

1997

Herman Reedeker, Ruth Reese, Gayle THeurer, Joan Valentine, Robert Valentine, and Tom Plummer v. NORMAN J. SALISBURY, in his capacity as President of the American Towers Owners Association, SPENCER KIMBALL, in his capacity as Vice President of the American Towers Owners Association, GLEN GETZ, WILLIAM S. RICHARDS, JOAN HOLMES, WILLIAM T. MATLOCK, DON CLARK, STERLING RIGBY, JOHNNY BOWNE, VICTOR ROMERO and CRAIG THORLEY, in their capacities as past and present Trustees and Directors of the American

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Towers Owners Association, and John Does I through X, : Reply Brief

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

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IN THE UTAH COURT OF APPEALS

DOCKET NO. 970032-CA

HERMAN REEDEKER, RUTH REESE, :
GAYLE THEURER, JOAN VALENTINE, :
ROBERT VALENTINE, and TOM :
PLUMMER, :

Plaintiffs-Appellants, :

v. :

Appeal No. 970032-CA

NORMAN J. SALISBURY, in his :
capacity as President of the :
American Towers Owners :
Association, SPENCER KIMBALL, :
in his capacity as Vice :
President of the American :
Towers Owners Association, :
GLEN GETZ, WILLIAM S. :
RICHARDS, JOAN HOLMES, WILLIAM :
T. MATLOCK, DON CLARK, :
STERLING RIGBY, JOHNNY BOWNE, :
VICTOR ROMERO and CRAIG :
THORLEY, in their capacities :
as past and present Trustees :
and Directors of the American :
Towers Owners Association, :
and John Does I through X, :

Priority No. 15

Defendants-Appellees.

REPLY BRIEF OF APPELLANTS

On Appeal From a Motion to Dismiss of the Third Judicial
District Court for the Salt Lake County, State of Utah
Honorable David S. Young, District Judge

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COURT OF APPEALS

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Pursuant to Rule 24(c) of the Utah Rules of Appellate Procedure, Appellants (Homeowners), suing derivatively on behalf of the American Towers Homeowners Association, file this Reply Brief.

INTRODUCTION

In their Responding Brief, much as they did in the court below, Appellees (the Trustees) frame the issues in what appears to be a studied effort to confuse and deflect the Court's attention from the complexity of the issues before it. On appeal, Homeowners challenge solely, whether, in light of the facts contained in their Complaint, the trial court erred as a matter of law in dismissing the Complaint pursuant to Rule 12(b)(6) of the Utah Rules of Civil Procedure. Were this simply an issue governed by the four corners of the Utah Nonprofit Corporation Act (Nonprofit Act), Utah Code Ann. § 16-6-54 through § 16-6-112 (1995 & Supp. 1996), as the Trustees claim, there would be no issue for appeal. However, this case involves significant issues impacting the rights of condominium owners. This case raises a question of first impression regarding the correct interpretation of the Utah Condominium Act (Condominium Act or the Act), Utah Code Ann. § 57-8-1 et. seq. (1995 & Supp. 1996), and the rights and duties conferred by the Condominium Act.¹ Further, this case concerns the proper application of settled contract principles to the unique

¹ Just as a condominium is neither a house nor an apartment, but falls somewhere in between, the law regarding a breach of a condominium bylaw is neither solely nonprofit corporate law nor solely for-profit corporate law -- but is a studied combination of both.

circumstances relating to the proper operation and management of condominium associations and boards.

STANDARD OF REVIEW

When reviewing a trial court's dismissal under Rule 12(b)(6) of the Utah Rules of Civil Procedure, this Court must accept the material allegations of the complaint as true and consider those allegations and all reasonable inferences in a light most favorable to the complainant. Colman v. Utah State Land Bd., 795 P.2d 622, 624 (Utah 1990). A motion to dismiss under Rule 12(b)(6) is proper only where the claimant would not be entitled to relief under the facts alleged in the complaint "or under any state of fact they could prove to support their claim." Prows v. State, 822 P.2d 764, 766 (Utah 1991) (emphasis added). This Court may affirm the trial court's ruling only if it clearly appears, that as a matter of law, the complainant can prove no set of facts in support of his or her claims. Educators Mutual Ins. Ass'n v. Allied Prop. & Cas. Ins. Co., 890 P.2d 1029, 1030 (Utah 1995); see Wright v. University of Utah, 876 P.2d 380, 382 (Utah App. 1994). To this end, this Court has stated

[D]ismissal of a claim under Rule 12(b)(6) is a severe measure given the liberality of notice pleading . . . When challenging a dismissal under Rule 12(b)(6) the appellant is entitled to a generous standard of review.

