

69519-3-I

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

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MATT SUROWIECKI, JR. and INEZA KUCEBA,

Plaintiffs/Appellants

v.

HAT ISLAND COMMUNITY ASSOCIATION,

Defendant/Respondent

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RESPONDENT'S BRIEF

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Jeremy Stilwell, WSBA No. 31666  
Attorneys for Respondent  
Hat Island Community Association

BARKER MARTIN, P.S.  
719 Second Avenue, Suite 1200  
Seattle, WA 98104  
Phone: (206) 381-9806  
Fax: (206) 381-9807

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## **I. STATEMENT OF THE ISSUES**

1. Whether the procedural right to demand a meeting of the homeowners association confers a substantive right to have those owners in attendance vote on a matter that is squarely within the board of directors' authority pursuant to the Nonprofit Corporations Act, the Homeowners Association Act and the Association's Bylaws and where no legal authority establishes a substantive "right" of the homeowners to vote on the matter.

2. Does a trial court's discretion to award "reasonable attorney fees to a prevailing party" under RCW 64.38.050 include the discretion to award less than an amount the Court expressly finds to be "reasonable."

## **II. ASSIGNMENT OF ERROR**

On cross-appeal, Respondent makes the following assignment of error:

1. The trial court erred when it awarded only partial attorney's fees to Respondent. CP 33.

## **III. STATEMENT OF THE CASE**

### **A. Factual Background**

Hat Island Community Association ("HICA" or "Association") is a Homeowners Association and nonprofit corporation governed by RCW

64.38 (“HOA Act”), RCW 24.03 (“Nonprofit Corporations Act) and the Association’s bylaws that were adopted pursuant to those chapters. The Association members elect a board of directors, referred to in the bylaws as a “Board of Trustees” whose authority is defined as follows:

SECTION 1. Subject to limitations in the Articles of Incorporation and the By-Laws and Laws of the State of Washington, all powers of the Association and the business and affairs of the Association shall be controlled by the Board of Trustees, without prejudice to such general powers, and subject to the same limitations, it is hereby expressly declared that the trustees powers shall include but not be limited to providing and maintaining roads, recreational facilities, transportation, and water, in a fiscally responsible manner, preserve the island's safety, security and environmental character, enhance owner's quality of life, and preserve and protect the real and intangible values of the island owner's personal and community properties.

CP 306.

SECTION 3. To conduct, manage and control the affairs and business of the Association and to make such rules and regulations therefore not inconsistent with law, with the Articles of Incorporation or the By-Laws, as they may deem in the best interest of the public good.

CP 306.

As alleged by Appellants, in 2006 and 2007 the Association members approved special assessments to fund improvements to the Association’s marina. CP 329-330. Payment of the assessment was to be made over 10 years with interest. CP 329-330. In May 2012, more than five years after the Association levied the assessment, Appellants and

other members of the Hat Island Association submitted the requisite number of owner requests to call a meeting of Association owners. CP 331. As part of their call for a meeting, Appellants demanded a “vote whether or not both projects should be put to another vote of the Members for purpose of either terminating, redefining or continuing the projects.” CP 331.

The Association called the meeting, but did not allow the requested vote to happen because decisions to contract for the maintenance and improvement of Association property must be made by the Board and, in fact, had already been made years earlier. CP 331-332.

**B. Procedural Background**

Appellants filed their complaint on August 27, 2012, and simultaneously requested a preliminary injunction, which the trial court denied. CP 326-335; 322-325; 167-168. Plaintiffs have not appealed this decision. The Association then moved to dismiss the case under CR 12(b)(6) for failure to state a claim upon which relief may be granted. CP 158-166. Appellants asked the court to convert the motion to dismiss to a summary judgment hearing under CR 56,<sup>1</sup> but that request was denied and the decision has not been appealed. On September 28, 2012 the trial

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<sup>1</sup> CP 136-157.

court granted the Association's motion to dismiss the case in its entirety pursuant to CR 12(b)(6). CP 123-124.

Appellants devote over a page of briefing to the preliminary injunction hearing and extensively cite Matt Suroweicki Sr.'s self-serving declaration in support that motion.<sup>2</sup> However, Plaintiff's contentions in support of the preliminary injunction, while disputed, are irrelevant to this appeal because they are outside of the complaint and more importantly, Appellants have not appealed that decision. The gravamen of this appeal is whether Appellants were legally entitled to their requested relief: a vote of the Association's owners as to whether or not both [marina] projects should be put to another vote of the Members for purpose of either terminating, redefining or continuing the projects. The trial court found that Plaintiffs were not entitled to such relief, even accepting all facts as alleged, and dismissed the claims pursuant to CR 12(b)(6). CP 123-124.

After prevailing on all claims, the Association moved for an award of attorney fees pursuant to RCW 64.38.050. CP 114-122. On October 27, 2012 the trial court found the number of hours, billable rates and total fees requested by the Association were reasonable but awarded only half

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<sup>2</sup> See Appellant's Brief pp. 8-10.

of those fees finding that “Plaintiff’s claims ‘are not frivolous.’”  
CP 32-33.

#### IV. ARGUMENT

##### A. **Standard of Review**

This Court reviews orders granting motions to dismiss a complaint for failure to state a claim under CR 12(b)(6) on a *de novo* basis. *Haberman v. WPPSS*, 109 Wn.2d 107, 120-21, 744 P.2d 254 (1987). The amount of attorney’s fees to be awarded is reviewed on the substantial evidence test, and the standard of review is abuse of discretion. *Schmidt v. Cornerstone Investments*, 115 Wn.2d 148, 169, 795 P.2d 1143 (1990).

##### B. **Appellants Failed to State a Legally Supported Claim for Relief**

Appellants brief and their complaint demonstrate a fundamental misunderstanding of the substantive and procedural rights of owners in a homeowners association. Appellants string together several *procedural* sections from the Association’s bylaws and argue that these procedural requirements create a substantive right inconsistent with the remainder of the Bylaws, the HOA Act and the Nonprofit Corporations Act. Put simply, the procedural right to call a meeting of the association owners does not confer on the owners a substantive right to vote on matters reserved to the authority of the Board.

Appellants argue that this is a case of first impression because there is no case law on the issue. Perhaps the fact that corporate acts within a board's authority must be determined by the board and not by the membership is so fundamental and the statutes so clear that the absence of case law on the issue is not surprising.

**C. Absent a Statutory or Governing Document Limitation, an Association Acts through its Board of Directors**

The HICA is a homeowners association and nonprofit corporation governed by RCW 64.38, RCW 24.03. Under the HOA Act, members of the Association are entitled to vote for their directors. RCW 64.38.030(1). The board of directors then act on behalf of the Association in all matters, unless the Association's governing documents or RCW 64.38 specify otherwise. RCW 64.38.025(1).

While the board of directors is given significant authority, there are statutory limits to that authority. If the owners are dissatisfied with the Directors, they have the right to remove them with or without cause. RCW 64.38.025(5). Directors are also prohibited from amending the Association's articles of incorporation, terminating the association, defining the qualifications, powers, and duties, or terms for directors or taking any action that requires the vote or approval of the owners. RCW 64.38.025(2).

If Appellants in this case had demanded a vote to amend the Bylaws to add a provision capping the Board's spending authority or requiring a vote of the owners prior to making capital improvement, then the Association would have to comply and call for a vote of the members. Similarly, if Appellants had demanded a special meeting to remove the board members so that new board members sympathetic to their minority view could be lawfully elected, the Association would have had to comply because the ability to remove board members is reserved to the membership. RCW 63.38.025(5).

There are statutory mechanisms for the members to be heard and an Association can further limit the board's authority via its Bylaws. However the members do not have an inherent right to vote on all matters. As discussed further below, the HOA Act, the Nonprofit Act and the Association's bylaws expressly define when the Board has authority to act on behalf of the Association and when it does not.

**D. The HICA's Board of Directors are the Exclusive Agents of the Association – Except as Specifically Limited**

An association's governing documents can include provisions that limit the board's authority to act on behalf of the Association beyond those limits in RCW 64.38. RCW 64.38.025(1). The HICA Bylaws broadly define the authority of its Board of Directors as follows:

SECTION 1. Subject to limitations in the Articles of Incorporation and the By-Laws and Laws of the State of Washington, all powers of the Association and the business and affairs of the Association shall be controlled by the Board of Trustees, without prejudice to such general powers, and subject to the same limitations, it is hereby expressly declared that the trustees powers shall include but not be limited to providing and maintaining roads, recreational facilities, transportation, and water, in a fiscally responsible manner, preserve the island's safety, security and environmental character, enhance owner's quality of life, and preserve and protect the real and intangible values of the island owner's personal and community properties.

CP 308.

