

No. 32858-5-II

COURT OF APPEALS, DIV. II
OF THE STATE OF WASHINGTON

Save Columbia CU Committee and Robert Tice, Appellants,

vs.

Columbia Community Credit Union, Karen Martel, Edwin C.
Bell, Dale Magers, William F. Byrd III, Robert M. Byrd,
Dennis McLachlan, Mark L. Ail, Connie Jones, and Bruce
Davidson, Respondents.

APPELLANTS' REPLY BRIEF

Attorney for Appellants:

Douglas A. Schafer (WSBA No. 8652)
Schafer Law Firm
950 Pacific Ave., Suite 1050
P.O. Box 1134
Tacoma, WA 98401-1134
(253) 431-5156

TABLE OF CONTENTS

INTRODUCTION 1

ISSUES 1

 1. The Term Limits Claim. 1

 2. The Fiduciary Duty Claim. 7

 3. The Access to Records Claim. 10

 4. The No Enabling Law and Supermajority Vote Claims. 12

 5. Attorneys Fees. 12

CONCLUSION 12

TABLE OF AUTHORITIES

Cases

Berg v. Hudesman, 115 Wn.2d 657, 937 P.2d 1062 (1990) 3

City of Everett v. Estate of Sumstad, 95 Wn.2d 853, 631 P.2d 366 (1981)
..... 5

Fire Protection District v. Yakima, 122 Wn.2d 371, 858 P.2d 245 (1993)
..... 3

Go2Net, Inc. v. C I Host, Inc., 115 Wn. App. 73, 60 P.3d 1245 (2003) .. 5

Hearst Communications, Inc. v. Seattle Times Co., 154 Wn.2d 493, 115
P.3d 262 (2005) 4

Hollis v. Garwall, Inc., 137 Wn.2d 683, 974 P.2d 836 (1999) 5

In re Marriage of Schweitzer, 132 Wn.2d 318, 937 P.2d 1062 (1997) ... 5

J.W. Seavey Hop Corp. of Portland v. Pollock, 20 Wn.2d 337, 147 P.2d

310 (1944)	6
<i>Kilian v. Atkinson</i> , 147 Wn.2d 16, 50 P.3d 638 (2002)	2
<i>Lake Limerick Country Club v. Hunt Mfg. Homes</i> , 120 Wn. App. 246, 84 P.3d 295 (2004)	3
<i>Lynott v. Nat'l Union Fire Ins. Co.</i> , 123 Wn.2d 678, 871 P.2d 146 (1994)	3-5
<i>Max L. Wells Trust v. Grand Cent. Sauna & Hot Tub Co. of Seattle</i> , 62 Wn. App. 593, 815 P.2d 284 (1991)	5
<i>Rodruck v. Sand Point Maint. Comm'n</i> , 48 Wn.2d 565, 295 P.2d 714 (1956)	2
<i>State ex rel Wicks v. Puget Sound Sav. & Loan Ass'n</i> , 8 Wn.2d 599, 113 P.2d 70 (1941)	10
<i>Stender v. Twin City Foods, Inc.</i> , 82 Wn.2d 250, 510 P.2d 221 (1973) ..	4
<i>Strougo v. Bassini</i> , 282 F.3d 162 (2nd Cir. 2002)	9
<i>U.S. Life Credit Life Ins. Co. v. Williams</i> , 129 Wn.2d 565, 919 P.2d 594 (1996)	5
<i>Universal/Land Constr. Co. v. City of Spokane</i> , 49 Wn. App. 634, 745 P.2d 53 (1987)	5

INTRODUCTION

Plaintiffs/appellants Robert Tice and Save Columbia CU Committee (“Save CCU”) here reply to the Brief of Respondents (“Resp. Br.”) filed by Columbia Community Credit Union (“Columbia” or “CCCU”) and the individuals who were members of Columbia’s board of directors in early 2004¹ (collectively, “Defendants”).

ISSUES

1. The Term Limits Claim.

While this issue has been nearly rendered moot by the changes in the membership of Columbia’s board, it presents an important opportunity for clarification of the manner in which corporate bylaws are judicially applied—as a contract among assenting parties or as a legislative enactment.