Wright 876 P.2d at 390 (Billings, J., dissenting) (emphasis added) (citation omitted) (quoting Olson v. Park-Craig-Olson, Inc., 815 P.2d 1356, 1360 (Utah App. 1991)). Finally, the propriety of a Rule 12(b)(6) dismissal presents a question of law this Court

reviews for correctness, giving no deference to the lower court's decision. St. Benedict's Dev. Co. v. St. Benedict's Hosp., 811 P.2d 194, 196 (Utah 1991).

ARGUMENT

- I. THE ASSOCIATION IS ORGANIZED PURSUANT TO THE UTAH CONDOMINIUM ACT, § 57-8-1 et seq. AND IS SUPPLEMENTALLY GOVERNED BY BOTH THE REVISED BUSINESS CORPORATIONS ACT, § 16-10a-101 to -1705 AND THE UTAH NONPROFIT CORPORATION ACT, § 16-6-54 to -112.

In Point I of their Brief, the Trustees erroneously contend the Nonprofit Act is dispositive of Homeowners' claims in this case. Rather, it is the Condominium Act, acting in concert with all other relevant law, that governs this case and is therefore dispositive of Homeowners' claims. See Utah Code Ann. § 57-8-35(1) (1995).

In relevant part, the Condominium Act provides

(1) The provisions of this act shall be in addition and supplemental to all other provisions of law, statutorily or judicially declared, provided that where the application of the provisions of this act conflict with the application of such other provisions, this act shall prevail.

Id. (emphasis added). The American Towers Homeowners Association (the Association) has expressly incorporated the Condominium Act into its Declaration and Bylaws. See Article X § 10.07 (R. 67); Article I § 1.14 (R. 56); Article XX § 20.02 (R. 85); see also Homeowners' Opening Brief at 32-33. Undisputedly, the Condominium Act governs Homeowners' claims.

Recognizing the inescapable application of the Condominium Act to the facts alleged in the instant case, the Trustees contend that

while the Act primarily governs the instant action, because it contains no requisite standard of care for the elected officers and directors of the Association's Board of Trustees, the court must look to the Nonprofit Act for guidance. The Trustees read too much into the Condominium Act and erroneously overstate the Condominium Act's terms.

It is clear, and the Trustees concede, § 57-8-35(1) contains no specifications regarding what "other provisions of law" shall supplement the Condominium Act. Certainly the legislature intended the Condominium Act be read in harmony with other law, however, the legislature failed to provide which law(s) should apply. It is at least arguable, and indeed compelling, that the legislature likewise intended the Utah Revised Business Corporation Act (Business Act) to be considered when interpreting the Condominium Act. See Utah Code Ann. § 16-10a-101 to -1750 (1995).

A fundamental tenet of statutory construction provides that when there is doubt or uncertainty as to the meaning or application of a statute, courts must analyze the statute in its entirety, in light of its objectives, and harmonize the statute with legislative intent and purpose. Clover v. Snowbird Ski Resort, 808 P.2d 1037, 1045 (Utah 1991). Read as a whole, the Condominium Act neither expressly refers to nor relies upon the Nonprofit Act. Further, when harmonizing the full text of § 57-8-35, the section in controversy, the language of this section suggests it relates to such "other provisions of law" regarding the zoning, development, approval, and recording of plats -- property law, not civil

liability, statutes.² Finally, when laying the Nonprofit Act and the Condominium Act side-by-side, there is far more discord than harmony among the separate acts.³

Certainly, there are differences between the Condominium Act and the Nonprofit Act. And, in part, those differences are

² Section 57-8-35(1) expressly refers to Utah Code Ann. §§ 10-9-25 (regarding municipal land use and development); 10-9-26 (same); 17-21-8 (regarding recording and approval of maps and plats); 17-27-21 (regarding county land use and development); and 57-5-3 (regarding plats and subdivisions). Subsections (2), (3), and (4) all relate to future development, zoning, and compliance with municipal and county property ordinances.

