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**STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1403**

Gallery Tower Condominium Association,
Respondent,

vs.

Stephen W. Carlson, defendant and third party plaintiff,
Appellant,

Vikki Carlson,
Defendant and Third Party Plaintiff,

vs.

Gallery Tower Condominium Association, third party defendant,
Respondent,

Gittleman Management Corporation, et al.,
Third Party Defendants.

**Filed June 13, 2011
Affirmed
Wright, Judge**

Ramsey County District Court
File No. 62-CV-09-10145

Charles E. Jones, Meagher & Geer, P.L.L.P., Minneapolis, Minnesota (for respondent)

Stephen W. Carlson, St. Paul, Minnesota (pro se appellant)

Considered and decided by Stoneburner, Presiding Judge; Wright, Judge; and
Schellhas, Judge.

UNPUBLISHED OPINION

WRIGHT, Judge

In this condominium-association dispute, appellant challenges the district court's summary judgment in respondent's favor and award of attorney fees, costs, and disbursements to respondent. Appellant argues that the district court erroneously interpreted the condominium-association bylaws; violated appellant's rights under the Minnesota and United States constitutions; abused its discretion by awarding attorney fees, costs, and disbursements to respondent; and failed to include the real parties in interest in the proceedings. Appellant also contends that the association lacks authority to place and foreclose a lien on his condominium unit. For the reasons set forth below, we affirm.

FACTS

Gallery Tower Condominium is a 20-story building in St. Paul consisting of 194 residential units. The unit owners in Gallery Tower Condominium are members of respondent Gallery Tower Condominium Association (association), which is incorporated under the Uniform Condominium Act, Minn. Stat. §§ 515A.1-101–515A.4-117 (2010). The association is governed by a 9-member board of directors.

Appellant Stephen W. Carlson and his wife Vikki Carlson jointly own a condominium unit in Gallery Tower. After leaking riser pipes caused water damage and disrupted the building's temperature control, the board of directors determined that the building's heating, ventilation, and cooling (HVAC) system was in need of repair. The project included replacing the building's riser pipes, which carry heated or chilled water

from centralized heating and cooling units to the condominium units and common areas throughout the building. The association contracted with an engineer and a construction company to replace the riser pipes on June 30, 2009 and notified the unit owners of the riser-pipe-replacement schedule shortly thereafter. The riser-pipe-replacement project required owners to give the contractors access to their units so that the walls could be opened, the exposed pipes removed and replaced, and the walls restored. To facilitate this work, the board of directors also decided to install a master-key system, which required installing new locks in all of the unit entry doors. The association notified unit owners of the schedule for installing the master-key system in August 2009.

Dissatisfied unit owners petitioned the board of directors to hold a special meeting to remove and replace the board members. Seventy-six percent of the unit owners attended the special meeting on August 17, 2009, and a vote was held on whether to remove the board members. Fifty-five percent of the votes of the unit owners at the meeting favored removing the members. This represents 42 percent of the eligible votes of all unit owners in the association. The board of directors determined that the removal motion failed because a majority of unit owners did not vote in favor of it.

Work on the riser-pipe project was scheduled to begin on September 14, 2009. In a letter to the association's property manager dated September 11, 2009, Carlson asserted that the board members were removed by the August 17, 2009 vote and advised that he would not grant access to his unit for the riser-pipe replacement or installation of the master-key system. In its September 14, 2009 letter, the association warned Carlson that,

if he refused access to his unit, the association would take legal action to enforce the association's right of access under the association's governing documents.

When Carlson persisted in his refusal to grant access, the association commenced a lawsuit against the Carlsons, alleging that they violated the association's easement and access rights guaranteed by the Minnesota Common Interest Ownership Act (MCIOA), Minn. Stat. §§ 515B.1-101–515B.4-118 (2008).¹ The association sought an injunction requiring the Carlsons to provide access to their unit. And the association moved for a temporary restraining order to secure access to the Carlsons' unit for repair of common elements, including the riser pipes. Following a hearing on the motion, the district court issued a temporary restraining order requiring the Carlsons to permit access to their unit for the riser-pipe replacement. The Carlsons complied and the riser-pipe replacement was completed.

