

NO. 66514-6
COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

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

Plaintiffs/Appellants/Cross-Respondents,

v.

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

Defendants/Respondents/Cross-Appellants.

RESPONDENTS'/CROSS-APPELLANTS' REPLY BRIEF

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

2011 NOV 28 PM 4: 17
COURT OF APPEALS
STATE OF WASHINGTON
FILED
RECEIVED

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
II. ARGUMENT	1
1. The Association Is Entitled to Recover Attorney Fees and Costs Under the <i>Covenants</i>	1
2. The Association Is Entitled to Recover Attorney Fees Under RCW 64.38.050 of the HOA Statute.	6
3. The Association Is Entitled to Recover Additional Attorney Fees and Costs Under the <i>By-Laws</i>	8
4. The Roats Are Not “Implied Co-Insureds” of the Association’s Director & Officer Insurance Coverage, and Remain Liable for the Association’s Fees and Costs.....	11
III. CONCLUSION.....	14

TABLE OF AUTHORITIES

Page

STATE CASES

Blueberry Place Homeowners Association v. Northward Homes,
126 Wn. App. 352, 110 P.3d 1145 (2005).....8

Cascade Trailer Court v. Beeson,
501 Wn. App. 678, 749, P.2d 761 (1988).....13

*General Insurance Co. of America v. Stoddard Wendle Ford
Motors*,
67 Wn.2d 973, 410 P.2d 904 (1966).....13

Lakes at Mercer Island Homeowner Association v. Witrak,
61 Wn. App. 177, 810 P.2d 27 (1991).....3

STATE STATUTES

RCW 64.38.010(2).....7

RCW 64.38.0207

RCW 64.38.0357

RCW 64.38.0505

I. INTRODUCTION

This Court should grant the Association relief on its cross-appeal regarding the proper bases and amount of fees and costs due the Association. The trial court properly awarded the Association fees, but did not go far enough. The Association asked this Court in its Respondents' Brief, pp. 39-45, to examine its governing documents and applicable statutes and conclude that the Association is entitled to additional fees and costs. Setting aside the Roats's antagonism and hyperbole, the Roats offer no persuasive opposition.

II. ARGUMENT

The only relief this Court should grant is for additional fees and costs due the Association. As a matter of law, additional fees and costs should have been awarded under the *Covenants*, Homeowners' Association statute (the "HOA statute"), and the *By-Laws*. This Court should remand for determination of additional attorney fees and costs due the Association.

1. **The Association Is Entitled to Recover Attorney Fees and Costs Under the *Covenants***

The Association is entitled to additional amounts of fees and costs pursuant to the *Covenants*. As argued in Respondents' Brief, pp. 42-43, the *Covenants*' "General Enforcement Provisions and Penalties" section provides a basis for recovery of fees and costs under such circumstances.

The Roats' opposition to this ground for fees and costs fails. On *de novo* review, this Court should reverse and instruct the trial court to award fees and costs pursuant to the *Covenants*.

To begin with, the Association has acted within its scope of authority such that it is eligible for additional fees and costs under the *Covenants*. The Roats's challenge seeking declaratory relief that the Association acted outside its scope of authority is moot.¹ Even if not moot, the Court should rule that the *Covenants* give the Association the express authority to act as it has. The Roats have withdrawn their

¹ The Roats contend that the membership's decision to amend the *Articles of Incorporation* and the *By-Laws* does not affect any existing claims or actions, yet these governing documents were amended after the trial court issued its final judgment and the matter had been decided in superior court. RCW 24.03.180 is inapplicable in this instance. The trial court concluded that the Association acted within its scope of authority and issued its final judgment on November 29, 2010. The membership subsequently adopted amendments to the *Articles of Incorporation* and the *By-Laws* on July 2, 2011. The Court should affirm the trial court on the basis that the Roats's claims are moot. To the extent the Court considers RCW 24.03.180 to apply in this instance, it only applies as to the *Articles of Incorporation* and does not curb consideration of the amendments to the *By-Laws*.