³ In relevant part: (1) The Condominium Act governs the collective ownership and possession of fee simple property. See Id. §§ 57-8-6, -7. The Nonprofit Act makes no mention of real property rights or condominium associations. See Id. § 16-16-108 (term "cooperative association" refers to agricultural cooperative not condominiums; § 16-6-21 (includes no reference to the Condominium Act, condominiums, or condominium associations in exhaustive list of statute's purposes); (2) The Condominium Act mandates that condominium associations create declarations and bylaws, to be executed and acknowledged by all owners and lessees and duly recorded, and that each owner shall strictly comply with the bylaws. See Id. §§ 57-8-8, -10, -12, -16. The Nonprofit Act does not require bylaws. See; id. § 16-6-44. (3) The Condominium Act provides "common profits of the property shall be distributed to . . . the unit owners according to their respective percentage of fractional undivided interests . . ." Id. § 57-9-24. The Nonprofit Act regards only "corporation[s] which [do] not distribute any part of its income to its members, trustees, or officers . . ." id. § 16-6-19(11), and "[n]o part of the net earnings of a nonprofit corporation may inure to or for the benefit of or be distributable to the corporations' members . . ." Id. § 16-6-42.

With respect to (3), on page 11 of their Brief, the Trustees contend "Homeowners have never alleged that this Association distributes profits to members, trustees, or officers," and therefore the instant Association must be a nonprofit corporation. This is a distinction without a difference. Simply because the Association, up to this point, has not distributed its profits does not foreclose the fact that the Association may do so in the future or that, in this regard, the Association is much more akin to a for profit corporation than a nonprofit corporation.

material and extreme. The state legislature did not intend for courts -- such as the lower court -- to harmonize such inapposite statutory provisions to give effect to an ambiguous statute. Rather, when "dealing with an unclear statute," -- such as § 57-8-35(1) -- Utah courts must render interpretations that "will best promote the protection of the public." Clover, 808 P.2d at 1045 (quoting Curtis v. Harmon Electronics, 575 P.2d 1044, 1046 (Utah 1978)). Reading too much into § 57-8-35(1) as the district court did below and as the Trustees likewise urge this Court to do on appeal, promotes the Trustees', not the public's interest, and permits the Trustees to profit from their misdeeds. Such reading allows the Trustees to violate express covenants, conditions, and bylaws of the Association. Clearly, such an interpretation permits acts that would violate the homeowners' interests.

In relevant part, the competing statutes -- § 16-6-107 of the Nonprofit Act and § 16-10a-840 of the Business Act -- provide:

(1) A trustee or officer of a nonprofit corporation is not personally liable to the corporation or its members for civil claims arising from acts or omissions made in the performance of his duties as a trustee or officer, unless the acts or omissions are the result of his intentional misconduct.

Utah Code Ann. § 16-6-107(1) (1995) (emphasis added).

(4) A director or officer is not liable to the corporation, its shareholders, or any conservator or receiver, or any assignees or successor-in-interest thereof, for any action taken, or any failure to take any action, as an officer or director, as the case may be, unless:

(a) the director or officer has breached or failed to perform the

duties of the officer in compliance with this section; and

(h) the breach or failure to perform constitutes gross negligence, willful misconduct, or intentional infliction of harm on the corporation or the shareholders.

Id. § 16-10a-840(4) (emphasis added).⁴

At the hearing on The Trustees' Motion to Dismiss on August 9, 1996, the lower court expressly recognized the application of both the Business and Nonprofit Acts to the facts in this case. In relevant part, the district court stated:

Under the Utah Nonprofit Corporation Act it goes, if at all, to torts. But you have to superimpose on that the Utah Condominium Act. And it brings in the Utah General Business Corporation Act. The very fact [the Association] put in an indemnification provision in their Bylaws, there is no indemnification provision in the Utah Nonprofit Corporations Law. But when you sort through this, it's not just the Utah Non-Profit Corporation Act that controls here.

