

2002

Jean Levanger and Rebecca Levanger v. John Vincent, Ken Fisher, Diane Duplanty, Ron Duplanty, Jan Nemcick, Becky Nelson, Rosie Petronella, Cory Alsberg, Gerald Vincent, Sandy Fisher, Scott Featherstone, Martin Roguschka, Lance Swedish Laurel Kangas, and Highland Estate Properties Owners Association, Inc. : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

JEAN LEVANGER and REBECCA
LEVANGER,

Plaintiffs/Appellees,

v.

Case No. 20020090-CA

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/Appellants.

BRIEF OF APPELLEE AND CROSS-APPELLANT

APPEAL AND CROSS-APPEAL FROM ORDERS
TAKEN FROM THE THIRD JUDICIAL DISTRICT COURT
FOR SUMMIT COUNTY, STATE OF UTAH
Judge Robert K. Hilder Presiding

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FILED
Utah Court of Appeals

JAN 19 2003

Paulette Stagg
Clerk of the Court

PARTIES TO THE PROCEEDINGS
IN THE DISTRICT COURT

The caption of the case on appeal contains the names of all parties to the proceedings in the district court.

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IN THE UTAH COURT OF APPEALS

JEAN LEVANGER and REBECCA	:	
LEVANGER,	:	
	:	
Plaintiffs/Appellants,	:	
	:	
v.	:	
	:	Case No. 990301-CA
JOANN VINCENT, KEN FISHER, DIANE	:	
DUPLANTY, RON DUPLANTY, JAN	:	
NEMCIK, BECKY NELSON, ROSIE	:	Priority No. 15
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.	:	
	:	

JURISDICTION OF THE APPELLATE COURT

The Court of Appeals has jurisdiction pursuant to Utah Code Ann. § 78-2a-3(j) (2002). The appeal was transferred to the Court of Appeals from the Utah Supreme Court.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

The issues presented for review are these:

1. Did the trial court properly determine that LeVangers were proper representatives to pursue this derivative shareholders' action?
2. Did the trial court properly hold that a substantial benefit was conferred on Highland Estates, sufficient to justify the award of attorneys' fees to LeVangers?

3. Did the trial court err in granting defendant Highland Estates' motion for return of garnished funds?

Standard of Review

The standard of review on an appeal from the denial of the motion for directed verdict on the issues of standing and substantial benefit is the same. The parties in whose favor the judgment has been rendered, the LeVangers here, are entitled to all reasonable inferences that may be drawn from the facts. Appellants are required to marshal all the evidence and demonstrate that all of the evidence in favor of the determination is insufficient to support the trial court's decision. As the Utah Supreme Court held in Brewer v. Denver & Rio Grande W.R.R., 31 P.3d 557, 569 (Utah 2001):

[T]his standard obligates "the appealing party '[to] marshal the evidence in support of the verdict and then demonstrate that the evidence is insufficient when viewed in the light most favorable to the verdict.'" In other words, demonstrating insufficiency of the evidence requires an appealing party to show that all the evidence in favor of the verdict "cannot support the verdict."

(citations omitted).

As regards the appeal from the granting of the Association's motion to return garnished funds, the standard of review is one of abuse of discretion. Lund v. Hall, 938 P.2d 285, 287 (Utah 1997).

STATUTES AND RULES WHOSE INTERPRETATION IS OF
CENTRAL IMPORTANCE TO THE APPEAL

Rule 23.1 of the Utah Rules of Civil Procedure is of central importance to the Association's appeal, and provides as follows:

In a derivative action brought by one or more shareholders or members to enforce a right of a corporation or of an unincorporated association, the corporation or association having failed to enforce a right which may properly be asserted by it, the complaint shall be verified and shall allege (1) that the plaintiff was a shareholder or member at the time of the transaction of which he complains or that his share or membership thereafter devolved on him by operation of law, and (2) that the action is not a collusive one to confer jurisdiction on a court of the United States which it would not otherwise have. The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action he desires from the directors or comparable authority and, if necessary, from the shareholders or members, and the reasons for his failure to obtain the action or for not making the effort. The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association. The action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to shareholders or members in such manner as the court directs.

As regards the LeVangers' cross-appeal, Rule 4-504(1) & (2) of the Utah Code of Judicial Administration and Rules 5(b)(1), 58A(d), and 64D(e) of the Utah Rules of Civil Procedure are of central importance. They provide, in relevant parts, as follows:

(1) In all rulings by a court, counsel for the party or parties obtaining the ruling shall within fifteen days, or within a shorter time as the court may direct, file with the court a proposed order, judgment, or decree in conformity with the ruling.

(2) Copies of the proposed findings, judgments, and orders shall be served upon opposing counsel before being presented to the court for signature unless the court otherwise orders. Notice of objections shall be submitted to the court and counsel within five days after service.

Rule 4-504(1) & (2) of the Utah Code of Judicial Administration.

(b) Service: How made and by whom.

(1) Whenever under these rules service is required or permitted to be made upon a party represented by an attorney, the service shall be made upon the attorney unless service upon the party is ordered by the court. Service upon the attorney or upon a party shall be made by delivering a copy or by mailing a copy to the last known address or, if no address is known, by leaving it with the clerk of the court.

Rule 5(b)(1) of the Utah Rules of Civil Procedure.

(d) *Notice of signing or entry of judgment.* A copy of the signed judgment shall be promptly served by the party preparing it in the manner provided in Rule 5. The time for filing a notice of appeal is not affected by the requirement of this provision.

