

NO. 69519-3

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

MATT SUROWIECKI, JR. and INEZA KUCEBA,

Appellants,

v.

HAT ISLAND COMMUNITY ASSOCIATION, a Washington
nonprofit corporation and homeowners' association,

Respondent.

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2013 MAR 15 PM 4:42

REPLY BRIEF OF APPELLANTS

Michael E. Gossler
WA State Bar No. 11044
MONTGOMERY PURDUE
BLANKINSHIP & AUSTIN PLLC
Attorneys for Appellants

5500 Columbia Center
701 Fifth Avenue
Seattle, WA 98104-7096
(206) 682-7090

TABLE OF CONTENTS

TABLE OF CONTENTS 1

TABLE OF AUTHORITIES 2

I. ARGUMENT 4

 A. MEMBERS HAVE A RIGHT TO CALL AND TRANSACT BUSINESS
 AT SPECIAL MEETINGS UNDER THE EXPRESS TERMS OF THE
 BYLAWS. 4

 B. THE TRIAL COURT ERRED IN AWARDING ATTORNEY’S FEES TO
 HICA. 7

 C. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN FIXING
 THE AMOUNT OF FEES TO BE AWARDED. 8

II. CONCLUSION 9

TABLE OF AUTHORITIES

Cases

Donohue v. Arrowhead Lake Community Assoc, 718 A.2d 904 (Pa. Commw. Ct. 1998)..6
Eversole v. Sunrise Villas VIII Homeowners Assoc., 925 P.2d 505 (Nev. 1996).....6
McDonald v. Dalheim, 114 Ohio App. 3d 543, 683 N.E.2d 447 (1996).....7
Schmidt v. Cornerstone Investments, 115 Wn. 2d 148, 795 P.2d 1143 (1990).....8

INTRODUCTION

According to Respondent HICA, members have no right to call a special meeting and vote at a special meeting other than to (1) amend the bylaws, or (2) remove a board member. HICA further argues that the provisions in the Bylaws authorizing the calling of meetings and the transaction of business at meetings are purely “procedural,” and the Bylaws give members no authority to vote on the business affairs of the Association. In so arguing, HICA renders a nullity out of the special meeting provisions, and HICA ignores the provision in the Bylaws requiring a membership vote on the imposition of special assessments. HICA seeks to disenfranchise the members in a manner contrary to the Bylaws and to the enabling legislation that authorized these provisions in the Bylaws.

HICA likewise wrongly argues that this action involves a suit to enforce substantive rights under the Homeowner’s Association statute, thereby entitling it to invoke the attorney’s fees provision of that statute, when Appellants’ claim, instead, is based upon the provisions and its rights under the Bylaws, which contain no fee shifting clause. Further, even if the statute were deemed to apply, this is not an appropriate case to award fees given the absence of any controlling authority and the novelty

of the issue. For the same reason, if fees were awardable, the trial court did not abuse his discretion in setting them at the amount he awarded.

I. ARGUMENT

A. **Members Have A Right to Call and Transact Business at Special Meetings Under the Express Terms of the Bylaws.**

The entire substance of HICA's response is that members have no substantive right to set the agenda of a special meeting, call such a meeting, and vote at a special meeting, except for special meetings called to amend the bylaws or remove a director. HICA relies on the grant of powers clause in Sections I and III of the Bylaws. HICA then seeks to use a "labeling" approach by characterizing Article V of the Bylaws (the "Meetings" provisions) as purely "procedural." In so arguing, HICA disregards the direct language of the Bylaws, in an effort to disenfranchise the members.

Section I of the Bylaws does not vest all authority to make decisions on the transaction of association business **solely** in the Board. The "grant" language is preceded by the language "Subject to the limitations in . . . the Bylaws and Laws of the State of Washington," – a qualifier that requires one to look at the rest of the Bylaws and applicable statutes to ascertain the rights of members to make business decisions on behalf of the Association.

Labeling Article V as mere “procedure” ignores its provisions and terms. The actual title to the Article is “Meetings” – not “Meeting Procedures.” Section 2 authorizes a special meeting to be called by the President, the Board, or 15% of the members in good standing. It gives any of these persons the right to designate “the object thereof,” without restriction or limitation. Section 3 specifies the quorum requirement for the transaction of business, again without restrictions or limitations on the subject of the special meeting. These provisions in the Bylaws implement the enabling authority for such provisions set forth at RCW 24.03.075, .080 and .085, as discussed in Appellants’ opening brief.

The argument now being advanced by the Board is a departure from and is contradictory to the interpretation it presented to Appellants when they and the other 140 members requested the special meeting for the purpose of discussing and voting on the marina projects. The Board previously acknowledged the legal right on the part of the members to call a meeting to discuss the marina projects, but took the position that members had no right to vote at such a meeting. Apparently now recognizing the absurdity of allowing members to call a meeting but then to have no power to act at the meeting, the Board now argues the only special meeting the members may call are meetings to amend the bylaws

or remove a director. Under Bylaws adopted under the authority of Chapter 24.03 RCW, no such limitations exist.