SECTION 3. To conduct, manage and control the affairs and business of the Association and to make such rules and regulations therefore not inconsistent with law, with the Articles of Incorporation or the By-Laws, as they may deem in the best interest of the public good.

CP 308.

Pursuant to the plain language of the HICA Bylaws, “all powers of the Association and the business and affairs of the Association shall be controlled by the Board of Trustees”<sup>3</sup> subject to limitations in the Articles of Incorporation, Washington law and the Bylaws themselves. Therefore, pursuant to the plain language of the Association’s Bylaws, the default rule is that the board of directors will act on behalf of the Association. A specific law or provision of the bylaws or articles of incorporation must be shown to vary that default rule.

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<sup>3</sup> CP 308.

Pursuant to the HOA Act and the Association Bylaws, the Hat Island Board of Directors has clear authority to terminate, redefining or continue” the marina projects.” Appellants do not contend that the Hat Island Board of Directors lack authority to take the actions that they seek to impose on the Association by way of a vote of owners. Instead, Appellants argue that the Board’s authority is not “exclusive,” despite plain language in the Bylaws to the contrary.

An Ohio appellate decision is one of the few published decisions that analyzes an argument similar to Appellants’ novel position in this case. In *McDonald v. Dalheim*, 114 Ohio App. 3d 543, 683 N.E.2d 447 (1996), the plaintiffs argued that a resolution was binding on the corporation, despite not being voted on by its board of directors, because “the shareholders of a majority of the [corporation’s] stock” were present for the vote. *Id.* The court rejected that argument because Ohio law, similar to Washington law, states that “except where the law, the articles or the regulations require action to be authorized or taken by shareholders, all of the authority of a corporation shall be exercised by or under the direction or its directors.” The court then affirmed the trial court, finding that “the resolution in question was not a valid action of the shareholders.” *Id.*

This court should apply the same reasoning to find that, as a matter of law, Appellants were not entitled to the relief they requested in the form of a vote of the owners to undo a decision the board of directors because the vote in question was not a vote subject to approval of the owners.

**E. Stringing Together a Series of Procedural Provisions Does Not Create a Substantive Right**

Appellants cannot identify a single Bylaw provision that grants them the substantive right to transact business or vote on any matter they choose. Instead, they string together a series of procedural provisions related to “calling” meetings and quorums to suggest that once a meeting is convened, any and all business can be transacted without regard to basic corporate governance.

Appellants argue that Article V, Section 2 of the HICA Bylaws,<sup>4</sup> a procedural section that allows fifteen percent of the Association’s members to call a special meeting of the Association, inherently includes the substantive right to have those owners vote on any matter they desire at that meeting. Then, they argue that a purely procedural provision requiring 15% of the members of the Association to be present to establish quorum for the transaction of business impliedly includes a substantive right to transact *any* business at that meeting, once a quorum is

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<sup>4</sup> CP 307.

established. This defies logic. An Association's quorum requirement cannot empower owners to make any motion on any matter and have that motion recognized, voted on and bind the Association.

Appellants also claim that any nonprofit corporation with a provision for special meetings must also allow its members to vote on any matter they desire at such a meeting and the corporation be bound by that vote. Appellants claim this substantive right to vote on any matter regardless of corporate authority, stems from RCW 24.03.075, a procedural statute that allows members to call a special meeting of the members; RCW 24.03.080, a procedural statute that defines how and when notice of a meeting must be provided; and RCW 24.03.085 a general procedural statute that entitles members to vote "on each matter submitted to a vote of members." The right to vote on matters submitted to a vote of the members must assume that those matters are *lawfully* submitted to a vote of the members.

The distinction between owners asserting a substantive right that they are legally entitled to vote on versus the relief requested by Plaintiffs in this case distinguishes the Pennsylvania and Nevada cases cited by Plaintiffs.

In *Donahue v. Arrowhead Lake Community Ass'n*, 718 A.2d 904 (1998), the owners demanded that a special meeting be called to “consider the amendment of the Bylaws as proposed in the petition.” *Id.* at 905. The Association refused to call the meeting despite acknowledging that the owners had obtained more than the requisite number of signatures to call a special meeting. *Id.* Because the association never called the meeting, that case did not deal with the issue of whether a vote on the bylaws was something within the purview of the homeowners. *Id.*

A comparison of the reliefs requested by the plaintiff in *Donahue* and Appellants here demonstrates why Plaintiffs’ complaint fails as a matter of law. In *Donahue*, the Association board of directors had a “pending” decision “regarding whether to spend a minimum of 16 million dollars to upgrade and expand the Association’s sewer system.” *Id.* Prior to a decision being made by the board, the *Donahue* plaintiff circulated a petition to call for *an amendment of the association’s bylaws* that would divest the board of the power to approve significant expenditures of money. *Id.* The Appellants in this case want the same relief the *Donahue* plaintiff was ultimately seeking: “to divest the Association’s Board of Directors of the power.” The key difference is that the owners in *Donahue* sought to limit the board’s authority by *amending the bylaws*, an action

that is an explicit and substantive right of the owners conferred by the Association's governing documents and rightfully subject to a vote of the owners. Here, Appellants simply want to vote to overturn a specific decision without any basis for divesting the board's authority.

Amendment of the bylaws is generally a power relegated to the owners, not the board. If Appellants in this case had submitted signatures that proposed an amendment to the Association's Bylaws that limited the board's authority, the Association would be required to hold that vote just as the *Donahue* court required because the HICA Bylaws explicitly relegate that power to the owners.<sup>5</sup> Here, the Association members do not have the explicit power to vote to overrule the decision to proceed with the Marina Project or the special assessment levied therefore – which is the relief Appellants have requested.

Similarly, in *Eversole v. Sunrise Villas III Homeowners Ass'n*, 112 Nev. 1255 (1996), the purpose of the meeting requested by the owners was to elect a new board of directors. *Id.* at 1256. The *Eversole* court explicitly acknowledged:

Pursuant to the bylaws of respondent Sunrise Villas VIII Homeowners Association (the Association), the

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<sup>5</sup> The Hat Island Bylaws require “a vote of two-thirds of the members in good standing voting at any meeting of the members of the Association.” CP 311. *See also* RCW 64.38.025

Association's board of directors had a duty to hold an annual meeting of the Association's membership for the purpose of electing the Association's board of directors on December 7, 1993.

*Id.* The board did not hold the meeting and withheld from the members their right to vote for new board members. Thus, it is clear that in *Eversole*, the owners sought to conduct business that they were substantively entitled to conduct under the association's bylaws. As in *Donahue*, the board in *Eversole* refused to hold the special meeting. Instead, the members themselves sent the notice, held the meeting and elected new board members. *Id.* As such, *Eversole* simply does not stand for the proposition urged by Appellants: that an association must call a meeting and conduct business at that meeting that is otherwise not within the membership's power. In fact, *Eversole* confirms that the membership may conduct business otherwise within their authority under the governing documents pursuant to the request for a special meeting.

These cases simply do not stand for the proposition urged by Appellants – that the procedural right to call a meeting grants the members the substantive right to conduct any sort of business they want. If anything, these cases support the Association's position that the purpose of the meeting must be to exercise authority granted to the membership by the HOA Act or governing documents.

Appellants' request for relief in this case stands in stark contrast to the relief requested in *Donahue* and *Eversole*. Had the Appellants in this case demanded a vote on issues explicitly reserved to the members, the Association would have had to comply. Instead, Appellants ask this court to interpret and apply several procedural statutes and bylaw sections to conclude that members of a non-profit corporation have the right to call for a vote on any matter, including matters reserved to and/or already decided by the board of directors. This court should not engage in a strained interpretation of procedural statutes and bylaw provisions to find that members of a non-profit corporation can call for a vote on any matter at any meeting. Doing so would violate a basic tenet of statutory construction in Washington, that "statutes should be construed to effect their purpose, and strained, unlikely or absurd consequences" are to be avoided. *In re the Personal Restraint of Andress*, 147 Wn. 2d 602, 610, 56 P.3d 981 (2002).

**F. Sound Corporate and Public Policy Requires Clear Delineation of Authority to Act on Behalf of Corporations.**

In order for Plaintiff to be entitled to relief under their complaint, the Court would have to accept that non-profit corporations will be bound by any votes demanded by members at a special meeting of the association. Accepting this argument would throw corporate law in

Washington into a tailspin. Corporation bylaws define the relative authority of its board and its members. That division is meaningless if a small percentage of the Association's members can demand a meeting and bind the Association to any vote for which they can garnish support from a majority vote of members at a meeting with quorum.

