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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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No. 42287-5-II

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

HAROLD GENE DAVIS and DELIA M. DAVIS,

Appellants,

vs.

PLEASANT FOREST CAMPING CLUB,

Respondent.

BRIEF OF RESPONDENT

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**Pleasant Forest Camping Club By-Laws and Rules,
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I. SUPPLEMENTAL STATEMENT OF THE CASE

The Respondent is in agreement with most of the Statement of the Case submitted on behalf of the Appellants. However, the Respondent submits the following supplemental facts which were before the Superior Court:

1. Prior to the Board of Directors calling for a Special Meeting of the Membership to vote upon the termination of the Appellants' membership, there had been filed with the Board several complaints by members and a petition for termination. In the complaints and the petition, the belligerent, obnoxious and confrontational attitude and activities of Gene Davis were described. (CP at 165 – 177.)

2. After receiving the petition and complaints and prior to mailing the July 5, 2007 Notice of the Special Meeting of Members, the Board of Directors of the Pleasant Forest Camping Club voted unanimously to call the August 11, 2007 Special Meeting of the Membership.

3. There were 75 votes cast at the August 11, 2007 meeting. Of this total, 66 voted in favor of termination of Mr. and Mrs. Davis and 9 voted against. (CP at 78.)

4. Although the ballots which had been mailed in or left at the office prior to the August 11, 2007 meeting, had not initially been counted, they were preserved separate from those votes cast at the meeting. After this litigation was filed, the earlier ballots were counted with 89 ballots voting for termination and 16 voting against such termination. (CP at 79.)

5. Although the membership in the Club of Mr. and Mrs. Davis was terminated, they have been allowed, in accordance with the Bylaws to sell the rights to utilize the assigned lots.

II. ARGUMENT IN SUPPORT OF SUMMARY JUDGMENT

A. NO MATERIAL FACTS IN ISSUE.

The Appellants cite court decisions to the effect that Summary Judgment should be granted only when there is no genuine issue as to any material fact and the issues can be resolved as a matter of law. That was exactly the status of this case at the time Judge Paula Casey rendered her decision. Mr. Davis raised many non-relevant issues. However, the issue before the court was whether the Davis membership was properly terminated. The facts regarding the information before the Board at the time it called for a special meeting of members, the notice which went out to the membership, the voting procedures, the votes cast

on the issue of termination and the fact that an Appeal Hearing took place were all before the court in an uncontested fashion. Therefore, from a factual standpoint, the case was ripe for Summary Judgment. A review by this court should also find that the facts material to the only relevant issue in this action were not contested.

B. MR. AND MRS. DAVIS KNEW THE RULES.

Mr. and Mrs. Davis purchased a membership in the Camping Club with a clear understanding that violation of the rules and regulations of the Club could result in termination of their membership. (CP at 262.) Further, Mr. Davis was formerly a member of the Board and as such, would have become even more knowledgeable about the requirements of the Club.

C. ACTIONS OF MR. DAVIS.

Mr. Davis had differences with the Board of Directors regarding the type of vehicles which were to be allowed in the park. Either for this reason or for reasons unknown, Mr. Davis' conduct became confrontational, belligerent, obnoxious and harassing. This attitude and conduct by Mr. Davis became so prevalent and threatening to other members that complaints by these members were filed with the Board of Directors. Karine Martin, a member of the Club filed a complaint

characterizing Gene Davis as a control freak and a verbal bully. Her complaint indicates that in her judgment, Gene Davis loves to bully while smiling all of the time. It is her conclusion that Gene thoroughly enjoys troublemaking. (CP at 169.) In addition to individual complaints, a petition was circulated and filed with the Board to terminate the Davis membership. (CP at 172 – 175.) Rule 24-i of the Pleasant Forest Camping Club Rules, Regulations and Covenants, states in relevant part “Being a nuisance is especially prohibited, by actions or by word, belligerence, obnoxiousness ...” Further, Subsection k of Rule 24 similarly prohibits “confrontation.” These Rules and Regulations were made a part of the Bylaws by Article XIV. (CP at 58.)

D. MEETING OF MEMBERS.

The Board’s own knowledge of the actions of Gene Davis together with the complaints and petition that were filed with the Board caused the Board to unanimously vote on July 5, 2007 for the calling of a Special Meeting of the membership for the purpose of voting on the sole issue of the termination of the Davis membership. Notice of this meeting was provided to all members of the club. (CP at 72.) Mr. and Mrs. Davis took this opportunity to prepare a letter addressed and sent to all club members

refuting the issues raised by the petition and the Board and defending their own position. (CP at 178.)

