No. 73725-2-I

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

SUSAN CORLISS,

Appellant,

vs.

ADMIRAL'S COVE BEACH CLUB et al,

Respondents.

MOTION FOR INJUNCTION PURSUANT TO RAP 8.3 TO PRESERVE APPEAL

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I. Identity of Moving Party

Susan Corliss ("Corliss"), the Appellant here and Intervenor below, brings this Motion for an Injunction.

II. Statement of Relief Sought

Pursuant to RAP 8.3, Ms. Corliss requests that this Court issue an injunction preventing the Admiral's Cove Beach Club from implementing a recent, second vote of the community regarding the disposition of their disputed swimming pool.

This appeal concerns the validity of a previous, 2013 vote of the Cove community to decommission their dilapidated, outdated swimming pool. The community democratically rejected an option to raise $650,000 from a special assessment for poor repairs, and instead decided they wanted to get rid of the expensive, rarely used pool. A single member of the community sued to overturn that vote, and this is the case presently on appeal. On appeal, Corliss argued that the prior vote – rejecting a $650,000 special assessment and calling to decommission the pool -- was valid and should be implemented. This is the entire subject of the litigation.

However, despite the pendency of this appeal, the new Board of the Admiral's Cove Beach Club chose to go forward with a second vote. This time, Cove residents narrowly voted *in favor* of a $650,000 special assessment to pay to repair, not decommission, their pool. However, the Cove Board only conducted this second vote after they disenfranchised many Cove residents, preventing them from voting at all. These same residents are now facing large special assessments, assessments they were prohibited from voting against in the first place.

If this new Board is able to implement its plan to collect these assessments and repair the pool, this will entirely moot the present appeal. It will make it impossible for the parties to return to the status quo that existed at the time that the trial court first enjoined the 2013 vote of this community. The Appellate Court should enjoin any further action by the Cove Board to implement this second vote, until after this appeal is decided. Otherwise, this appeal is, in a word, pointless.

III. Facts Relevant to Motion

These facts are derived from the Declarations of Appellant Corliss, Deegan, and Novak, filed herewith.

This case concerns a dilapidated, nearly-half-century-old, uncovered outdoor swimming pool located within a property development on Whidbey Island. The 600 member development is known as the Admiral's Cove Beach Club (the "Club"). This broken down, outdoor pool is only open on a small number of days each year. It is used regularly by only a small minority of Club Members. Moreover, expert analysis has disclosed that the pool has no remaining useful life left, and that it will cost at least $650,000 to effectuate needed repairs.

Accordingly, in May, 2013, after a well informed and carefully vetted process, the Members of the Club voted to close and decommission this pool. The membership was given a choice between a significant $650,000 assessment to repair and refurbish the pool, or a $200,000 assessment to decommission and remove it. The community voted and democratically chose to remove the pool, not repair it. This prior vote is the subject of the present appeal.

Under the plain terms of the Club's Articles of Incorporation, the Club Members and their Board had every right to eliminate or "dispose of" the pool. However, one Club Member, plaintiff Robert Wilbur, filed a lawsuit against the Club. He sought a permanent injunction to invalidate the vote of the Club membership to get rid of the pool. See generally, Plaintiff's Motions for Summary Judgment, CP 743-757; CP 302-317.

In its final ruling below, the trial court invalidated the prior vote of the membership to get rid of the pool. The court ruled that the documents governing the Club somehow created a contractual right, enforceable by Mr. Wilbur, in the perpetual maintenance and operation of the swimming pool. CP 17-18. It is this ruling that is directly challenged on appeal.

As argued in Corliss' Opening Brief, neither the Restrictive Covenants nor the Articles of Incorporation of the Club say anything whatsoever about a swimming pool. Because they nowhere mention a pool, these documents cannot establish any enforceable right in the perpetual operation of a pool. And while the Club Bylaws have certain provisions touching on the pool, these provisions are operational only, and are limited to the "Committees" portion of the bylaws. These provisions merely concern operational procedures such as committee work to manage the pool. They nowhere guarantee or require or compel the perpetual presence of a swimming pool. Nor can they be reasonably construed to do so.

The Articles of Incorporation of the Club do make clear, however, that the Club has the right "[t]o sell, convey, mortgage, pledge, lease, exchange, transfer and otherwise dispose of all or any part of the property and assets." See Corliss

Declaration, CP 496-577, Exhibit F, Article V, ¶ 5, CP 546. The power of the Club to "dispose of" of "all or any part of" its assets could not be stated more clearly and unambiguously. This unambiguous provision alone, placed Mr. Wilbur on clear notice that the Club could, at its discretion, "dispose of" the pool. This unambiguous language overrides any attempt to construe vague Bylaw provisions regarding pool committees as somehow compelling the perpetual presence of the pool.

