

1999

Jean Levanger v. JOANN VINCENT, KEN  
FISHER, DIANE DUPLANTY, RON  
DUPLANTY, JAN NEMCIK, BECKY NELSON,  
ROSIE PETRONELLA, CORY ALSBERG,  
GERALD VINCENT, SANDY FISHER, SCOTT  
FEATHERSTONE, MARTIN ROGUSCHKA,  
LANCE SWEDISH LAUREL KANGAS, JOHN  
DOES 1-5, JANE DOES 1-5, and HIGHLAND  
ESTATES PROPERTIES OWNERS  
ASSOCIATION, INC. : Reply Brief

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Paul M. Belnap; Burt Ringwood; Strong and Hanni; Attorneys for Defendant/Appellant.

E. Jay Sheen; Robinson and Sheen; Attorneys for Plaintiffs/Appellees.

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IN THE UTAH COURT OF APPEALS

JEAN LEVANGER and REBECCA  
LEVANGER,  
Plaintiffs/Appellants,  
v.

JOANN VINCENT, KEN FISHER, DIANE  
DUPLANTY, RON DUPLANTY, JAN  
NEMCIK, BECKY NELSON, ROSIE  
PETRONELLA, CORY ALSBERG,  
GERALD VINCENT, SANDY FISHER,  
SCOTT FEATHERSTONE, MARTIN  
ROGUSCHKA, LANCE SWEDISH  
LAUREL KANGAS, JOHN DOES 1-5,  
JANE DOES 1-5, and HIGHLAND  
ESTATES PROPERTIES OWNERS  
ASSOCIATION, INC.,

Defendants/Appellees.

Case No. 990301-CA

Priority No. 15

## REPLY BRIEF OF APPELLANTS

APPEAL FROM SUMMARY JUDGMENT  
TAKEN FROM THE THIRD JUDICIAL DISTRICT COURT  
FOR SUMMIT, STATE OF UTAH  
Judge Pat B. Brian Presiding

Paul M. Belnap (No. 0279)  
Burt Ringwood (No. 5787)  
STRONG & HANNI  
9 Exchange Place, Suite 600  
Salt Lake City, UT 84111  
Telephone: (801) 84111  
Attorneys for Defendant-Appellee  
Highland Estates Homeowners  
Association

E. Jay Sheen (No. 3749)  
ROBINSON & SHEEN, L.L.C.  
1366 East Murray-Holladay Road  
Salt Lake City, Utah 84117  
Telephone: (801) 273-0855  
Attorneys for Plaintiffs-  
Appellants Jean and  
Rebecca LeVanger

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IN THE UTAH COURT OF APPEALS

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JEAN LEVANGER and REBECCA	:	
LEVANGER,	:	
	:	
Plaintiffs/Appellants,	:	
	:	
v.	:	
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JOANN VINCENT, KEN FISHER, DIANE	:	
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GERALD VINCENT, SANDY FISHER,	:	
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ESTATES PROPERTIES OWNERS	:	
ASSOCIATION, INC.,	:	
	:	
Defendants/Appellees.	:	
	:	

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INTRODUCTION

The Association amended its CC&R's by a method created whole cloth by the trustees. Appellee would have us believe that the Association's trustees invented the written balloting process in order to allow for more participation by the property owners. Nothing could be further from the truth. The trustees had attempted for years, unsuccessfully, to amend the CC&R's in face-to-face meetings of members of the Association. Having been defeated at every turn, the trustees created a method by which they controlled the flow of information, they created the rules and procedures for voting and tallying votes, and they controlled the outcome. The procedures they employed were contrary to the

Association's charter documents and the provisions of the extant CC&R's.

In pursuit of their goal, the trustees violated all of the fundamental rules of shareholder voting. There was no notice given to all members, there was no record of those entitled to vote, there was no record date set or membership list produced, deadlines for voting established by the trustees were ignored and extended without notice, and the explicit rules in the Associations' bylaws regarding tallying of votes were ignored.

#### REPLY TO APPELLEE'S STATEMENT OF FACTS

1. Appellee indicates in paragraph 4 of its Statement of Facts that the "bylaws do not specifically require that all voting be done at a meeting." The bylaws only contemplate face-to-face meetings. Sections 2.5 (voting requirements, casting votes, proxies), 2.6 (record date establishment), 2.7 (quorum, reconvened meetings), and 2.8 (irregularities) of the bylaws, only make sense in the context of a face-to-face meeting. Likewise, requirements of record dates, membership lists available at the time of voting, and determination of those entitled to vote, all require a face-to-face meeting and a definitive voting date.

2. Without the requirement of a meeting, fundamental rights of members can be ignored, which is precisely what was done in the present case. No record date was set. R. 749-752. No membership list was prepared or maintained at any time. R.

