

NO. A11-289

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State of Minnesota  
*In Court of Appeals*

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Kenneth and Mary Ellen Horodenski,  
*Appellants,*

vs.

Lyndale Green Townhome Association, Inc.,  
*Respondent.*

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**RESPONDENT'S BRIEF AND APPENDIX**

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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## STATEMENT OF LEGAL ISSUES

I. Was dismissal of Appellants' declaratory judgment count proper?

How issue raised: Cross-Motions for Summary Judgment  
AR-33; AR-115  
Trial Court held: Dismissal was proper  
Add.-37-51  
Apposite legal authority: Minn. Stat. Sec. 515B.3-115(e)(4)  
Declaration 6.1

II. Was the grant of summary judgment to Respondent Association and denial of summary judgment to Appellants warranted?

How issue raised: Cross-Motions for Summary Judgment  
AR-33; AR-115  
Trial Court held: In the affirmative  
Add.-37-51  
Apposite legal authority: Minn. Stat. Sec. 515B.3-115(e)(4)  
Minn. Stat. Sec. 515B.3-116

III. Was the denial of Appellants' Motion to Compel Discovery appropriate?

How issue raised: Motion to Compel Discovery  
AR-148  
Trial Court held: In the affirmative  
Add.-37-51  
Apposite legal authority: Alliance for Metro. Stability v. Metro. Council, 671  
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IV. Were the actions of Respondent Association unconscionable or in bad faith?

How issue raised: Appellants' Motion for Summary Judgment  
AR-115  
Trial Court held: In the negative  
Add.-37-51  
Apposite legal authority: Minn. Stat. Sec. 515B.1-112  
Minn. Stat. Sec. 515B.1-113

V. Was an award of attorney's fees and costs to Respondent Association appropriate?

How issue raised: Cross-Motions for Summary Judgment  
AR-33; AR-115

Trial Court held: In the affirmative  
Add.-37-51

Apposite legal authority: Minn. Stat. Sec. 515B.3-115(e)(4)

**STATEMENT OF THE CASE AND THE FACTS**

This is an appeal from a summary judgment entered in Hennepin County District Court, the Honorable Marilyn Brown Rosenbaum presiding. The case involves a dispute over assessments between townhome association members, Appellants Kenneth and Mary Ellen Horodenski, and their association, Respondent Lyndale Green Townhomes Association, Inc. (“Association”). Granting the Association’s motion for summary judgment and denying Appellants’ cross-motion for summary judgment, the Trial Court held that Appellants’ motion to compel discovery was moot. (Add.-37-51). In a subsequent unopposed proceeding the Trial Court awarded the Association’s attorney’s fees and costs. (Add.-52-7).

Appellants are the fee owners of real property at 316 West 84<sup>th</sup> Street in Bloomington, Minnesota. The property is part of the Lyndale Green Townhome Association and Appellants are members of the Association by virtue of their ownership of a unit in that community. (AR-106).

The Association was formed under and is governed by Minn. Stat. Ch. 515B, the Minnesota Common Interest Ownership Act (“MCIOA”) and by the Association’s Declaration, Articles, Bylaws, Rules and Regulations (collectively “the Governing Documents”). Together, MCIOA and the Governing Documents define and control the relationship between the Association and its members.

Respondent community association is responsible for the common area maintenance and upkeep and for general management of the community. (AR-63). Appellants, like all members of the Association, are responsible for their share of the community's common costs, as well as costs associated with the maintenance of their own unit. (AR-64-8).

Pursuant to Section 6 of the Declaration and Minnesota Statutes Section 515B.3-115, each owner of real property within the Association is responsible for payment of annual and special assessments for that owner's share of common expenses within the Association. Id. Pursuant to the Governing Documents and MCIOA, the Association established late fees and/or interest, which become due and payable on delinquent assessments. (AR-64-5). All members, Appellants included, are personally liable for all such assessments, interest and late fees assessed against their Property by the Association during the time of their ownership. Minn. Stat. Sec. 515B.3-116 Subd. (e), Declaration 6.1, 6.5, 6.7-9. (AR-64-8).

MCIOA and the Declaration set forth the relative responsibilities for maintenance of the Property and delineate which items are the Association's responsibility and which are the unit owner's responsibility, as well as who is responsible for paying for expenses related to certain maintenance items. Minn. Stat. Sec. 515B.3-115; Declaration, Sections 6 and 9. Generally, the Association maintains the Common Elements and has responsibility for a portion of the units' exterior maintenance, Declaration 9.1 and 9.2; the unit owner is responsible for all other aspects of exterior maintenance and all maintenance of the unit's interior. Declaration 9.4. (AR-72).

The Association is governed by an elected Board of Directors. (AR-63). The board is responsible for enforcing the community's Governing Documents. Id. The board's obligations include maintenance of the community's "common elements," the collection of dues and assessments and, where there are delinquencies, pursuing collections. (AR-64-8). The board is empowered to retain a professional property manager to help it discharge these responsibilities. (AR-63). The board retained Paradise & Associates for that purpose. (AR-198).

