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.

REPLY ON MOTION FOR INJUNCTION PURSUANT TO RAP 8.3 TO PRESERVE APPEAL

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Corliss did not seek this injunction with "unclean hands." The Board's recent decision to send assessment invoices to all Club members, many of whom were recently disenfranchised from voting on that assessment, was the concrete act which prompted this motion. Many Club members are retirees who live on very fixed incomes, and they cannot afford this assessment. They voted, back in 2013, not to impose it upon themselves. That is the subject of this appeal. Therefore, if the Board is allowed to collect these assessments now, based upon the very recent vote, the entire subject of this appeal will be moot. This motion is timely, and is based upon recent events on the ground.

There is a significant irony in the Board and Wilbur's "unclean hands" argument. Wilbur himself waited until the 2013 vote of the community was completed, the results were known, and the assessment to dispose of the pool was imposed, before he brought suit and sought a TRO. So from a timing perspective, both sides are in the same situation. There are no unclean hands.

The Board and Wilbur make internally inconsistent arguments. On the one hand, they argue that there is no reason to stay implementation of the new vote, because there will be little done to spend the money raised before this Court has an opportunity to decide this appeal. On the other hand, they argue that they must be able to raise the money immediately, because they intend to begin major expenditures on things like design, permitting, and shoreline issues (which will be highly complex, as this outdoor pool abuts the ocean). The Board's admitted plan to immediately spend substantial sums powerfully supports the need for an injunction. Once spent, that money cannot be recovered. It will be lost to Club members

forever, even if Corliss prevails on this appeal. That will constitute wasted money and wasted effort, and will moot this appeal.

The Board does not rebut that Corliss has a substantial likelihood of success on this appeal. Based upon arguments in the merits briefing, particularly regarding the plain meaning of the Board's power to "dispose of" assets, there is a strong likelihood of success. Assuming Corliss were successful, the Board's argument is that it should nevertheless be allowed to hold disputed assessment funds in some manner of escrow for all 600 or so members of the Club. If they lose, presumably the Board would return whatever funds remained, to the membership. Yet no details are provided as to how these funds will be held, in what sorts of accounts, whether interest will be earned, etc. Moreover, even if some funds are returned, there will already have been great harm imposed. Many members will not be able to afford the assessment, and will be disenfranchised from Club membership as a result. The Board may very well institute collection proceedings against members who cannot or will not pay. The financial lives of all 600 members will have been impacted. Much of the money will be lost forever, as the Board will admittedly have spent it on planning, permitting and design work. If the Board is allowed to collect and spend these funds now, only to lose this appeal on the merits later, there will have been substantial harm to many people.

That is contrasted with the lack of demonstrable harm if the assessment is stayed until this appeal is decided. While the Board attempts to argue that there is some sort of 5% cost increase if their plans are delayed, there is no support for this whatsoever. No document supporting this contention is placed in evidence. The

contractor or other person who allegedly provided this figure is not identified. There are no details whatsoever as to what accounts for this alleged 5% increase, what the cost elements of the increase are, or any other detail. The Board may be relying on boilerplate language about inflation that regularly appears in contractor documents.

This is a very thin reed, but it is the entire basis for the Board's argument that there will be harm from a delay. It is also the entire basis for the Board's argument about the need for a bond. No bond is necessary, as the Board will have the exact same ability to impose assessments on the community after this appeal (if they are successful) as they have now.

The Board's conduct in pushing this second vote was, to say the least, suspect. The Board admits that they actively disenfranchised many members before putting this vote forward. They did this near the beginning of the year, when annual dues invoices are sent out but before many members, some of whom winter elsewhere, had an opportunity to pay their annual dues invoice. As a result, many members are facing this large special assessment, having been recently denied any right to vote for or against it. Furthermore, the ballot materials composed by the Board (attached as exhibits to the Delahanty declaration) were not a fair and balanced presentation of the pool issue. The Board, as a fiduciary for the entire community, would have been expected to compose ballot materials reflecting the long standing and clear divisions within the community regarding the pool. Instead, the Board composed "pro-pool" campaign literature, wholly favoring the new pool assessment, and then presented this campaign literature to the membership with

the ballot. In addition, Dustin Frederick, the current Board chair, was once a plaintiff in this very case. He, along with Wilbur, sued the Board regarding the 2013 vote to get rid of the pool. Once elected to the Board (the very entity he was suing at the time), he did not recuse himself from Board decision making regarding the pool. Instead, he has consistently used his Board position to advocate for the same result that he once sought through litigation against his own Board. His ongoing failure to recuse may constitute a conflict of interest and a violation of his fiduciary duties to the community.

However, despite these and other irregularities, in this Motion Corliss is not seeking to overturn the new assessment on its substantive merits. If she were, that motion would be properly brought, in the first instance, before the trial court. Instead, here Corliss seeks relief specifically under RAP 8.3. She moves on the sole basis that a stay is required to preserve the subject matter of this appeal. That question is properly before the Court of Appeals.

In 2013, this community voted against an assessment to spend $650,000 to fix this swimming pool. They instead voted to get rid of the pool. That vote has been the subject of litigation since Wilbur, the appellee here, sued to enjoin it. Corliss intervened only when the Board itself, under direction from former plaintiff Mr. Frederick, decided to fully cooperate with the lawsuit against itself. On appeal, the Board continues to advocate in favor of the very legal claims filed against it as the defendant below. In fact, on appeal the Board is handling all of the briefing – and absorbing all of the cost – in support of the legal claims against it. It advocates strongly in favor of a Court order below that invalidated its own decisions.

This conflicted Board has now held a second, directly contradictory vote on exactly the same issue that is currently on appeal. It seeks to immediately implement this new vote without giving time for this appeal to run its course. Wilbur and the Board relied upon the courts when it served their interests. Now that they have generated a different result on the ground, they want this Court to "stay out."

With substantial justification, Corliss believes that the court order below, invalidating the 2013 vote, will be overturned on appeal. She has spent considerable time and money to litigate this issue and to file, perfect, and fully brief this appeal. If the new vote is not stayed until this appeal is decided, her appeal -- her ability to secure legal relief on the merits -- will be largely or completely moot. This is fundamentally unfair, and preserving the fruits of an appeal is the very purpose of RAP 8.3.

Corliss respectfully requests that this Court enjoin implementation of the new pool assessment until after this appeal is decided. She further requests that no bond be imposed, or if a bond is imposed, that it be for $100 (which was the bond imposed for Wilbur's injunction below and which, on information and belief, Wilbur never posted).

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 May 9, 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 9th day of May, 2016.

/s/_____
Jay Carlson, WSBA 30411