Rule 58A(d) of the Utah Rules of Civil Procedure.

(e) *Service of writ; return; general service (pre-judgment or after judgment).* The writ, any order pursuant to subdivision(s) of this rule, and any order pursuant to Rule 64A(3), shall be served upon the garnishee by a sheriff, constable, deputy, or such other person designated by court order and return thereof made in the same manner as a return of service upon a summons. All other service may be by first class mail or hand delivery.

Rule 64D(e) of the Utah Rules of Civil Procedure.

STATEMENT OF THE CASE

Nature of the Case

This is a derivative action brought by the LeVangers on behalf of members of the Highland Estates Properties Owners

Association similarly situated to seek rescission of the Association's execution and recording of amended CC&R's in 1995, approved by way of written ballot without benefit of a members meeting, as required by law. Not all members of the Association were contacted regarding their right to vote on the matter, and the proposed amended CC&R's, as presented to the members, was revised before recording. This Court overturned the trial court's grant of summary judgment in favor of the Association. The trial court has ordered the rescission of the amended CC&R's and the LeVangers were awarded their attorneys fees following an evidentiary hearing. The Association has appealed.

Following an order of the trial court granting the LeVangers their attorneys fees incurred in prosecuting the action, the LeVangers garnished from the Association the amount of the award. The Association obtained an order from the trial court requiring the return of the garnished funds. The LeVangers have appealed.

Course of Proceedings

Plaintiffs filed their verified complaint January 21, 1997. R.9. Defendant Homeowners Association filed its answer February 26, 1997. R.77.

Plaintiffs filed a motion to reconsider the decision granting summary judgment or to certify the order as final and appealable on July 16, 1998. R. 479. The Court denied the motion to reconsider and granted the motion to certify the

summary judgment as final pursuant to Rule 54(b) in its Order of March 3, 1999. R. 1063.

The LeVangers filed a Notice of Appeal on March 31, 1999. R. 1074. The case subsequently was poured-over to the Court of Appeals by Order dated May 18, 1999, and filed May 20, 1999. R. 1063.

The Court of Appeals issued its opinion April 13, 2000, reversing the decision of the trial court and holding that the amended CC&R's were illegally adopted by the Homeowner's Association. LeVanger v. Vincent, 3 P.3d 187 (Utah Ct. App. 2000). See Appendix E to Appellant's Brief.

Based on the decision of the Court of Appeals, the trial court ordered the rescission of the amended CC&R's and the LeVangers were awarded their attorneys fees following an evidentiary hearing. R. 1551-1556.

The Court entered its ruling awarding Plaintiffs their attorneys' fees and costs on November 27, 2001. R. 1551-1553. Based on the Court's written ruling, Plaintiffs provided a proposed Order to defendant Highland Estates by hand delivery on November 29, 2001. R. 1556. On November 29, 2001, Plaintiffs mailed a copy of the proposed order to the Clerk of the Court, Summit County. R. 1554-1556.

The Court, after the time for objection had run, signed the Order on December 11, 2001. R. 1555. Plaintiffs' counsel personally contacted the Court's Clerk on December 11, 2001, to

inquire as to the Judge's availability to sign the Order. R. 1610-1611. The Clerk informed plaintiffs' counsel that the Order had already been signed. R. 1611.

A Writ of Garnishment, directed to garnishee, Bank One Utah, N.A., was duly issued and served upon the garnishee on December 11, 2001. R. 1570-1576. The Garnishee mailed notice to defendant Highland Estates of the garnishment and of defendant's rights under Rule 64. R. 1575. The Affidavit of garnishee indicated that the Notice was mailed to Highland Estates on December 19, 2001. R. 1575.

Highland Estates knew of the signing of the Order by at least December 28, 2001. R. 1597. Defendant filed a Notice of Appeal in early January, 2002. R. 1583-1584. Defendant did not file a motion to stay collection activities, nor did it file a supersedeas bond with the Notice of Appeal.

The trial court granted the Association's subsequent motion seeking return of the garnished funds. R. 1621-1626.

The Association appeals and the LeVangers cross appeal.

STATEMENT OF FACTS

1. In their verified complaint, the LeVangers alleged, with respect to the standing issue:

1. Plaintiffs bring this action derivatively under Rule 23.1 of the Utah Rules of Civil Procedure, on behalf of themselves and all other members of Highland Estates Properties Owners Association, Inc. ("Highland Estates"), similarly situated, and in the right and for the benefit of Highland Estates.

2. Plaintiffs fairly and adequately represent the interests of the members similarly situated in enforcing the rights of Highland Estates and seek to enforce only claims on behalf of Highland Estates which management of Highland Estates refuses to pursue. Plaintiffs assert no personal claims against Highland Estates by this action.

3. Plaintiffs have owned a membership interest in Highland Estates at all times relevant to the allegations in this Complaint.

4. This is not a collusive action to confer jurisdiction on this Court that it otherwise would not have.

5. Several demands have been made by the plaintiffs on Highland Estates and on the individual defendants who are currently members of the Board of Trustees of Highland Estates. Defendants have refused to take action on the demands.

R. 8.

2. In its answer to the verified complaint, Defendant Highland Estates admitted that several demands had been made by the LeVangers on Highland Estates and on individual members of the Board of Trustees of Highland Estates.