At the regularly called Special Meeting, Mr. Davis was given an opportunity to speak to the assembled group, however, he declined to do so by leaving the meeting. The result of the ballots of those attending the meeting was 66 votes in favor of termination and 9 votes against termination. However, ballots had also been furnished with the notice of the upcoming special meeting. Initially these votes were not counted, however, they were preserved separately from the ballots counted at the meeting. After this litigation was filed, upon the advice of counsel, the Club counted the ballots which had been cast either by mail or deposited at the office prior to the August 11, 2007 meeting. The result was 89 votes for termination and 16 against termination. Therefore, the percentage of members voting for termination in each of these counts was between 85% and 88%. (CP at 78 – 79.)

E. APPEAL HEARING BEFORE BOARD.

The Club Bylaws provide that even after affirmative vote of termination by members, there is the right to appeal to the Board of Directors. (CP at 46.) Mr. and Mrs. Davis, represented by counsel did appeal the matter to the Board of Directors. Therefore, the Board delayed

the effective date of the termination until a hearing could be held. At the hearing, the Board heard all evidence presented on behalf of Mr. and Mrs. Davis. After receiving the evidence and hearing argument of counsel, the Board affirmed the membership vote, rejected the appeal and made termination effective with the rendering of the Board's decision. That action was taken on September 25, 2007. In accordance with that decision, Mr. and Mrs. Davis moved their recreational vehicle out of the park.

F. COURT RESTRAINT FOR VOLUNTARY ASSOCIATIONS.

The Pleasant Forest Camping Club is a voluntary association. As a general rule, courts refrain from interfering in the internal affairs of voluntary associations. *Anderson v. Enterprise Lodge No. 2*, 80 Wn App. 41, 906 P.2d 962 (1995) and *Grand Aerie Fraternal Order of Eagles v. National Bank of Washington*, 13 Wn.2d 131, 124 P.2d, 203 (1942).

In this case, Mr. and Mrs. Davis joined the Camping Club knowing it was a private organization and that actions which violated the Rules and Regulations of the Club could result in termination of membership by a vote of the members. Despite that knowledge, Gene Davis conducted himself in a manner which resulted in complaints being filed and a petition for termination being signed. He was obsessed with his differences over the recreational vehicle and disputes with the Board. Regardless of who is

right regarding those issues, Mr. Davis proceeded to confront not only the owners of the vehicle at issue but many others and generally act in an obnoxious and threatening way. While these proceedings were pending before the Board, additional written complaints were filed. For example, Ruby Powers, a member of the Club since 1971 stated that Gene Davis would holler from his deck or the edge of his road through a bullhorn in order to harass them. (CP at 165.) Kathleen Thurston, a lady of 61 years, indicates that Mr. Davis made sordid comments and played a whistling tape over and over. She related that Mr. Davis verbalized loudly in what appeared to be a recorder, recording step by step the comings and goings of guests at the lot of Mr. and Mrs. White. She indicated that in her 61 years she had never seen or experienced another human being like Mr. Davis and that his actions have left a mark on her forever. (CP at 166.) Tammy Franson stated that Gene Davis had made menacing comments towards her and that she felt violated by a man who enjoys verbal harassment which is truly menacing and verbally insulting. (CP at 167.)

The case of *Garvey v. Seattle Tennis Club*, 60 Wn. App. 930, 808 P.2d 1155 (1991) presented a very similar factual pattern to the case at hand. In *Garvey*, the Garvey family was expelled as members of the Seattle Tennis Club for “unbecoming conduct upon the premises of the

club.” In that case, the expulsion was directed by the Board of Directors only as opposed to the vote of the membership taken in this case. The Board initially made its decision without a hearing and subsequently held a hearing with the same result. The Garveys claimed that the procedures followed were not in compliance with the requirements of the By-Laws and that they were denied due process because they could not have a fair hearing before a Board in which some members had earlier voted for the expulsion. Both the trial court and the appellate court rejected the procedural irregularity claim. The court held that even if, for sake of argument, some of the earlier proceedings of the Board of Directors of the Tennis Club were irregular, the Garveys were allowed continued use of the facility until a meeting which was in compliance with the By-Laws was held and expulsion ordered.

The court in *Garvey*, also addressed the due process claim. The court stated at 935 “The Garveys argue that they are denied due process because they cannot have a fair hearing before a board in which some members had voted in favor of expulsion. However, constitutional due process does not apply because the Garveys’ action is private and of a social nature. ‘Private action is immune from the restrictions of the Fourteenth Amendment.’ *Hurst v. Farmer*, 40 Wn. App. 116, 118, 697

P.2d 280, *review denied*, 103 Wn2d 1038 (1985). As stated in *Hartung v. Audubon Country Club, Inc.*, 785 S.W.2d 501, 503 n.1 (Ky. Ct. App. 1990):

Many cases dealing with social club expulsion talk in terms of due process. In the traditional sense, due process is protection against state action. We fail to see its relevance in disputes between a voluntary private social club and its members.