For example, if Appellants in this case wanted to limit the Board's authority to proceed with the Marina project, they could have proposed a vote to amend the Association's Bylaws to limit the Board's authority. Pursuant to Article IX, a vote to amend the Bylaws in such a manner would require approval by two-thirds of the members. CP 311. In contrast, Appellants so-called "right" to transact business, the actual substantive right to vote on bylaw amendments, is explicitly and clearly reserved to the owners in the Bylaws.

Rather than call for a vote that the owners actually have authority to act on, Appellants attempted to circumvent the legal process and call for a vote that would limit the Board's authority to act on behalf of the Association without first obtaining the requisite votes to amend the Bylaws.

As discussed above, if Appellants had demanded a meeting to vote to amend the Bylaws to substantively limit the Board's spending authority, or require a vote of the owners prior to making capital improvements, the Association would have had to comply. Similarly, if Appellants had demanded a special meeting to remove the board members so that new board members sympathetic to their minority view could be lawfully elected, the Association would have had to comply because the ability to remove board members is reserved to the membership. RCW 63.38.025(5).

Appellants could have demanded a meeting to exercise any substantive right delegated to them by the HOA Act or the governing documents and the Association would have had to comply. But the Association is simply not required to allow the members to throw out the HOA Act's basic rules of governance and the specific Bylaws tailored to this Association simply because Appellants included it in a special meeting demand. Such holding would not only violate the HOA Act and the governing documents, but would lead to chaos in the governance of community associations.

Lastly, Appellants attempt to analogize the initiative process with homeowner association governance does not help their argument. As Appellants observe, laws can be enacted or repealed through the initiative

process. Likewise, the Association's Bylaws can be amended to enact new provisions or repeal existing provisions. However, just as there are rules and requirements under the initiative process, there are rules and requirements to amend the Bylaws. As stated above, if Appellants had proposed an amendment to the Bylaws to limit the board's authority, that vote would have been submitted to the owners. Instead, Appellant failed to request a proper vote and it was rejected, much like an initiative petition that doesn't comply with the submission requirements would be rejected.

**G. The Trial Court Committed Reversible Error By Finding the Attorneys Fees Requested by The Association to be Reasonable and Awarding Substantially Less than the Reasonable Fees.**

The HOA Act grants the court discretion to award fees to the prevailing party "in an appropriate case." *Roats v. Blakely Island Maintenance Com'n, Inc.* 169 Wn.Ap. 263, 279 P.3d 943, 954-955 (2012).

Any violation 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.

RCW 64.38.050. The trial courts determination that plaintiff was the prevailing party and that this is an "appropriate case" for an award of fees is supported by the facts in this case.

On appeal, Appellants allege that their claim for declaratory relief “does not involve a statutory claim for relief under the HOA Act.”<sup>7</sup> However, Plaintiffs’ Complaint and the pleadings in this case are clear: they alleged that the Association violated RCW 64.38 by refusing to allow the vote they demanded. In their Complaint, Plaintiffs specifically alleged that the Association was governed by the HOA Act and the Association “violated its duty to both the Plaintiffs and the members of HICA under Article V, Section 2 of the Bylaws, and under Washington State Law.” CP 332. In their motion for preliminary injunction, Plaintiffs specifically claimed that the Association violated RCW 64.38.035 by refusing to allow the vote as they requested. CP 323-324. Because Plaintiffs evoked RCW 64.38 and alleged that the Association violated that act, the attorney fee provision in RCW 64.38.050 applies.

Appellants next argue that fees should not be awarded because of the trial court’s finding that Appellants’ claims were not “frivolous.” CP 33. Appellants rely primarily on *Roats v. Blakely Island Maintenance Com’n, Inc.* 169 Wn. App. 263, 279 P.3d 943 (2012), in which the court affirmed the denial of fees to the Association and the denial of the

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<sup>7</sup> Appellant’s Brief p. 22.

homeowners' motions for fees under RCW 64.38.050 on the basis that neither was the prevailing party. *Roats*, 279 P.3d at 953.

The *Roats* court clearly determined that neither party "prevailed" in such a manner as to warrant an award of fees, but the implication was that the fee award would apply if a prevailing party could be determined, even absent a finding that the claims were frivolous. Instead, it held that the trial court's denial of the owners' claims for fees were "within the range of acceptable choices available to the court" and therefore, was not an abuse of discretion. *Id.* The current case has little in common with the *Roats* decision because the Association is clearly the prevailing party in this litigation.

The standard under RCW 64.38.050 is not whether the lawsuit was frivolous; it is whether, given the circumstances, it is an "appropriate case" in which to award fees to the prevailing party. *Eagle Point Condominium Owners Ass'n v. Coy*, 102 Wn. App. 697, 715, 9 P.3d 898 (2000), a case decided under RCW 64.34 discusses the "appropriate case" for an award of fees. The *Eagle Point* court specifically acknowledged that the party being ordered to pay fees in that case had meritorious arguments in opposition to the claims. *Eagle Point Condominium Owners Ass'n v. Coy*, 102 Wn. App. 697, 715, 9 P.3d 898 (2000). Thus, appellants

argument that the lawsuit involved a valid dispute”<sup>8</sup> does not make this an inappropriate case for an award of fees. The fee dispute in *Eagle Point* focused heavily on identifying the prevailing party. *Id.* at 706-715. Ultimately, the Association was awarded attorney fees despite the fact it minimally improved its position at trial over previous offers of settlement and the damages proven at trial were much lower than the damages claimed prior to trial. *Id.* Despite only *minimally* prevailing, the court found that an award of attorney fees was appropriate.

A “prevailing party” is generally one who receives a judgment in its favor. *Scoccolo Const., Inc. ex rel. Curb One, Inc. v. City of Renton*, 158 Wash.2d 506, 145 P.3d 371, 378 (2006). The Association did not “minimally” prevail in defense of the claims against it. The Association obtained a complete dismissal of the case, leaving no doubt as to the prevailing party. As the prevailing party against a claim in which Appellants alleged violations of RCW 64.38, an award of fees pursuant to RCW 64.38.050 was clearly appropriate.

The Association cross appeals that the trial court abused its discretion when it awarded substantially less than the fees it specifically found to be reasonable. Plaintiff requested \$22,266.40 in fees for defense

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<sup>8</sup> CP 65.

of the action plus \$4,319.50 in fees related to the Motion for Attorneys' Fees. The Court specifically found the hours and rates supporting those fees to be reasonable but "in exercise of its discretion" awarded "partial fees in the amount of \$13,500.

There is no statutory authority for the court to award less than reasonable fees. Pursuant to RCW 64.38.050, once the trial court determines that there is a prevailing party and the case is "appropriate for an award of fees" the court should then award "reasonable" attorneys fees. Not an amount less than reasonable attorneys fees as the court did in this case.

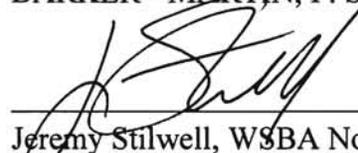
#### V. CONCLUSION

The Association is simply not required to allow the members to throw out the HOA Act's basic rules of governance and the specific Bylaws tailored to this Association simply because Appellants included it in a special meeting demand. Such holding would not only violate the Act and the governing documents, but would lead to chaos in the governance of community associations. Appellants' complaint did not state a claim upon which relief could be granted because the membership had no authority to vote on a matter that would contravene the Board's express authority to control the business and affairs of the Association. Therefore,

the trial court's dismissal pursuant to CR 12(b)(6) was correct and should be affirmed.

RESPECTFULLY SUBMITTED this 13<sup>th</sup> day of February, 2013.

BARKER • MARTIN, P. S.

A handwritten signature in black ink, appearing to read 'J. Stilwell', is written over a horizontal line.

Jeremy Stilwell, WSBA No. 31666  
Attorney for Respondent Hat Island  
Community Association

**DECLARATION OF SERVICE**

I HEREBY CERTIFY that on February 13, 2013, I caused to be served a true and correct copy of Respondent's Brief on the party listed below in the manner indicated:

Michael E. Gossler  
Montgomery Purdue Blankinship &  
Austin PLLC  
701 Fifth Avenue, Suite 5500  
Seattle, WA 98101

**Via:**  
 Hand Delivery  
 U.S. Mail  
 Electronic Mail  
 Facsimile Transmission

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed at Seattle, Washington on this 13<sup>th</sup> day of February, 2013.

  
Ayrian Hastings

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# **APPENDIX**

 [West Reporter Image \(PDF\)](#)

718 A.2d 904

Briefs and Other Related Documents  
Judges and Attorneys

Commonwealth Court of Pennsylvania.  
John DONOHUE  
v.  
ARROWHEAD LAKE COMMUNITY ASSOCIATION, Appellant.

Argued April 14, 1998.  
Decided Oct. 5, 1998.