R. 74.

3. Highland Estates filed a motion for summary judgment on November 26, 1997. In its memorandum, Highland Estates argued that plaintiffs did not have standing to pursue the action derivatively:

In the case at hand plaintiffs purport to represent all members of Highland Estates. Plaintiffs are unable to fairly and adequately represent the interests of the other members because: (1) the plaintiffs's sole motive for bringing this action was vindication against certain Board members; (2) plaintiffs' personal interest substantially outweigh any derivative interests; (3) economic antagonism exists between the

LeVangers and the members; and (4) plaintiffs have virtually no support from the other members.

R. 211-212.

4. In opposition to plaintiffs' motion for summary judgment on the standing issue, the LeVangers obtained Affidavits from Shelby Jean Ramsdell and Robert G. Blackbourn, Jr., members of the Highland Estates Properties Owners Association in support of the LeVangers. R. 355-357; 359-362.

5. Shelby Jean Ramsdell was a member of the Highland Estates' Board of Trustees at the time she executed her Affidavit.

R. 360.

6. Ms. Ramsdell knew of other members who were delinquent in payment of their assessments to the Association. R. 360.

7. Ms. Ramsdell had paid assessments to the Association under protest before. R. 360

8. Ms. Ramsdell agreed with the LeVangers in their allegations regarding the unlawful adoption of the amended CC&R's in 1994. In her Affidavit she stated:

11. In 1994 the Association proposed amending the CCR's, and I voted against the amendments.

12. On or about September 19, 1996, after an annual Property Owners meeting, I voiced my protest to Association President regarding the balloting process and the length of time the Association took to collect ballots to amend the CCR's from August 1994 until they were recorded in October 1995.

R. 361.

9. Mr. Blackbourn had been delinquent in his payment of assessments to the Association. R. 356.

10. Mr. Blackbourn agreed with the LeVangers in their allegations regarding the unlawful adoption of the amended CC&R's in 1994. In his Affidavit he stated:

The CCR's had a deadline of November 30, 1994. A year later votes were still being solicited. The Association never voted to extend the vote or take a new vote.

R. 356.

11. Ms. LeVanger filed an Affidavit in opposition to Highland Estates' motion for summary judgment on the issue of the LeVangers' standing to pursue the action derivatively. In it, she stated:

14. Other homeowners agree with my husband and me. I was recently elected as a member of Association's Board of Trustees. Other Board members have voiced complaints similar to mine. I am not vindictive toward any Board member.

R. 372.

12. The trial court granted Highland Estates' motion for summary judgment solely on the issue of the legality of manner by which the CC&R's were amended. The trial court denied Highland Estates' motion for summary judgment on all other issues, including the issue of the LeVangers' lack of standing to pursue the action derivatively.

1. The defendant's Motion for Summary Judgment is hereby granted in part and denied in part as follows:

A. All of plaintiffs' claims set forth in plaintiffs' Complaint relating to the conduct of the members of the Board of Trustees of Highland Estates in the manner in which the Amendment to Declaration of Restrictive and Protective Covenants was voted on and approved are hereby dismissed with prejudice.

B. Defendant's Motion for Summary Judgment as it relates to all other claims in plaintiffs' Complaint is hereby denied.

R. 470-471.

13. In his ruling on Highland Estate's Motion, the trial judge, Judge Nehring, noted that: "I'm at this time denying the motion, for lack of a better term, to disqualify the Levangers as derivative action claimants, or plaintiffs" R. 453.

14. In his ruling on Highland Estate's Motion, the trial judge also noted that:

It is true that there is nothing -- few things -- more fundamental to corporations, entities in general, than this process by which those entities amend their charters or their beginning documents so to speak.

R. 447.

15. On July 15, 1998, the LeVangers filed a Motion to Reconsider the trial court's partial grant of summary judgment relating to the legality of the adoption of the CC&R's. R. 479-481.

16. In support of their motion to reconsider, the LeVangers obtained affidavits from Christie Bamberg and Michael Ferrigno, both members of the Highland Estates Properties Owners Association. R. 472-474; 475-478.

17. Mr. Ferrigno was the then President of Highland Estates and a member of the Board of the Association. R. 473. He stated in his Affidavit:

4. I did not vote in 1994 when the Highland Estates Properties Owners Association proposed to amend the CC&R's for the subdivision because I did not receive any notice of the vote.

5. 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.

6. No one personally came to my house and solicited my vote on the amended CC&R's at any time.

R. 473.

18. Ms. Bambery stated in her Affidavit:

10. I share the opinion of the LeVangers, plaintiffs herein, that the Board of Trustees has operated the Association illegally and in violation of the Association's Articles, bylaws and CC&R's.

R. 476.

19. At the beginning of the hearing on June 26, 2001, the trial court, Judge Hilder, and counsel for the Association had the following exchange:

THE COURT: Obviously, this case has been around a while. I read the Court of Appeals decision and I -- I assume they're not -- there's not a lot to be said about the underlying summary judgment, as far as the election and the validity of the amended CC&Rs. That's really not what your objection is, Mr. Belnap. It's the fees, it's the issues, of course, about probably the benefit and about the reasonableness; is that correct? On the evidentiary basis.