Pursuant to Section 6.5 of the Declaration, the liability of owners for assessments is "absolute and unconditional." (AR-66-7). Owners are specifically prohibited from withholding payment of their share of the Association's common expenses for any reason whatsoever. Id.

Pursuant to Section 6.1(d), AR-64-5, of the Association's Declaration and Minn. Stat. Sec. 515B.3-115(e)(4), reasonable attorneys' fees and other costs incurred by the Association in connection with (i) the collection of assessments and (ii) the enforcement of the Governing Documents, the Act, or the Rules and Regulations, may be assessed against the Owner and the Owner's unit. Contrary to Appellants' assertion, there is no "discrepancy" in these provisions. Appellants' Brief at 8.

MCIOA and the Declaration provide that the Association has a lien for assessments. Minn. Stat. Sec. 515B.3-116; Declaration 6.7. (AR-67). They provide that the Association's lien may be foreclosed by action or advertisement. Minn. Stat. Sec. 515B.3-116; Declaration 6.8. (AR-67).

For about a year before October of 2009, Appellants communicated with the Association's board and/or Paradise, its property manager, regarding complaints, repairs and maintenance concerns that Appellants contended were the Association's responsibility. (Add.-46; A-6). While Appellants complain that their efforts to communicate fell on deaf ears (Appellants' Brief at 10-11), the fact of the matter is that they had "many conversations...over the past 1½ years" with the property manager regarding their complaints, Horodenski letter 10/21/09 at 1 (A-6), and their son met in person with the Board of Directors on June 29, 2009 to discuss some of his concerns regarding rodent problems, trash in his yard, missing light bulbs, lazy Minnesotans, gutter problems and a repair that he made to his furnace vent. (Add.-46); (AR-158). Ultimately, Appellants were not satisfied with the Association's responses. (Add.-46).

By letter dated October 21, 2009, Appellant Kenneth Horodenski wrote to the Association, in care of Paradise, expressing his dissatisfaction and demanding action. (A-6-10). The letter stated that it was written "per advice of our council [sic] (attorney)," although counsel was not identified. Id. The letter discussed expenses which Appellants claimed they had incurred for repairs and demanded reimbursement. Id. The letter enumerated the repairs which Appellants claimed were the Association's responsibility and demanded that this work be done at the Association's expense. Id. It stated:

Please note home owners fees will no longer be paid by us (effective with Nov. 09 dues) until all repairs contained in this letter are completed to our satisfaction. We will forward back dues when repairs are completed and have no intent, nor will we pay any late penalty fees.

The letter also threatened litigation against the Association. (A-6).

On receipt of Appellants' letter the Association consulted its attorneys for help responding to Appellants' demands and threats. (AR-198-9). The Association's counsel investigated the complaints and claims and researched the issues raised by them. Reporting back to the Association, counsel was directed to provide a written response to Appellants' demand letter. (AR-199).

By letter dated November 16, 2009, the Association's counsel responded<sup>1</sup>, advising Appellants that the Declaration addressed the maintenance and repair issues that had been raised. (A-12-15). The letter then directly addressed each of Appellants' demands in reference to the Declaration's division of responsibilities and advised Appellants that each of the maintenance and repair issues raised in their letter were items that were the responsibility of the unit owner and not the Association but that the Association was willing to take certain steps to address some of Appellants' concerns as a gesture of good will. (A-13 – A-14). The letter addressed Appellants' threatened withholding of assessments in terms of the Declaration's prohibition against doing so. (A-14). The letter explained that the Declaration provided for recovery of costs and legal fees incurred in collections and enforcement and stated that this included the cost of responding to Appellants' communications. (A-14-15). Contrary to Appellants' representations (Appellants' Brief at 21), the Association's response specifically stated it was in an effort to enforce the Governing Documents. (A-14)

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<sup>1</sup> Appellants contend that the Association's attorney violated the Rules of Professional Conduct by communicating directly with Mr. Horodenski. Appellants' Brief at 12-13. Appellants' counsel was never identified and, in fact, Mr. Horodenski stated his intention to pursue his grievances further via direct communications with the board. (A-6). Thereafter, he initiated direct contact by telephone with the Association's attorney. (AR-51).

As they had threatened to do, Appellants withheld payment of their monthly assessments for November and December 2009. (AR-51-2). They thereafter continued to withhold payment of assessments, costs and fees incurred by the Association, including the fees and costs incurred in responding to their letter of October 21, 2009.<sup>2</sup>

On April 19, 2010, Appellants commenced the instant lawsuit in response to the Association's demand for payment of their delinquent account balance. Their Complaint seeks a declaratory judgment determining that the Association could not assess them for the attorney's fees and costs incurred in responding to their October 21, 2009 letter; seeks a judgment determining that an award of attorney's fees is "unconscionable;" makes a "bad faith" claim against the Association; and seeks an award of attorney's fees and costs under Minn. Stat. Sec. 515B.4-116; AR-5-6.

On May 11, 2010, the Association answered and counterclaimed seeking a money judgment against Appellants, seeking determination of its lien against Appellants' property and foreclosure of that lien. The counterclaim was based alternatively on breach of contract<sup>3</sup> and the equitable doctrine of unjust enrichment. (AR-23-32).