Homeowner initiated action against homeowners' association, seeking order directing association to hold special meeting for purpose of amending bylaws. The Common Pleas Court, Monroe County, No. 4721 Civil 1997, O'Brien, J., entered order requiring association to hold special meeting. Association appealed. The Commonwealth Court, No. 2834 C.D. 1997, Doyle, J., held that: (1) association had burden of coming forward with evidence to rebut homeowner's claim, and (2) homeowner was entitled to recover his attorney fees.

Affirmed and remanded.

West Headnotes

[1]  [KeyCite Citing References for this Headnote](#)

↔ 30 Appeal and Error  
↔ 30V Presentation and Reservation in Lower Court of Grounds of Review  
↔ 30V(A) Issues and Questions in Lower Court  
↔ 30k169 k. Necessity of presentation in general. Most Cited Cases

Claim that was raised for first time on appeal from order compelling homeowners' association to hold special meeting was waived.

[2]  [KeyCite Citing References for this Headnote](#)

↔ 83T Common Interest Communities  
↔ 83TIV Unit Owners' Association  
↔ 83Tk65 k. Member meetings. Most Cited Cases  
(Formerly 41k17)

Homeowner established prima facie case for special meeting of homeowners'

association, and burden of coming forward with evidence to rebut claim shifted to association, where homeowner entered copy of written petition for call of special meeting into record, petition clearly demanded that special meeting be convened for purpose of amending bylaws, and association conceded that more than 21% of the members had signed petition. 15 Pa.C.S.A. § 5755.

[3]  KeyCite Citing References for this Headnote

↪ 102 Costs

↪ 102X On Appeal or Error

↪ 102k259 Damages and Penalties for Frivolous Appeal and Delay

↪ 102k260 Right and Grounds

↪ 102k260(4) k. What constitutes frivolous appeal or delay. Most Cited

Cases

An appeal is deemed to be frivolous, warranting award of counsel fees, when there is no likelihood of success and the continuation of the contest is unreasonable. Rules App.Proc., 2744, 42 Pa.C.S.A.

[4]  KeyCite Citing References for this Headnote

↪ 102 Costs

↪ 102X On Appeal or Error

↪ 102k259 Damages and Penalties for Frivolous Appeal and Delay

↪ 102k260 Right and Grounds

↪ 102k260(5) k. Nature and form of judgment, action, or proceedings

for review. Most Cited Cases

Homeowners' association's appeal from order requiring it to hold special meeting for purpose of amending bylaws was frivolous, and homeowner was entitled to recover his attorney fees, where association's sole issue on appeal was waived, and special meeting had already been convened. Rules App.Proc., 2744, 42 Pa.C.S.A.

**\*904** Richardson Todd Eagen, Hawley, for appellant.

Joseph S. Wiesmeth, Stroudsburg, for appellee.

Before DOYLE and McGINLEY, JJ., and LORD, Senior Judge.

DOYLE, Judge.

The Arrowhead Lake Community Association (Association) appeals an order of the Court of Common Pleas of Monroe County, which directed the Association to hold a special meeting of the Association's membership **\*905** and assessed counsel fees against the Association. Also before us is the application of the Appellee, John Donohue, for counsel fees and costs pursuant to Pa. R.A.P. 2744.

The Association is a Pennsylvania nonprofit corporation comprised of approximately 3,200 members who own real property in the Arrowhead Lake Development (Development), located in Tobyhanna Township, Monroe County, which is in the Pocono Mountain resort area of Pennsylvania. In March of 1997, Donohue, who owns property in the Development and is a member of the Association, circulated a "Petition for the Call of a Special Meeting Arrowhead Lake Community Association" (Petition). The special meeting was for the purpose of considering an amendment to the Arrowhead Lake Community Association Bylaws (Bylaws) that would divest the Association's Board of Directors of the power to approve significant expenditures of money. Under Donohue's amendment, all material decisions involving the expenditure of money would be approved by a majority of the Association's membership. Donohue circulated the Petition in response to a decision pending before the Board of Directors regarding whether to spend a minimum of 16 million dollars to upgrade and expand the Association's sewer system.

The Association's Bylaws provide that a special meeting may be called "upon the written petition of five-percent of the Members of the Association who would have the right to vote at such special meetings." (Article VIII, Section 3, of the Bylaws.) A similar provision is contained in Section 5755(b) of the Nonprofit Corporation Law of 1988(Law), 15 Pa.C.S. § 5755, which states that a special meeting may be called by "members entitled to cast at least 10% of the votes which all members are entitled to cast at the particular meeting...." Donohue procured 999 signatures of Association members on his petition. The 999 members who signed the Petition constituted about thirty-one percent of the Association's total membership, which is well in excess of the minimum number of signatures required to call a special meeting under the Bylaws or the Nonprofit Corporation Law of Pennsylvania.

On May 3, 1997, Donohue attended a meeting of the Association, presented the signed Petitions, and requested that a special meeting be called to consider the amendment of the Bylaws as proposed in the Petition. The officers of the Association, however, did not call the special meeting.

On June 6, 1997, Donohue initiated an action against the Association by filing a Praecipe for Writ of Summons in the Common Pleas Court. Four days later, Donohue filed a "Motion for Equitable Relief," seeking an order directing the Association to hold a special meeting and directing the Association to reimburse him for costs and reasonable attorney's fees. Thereafter, the Association filed an answer to the motion which, among other things, disputed the authenticity of the signatures on the Petitions, but raised no affirmative defenses in new matter. An evidentiary hearing was conducted on August 18, 1997, by Common Pleas and Donohue presented testimony and introduced documents into evidence; the Association presented no evidence. Furthermore, at the hearing Common Pleas directed the parties to compare the signatures on the Petitions to the Association's records to verify whether those individuals were members in good standing. After examining those records, the Association **conceded** that 700 signatures on the Petitions were those of members in good standing and that the 700 signatures constituted more than five percent of the Association's membership.

The Common Pleas Court found as fact that 700 members in good standing of the Association signed the Petitions, and that Donohue, therefore, met the standards of the Bylaws and the Law for calling a special meeting. The Court also observed that, under Section 5792 of the Law, where a nonprofit corporation has failed to hold a meeting and that the failure has continued for at least thirty days, a court has the power "to summarily order a meeting to be held upon the application of any person entitled ... to call a meeting...." 15 Pa.C.S. § 5792. Accordingly, on August 19, 1997, the Common Pleas Court entered an order requiring the Association to hold a special meeting within sixty days.

**\*906** The Court also granted Donohue counsel fees as a sanction against the Association, and explained its decision as follows:

The Association's conduct in this proceeding, in failing to verify the validity of Plaintiff's Petitions until ordered to do so by this Court and requiring the Plaintiff to commence this proceeding in spite of a clear statutory mandate to convene a special meeting, is frivolous, dilatory, obdurate and vexatious entitling the Plaintiff to an award of attorney's fees.

(Common Pleas Court's opinion at 6.) This appeal by the association was filed on October 17, 1997. However, after the appeal was filed, the Association nevertheless scheduled the special meeting demanded by Donohue for December 14, 1997, and the meeting has been held. (Donohue's Brief in Support of Application for Counsel Fees at 4, 10.)

On appeal, the Association contends that the Common Pleas Court improperly shifted the burden of proof from Donohue to the Association to show that the signatures on the Petitions were authentic. The Association asserts that Donohue never proved that he followed all necessary procedures to call a special meeting or proved that the signatures of the members on the Petitions were authentic. Hence, the argument goes, Donohue did not establish a prima facie case and, for that reason, the burden never shifted to the Association. We cannot agree.

[1]  First, our review of the record reveals that the Association never even argued at the hearing before the Common Pleas Court that this case should be dismissed on the ground that Donohue failed to present sufficient evidence to support his claim, or that the Court erred in shifting the burden of proof to the Association to prove authenticity of the signatures on the Petitions. Since the Association's issue is being raised for the first time on appeal, it is waived. *Dilliplaine v. Lehigh Valley Trust Co.*, 457 Pa. 255, 322 A.2d 114 (1974). Pa. R.A.P. 302(a). However, even if the Association's argument had been properly preserved for our review, the argument would fail.

Article VIII, Section 3, of the Bylaws establishes the following procedure for calling a special meeting by petition: (1) the petition must be written; (2) the petition must be signed by five percent of the members of the Association who

would have the right to vote at a special meeting; and (3) the petition must set forth the purpose of the special meeting. Under Section 5755 of the Law, to call a special meeting of a nonprofit corporation, it must only be shown that ten percent of the members entitled to cast votes demand such a meeting.

[2]  Donohue presented the Common Pleas Court with evidence satisfying every element of the Bylaws and the Law. Specifically, Donohue entered a copy of the written Petition into the record, and the Petition clearly demanded that a special meeting be convened for the purpose of amending the Bylaws. The text of the proposed amendment was included in the Petition. Donohue testified that he collected 999 signed Petitions. Most important, the Association *conceded* that 700 of the signatures on the Petitions were members in good standing of the Association:

THE COURT: Counsel, how did you make out with respect to the determination of how many of these petitioners are members in good standing?