The Carlsons persisted in refusing to permit the replacement of their unit's locks as part of the master-key system. The association advised the Carlsons that they would be charged a daily fee of \$25 until they consented. The Carlsons responded by granting a "qualified consent" to the lock replacement; but they asserted that their consent was "under duress," and they would hold the association liable for loss and damage. The association declined to replace the Carlsons' locks because it deemed such consent to be involuntary.

¹ Here, we review the district court's decision under the 2008 statute that was in effect when the lawsuit was initiated.

The Carlsons brought counterclaims and third-party claims against the association, the board of directors, the association's property management company, the association's law firm, and other management personnel and the board members individually. They asserted that the board members failed to comply with the association's governing documents by continuing to act as the board of directors after the August 17, 2009 vote to remove them and, among other acts, by imposing the \$25 daily fee. The Carlsons also asserted claims of negligence, misconduct, tortious interference with contract, fraud, trespass, conversion, and defamation; and they sought injunctive relief, damages, and costs.

The association moved for summary judgment on all claims. After a hearing and before the district court issued its decision, the Carlsons moved to dismiss the association's claims for failure to prosecute in the name of the real parties in interest and for violations of the Minnesota and United States constitutions. The district court concluded that the association's governing documents require a majority vote of all unit owners to remove a board member. The board members, therefore, were not removed by the August 17, 2009 vote. The district court also held that the association has the legal right to access the Carlsons' unit to repair common elements of the association, and the Carlsons' refusal to provide access to their unit violates the association's governing documents and Minnesota law. The district court granted summary judgment in the association's favor on all claims, ordered the Carlsons to cooperate with the master-key project, and dismissed the Carlsons' claims with prejudice. The district court subsequently awarded the association \$5,000 in attorney fees and \$631.48 in costs and

disbursements. After the Carlsons moved for postjudgment relief, which the district court denied, this appeal followed.

DECISION

I.

Carlson asserts that summary judgment was erroneously granted because there are disputed material facts as to the association's authority to replace the riser pipes and to require him to cooperate with the master-key installation. Carlson also contends that the district court erroneously concluded that the board members were not removed by the August 17, 2009 vote.

We review the district court's decision to grant summary judgment to determine whether there are any genuine issues of material fact and whether the district court erred in its application of the law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). Summary judgment shall be granted if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law." Minn. R. Civ. P. 56.03. Mere averments set forth in the pleadings are insufficient to defeat a motion for summary judgment. Minn. R. Civ. P. 56.05. Rather, to defeat summary judgment, there must be evidence sufficient to establish a genuine issue for trial as to the existence of an essential element on which the nonmoving party bears the burden of proof. *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997).

The association's declaration and bylaws, along with the MCIOA, establish the governance and powers of the association.² Minn. Stat. § 515B.3-102. Interpretation of the association's governing documents and statutory interpretation present questions of law, which we review de novo. *Swenson v. Holsten*, 783 N.W.2d 580, 583 (Minn. App. 2010) (applying de novo review to question of statutory interpretation); *Swanson v. Parkway Estates Townhouse Ass'n*, 567 N.W.2d 767, 768 (Minn. App. 1997) (interpreting townhome-association bylaws and declaration).

The canons of construction govern our interpretation of the association's governing documents. *Swanson*, 567 N.W.2d at 768; *see also Isaacs v. Am. Iron & Steel Co.*, 690 N.W.2d 373, 376 (Minn. App. 2004) (applying rules of statutory and contract interpretation to interpretation of corporate bylaws), *review denied* (Minn. Apr. 4, 2005). The goal of this interpretation is to determine and enforce the intent of the contracting parties, *Motorsports Racing Plus, Inc. v. Arctic Cat Sales, Inc.*, 666 N.W.2d 320, 323 (Minn. 2003), which we discern from the plain and unambiguous language of the relevant documents, giving meaning to all provisions, *Travertine Corp. v. Lexington-Silverwood*, 683 N.W.2d 267, 271 (Minn. 2003); *Current Tech. Concepts, Inc. v. Irie Enters., Inc.*, 530 N.W.2d 539, 543 (Minn. 1995); *Telex Corp. v. Data Prods. Corp.*, 271 Minn. 288, 293, 135 N.W.2d 681, 685 (1965). When the language employed is subject to more than