The Association's counterclaim included:

- a. the outstanding balance of the Association's assessments, late fees, legal fees, costs and related charges as of the date of that pleading: \$5,031.00;
- and

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<sup>2</sup> Appellants contend they "have stayed current on all Association dues." Appellants' Brief at 18-19. They never have paid up their assessments. (A-16) They contend that they simply "missed" their November and December 2009 assessments. Appellants' Brief at 18. Actually, they withheld those payments intentionally. Order and Memorandum (November 12, 2010) at 11 (Add-47).

<sup>3</sup> The basis for the breach of contract counterclaim is Minn. Stat. Sec. 515B.3-115 and Declaration 6.1, both of which provide for liens, foreclosure and recovery of fees and costs incurred in doing so and in enforcing the Governing Documents.

- b. assessments, late fees, attorney's fees and costs that continued to accrue during the course of the litigation.<sup>4</sup>

On September 2, 2010 Appellants served and filed a motion for summary judgment (AR-115) and on September 16, 2010, a motion to compel discovery. (AR-148). The Association filed its own motion for summary judgment on September 2, 2010. (AR-33). On September 23, 2010 the Association served and filed a memorandum in opposition to Appellant's motion to compel. (AR-177) After a hearing, on November 12, 2010, the Trial Court issued orders denying Appellant's motion for summary judgment, granting the Association's cross-motion, and denying Appellant's motion to compel discovery as moot. (Add.-37-51) On December 21, 2010 the Court entered its Amended Order awarding the Association's costs and attorney's fees and amending the judgment. (Add.-52-57) This appeal ensued.

### STANDARD OF REVIEW

1. Grant or Denial of Summary Judgment.

On appeal from a grant or denial of summary judgment, the appellate court determines whether genuine issues of material fact exist and whether the district court erred on its application of the law. State by Cooper v. French, 460 N.W.2d 2, 4 (Minn. 1990); Zank v. Larson, 552 N.W.2d 719, 721 (Minn. 1996).

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<sup>4</sup> Pursuant to Minn. Stat. Sec. 515B.3-115(h) and Declaration 6.1(h), the Association accelerated the monthly installments of Appellant's share of the community's annual assessments through December 31, 2010, and included the accelerated obligations in its claim.

Questions of law are reviewed de novo. Dairyland Ins. Co. v. Starkey, 553 N.W.2d 363, 364 (Minn. 1995).

2. Award of Attorney's Fees and Costs.

Appellate courts will not reverse an award of attorney's fees absent an abuse of discretion. Becker v. Alloy Hardfacing & Engineering Co., 401 N.W.2d 655, 661 (Minn. 1987).

3. Denial of a Motion to Compel Discovery.

Discovery orders are reviewed under an abuse of discretion standard. Erickson v. MacArthur, 414 N.W.2d 406, 407 (Minn. App. 1993).

## **ARGUMENT AND AUTHORITIES**

### **I. Dismissal of Appellants' Declaratory Judgment Count was Proper**

Appellants' "declaratory judgment action" boiled down to a single issue: Was the attorney work in response to Appellants' demands and threats recoverable under Declaration 6.1? Complaint, Count I (AR-4-5). The facts bearing on this narrow issue have never been in dispute. Appellants demanded repairs that were their own responsibility to make, threatened suit and threatened to withhold monthly payments. Horodenski Letter 10/29/09 (A-6-9). The Association consulted counsel to respond. (AR-199) Resolution only required the Trial Court to apply the law to these facts.

The law is clear. Minn. Stat. Sec. 515B.3-115(e)(4) authorized the Association to provide in its declaration for reasonable attorney's fees and costs incurred by the association in connection with (i) the collection of assessments, and (ii) the enforcement

of this chapter, the articles, bylaws declaration, or rules and regulations, against a unit owner[.]

Pursuant to this grant of authority, the Association's declaration made exactly those provisions in essentially the same terms. Declaration 6.1 (AR-64-5).

Applying these unambiguous, and perfectly conscionable<sup>5</sup>, provisions to the facts, the Trial Court declared the rights and duties of the parties. The Association had a right to recover the disputed expenses. Appellants had a duty to pay them. The declaratory judgment was adjudicated in a manner consistent with the law and the parties' contract and must be affirmed.

## **II. The Trial Court's Decision on the Cross-Motions for Summary Judgment was Correct: There Were No Genuine Issues of Material Fact and the Trial Court Correctly Applied Settled Law**

### **A. No "Genuine Issues of Material Fact."**

Although they moved for summary judgment themselves and argued to the Trial Court that there were no genuine issues of material fact (A-1), Appellants now contend that the questions both parties sought to address summarily involve issues that a jury has to decide. Taken as framed by Appellants themselves, however, none of those questions involve genuine issues of material fact.

Appellants' Complaint raises these issues:

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<sup>5</sup> Appellants may have abandoned their claim below that these provisions are "unconscionable." Complaint, Count II (AR-5). Because their intent is not clear, we address that claim below.