Moreover, the Roats have repeatedly taken the position that such an amendment would cure their allegations. See Appellants' Brief at 2 ("If there were such a compelling need [for the Association to operate the marina], and 2/3 of Blakely's residents agreed, [the Association] could have secured an appropriate amendment to the Articles."); CP 1922 ("There are prescribed ways to amend the governing documents, but unless and until those procedures are followed, and the requisite number of members vote to expand BIMC authority, the Board may not engage in activities beyond the current stated limitations."); and CP 1942 ("If enough BIMC members in fact wish to operate the Marina, they have the power to amend these governing documents by following the prescribed formalities. But no such action has occurred."). Consistent with these assertions, the Roats should concede that the amendments adopted by the membership defeat their claim.

assignment of error challenging the validity of the *Covenants*, conceding that they are a valid governing document. See Appellants' Brief, p. 12. Paragraph 11(B) of the *Covenants* provides complete authority for the Association to act as it has:

(8) To have the power ... after approval of its members, to incur indebtedness on behalf of the BIMC, to finance said improvements and to maintain the same.

(9) [A]fter approval of its members, to acquire and own real or personal property ... and to levy assessments against the owners of assessed lots or tracts for the payment of the acquisition price, taxes and costs of maintenance of the real or personal property[.]

(10) [A]fter approval of its members, to execute easements, licenses, conveyances and other legal documents to carry out the business interests of the BIMC.

CP 896 (*Covenants* at 11(B)(8)-(10)).

While the *Covenants* identify the Association's authority with specificity in some sections of paragraph 11(B), subparagraphs (8) through (10) provide a wide scope of authority that gives the Association the flexibility to act in a manner *approved of by the membership*. Courts similarly "place special emphasis on arriving at an interpretation that protects the homeowner's collective interests." See *Lakes at Mercer Island Homeowner Association v. Witrak*, 61 Wn. App. 177, 180, 810 P.2d 27 (1991). The Association's membership has repeatedly approved the marina-related decisions, including the initial decision to create the

Blakely Community Facility LLC (“BCF”) and lease the marina in 2005 (CP 955-56), the \$100,000 BCF-related expenditure and assessment in 2007 (CP 995), the \$120,000 expenditure and assessment in 2008 (CP 982-83), and the 2011 decision to amend the governing documents which impliedly ratified each of the earlier marina-related decisions. CP 3897, 3924.

The *Covenants* expressly provide the Association with the flexibility to respond to the membership’s needs and, in this instance, with the authority to create the BCF and lease the marina.

The Roats narrowly concentrate on the language set forth in the original version of the *Articles of Incorporation* filed in 1961. *See* Appellants’ Brief, pp. 27-28. Yet the outdated authority described in the original *Articles of Incorporation* is immaterial because “[t]o the extent that there are any differences between the terms of the [*Covenants*] and the BIMC Articles and/or *Bylaws* ..., the provisions of the [*Covenants*] shall control and be determinative of any inconsistency.” CP 902-903 (*Covenants*, Art. 20).

While the Court can affirm the trial court’s dismissal of the Roats’s claim for any one of the reasons set forth in the Respondents’ Brief, the Court need look no further than the *Covenants* for the Association’s express authority to act in the manner it has. On this basis alone, the

Court should affirm the trial court's determination that the Association acted within its scope of authority.

Having acted within the scope of authority of the *Covenants*, the Association is entitled to additional fees and costs under the *Covenants*. The *Covenants* do not require that the Association be the party to initiate litigation in order to be eligible for an award of fees and costs. The relevant provision provides: "In the event litigation is commenced, the owner who is in violation shall be obligated to pay all costs of such litigation, including the payment of reasonable attorneys' fees." CP 897 (*Covenants*, ¶ 11.C(2)(b)). Litigation was commenced, albeit by the Roats, and the Association prevailed. CP 1-129; CP 212-278. The Roats challenged the validity of the *Covenants* and the Association's enforcement of its provisions against the Roats's property. CP 221-222. The Roats challenged the Association's authority to collect assessments under the *Covenants*. CP 221-223. The Roats challenged the Association's authority to create an entity to carry out the Association's business interests and enter into a lease. CP 222-223. The Roats claimed that the members of the Board of Governors breached their duties and loyalties to the Association.² CP 223-225. The trial court dismissed each

² In so doing, the Roats breached their obligation under the *Covenants*, Art. 11, ¶ D, to indemnify and hold harmless the Board of Governors. See CP 898.

of these claims. The trial court validated the *Covenants* and its enforcement provisions, confirmed the Association's authority to levy assessments and create the BCF to carry out specific activities related to the marina, and adjudged the Association as the "prevailing party." See CP 3776-3777.