So, the Club voted democratically to get rid of its pool, and it had every right to do so under its own formation documents. This is the issue presented to this Court on appeal.

Now, despite the pendency of this case, the current Cove Board (the respondents here) recently went forward with a second vote regarding the disposition of the swimming pool. The new Board for a second time asked the community to approve a large, $650,000 set of repairs. This is functionally identical to the prior request which the community previously rejected and which is the subject of this appeal. Prior to holding this new vote, however, the Cove Board disenfranchised many members and prevented them from voting. Only select members of the Cove community were therefore permitted to vote. See Declaration of Deegan at 4; Declaration of Corliss.

The vote results were announced on March 12, 2016. By a 144/125 margin, the limited number of community members who were allowed to vote narrowly approved the new request for a repair assessment. So, this new vote is directly contrary to the prior vote of this Community, which is the subject of this appeal.

Now, the Cove Board has sent out bills to all 600 members of the Cove community, including those who were not allowed to vote. A special assessment of $1000 per each lot is being invoiced and imposed. This will present a severe financial hardship for many members of the Cove community, including those who were prohibited from voting. Deegan Declaration at 5-6; Novak Declaration at 3-4.

After raising the funds from this new assessment, the new Cove Board intends to hire contractors and complete very substantial repair work on the pool. This will all take place before this Court has an opportunity to rule on the present appeal. These activities should be enjoined until this appeal is decided. Otherwise, the appeal will be rendered moot.

IV. Grounds for Relief and Argument

Pursuant to RAP 8.3, this Court is empowered to "issue orders, before or after acceptance of review …, to insure effective and equitable review, including authority to grant injunctive or other relief to a party." RAP 8.3. This Court will grant a stay under RAP 8.3 when "the movant can demonstrate that debatable issues are presented on appeal and that the stay is necessary to preserve the fruits of the appeal for the movant after considering the equities of the situation." Boeing Co. v Serriacin Corp., 43 Wn.App. 288, 292, 716 P.2d 956 (Div. I, 1986)(citing Purser v. Rahm, 104 Wash.2d 159, 702 P.2d 1196 (1985); Kennett v. Levine, 49 Wash.2d 605, 304 P.2d 682 (1956)). "In actual application of this theory, courts apply a sliding scale such that the greater the inequity, the less important the inquiry into the merits of the appeal. Indeed if the harm is so great that the fruits of a successful appeal would be totally destroyed pending its resolution, relief should be granted,

unless the appeal is totally devoid of merit." Id. (citing Shamley v. Olympia, 47 Wash.2d 124, 286 P.2d 702 (1955)).

This entire appeal is about whether the 2013 vote of the Cove community to reject a repair assessment and to decommission and remove the swimming pool was valid. Corliss intervened in this case because the Cove Board itself (the defendant) decided to stop defending this case and to agree with plaintiff Wilbur's attempt to invalidate the prior vote. Since her intervention, Corliss has consistently argued that the prior 2013 vote was valid, and that it should now be implemented. See Appellant's Opening Brief at 7 (Assignments of Error). She seeks such an order on appeal.

If the new Cove Board is allowed to implement the new vote, this will entirely moot this appeal. There will be no way to implement the 2013 decision to decommission and remove the pool after the $650,000 has been raised from the community and spent to refurbish it. It will be, in effect, too late for this Court to grant the relief that Ms. Corliss' rightfully seeks in this appeal.

As to the likelihood of success, the Opening and Response briefs have been filed in this case and are available as a reference on the merits. Corliss argues that because the language of the formation documents: (1) unambiguously allow the Cove Board to dispose of any assets (such as a swimming pool), and (2) nowhere unambiguously provide for the perpetual operation of a swimming pool, she has a high likelihood of success on this appeal. In any case, where, as here, the actions of one of the parties would totally destroy the value of this appeal, the "likelihood of

success" factor is less important. Boeing Co. v Serriacin Corp., 43 Wn.App. 288, 292, 716 P.2d 956 (Div. I, 1986).

Wilbur and the new Board have used this litigation as part of a long and hard-fought strategy to invalidate the prior, 2013 vote of this community. This is the very issue now appealed. Wilbur sought legal relief on his claim that the prior vote was invalid, and he prevailed below. Ms. Corliss also has a right to legal relief, and she has sought such relief by filing, perfecting and prosecuting this appeal. This Court should issue an Order enjoining implementation of the new vote, so that this appeal can effectively proceed. Otherwise, the very issue being appealed will be rendered moot.

Respectfully submitted,

/s/_____

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DECLARATION OF SERVICE

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

That on April 8, 2016, I served the attached Motion for Injunction under RAP 8.3, and the accompanying declarations of Corliss, Deegan and Novak, to the parties to this action via email (pursuant to previous agreement):

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DATED at Seattle, Washington this 8th day of April, 2016.

/s/_____

Jay Carlson, WSBA 30411