MR. BELNAP: It is, Your Honor. As you know, from having the file, we were nine days away from trial of this case, and we filed a motion for summary judgment. Judge Nehring heard that and granted it

partially, and that's what the Court of Appeals dealt with. There are just some very broad sweeping allegations in the Complaint about breach of fiduciary duty, and that's the cause of action. And he said, "Well, what I'm going to do is -- is -- in talking to counsel, he said, "What's this case really about?" And counsel said, "Well, it's really about the voting --

THE COURT: Uh-huh.

MR. BELNAP: -- and these CC&Rs." And so he said, "Well, I'm going to grant that and then we're going to see where that takes us," because Mr. Sheen indicated he wanted to take an appeal. And that's where we are today.

So I don't know if there's anything left to try on the lawsuit itself, based on that previous discussion at the time of summary judgment, but we certainly do have a concern which we've raised in our papers about benefit, success in the litigation. Also, do the LeVangers fairly represent --

THE COURT: Oh, yeah, the derivative. Yeah.

MR. BELNAP: -- the derivative issue, Judge, and then simply on the fees themselves, we don't think that there's -- that they meet Utah law's evidentiary requirement for the showing.

THE COURT: You've raised a lot of issues, all around the same essential issue of the fees, and they seem to be very fact-intensive.

R. 1634, p. 2-4.

20. In its ruling of November 27, 2001, the trial court held:

The court agrees that plaintiffs must satisfy the substantial benefit test to receive fees, but once it is shown that the Association was required to change its practices, and that certain rights of the Association members, as asserted by plaintiffs, were vindicated, the court cannot say that a substantial benefit was not conferred. The extent of the benefit is potentially far-reaching, and for the court to engage in excessive assessment of the quality of the benefit would likely discourage similarly situated plaintiffs from taking aggressive action for fear of

the financial burden if the court found that some, but not enough, benefit was conferred in a particular case.

R. 1552.

21. At the conclusion of the September 19th hearing, the trial court agreed that the LeVangers had not waived the right to present evidence on the standing issue, if necessary to preserve their right to pursue the action:

MR. ROBINSON: And I apologize for interrupting, but we do need to reserve the standing issue of -- if that's -- I mean that --

THE COURT: Well, here's the thing. I don't know if it's a big issue or not. What I'm proposing is that you each have until a week from Friday, the 28th, at 5:00 to file any supplemental brief you want. It can include standing, it can include entitlement fees, it can include the summary of the testimony on the reasonableness and necessity in the way of a closing. And, frankly, standing is not an issue or, if it is, it may be factual and I'll have to consider another hearing. I mean -- but you're not waiving it at this time.

MR. ROBINSON: Right.

THE COURT: But I may determine, based on the brief, that it's not even an issue or I may determine we need more, and I could determine, you know, Mr. Belnap's right, there's no standing. So I cannot tell you. You'll have to make your best argument of what I should do with it.

MR. ROBINSON: I understand.

R. 1634, p.148.

22. The Court entered its ruling awarding Plaintiffs their attorneys' fees and costs on November 27, 2001. R. 1551-1553.

23. Based on the Court's written ruling, Plaintiffs provided a proposed Order to defendant Highland Estates by hand delivery on November 29, 2001. R. 1556.

24. On November 29, 2001, Plaintiffs mailed a copy of the proposed order to the Clerk of the Court, Summit County. R. 1554-1556.

25. The Court, after the time for objection had run, signed the Order on December 11, 2001. R. 1555. Plaintiffs' counsel personally contacted the Court's Clerk on December 11, 2001, to inquire as to the Judge's availability to sign the Order. R. 1610-1611. The Clerk informed plaintiffs' counsel that the Order had already been signed. R. 1611.

26. A Writ of Garnishment, directed to garnishee, Bank One Utah, N.A., was duly issued and served upon the garnishee on December 11, 2001. R. 1570-1576. The Garnishee mailed notice to defendant Highland Estates of the garnishment and of defendant's rights under Rule 64. R. 1575.

27. The Affidavit of garnishee indicated that the Notice was mailed to Highland Estates on December 19, 2001. R. 1575.

28. Highland Estates knew of the signing of the Order by at least December 28, 2001.

29. The trial court granted the Association's subsequent motion seeking return of the garnished funds. R. 1621-1626.

SUMMARY OF ARGUMENT

The LeVangers, on behalf of all members of the Association, contested the methods employed by the Board of the Association to amend the CC&R's affecting the members' property. The trustees chose to employ a mail-in balloting process, inventing new rules or ignoring established rules of corporate governance as it suited their purposes in allegedly obtaining approval for the amended CC&R's. Their methods were fatally defective -- no record date for members entitled to vote was established; notice of the altered method for approving the amendments was not provided to all members; the deadline for voting was unilaterally extended, without advance notice; property owners who became such only after the voting process began were allowed to cast ballots; voting tallies were improperly kept.

In its appeal, the Association has not marshalled all the evidence from the record that supports the trial court's determination that the LeVangers are proper representatives and entitled to their fees. The LeVangers have standing to pursue this action, since the adequacy of LeVangers representation of the other members of the Association has been previously resolved. The Association has the burden of establishing that the LeVangers are inadequate representatives and it has not met its burden. Alternatively, the Association has waived the standing issue since it has not objected to the award of substantive relief to the LeVangers.

At the very least, the LeVangers are entitled to an evidentiary hearing on the issue of their standing as adequate representatives since they preserved the issue with the trial court.

The LeVangers, through their derivative action, have conferred a substantial benefit on the Association and its Members by this action. Maintaining the integrity of the voting process is a substantial benefit, as is reaffirming the in-person meeting process, and enforcing strict compliance by the Association and its Board with applicable statute.