Save CCU, once it obtained a copy of Columbia’s bylaws, believed that the director term limits provision was clear and unambiguous. The full bylaws are included in the appendix to its Opening Brief. (Open. Br. A-5 to A-19; also CP 469-83) Article V Section 1 indicates that directors are either *elected* or else *appointed* to fill vacancies. Section 13 of that article provides that *appointed* directors serve only until the next annual membership meeting. Section 2 of that article—the term limits

¹ Of the early 2004 directors, only Mark Ail and Robert Byrd now remain on Columbia’s board of directors. Connie Jones declined to seek re-election when her term expired at the annual shareholders’ meeting on June 29, 2005. At that shareholders’ meeting, Dale Majers was not re-elected. Karen Martel had resigned, effective June 29, 2005.

provision—provides that “[e]ach Director, upon election, may serve a maximum of three (3) consecutive, three (3) year terms”

Nothing in the printed bylaws indicates the date that the term limits provision (or any other bylaws provision) was adopted or indicates any other effective date. Nothing in the printed bylaws indicates that any individual directors were “grandfathered” or made exempt from the term limits provision. The term limits provision is plain and unambiguous. If treated as an enactment by a legislative body, the term limits provision would be applied according to its plain terms.

If a statute is clear on its face, its meaning is to be derived from the language of the statute alone. This court has repeatedly held that an unambiguous statute is not subject to judicial construction and has declined to add language to an unambiguous statute even if it believes the Legislature intended something else but did not adequately express it. A statute is ambiguous if it can be reasonably interpreted in more than one way, but it is not ambiguous simply because different interpretations are conceivable. If a statute is ambiguous, this court resorts to principles of statutory construction, legislative history, and relevant case law to assist in interpreting it.

Kilian v. Atkinson, 147 Wn.2d 16, 20-21, 50 P.3d 638 (2002) (footnotes omitted)

However, because judicial opinions refer to an organization’s bylaws as constituting, *in effect*, a contract between the organization and its members (*e.g.*, *Rodruck v. Sand Point Maint. Comm’n*, 48 Wn.2d 565, 578, 295 P.2d 714 (1956)), the trial court interpreted Columbia’s bylaws

as it would a contract. CP 312. It applied contract law analysis, writing in its Ruling of May 7, 2004 (CP 311):

The starting point for the analysis is *Berg v. Hudesman*, 115 Wn.2d 657, 937 P.2d 1062 (1990), which rejected the “plain meaning” rule in Washington, holding that even in a case where the meaning of a term in a contract appears to be clear on its face, the courts may look to extrinsic evidence to interpret the meaning of the document.

Based upon *Berg*, the trial court accepted the Defendants’ argument that the unexpressed subjective intention of those directors who adopted the term limits provision on November 16, 1999, was to exclude from its application their terms in office that had commenced before that date.

A contract requires mutual assent of all the contracting parties. *Fire Protection District v. Yakima*, 122 Wn.2d 371, 388, 858 P.2d 245 (1993). In early 2004, Columbia had nearly 60,000 members. Resp. Br. 2. This court recently recognized, in *Lake Limerick Country Club v. Hunt Mfg. Homes*, 120 Wn. App. 246, 260-61, 84 P.3d 295 (2004), that normal contract law analysis is inapplicable to the bylaws of an organization with many members, because they will not have shared “a mutual consent and intention to contract.”

In *Berg*, the state supreme court ruled that extrinsic evidence is admissible in contract analysis—adopting the “context rule”. In *Lynott v. Nat’l Union Fire Ins. Co.*, 123 Wn.2d 678, 683-85, 871 P.2d 146 (1994), the court sought to dispel confusion over the context rule by emphasizing

that extrinsic evidence is admitted only to show the mutual intentions of the contracting parties as to the meanings of the words they chose to use in the contract. It noted that, therefore, the context rule could not be applied to contracts, like typical insurance policies, that were not result of actual negotiations between the contracting parties. *Lynott*, 123 Wn.2d at 684.