- Count I: Was the expense incurred by the Association incurred “in connection with the enforcement of the Governing Documents”?
- Count II: Is the application of Declaration 6.1 “unconscionable” under Minn. Stat. Sec. 515B.1-112? (Argument waived on appeal.)
- Count III: Did the Association’s assessment of attorney’s fees and costs violate the “good faith” provisions of Minn. Stat. Sec. 515B.1-113?
- Count IV: Are Appellants entitled to an award of attorney’s fees and costs pursuant to Minn. Stat. Sec. 515B.4-116? (Argument waived on appeal.)

Complaint (AR-1-22). Neither Appellants’ pleadings nor their summary judgment arguments raise any material fact issues. Appellants never questioned the fact or amount of fees and costs assessed against them, even in the ancillary proceeding to assess their reasonableness. (Add.-52). Rather, Appellants asked the Trial Court to summarily decide that the involved assessments were not proper under the Governing Documents, were “unconscionable,” or were in “bad faith” so as to entitle them to an award of fees and costs.

The record reflects that all of Appellants’ arguments involved questions of law, not fact. They argued that the unambiguous language of the Declaration does not allow the Association to assess its fees and costs. (AR-118-19) They argued that the Declaration is ambiguous and must be construed against the Association. (AR-120)

They argued that it is “unconscionable” to construe the Declaration as authorizing assessment of fees and costs under circumstances that were not in dispute. (AR-120-1) They contended that actions taken by the Association, actions that no one disputed, were in “bad faith.” (AR-121-2).

Without a shred of evidentiary support, they claimed to “believe” that the Association “intentionally assessed attorney’s fees against them to intimidate or punish them.” (AR-108-14). Putting aside questions of admissibility, that unsupported “belief” does not create a fact issue on any aspect of this case.

Claiming to reserve the right to “contest every pretend fact submitted by [the Association] as ‘uncontested’” (AR-134-47), they offered no admissible evidence creating material fact issues at any stage of the proceedings. Instead, reciting the same facts as did the Association, Appellants advocated for a different application of the law.

Mere allegations do not meet the burden imposed on either the moving or non-moving parties in a motion for summary judgment. See, e.g., Minn. R. Civ. P. 56.05: “When a motion for summary judgment is made and supported as provided in Rule 56, an adverse party may not rest upon mere averments or denials \* \* \* but must present specific facts showing that there is a genuine issue for trial.” Moreover, “[t]he court is not required to save the nonmoving party by drawing unreasonable inferences.” *City of Savage v. Varey*, 358 N.W.2d 102, 105 (Minn. Ct. App. 1984). A genuine issue of material fact must be established, for summary judgment purposes, by substantial evidence. *Gunderson v. Harrington*, 632 N.W.2d 695, 704 (Minn. 2001); *Bebo v.*

*Delander*, 632 N.W.2d 732, 737 (Minn. Ct. App. 2001) *review denied* (Oct. 16, 2001).

The record demonstrates unequivocally that Appellants did not meet this burden.

**B. The Association was entitled to judgment as a matter of law.**

**1. Legal services performed in response to the letter of October 21, 2009, were incurred “in connection with (i) the collection of assessments and (ii) the enforcement of the Governing Documents, the Act, or the Rules and Regulations, against an Owner.”**

The heart of Appellants’ case is the notion that obtaining legal advice regarding its rights and obligations, in response to threats of nonpayment, litigation and a demand for action that the Association was not obligated to take, was unrelated to the purposes described in Section 6.1(d) of the Declaration for which the Association is authorized to assess the costs incurred against Appellants’ unit. Expending considerable effort defining “enforce” and “opinion,” but no effort applying those definitions to the undisputed facts of this case, Appellants argued their own interpretation of Declaration 6.1(d). The fact is that Appellants made specific demands on the Association, seeking repairs and reimbursement which they asserted were the Association’s responsibility. The fact is that Appellants specifically stated they intended, in violation of the Governing Documents, to withhold payment of monthly assessments on their property until such time as their demands were met. The fact is that Appellants threatened civil litigation if their demands were not met. Having made demands purportedly on the advice of their own counsel, they claimed the Association’s legal consultation was not justified.

Whether Appellants were entitled to reimbursement or to have repairs made to their property at the Association’s expense were questions whose answers lay in the

Governing Documents. So, too, did the answer to whether Appellants were entitled to withhold payment of monthly assessments pending acquiescence to their demands. They were entitled to neither, as the Association's counsel determined in her review of the facts, the Governing Documents and the law. Importantly, Appellants have never contested this determination in the current action.

Appellants object to steps taken in response to their own demands. The Association asked its lawyer what its rights were. The lawyer researched the issues and responded. Then, at her client's direction, the Association's counsel related the Association's position to Appellants as Appellants' demand required the Association to do.

To use Appellants' own definitions, the Association's counsel prepared a "formal expression of a professional judgment" as the first step in an effort to "compel obedience to" the Governing Documents; to "obtain payment" from Plaintiffs; and "to impose a course of action" dictated by the Governing Documents. (AR-119) There is no legitimate argument that these efforts are anything other than those contemplated by Declaration 6.1(d) and Minn. Stat. Sec. 515B.3-115(e)(4).

The trial court correctly held that, as a matter of law, the costs of the opinion and response letters obtained by the Association were incurred in connection with the enforcement of the governing documents.

