COMMUNITY COUNSEL

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RECENT CASES

- **Awards of attorneys fees must be supported by specific written findings, made after a hearing, and on relevant issues.**
- **Award of attorney's fees against opposing counsel overturned where case was not so cut and dried that attorney would know case was frivolous.**

THE INFORMATION GIVEN IS SUMMARY IN NATURE, FOR EDUCATIONAL PURPOSES. IT IS NOT INTENDED AS SPECIFIC OR DETAILED LEGAL ADVICE. ALWAYS SEEK INDEPENDENT LEGAL COUNSEL FOR ADVICE ON YOUR UNIQUE SITUATION.

FREE SPEECH AND COMMUNITY ASSOCIATIONS

In the case of Committee for a Better Twin Rivers, et al., vs. Twin Rivers Homeowners Association, Inc., A-4047-03T2 (N.J. Super, 2/7/2006), a New appellate court rendered a ruling of possibly far reaching consequences. While the court addressed many issues raised by the parties, the most interesting issue was the question of whether, and in what circumstances, the expressive rights guarantees of the New Jersey Constitution limit the authority of those who govern a community association in setting and administering standards for their community. The plaintiffs were owners who sought injunctive relief permitting the posting of political signs on the property of community residents, permission to allow plaintiffs to utilize a community room in the same manner as other similarly situated entities, and equal access to the community newsletter to publish countervailing views.

The issue on appeal was whether the association performed quasi-municipal functions, so that its should be viewed as similar to a government. The appellate court noted that the protections of the New Jersey Constitution regarding free speech were more sweeping in scope that the First Amendment to the United States Constitution. In New Jersey, the courts had already held that the:

... guarantees the State Constitution confers can be available against private entities [regional shopping malls], as well as governmental entities, when the private entities have assumed a constitutional obligation not to abridge the individual exercise of such freedoms because of the public use of their property. The right of free speech is protected not only from abridgement by government, but also from unreasonable restriction and oppressive conduct by private entities. Freedom of speech, as a fundamental right, occupies a preferred position in our system of constitutionally-protected interests.

The court analyzed the manner and extent to which functions undertaken by community associations have supplanted the role that only towns or villages once played in our society. Fundamental rights, including free speech, must be protected as fully as they always have been, even where modern societal developments create new relationships or change old ones. In this case, the plaintiffs did not contend that the association was a state actor, but instead asserted that it is a "constitutional actor," required to respect fundamental rights protected by the New Jersey Constitution when exercising dominion over residents within its borders. The court recognized this distinction as a valid one. As such, the court held that plaintiff's fundamental rights – as set out in the New Jersey Constitution, including free speech rights, stays with them in planned communities.

The winds of change are blowing

The court quoted prior precedent:

… [a] level playing field requires equal access to this condominium because it has become in essence a political company town in which political access controlled by the Association is the only game in town.

The court concluded that any:

… person is free to accept [the association's] invitation to purchase or rent property in that community; that choice cannot be at the expense of relinquishing what the New Jersey Constitution confers.

A New Jersey case is not precedent in Florida, but several issues should be noted. The Florida Constitution contains almost identical language to the protections of the New Jersey Constitution. Associations must be mindful of the fact that the "winds of change" seem to be blowing in favor of homeowners' rights in Florida, both in the legislature and in the courts. The association in this case was a planned development with almost 10,000 residents and a myriad of private facilities and roads. It is difficult to evaluate how much of an influence this "size" factor may have had upon the court. However, associations may need to adjust their policies in order to survive judicial scrutiny of any first amendment claims.