Continued confusion over the misapplication of the context rule of *Berg* led our high court to try again recently to reign in the excessive use of extrinsic evidence in contract analysis by the lower courts. In *Hearst Communications, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 115 P.3d 262, 266-67 (June 30, 2005), the court wrote:

We adopted the “context rule” and recognized that intent of the contracting parties cannot be interpreted without examining the context surrounding an instrument’s execution. If relevant for determining mutual intent, extrinsic evidence may include (1) the subject matter and objective of the contract, (2) all the circumstances surrounding the making of the contract, (3) the subsequent acts and conduct of the parties, and (4) the reasonableness of respective interpretations urged by the parties. [Berg] at 667 (quoting *Stender v. Twin City Foods, Inc.*, 82 Wn.2d 250, 254, 510 P.2d 221 (1973)). In *Berg*, we concluded that extrinsic evidence was admissible to aid in understanding the parties’ intent with respect to the meaning of “gross rentals.” [Berg] at 672.

Unfortunately, there has been much confusion over the implications of *Berg*.

In *Hollis*, we sought to clarify the meaning of *Berg*:

Initially *Berg* was viewed by some as authorizing unrestricted use of extrinsic evidence in contract analysis, thus creating unpredictability in contract interpretation. During the past eight years, the rule

announced in Berg has been explained and refined by this court, resulting in a more consistent, predictable approach to contract interpretation in this state.

Hollis v. Garwall, Inc., 137 Wn.2d 683, 693, 974 P.2d 836 (1999) (citations omitted).

Since Berg, we have explained that surrounding circumstances and other extrinsic evidence are to be used “to determine the meaning of specific words and terms used” and not to “show an intention independent of the instrument” or to “vary, contradict or modify the written word.” *Id.* at 695-96 (emphasis added). See also *U.S. Life Credit Life Ins. Co. v. Williams*, 129 Wn.2d 565, 571, 919 P.2d 594 (1996) (court’s intention in adopting the “context rule” was not “to allow such evidence to be employed to emasculate the written expression of” the meaning of the contract’s terms); *In re Marriage of Schweitzer*, 132 Wn.2d 318, 327, 937 P.2d 1062 (1997) (“context rule” cannot be used to show intention independent of the instrument); *Go2Net, Inc. v. C I Host, Inc.*, 115 Wn. App. 73, 60 P.3d 1245 (2003) (admissible extrinsic evidence does not include evidence of a party’s unilateral or subjective intent as to contract’s meaning).

Our holding in Berg may have been misunderstood as it implicates the admission of parol and extrinsic evidence. We take this opportunity to acknowledge that Washington continues to follow the objective manifestation theory of contracts. Under this approach, we attempt to determine the parties’ intent by focusing on the objective manifestations of the agreement, rather than on the unexpressed subjective intent of the parties. *Max L. Wells Trust v. Grand Cent. Sauna & Hot Tub Co. of Seattle*, 62 Wn. App. 593, 602, 815 P.2d 284 (1991). We impute an intention corresponding to the reasonable meaning of the words used. *Lynott v. Nat’l Union Fire Ins. Co. of Pittsburgh, Pa.*, 123 Wn.2d 678, 684, 871 P.2d 146 (1994). Thus, when interpreting contracts, the subjective intent of the parties is generally irrelevant if the intent can be determined from the actual words used. *City of Everett v. Estate of Sumstad*, 95 Wn.2d 853, 855, 631 P.2d 366 (1981). We generally give words in a contract their ordinary, usual, and popular meaning unless the entirety of the agreement clearly demonstrates a contrary intent. *Universal/Land Constr. Co. v. City of Spokane*, 49 Wn. App. 634, 637, 745 P.2d

53 (1987). We do not interpret what was intended to be written but what was written. *J.W. Seavey Hop Corp. of Portland v. Pollock*, 20 Wn.2d 337, 348-49, 147 P.2d 310 (1944), cited with approval in *Berg*, 115 Wn.2d at 669.