[ASSOCIATION'S COUNSEL]: Your Honor, we ran a computer run on it and tried to compare the list we already had.... [T]he names of the petitioners come to approximately seven hundred members in good standing, which exceeds five percent of the membership....

(Notes of Testimony (N.T.) at 24; Reproduced Record (R.R.) at 34a.) In fact, the 700 individuals who signed the Petition constituted more than twenty-one percent of the 3,200 members of the Association, much more than the five-percent required by the Bylaws and the ten-percent required under the Law. Therefore, it is clear that Donohue established a prima facie case that the Association was required to conduct a special meeting.

Because Donohue presented a prima facie case, the burden of coming forward with evidence to rebut Donohue's claim shifted to the Association. The Association, however, never produced any evidence at all on its behalf; nor did it present a cogent defense. \*907 Although the Association argued that it was impossible for the Court to determine, based on Donohue's evidence, whether the signatures on the Petitions were authentic, the Common Pleas Court correctly explained that the Association had to produce evidence on that issue:

THE COURT: Now you've been to court, seen the petitions, checked them against your members. Do you want to present some evidence. You are making an argument. He has established a prima facie case. He has given me a petition. You agree that there are seven hundred members in good standing....

[ASSOCIATION'S COUNSEL]: I agreed the signatures matched. I can't tell you whether those are the same seven hundred people or not.

THE COURT: You don't have to. If you want to, show me that they are not. He established at this point there are seven hundred members who signed the

petitions, members in good standing. If you want to rebut that evidence, my ears are open.

....

THE COURT: Any evidence you want to present?

[ASSOCIATION'S COUNSEL]: Nothing.

(N.T. at 28-29; R.R. at 38a-39a.)

Therefore, in light of the above, we hold that the Common Pleas Court did not erroneously place the burden of proof on the Association, but rather properly determined that the Association had to go forward with the evidence to rebut Donohue's prima facie case that the Association was required to convene a special meeting as provided by the Bylaws and the Law. Therefore, we will affirm the Common Pleas Court's order.

[3]  We will now consider Donohue's application for counsel fees and costs. Under Pa. R.A.P. 2744, an appellate court may award counsel fees and costs when

it determines that an appeal is frivolous or taken solely for delay or that the conduct of the participant against whom costs are to be imposed is dilatory, obdurate or vexatious.

An appeal is deemed to be frivolous when there is no likelihood of success and the continuation of the contest is unreasonable. Leberfinger v. Department of Transportation, Bureau of Traffic Safety, 137 Pa.Cmwlth. 605, 587 A.2d 46 (1991).

Donohue claims that the Association's appeal is frivolous, because (1) the issue raised on appeal was not preserved for appellate review, (2) Donohue's right to the meeting was clear and the Association offered no defense to the merits of the claim, and (3) the Association continued to pursue this appeal despite that fact that the special meeting was held in December of 1997.

In response, the Association argues that it had a good faith reason for prosecuting this appeal, since it has an important financial interest in limiting the availability of special meetings. The Association states:

In order to hold a special meeting, many difficult and costly steps must be taken. Prior to the meeting, expenses accrue related to sending notice of the meeting. These expenses include postage, stationary, administrative drafting, and envelope stuffing [and] sealing. Additional expenses include drafting and mailing proxy statements, and administrative costs for research concerning each of the [3,200] members to determine if they are members in good standing entitled to vote....

The approximate cost to hold a special meeting can run as high as ten thousand dollars. Because of this tremendous expense, the Appellant has an important reason for making sure that every procedural step is properly taken before a meeting could be held. That was the foundation of Appellant's argument at the lower court.

(Association's Brief in Response to Donohue's Brief in Support of Counsel Fees at 9.) The Association, however, does not deny Donohue's claim that the special meeting was scheduled and held, and does not assert that it had meritorious defense to Donohue's claim.

[4]  We therefore conclude that this appeal is indeed frivolous. The Association's sole issue on appeal was waived and, moreover, even if that issue had been properly preserved, it was frivolous. Furthermore, because the special meeting **had been convened\*908**, the Association's decision to continue to pursue this appeal, thereby incurring further costs, is plainly unreasonable, if its argument was that it took the appeal in the first place to conserve costs.

The Association admits that it pursued this appeal to avoid the financial expense of conducting the special meeting. In the absence of any basis in law or fact that could arguably show that Donohue was not entitled to the special meeting, the Association's actions in refusing to hold such a meeting and then litigating this matter in order to avoid the financial costs of complying with its own Bylaws, in our view, cannot be deemed a good faith reason to prosecute this appeal. See 220 Partnership v. City of Philadelphia, 129 Pa.Cmwlth. 300, 565 A.2d 518 (1989) (appeal filed merely to delay the payment of a fine was frivolous), *petition for allowance of appeal denied*, 525 Pa. 652, 581 A.2d 577 (1990).

Donohue's application for counsel fees and costs, therefore, is hereby granted, and we will remand this case to the Common Pleas Court for the calculation and imposition of reasonable attorney's fees and costs against the Association pursuant to Pa. R.A.P. 2744. This would, of course, be in addition to any counsel fees previously awarded to Donohue against the Association by Common Pleas for the obdurate conduct of the Association up to the date the trial court's order was entered.

Accordingly, the Common Pleas Court's order is affirmed and this case is remanded for proceedings consistent with this opinion.

#### **ORDER**

**NOW**, October 5, 1998, the order of the Court of Common Pleas of Monroe County in the above-captioned matter is hereby affirmed. John Donohue's application for counsel fees and costs is granted. This matter is remanded to the Common Pleas Court for the calculation of reasonable attorney's fees and costs against Arrowhead Lake Community Association pursuant to Pa. R.A.P. 2744.

Jurisdiction relinquished.

Pa.Cmwth.,1998.  
Donohue v. Arrowhead Lake Community Ass'n  
718 A.2d 904

Briefs and Other Related Documents ([Back to top](#))

- [1998 WL 34356921](#) (Appellate Brief) Reply Brief (Jan. 21, 1998)  [Original Image of this Document \(PDF\)](#)
  - [1998 WL 34356922](#) (Appellate Brief) Brief of Appellee (Jan. 2, 1998)  [Original Image of this Document with Appendix \(PDF\)](#)
  - [1997 WL 33822238](#) (Appellate Brief) Brief of Appellant (Dec. 8, 1997)  [Original Image of this Document \(PDF\)](#)
- 

Judges and Attorneys ([Back to top](#))

[Judges](#) | [Attorneys](#)

Judges

- **Doyle, Joseph T.**

[Litigation History Report](#) | [Profiler](#)

- **Lord, Hon. Charles A.**

Commonwealth of Pennsylvania Commonwealth Court  
Harrisburg, Pennsylvania 17106

[Litigation History Report](#) | [Judicial Reversal Report](#) | [Profiler](#)

- **McGinley, Hon. Bernard L.**

Commonwealth of Pennsylvania Commonwealth Court  
Harrisburg, Pennsylvania 17106

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- **O'Brien, Hon. Dennis**

State of Connecticut Probate Court, Windham-Colchester District  
Willimantic, Connecticut 06226

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Attorneys

Attorneys for Appellant

- **Eagen, Richardson T.**

Harrisburg, Pennsylvania 17110

[Litigation History Report](#) | [Profiler](#)

Attorneys for Appellee

- **Wiesmeth, Joseph S.**

Stroudsburg, Pennsylvania 18360

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Other Attorneys

• **Doyle, Joseph T.**

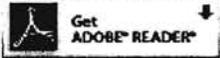
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112 Nev. 1255, 925 P.2d 505

### Judges and Attorneys

Supreme Court of Nevada.  
William EVERSOLE, Appellant,

v.

SUNRISE VILLAS VIII HOMEOWNERS ASSOCIATION, a Nevada Corporation,  
Respondent.

No. 26472.  
Oct. 22, 1996.

Homeowners association brought action against association members for injunctive relief to enjoin members from acting as directors of association. The Eighth Judicial District Court, Clark County, Joseph T. Bonaventure, J., entered judgment in favor of association and ordered one individual defendant to pay attorney fees. Defendant appealed. The Supreme Court held that association's bylaws permitted 40 percent of association to call special meeting to elect new officers when president and secretary refused to take such action.

Reversed and remanded with instructions.

### West Headnotes

[1]  [KeyCite Citing References for this Headnote](#)

↪ 83T Common Interest Communities

↪ 83TIV Unit Owners' Association

↪ 83Tk64 k. Governing board; members, directors, and officers; committees.