(Citation omitted.) In the context of a subsequent expulsion of a club member whose initial expulsion was invalid, '[t]he Court's only directive in this regard is that any decision must be rendered in good faith and not in malice which simply means that [the member] must be accorded a fair hearing and fair decision.' *Jackson v. American Yorkshire Club*, 340 F. Supp. 628, 636 (N.D. Iowa 1971)."

G. OTHER – NON-MATERIAL ISSUES.

The Appellants, Davis, complain to this Court that both the Club and the Superior Court, in the Summary Judgment proceedings ignored other claims of Mr. and Mrs. Davis. First, it is argued that the Superior Court should have resolved the issue of whether a Park Model Trailer should be allowed in the park. However, in making that argument, they neglect to inform the court that the issue of the Park Model Trailer was the subject matter of a separate Superior Court action under Thurston County

Cause No. 07-2-01747-7. That action was filed on August 30, 2007 and was voluntarily dismissed, with prejudice, by Mr. and Mrs. Davis by Stipulation and Order of Dismissal signed and approved by their attorney. By proposing and agreeing to such Stipulation and Order, the matter of the Park Model Trailer was resolved and Mr. and Mrs. Davis were collaterally estopped from raising the issue in the action under review.

Mr. and Mrs. Davis also complain that their civil rights were violated for the reason that the Club terminated their membership as a means of eliminating their standing in Cause No. 07-2-01747-7. Again, however, Mr. and Mrs. Davis neglect to point out that although the vote to terminate occurred on August 11, 2007, the separate cause of action regarding the Park Model Trailer was not filed until August 30, 2007. Appellants, Davis, presented no evidence which in any way would support an allegation that the Club terminated their membership for the purpose of removing their standing in the separate lawsuit. In fact, no such evidence exists since lack of standing was not raised by the Club as an affirmative defense in that action and the case was dismissed totally upon the basis of the voluntary stipulation of Mr. and Mrs. Davis.

III. THE SUPERIOR COURT DID NOT ERR IN AWARDING UNCONTESTED ATTORNEY FEES

On April 28, 2011, the Club filed a Motion for Award of Reasonable Attorney Fees and Costs in accordance with the provisions of the Bylaws of the Pleasant Forest Camping Club. (CP at 267.) This Motion was supported by the Declaration of Kenneth R. Ahlf. (CP at 260 – 266.) The Declaration quoted the terms of the Bylaws and Camping Club Rules and Regulations which provided for attorney fees and court costs to be awarded to the Club and against a member who causes the Club to incur such fees and costs. The Declaration also attached a copy of the Application Agreement signed by Mr. and Mrs. Davis (CP at 262.) and the billing and time records of attorney fees and costs incurred by the Club in response to this Davis litigation. (CP at 263 – 266.)

Mr. and Mrs. Davis present nothing by way of the Clerk's Papers or Report of Proceedings demonstrating that there was any objection raised by them in response to this Motion. No such showing could be made since no objection was raised by Mr. and Mrs. Davis to the award of attorney fees.

Generally, Appellate Courts will not entertain issues raised for the first time on appeal. See *Wilson and Son Ranch v. Hintz*, 162 Wn.

App. 297, 306, 253 P.3d 470, 475, (2011) and *Brundridge v. Fluor Fed. Servs., Inc.*, 164 Wn.2d 432, 441, 191 P.3d 879 (2008). As stated in *Wilson* at 303, “The reason for this rule is to afford the trial court with an opportunity to correct errors, thereby avoiding unnecessary appeals and retrials. *Smith v. Shannon*, 100 Wn.2d 26, 37, 666 P.2d 351 (1983).”

If the court determines it should address this issue despite the fact that no objection was raised at the trial court level, we must look to the materials which were before the trial court and a discussion of the loadstar analysis.

Mr. and Mrs. Davis cite *Mahler v. Szucs*, 135 Wn.2d 398, 957 P.2d 632 (1998) as supporting the proposition that the loadstar method must be used by the trial court in setting attorney fees. In *Mahler* at 434, the court stated:

“Under the lodestar methodology, a court must first determine that counsel expended a reasonable number of hours in securing a successful recovery for the client. Necessarily, this decision requires the court to exclude from the requested hours any wasteful or duplicative hours and any hours pertaining to unsuccessful theories or claims. *Fetzer*, 122 Wn.2d at 151.