750-753. Voting deadlines were set and ignored. Voting was extended arbitrarily for more than one year because the trustees were unable to muster sufficient votes to amend the CC&R's. R. 51,53,54,356. In tallying votes, specific voting procedures were ignored. R. 33,512.

3. Contrary to the implication from Appellee's Statement of Facts, paragraph 4, while the Bylaws allow for reconvened meetings of shareholders, no meeting of shareholders of the Association prior to the filing of the present action was ever reconvened.

4. In reply to Appellee's Statement of Facts, paragraph 5, the trustees were never properly elected by vote of the shareholders of the Association, since no reconvened meeting was ever held, and yet the trustees acted and transacted business without authority.

5. Contrary to Appellee's assertions in its Statement of Facts, paragraphs 7 through 11, the Association's attorney recommended the written ballot mechanism not as an attempt to allow more participation by property owners, but in order to comply with the Association's CC&R's which clearly required that a majority of the members approve amendments. R. 245.

6. Appellee's Statement of Facts, paragraph 13, indicates that the notice to members "requested" that ballots be returned no later than November 30, 1994. In fact, both the notice to members and the letter from counsel for the Association clearly

indicated that the deadline for voting was November 30, 1994. The notice stated the ballot was "(to be returned by November 30, 1994)." R. 53. Mr. Welling's letter was even more explicit: "Please note: the voting period expires November 30, 1994; ballots must be returned by that date." (emphasis in original).

7. The trustees have expressed through their actions, time and time again, that they do not want the input of the property owners. Attempts to amend the CC&R's failed year after year, yet the trustees ignored the wishes of the property owners who participated and continued to scheme to amend them.

8. No one discussed the use of a reconvened meeting in connection with amending the CC&R's in 1994 since the Association's counsel had already informed the Board that use of a reconvened meeting was not an option.

9. Contrary to Appellee's Statement of Facts, paragraphs 14 and 15, and no matter how often Appellee asserts that the notice of the balloting to amend the CC&R's was hand delivered to each of the members of Highland Estates, the record is clear that the notice was not hand delivered and that all homeowners did not receive the notice and the ballot<sup>1</sup>. R. 473. No less that the past-President of the Association, Michael Ferrigno, testified that he "did not vote in 1994 when the Highland Estates

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<sup>1</sup> Note how carefully Appellee couches its statements in paragraphs 14 and 15 -- "the Amended CC&R's was to be hand delivered," and "Plaintiffs received by hand delivery." It, too, recognizes that not all members were hand delivered (or even delivered at all) the notice, ballot and amended CC&R's.



Properties Owners Association proposed to amend the CC&R's for the subdivision because I did not receive any notice of the vote," and "I did not receive any letters soliciting my vote, did not receive copies of the proposed amendments to the CC&R's, nor was I given a ballot with which to cast my vote." R. 473.

10. Paragraph 17 of Appellee's Statement of Facts notes that the January, 1995 Association newsletter extended the voting period for the measure. Appellee fails to note that the newsletter was sent months after the deadline for voting had already passed, the extension period for voting was never put to the vote of the members nor approved by the members, and there is nothing in the record to suggest that the newsletter was properly delivered to all members.

11. Paragraph 18 of Appellee's Statement of Facts is simply wrong and ignores the explicit wording of the notice and cover letter, the only documents the trustees supposedly went to great pains to deliver to all members. The deadline of November 30, 1994, was highlighted, and the exact words chosen and used by the Association's counsel were: "the voting period expires November 30, 1994."

12. Paragraph 20 of Appellee's Statement of Facts fails to note that the amended CC&R's as recorded varied substantially from the CC&R's submitted to the members for their approval. A provision dealing with liability of members for bridal path improvements, a key provision according the trustees in their

description of the amended CC&R's, was completely omitted from the CC&R's as recorded. Thirteen lots were excluded from the definition of residential lots in the recorded CC&R's versus the CC&R's submitted for approval. R. 756-767, 768-779.

13. The trial court, in ruling on Appellee's Motion for Summary Judgment, held that Appellants were proper parties to bring a derivative action on behalf of the Association, that they properly represented other members of the Association similarly situated, and that the action was properly brought as a derivative action, in the right of all the other shareholders of the Association. R. 654,655.

14. Contrary to the assertions of paragraph 33 of Appellee's Statement of Facts, plaintiff Rebecca LeVanger did not "wrongfully" secure the voting ballots and did not "circumvent" discovery procedures. She was given access to the ballots by the President of the Association upon request. There was nothing surreptitious about it<sup>2</sup>.

#### ARGUMENT

##### **I. The Trial Court Did Not Properly View the Evidence.**

The trial court failed to consider the cumulative effect that all of the procedural irregularities had on the voting process undertaken by the Association's trustees rendering the vote fatally defective.