(R. 496-97). The Trustees attempt to explain away this statement in a brief footnote located on page 15 of their Brief. Contrary to The Trustees' claim, the district court was not merely restating Homeowners' argument, but was recognizing that § 57-8-35(1) is ambiguous and that both the "Utah General Business Corporations Act" and the "Utah Non-Profit Corporation Act" apply. Indeed, the lower

⁴ Prior to May 3, 1993, the standard of care for directors and officers was simple negligence. The substantive amendment changing the standard of care to gross negligence is not retroactive, Resolution Trust Corp. v. Hess, 820 F. Supp. 1359, 1364-67 (D. Utah 1993), and therefore acts which occurred before May 3, 1993, including the February 11, 1993 closed-door meeting in which the Trustees decided to misappropriate funds from the reserve fund, are subject to the lower, simple negligence standard of care.

court expressly recognized the problem created by § 57-8-35's ambiguity, yet, in derogation of legislative intent, the court went on to state without explanation:

I don't think there is wisdom in attempting to apply multiple acts and then trying to determine from those acts where there could be a potential for a different standard to be applied to Directors of Nonprofit Condominium Associations and Nonprofit Corporations. . . .

. . . .

So, Mr. Manning, your Motion to Dismiss is Granted.

(R. 496-97).

In so ruling, the district court placed itself in the shoes of the state legislature, ignored fundamental rules of statutory construction, and without balancing the competing statutes, declared by judicial fiat the standard of care for condominium officers and directors. See Salt Lake Child and Family Therapy Clinic, Inc. v. Frederick, 890 P.2d 1017, 1024 (Utah 1995) ("The Legislature expects courts to apply statutes, . . . with some degree of common sense to particular situation. The Legislature does not expect courts to effectuate what they think is good policy.") (emphasis added). Reading § 57-8-35(1) as the lower court did compels absurd results, results which contradict the lower courts own findings: The district court recognized the ambiguity in § 57-8-35; the district court recognized the relevant application of both the Business Act and the Nonprofit Act; thus, the district court recognized Homeowners had stated a claim -- under the bylaws and the "Utah General Business Corporations Act"-- upon which relief

could be granted. Inexplicably, however, the district reversed itself and dismissed Homeowners complaint in contravention of Rule 12(b)(6) of the Utah Rules of Civil Procedure.

If the court had applied, as it recognized it ought to, a "gross negligence" standard of care, the allegations contained in Homeowners' Complaint more than adequately state a claim for relief.⁵ In part, Count IV alleges facts legally sufficient to support a finding of "simple" negligence for the Trustees' pre-May 3, 1993 acts. Count V alleges facts legally sufficient to support a finding of "gross" negligence for the Trustees' post-May 3, 1993 ultra vires acts. This Court should therefore reverse the lower court's dismissal.⁶

⁵ In part "gross negligence" has been interpreted to mean "a want of ordinary care and diligence." Warren v. Robison, 57 P. 287, 291 (Utah 1899). Moreover, as this Court must, when construing the instant Complaint in a light most favorable to Homeowners' and drawing all reasonable inferences in Homeowners' favor, Olson v. Park-Craig-Olson, Inc., 815 P.2d 1356, 1360 (Utah App. 1991), it is reasonable to infer Homeowners have alleged conduct akin to an intentional and willful act. See Wright v. University of Utah, 876 P.2d 880, 890 (Utah App. 1994) (Billings, J., dissenting) (finding that where plaintiff alleged employee "assaulted and struck" her, it reasonable could be inferred plaintiff claim both an intentional and negligent act).

⁶ In their Brief, the Trustees likewise contend the breach of fiduciary duties and negligent management claims contained in Homeowners' Complaint must fail as they too are based upon an "intentional misconduct" standard of care. Again, the Trustees err. Rather, when a homeowner volunteers to sit on a condominium homeowner board, the homeowner assumes the fiduciary duties of care, obedience, and diligence, which duties the homeowner breaches by its negligent acts. Homeowners' Complaint sufficiently alleges facts which show the Trustees breached these duties in the instant case.

II. TRUSTEES MUST STRICTLY COMPLY WITH THE DECLARATION AND BYLAWS AND THE OWNERS HAVE STANDING TO SUE FOR THEIR FAILURE TO SO COMPLY.