## **2. Declaration 6.1(d) is not ambiguous.**

Appellants conceded below, and the Association agreed, that the word "enforcement" is not ambiguous. (AR-118-19; AR-129-30).

The Declaration 6.1(d) language at issue is drawn directly from Minn. Stat.

Sec. 515B.3-115 (e)(4):

Unless otherwise required by the declaration \* \* \* (4) reasonable attorneys fees and costs incurred in connection with (i) the collection of assessments and (ii) the enforcement of this chapter, the articles, bylaws, declaration or rules and regulations, may be assessed against the Owner's unit.

Neither the statute nor the Declaration is ambiguous. The sole question is whether the undisputed facts before the court fall within the scope of this provision. They do, as a matter of law.

Appellants asked the Trial Court to construe a term which needs no construction and to do so very narrowly. They asked the Trial Court to hold that, unless the action is specifically directed to an owner in response to the owner's direct violation of the governing documents and in the form of direct legal action, attorney's fees cannot be considered to have been incurred *in connection with* the "collection of assessments" or the "enforcement" of an association's rights under the law and the Association's governing documents. (AR-112).

The statute neither requires nor permits such a constrained reading. A fundamental principle of statutory construction is that the Legislature does not intend an absurd result. State v. Basal, 763 N.W.2d 328 (Minn. App. 2009). It would be absurd to hold that Minn. Stat. Sec. 515B.3-115(e)(4) only applies to those actions specifically directed to an owner, in the form of a legal action to compel compliance with the law or an association's governing documents. This is particularly true because Sec.515B.4-116 already provides for attorney's fees to be awarded to a prevailing party in a litigated case.

There would be no need for the Legislature to have enacted Sec.515B.3-115(e)(4) unless it intended that section to have different and/or broader application than the attorney's fees provisions in Sec.515B.4-116.

Equally absurd is the idea that an attorney's statement for services rendered must use the word "enforce" in its description of services or forfeit a client's right to recover for those services.

Neither the Declaration nor the statute from which Section 6.1(d) is drawn requires that we abandon common sense in their application. The Trial Court correctly held that the legal fees incurred in responding to Appellants' demands "were incurred 'in connection with' the collection of assessments or enforcement of the Governing Documents." (Add.-50).

### **III. Denial of Appellants' Motion to Compel Discovery Was Proper**

At the trial court level, Appellants sought to compel certain discovery as an alternative to their own motion for summary judgment.

While their specific objectives were not clear, Appellants asked for "information and documents obtained prior to litigation from Paradise and Associates" (AR-148-54) contending that "Paradise and Associates is NOT entitled to privilege or protection." (AR-149-50). To the extent their position was articulated at all, it seemed to focus on communications between Paradise and the attorney consulted by the Association in response to Appellants' letter of October 21<sup>st</sup> (Id.), generalized "correspondence from

Paradise and Associates to the Defendant” (AR-153), and “agreements between” Paradise and the Association (AR-153).

As the parties’ submissions on this motion reflect (AR-148; AR-177), the Association had disgorged all of its documents from before the attorney consultation, duly objected to some of the demands as irrelevant, and asserted privilege with respect to documents reflecting their response to Appellants’ demand letter.

The Trial Court deemed Appellants’ discovery motion moot. (Add.-37).

Now Appellants seek to overturn that order and, in doing so, attempt to expand the scope of their discovery. Appellants’ Brief at 30-31. Their new arguments do not alter the landscape or justify any different result.

**A. Relevance Not Established.**

First, Appellants offered no evidence or authority establishing the relevance of these communications to any of the issues then before the Court. Their summary judgment motion focused exclusively on the application of law to undisputed facts. With respect even to their “bad faith” claim, their only argument was that the Association engaged counsel “with the intent...to impose Attorney’s Fees against Plaintiffs for the same.” (AR-121-2). Absent any evidence of such an intent or the offer of any legal authority under which such an intent was relevant to any issue before the court, and in view of the fact that recovery of attorney’s fees was authorized by both statute and the Declaration, the trial court properly denied Appellants’ motion to compel. The same rationale applies to Appellants’ new contentions, raised for the first time on appeal, regarding the board’s discussions at meetings in response to Mr. Horodenski’s letter, or

the board members' "level of knowledge...in knowing their own obligations under their own contract." Appellants Brief at 30.

**B. Attorney-Client Privilege Not Waived.**

Appellants argued that attorney-client privilege doesn't attach to communications involving the property manager. They are just plain wrong.

The attorney-client privilege arises where there is a confidential communication between a client and its attorney, made for the purpose of securing legal advice. Lumber v. PPG Industries, Inc., 168 F.R.D. 641 (D. Minn. 1996). Such communications are protected from disclosure, unless the privilege has been waived. National Texture Corp. v. Hymes, 282 N.W.2d 890 (Minn. 1979).