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<sup>2</sup>The trustees voted to impeach Mr. Ferrigno as President and later asked Ms. LeVanger to request his resignation while he lay dying of cancer, in retaliation. They are now attempting to unseat Ms. LeVanger in retaliation for the lawsuit.

The Association failed to establish the propriety of the notice given to members. On its face, the Affidavit of Mr. Welling does not contain information regarding hand delivery of the notices. Yet the trial court accepted the unsupported representation of counsel for the Association.

The deadline for voting was explicitly set forth and later extended (long after the deadline had passed) until sufficient votes could be obtained to achieve the result the trustees desired. Even in circumstances in which mail-in balloting is allowed, there is must be a reasonable length of time to conduct the election. More than one year passed, 41 lots changed hands in the interim, the whole purpose of the balloting had to be lost on most voters by the end of the unreasonably lengthy balloting process.

Establishing a record date is fundamental to any voting process, defining eligibility to vote and identifying those entitled to vote. A record date was not established.

Votes were tallied behind closed doors, not at a face-to-face meeting. The voting irregularities were numerous and render the result voidable by the trial court.

Appellee argues that the actions of the trustees are protected by the business judgment rule. One of the very cases cited by Appellee, In re Croton River Club, Inc., 52 F.3d 41 (2d. Cir. 1995), questioned the applicability of the business judgment rule in the homeowner association context, citing the primary

case relied on by Appellee, Levandusky v. One Fifth Avenue Apartment Corp., 553 N.E.2d 1317 (N.Y. 1990). The court noted:

Levandusky emphasized that the business judgment rule was to be looked to for purposes of analogy only and that the rule would have to be adapted in light of the somewhat different context of boards of not-for-profit cooperative condominiums. *Levandusky*, 553 N.E.2d at 1321-22. It is the case with regard to such boards that members will be condominium owners and will rarely be wholly disinterested.

The trustees acted in their own self-interest and in bad faith in forcing the amended CC&R's on the Association's members and their actions should not be shielded by the business judgment rule.

## **II. The Trial Court Abused its Discretion**

The evidence sought to be introduced in connection with the motion to reconsider were the ballot results, proving the invalidity of the vote tally made, and the Affidavits of two home owners who came forward late in the process to offer their testimony on important matters of notice of the balloting process and sufficiency of the disclosure in the notice.

Counsel for plaintiffs did not waive plaintiffs rights to contest the trial court's denial of plaintiffs' motion to reconsider. Counsel agreed to go forward with oral argument, noting for the record that the pleadings had not been reviewed. The trial court indicated that it would consider whether it was necessary to review the pleadings. Following oral argument the trial court noted that its decision was based solely on procedural grounds and that it, therefore, had no need to review

the pleadings. Counsel for plaintiffs did not stipulate that the trial court's decision not to review the pleadings was correct or that plaintiffs would not appeal the trial court's decision on the matter.

As for the notion that counsel "agreed to submit," Appellee's argument is incredible. When the trial court, following argument, says "are you ready to submit" or "will you submit," it doesn't mean "if you say yes you are agreeing with everything I am doing here today!" It means, "are you done arguing." And plaintiffs' counsel was.

Trembly v. Mrs. Fields Cookies, 884 P.2d 1306 (Utah Ct. App. 1994), still provides the standard that should be applied in considering whether the trial court's decision was arbitrary and capricious:

when (1) the matter is presented in a "different light" or under "different circumstances;" (2) there has been a change in the governing law; (3) a party offers new evidence; (4) "manifest injustice" will result if the court does not reconsider the prior ruling; (5) a court needs to correct its own errors; or (6) an issue was inadequately briefed when first contemplated by the court.

Id. at 1311 (citations omitted).


The trial court abused its discretion and its ruling should be reversed.

#### CONCLUSION

The trial court erred and its decisions should be overturned.

DATED: November 19, 1999.

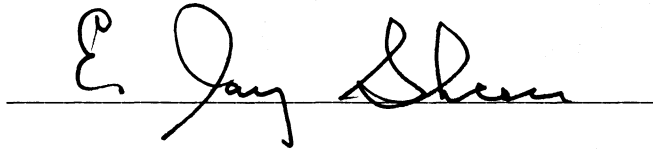
ROBINSON & SHEEN, L.L.C.

By   
E. Jay Sheen  
Attorneys for the LeVangers  
Appellants

CERTIFICATE OF SERVICE

I hereby certify that on November 19, 1999, two copies of  
Brief of Appellant were mailed to:

Paul M. Belnap  
Burt Ringwood  
STRONG & HANNI  
9 Exchange Place, Suite 600  
Salt Lake City, UT 84111

A handwritten signature in black ink, appearing to read "E. Jay Shuman", is written over a horizontal line.