The Association is not entitled to the return of garnished funds.

ARGUMENT

I. The Association Has Not Marshalled All the Evidence.

As this Court has noted:

[I]n order to challenge a trial court's findings of fact on appeal, the challenger "must marshal *all* the evidence in support of the findings and then demonstrate that the evidence is insufficient to support the findings in question." . . . We will uphold the trial court's findings of fact if a party fails to appropriately marshal all of the evidence. . . . Defendant has not properly marshaled the evidence but has merely recited the findings on point and then highlighted the evidence which he deems contrary to the findings. Accordingly, we do not disturb the trial court's findings and affirm the awards on appeal.

Marshall v. Marshall, 915 P.2 508, 516 (Utah Ct.App. 1996).

Here, as in Marshall, all the Association has done is recite the evidence in the record it contends does not support the trial court's conclusion. The Association must deal with the evidence

in the record, including all reasonable inferences to be drawn therefrom, that supports the trial court's decision, and demonstrate how that evidence remains insufficient to justify the trial court's decision.

Particularly, as regards the trial court's conclusion that Judge Nehring did reach the merits of the standing issue and effectively held that the LeVangers had standing. The Association does nothing to marshall all the evidence that would support such a conclusion by the trial court.

As indicated in the LeVangers' statement of facts herein, there is ample evidence to support the trial court's decision. This Court need only review the facts set forth above, particularly paragraphs 4 through 18 to understand how far short the Association has fallen in marshalling **all** the evidence.

II. The LeVangers Have Standing to Pursue This Action.

The LeVangers standing to pursue this action is limited to the issue of the adequacy of their representation of the other members of the Association similarly situated. The issue has been previously resolved or, in the alternative, the Association has waived the issue. In any event, and just as importantly, it is the Association's burden to establish that the LeVangers are inadequate representatives.

A. The Adequacy of LeVangers Representation of the Other Shareholders Has Been Previously Resolved.

The LeVangers have alleged and proven their right to represent all property owners similarly situated in prosecuting

this action. On at least two occasions, the Association's motion attacks on the adequacy of plaintiffs' representation have been rejected.

Defendant first attempted to attack the adequacy of plaintiffs' representation in connection with its motion for summary judgment in 1998. Most of the written material, the memoranda, the affidavits and the oral argument in the hearing on January 6, 1998 dealt with the adequacy of representation. The Association argued the alleged inadequacy of representation on four bases:

- (1) the plaintiffs's sole motive for bringing this action was vindication against certain Board members;
- (2) plaintiffs' personal interest substantially outweigh any derivative interests; (3) economic antagonism exists between the LeVangers and the members; and (4) plaintiffs have virtually no support from the other members.

R. 211-212.

The trial court rejected all of the Association's contentions and the issue of standing and it lost. Judge Nehring determined that the Association had failed to meet its burden of challenging the adequacy of the LeVangers' representation and denied the Association's motion to disqualify plaintiffs as adequate representatives.

Such a result is not surprising. The Association offered no evidence of the LeVangers' personal animosity toward any particular Board member as being the determining factor in bringing this action. This Court, as the trial court did, need

look no further than the fact that though individual Board members were named as defendants for procedural purposes, no action has been pursued against individual members of the Board.

The LeVangers personal interests are no different than any other member of the Association -- to correct the Association's methods of operation and prevent the Association from trampling on members rights to be heard and cast informed votes, and to prevent the Association and its Board from acting contrary to the Association's charter documents, including the CC&R's, and state statutes.

As for economic antagonism, the record is clear that the LeVangers were not unique in their protests over assessments. Other members were upset with the assessment process, had paid assessments under protest, and had been delinquent in the payment of assessments.

No where is the Association's failure to discredit the LeVangers more hollow than when it contends, as it continues to do to this very day, that no other members support the LeVangers in their pursuit of justice for members of the Association. Many members, including Board members and a President of the Association, both elected by the members, signed Affidavits supportive of the LeVangers and their attempts to require the Association to act within the law. Ms. LeVanger, herself, was elected a Board member during the pendency of the present action! The facts clearly establish that many other members are so

supportive of the LeVangers in the present case that they will sign Affidavits on their behalf and will elect one of the LeVangers to serve on the Board of Trustees.

B. Highland Estates Has the Burden of Establishing that the LeVangers are Inadequate Representatives, and Did Not Meet Their Burden.

The law is clear that the Association has the burden of establishing that the LeVangers are inadequate representatives of the members of the Association. See, e.g., Riqgin v. Rea Riqgin & Sons, Inc., 738 N.E.2d 292, 299 (Ind. Ct. App. 2000) ("[F]ederal courts interpreting F.R.C.P. 23.1 have held that the burden should rest with the defendant to show that the plaintiff is not a fair and adequate representative"); Schneider v. Austin, 94 F.R.D. 44 (1982) ("Defendants bear the burden of demonstrating inadequate representation"). See also, Gottlieb v. Wiles, 11 F.3d 1004, 1014 (10th Cir. 1993):

Unlike class actions under Rule 23, in shareholder derivative suits under Rule 23.1, a preliminary affirmative determination that the named plaintiffs will fairly and adequately represent the interests of the other class members is not a prerequisite to the maintenance of the action. Rather, the rule provides only that the derivative suit may not be maintained if it appears that the named shareholder does not fairly and adequately represent the other shareholders.