² Because Gallery Tower Condominium was formed under the Uniform Condominium Act in September 1981 and the events at issue here occurred after June 1, 1994, the provisions of the MCIOA apply. *See* Minn. Stat. § 515B.1-102(b)(1) (stating that MCIOA applies to condominiums created under Uniform Condominium Act with respect to events occurring on or after June 1, 1994).

one reasonable interpretation, it is ambiguous. *Blackburn, Nickels & Smith, Inc. v. Erickson*, 366 N.W.2d 640, 644 (Minn. App. 1985), *review denied* (Minn. June 24, 1985). But we will not construe such language to yield an absurd result. *Brookfield Trade Ctr., Inc. v. Ramsey Cnty.*, 584 N.W.2d 390, 394 (Minn. 1998).

A.

We first address the power of the association, acting through its board of directors, to undertake the riser-pipe replacement. In a condominium association, a unit owner owns the area within the boundaries of the unit, as established by the association's declaration; but "all portions of the common interest community other than the units" are common elements that are owned in common by all unit owners. Minn. Stat. §§ 515B.1-103(7) (defining "common elements"), 515B.1-103(11) (defining "condominium"), 515B.1-103(34) (defining "unit"). Section VIII of the association's declaration provides that the association "shall be responsible for necessary maintenance and repair of the common elements (including limited common elements) and shall promptly perform all maintenance and repairs which, if omitted, would adversely affect any unit or limited common element." Applying these definitions to section VIII, the association's responsibilities include repairing and maintaining the condominium's common areas and systems.

Carlson contends that the riser pipes are part of his unit's HVAC system and, thus, are "limited common elements," which are reserved for the exclusive use of unit owners. *See* Minn. Stat. § 515B.2-109(a) (designating limited common elements for exclusive use of owner of the unit to which limited common elements are allocated). But this argument

is contrary to both the declaration and the MCIOA. The declaration expressly provides that the association is responsible for maintenance and repair of both common elements and limited common elements. And under the MCIOA, the riser pipes at issue here are not limited common elements. The MCIOA provides, in relevant part:

If any . . . pipe . . . serving fewer than all units lies partially within and partially outside of the boundaries of the unit . . . any portion thereof serving only that unit . . . is a limited common element allocated solely to that unit . . . and any portion thereof serving any portion of the common elements is a part of the common elements.

Minn. Stat. § 515B.2-102(d). The declaration defines a unit's boundaries as its "walls, floors, and ceilings." *See* Minn. Stat. § 515B.2-102(a) (stating that the declaration shall describe the unit boundaries). The property manager's unrebutted affidavit testimony states that the riser pipes are located in the wall cavity and service the entire building. Because the riser pipes are located outside the boundaries of Carlson's unit, they are common elements. *See* Minn. Stat. §§ 515B.1-103(7), 515B.2-102(d). Riser-pipe repair, therefore, falls squarely within the authority that section VIII conveys to the association.

Carlson's argument that the riser-pipe maintenance was not authorized as a "necessary maintenance and repair of the common elements" under section VIII of the declaration also fails. The undisputed evidence establishes that leaking riser pipes had caused damage in the building and that the board of directors determined that the riser-pipe maintenance was necessary to prevent additional damage. The record also contains detailed documentation of failures in the building's HVAC system and water damage caused by leaking pipes. That Carlson asserts his HVAC unit was fully functional and

did not pose a threat of damage to other units or common elements and that his unit was not inspected before the association decided to repair the riser pipes do not defeat summary judgment for at least two reasons. First, Carlson presented no evidence in support of this contention. Second, and most importantly, he cites no authority for the proposition that necessity must be established for each unit in the association. Because a genuine issue of material fact does not exist regarding the necessity of riser-pipe maintenance, this aspect of Carlson's challenge to summary judgment also fails.