The Association is a corporation. Like any corporation, it can act only through its agents, be they its officers, directors, employees or others. See, St. Paul Companies v. Van Beek, 609 N.W.2d 256, 258 (Minn. Ct. App. 2000). The acts of corporate agents are the acts of the corporation. Id. Paradise & Associates is a property management company retained by the Association to assist in its management and operation. It is, in fact, the Association's agent for those purposes. Appellants implicitly admitted Paradise & Associate's agency status by alleging the Association's liability for the actions of Paradise & Associates. (AR-1-22) Thus, any confidential communication between Paradise & Associates and counsel for the Association in which Paradise sought legal advice on the Association's behalf is the act of the Association and is subject to the attorney-client privilege.

The Minnesota Supreme Court already has ruled explicitly on this question, holding that the attorney-client privilege “extends to a communication prepared by an agent or employee whether it is transmitted directly to the attorney or by the client or his agent or employee.” Brown v. St. Paul City Ry. Co., 241 Minn. 15, 33, 62 N.W.2d 688, 700 (1954), citing Schmitt v. Emery, 211 Minn. 547, 2 N.W.2d 413 (1942). Although Appellants cited Brown, (AR-151), they failed to mention this, a holding fatal to their own argument.

The only communications between the board, Paradise and the Association’s counsel for which this privilege is claimed are those occurring on or after receipt of Appellants’ letter of October 21, 2009, advising that they were acting on advice of counsel, threatening litigation, and which relate to the Association’s investigation and response to Appellants’ demands and threats. See, generally, Affidavits of Kim Verros and Phaedra J. Howard (AR-49; AR-198). If those communications are not privileged, nothing is.

Moreover, the attorney-client privilege is not overcome by a showing of substantial need. See, Minn. R. Civ. P. 26.02(d). It is absolute, unless waived. National Texture, supra. Thus, Appellants’ motion to compel production of any document protected by attorney-client privilege was properly denied.

**C. Documents prepared by Defendant’s managing agent in anticipation of litigation are privileged.**

Minn. R. Civ. P. 26.02(d) states that a party may obtain discovery of materials “prepared in anticipation of litigation or trial” by a party or that party’s “representative

(including \* \* \* agent)” only upon a showing that the party has substantial need of the materials in the preparation of the party’s case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means.” In ordering the production of such materials, the court is obligated to “protect against the disclosure of the mental impressions, conclusions, opinions, or legal theories of the attorney or other representative of a party concerning litigation.” Id. (Emphasis added.)

As the Association’s representative, materials prepared by Paradise & Associates in anticipation of *litigation or trial* are expressly protected by the rule, unless Appellants can satisfy the court that substantially equivalent information cannot be obtained without undue hardship.

The only materials prepared by Paradise & Associates for which this privilege is claimed are those prepared on or after receipt of Appellants’ letter of October 21, 2009. Respondent produced everything else. (AR-178-82).

Appellants have the burden to demonstrate relevance, substantial need for these materials and that substantially equivalent information cannot be obtained by other means without undue hardship. The trial court was not told what information Appellants believe may be contained in these privileged materials. If they seek facts known to Paradise, they’ve already received responses containing that information. (AR-178-82). They also had the option of deposing board members and Paradise employees before bringing their motion for summary judgment. If Appellants seek the board members or Paradise’s thoughts on the merits of their claims, those thoughts are not to be disclosed under any circumstances. See, Minn. R. Civ. P. 26.02 (d).

Appellants simply did not meet their burden in this motion, with respect to any materials prepared in anticipation of litigation by the board, Paradise or any other person acting on the Association's behalf. Their motion in this regard, therefore, properly was denied.

**D. The work product privilege and its application here.**

The work product privilege is derived from the protections granted by Minn. R. Civ. P. 26.02. See, City Pages v. State, 655 N.W.2d 839, 846 (Minn. 2003). It is defined as:

an attorney's mental impressions, trial strategy, and legal theories in preparing a case for trial. \* \* \*  
[Materials] prepared in anticipation of litigation that do not contain opinions, conclusions, legal theories, or mental impressions of counsel are not work product."

Dennie v. Metro. Med. Ctr., 387 N.W.3d 401, 406 (Minn.1986), quoted in City Pages, supra. To be protected by this doctrine, the material must contain the thoughts of counsel "and it must have been prepared in anticipation of litigation." City Pages, supra. To the extent that Appellants' argument on this point was based on the assertion that the privilege only applies to material created "in preparing a case for trial," Appellants are simply wrong. (AR-150), emphasizing the phrase "in preparing a case for trial" without also pointing out the balance of the quoted language regarding "materials prepared in anticipation of litigation."

It never was possible to determine with any certainty what documents Appellants sought under this portion of their motion. They first referred to the fact that the "Opinion Letter" "was delivered to Plaintiffs." If by this they mean the November, 2009, letter to

them from the Association's counsel, they are correct. Of course, they have that document. They then claimed that the Association has admitted that this letter was not prepared in anticipation of trial, but they offered no supporting citation. In fact, the Association couldn't, and didn't, claim any privilege as to its attorney's letter to Appellants. That argument simply made no sense.

Appellants' final argument that "information from Paradise & Associates preceding that Opinion Letter cannot be classified as work product" is ambiguous at best. If they were referring to communications between Paradise and the Association or its counsel, on or after October 21, 2009, those communications are doubly privileged, as discussed earlier.