#### Most Cited Cases

(Formerly 41k18)

Bylaws of homeowners association permitted 40% of association to call special meeting to elect new officers when president and secretary refused to take such action as required by bylaws, pursuant to provision in bylaws stating that special meetings "may be called by the President and Secretary . . . or by members representing at least 40% of the voting power," even though notice and meeting were not done by president and secretary, as required by bylaws.

[2]  [KeyCite Citing References for this Headnote](#)

↪ 95 Contracts

↳ 95II Construction and Operation

↳ 95II(A) General Rules of Construction

↳ 95k143.5 k. Construction as a whole. Most Cited Cases

↳ 95 Contracts  KeyCite Citing References for this Headnote

↳ 95II Construction and Operation

↳ 95II(A) General Rules of Construction

↳ 95k151 Language of Instrument

↳ 95k154 k. Reasonableness of construction. Most Cited Cases

Contractual provisions should be harmonized whenever possible and construed to reach reasonable solution.

[3]  KeyCite Citing References for this Headnote

↳ 102 Costs

↳ 102I Nature, Grounds, and Extent of Right in General

↳ 102k69 k. Costs to abide event. Most Cited Cases

↳ 102 Costs  KeyCite Citing References for this Headnote

↳ 102VIII Attorney Fees

↳ 102k194.24 Particular Actions or Proceedings

↳ 102k194.25 k. In general. Most Cited Cases

Defendant who lost at district court level could not be assessed attorney fees, based on district court's prior clear indication that attorney fees and costs would not be assessed against any of the individual defendants as long as defendants took no further action in case; defendant did file answer after court's indication, but plaintiff made it impossible for defendant to take no action by serving defendant with notice of intent to default.

**\*\*505 \*1255** Kerr & Associates and Craig Burr, Las Vegas, for Appellant.

Deaner, Deaner, Scann, Curtas & Malan, Las Vegas, for Respondent.

### **\*1256 OPINION**

PER CURIAM:

Pursuant to the bylaws of respondent Sunrise Villas VIII Homeowners Association (the Association), the Association's board of directors had a duty to hold an annual meeting of the Association's membership for the purpose of electing the Association's board of directors on December 7, 1993. However, this meeting was not held on the scheduled date. Consequently, appellant William Eversole and other members of the Association attempted to call a special meeting to elect a new board of directors. Eversole and the other members secured proxies, which contained requests to hold a special meeting to elect new directors,

from forty-one percent of the Association's membership. A written request to hold a special meeting was then delivered to the Association's president and secretary.

Article I, Sections 8 and 9 of the Association's bylaws provide for the calling and notice of special meetings as follows:

#### Section 8. SPECIAL MEETINGS, HOW CALLED

*Special meetings of the membership for any purpose or purposes may be called by the President or Secretary, upon a request in writing therefor, stating the purpose or purposes thereof, delivered to the President or Secretary, signed by the President or any two directors, or by members representing at least forty percent (40%) of the voting power in the corporation, or by resolution of the directors.*

(Emphasis added.)

#### Section 9. NOTICE OF MEMBERSHIP MEETINGS.

*Written or printed notice, stating the place and time of the meeting, and the general nature of the business to be considered, shall be given by the Secretary to each member entitled to vote thereat at his last known post office address, not less than ten (10) nor more than sixty (60) days before the meeting.*

(Emphasis added.) In addition, Article III, Section 4 of the bylaws provides that the secretary "shall attend to the giving and serving of all notices to the members and directors and other notices required by law."

**\*1257** The Association's leadership did not honor the request to call a special meeting. In response, Eversole and the other members took it upon themselves to give notice to the membership that a special meeting would be held on February 17, 1994. Eversole reserved the hall where the meeting was to be held with his personal check. The meeting was held, and an election was conducted wherein Eversole and the other members were installed as the new board of directors.

The Association filed a complaint in district court against Eversole and these other members (the defendants) alleging that they had attempted to oust the Association's board of directors and had conducted a spurious election in violation of the Association's bylaws. The Association sought a temporary restraining order, as well as preliminary and permanent injunctive relief, to enjoin the defendants from acting as directors. The complaint also prayed for a declaration confirming the composition of the board of directors. Finally, the Association sought damages, including attorney fees and costs.

Before answers were filed, an in-chambers conference was held. In that conference, counsel for the defendants and the Association agreed that a new election would be held by a master and that the status quo would be maintained in the interim. The lower court entered an order reflecting this agreement.

**\*\*507** Pursuant to the court's order, an election was held on March 9, 1994, and the directors whom the defendants had opposed were retained in office. The district court later confirmed the results of the election.

A status hearing was subsequently held, and the district judge clearly indicated that he felt the case was moot. The judge stated that Eversole and the other defendants should not file answers or take any further action and he would not assess any fees against them. When the attorney for the Association asked about attorney fees, the district judge indicated he might assess fees against the Association but not against the individual defendants. In talking to a defendant other than Eversole, the judge explained:

In other words, if you don't answer this complaint nothing is going to happen to you. You're not going to have any money taken out of your pocket. Is that correct, Miss Higbee [attorney for Association]?

And later he told the Association's attorney:

And if you want extra money from Mr. Eversole or this man you better notify them. I'm not prone to give it to them. I don't want to take money out of your pocket. As long as you let it lie. But if you keep on filing motions or whatever it is and if they win and prevail you're going to have to pay. All **\*1258** right? But as of right now I very seriously doubt that I'm going to award them attorney fees that you have to pay or you have to pay personally. I very seriously doubt I'm going to do that right now. All right? Even if they file a motion. I'm going to have to give them some money to be paid out of the Sunrise Villas Association fund, but we'll take that up at a later time.

About a month thereafter, the Association served the defendants with a notice of intent to default. Since Eversole's attorney had withdrawn, he retained another attorney who advised him to file an answer, and that was done. A default was entered against the other defendants.

The Association then filed a motion, with points and authorities, for entry of final judgment, including attorney fees and costs. Eversole filed opposition and reply points and authorities thereafter and the Association filed its reply. A hearing on the motion was held.

The district court subsequently entered its findings of fact, conclusions of law and judgment. The court concluded that the election conducted by the defendants violated the Association's bylaws and that the Association was entitled to attorney fees under NRS 116.4117. The court ordered Eversole to pay the Association \$5,563.20 in attorney fees, one-half the attorney fees alleged to have been incurred by the Association in prosecuting and defending the action. The court further adjudged that the Association's claims for injunctive and declaratory relief had been rendered moot by the new election held by the master.

Eversole later filed a motion to amend the court's findings, conclusions and judgment. After a hearing, the court denied the motion.

Eversole now appeals the award of attorney fees claiming that the parties' stipulation incorporated in the lower court's order maintaining the status quo operated to preclude the district court from determining the impropriety of the special election, the lower court erred in awarding the Association attorney fees as there were genuine issues of material fact which required a trial, the lower court was estopped from awarding attorney fees when it induced Eversole and the other defendants to sit on their rights, and the attorney fees that were assessed were fatally flawed and should have been adjusted by the lower court.

The Association asks this court to conclude that Eversole's appeal is frivolous and seeks double costs and attorney fees incurred.

[1]  The critical legal issue is whether the bylaws permitted forty percent of the Association to call a special meeting to elect new **\*1259** officers when the president and secretary refused to take such action as required by the bylaws. The Association bylaws require that the annual meeting be called in December each year by the president and secretary. The bylaws also provide that special meetings "may be called by the President **\*\*508** and secretary ... or by members representing at least 40% of the voting power..."

The Association claims that although forty percent of the members called the special meeting to elect new officers and directors, such notice and meeting were ineffective because they were not done by the president and secretary. The district court agreed and entered this conclusion as part of its final judgment.

Several cases have come to a result contrary to the district court and seem to provide a more reasonable, less legalistic solution to organizational stalemate. In *Whipple v. Christie*, 141 N.W. 1107 (Minn.1913), the constitution of a fraternal order provided that its head executive officer had authority to call special meetings and that the order's scribe was to mail notice of such meetings to members of the order's council. The executive officer called for a special meeting, the scribe refused to send out notices of the meeting, and the executive officer mailed the notices himself. The court considered whether the notice of the call was valid. The notice "complied with the provisions of the constitution, was mailed at the proper place, within the specified time, and was received by every member" of the council; "[t]he only defect that may be pointed to is that the Imperial Scribe did not send the notice." *Id.* at 1108. But the scribe had "the mere clerical duty" to mail the notice of the meeting. *Id.* The court concluded that

in giving notice of a business meeting of a corporation or a managing board, minor irregularities and deviations from the strict letter of its constitution or bylaws, necessitated by an unanticipated contingency, and which do not defeat or in substance affect the purpose of the enactments, do not invalidate the meeting held pursuant to such call.