In sum, under the authority granted by the declaration, the association, acting through its board of directors, properly entered into a contract to repair and replace the riser pipes. The association had the legal right to make such repairs.³

B.

Carlson next argues that the district court erroneously concluded that the incumbent board of directors was not removed by the August 17, 2009 vote because a majority of the unit owners in attendance voted in favor of removing the board members. Carlson does not dispute that only 42 percent of *all* unit owners voted in favor of removing the board members; and thus that a majority of *all* unit owners did not vote to remove the board members. Rather, Carlson disputes whether the declaration and bylaws require a majority of all unit owners to vote in favor of removing the board members. The district court held as a matter of law that, to remove the board members, the

³ We observe that the legislature amended the MCIOA in 2010. *See* 2010 Minn. Laws ch. 267. Because we identify no change to the substance of the relevant provisions, application of the 2010 version of the MCIOA to the facts in this case would not produce a different result.

declaration and bylaws require a majority vote of all unit owners to vote in favor of doing so. Carlson argues that the voting provisions require a majority of those unit owners *present at a meeting* to vote in favor of removal. We examine the relevant provisions below.

Article 4, section G, of the bylaws provides:

Except as otherwise provided in these Bylaws, the presence in person or by proxy of unit owners having, in the aggregate, fifty percent (50%) or more of the total votes entitled to be cast at the meeting shall constitute a quorum at all meetings of unit owners. The vote of fifty percent (50%) or more of the total votes of all unit owners present in person or by proxy and voting at any meeting of the unit owners at which a quorum shall be present, shall be binding upon all unit owners for all purposes except where in the Declaration or these Bylaws or by law, a higher percentage vote is required.

Article 3, section E, of the bylaws provides:

At any regular or special meeting of unit owners, any one or more of the members of the Board of Directors . . . may be removed with or without cause by a majority vote of the unit owners and a successor may then and there or thereafter be elected to fill the vacancy thus created.

According to the bylaws, article 4 establishes that, at a meeting at which a quorum has been established, a decision ordinarily is binding when at least 50 percent of the votes of all unit owners present and voting favor the motion. But when required by the declaration, bylaws, or law, the higher-percentage-vote requirement supersedes article 4. The plain language of article 3 establishes that a “majority vote of the unit owners” is required to remove a director. Accordingly, the vote requirement of article 3 supersedes that of article 4.

Carlson contends that the introductory phrase to article 3, section E—“[a]t any regular or special meeting of unit owners”—defines and restricts the article’s later use of “unit owners” to signify only those unit owners in attendance *at the meeting*. Therefore, he argues, removal of a board member requires only a majority vote of the unit owners at a meeting. But principles of construction prevent us from supplying that which the drafters omitted. *In re Welfare of J.M.*, 574 N.W.2d 717, 723 (Minn. 1998); *Wallace v. Comm’r of Taxation*, 289 Minn. 220, 230, 184 N.W.2d 588, 594 (1971). As the district court concluded, Carlson’s interpretation requires insertion of language that is not present in the text, namely, that the second reference to “unit owners” is limited to unit owners at the meeting. Moreover, Carlson’s construction of the text renders article 3, section E, meaningless and unnecessary because, if adopted, article 3 would supply a rule that is identical to article 4, namely, that a majority vote of unit owners in attendance at a meeting is required to remove directors. But the plain meaning of article 3 and its effect are distinct from article 4 and consistent with the higher-percentage-vote exception established by article 4. *See Current Tech. Concepts*, 530 N.W.2d at 543 (stating that contract must be interpreted in a manner that gives all of its provisions meaning).

The district court correctly concluded that the bylaws require a majority vote of all unit owners to remove a board member. Because a majority of unit owners did not vote in favor of removing the board members, the incumbent board of directors was not removed.

C.