The trial court committed legal error in denying the Association a fee award under the *Covenants*. This Court should reverse and remand for a determination of additional fees and costs due to the Association on this basis.

2. The Association Is Entitled to Recover Attorney Fees Under RCW 64.38.050 of the HOA Statute

The trial court erroneously denied the Association recovery of fees and costs under RCW 64.38.050 of the Homeowner's Association ("HOA") statute. This statute permits a prevailing party like the Association to recover its fees and costs. On *de novo* review, this Court should reverse and instruct the trial court that the HOA statute provides a basis for fees and costs.³

³ In contrast to the *de novo* standard of review applicable to the Association's challenge to the denial of its request for fees under the HOA statute, the trial court's decision to deny the Roats any attorney fee award is reviewed for abuse of discretion. See Respondents' Brief, pp. 36-39. The HOA statute gives the trial court the discretion to award fees and costs. The trial court recognized its ability to award fees and costs to the Roats but exercised its discretion not to award fees. See CP 2563. The trial court did not award the Roats any attorney fees because: (i) the majority of the Roats's fifth claim was dismissed (CP 2147); (ii) the

The Roats incorrectly argue that fees are not due under the HOA statute because they did not bring their claims under it but “brought their ultra vires claims under RCW 24.03.040.” See Appellants’ Brief, p. 39. The Court should reject this revisionist history. The Roats only raised their ultra vires challenge late in the lawsuit when it became evident that they may be subject to an attorney fee award under the HOA statute. The Roats’s Amended Complaint, for example, makes no mention of an “ultra vires” claim against the Association and fails to identify chap. 24.03 RCW as a basis for any of their claims. CP 212-226. The Roats instead focused their claim on the HOA statute. CP 1934 (“In the *absence* of relevant limitations in the governing documents, the association powers are defined by RCW 64.38.020[.]”) (underline emphasis added, italics emphasis in the original); CP 1003-1004. The Roats premised their claims on RCW 64.38.010(2) of the HOA statute, contending,

[T]he “governing documents” of a homeowners association are defined by statute as “the articles of incorporation, bylaws, plat, declaration of covenants, conditions, and restrictions, rules and regulations of the association, or other written instrument by which

meetings themselves were always open for observation by the Association’s members and the Board published minutes for each of its meetings in order to keep the membership informed (CP 2429-2430); and (iii) the Roats received limited declaratory relief but no material remedy or damages for the few meetings found to have been procedurally deficient (CP 2563). The trial court’s decision was tenable and within its discretion. As to the Association, however, the trial court rejected that the HOA statute provided a legal basis for a fee and costs award to the Association. This was legal error.

the association has the authority to exercise any of the powers provided for in this chapter [ch. 64.38 RCW] or to manage, maintain, or otherwise affect the property under its jurisdiction.”

CP 1003-1004, FN 2, *quoting* RCW 64.38.010(2) (emphasis added). *See also* CP 222 (Roats’s first claim challenged the validity of the *Covenants*, a governing document defined by RCW 64.38.010(2) and dictating the Association’s powers under RCW 64.38.020); CP 1003-1004, 1934 (Roats’s second claim challenged the Association’s powers under RCW 64.38.020); CP 225, 2147 (Roats’s fifth claim challenged in-part whether telephonic meetings are proper under RCW 64.38.035).

The record demonstrates that the Roats’s claims were based on the HOA statute and inextricably linked to the Association’s authority and obligations under that statute. The Association, therefore, is entitled to recover the fees and costs incurred in defending against the Roats’s lawsuit under the HOA statute. The Association asks this Court to reverse the trial court’s rejection of the HOA statute as a basis for fees and costs, and remand with instructions that the HOA statute provides a basis for fees and costs as a matter of law.