In this case, the trial court should have applied the term limits provision in Columbia's bylaw according to its plain language—without considering the unexpressed subjective intention of those directors who adopted it to exclude their prior board terms. Had the trial court properly applied that bylaws provision based upon the rules of statutory construction—a logical application given the circumstances, including Columbia's nearly 60,000 members—it would have simply enforced its plain language as written. But even if Columbia's bylaws were applied as a contract between it and its members, the result ought to have been the same because the members, as “contracting parties,” did not negotiate with those directors and share with them any “mutual intent” that language of the term limits provision excluded the directors' prior board terms. Under those circumstances, the context rule of *Berg* does not permit the consideration of the evidence that the trial court regarded as “most significant”—the affidavit of a Columbia employee as to the subjective intentions of its directors who adopted the term limits provision. CP 311.

In their brief, Defendants assert repeatedly (Resp. Br. 11-15) that the directors intended the term limits provision to apply *prospectively*.² As

² Defendants repeat the word *prospective* or a variant of it 15 times in those pages.

Save CCU noted (Open. Br. 10-11), such assertion equally supports its position that the term limits provision took effect as a board-candidate qualification at the time of each director's next election.

In their brief, Defendants again argue judicial estoppel. Resp. Br. 14-16. The trial court summarily rejected that argument. CP 310.

In summary fashion, I decline to accept Defendants' judicial estoppel argument. I do not agree that Plaintiffs' seeking to compel the Board of Directors to hold, upon proper demand, a special member's [sic] meeting is inconsistent with the term limits challenge now brought. Plaintiffs' mandamus action cannot be construed as a judicial admission of the right of the challenged directors to hold office, as opposed to a recognition that the challenged directors remained in power until and unless removed.

This court similarly should reject that argument.

2. The Fiduciary Duty Claim.

Defendants attempt to mis-characterize this claim as simply based on the directors having expended funds of Columbia in connection with the election held on their removal from office. Resp. Br. 1, 18. But the claim was much broader than that, as the trial court recognized (CP 313-16):

The complaint, filed March 16, 2004, alleges that the directors of the credit union owe a fiduciary duty to "Columbia Community Credit Union and its members." The alleged breach of that duty consists of denying the request for a special membership meeting; expending "substantial sums[]" to campaign against the directors' removal vote by employing their control over the property, employees and resources of Columbia Community Credit Union to prevent Plaintiffs from communicating

information about the removal vote to Columbia Community Credit Union members; and by the directors exercising their power and authority to retain their positions and the benefits thereof.

. . . . The complaint does allege, however, a violation of the statutory right afforded to members to request and receive a special membership meeting to seek removal of directors, in order to further the director's term in office, and the expenditure of "substantial sums" to retain the director's positions. While it is true that some courts, in some cases, have approved the expenditure of corporate funds to lobby for a particular slate of candidates, or to wage a proxy fight, under the standards applicable to a CR 12(b)(6) [motion], a set of facts could be envisioned whereunder action by a Board to retain control of a credit union could be so egregious that it amounts to a violation of the Board's fiduciary duty.

The trial court had already recognized in the mandamus action that Columbia's members, including Save CCU, had standing to sue Columbia's directors to enforce their right to have the special membership meeting to vote on the removal of directors. CP 314. Since they had standing against the directors to enforce that right, logically they had standing to bring an action against the directors for the harm caused to them by the directors' violation of that right. Save CCU and its members suffered harm by having to bring the mandamus action itself, suffered harm at having been denied means to communicate with fellow Columbia members concerning the removal vote, and suffered harm at having to expend substantial sums in an attempt to counter the massive anti-removal advertising and direct solicitation campaign that the directors waged with Columbia's funds.

In their brief, Defendants assert that under corporate law, shareholders cannot, except through a derivative action, bring claims against a director for breach of fiduciary duty. Resp. Br. 23. The law is otherwise, as Save CCU briefed to the trial court. CP 164. In *Strougo v. Bassini*, 282 F.3d 162 (2nd Cir. 2002), the Federal Court of Appeals for the Second Circuit, in a thorough and thoughtful opinion approving direct shareholder claims for breach of fiduciary duty against directors of a corporation, held at page 171, applying Maryland law:

Where shareholders suffer an injury that does not stem from an injury to the corporation's business or property... the corporation lacks standing to sue, and Maryland's "distinct injury" rule allows shareholders access to the courts to seek compensation directly.