A. As Owners, Trustees are Contractually Obligated to Strictly Comply with the Declaration and Bylaws.

The Trustees further contend Homeowners have failed to state a upon which the court may find a breach of contract. The Trustees concede the condominium Bylaws, together with the Articles of Incorporation and the members' applications constitute a contract between the members and the corporation. Turner v. Hi-Country Homeowner's Ass'n, 910 P.2d 1223, 1225 (Utah 1996). Conversely, the Trustees argue that as individuals, the Trustees are not a party to this contract and accordingly, may not be sued under it.

The Trustees claim the agreement to establish the Reserve Account (which account the Trustees mismanaged) is between the Association and the owners and that the Trustees had no part in this agreement. As a general principle, a condominium association's declaration and bylaws form part of "an elaborate contract among the individuals owning and sharing property in the community." P.M. Dunbar, The Homeowners Association Manual, at 5-6 (2 ed. 1991). Under this contract, each owner is entitled to "defend their contract rights and to resist efforts of those who would impair or take them away [including] arbitrary action of the board of directors." Id. (emphasis added).

In the instant case, the Trustees themselves are owners and therefore parties to this "elaborate contract." The Trustees are also the elected officers and representatives of the collective

homeowners, charged with upholding their will. It is untenable to suggest, as the Trustees do, that once elected, the Trustees were somehow released from their reciprocal duty (as owners) to strictly comply with the contract. Rather, once elected to serve as trustees, the Trustees undertook a dual obligation (1) as owners, to strictly comply with the Declaration and Bylaws (the contract), (R. 83), and (2) as agents, to carry out their duties consistent with the rights and obligations contained in the Declaration and Bylaws (the contract). (R. 121). The Trustees cite no authority, and indeed there is none, to support their claim that once elected, they became relieved of their obligation to comply with the contract.⁷ Because the Trustees are in the unique position of being parties -- by virtue of their status as owners -- and agents to the contract, they may be held liable and indeed sued for breach of this contract.

Clearly, under Rules 8(a) and (e) of the Utah Rules of Civil Procedure, and pursuant to the Utah Supreme Court's recent pronouncement in Broadwater v. Old Republic Sur., 854 P.2d 527, 536

⁷ In an attempt to avoid their obvious contractual liability in this case, the Trustees assert that they, like any other "agent" cannot be held individually liable for the contractual obligations of their principle. The Trustees rely on the recent Utah Supreme Court decision in Carlie v. Morgan, 922 P.2d 1, 6 (Utah 1996), in which the court held an implied warranty of habitability may not be enforced against an agent who entered into a contract on behalf of a disclosed principle. Carlie is distinguishable from the instant case. First, Carlie concerns an implied term and not an express contract. Next, the agent in Carlie had no stake in and was not otherwise a party to the implied contract. Here, the Trustees are both parties to the contract -- they are owners as well as officers -- who have been elected by the other owners to enforce and uphold the express contract terms. As such, the Trustees may be sued in contract for their failure to do so.

(Utah 1993), the same facts giving rise to a tort claim, i.e., the Trustees' negligent mismanagement of the Reserve Account, may also give rise to a separate contract claim. Thus, even assuming arguendo Homeowners' have not plead the appropriate tort standard of care in this case, such failure cannot and shall not effect the validity of Homeowners' well-plead and legally cognizable contract claims. Accordingly, this Court must reverse the district court's erroneous dismissal of Homeowners contract claims and allow Homeowners to proceed to trial on those issues.

B. The Trustees Are Bound to Strictly Comply with Declaration and Bylaws.

In support of their contention that the individual trustees may not be sued in contract, the Trustees claim that neither the text of the Declaration and Bylaws nor Utah law dictate that they "strictly comply" with the "contract." In so claiming, the Trustees again oversimplify the issues in this case and distort the reality regarding their status both as owners and agents. This Court must be wary to accept such broad-sweeping claims -- which claims the Trustees predicate on generalized contract principles with no application, or only limited application, to the law regarding condominium associations. See Booneville Properties, Inc. v. Simons, 677 P.2d 1111, 1112 (Utah 1984) (holding that where association has adopted internal rules and regulations which members have agreed to be governed by, controversies arising therein shall be determined by internal rules and not general contract law). Homeowners have not made this mistake. Rather, Homeowners Opening Brief is squarely premised upon the Declaration

and Bylaws and the difficult and evolving principles of law regarding condominiums.