The document most likely referred to is the opinion letter from the Association's attorney to the Association, a letter written in direct response to Appellants' letter of October 21, 2009. What possible basis can there be for asserting that such a letter is not subject to attorney-client privilege? Wasn't that letter prepared in anticipation of Appellants' expressed intention to commence litigation and flout the Governing Documents? How could a claim be made that it does not contain the work product of the involved attorney, particularly given the fact that Appellants have themselves repeatedly referred to this document as the attorney's "*Opinion Letter*"?

**E. The Association properly asserted its claims of privilege.**

As demonstrated by the exhibits before the Trial Court, the Association explicitly asserted the privileges at issue here in its responses to Appellants' discovery requests, in subsequent correspondence regarding those responses, and yet again in response to

Appellants' motion. The categories of documents for which these privileges were asserted were detailed in Respondent's filings with the trial court. (AR-177-205).

Rice v. Perl, 320 N.W.2d 407, 412 (Minn. 1982) and the other case cited by Appellants, Hasan v. McDonald's Corp., 377 N.W.2d 472 (Minn. App. 1985), don't alter the outcome on this issue one bit. In Perl the issue was whether it was an abuse of discretion to deny the request for a continuance. 377 N.W.2d at 412. In our case, no continuances were requested.<sup>6</sup> To the contrary, Appellants asserted in their own summary judgment motion that there were no genuine issues of material fact and that the matter was ripe for adjudication. Moreover, the ultimate issue is whether the proposed discovery will "uncover" material facts or is "merely a fishing expedition." As Perl puts it:

[T]he court should be quite strict in refusing continuances where the party merely expresses a hope or a desire to engage in a fishing expedition either by discovery or at the time of trial.

Id., quoting Vospeck v. Lerdahl, 245 Minn. 164, 167-68, 72 N.W.2d 371, 374 (1955).

Unlike Rice, Appellants don't "survive the fishing expedition inquiry." Id. And, unlike Rice, Appellants can't get past the issue of material fact, as their own summary judgment motion reflects.

Ultimately, Judge Rosenbaum properly exercised her discretion and decided no purpose would be served by putting the Association to even more recoverable expense when the discovery sought wasn't material and when the case could be disposed of as a

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<sup>6</sup> Hasan also dealt with denial of a request for a continuance. 377 N.W.2d at 475.

matter of law. That exercise of discretion was appropriate and sound. It must not be reversed.

#### **IV. The Association's Actions Were Not "Unconscionable" Or In "Bad Faith."**

While the Statement of the Case of Appellant is vague, and the arguments in Appellants' Brief are unclear, the issues of "unconscionability" and "bad faith" were raised below. So we will address both here.

##### **A. Neither Section 6.1(d) nor its application in this case are unconscionable.**

Appellants asked the Trial Court to hold that Section 6.1(d) and its application in this case are unconscionable. To do so, the Trial Court would have had to hold that the statute from which Section 6.1(d) is drawn, almost verbatim, also is unconscionable. There is no justification for doing so.

Appellants did not even bother to define the word "unconscionable" much less provide the court with any information as to why Section 6.1(d) could be considered as unconscionable "at the time the contract was made". See, Minn. Stat. Sec. 515B.1-112(a).

The trial court, however, reviewed the language of the statute and held that:

A review of the Governing Documents and statutes leads to only one legal conclusion: the Association acted \* \* \* in full accord with the clear language and intent of the Minnesota Common Interest Ownership Act.

(Add.-51).

The only argument specifically advanced by Appellants on this point was the claim that their letter “was immediately turned over to an Attorney (sic) without notice to the Plaintiffs and with the intent to impose Attorneys Fees (sic) against Plaintiffs for the same.” (AR-121). Seeking legal advice in response to a letter claiming to have been sent on advice of counsel, making demands and asserting various rights under the parties’ agreement, and threatening legal action based on that agreement, cannot be considered evidence that the provision in question or its enforcement is unconscionable. It is precisely what any prudent person would do and what any lawyer would expect of a client. Moreover, the Association’s Board of Directors had a duty to ensure that the Association was acting appropriately and that its actions were in accordance with the law and the governing documents, as failing to have a legitimate legal basis for its position would expose the Association not only to the loss of Appellants’ share of the community’s operating costs, it could expose the Association to claims of “bad faith.”

Appellants do not provide the court with any legal authority for the implied proposition that, to recover its costs, an association must first specifically advise an owner that it is authorized to seek legal help in responding to legal positions the owner has taken or the Association’s right to assess the fees and costs incurred in doing so. Neither MCIOA nor the Governing Documents impose such an obligation. Minnesota common law does not impose such an obligation either. To the contrary, Appellants are legally presumed to know the terms of their contract. See, Hage v. Benner, 111 Minn. 365, 368, 127 N.W 3, 4 (1910). More specifically, Appellants were on notice of their

exposure to the costs of collection and enforcement of the Governing Documents from the day they first took steps to buy into the Community.<sup>7</sup>

Appellants' unconscionability argument was properly rejected as a matter of law.