Thus, under Maryland law, when the shareholders of a corporation suffer an injury that is distinct from that of the corporation, the shareholders may bring direct suit for redress of that injury; there is shareholder standing. When the corporation is injured and the injury to its shareholders derives from that injury, however, only the corporation may bring suit; there is no shareholder standing.

No authority suggests that Washington law differs from Maryland law on this point. Save CCU and its members suffered harm distinct from any harm to Columbia. The trial court was correct in ruling on May 7, 2004, (CP 316) that Save CCU's claim against Columbia's directors stated a claim under CR 12(b)(6), and it erred in reversing that ruling on June 17, 2004. CP 428

3. The Access to Records Claim.

Plaintiffs's Access to Records Claim sought to enjoin Defendants from denying Columbia's members access to their bylaws and bylaws amendments, minutes of their member meetings and of those portions of director meetings at which corporate policies and plans are discussed and decided, and copies of corporate policies and plans, and records that enable members to communicate with other members concerning Columbia's corporate affairs. CP 5-6, 8. Plaintiffs' opening brief presented an extensive review of the common law of corporations, including Washington cases. Open. Br. 17-21.

In their brief, Defendants rely exclusively upon one case— *State ex rel Wicks v. Puget Sound Sav. & Loan Ass'n*, 8 Wn.2d 599, 113 P.2d 70 (1941). *Wicks* is readily distinguishable as a unique case. First, it did not involve a denial of access to corporate bylaws and bylaws amendments, as was the case here.

Wicks addressed the rights of “persons designated as shareholders under our savings and loan association act,” Washington Laws of 1933, Chapter 183. *Id* at 602. The court noted that in an earlier decision it had “stated that the persons called shareholders in these associations are more like depositors than investors in corporate stock.” *Id*. It noted that “the relation of shareholders in savings and loan associations under our act is *sui generis*.” *Id*. It noted that the 1933 savings and loan act expressly

granted the supervisor of savings and loan “full access to all books, papers, records of every kind and nature for the purpose of examination” of each savings and loan association, and opined that “the legislature did not intend that shareholders should have the right to inspect the books, which prevails in the case of ordinary corporations.”

The plainly most persuasive reason given by the *Wicks* court for its ruling was the unique and specific legislative history of the 1933 savings and loan association act, which it described at 604:

Another reason for concluding that the legislature did not intend to allow shareholders to inspect the books and records of associations at their will, is the fact that, when the act was submitted to the governor for his signature, it contained § 46, p. 731 (Laws of 1933, chapter 183), which reads as follows:

“Any member shall have the right at reasonable times and for reasonable and proper purposes, to inspect the books and records, articles and by-laws of the association: Provided, however, That nothing in this section contained shall permit the giving to or obtaining by a member of the names of members in or borrowers from such association, or the individual amounts of such accounts.”

This section was vetoed by the governor and was not passed over his veto or reenacted at subsequent sessions.

It appears that the *Wicks* decision has never been applied to a Washington credit union or to any other corporation subject to regulatory oversight, as many are. Nor does it appear that any reported judicial case has treated a Washington credit union member as merely a depositor. The *Wicks* case is simply inapplicable.

4. The No Enabling Law and Supermajority Vote Claims.

The Defendants' Brief in Response simply asserts that these claims arise from a potential, theoretical, abstract, or academic dispute, seeming to ignore the contrary evidence that Save CCU pointed to in its Opening Brief. Open. Br. 23-26; Resp. Br. 30-32.

5. Attorneys Fees.

The Defendants' Brief in Response raised no issue needing reply.

CONCLUSION

For the reasons discussed above and in the Opening Brief, the Plaintiffs ask that this appellate court (1) reverse the trial court's dismissal on summary judgment of the Term Limits Claim and its dismissal based on CR 12(b)(6) of the Fiduciary Duty Claim, the Access to Records Claim, the No Enabling Law Claim, and the Supermajority Claim, (2) reverse the trial court's denial of, and affirmatively grant, Plaintiff's summary judgment motion on the Term Limits Claim, and (3) award Plaintiffs reasonable attorney fees for prosecuting this case at the trial and appellate court levels.

Respectfully submitted this 15th day of August, 2005.

Douglas A. Schafer, Attorney for Appellants
WSBA No. 8652