The Association has failed to carry its burden. It failed in its original motion for summary judgment before the trial court, and it failed during the September 19th hearing.

III. The Association Has Waived the Standing Issue.

The adequacy of plaintiffs' representation was recognized by the parties on the prior appeal. Plaintiffs and defendant addressed the Utah Court of Appeals and acknowledged without qualification to the Court of Appeals that the case before the court was a "derivative action." ("This is a derivative action brought by plaintiffs" Appellant's Brief at 3. "This is an action brought by Jean and Rebecca LeVanger, as a derivative action" Appellee's Brief at 3.) Nothing in the parties' briefs or in oral argument asserted that the adequacy of plaintiff's representation had not been resolved in the trial court.

The defendant attempted again to attack the plaintiffs' adequacy as representatives in response to plaintiffs' motion for summary judgment before this court following the appellate decision. In memoranda and in oral argument, plaintiffs argued then that the issue of adequate representation had been previously resolved. On June 26, 2001, this Court rejected defendant's contention and granted plaintiffs' motion for summary judgment. The Court ordered that the 1995 Amended CC&R's be rescinded and a recording to that effect be made. The Court could not have issued its order of June 26, 2001, if the plaintiffs were inadequate representatives to prosecute the action. The Court reserved for later hearing only attorney fees, i.e., reasonableness of plaintiffs' fees and the benefit

conferred to the extent that issue bore on the reasonableness of those fees.

The entire tenor of the Association's arguments before the trial court at the June 26th and September 19th hearings was that the only remaining issue before the trial court was the LeVangers' request for fees. Right at the beginning of the first hearing, the Court began by outlining the remaining issues, and counsel for the Association agreed:

THE COURT: [T]here's not a lot to be said about the underlying summary judgment, as far as the election and the validity of the amended CC&Rs. That's really not what your objection is, Mr. Belnap. It's the fees, it's the issues, of course, about probably the benefit and about the reasonableness; is that correct? On the evidentiary basis.

MR. BELNAP: It is, Your Honor.

R. 1634, p. 2.

Later on, the Association conceded that the substantive relief requested in the LeVangers' lawsuit, should be granted by the trial court based on the decision of the Court of Appeals in LeVanger, 3 P.3d 187: "So I don't know if there's anything left to try on the lawsuit itself, based on that previous discussion at the time of the summary judgment." R. 1634, p. 3.

The Court also indicated the LeVangers were entitled to substantive relief. "What's your opinion on that, Mr. Sheen? And I think you get your summary judgment on the underlying issues. I cannot imagine why you wouldn't. And I guess, in the formal matter, what the Court of Appeals gave you." R. 1634, p.

4. The Association did not object that substantive relief should be granted and that the Association should rescind its amended CC&R's.

At the Sept. 19th hearing, the Association reiterated that there was nothing more to litigate in this case than the fees requested and the form of the eventual Order on the rescission of the amended CC&R's, based on the decision of the Court of Appeals.

MR. BELNAP: If there's nothing left to litigate in the Complaint other than the fees and then the form of orders, the separate issues that we have submitted, or can submit orders on, Judge, which we have them here today that we've each prepared --

THE COURT: Okay.

MR. BELNAP: -- then I think that resolves it and we're ready to go.

R. 1634, p. 18.

The Association raised the standing argument in the September 19th hearing **solely** for the purpose of defeating the LeVangers attempt to recover their fees in the derivative action. "MR. BELNAP: Under Rule 23, the plaintiffs have to establish to this Court that they have standing. That issue was not decided below [sic] and remains a threshold issue for this Court to determine with respect to whether they recover attorneys fees."

R. 1634, p. 29.

Similar attempts to resurrect the standing issue at late stages of a proceeding have been rejected by the courts. Thus, in In Re Cendant Corporation Litigation, 264 F.3d 201, 251-52

(3rd Cir. 2001), the court held that the defendants waived their objections to class certification:

The Davidsons first argue that the District Court erred by failing to make explicit findings that all of Federal Rule of Civil Procedure 23's requirements were met when certifying the Class. . . . In their Reply Brief, the Davidsons add the argument that Rule 23(a)'s commonality requirement was not met as well. However, the Davidsons neglected to raise these arguments in a timely fashion, failing to raise them until the settlement approval stage. We thus conclude that they waived these arguments by not raising them earlier. See Joel A. v. Giuliani, 218 F.3d 132, 140 (2d Cir. 2000) (holding that objectors to a class action settlement who argued, at the settlement approval stage, that the Rule 23 requirements were not met for them in their subclass were untimely with their objection, and thus the objection was waived).

Having agreed that the LeVanger's were entitled to the affirmative relief sought in the action, the Association waived its right to subsequently contest the adequacy of the LeVangers representation of other members of the Association similarly situated.

IV. The LeVangers Are Entitled to an Evidentiary Hearing on the Issue of Their Standing as Adequate Representatives.

Should this Court rule that there was insufficient evidence to support the trial court's determination that the LeVangers have standing to pursue this action, the LeVangers are entitled to an evidentiary hearing to establish, once and for all, their right to pursue this action derivatively.

The trial court noted, at the conclusion of the last hearing in this matter, that the LeVangers would be entitled to an evidentiary hearing if the issue came down to the sufficiency of

the evidence supporting the adequacy of the LeVangers representation of other members similarly situated in the Association: "[THE COURT:] [S]tanding is not an issue or, if it is, it may be factual and I'll have to consider another hearing. I mean -- but you're [the LeVangers] not waiving it at this time." R. 1634, at p. 148.

