

2016

**JEAN A. RAPOPORT AND RICHARD N. RAPOPORT, Trustees of the  
RAPOPORT FAMILY TRUST Appellants vs. JUDY MARTIN, an  
individual and FOUR LAKES VILLAGE HOMEOWNERS  
ASSOCIATION, A Utah Nonprofit corporation Appellees : Reply  
Brief**

Utah Court of Appeals

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 IN THE UTAH COURT OF APPEALS
 

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JEAN A. RAPOPORT AND  
RICHARD N. RAPOPORT,  
Trustees of the RAPOPORT  
FAMILY TRUST

Appellants

vs.

JUDY MARTIN, an individual and  
FOUR LAKES VILLAGE  
HOMEOWNERS ASSOCIATION,  
A Utah Nonprofit corporation

Appellees

Appellate Court  
Case No. 20160935-CA

Oral Argument Requested

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 APPELLANTS REPLY BRIEF
 

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Appeal from the Judgment entered by the Third District Court,  
Summit County, The Honorable Kara Pettit

---

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Plaintiffs/Appellants

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## I. INTRODUCTION

In this matter there were two separate motions for summary judgment filed respectively by the Rapoports (CT 201-248) and the Association (CT 268-373). In addition Judy Martin joined in the Association's motion for summary judgment (CT 400-412). However, at the hearing before the District Court the only motion that was the subject of the oral argument was the Rapoports' motion. Reporters Transcript.

Neither counsel for the Association nor Counsel for Judy Martin presented an argument with respect to the Association's motion for summary judgment. Consequently this motion must be judged by the written arguments presented for and against the motion.

At the beginning of the hearing Judge Pettit stated "it seems to the court that the issue boils down to whether or not the Board had authority to authorize the deck extension in light of Article 5.06"

"So that' how I'm seeing the issue." (RT4 L11-16).

The Rapoports argued that the Board did not have such authority and counsel for the Association and for Judy Martin argued that it did. After hearing the arguments the court found that the Board was authorized to allow improvements or alterations that may even be deemed to be an

obstruction to the common area under the language of 5.06, 5.05 in particular, and the also under 7.01. (RT 21 L1 – RT22 L6).

Notwithstanding the lack of a ruling on the Association’s motion counsel presented an “Order on Plaintiff” Motion for Summary Judgment” dismissing the Rapoports’ complaint with prejudice. (CT 479 -482)

The Rapoports objected to the proposed order on the ground that the there was an outstanding issue of whether the Rapoports’ consent was required under the rules adopted by the Association. (CT 472- 473)

The Association and Judy Martin filed a joint response to the Rapoports’ objection arguing that the issue was before the court and that by granting the Association’s motion for summary judgment she had ruled in their favor. They further argued that if the Association had the right to approve the deck extension, the lack of neighbor approval was irrelevant because the Board had considered the Rapoports’ objection in granting its approval. (CT 474-478).

## **II. THE CONSTRUCTION OF THE DECK EXTENSION WAS A VIOLATION OF THE CC&RS**

There was no response in the Appellees Brief to the arguments made by the Rapoports that the construction of the deck extension was a violation

Section 5.06 of the CC&Rs. Instead the Association and Judy Martin repeated the argument that was made to the District Court, again leaving out the limitation that provides that the Association's authority is limited by the rights of the owners under Section 3.05 of the CC&Rs.

In addition to the fact that the deck extension was a violation of Section 5.06 of the CC&Rs it was also a violation of Section 3.05 because it hinders and encroaches of the rights of another owner, the Rapoport.

### **III. JUDY MARTIN WAS REQUIRED TO OBTAIN THE WRITTEN CONSENT OF THE RAPOPORTS FOR THE DECK EXTENSION**

In order to provide for the enforcement of Section 3.05 of the CC&Rs the Association has made a rule that prior to requesting the consent of the Board for a change in the exterior of his or her unit the owner must obtain the written consent of an affected neighbor. *Rapoport v. Four Lakes Village Homeowners Association 2013 Utah App. Page 10*. Probably to avoid alerting the Rapoport about her plans she made no effort to obtain their consent. The Association has not provided any justification for the failure of Judy Martin to obtain the Rapoport's consent.