Carlson also argues that the district court erred by concluding that the association has the legal right to require the Carlsons to cooperate with the installation of the master-key system. The association counters that the master-key system is necessary to secure its right of access and fulfill its responsibilities to make emergency repairs and prevent building damage. Section VIII of the declaration requires unit owners to provide the association access that is reasonably necessary to maintain and repair the common elements. Section VI.A grants the association an easement “in the common elements designed for such purposes as ingress to, egress from, utility services for, and support, maintenance, and repair of such units, and easements in all other common elements for use according to their respective purposes.” Another easement grants the association

the right, to be exercised by its Board of Directors or the managing agent, to enter each unit from time to time during reasonable hours as may be necessary for the operation and maintenance of the condominium, or at any time for making emergency repairs therein necessary to prevent damage to any units or common elements.

The MCIOA also authorizes these access rights. Minn. Stat. § 515B.3-107(b) (providing that “[t]he association shall have access through and into each unit for purposes of performing maintenance, repair, or replacement for which the association may be responsible.”) And the MCIOA grants to the association broad authority to adopt measures that are consistent with the governing documents, including the authority to regulate the use of the units that may damage the common elements or other units,

implement the governing documents, and otherwise facilitate the operation of the common-interest community. Minn. Stat. § 515B.3-102(a)(1), (16).

The board of directors' decision to implement a master-key system is authorized by the bylaws, the declaration, and the MCIOA as a measure to facilitate the association's fulfillment of its responsibilities. Carlson's arguments to the contrary are unfounded.

The district court correctly concluded that there are no genuine issues of material fact in dispute as to this issue. Summary judgment was properly granted in the association's favor.⁴

II.

Carlson argues that the district court's legal analysis of the association's governing documents impairs his right to a remedy under the Minnesota Constitution, infringes on his equal-protection and contract rights under the Minnesota and United States constitutions, and violates the Privileges and Immunities Clause of the United States Constitution. Although Carlson frames his constitutional arguments as challenges to the MCIOA "as applied" by the district court, these constitutional challenges are based on Carlson's assertion that the district court improperly disregarded the vote requirement of article 3 of the bylaws.

⁴ Carlson also challenges the district court's temporary restraining order requiring the Carlsons to permit the association to enter their unit to complete the riser-pipe project. The riser-pipe project is now complete. And in light of our decision that the board properly exercised its authority to repair the riser pipes, Carlson's challenge to the temporary restraining order is moot. *See In re Application of Minnegasco*, 565 N.W.2d 706, 710 (Minn. 1997) (holding that when event occurs pending appeal that makes a decision on the merits unnecessary or an award of effective relief impossible, appeal may be moot).

We first address Carlson’s argument that the district court’s analysis infringes on his contract rights under the contract clauses of the United States and Minnesota constitutions. The contract clauses prohibit the state from passing any law that impairs the obligation of contracts. U.S. Const. art. I, § 10, cl. 1; Minn. Const. art. 1, § 11. But Carlson fails to identify any aspect of the MCIOA that impairs the rights of unit owners secured by ownership contracts or the association’s governing documents. *See Jacobsen v. Anheuser-Busch, Inc.*, 392 N.W.2d 868, 872 (Minn. 1986) (stating that party alleging that statute impairs contract must first demonstrate that the contract has been substantially impaired).

As to Carlson’s equal-protection, remedy, and privileges-and-immunities challenges, Carlson makes no legal argument to support his position, and our review identifies no error committed by the district court. *See Schoepke v. Alexander Smith & Sons Carpet Co.*, 290 Minn. 518, 519-20, 187 N.W.2d 133, 135 (1971) (holding that appellant’s assignment of error based on “mere assertion” without support of legal argument or authorities “is waived and will not be considered on appeal unless prejudicial error is obvious on mere inspection). We, therefore, decline to address these constitutional challenges.

III.

Carlson asserts that the district court erred by awarding the association \$5,000 in attorney fees and \$631.48 in costs and disbursements because the association was not the prevailing party, he has a contractual right to litigate in defense of his right to self-governance, the amount of the award is excessive, and the governing documents preclude

the association from recovering fees. We review a district court's award of attorney fees, costs, and disbursements for an abuse of discretion. *Giuliani v. Stuart Corp.*, 512 N.W.2d 589, 596 (Minn. App. 1994).