V. A Substantial Benefit Has Been Conferred on the Association and its Members by this Action.

The LeVangers are entitled to their attorneys' fees for having conferred a substantial benefit on the Association and its members.

"In a stockholder's derivative action, when the stockholder confers a substantial benefit upon the corporation, the stockholder bringing the derivative action is entitled to recover a reasonable attorney fee from the corporation." American Family Care, Inc. v. Irwin, 571 So.2d 1053, 1062 (Ala. 1990).

Courts have had numerous opportunities to define the scope of the "substantial benefit" that must be conferred on the corporation to justify an award of attorneys fees. In American Family Care, the trial court imposed a constructive trust on 15% of the company's outstanding shares to remedy a breach of the duty of loyalty by a principal in the company. The Supreme Court of Alabama upheld an award of attorneys' fees, agreeing that a substantial benefit had been conferred on the corporation. In Mills v. Electric Auto-Lite Co., 396 U.S. 375, 396 (1970), the United States Supreme Court held that, "in vindicating the

statutory policy [regarding proxy solicitations], petitioners have rendered a substantial service to the corporation and its shareholders. . . . [R]egardless of the relief granted, private stockholders' actions of this sort 'involve corporate therapeutics,' and furnish a benefit to all shareholders"

See also, In re Vitalink Communications Corp. Shareholders Litigation, 6 FED. SEC. L. REP. ¶ 96,585, at 92,746 (Del. Ch. 1991) (claims asserted in derivative action were "very weak," settlement "provided speculative benefits to the class," including ten day extension of tender offer and limitation of allowable expenses; attorneys' fees and costs of \$275,000 awarded); Martin v. F.S. Payne Co., 569 N.E.2d 808 (Mass. 1991) (judgment gave disinterested shareholders a right to vote to invalidate insider stock purchase; fees and costs awarded even though stockholders subsequently approved insider purchase terms); Scott v. Anderson Newspapers, Inc., 477 N.E.2d 553, 563 (Ind. App. 1985) (derivative action sought declaratory judgment on proper interpretation of corporation charter; all fees and costs awarded); Lewis v. Anderson, 692 F.2d 1267, 1270-71 (9th Cir. 1982) (derivative action challenged validity of stock option grants; company obtained shareholder ratification of grants after lawsuit was filed; all fees and costs of derivative action awarded); Neese v. Richer, 428 N.E.2d 36, 39 (Ind. App. 1981) (shareholder in derivative action had lost on issues of mismanagement, fraud and conversion of assets but had won on

request for accounting; all fees and costs awarded). Wright and Miller have noted that "[t]he trend appears to be to allow reimbursement [of a derivative plaintiff's attorneys fees and costs] whenever the action furthers the objectives of the derivative suit procedure or the policies of any applicable substantive law." FEDERAL PRACTICE AND PROCEDURE, § 1841, at 205 (2d ed. 1986) (footnote omitted).

As the Court of Appeals of Indiana noted, in DRW Builders, Inc. v. Richardson, 679 N.E.2d 902 (1997), "because the corporation is the beneficiary of the recovery of funds **or of the corrective benefit** of a derivative action, the corporation bears the expense of attorneys' fees in shareholder derivative suits." (citation omitted; emphasis added).

A. Maintaining the Integrity of the Voting Process is a Substantial Benefit.

Courts have held that upholding a shareholder's right to vote is a substantial benefit, in and of itself. The Federal Court of Appeals for the Second Circuit, in Amalgamated Clothing v. Wal-Mart Stores, 54 F.3d 69, 70 (1995), noted that: "the right to cast an informed vote, in and of itself, is a substantial interest worthy of vindication." In that case, the court upheld an award of attorney's fees for the derivative plaintiffs, holding "that the promotion of corporate suffrage regarding a significant policy issue confers a substantial

benefit regardless of the percentage of votes cast for or against the proposal at issue." Id.

All of the judges who have considered the issue in this action have noted how fundamentally important it is to maintain the integrity of the voting process in a corporation, particularly as regards amending charter documents. The CC&R's for a homeowners' association are at least as critical and fundamental to its operation as are its Articles and Bylaws.

The trial court in the matter now before the Court, even while ruling against the LeVangers on the propriety of the manner in which the Association's CC&R's were amended, noted: "It is true that there is nothing -- few things -- more fundamental to corporations, entities in general, than this process by which those entities amend their charters or their beginning documents so to speak." R. 241.

This Court also noted, in its prior opinion in this action, that: "The statutory and by-law provisions requiring that action by members of a nonprofit corporation be taken only at a duly convened meeting protect the interests of the members of the association; strict compliance with these provisions is therefore required." LeVanger, 3 P.3d at 191.

B. Reaffirming the In-Person Meeting Process is a Substantial Benefit.

Courts have uniformly held that upholding the integrity of the face-to-face meeting process is a substantial benefit, warranting attorneys' fee recovery. Thus, in Amalgamated, 54

F.3d at 71, the Second Circuit held: "The district court identified the facilitation of communication among shareholders and between shareholders and management as a substantial interest that was vindicated by plaintiffs' action. We agree."