*Id.* at 1109. The court rejected the argument that the executive officer's only remedy was to seek a court order, reasoning that

the business and conduct of corporations should not be hampered and interrupted by some willful refusal of an officer to perform a mere clerical duty imposed on him. If there be such refusal, and the duty is to all intents and purposes as well performed by some other officer of the corporation, its business should not be at a standstill unless some good reason exists therefor. A resort to mandamus to compel a recalcitrant official to perform a ministerial act is at best a slow process, because of the right of appeal.

**\*1260** *Id.*; see also Talton v. Behncke, 199 F.2d 471, 474 (7th Cir.1952) ("Defendant's plea that the meeting should have been called by the president is of no avail, for, having been asked to call it and having refused and having attempted to prevent the directors from attending, he has effectually barred himself from questioning the effectiveness of the call by other authorized officers under the Constitution and By-Laws."); Cullum v. Board of Education of North Bergen Tp., 15 N.J. 285, 104 A.2d 641, 644 (N.J.1954) (where a board of education rule required the board secretary to call a special meeting upon the request of three board members, the board members "had the clear right to perform the ministerial act of serving the notice" when the secretary was unavailable; "[t]he vital thing was not the presence of the secretary's signature but the service of the notice in due and reasonable time").

[2]  Permitting a substantial minority to call a special meeting when the elected officers or directors cannot or will not act is a safety provision empowering a substantial minority to bring an issue before the Association or take necessary action. There is no reason why a special vote called by forty percent <sup>FN1</sup> of the members cannot be used to call an annual meeting that was the responsibility of the president and secretary to call. Requiring the minority to go to court to compel the president and secretary to call the special meeting when a specific remedy is already provided in the bylaws seems a **\*\*509** waste of precious Association and judicial resources and to exalt form over substance. Contractual provisions should be harmonized whenever possible, Royal Indem. Co. v. Special Serv., 82 Nev. 148, 151, 413 P.2d 500, 502 (1966), and construed to reach a reasonable solution. Fisher Properties v. Arden-Mayfair, Inc., 106 Wash.2d 826, 726 P.2d 8, 15 (1986). If forty percent did indeed call the special meeting, it was valid and done pursuant to the bylaws of the Association.

FN1. This percentage is much higher than that now permitted by the Legislature. NRS 116.3108(1) provides that special meetings of a unit-owners' association may be called "by units' owners having 20 percent, or any lower percentage specified in the bylaws, of the votes in the association." (Emphasis added.) Apparently, Sunrise Villas pre-existed enactment of NRS Chapter 116 so this provision does not

apply to this case. See NRS 116.1201, 116.1204.

[3]  It is also perplexing why Eversole was assessed attorney fees when the district court gave a clear indication that attorney fees and costs would not be assessed against any of the individual defendants, but rather against the Association, as long as the defendants took no further action in the case. The Association \*1261 made it impossible for Eversole to do this because it served him with a notice of intent to default, and his attorney properly advised him to file an answer. This action was followed by the Association's motion for final judgment and attorney fees. Eversole opposed the Association's motion for final judgment, but contrary to its prior indication, the district court entered judgment against the defendants and assessed Eversole half the attorney fees of \$11,126.40.

Just as the Association began the controversy by failing to call the annual meeting, the Association's attorneys forced Eversole to act when the district court had indicated it wanted the opposite conduct from Eversole.

#### CONCLUSION

When the secretary and president of the Association failed to discharge their responsibilities to call an annual meeting, Eversole and the other homeowners were empowered, pursuant to the bylaws, to call a special meeting for that purpose. Since Eversole acted properly and should have been the prevailing party in this litigation, no attorney fees or costs should have been assessed against him. Any attorney fees are the responsibility of the Association to pay. Accordingly, we reverse the judgment of the district court and remand this case for entry of judgment in Eversole's favor.

Nev., 1996.

Eversole v. Sunrise Villas VIII Homeowners Ass'n  
112 Nev. 1255, 925 P.2d 505

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Judges

• **Bonaventure, Hon. Joseph T.**

State of Nevada District Court, 8th Judicial District  
Las Vegas, Nevada 89155

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Attorneys

Attorneys for Appellant

• **Burr, Craig D.**

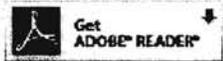
Henderson, Nevada 89074

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114 Ohio App.3d 543, 683 N.E.2d 447

### Judges and Attorneys

Court of Appeals of Ohio,  
Eleventh District, Lake County.  
McDONALD et al., Appellants,  
v.  
DALHEIM et al., Appellees.<sup>FN\*</sup>

FN\* Reporter's Note: A discretionary appeal to the Supreme Court of Ohio was not allowed in (1997), 78 Ohio St.3d 1410, 675 N.E.2d 1249.

Nos. 95-L-199, 95-L-200.  
Decided Oct. 15, 1996.

Former president and secretary of dissolved corporation brought action to recover certain assets of corporation, pursuant to resolution adopted. The Court of Common Pleas, Lake County, entered summary judgment in favor of defendants. Appeal was taken. The Court of Appeals, Joseph Donofrio, J., sitting by assignment, held that resolution adopted at joint meeting of shareholders, directors, and officers of corporation at which quorum of directors was not present was insufficient to bind corporation.

Affirmed.

### West Headnotes

[1]  [KeyCite Citing References for this Headnote](#)

↔ [101 Corporations and Business Organizations](#)  
 ↔ [101VII Directors, Officers, and Agents](#)  
 ↔ [101VII\(C\) Authority and Functions](#)  
 ↔ [101k1783 Meetings of Directors](#)  
 ↔ [101k1794 k. Quorum. Most Cited Cases](#)  
 (Formerly 101k298(5))

Resolution adopted at joint meeting of shareholders, directors, and officers of corporation at which only two of four directors were present was insufficient to bind corporation, though majority of stock was present at meeting; corporation's code of regulations provided that majority of directors constituted quorum required to transact business. R.C. § 1701.59(A)

[2]  KeyCite Citing References for this Headnote

- ↔ 101 Corporations and Business Organizations
  - ↔ 101VI Shareholders and Members
    - ↔ 101VI(B) Rights and Liabilities as to Corporation and Other Shareholders or Members
      - ↔ 101k1534 Management of Corporate Affairs in General
        - ↔ 101k1535 k. In general. Most Cited Cases  
(Formerly 101k180)

As a general rule, shareholders are not permitted to act on behalf of corporation.

[3]  KeyCite Citing References for this Headnote

- ↔ 101 Corporations and Business Organizations
  - ↔ 101VI Shareholders and Members
    - ↔ 101VI(B) Rights and Liabilities as to Corporation and Other Shareholders or Members
      - ↔ 101k1534 Management of Corporate Affairs in General
        - ↔ 101k1537 k. Shareholder agreements as to management. Most Cited Cases  
(Formerly 101k180)

- ↔ 101 Corporations and Business Organizations  KeyCite Citing References for this Headnote
  - ↔ 101VII Directors, Officers, and Agents
    - ↔ 101VII(C) Authority and Functions
      - ↔ 101k1782 k. Authority of directors. Most Cited Cases  
(Formerly 101k297)

Stockholders of corporation cannot by any agreement among themselves prejudice rights of corporation, creditors, or other stockholders, or divest board of directors of authority to manage and control corporate affairs.

[4]  KeyCite Citing References for this Headnote

- ↔ 101 Corporations and Business Organizations
  - ↔ 101IX Corporate Powers and Liabilities
    - ↔ 101IX(B) Representation of Corporation by Corporate Principals
      - ↔ 101k2384 Ratification and Repudiation
        - ↔ 101k2388 k. By assent of shareholders or directors. Most Cited Cases  
(Formerly 101k426(2))

While shareholders have authority to ratify actions of corporate directors, including frauds of said directors in certain situations, only disinterested majority of

shareholders can accomplish this task.

**\*\*448** Albert C. Nozik, Mentor-on-the-Lake, for appellants.

Barry M. Byron, Willoughby, for appellees.

JOSEPH DONOFRIO, Judge.

In this accelerated calendar appeal, plaintiffs-appellants, Eleanor S. McDonald and Albert C. Nozik, appeal from a judgment of the Lake County Court of Common Pleas granting summary judgment in favor of defendants-appellees, Theodore J. Dalheim et al. For the reasons that follow, we affirm the judgment of the trial court.

The facts pertinent to this appeal are as follows. On May 12, 1995, appellants, individually, filed complaints alleging that they were entitled to certain assets of a dissolved corporation, Mentor Lagoons, Inc. ("Mentor Lagoons"), pursuant to a "joint special meeting" of the shareholders, directors, and officers held on March 13, 1975.