3. The Association Is Entitled to Recover Additional Attorney Fees and Costs Under the *By-Laws*

The *By-Laws* support the Association’s cross-appeal and demonstrate that additional fees and costs were warranted. The Court should review *de novo* whether the Association was entitled to additional

fees because the trial court decided as a matter of law that the Association could not recover fees under the *By-Laws* after May 14, 2009. *See Blueberry Place Homeowners Association v. Northward Homes*, 126 Wn. App. 352, 110 P.3d 1145 (2005). This was legal error. The *By-Laws* support an award through July 26, 2010, when the Association defeated the Roats's claim challenging its assessment authority and the Roats paid their delinquent assessment.

The trial court correctly concluded that the Roats's lawsuit is "fundamentally a dispute concerning assessments" because the Roats withheld their unpaid assessment and challenged the Association's authority to collect assessments. Yet the trial court erred when it concluded that the *By-Laws* did not support an award of fees incurred after the Roats deposited their delinquent assessment into the San Juan County Court Registry on May 14, 2009, because after that point "the lawsuit was no longer about collecting unpaid assessments[.]" CP 3530-3531. It was legal error for the trial court to conclude that an award under the *By-Laws* was cutoff on May 14, 2009.

If the Court were to review the trial court's conclusion for abuse of discretion, it also should reverse. The record does not support that the assessment was no longer disputed after May 14, 2009. As argued in the Respondents' Brief, pp. 43-45, when the Roats deposited the unpaid

assessment into the Court Registry, they plainly stated in their notice: “Plaintiffs shall, pursuant to CR 67, deposit with the Court, the sum of \$2,247.40, representing the *disputed portions of the unpaid* 2008-2009 Annual Assessments for Lots No. 128 and No. 129, Blakely Island Aviation Estates.” CP 280 (emphasis added). The Roats ignore this evidence in their reply brief. They make no reply. The Roats never attempt to explain how their assessment can be “disputed” and yet also considered paid. The Roats’s deposit of their assessment into the Court Registry merely avoided a lien on their property; the Roats continued to deny these funds to the Association. CP 280 provides incontrovertible evidence that the assessment remained in controversy, *i.e.*, was disputed.

The record also shows that the Roats did not capitulate on their dispute of the assessment until well-beyond May 2009. The Court dismissed the Roats’s second claim challenging the Association’s assessment authority on July 10, 2010. CP 2146. The Roats paid their delinquent assessment to the Association shortly thereafter on July 26, 2010. CP 2877, 3085. The Association is legally entitled under the *By-Laws* to fees and costs incurred through July 26, 2010.⁴

⁴ Even now, the Roats admit that “an express limitation on [the Association’s] *assessment power* [is] at the very heart of this appeal[.]” Appellants’ Brief, p. 16 (emphasis original). The dispute continues to concern the Association’s assessment authority.

The trial court's conclusion that the assessment dispute ended on May 14, 2009, was legal error or clear error where the record shows the Roats continued to dispute the assessment until July 26, 2010, when they finally paid it. This lawsuit continued to be "fundamentally a dispute concerning assessments" through at least July 2010. The Court should reverse the trial court and conclude that the *By-Laws* require an award to the Association through July 26, 2010.

4. The Roats Are Not "Implied Co-Insureds" of the Association's Director & Officer Insurance Coverage, and Remain Liable for the Association's Fees and Costs

The Roats argue that they cannot be liable for attorney fees and costs paid by the Association's insurer.⁵ To reach that conclusion, the Roats state that they are "a party for whose benefit the policy was purchased." Appellants' Response Brief, p. 33. The Roats's argument fails.

The policy in question is for the benefit of the Association's officers and directors pursuant to its indemnity obligations under both the *Covenants* and the *By-Laws*. CP 3823-3844. The Association's indemnity obligations specified in the *Covenants* state:

Hold Harmless and Indemnity. In consideration of the Board of Governors' service on behalf of the owners, the owners hereby

⁵ The Association categorically rejects the Roats's statement that the insurer "is the real party in interest with respect to any request for fees." Appellants' Response Brief, p. 34. No evidence in the records supports such a contention.

hold the Board of Governors harmless for any and all liabilities they might incur while serving in their capacity as a Board members. Further, the owners agree to indemnify any Board member who shall become liable for any damages as a result of his or her service as a member of the Board of Governors.