A district court may award reasonable attorney fees and costs of litigation to the prevailing party in an action to enforce the MCIOA. Minn. Stat. § 515B.4-116(b). In doing so, the district court has discretion to determine whether any party qualifies as a prevailing party. *Benigni v. St. Louis Cnty.*, 585 N.W.2d 51, 54-55 (Minn. 1998). A "prevailing party" is one "who has, in the view of the law, succeeded in the action." *Borchert v. Maloney*, 581 N.W.2d 838, 840 (Minn. 1998) (quotation omitted). This definition includes a party in whose favor the decision is rendered and judgment is entered. *Id.*

The entry of summary judgment in the association's favor disposed of Carlson's claims on the merits. *See DLH*, 566 N.W.2d at 69 (stating that summary judgment disposes of action on merits). Thus, the association succeeded in the action. *Borchert*, 581 N.W.2d at 840. The district court's determination that the association is the prevailing party and its decision to award fees and costs accordingly are legally sound.

Carlson also argues that the amount of the award is excessive because the award reflects work completed for the association by two law firms. Indeed, one law firm represented the association in its affirmative MCIOA claims against the Carlsons; and a different law firm defended the association against the Carlsons' counterclaims. But the district court awarded fees and costs to the association only for the work completed by the law firm that represented the association in its action to enforce the MCIOA. Such an

award is authorized by the MCIOA, Minn. Stat. § 515B.4-116(b), and the district court did not abuse its discretion by awarding these fees.

Carlson also maintains that the award was improper because the association's declaration precludes the association from making a claim against a unit owner for "any loss or damage to the condominium, or to a unit or personal property . . . due to a peril insured against by insurance maintained by the association . . . to the extent of the insurance proceeds recovered under any or all such policies of insurance." Here, the association brought a claim against a unit owner to enforce the governing documents as authorized by the MCIOA. The claim was not to recover for loss or damage covered by insurance. Accordingly, Carlson's argument fails, and the district court did not abuse its discretion by awarding the association attorney fees, costs, and disbursements.

IV.

Carlson also argues that the district court erred by permitting the proceedings to continue without the real parties in interest. Rule 17.01, Minnesota Rules of Civil Procedure, requires that any party bringing any claim be a "real party in interest," which is demonstrated by establishing that the party has a legal right to bring the claim under the applicable substantive law. *Austin v. Austin*, 481 N.W.2d 884, 886 (Minn. App. 1992). Determining the real party in interest ordinarily presents a question of fact for the district court, whose findings must be upheld unless clearly erroneous. *Minn. Educ. Ass'n v. Indep. Sch. Dist. No. 404, Lake Benton*, 287 N.W.2d 666, 668 (Minn. 1980).

Carlson argues that the district court improperly permitted the board of directors to represent the association at the hearing on the temporary restraining order in September

2009 because the board of directors was removed by the August 17, 2009 vote. Because we have concluded that the board of directors was not removed, this argument is unavailing.

Carlson also contends that the district court erroneously excluded five unit owners who attempted to join the lawsuit. We disagree. The district court excluded these unit owners, who attempted to file a third-party intervenors complaint or motion to join as amicus curiae, because they failed to pay the filing fees. Generally, absent a determination that a party is in forma pauperis, a motion may not be heard until the moving party pays the required motion fee. Minn. Stat. § 563.01, subd. 3 (2010) (in forma pauperis submissions); Minn. R. Gen. Pract. 115.03 (dispositive motions), 115.04 (nondispositive motions). The district court's exclusion of these submissions from the litigation on that ground was proper.⁵

V.

For the first time on appeal, Carlson seeks review of the association's authority to place a lien or foreclose on his unit. We decline to address on appeal issues that have not been previously presented to or considered by the district court. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). Accordingly, this argument is beyond the scope of our review.

Affirmed.

⁵ Carlson also argues that, by excluding these "real parties in interest," the district court deprived him of due process and equal protection of the laws guaranteed by the United States Constitution and the right to a remedy for impairment of contract under the Minnesota Constitution. We do not reach these constitutional arguments because the district court's decision to exclude these individuals was legally sound.