In part, Utah Code Ann. § 57-8-8 and Article XVIII Section 18.01 of the Declaration refer to owners, not trustees. (R. 83). However, as stated herein, with regard to condominium associations in which the governing board is comprised of homeowners, this is a distinction without a difference. Both the Utah Code and Declaration set forth the reciprocal duty of all homeowners -- including the Trustees in this case, who have been elected from the pool of homeowners to serve those homeowners' interests. As owners, the Trustees are independently held to a duty of "strict compliance" with the Condominium Act and the Associations' Declaration and Bylaws. The Trustees dual-status as trustees and owners does not extinguish this duty. Indeed, it makes the duty more all the more relevant. See e.g., Badger v. Madsen, 896 P.2d 20, 23 (Utah App. 1995) (stating courts require strict compliance where failure to adhere to contract requirement will effect substantive rights and result in possible prejudice.)

Homeowners Complaint sufficiently alleges the Trustees' failure to strictly adhere to the requirements of the Utah Code and the Association's Declaration and Bylaws. The Complaint therefore states an enforceable claim for breach of contract. Accordingly, this Court must reverse the district court's erroneous dismissal of Homeowners' Complaint.⁸

⁸ In a further effort to defeat their clear contractual obligations, the Trustees contend in their Brief to this Court, that even if they are bound to a duty of strict compliance, the

C. The Trustees Committed Numerous Ultra Vires Acts for Which Homeowners are Entitled to Relief Under Both the Business Act and the Nonprofit Act.

In their Brief, the Trustees argue that if they are guilty of anything, they are guilty only of *intra vires* acts -- acts which were authorized, but imperfectly executed. As such, the Trustees contend that Utah Code Ann. § 16-6-23, which expressly permits the instant action, has no bearing on this case.

It is settled that an *ultra vires* act is an act that exceeds the actor's authority -- regardless of whether the act was intentional or not. *Ultra vires* acts include not only acts "wholly beyond the scope of the authority of the corporation, but also [acts] apparently within the scope of authority but actually, in the particular case, for a purpose not within the authority of the corporation." William M. Fletcher, *Fletcher Cyclopedia of the Law of Private Corporations* § 3550 (Perm. ed. 1989); see also Black's Law Dictionary 1365 (5th ed. 1979) ("The term [*ultra vires*] has a

Trustees have strictly complied in this case. In part, the Trustees argue that because Article XIX Section 19.05 of the Declaration does not specifically prohibit Trustees from diverting funds from the reserve account to finance expensive litigation, that section gives them the necessary discretion to act as they did in this case. The text of the Declaration, however, is to the contrary. (R. 84). Article X Section 10.03, states in relevant part, "[T]he Association may acquire and pay for out of the Common Expense Fund" -- not the Reserve Account -- "legal and accounting services necessary or desirable in connection with the operation of the Project or the enforcement of this Declaration." (R. 67) Certainly, the Trustees' use of the Reserve Account in this case contravenes the Declaration's clear directives and therefore, even if Trustees were entitled to exercise some degree of discretion -- which they are not -- in obtaining such legal services, they abused this discretion in this case. Moreover, the Trustees failed to obtain homeowner consent.

broad application and includes not only acts prohibited by the charter, but acts which are in excess of powers granted and not prohibited, and generally applie[s] . . . when the corporation has the power but exercises it irregularly"). The Trustees claim that because the Association, acting through the Trustees, has the power to sue and be sued, "[t]here can be no question that the prosecution of the CCI Litigation was authorized." In fact, the Trustees devote more than four pages of their brief to their tilted argument regarding the Trustees authority to act imperfectly as they did in this case.

Certainly the Association has the authority to sue. Further, Homeowners do not contend otherwise. What Homeowners contest in this case -- which contention the Trustees clearly do not understand -- is the manner in which the Trustees pursued this litigation. It is not disputed that the Trustees could have resorted to legal action to resolve the plumbing problems in this case. It is, however, disputed that the Trustees could divert and misappropriate funds, all while acting in secret, to pursue this legal action. Clearly, the Trustees have authority to sue and be sued. Clearer still, the manner in which the Trustees "sued" in this particular case, was in excess of the powers granted them and therefore "not within" the Trustees' authority.