At the meeting of March 13, 1975, Albert C. Nozik ("Nozik") president and director of Mentor Lagoons, and owner of two hundred forty shares of Mentor Lagoons stock, met with Eleanor S. McDonald ("McDonald"), secretary and director of Mentor Lagoons. At that time, McDonald had a "life interest" in twenty shares of stock of Mentor Lagoons. The meeting was held pursuant to notice to the other two directors, who were not present at the meeting, Sara B. Nozik, treasurer of Mentor Lagoons and owner of two hundred forty shares of stock, and Errol S. Nozik, vice president and residual beneficiary of the twenty shares of stock held by McDonald.

At the meeting, Nozik and McDonald, in anticipation of Nozik's resignation from the corporation, attempted to adopt a resolution to provide appellants the following upon Nozik's departure:

"1. Employment of Albert C. Nozik as attorney for the corporation at the rate of \$75.00 per hour and as consultant to the corporation at \$100.00 per hour.

"2. That in further consideration of the services rendered by Albert C. Nozik, that he be and is hereby granted a life interest in the use of the apartment now occupied by him at Mentor Lagoons Marina and that the corporation pay all the expenses of upkeep, maintenance, repair and improvement.

**\*545** "3. That a boat selected by Albert C. Nozik of no less than the market value of \$75,000.00 be given to and conveyed to Albert C. Nozik by certificate of title, free and clear of all encumbrances; and that the corporation provide a dock for said boat for as long as Albert C. Nozik so desires, and that all expenses of maintenance, repair, and operation, including parts and gasoline, be paid by the corporation.

"4. That the corporation purchase an automobile at no less than the value of

\$12,000.00 to be selected by Albert C. Nozik and that title be transferred to him; that the corporation pay all expenses of said automobile, any replacement thereof during his lifetime, including the garaging, repairs, maintenance, and all expenses of operation including gasoline.

"5. That the corporation purchase and provide such policies of insurance as will secure said Albert C. Nozik as to any personal liability with regard to any of his activities, past, present, or future, either individually, professionally, or on behalf of the corporations.

**\*\*449** "6. That a pension fund be established for the benefit of Albert C. Nozik from which he is to receive a minimum of \$2,000.00 each month, exclusive of taxes, for the duration of his lifetime; and that said corporation is to provide and pay for any medical, nursing or other expenses necessary or required for the maintenance of his health.

"7. That the corporation pay for in advance or set aside a fund which will pay for a vacation of six months for said Albert C. Nozik to any place of his choice at any time convenient to him.

"8. That the corporation further pay to Eleanor Schwed McDonald in the event the property of the corporation or any part thereof is sold or refinanced, the sum of \$100,000.00, tax free, in cash or installments, at her option, as part of the consideration of the service rendered by her to the corporation."

On June 13, 1995, appellees filed an answer and counterclaim in response to appellants' complaints. Appellees alleged, *inter alia*, that, because of an absence of a quorum of directors, the resolution adopted at the meeting of March 13, 1975 was invalid. Subsequently, both parties filed motions for summary judgment.

The trial court, in a judgment entry filed November 29, 1995, consolidated appellants' cases and granted appellees' motion for summary judgment against both Nozik and McDonald. In granting appellees' motion for summary judgment, the trial court ruled that, at the meeting held on March 13, 1975, there was no valid corporate authority to award appellants the compensation sought by them in their complaints. From this judgment, appellants, in a consolidated appeal before this court, argue that the trial court erred in granting appellees' motion for summary judgment.

**\*546** Civ.R. 56(C), providing the standard governing motions for summary judgment, states:

"Summary judgment shall be rendered forthwith if the pleading, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be

rendered unless it appears from such evidence or stipulation and only therefrom, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, such party being entitled to have the evidence or stipulation construed most strongly in his favor. \* \* \* "

In construing Civ.R. 56(C), the Supreme Court of Ohio has stated that the moving party bears the burden of establishing that (1) there is no genuine issue as to any material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds, construing the evidence in favor of the nonmoving party can come to but one conclusion, and that conclusion is adverse to the party opposing the motion. Harless v. Willis Day Warehousing Co. (1978), 54 Ohio St.2d 64, 66, 8 O.O.3d 73, 74, 375 N.E.2d 46, 47; Morris v. Ohio Cas. Ins. Co. (1988), 35 Ohio St.3d 45, 46-47, 517 N.E.2d 904, 906-907.

[1]  Applying this standard to the case *sub judice*, it is undisputed that only two of the four directors of Mentor Lagoons were present at the meeting held on March 13, 1975. The issue raised in appellees' motion for summary judgment was whether the resolution approved at this meeting was binding upon the corporation.

R.C. 1701.59(A) states:

"Except where the law, the articles, or the regulations require action to be authorized or taken by shareholders, *all of the authority of a corporation shall be exercised by or under the direction of its directors.* \* \* \* " (Emphasis added.)

Appellees argued, and the trial court ultimately determined, that the absence of a quorum of directors meant that the corporate entity could not pass the resolution from which appellants claimed their compensation. We agree.

**\*\*450** Black's Law Dictionary defines a "quorum" as follows:

"Such a number of the members of a body as is competent to transact business in the absence of the other members. The idea of a quorum is that, when that required number of persons goes into a session as a body, such as directors of a **\*547** corporation, the votes of a majority thereof are sufficient for binding action." *Id.* (6 Ed.1990) 1255.

In the case *sub judice*, the number of directors needed to conduct business was set forth in Article IX of the Code of Regulations of Mentor Lagoons. The regulation states:

"QUORUM

"A *majority* of the Directors in office at the time shall constitute a quorum at all meetings thereof." (Emphasis added.)

As only two of the four directors were present at the meeting of March 13, 1975, a sufficient number of directors were not present to transact business. Consequently, the resolution passed by Nozik and McDonald at this meeting was legally invalid.

[2]  Appellants argue that this court should ignore the absence of a quorum of directors because the shareholders of a majority of Mentor Lagoon's stock were present at the "joint" meeting of March 13, 1975. However, as the trial court correctly noted, it is the general rule that shareholders are not permitted to act on behalf of the corporation. 12 Ohio Jurisprudence 3d (1995), Business Relationships, Section 578, summarizes the general rule as follows:

"All the capacity of a corporation is vested in its board of directors, and all its authority is supposed to be exercised by them. It is the function of the board of directors to manage and conduct the business of the corporation. The shareholders, as such (i.e., who are not also directors, officers, or agents of the corporation) have no authority to act for the corporation. They are limited to acting in an advisory capacity only, or to approving or disapproving such measures as are submitted to them by the board. \* \* \* Authority to act for the corporation will not be implied from the mere fact that the particular shareholder who presumes to act for the corporation owns a majority of the shares." (Citations omitted.)

[3]  Further, "stockholders of a corporation cannot by any agreement among themselves prejudice the rights of the corporation, creditors, or other stockholders, or divest the board of directors of authority to manage and control corporate affairs \* \* \*." Hocking Valley Railway Co. v. Toledo Terminal Railroad Co. (1918), 99 Ohio St. 35, 122 N.E. 35, paragraph three of the syllabus.

[4]  While shareholders do have the authority to ratify the actions of corporate directors, including the frauds of the directors in certain situations, only a disinterested majority of shareholders can accomplish this task. Claman v. Robertson (1955), 164 Ohio St. 61, 57 O.O. 89, 128 N.E.2d 429, paragraph one of the syllabus. Appellants attempted to award themselves a substantial amount of compensation under the guise of shareholder action. The trial court properly **\*548** determined that the resolution in question was not a valid action of the shareholders.

As the resolution passed by appellants was insufficient to bind the corporation, there is no basis from which appellants could claim the compensation they sought in their complaints. Accordingly, appellants' sole assignment of error is without merit.

Based on the foregoing, we affirm the decision of the trial court.

*Judgment affirmed.*

FORD, P.J., and CHRISTLEY, J., concur.

✓ \* ✎  
JOSEPH DONOFRIO, J., retired, of the Seventh Appellate District, sitting by assignment.

Ohio App. 11 Dist., 1996.  
McDonald v. Dalheim  
114 Ohio App.3d 543, 683 N.E.2d 447

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Judges

- **Christley, Hon. Judith A.**

State of Ohio Court of Appeals, 11th District  
Warren, Ohio 44481

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- **Donofrio, Hon. Gene**

State of Ohio Court of Appeals, 7th District  
Youngstown, Ohio 44503

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- **Ford, Hon. Donald R.**

State of Ohio Court of Appeals, 11th District  
Warren, Ohio 44481

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Attorneys

Attorneys for Appellant

- **Nozik, Albert C.**

Mentor, Ohio 44060

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Attorneys for Appellee

- **Byron, Barry M.**

Willoughby, Ohio 44094

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