**IV. WITHOUT A TRIAL ON THE MERITS OF THE CASE THE  
DISTRICT COURT CANNOT DETERMINE WHETHER THE  
RAPOPORTS ARE ENTITLED TO AN INJUNCTION REQUIRING  
THE REMOVAL OF THE DECK EXTENSION**

In their motion for summary judgment the Rapoport's requested only a declaration that the deck extension was a violation of the CC&Rs. They did not request that Judy Martin be ordered to remove the deck extension.

The Association and Judy Martin in support of their motion to dismiss the Rapoport's complaint claimed that the Rapoport's are not entitled to a mandatory injunction. In support of their argument the Association cites *Smith v. Simas, 2014 UT App78*.

In the *Smith* case the trial court found that that the failure of Christy and Timothy Simas to comply with the specific requirements of the CC&Rs was innocent, that the cost of the removal of a portion of their residence was substantial and that an award of damages to the plaintiffs would provide an adequate remedy. *Smith v. Simas, supra 8-10*. Judy Martin is certainly entitled to make the claim that her violation of the CC&Rs was innocent, that the cost of removal would be substantial and that the Rapoport's can be adequately compensated by an award of damages. However, it is obvious

that in order for the District Court to make such findings in this case a trial is required.

**V. ALL THE OWNERS OF UNITS IN FOUR LAKES VILLAGE  
WILL BE DIRECTLY AFFECTED BY THE  
DECISION IN THIS CASE**

There are total of 72 units in Four Lakes Village. The current and future owners of these units will be bound the decision of the court in this matter because your decision will set a judicial precedent with respect to the interpretation of the CC&Rs and the aforesaid rule of the Association.

Only the Rapoport and Judy Martin have had the opportunity to influence your decision. The Board is supposed to represent the other owners, but the Board has failed these owners in this matter. In order to satisfy the desire of Judy Martin to extend her deck the Board has reversed the prior position of the Association, prior boards and their advisors with respect to the interpretation of the CC&Rs and the rules adopted by the Association. The Board has expended over \$19,000 of the owners funds for attorneys' fees and costs in this effort.

If the decision of the District Court is upheld, this Board and future boards will be given the right to approve the appropriation of the Common

Area by individual owners and ignore legitimate objections to such approval by their neighbors. Having done so in this case the Board will have difficulty in denying the same treatment for future requests that may be made. Such a result will clearly be detrimental to the interests of the owners.

## VI. CONCLUSION

The Rapoports request that this court make the following rulings:

1. Reverse the decision of the District Court granting the summary judgment to the Association.
2. Order the District Court to grant the Rapoports motion for a declaratory judgment that the deck extension was a violation of the CC&Rs.
3. Reverse the award of attorneys' fees and costs to the Association.
4. Award the Rapoports their costs incurred in this appeal.

No Addendum is necessary under Rule 24(a)(11)

Respectfully submitted,

\_\_\_\_\_  
/s/  
Richard N. Rapoport

\_\_\_\_\_  
/s/  
Jean A. Rapoport

**CERTIFICATE OF COMPLIANCE**

I do hereby certify that the foregoing Brief of the Appellants contains 1,197 words excluding the Table of Contents, the Table of Authorities and Addenda and complies with the type-volume limitations of Rule 24(f) of the Utah Rules of Appellate Procedure.

\_\_\_\_\_  
/s/  
Richard N. Rapoport

**CERTIFICATE OF SERVICE**

I, Richard N. Rapoport, do hereby certify that on June 20, 2017 I personally served two copies of the Appellants Reply Brief on the Appellees by mailing United States Mail, postage prepaid to Appellees' Counsel at:

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