**B. There is no support for the claim that the Association acted in "bad faith."**

MCIOA provides that: "Every contract or duty governed by this chapter imposes an obligation of good faith in its performance or enforcement." Minn. Stat. Sec. 515B.1-113. Appellants claim the Association violated this requirement in two ways: They contend that the Association "either negligently or intentionally fail[ed] to communicate with [them]," Complaint, paragraph 38 (AR-6); and they contend that the Association's assessment of attorney's fees was "to intimidate and/or punish them." *Id.* at paragraph 39 (AR-6). Required to produce admissible evidence in opposition to the Association's summary judgment motion, Appellants did not even address their "bad faith" claim. (AR-134-47).

The record, in fact, completely contradicts that claim. The Trial Court received evidence that the parties had communicated, both in person and, of course, in writing. (Add.-46). Appellants themselves acknowledged "many conversations over the past 1½ years." (A-6). There was no evidentiary basis for a claim of intimidation or punishment. To the contrary, the record supported only one conclusion: the Association's conduct was "not a violation of the obligation of good faith." (Add.-51)

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<sup>7</sup> Minn. Stat. Sec. 515B.4-102 and 515B.4-107 require the seller to provide a purchaser with the Governing Documents even though they are already of record. The demands made in Appellants' October 21 letter, albeit misguided, reflect that they had access to the Governing Documents and, therefore, were on notice of all of their terms.

The rejection of this unsupported “bad faith” claim was proper as a matter of law.

**V. The Award of Attorney’s Fees and Costs Was Proper**

The Trial Court applied MCIOA and the Governing Documents to the undisputed facts of this case and held that:

1. Appellants had breached their contract with the Association (Add.-50); and
2. As authorized by Minn. Stat. Sec. 515B.3-115(e)(4), Sections 6.1(d) and 6.1(e) of the Declaration obligated Appellants to pay “reasonable attorney’s fees and other costs incurred by the Association in connection with (i) the collection of assessments and (ii) the enforcement of the Governing Documents, the Act, or the Rules and Regulations” of the Association (Add.-50).

The Trial Court ordered the Association to “submit its application for reasonable attorney’s fees, costs and disbursements” (Add.-37-8) and gave Appellants an opportunity to respond (Add.-38). The Association made a submission pursuant to the Trial Court’s Order, but Appellants did not. (Add.-52). The Court thereafter issued its Amended Order Awarding Reasonable Costs And Attorney Fees and Amended Order For Judgment (Add.-52-3).

The Amended Order was accompanied by a Memorandum setting forth the legal and factual rationale for that Order. Citing Minnesota and U.S. Supreme Court precedent, Judge Rosenbaum articulated the analytical framework she was required to follow (Add.-53-7). She then went on to follow that framework to the letter in arriving at

an award. The Trial Court's procedure in reaching this award, and the award itself, are beyond reproach.

Appellate Courts will not reverse an award of attorney's fees absent an abuse of discretion. Becker v. Alloy Hardfacing & Engineering Co., 401 N.W.2d 655, 661 (Minn. 1987). A determination of the reasonable value of attorney's fees must be based on "all relevant circumstances," including:

the time and labor required; the nature and difficulty of the responsibility assumed; the amount involved and the results obtained; the fees customarily charged for similar legal services; the experience, reputation and ability of counsel; and the fee arrangement existing between counsel and the client.

State ex rel. Head v. Paulson, 290 Minn. 371, 373, 188 N.W.2d 424, 426 (1971).

Following exactly this procedure, articulating the outcome of the analysis each step of the way, Judge Rosenbaum's award is perfectly consistent with the law. There being no abuse of discretion, this award must be affirmed.

### **CONCLUSION**

The trial court correctly held that there were no genuine issues of material fact as to any issue before it and that Respondent was entitled to judgment, as a matter of law, on all claims.

The trial court also properly held that Appellants' motion to compel production of documents was rendered moot by the court's rulings on the cross-motions for summary judgment. Even if Appellants' motion to compel was not moot, the trial court's refusal to

rule on that motion was not error because the material sought by Appellants was protected by privileges which Appellants could not overcome or had failed to overcome.

The award of attorney's fees to the Association was correct. For these reasons, Respondent respectfully requests that the judgment of the trial court be affirmed in all respects.

STATE OF MINNESOTA  
IN COURT OF APPEALS

Kenneth and Mary Ellen Horodenski,

Appellants

CERTIFICATE OF  
BRIEF LENGTH

Vs.

Lyndale Green Townhome Association, Inc.,

Respondent.

APPELLATE COURT  
CASE NO. A11-289

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds. 1 and 3, for a brief produced with a proportional font. The length of this brief is 7,433 words. This brief was prepared using Microsoft Word 2002.

Dated: \_\_\_\_\_

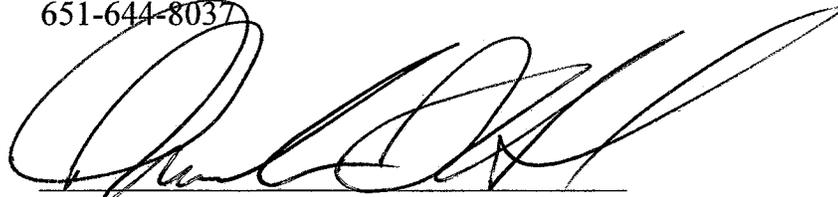
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