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RECENT CASE SUMMARIES

In **Baratta vs. Valley Oak Homeowners Association, Inc.,** 31 Fla. L. Weekly D456 (2nd DCA 2/10/2006) Owner appealed from a judgment awarding attorneys' fees to Association. Owner initially filed suit against Association concerning an assessment for new sign posts and mailboxes. Owner objected to the assessment and to the type and color of proposed signposts and mailboxes in the community. Owner succeeded in obtaining a temporary injunction against Association preventing the installation of the signposts and mailboxes. However, Owner never took any steps to obtain a permanent injunction. When there was no record activity on the case for one year, Association sought and obtained a dismissal of the lawsuit for failure to prosecute. Thereafter, Association sought an award of attorneys' fees and costs as the prevailing party, arguing that it prevailed when the suit was dismissed for failure to prosecute. Initially, the trial court granted fees and costs to Association. However, this ruling was reversed in an appeal to the Second District Court of Appeal. The appellate court reversed the judgment for attorney's fees in favor of Association and remanded for the trial court to make necessary findings of fact related to the hourly rates, number of hours, and other necessary components of an award of attorneys' fees. However, the appellate court also affirmed the Association's entitlement to an award of attorneys' fees and costs as the prevailing party. After remand, Association argued that the trial court did not need to conduct another evidentiary hearing on the issue of attorneys' fees and that the court could simply enter an amended judgment incorporating the findings the court allegedly made on the record at the earlier hearing. Association proffered a proposed amended judgment for attorney's fees and costs that contained findings as to the reasonable hourly rate for and the reasonable number of hours expended by its attorneys. Owner objected to this process, noting that it did not comply with the appellate court's mandate from the first appeal. The trial court ultimately entered the amended final judgment. Owner, on this second appeal, argued that the amended order failed to comply with the appellate court's mandate from the first appeal. This time, the Second District Court of Appeal again reversed the amended judgment and remanded the case to the trial court. In order to support an award of attorneys' fees, the trial judge must make specific findings of fact concerning the reasonable hourly rate, the number of hours reasonably expended, and the appropriateness of any reduction or enhancement factors. The failure to make these required findings constitutes reversible error, and this amended judgment failed to make any findings with regard to the appropriateness of any reduction or enhancement factors. As such, the appellate court again reversed the trial court and remanded for a new evidentiary hearing and new findings of fact.

In **Peyton vs. Horner**, 31 Fla. L. Weekly D462 (Fla. 2nd DCA 2/10/2006), Attorney challenged the award of attorney's fees against him pursuant to Sec. 57.105, Fla. Stat. Attorney had represented Association in a suit against Owner seeking an injunction to prohibit Owner from violating certain deed restrictions imposed on Owner's subdivision. On the merits of the lawsuit, the trial court held that Association had no standing to enforce the deed restrictions in Owner's particular subdivision. The first subdivision in the community was called Forest Lake Estates. Developer recorded deed restrictions for this subdivision in the public records. Later, developer recorded an "adoption of restrictions" applicable to Forest Lake Estates Unit Four. This "adoption of restrictions" specifically referred to the restrictions for Forest Lake Estates and declared that the referenced restrictions were to be covenants running with the land in Forest Lake Estates Unit Four "the same as if said restrictions were hereinafter set forth verbatim." This "adoption of restrictions" was also recorded in the public records. Thereafter, developer assigned its rights to enforce the restrictive covenants to Association. The assignment recited that Association was given developer's authority, powers, and rights to enforce the certain Declaration of Restrictions pertaining to Forest Lake Estates. However, the assignment did not refer to the "adoption of restrictions" nor to developer's right to enforce the restrictions in unit four. The trial court held that this assignment did not assign to Association the power to enforce the covenants and restrictions in Forest Lake Estates Unit Four, where Owner's lot was located. This decision of the trial court was not appealed by either party. Thereafter, Owner sought attorneys' fees from Attorney on the basis that Attorney "knew or should have known that the claim he raised on behalf of Association was not supported by the material facts necessary to establish the claim." On appeal of the award of attorneys' fees, the Second District Court of Appeal reversed the award of fees against Attorney. The appellate court noted that Association's position that it could enforce the restrictions against owners may have been incorrect, as the trial court found, but the claim was not frivolous. The issue was not so cut and dried that either association or its attorney knew or should have known that it was not supported by the material facts necessary to establish the claim.

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