The Trustees had no authority to go outside the express terms of the Declaration and Bylaws. The Trustees had no authority to authorize and fund from the Reserve Account an enormous and ill-fated litigation expenditure. The Trustees had no authority to

repeatedly disregard the pleas and complaints from their neighbors, the homeowners whom they were elected to serve, regarding this diversion of funds. Finally, the Trustees had no authority to attempt to correct their misdeeds by foisting a special assessment on the collective owners after the owners had soundly defeated this "assessment." In the face of these, and numerous other egregious indiscretions, see Opening Brief at pp. 27-28, the Trustees claim that "[t]here can be no question" but that the Trustees were authorized to divert funds from the Reserve Account, is unfathomable.

The Trustees acted completely without authority in this case. They repeatedly engaged in *ultra vires* conduct for which Homeowners are entitled to relief. Viewing Homeowners' Complaint in the light most favorable to Homeowners, this Court must reverse the district court's order of dismissal.⁹

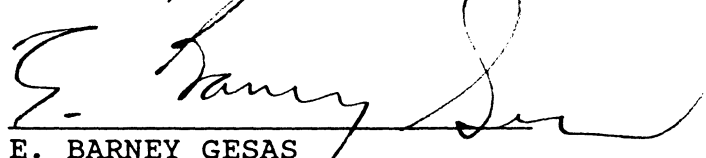
⁹ Finally, in response to Point VI of the Trustees' Brief, Homeowners would agree the district court's "speculation" is irrelevant. Indeed, it is because the speculation was irrelevant and wholly outside the proceedings then before the court that the district court erred. As set forth in the Opening Brief, it was irrelevant for the lower court to "speculate" on issues and scenarios not raised in Homeowners' Complaint and therefore not before the court. Further, it was error for the court to then use that speculation as a basis for dismissing Homeowners' Complaint. The lower court's speculation gave rise to an arbitrary denial of Homeowners' claim for relief which this Court must reverse. See In re Cruchelow, 926 P.2d 833, 834 (Utah 1996) (stating where trial court relied on its own "policy" to deny plaintiff's request for a name change, decision was based "purely on unsupported generalizations and speculation" and constituted an arbitrary denial of claim for relief).

CONCLUSION

Pursuant to Rule 8(a), 8(e) and 12(b)(6) of the Utah Rules of Civil Procedure, Homeowners' Complaint alleges sufficient facts, which taken as true, reasonably and adequately support a claim upon which relief can be granted. The district court erred in dismissing this Complaint based upon speculation and conjecture and an inappropriate application of the law. In relevant part, Homeowners have plead sufficient facts to support both their tort and contract claims, as well as the Homeowners' entitlement to attorney fees. Therefore, Homeowners request that this Court reverse the lower court's order dismissing their Complaint, remand this case for further proceedings, and permit Homeowners their day in court.

RESPECTFULLY SUBMITTED this 31st day of July, 1997.

CAMPBELL, MAACK & SESSIONS



E. BARNEY GESAS

BRIDGET K. ROMANO

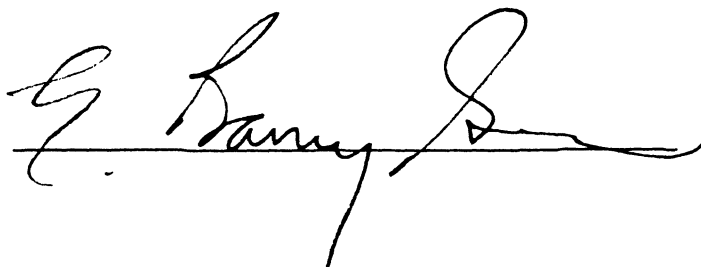
Attorneys for Appellants

CERTIFICATE OF SERVICE

I herewith certify that I am a member of and/or employed by the law firm of CAMPBELL MAACK & SESSIONS, One Utah Center, Thirteenth Floor, 201 South Main Street, Salt Lake City, Utah and that in said capacity and pursuant to Rule 21 Utah Rules of Appellate Procedure, two copies of the **Reply Brief of Appellants** were served upon the Defendants/Appellees by causing true and correct copies to be hand delivered to the following:

BRENT V. MANNING
MANNING CURTIS BRADSHAW & BEDNAR, LLC
370 East South Temple, Suite 300
Salt Lake City, UT 84111

DATED this 31st day of July, 1997.

A handwritten signature in cursive script, appearing to read "G. Denny", is written over a horizontal line.