 § 2011.1* (sanctions for frivolous actions not arising out of contract). "[T]he purpose of the sanction provision in *§ 2011* is to discourage pleadings, motions or other papers that are frivolous or are filed for an improper purpose **[***11]** such as delay." *Cooper v. Booher, 2004 OK 40, P7, 93 P.3d 19, 22.*

[*P12] Similar to *§ 2011, 12 O.S. Rev. Supp. 2005 §§ 3226.1, 3230,* and *3237* allow as a sanction for discovery abuses the recovery of costs and attorney fees *incurred.* These sanctions are "designed as a tool to compel production of evidence, compensate adversaries

for unnecessary expense and deter misconduct." *Cf. Payne v. Dewitt, 1999 OK 93 n.7, 995 P.2d 1088, 1093* (discovery sanctions pursuant to *§ 3237*). [2] As with *§ 1101.1*, the purpose of these statutes would be thwarted by allowing an offending party to escape sanctions merely because the other party did not actually have to pay attorney fees because of insurance coverage.

2 Other examples of statutes that use the word "incurred" in relation to recovery of costs or attorney fees are *12 O.S. Rev. Supp. 2005 § 832.1* (duty of manufacturer to indemnify seller in products liability action); *12 O.S.2001 § 995* (dismissal of frivolous appeals); *12 O.S. 2001 § 1106* (offer to "confess judgment for part of the amount claimed, or part of the causes involved in the action"); *12 O.S. Rev. Supp. 2005 § 1876* (judgments entered in conformity with orders "confirming, vacating without directing a rehearing, modifying, or correcting an award"); *15 O.S.2001 § 761.1* (frivolous actions or defenses under the Consumer Protection Act); *12 O.S.2001 § 1141.5* (quiet title actions); *23 O.S.2001 § 103* (actions asserted in bad faith).

[*12]** **[*P13]** We must conclude that Defendant is entitled to recover both her attorney fees and costs under *§ 929* and *§ 1101.1*. On remand, the trial court shall hold a hearing to determine the reasonable attorney fees that accrued after Defendant offered to confess **[**868]** judgment. Because Plaintiff only challenges Defendant's entitlement to costs and not the reasonableness of the costs awarded by the trial court, the award of costs is affirmed. [3]

3 In addition to challenging an award of costs incurred after the offer to confess judgment made pursuant to *§ 1101.1*, Plaintiff challenges the award of costs under *12 O.S.2001 §§ 929* and *942*. For the same reasons discussed above, we conclude that Defendant is entitled to costs as prevailing party under *§ 929*, as well as pursuant to *§ 1101.1*.

[*P14] **[***13]** AFFIRMED IN PART, REVERSED IN PART, AND REMANDED FOR FURTHER PROCEEDINGS.

GOODMAN, J., and FISCHER, J., concur.

CERTIFICATE OF SERVICE

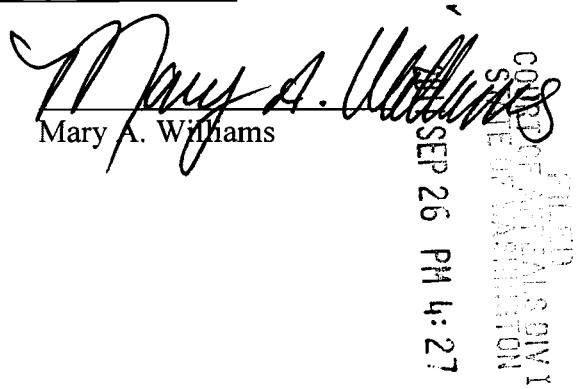
I hereby certify that on the 26th day of September, 2011, I caused to be served the foregoing *Respondent's Brief* on the following parties at the following addresses:

Richard T. Roats
Roats Law Office PLLC
702 W. Idaho Street, Suite 321
PO Box 9811
Boise, ID 83707
Tel: (208) 344-3477
Fax: (888) 331-7581
E-Mail: rtr@roatslaw.com

Arthur W. Harrigan
Elizabeth Weden Perka
Christopher T. Wion
Danielson Harrigan Leyh & Tollefson
999 Third Avenue, Suite 4400
Seattle, WA 98104
Telephone: (206) 623-1700
Facsimile: (206) 623-8717
E-Mail: arthurh@dhlt.com

by:

- [x] U.S. Postal Service, ordinary first class mail
- [ ] U.S. Postal Service, certified or registered mail, return receipt requested
- [ ] hand delivery
- [ ] facsimile
- [x] electronic service
- [ ] other (specify) _____



Mary A. Williams