Counsel must provide contemporaneous records documenting the

hours worked. As we said in *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 597, 675 P.2d 193 (1983), such documentation

need not be exhaustive or in minute detail, but must inform the court, in addition to the number of hours worked, of the type of work performed, and the category of attorney who performed the work (*i.e.*, senior partner, associate, etc.).

The court must also determine the reasonableness of the hourly rate of counsel at the time the lawyer actually billed the client for the services. *Fisher Properties, Inc. v. Arden-Mayfair, Inc.*, 115 Wn.2d 364, 798 P.2d 799 (1990) (outside civil rights context, contemporaneous rates actually billed rather than current rates or contemporaneous rates adjusted for inflation will be employed).

Finally, the lodestar fee, calculated by multiplying the reasonable hourly rate by the reasonable number of hours incurred in obtaining the successful result, may, in rare instances, be adjusted upward or downward in the trial court's discretion. *Fetzer*, 122 Wn.2d at 150; *Travis v. Washington Horse Breeders Ass'n*, 111 Wn.2d 396, 759 P.2d 418 (1988).”

The court in *Mahler* further emphasized the need for an adequate record on fee award decisions and that findings of fact and conclusions

of law are required to establish such a record. In this action, the Motion and Declaration of counsel for the Club together with the time and billing records attached to that Declaration provides an adequate record for the decision regarding attorney fees. This is particularly true when Mr. and Mrs. Davis raised no objections and submitted no materials which would shed doubt on either the fact that the Club is entitled to attorney fees or the amount of those fees.

The Club also questions whether the holding of the Court in *Mahler* regarding the necessity for findings of fact and conclusions of law is applicable in a summary judgment case. CR 52(a)(5)(B) specifically provides that findings of fact and conclusions of law are not necessary on decisions of motions under Rules 12 or 56 or any other motion, except as provided in Rules 41(b)(3) and 55(b)(2). However, if this court should determine that findings of fact and conclusions of law are necessary for an attorney fee award in a summary judgment case, the solution would be to remand to the Superior Court for the purpose of entering those findings and conclusions.

IV. REQUEST OF THE CLUB FOR ATTORNEY FEES ON APPEAL

Article VI, Section II of the Bylaws of the Pleasant Forest Camping Club provide for an award of attorney fees against Mr. and

Mrs. Davis and in favor of the Club. (CP at 46.) That fee provision would apply also to attorney fees and costs incurred on appeal. Therefore, the Club requests that the court award attorney fees and costs to it pursuant to the provisions of RAP 18.1.

V. CONCLUSION

The Pleasant Forest Camping Club is a voluntary association which has properly adopted Bylaws and Rules and Regulations. Mr. and Mrs. Davis joined this voluntary association, and in doing so, acknowledged the contents of the governing documents. A portion of those governing documents provide that a membership may be terminated by vote of the members. Mr. and Mrs. Davis now complain about that termination although they clearly knew that actions such as those described of Mr. Davis could result in such termination.

The issue before the Superior Court and likewise before this Court is not whether a particular judge or judges would have voted for termination. Instead, the issue is whether that decision was made after Mr. and Mrs. Davis were afforded a fair hearing and fair decision. Mr. Davis had served on the Board and was familiar with its proceedings. He was heavily involved in contesting the actions of the Board. Evidently for this reason and others, Mr. Davis became confrontational

and obnoxious causing others to fear for their safety. Written complaints about Mr. Davis' conduct and a petition asking for the termination of the Davis membership were filed with the Board.

Mr. and Mrs. Davis were familiar with the petition and received the Notice of the Special Meeting of Members. They were afforded and took advantage of an opportunity to write to all members advancing and defending their position. Mr. and Mrs. Davis had an opportunity to again orally present their case to the members but chose not to do so. Finally, after the vote of the membership, Mr. and Mrs. Davis were afforded a complete opportunity, to present their case to the Board, with the assistance of competent counsel, as part of the appeal process. Clearly, Mr. and Mrs. Davis were afforded a fair hearing and a fair decision.

Mr. and Mrs. Davis were initially represented by counsel in the filing of this action, the preparation of briefing and the presentation of oral arguments upon their Motion for Injunctive Relief. Counsel was also present for the entry of Findings of Fact and Conclusions of Law supporting the decision of Judge Anne Hirsch denying the Motion for Injunctive Relief. Subsequently, Mr. and Mrs. Davis represented themselves and therefore many non-material and non-relevant issues

were attempted to be interjected. However, the opinion of Judge Paula Casey concentrated on those facts which were material to the decision regarding wrongful termination and properly ruled in favor of the Club. This Court is urged to uphold the decision granting Summary Judgment to the Club and awarding attorney fees and costs.

Respectfully submitted this 14th day of December, 2011.



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