Similarly, in the present action, this Court has already noted the importance of complying with the Association's charter documents in conducting shareholders' meetings. In LeVanger, 3 P.3d at 190 and 191, this Court noted:

We conclude the present case raises the same concerns. The Act's requirement that Association members act only at a duly called meeting protects the rights of the members and is therefore for their benefit. See id. The Association included a similar protection in its by-laws, which, like the Act, contemplate actions taken only at a duly constituted meeting of Association members. That by-law, like the Act, protects the Association's members by requiring that member actions be taken at member meetings where free discussion and dissent can be heard. Absent a meeting, the homeowners' consent must be unanimous.

C. Enforcing Strict Compliance with Statute is a Substantial Benefit.

The Association and its Board has always maintained that their actions were taken in good faith and were substantially compliant with the law. This Court noted that substantial compliance sufficient: "We conclude that, because the voting procedures protect the members' interests, they are mandatory rather than directory and therefore strict compliance is required. Because the mail-in balloting procedure did not comply strictly with either the Act or the Association's by-laws, we conclude it was ineffectual." Id. at 191.

The Association apparently has not even yet understood that admonition (strict compliance), as it maintains in its Brief that the recent changes to the non-profit corporation act allowing for mail-in balloting suggest their prior actions were not so bad. The Association's open-ended mail-in balloting process to amend the CC&R's, with fixed deadlines far beyond the pall of the statute, with selective mailings and member contacts (and lack thereof), with extension of the announced deadline without notice to members, and counting votes with no consideration to who the record shareholders were, has no relationship whatsoever to any legitimate balloting process, even though some process of balloting is now recognized by statute. The Association would also continue to ignore its own charter documents, even though this Court went to pains to point out that both the statute then in effect **and** the Association's bylaws contemplated in-person meetings.

VI. The Association is not Entitled to the Return of Garnished Funds.

The LeVangers fully complied with Rule 4-504 of the Utah Rules of Judicial Administration as it relates to providing the Association a copy of the proposed Order relating to the granting of the LeVangers' motion to be awarded their fees. The Association had an opportunity to object. The Association was given a copy of the proposed Order in advance of its being submitted to the Court for signature.

The LeVangers' counsel intended to obtain the Court's signature on the Order on December 11, 2001, but discovered the Order had already been signed when he went to the court clerk's office in Park City. All of the time requirements of the rule were followed. The trial court, on its own, and apparently computing the deadlines independent of either of the parties, executed the form of the Order in advance of anyone's request.

Rule 5 was fully complied with as it relates to the Writ of Garnishment and related papers. Rule 64D provides the notice requirements, and the Association received actual and proper notice of the garnishment, through the mailing made to it by the garnishee. There is no requirement that the Associations's counsel also be given notice. Rule 5 requires **either** that counsel or the party to the action receive notice, which the party did in this case. Post-judgment matters, certainly as regards collection, are routinely directed to the party in the action, not party's counsel. Each of the rules regarding post-judgment activities allows for personal service of the party to the action. For example, Rule 69 regarding writs of execution provides personal service on the judgment debtor "in the same manner as service of a summons in a civil action." Rule 69(g), Utah Rules of Civil Procedure. See also, Lincoln Benefit Life Insurance Company v. D.T. Southern Properties, 838 P.2d 672 (Utah Crt. App. 1992) (personal service of the individual defendant in the action, Hogle, with orders in supplemental proceedings and

bench warrants). In garnishment proceedings, notice is proper when the garnishee mails the garnishment papers to the party, which was done in this case. It is uncontested the Association received the garnishment papers. It simply neglected to go to its mailbox and get them.

Given a similar situation, the Utah Court of Appeals, in Lincoln Benefit Life, supra, held that:

Notwithstanding the argument that Lincoln and Allstate failed to give notice, Hogle received notice of the default judgment on July 18, 1990, when he was personally served with the court's order in supplemental proceedings. This notice, which Hogle received approximately seven weeks after the court entered default judgment, provided him adequate opportunity to timely move to set aside the default judgment.

Likewise, here, defendant had adequate opportunity to pursue any or all of the remedies noted above upon learning the judgment had been entered.

The notice requirement of Rule 58A with regard to the **executed** Order from Court's November ruling was not followed, but there was absolutely no detriment to the Association. The Association had actual knowledge of the execution of the Order no later than December 28, 2001, according to counsel's own admission. The Association had the ability to pursue one or more of the following legal remedies thereafter: (1) request for reconsideration of its objections or of the Court's Order; (2) motion to stay collection activities pending appeal; or, (3)

filing of supersedeas bond with the filing of the appeal.

Defendant **elected** not to pursue any of those remedies.

The trial court abused in discretion in ordering the return of garnished funds, and its decision should be vacated.


CONCLUSION

The trial court's decision to award the LeVangers their attorneys fees is correct and should be upheld.

The trial court abused its discretion in ordering the return of garnished funds and should be reversed.

DATED: January 10, 2003.

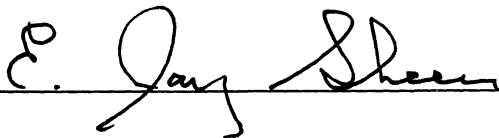
ROBINSON & SHEEN, L.L.C.

By 
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Appellees

CERTIFICATE OF SERVICE

I hereby certify that on January 10, 2003, two copies of
Brief of Appellee were mailed to:

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ADDENDUM

Pursuant to Rule 24(a)(11) of the Utah Rules of Appellate Procedure, no addendum to Appellee's Brief is necessary.