CP 898, *Covenants*, ¶ 11(D) (underline in original). Similarly, the *By-Laws* state:

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

CP 1077, Art. XI, ¶ 6 (underline added). The Roats are neither officers nor directors of the Association, and therefore cannot plausibly argue that they were “implied co-insureds.” Equally as important, the *By-Laws* expressly exclude coverage of members, such as the Roats, who do not hold positions within the Association. *Id.*

The Roats’s reliance on their cited authority is misplaced. In each case, the court found that the “implied co-insured” relationship arose from

an implied contractual obligation. In *General Ins. Co. of America v. Stoddard Wendle Ford Motors*, 67 Wn.2d 973, 410 P.2d 904 (1966), the court concluded that the insurance policy was obtained “for the benefit” of the tortfeasor pursuant to an assigned contract. *Id.* at 977-78. Here, the Association’s director & officer policy was obtained for the benefit of its officers and directors, not for the benefit of general members. In *Cascade Trailer Court v. Beeson*, 501 Wn. App. 678, 749, P.2d 761 (1988), the court held that a tenant under a lease can reasonably expect the insurance obtained by the landlord to cover the tenant “unless the parties have specifically agreed otherwise.” *Id.* at 686. As general members of the Association, the Roats were expressly excluded as indemnitees and therefore had no expectation of being covered by its director & officer policy.

In each of the cases cited by the Roats, the insurer sought to recover losses from the third-party tortfeasor through its subrogation rights. The Roats, by contrast, are not tortfeasors. Rather, they brought claims against the Association and its officers and directors while refusing to pay assessments. The Roats’s argument that they are “implied co-insureds” renders the purpose of the attorney fee provision in the *By-Laws* and *Covenants* as meaningless. Any member who refuses to pay assessments could defeat his or her liability for the Association’s attorney

fees by merely filing a claim against the Association, thereby invoking insurance coverage. The Court should reject the Roats's arguments.

Insurance coverage does not alter the Association's right to an award of fees and costs.

III. CONCLUSION

The trial court correctly awarded some fees to the Association under the *By-Laws*. Based on its success in this litigation, the Association is entitled to more fees and costs as a matter of law under the *Covenants*, the HOA statute, and the *By-Laws*. This Court should reverse and remand for consideration of additional fees and costs to the Association under the *Covenants*, the HOA statute, and the *By-Laws*.

Respectfully submitted on this 28th day of November, 2011.

SCHWABE, WILLIAMSON & WYATT, P.C.

By:



Lawrence A. Costich, WSBA #32178

Milton A. Reimers, WSBA #39390

Averil Rothrock, WSBA #24248

*Attorneys for Defendants/Respondents/
Cross-Appellants, Blakely Island
Maintenance Commission, et al.*

CERTIFICATE OF SERVICE

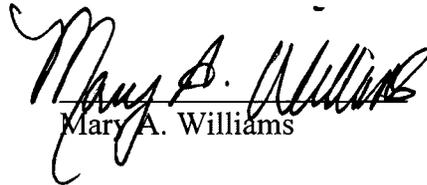
I hereby certify that on the 28th day of November, 2011, I caused to be served the foregoing *Respondents' / Cross-Appellants' Reply Brief* on the following parties at the following addresses:

Richard T. Roats
ROATS LAW OFFICE PLLC
702 W. Idaho Street, Suite 321
PO Box 9811
Boise, ID 83707
Telephone: (208) 344-3477
Facsimile: : (888) 331-7581
E-Mail: rtr@roatslaw.com

Arthur W. Harrigan
Elizabeth Weden Perka
Christopher T. Wion
DANIELSON HARRIGAN LEYH &
TOLLEFSON
999 Third Avenue, Suite 4400
Seattle, WA 98104
Telephone: (206) 623-1700
E-Mail: arthurh@dhlt.com

by:

- | | |
|-------------------------------------|--|
| <input checked="" type="checkbox"/> | U.S. Postal Service, ordinary first class mail |
| <input type="checkbox"/> | U.S. Postal Service, certified or registered mail,
return receipt requested |
| <input type="checkbox"/> | hand delivery |
| <input type="checkbox"/> | facsimile |
| <input checked="" type="checkbox"/> | electronic service |
| <input type="checkbox"/> | other (specify) _____ |


Mary A. Williams

PDX/113529/171333/MRE/8309880.5

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2011 NOV 28 PM 4: 17