The subject on which the members requested a meeting and vote involved to special assessments totaling in excess of \$4 million. Article VIII of the Bylaws specifically confers on the members the right to speak and vote on special assessments. Indeed, it provides that “Special assessments may be levied upon the affirmative vote of a simple majority of members in good standing voting in person or by proxy at a meeting of the members of the Association.” This is not the supermajority of 2/3 required to amend the bylaws – it is a simple majority of the votes of the members at a general or special meeting (the two special assessments in question were approved at special meetings of the members called by the Board).

The *Donohue v. Arrowhead Lake Community Assoc*, 718 A.2d 904 (Pa. Commw. Ct. 1998) and the *Eversole v. Sunrise Villas VIII Homeowners Assoc.*, 925 P.2d 505 (Nev. 1996) cases cited by Appellants in their opening brief are on point, and are not distinguishable because they dealt with bylaw and director issues. The ruling in both cases was that a non-profit corporations board and officers may not disregard and refuse to call a meeting on the subject designed in the call for the special meeting. The *McDonald v. Dalheim* decision (114 Ohio App. 3d 543, 683

N.E.2d 447 (1996)) cited by HICA does not support its position. The holding in that case did not involve a special meeting called by members, but rather the wholesale disregard of the quorum requirement for a board meeting. It in no respect involved the right of the shareholders to take action at a special meeting of the shareholders, and contained no discussion whether shareholders could, under its applicable bylaws, call a special meeting.

HICA argues that the only mechanism available to Appellants and the other 140 members who requested the meeting was to request a meeting to amend the Bylaws. Nothing in the special meeting provisions in the Bylaws imposes such a requirement on the members, and this interpretation is impractical and contrary to the purpose of bylaws. While it might be appropriate to include in bylaws a provision that no capital improvements or expenditures in excess of a certain amount of money may be made without member approval (although, as noted above, all special assessments require member vote and approval), it makes no sense to require a bylaw amendment every time a capital expenditure comes up for consideration – the result HICA argues for here.

B. The Trial Court Erred in Awarding Attorney’s Fees to HICA.

The underlying action involved a claim under the bylaws, which contain no fee shifting clause. The fact that the bylaws are enacted under

the authority of the Non-Profit Corporation's Act and the Homeowner's Association statute does not make this a claim under the statute. It certainly is appropriate to refer to and consider the wording of the enabling legislation to understand the meaning and to interpret the Bylaws, but citing to that authority does not make this action a claim under those statutes rather than an action on the Bylaws.

Further, given the novelty and lack of controlling authority, the members should be allowed the right to have an important matter of corporate governance addressed by the court without being penalized by way of an award of attorney's fees. The facts here are undisputed, and this court, as a matter of law, should rule this is not an appropriate case for the award of even partial attorney's fees reverse the award of attorney's fees made by the trial court.

C. The Trial Court Did Not Abuse Its Discretion in Fixing the Amount of Fees to Be Awarded.

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) Here, after considering all of the factors and the underlying claims and issues, the trial court awarded fees in an amount less than requested by HICA, but in an amount that was anything but insubstantial.

II. CONCLUSION

For the reasons discussed in Appellants' opening brief and this reply, this court should reverse the decision by the trial court dismissing Appellants' claim for declaratory relief on that issue and declare, as a matter of law, that HICA's Bylaws authorize HICA's members to call meetings and transact business at such meetings, and that in denying Appellants and the other 140 members who called the meeting the right to vote at the marina meeting, it violated their rights. Likewise, it was error for the trial court to award partial attorney's fees to Respondents, as Appellants' claims arise under the Bylaws, which contain no fee shifting clause, and this was not an appropriate case in which to award fees (indeed, if this Court agrees with Appellants and reverses the dismissal of the claim for declaratory relief, the fee award likewise must be reversed as Respondent then would not be the substantially prevailing party).

RESPECTFULLY SUBMITTED this 15th day of March, 2013.

MONTGOMERY PURDUE
BLANKINSHIP & AUSTIN PLLC

By 
Michael E. Gossler
WA State Bar No. 11044
5500 Columbia Center
701 Fifth Avenue
Seattle, WA 98104-7096
(206) 682-7090
Attorneys for Appellants

CERTIFICATE OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

On the date given below, I caused to be served by legal messenger a copy of this document on the following attorney as follows:

Jeremy L. Stilwell
Barker Martin, P.S.
719 – 2nd Avenue, Suite 1200
Seattle, WA 98104

DATED this 15th day of March, 2013, at Seattle, Washington.



Karen L. Baril

2013 MAR 15 PM 4:42

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON