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IN THE

Supreme Court of Virginia

RECORD NO. 150456

STEVEN F. TVARDEK, JR., *et al*.,

Appellants,

v.

POWHATAN VILLAGE
HOMEOWNERS ASSOCIATION, INC.,

Appellee.

OPENING BRIEF OF APPELLANTS

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STATEMENT OF THE CASE AND MATERIAL PROCEEDINGS[1]

This case presents not only a pristine issue of statutory interpretation, with significant consequences for the parties to this case, but also a number of important practical and policy considerations relating to the interpretation of residential property rights under the Virginia Property Owners Association Act. In 2013, the Appellants Steven F. Tvardek, Jr., and Marta P. Tvardek (the "Tvardeks") brought this action to determine the validity of a 2008 Amendment to the Powhatan Village Declaration of Protective Covenants and Restrictions dated February 2, 2002 ("Powhatan Village Declaration"). The Amendment purported to remove the Tvardeks' pre-existing right to rent their single family residence which they acquired in 2006.

The Tvardeks filed their original Complaint for Declaratory Judgment on November 11, 2013, alleging that the purported 2008 Amendment and the statutory limitations period were not "effective" under the express terms of Virginia Code §§ 55-515.1(E) and (F) because the amendment had not been *signed* by the requisite number of lot owners and because the

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[1] Pursuant to Supreme Court Rule 5:32, the parties have filed herewith a Joint Appendix which includes materials designated by the parties and which is consecutively paginated. All citations herein to documents in the Joint Appendix will be designated with the abbreviation "JA" and will be followed by the page number(s) on which the cited material appears.

recorded amendment did not contain the required statutory certification to that effect.

The Appellee Powhatan Village Homeowners Association, Inc. (the "HOA") demurred to the Complaint on December 13, 2013, asserting that the Tvardeks' failure to allege the existence of a prospective lease on the premises deprived them of standing to seek declaratory relief. JA18. On March 20, 2014, the Demurrer was overruled (JA21) and the Tvardeks' previously filed motion for leave to amend its Complaint (to attach an omitted exhibit and to allege threats of sanctions by the HOA) was granted. *Id*.

The Tvardeks filed their First Amended Complaint on March 24, 2014 ("First Amended Complaint") (JA23).[2] The HOA thereafter filed its Special Plea (the "Special Plea") (JA122) and its Answer[3] ("Answer") (JA124).[4]

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[2] The term "First Amended Complaint" as used in this Brief includes the two amendments referenced in footnote 3*, infra*. All citations in this Brief to the First Amended Complaint will for purposes of brevity be cited to herein as "First Amended Complaint ¶___".

[3] The term "Answer" as used in this Brief includes the two amendments thereto described in Note 4, *infra*. All citations in this Brief to the Answer will for purposes of brevity be cited to herein as "Answer ¶___".

[4] The First Amended Complaint and Answer were each further summarily amended by agreed Orders entered by the Court on June 18, 2014, and on July 7, 2014, which (1) added the Tvardeks' demand for attorney's fees and costs, and the HOA's opposition thereto (JA143), and

The Special Plea asserted a one-year statute of limitations defense based on Virginia Code § 55-515.1(E). The Tvardeks filed shortly thereafter a Motion for Partial Summary Judgment on Count III, alleging that the limitations provision was not a bar because the 2008 Amendment had never become "effective" under the express terms of Virginia Code § 55-515.1(E) and (F) and seeking partial summary judgment as to the invalidity of the 2008 Amendment. JA130.

On June 17, 2014, the Court denied the HOA's motion to defer briefing on the Motion for Partial Summary Judgment and ordered a July 15, 2014, hearing on both the Special Plea and the Motion for Partial Summary Judgment because they both presented the same issue. JA141. After argument by counsel (and without any record evidence other than the allegations of the First Amended Complaint and admissions made in the Answer) (JA224), the Circuit Court entered its non-final Order on August 20, 2014, granting the Special Plea and ruling that the limitations provisions of Virginia Code § 55-515.1(E) barred the First Amended Complaint, to

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(2) corrected and restated the allegations made in Paragraph 54 of the First Amended Complaint regarding the text of the certification made in the 2008 Amendment (JA150).

which the Tvardeks duly noted their objection.[5] JA166. The August 20 Order retained jurisdiction to decide the HOA's request for attorney's fees. After agreed submission of that issue on briefs filed by both sides (JA218), the Court issued its final order on December 23, 2014, affirming its August 20 ruling on the merits, and granting the HOA attorney's fees in the amount of $12,237.50, to which the Tvardeks duly noted their objection. JA220.

The Notice of Appeal, and transcript of the July 15, 2014, hearing on the merits, was filed pursuant to Rules 5:9 and 5:11 of the Rules of the Supreme Court of Virginia on January 14, 2015, with due notice thereof to the HOA. JA221.

STATEMENT OF FACTS

A. The Tvardeks' Property

In July, 2006, the Tvardeks acquired (and have since owned in fee simple) Lot 27 in Phase 4 of the Villages of Powhatan Subdivision, James City County, Virginia, more commonly known as 4511 Pleasant View Drive, Williamsburg, Virginia 23188 (the "Property"). First Amended Complaint, ¶5 JA24. The Property is improved with a single family detached residence containing approximately 1,835 square feet. Id. ¶6 JA24.

[5] The Court heard argument first on the Special Plea, ruling in HOA's favor (Transcript, JA 166, JA247), and thus did not specifically rule on the Motion for Partial Summary Judgment.

B. The Governing Restrictive Covenants

At the time the Tvardeks acquired the Property in 2006, it was subject to two sets of restrictive covenants. The first was the Declaration of Covenants and Restrictions for Powhatan of Williamsburg Secondary dated July 27, 1981 (the "PCSA Declaration").[6] Article VI, Section 1(c) of the PCSA Declaration stated as follows:

> (c) Residential Use. All property designated for residential use shall be used, improved and devoted exclusively to residential use. Nothing herein shall be deemed to prevent the owner from leasing a Living Unit to a single family, subject to all of the provisions of the Declaration. As used herein, the term "single family" is defined to include only persons related by blood or lawful marriage.

Under Article I, Section 7 of the PCSA Declaration, the term "Living Unit" is defined to "mean and refer to any portion of a structure situated upon the Properties designed and intended for use and occupancy as a residence by a single family." First Amended Complaint ¶¶ 8-9 JA26.

The second set of covenants on the Tvardeks' Property was the Powhatan Village Declaration of Protective Covenants and Restrictions dated February 2, 2002 and recorded on or about March 19, 2002. First

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[6] The PCSA Declaration and its recording information were described in the First Amended Complaint ¶ 9 JA26 and a complete copy attached as Exhibit "A" to the First Amended Complaint (JA41), all of which was admitted by HOA as being a true copy thereof. Answer ¶ 9 JA125.

Amended Complaint ¶ 13 JA26 ("Powhatan Village Declaration").[7] The latter declaration arose from the creation of "The Villages at Powhatan" (herein the "Powhatan Villages Subdivision"), a subordinate subdivision derived from the larger Powhatan of Williamsburg Secondary. The covenants under the Powhatan Village Declaration were administered by the HOA. First Amended Complaint ¶¶ 20-21 JA28. That Declaration continued to permit the rental of the lots in the subdivision, but included additional provisions (a) that, if leased, *all* of any given premises were required to be leased, (b) that leases must be written and for a term of no less than twelve months, and (c) that tenants must agree to comply with the restrictive covenants. First Amended Complaint ¶15 JA27; JA90. The Powhatan Village Declaration also explicitly provided that "[t]he Association shall be subject to and comply with the Virginia Property Owners' Association Act as set out in § 55-509 et seq., in the Code of Virginia, as amended." First Amended Complaint ¶17 JA27; JA98.[8]

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[7] The Powhatan Village Declaration and its recording information were described in the First Amended Complaint ¶¶ 13-14 JA26-27 and a complete copy attached as Exhibit "B" to the First Amended Complaint (JA64), all of which was admitted by the Appellee as being a true copy thereof. Answer ¶¶ 13-14 JA125.

[8] The Powhatan Village Declaration also expressly subordinated the Declaration to the terms of the PCSA Declaration. It stated that "[i]n the event of a conflict between the PCSA Declaration and the Governing

C. The Purported 2008 Amendment to the Powhatan Village Declaration

In late 2008, the HOA recorded in the land records of the Clerk's Office of the Circuit Court for the City of Williamsburg and James City County a document styled "Amendment to Declaration of Powhatan Village Homeowner's Association, Inc., (Leasing of Lots)" (the "2008 Amendment"). JA105. The document purported to amend the Powhatan Village Declaration. First Amended Complaint ¶ 25 JA28-29; JA105.[9] The 2008 Amendment added a new Section 7.5 to the Powhatan Village Declaration restricting rental of property in the subdivision to not more than thirty-one (31) Lots at any time. JA106-107. The Amendment also established mandatory HOA review and approval of all leases in the subdivision. See First Amended Complaint, ¶¶ 28-33 JA29-30; JA107.

Documents of the Association, the PCSA Declaration shall control." Article X, First Amended Complaint ¶¶ 18-19 JA27-28; JA99. The Powhatan Village Declaration also stated that "there shall be no amendment that would result in a conflict between the terms and conditions of [its] Governing Documents and the terms and conditions of the PCSA Declaration or the Bylaws or Articles of Incorporation of the PCSA. . . . " Article IX, First Amended Complaint ¶ 16 JA27; JA95.

[9] The 2008 Amendment was attached as Exhibit "C" to the First Amended Complaint and admitted by Appellee as being a true copy thereof. JA105.; *see* Answer ¶ 25 JA125, as amended by Order entered on July 7, 2014. *See also* Note 4, *supra*. The 2008 Amendment was recorded in the aforesaid Clerk's Office as Instrument 08003087. First Amended Complaint ¶25 JA28-29; JA105.

The 2008 Amendment (as recorded) contained the following certification:

> CERTIFICATION REQUIRED BY VIRGINIA CODE § 55-15.1.F
>
> The undersigned President of the Association does hereby certify that this Amendment has been approved by a vote of two thirds of the Class A votes in the Association, as evidence [sic] by the results of the meeting at which the vote was taken, such evidence on file with the Association, as required by Section 9.2 of the Declaration.
>
> EXECUTED on the date first written above by the duly authorized officer of the Association.
>
> POWHATAN VILLAGE HOMEOWNERS ASSOCIATION, INC., a Virginia Nonstock Corporation
>
> By: /s/ Barbara G. Moody
> Barbara Moody, President

First Amended Complaint ¶54 JA33-34, as amended at JA150-51[10]; JA109. The 2008 Amendment stated that "this Amendment does not result in a conflict between the terms and conditions of the Governing Documents and the terms and conditions of the PCSA Declaration or the Bylaws or Articles of Incorporation of the PCSA (the PCSA Governing Documents") confirmed by PCSA by letter dated March 3, 2008, attached hereto as Exhibit B." JA105. However, no Exhibit B was attached to the 2008 Amendment as

[10] See Note 4, *supra*.

recorded. *See* First Amended Complaint ¶59 JA34; Answer ¶26 JA125; Exhibit "C" to the First Amended Complaint JA105-114.

D. Applicable Provisions of the Virginia Property Owners Association Act Governing Amendments of Covenants

Virginia Code § 55-515.1(D) provides, in pertinent part, as follows:

> D. A declaration may be amended by a two-thirds vote of the owners. This subsection may be applied to an association subject to a declaration recorded prior to July 1, 1999, if the declaration is silent on how it may be amended or upon the amendment of that declaration in accordance with its requirements.

Virginia Code § 55-515.1(E) provides, in pertinent part:

> E. An action to challenge the validity of an amendment adopted by the association may not be brought more than one year *after* the amendment is *effective*. (emphasis added)

Virginia Code § 55-515.1(F) provides, in pertinent part:

> F. Agreement of the required majority of lot owners to any amendment of the declaration *shall be evidenced by their execution of the amendment, or ratifications thereof*, and the same *shall become effective* when a copy of the amendment is recorded *together with a certification*, signed by the principal officer of the association or by such other officer or officers as the declaration may specify, *that the requisite majority of the lot owners signed the amendment or ratifications thereof*. (emphasis added)

E. The Parties Contentions and the Court's Disposition

The First Amended Complaint asserted in Counts I and II that because the required majority of lot owners did *not sign* the 2008 Amendment or ratifications thereof, the 2008 Amendment was not "effective" under the express terms of Virginia Code § 55-515.1(F) and therefore was of no force or effect. The Tvardeks submitted discovery requesting evidence to document the existence or absence of the lot owner signatures, but the HOA refused to produce any documentation purporting to show lot owner signatures on the 2008 Amendment.[11] There is no evidence in the record of any lot owner(s) having signed the amendment or ratifications thereof.

Count III alleged that because the certification of the HOA set forth in the 2008 Amendment did not contain the statutory certification required by Virginia Code § 55-515.1 (F) --- that a requisite majority of lot owners had in fact signed the amendment or ratifications thereof --- the 2008 Amendment was not "effective" under Virginia Code §§ 55-515.1(E) and (F), and therefore of no force or effect.[12]

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[11] *See* Plaintiffs' Reply Brief To Defendant's Brief In Opposition To Motion For Partial Summary Judgment, p. 5, n. 1, Circuit Court Record, Case# CL13001844-00, pg. 345.

[12] Count IV of the First Amended Complaint asserted in the alternative that because the document recorded as the purported 2008 Amendment did not contain Exhibit B referenced therein, it was therefore incomplete

After the Court overruled its Demurrer, the HOA filed its Answer, as well as the Special Plea in which it alleged that "Virginia Code § 55-515.1(F) [sic][13] states that any action to challenge the validity of an amendment adopted by the Association may not be brought more than one (1) year after the amendment is effective" and that therefore the action "is barred because it is not brought within the time frame set forth in Virginia Code § 55-515.1." Special Plea, ¶¶ 3, 5 JA122. The Special Plea was limited to the statute of limitations defense and was decided by the Court on the face of the First Amended Complaint, with no evidence as to whether any lot owners signed the amendment or ratifications thereof.

After briefing and argument by counsel at a hearing on July 14, 2014, the Circuit Court identified the issue on the Special Pleas as being "whether or not [the] statute of limitations has begun to run in this particular case. . . ." including the question "is the language in the certification page. . . is it effective?" Transcript JA244-245. In short, "did the amendment become effective when it was recorded with this language and certification?" *Id*. at

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and was not the Amendment alleged to have been purportedly signed or ratified by the requisite majority of lot owners. JA34. Count V alleged that the Amendment conflicted with the overriding provisions of the PCSA Declaration and was therefore invalid under the interpretive terms of the respective sets of covenants. JA35

[13] The proper statutory reference is Virginia Code § 55-515.1(E).

JA246. As will be described in more detail in the argument below, the Court found the issue to be difficult, but ultimately accepted the certification, granted the Special Plea on statute of limitations grounds, and dismissed the case, but not after stating, when counsel noted objection: "I can't say I'm hundred percent confident of it. I think it's a close case. . . ." *Id*. JA247-248.

F. Pertinent Facts Relating to the Circuit Court's Attorney'sFee Award.

The HOA sought attorney's fees as a prevailing party and the Court awarded all of its requested fees. The Tvardeks contended that even if attorney's fees could be awarded, the attorney's fee award was excessive because the HOA did not prevail on its Demurrer, failed to specify under Supreme Court Rule 3:25 the basis for its demand for attorney's fees in its Demurrer and Answer, and was otherwise unreasonably compensated for work done under the Demurrer, the Answer or otherwise, including, for example, attorney travel time to and from court.

Exhibit A of Defendant's Brief in Support of Request for Attorneys Fees contained an itemized list of the legal fees requested in the case. JA172-173. Assuming without prejudice that the Court finds that the HOA is entitled to some prevailing party attorney's fees for work done on the Special Plea, the Tvardeks identified fees on the list that were

unnecessary, inappropriate and/or unreasonable. *See* Brief in Opposition to Defendant's Request for Attorneys Fees JA174.

The arguably justifiable time related to review of the Complaint and First Amended Complaint totaled 2.3 hours ($632.50) and 0.20 hours ($55.00). JA172. The work related to the Special Plea (as well as the work required to respond to the directly related motion for partial summary judgment) totaled approximately twenty-one and five tenths (21.5) hours of work, less two hours of travel time, for a total of 22 hours (JA172), $6,050.00, which is the amount the Tvardeks contended was appropriate for an award if (without prejudice) the Court determined that prevailing party attorney's fees were due. JA180.

ASSIGNMENTS OF ERROR

The Circuit Court erred in its grant of the Special Plea and the award of attorney's fees as follows:

1. In granting the Special Plea barring a challenge to a homeowners association amendment that removed the homeowners' pre-existing right to rent their residence, the Circuit Court erred by failing to hold that the plain meaning of the word "effective" in Virginia Code §§ 55-515.1 (E) and (F) tolled the limitations period for the recorded amendment when it contained no certification that the requisite majority of lot owners had signed the amendment or ratifications thereof. (Brief in Support of Opposition to Special Plea JA155-159, JA164-165; Tr. JA230-234, 247; 08/20/14 Order JA167; 12/23/14 Final Order JA220).

2. In granting the Appellee's Special Plea barring Appellants' challenge to a homeowners association amendment that removed the homeowners' pre-existing right to rent their residence, the Circuit Court erred by failing to apply the requirements of Virginia Code § 55-515.1 (E) and (F) (making the amendment and limitations period effective only upon satisfaction of stated statutory predicates) in accordance with the legislative intent, when those predicates were not met in this case. (Brief in Support of Opposition to Special Plea JA158-161; 162-164; Tr. JA231-232, 234-241, 247; 08/20/14 Order JA167; 12/23/14 Final Order JA220).

3. Assuming the Circuit Court was correct in its ruling on the merits of the Special Plea, and without prejudice to Assignments of Error Nos. 1 and 2, the Circuit Court erred in awarding the homeowners association all of its alleged attorney's fees under Virginia Code § 55-515 because it failed to take into account that Appellee (a) was not a prevailing party on its Demurrer, (b) did not make a sufficiently specific Rule 3:25 demand for its fees in its Demurrer or its Answer, and (c) should not be reimbursed under a statutory attorney's fees entitlement for attorney travel time. (Brief in Opposition to Defendant's Request for Attorneys Fees JA177-180; 12/23/14 Final Order JA220)

ARGUMENT

I. THE 2008 AMENDMENT DID NOT BECOME "EFFECTIVE" UNDER THE EXPRESS TERMS OF § 55-515.1(F) BECAUSE THE PREDICATE CONDITIONS IN FOR IT TO BECOME "EFFECTIVE" UNDER VIRGINIA CODE § 55-515.1(E) WERE NOT SATISFIED, AND THEREFORE THE LIMITATIONS PERIOD DID NOT APPLY.

A. The Standard of Review Is *De Novo*.

The issue presented by the Special Plea is strictly one of statutory interpretation, namely the interpretation and meaning of Virginia Code §§

55-515.1(E) and (F).[14] "Under well-established principles, an issue of statutory interpretation is a pure question of law which [this Court] review[s] *de novo*." *Conyers v. Martial Arts World of Richmond, Inc.*, 273 Va. 96, 104, 639 S.E.2d 174, 178 (2007); s*ee also*, *Laws v. McIroy*, 283 Va. 594; 724 S.E.2d 699 (2012). In conducting such *de novo* review, the Court has stressed certain guiding principles in each of the above referenced cases, summarized as follows:

> When the language of a statute is unambiguous, we are bound by the plain meaning of that language. Furthermore, we must give effect to the legislature's intention as expressed by the language used unless a literal interpretation of the language would result in a manifest absurdity. If a statute is subject to more than one interpretation, we must apply the interpretation that will carry out the legislative intent behind the statute." (citations omitted). Moreover, "[t]he plain, obvious, and rational meaning of a statute is to be preferred over any curious, narrow, or strained construction." Meeks v. Commonwealth, 274 Va. 798, 802, 651 S.E.2d 637, 639 (2007) (citation and internal quotation marks omitted).

Id. at 598-599, 701-02.

B. The Plain Meaning of the Statutory Language Is That An Amendment Is Not "Effective" Until the Statutory Prerequisites Are Met, Which Did Not Occur In This Case.

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[14] The HOA admitted virtually all material allegations with respect to the governing restrictive covenants, including the applicable statutes, and the text of the 2008 Amendment, as well as the status of the Tvardeks and their property. See Answer, ¶¶ 5 JA125, 7-44 JA125-126.

The unambiguous and "plain meaning" of the statutory language in Virginia Code §§ 55-515.1(E) and (F) is patently evident, not only under the principles governing the standard of review, but also in light of standards applied in cases specifically interpreting the Virginia Property Owners Association Act, as well as common law standards applicable to restrictive covenants.

Subsection (F) of Virginia Code § 55-515.1, clearly states that the agreement of lot owners to an amendment must be evidenced by the *execution* of that amendment or a ratification thereof by a requisite majority of lot owners. In addition, to be "effective," the amendment must not only be recorded, it must also contain a certification that the requisite number of lot owners actually *signed* the amendment or ratifications thereof. That certification does not appear in the certification contained in the recorded 2008 Amendment. (Nor is there any evidence in the record below of any lot owner signing the amendment or ratifications thereof because the case was decided only on the Special Plea and, in any event, the HOA refused to produce them in discovery, if even they exist. *See* note 11, *supra*, and related text.)

The interpretive framework used by the Supreme Court of Virginia in a recent Virginia Property Owner's Association Act case is instructive. *See*

Zinone v. Lee's Crossing Homeowners Association, 282 Va. 330, 714 S.E.2d 922 (2011). In the *Zinone* case, the plaintiff alleged that certain unilaterally adopted developer amendments to a declaration were improper and required homeowner authorization pursuant to § 55-515.1(F).[15] In reaching its decision, this Court considered first, the plain language of the statute, and then compared the provisions of the Act with similar provisions in the Virginia Condominium Act, followed by an analysis of significant differences between the two Acts.

The starting point in the *Zinone* case was the same touchstone as the standard of review outlined above: "We look to *the plain meaning of the statutory language*, and *presume* that the legislature chose, with care, the words it used when it enacted the relevant statute" Id. at 337 *quoting Addison v. Jurgelsky*, 281 Va. 205, 208 704 S.E.2d 402, 404 (2011) (emphasis added). Because the Court concluded that "the *plain language* of the provisions of the POAA concerning the ability to amend a declaration" used the permissive word "may," and was "neither mandatory

[15] The homeowner's association argued that Zinone's action was time-barred under § 55-515.1(E), but the Circuit Court overruled its plea in bar and this Court found the issue had been waived on appeal. 282 Va. at 334, n. 2, 714 S.E.2d at 923, n. 2.

nor exclusive," the Court upheld the unilateral developer amendments. Id. at 337 (emphasis added).

In the present case, the language of the applicable provisions of § 55-515.1, is unmistakeably clear: (1) subsection (E) states that actions to challenge the validity of an amendment can be brought up to one year after the amendment becomes "effective", and (2) subsection (F) outlines the requirements for an amendment to become "effective." To be "effective," Subparagraph (F) requires (a) that the amendment be recorded, and (b) tat the recorded amendment contain a certification that the requisite majority of homeowners actually *signed* the amendment or a ratification thereof. Since at least one of those conditions is known not to have been satisfied in the present case, the 2008 Amendment was not "effective." Accordingly, the one year limitations period in § 55-515.1(E) did not commence to run.

The Circuit Court analyzed it differently, finding resolution of the issue to be somewhat perplexing. For example, with reference to the certification in the 2008 Amendment, the Court said "So [the certification] cites that specific code section, and then the question is, is that enough? I don't know if that by itself is enough. I'm just saying we [sic] certification required by 55-515.1-F, that should be enough. There is no language here." Transcript JA245. And then, ". . . the question really, [I] think, for the Court is, is the

language in the certification page that and the president reports to be present to sign that. That's one of the requirements --- is it effective? And the amendment's effective when a copy of that is recorded, and that's been done here." *Id*. Continuing, the Court said: "I don't think there's any question here that Barbara Moody, President, signed it. And then that the requisite majority of the lot owners signed the amendment." *Id*.[16] While acknowledging the statutory requirement that a majority of the lot owners must sign the amendment, the Court decided to slight the statutory language and settle for something less:

> And I do note there are some differences in the language, you know, like I say, the statute in F says *signed* by the requisite majority, and the requisite majority this certification doesn't use that language but it certifies that it's been *approved* by a vote of two-thirds of the Class A votes in the association and two-thirds votes as referenced in Subsection D and I think that is sufficient. I'm really focusing on the word *approved* as used in the certification versus *signed* in the statute.

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[16] The latter statement is puzzling and must have been a reference to the next item for consideration in the Court's ongoing monologue since this case was decided only on the Special Plea with no evidentiary hearing as to whether any lot owner actually signed the amendment or a ratification thereof. Counts I and II of the First Amended Complaint directly alleged that the required majority of lot owners did not execute the 2008 Document or ratifications thereof. Moreover, there is no evidence in the record that any lot owner, let alone a majority, ever signed the amendment (or ratifications), and the certification references only a vote, with no reference at all to signatures.

Transcript JA246 (Emphasis added). Arriving then at a point of decision, the Court said: "[h]ere the Court is going to conclude that the certification page here, the way it reads, it cites specifically 515.1-F, and while it doesn't use the word signed, it uses the word approved by two-thirds vote." Transcript JA247.

> . . . [T]he Court is going to find that this certification page in looking at the statute as a whole and the policy behind the statute of limitations that this certificate page, the fact that it cites the specific code section, says two-thirds of the vote and *approved*, does not use the word *sign* as the statute does in F, *but I think it's enough* and, therefore, I'm going to grant the motion from the Defense to dismiss the matter under the statute of limitations 55-515.1(E). . . ..

Id. (Emphasis added).

As will be discussed in more detail below, not only did the Circuit Court avoid mention of the applicable standard of review, its analysis departed from applying that standard. Instead, it employed a balancing process reminiscent of placing weights on a scale, concluding with "I think it's enough." JA248. But this Court has made abundantly clear that "[i]It is not the function of the courts to add to or amend clear statutory language. We assume that the General Assembly chose its language with care and will apply it as written." *Gilliam v. McGrady*, 279 Va. 703, 709, 691 S.E.2d 797, 800 (Va. 2010) (citations omitted). In rendering its judgment, the Circuit Court also failed to analyze the legislative intent, as did the *Zinone*

court also seemed to discount entirely the statute's legislative history and the common law background surrounding restrictive covenants.

II. THE LEGISLATIVE HISTORY AND PUBLIC POLICY BEHIND VIRGINIA CODE §§ 55-515.1 (E) AND (F) REVEAL THAT THE GENERAL ASSEMBLY INTENDED THAT THE LIMITATIONS PERIOD WOULD NOT RUN UNTIL AN AMENDMENT BECAME "EFFECTIVE" BY SATISFACTION OF THE STATUTORY PREDICATES, WHICH DID NOT OCCUR IN THIS CASE.

The Circuit Court failed to give proper consideration to the policies and legislative intent underlying the statutory language in this case, which includes (a) comparable provisions of Virginia law governing association-owner rights such as the Virginia Condominium Act, (b) the legislative history of the statute, (c) the common law tradition of owner execution of restrictive covenants, and (d) the consistency of the current limitations provision with similar provisions for other special rights found in the Virginia Code. The standard of review for this question, as with Part I above, is *de novo* review, applying the principles set forth in *Conyers v. Martial Arts World of Richmond, Inc.*, *supra*, 273 Va. at 104, 639 S.E.2d at 178 (2007), *Laws v. McIroy*, *supra*, 283 Va. 594, 724 S.E.2d 699 (2012), and *Zinone v. Lee's Crossing Homeowners Association*, 282 Va. at 337, 714 S.E.2d at 925.

A. The *Zinone* Court's Comparative Analysis of Provisions of the Condominium Act Should Have Been Applied to This Case.

In interpreting the provisions of the Property Owners Association Act in the *Zinone* case, the Court declared that "[t]o determine the legislative intent underpinning the POAA's provisions concerning the manner for amending a declaration, it is instructive to look at the closely-related provisions of the Condominium Act, Code §§ 55-79.39 through - 79.103, which provide for the amendment of a condominium instrument." 282 Va. at 336, 714 S.E.2d at 925. The Circuit Court did not, at least overtly, undertake such a review.

The *Zinone* Court found the comparable provisions of the Condominium Act, § 55-79.71(B), to be significant because the statute in the Property Owners Association Act involved use of the permissive term "'may', whereas the corresponding provision in the Condominium Act used "the mandatory and directive term 'shall.'" *Id*.

In the present case, the parallel provision of the Condominium Act (Virginia Code § 55-79.71(D)) contains virtually identical language to that found in § 55-515.1(F), with both requiring that any amendment shall be *executed* by owners and that to be effective, there shall be mandatory certification by the principal officer of the association that the requisite majority of owners *executed* the amendment or ratifications thereof. The applicable provisions are likewise identical in that they both categorically

apply to "any amendment," meaning, without limitation, any and all amendments.[17]

However, just as in the *Zinone* case the differences between the words "shall" and "may" were found to be dispositive, the differences in the present case between the limitations provisions of the Condominium Act (Virginia Code § 55-79.71(C)) and that found in § 55-515.1(E) are equally significant. The Condominium Act imposes a one year limitation period after the amendment is *recorded*, whereas the one year limitation period in the Property Owners Association Act commences after the amendment becomes *effective*. The *Zinone* opinion makes clear that these differences cannot simply be ignored. As the Court said, "when the General Assembly has used specific language in one instance, but omits that language or uses different language when addressing a similar subject elsewhere in the Code, we must presume that the difference in the choice of language was intentional." *Id*. 282 Va. 337, 714 S.E.2d at 925.

Both provisions in this case require certification that the requisite number of property owners actually signed the amendments. But the

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[17] *See Sussex Community Services Association v. The Virginia Society For Mentally Retarded Children*, 251 Va. 240, 243, 467 S.E.2d 468-69 (1996); *Board Of Supervisors Of James City County v. Windmill Meadows, LLC*, 287 Va. 170, 179, 752 S.E.2d 837, 842 (2014).

Condominium Act keys the running of the limitations period to "recordation" of the amendment, whereas the Property Owners' Association Act starts the limitations period *only* when the amendment becomes "effective." Given the significant difference in the statutory language, the Circuit Court ignored this aspect of legislative intent and erred in failing to give the language full force and effect. The 2008 Amendment could not possibly be "effective" because there was no certification that the requisite majority of lot owners had *signed* the 2008 Amendment (or ratifications thereof) and, therefore, the Tvardeks' suit should not have been barred.

B. The Legislative History Reveals the General Assembly's Intent That Suits Will Not Be Barred Until One Year After An Amendment Becomes "Effective."

The legislative history of § 55.1-515.1 shows that the legislature intended for the § 55.1-515.1(F) predicates to be complied with for an amendment of a declaration to be effective and the limitations period to commence. Subparagraphs D through F of § 55.1-515.1 were added in 1999 by Chapter 805 of the Acts of Assembly. The legislative summary of that enactment described its purposes as follows:

> **Property owners' associations; amendment of declaration.** Provides that a declaration may be amended by agreement of owners of two-thirds of the lots subject to that declaration. The bill also authorizes an association created before July 1, 1999, to "opt-in" to the two-thirds amendment provision created under this bill, provided the "opt-in" is

> accomplished in accordance with the declaration. **The bill also provides (i) that an action to challenge the validity of an amendment may not be brought more than one year after the amendment is *effective* <u>*and*</u> *(ii) when an amendment is effective.***[18]

(Emphasis added). The legislative summary thus indicates that Subparagraph (F)'s conditions for an amendment to become "effective" is a distinct predicate to the running of the limitations period in Subparagraph (E). It likewise makes clear that the one year limitations provision contained in Subparagraph (E) of § 55-515.1 does not run until the amendment is "effective." Although other subparagraphs of § 55.1-515.1 have since been amended by the General Assembly, the language of Subparagraphs (E) and (F) --- which specify the conditions for an amendment to become "effective" –-- has remained constant and without amendment since its enactment in 1999.

C. The Common Law Tradition Requiring Property Owner Execution of Restrictive Covenants Underlies the Plain Wording of the Statutory Language.

The requirements in Virginia Code § 55-515.1 that homeowner association amendments and limitations to suit are *not* "effective" without

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[18] *See* Virginia General Assembly Legislative Information Service, SB 999 Property owners' associations; amendment of declaration, http://leg1.state.va.us/cgi-bin/legp504.exe?991+sum+SB999S (last viewed July 8, 2015).

certification that the requisite majority of owners *signed* the amendment is fully rooted in the common law tradition surrounding restrictive covenants for residential subdivisions. At common law, covenants running with the land could be enforced, provided the party seeking enforcement established: "(1) privity between original parties; (2) privity between original parties and their successors; (3) an intent that the restriction will run with the land; and (4) that the covenant "'touches and concerns' the land." *Sloan v. Johnson*, 254 Va. 271, 276, 491 S.E.2d 725, 728 (1997). As such, restrictive covenants are, in effect, a contract among the affected landowners and are interpreted on that basis. *See Sully Station II Community Ass'n v. Dye*, 525 S.E.2d 555, 259 Va. 282 (Va., 2000); *White v. Boundary Association, Inc*., 271 Va. 50 (2006). Moreover, "[i]n the absence of an agreement to the contrary, existing restrictions cannot be amended or terminated unless all parties affected by the restrictions, or their successors, agree to the amendment or termination." Cf. *Hening v. Maynard*, 227 Va. 113, 117, 313 S.E.2d 379, 381 (1984) *citing Duvall v. Ford Leasing*, 220 Va. 36, 44, 255 S.E.2d 470, 474-75 (1979).

In the *Duvall* case, this Court explicitly relied on the decisions of the Wyoming and Wisconsin Supreme Courts in *Hein* v. *Lee*, 549 P.2d 286, 292 (Wyo. 1976), and *Genske* v. *Jensen*, 188 Wis. 17, 19-20, 205 N.W.

548, 549 (Wis. 1925). In the *Hein* case, the Wyoming Supreme Court held that the amendments to certain restrcitive covenants on land "never became effective because they were not executed by all of the owners of the property encumbered by the covenants." 549 P.2d at 292. In the *Genske* case, an attempt was made to release certain restrictive covenants by the recordation of a quitclaim deed from the original grantor, but the Wisconsin Supreme Court found that deed to be ineffective because "[t]he restriction can be released only by the assent of the platted lots for whose benefit such restriction was imposed." 205 N.W. at 549. Thus, based on this Court's Virginia decisions, and the decisions upon which it has relied from other jurisidictions, it seems clear that changes to restrictive covenants, at least at common law, require the assent of all parties, unless, of course, the applicable declaration or the General Assembly otherwise explicitly provide.[19]

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[19] Two Virginia Circuit Courts have declared restrictive covenants to be invalid because requisite procedures were not followed. Prior to adoption of the 1999 amendment of Virginia Code § 55-515.1 (which added subsections (D), (E), and (F)), in *Homestead Props. of Front Royal v. Sky Bryce Ass'n*, 49 Va. Cir. 250, 1999 Va. Cir. LEXIS 315 (Va. Cir. Ct. 1999), a homeowners association had used ballots to be signed and returned for an amendment, and the recorded certification stated that a majority of lot owners had approved the amendment. The Circuit Court of Shenandoah County ruled that the actual signatures of the majority of lot owners were needed on the recorded document and because the requisite majority of lot owners had *not signed* the recorded document, the amendment was

Finally, as an interpretive matter, this Court has held that covenants *restricting* the free use of land are not favored and must be strictly construed; any ambiguity is to be resolved against the restrictions and in favor of the *free* use of property. *See Waynesboro Village, L.L.C. v. BMC Prop*., 255 Va. 75, 80-81, 496 S.E.2d 64, 67-68 (1998); *Bauer v. Harn*, 223 Va. 31, 39, 286 S.E.2d 192, 196 (1982); *Schwarzschild v. Welborne*, 186 Va. 1052, 1058, 45 S.E.2d 152, 155 (1947). Most recently, in *Fein v. Payandeh*, 284 Va. 599, 606, 734 S.E.2d 655, 659(2012), this Court again acknowledged the general principle that

> Restrictive covenants "are not favored, and the burden is on him who would enforce such covenants to establish that the activity objected to is within their terms. They are to be construed most strictly against the grantor and persons seeking to enforce them."

Id. *quoting Scott v. Walker,* 274 Va. 209, 212–13, 645 S.E.2d 278, 280 (2007).

Section 55-515.1(F)'s requirement that amendments be actually *executed* by the required majority of lot owners, and that owner execution

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invalid. In *Ross v. Laurel Glen Homeowners Association, Inc*., 43 Va. Cir. 205, 208 (1997), the Fairfax Circuit Court invalidated purportedly amended and restated covenants on grounds that only one co-owner for each of a majority of the affected lots had signed the operative documents, holding that "[i]t takes both co-owners to effect a change to property held as tenants by the entirety" *(*citations omitted*).*

be certified for an amendment to be legally effective is consistent with the common law tradition of horizontal privity and land owner execution of restrictive covenants. So, too, is the contingent nature of the § 55-515.1(E)'s limitations period as a means of enforcing these requirements. The direct linkage of Code § 55-515.1 to the common law tradition was explicitly recognized by this Court in *Dogwood Valley Citizens Association, Inc. v. Shifflett*, 275 Va. 197, 203-04, 654 S.E.2d 894, 897 (2008), where the Court "considered a declaration [to be] a document that can be changed only if the lot owners have notice and agree to the change*, see Code § 55-515.1, a condition consistent with the method of altering restrictive covenants applicable to real property*." (emphasis added). The Property Owners Association Act thus constitutes, in effect, a statutory modification of the common law, substituting the more limited "requisitie majority" signature, and "certification" requirements in place of the actual recordation of an amendment executed by *all* lot owners, at the same time protecting the property rights of lot owners when those requirements are not satisfied.

In light of provisions of the Condominium and Property Owners Association Acts, and in recognition of the common law tradition governing restrictive covenants on land ownership --- including requirements of privity

and individual owner execution and recordation of restrictive covenants --- it seems apparent that the General Assembly's enactment of the specific language in §§ 55-515.1(E) and (F) was rational and intentional and it was error for the Circuit Court not to accord it full force and effect.

D. Decisions From Other Jurisdictions Affirm Strict Application of Statutory Requirements Adopted for the Benefit of Property Owners.

Decisions from other jurisdictions affirm the necessity for strict application of requirements for amendment of declarations in the context of property owners and condominium owners associations. In *Riverview Heights Homeowners Association v. Rislov*, 2009 Wyo. 55, 205 P.3d 1035 (Wyo. 2009), the HOA declaration required amendments to be "executed and acknowledged in the form prescribed for the execution of deeds by seventy-five (75) percent of the *owners* of the total acreage contrained in this tract." *Id*. at 1038 (emphasis added). The HOA contended "that the 2004 amendment complied with Paragraph 14 because the Association's *officers* signed the document and their signatures were notarized." *Id*. at 1039 (emphasis added). The Wyoming Supreme Court rejected the association's argument, ruling as follows:

> This language is not ambiguous or subject to alternative interpretations. It requires execution and acknowledgement by the owners. Execution and acknowledgement by the Association's officers do not satisfy this requirement.

Id.

Similarly, in *Shorewood West Condominium Ass'n v. Sadri*, 992 P.2d 1008, 140 Wash.2d 47 (Wash., 2000), two unit owners challenged an amendment to a condominium association's unrecorded by-law prohibiting leasing of units, asserting that it was invalid without an amendment to the condominium declaration. Noting that the "property rights that owners of individual condominiums have in their units are creations of the condominium statute and are subject to the statute, the declaration, the by-laws of the condominium association, and lawful amendments of the declaration and by-laws (992 P.2d 1012)," the Washington Supreme Court focused specifically on the statutory provision requiring each condominium declaration to contain statements of the purposes for which units are intended and restricted as to use. *Id*. The Court agreed with the challengers, stating that "an association seeking to restrict a use in a bylaw must first amend its declaration if the declaration allows the use" *Id*. at 1013.

Finally, in *Breene v. Plaza Tower Ass'n*, 310 N.W.2d 730 (N.D. 1981), the North Dakota Supreme Court rejected a condominium association's defense that an owner should not be heard to complain about an amendment prohibiting leasing of units because when the unit was

acquired he was aware of the amendment process. *Id*. at 733. The Court stated that "a prerequisite to . . . enforceability is that the restriction be recorded prior to the conveyance of any condominium unit" and that "a necessary corollary of [the statute] is that a restriction adopted after the purchase of a condominium unit would not be enforceable against the purchaser except through the purchaser's acquiescence." *Id*. at 734. On that strict basis, the North Dakota Court invalidated the amendment. *Id*. at 735. [20]

In the present case, the statute not only contains requirements for an amendment to be "effective," but the Powhatan Village Declaration explicitly reinforces the point by stating that the HOA "shall be subject to and comply with the Virginia Property Owners' Association Act as set out in § 55-509 et seq. . . . ." JA98. In the context of property rights, the express requirement that the HOA comply with the provisions of the Virginia

[20] A number of other jurisdictions have permitted owners to amend restrictive covenants to prohibit residential leasing, but only where the procedures and requirements of the applicable declaration and governing law are satisfied. *See. e.g*., *Pres. at Forrest Crossing Townhome Ass'n, Inc. v. Devaughn*, No. M2011-02755-COA-R3-CV, reported on Fastcase (Tenn. App., 2013) and the cases referenced therein. In the present case, Count V of the First Amended Complaint contends that rental restrictions cannot be lawfully adopted because they directly conflict with the overriding use provisions of the PCSA Declaration which permit residential rentals. *See* First Amended Complaint ¶ 9, JA26; ¶¶ 63-67 JA 35-36; Powhatan Village Declaration, Article IX, §§ 9.1 and 9.2, JA 95, and Article X, JA98.

Property Owners Association Act only amplifies the need for strict adherence to the signature and certification requirements of Virginia Code § 55-515.1(F), and the conditions, benefits and rights underlying those requirements, including the tolling of the limitations period in § 55-515.1(E) until those requirements have been met.[21]

E. The Contingent Limitations Period of § 55-515.1(E) Is Consistent with Similar Provisions Governing Limitations On Other Special Rights Found in the Virginia Code.

The HOA argued below that the General Assembly "put an absolute time frame within which to challenge the effectiveness of the amendment" and complained that under the Tvardeks' interpretation they "could bring this suit 100 years from now and it would still be timely." Brief in Support of Special Plea JA146-147. The General Assembly did indeed place a time

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[21] Some commentators have gone so far as to suggest that the symbiotic relationship between property owner associations and the powers granted to such associations under state law elevates their status to "state action." *See* Aaron R. Gott, *Ticky Tacky Little Government? A More Faithful Approach to Community Associations Under the State Action Doctrine*, 40 Fla. State Univ. L. Rev. 201 (2013); *see also*, Steven Siegel, *The Constitutional and Private Governments: Toward the Recognition of Constitutional Rights in Private Residential Communities Fifty Years After Marsh v. Alabama*, 6 Wm. & Mary Bill Rts. J. 461, 469 (1998). Though no constitutional claim is presented in this case, there have been frequent calls in recent years for constitutional remedies against "pervasive private governments that may seriously undermine fundamental liberties if not properly held to account." (Gott, *supra*, at 220). The concerns listed by the authors militate in favor of strict application of what few protections exist under state law for property owners in subdivisions governed by associations.

frame in which the effectiveness of the amendment could be challenged, but the limitations period was not "absolute." It would run only when the amendment became "effective," in this case one year after the amendment was recorded with a certification that the requisite majority of owners had signed it. *See* § 55-515.1(F). Far from absurd (as the HOA argued below), this condition represents a rational legislative construct rooted in the common law tradition recognized by this Court in *Dogwood Valley Citizens Association, Inc. v. Shifflett*, *supra*, 275 Va. at 203-04, 654 S.E.2d at 897(2008). The requirement that the requisite number of lot owners sign the amendment or ratifications thereof, and of recordation and full certification that "the requisite majority of lot owners signed the amendment or ratifications thereof," protect long-recognized and valuable property rights. Likewise, those same rights are protected by the tolling of the limitations period until they are met.

Conditioning the commencement of a statute of limitations period on a predicate or triggering "effective date" is also not unique or novel in Virginia law. For example, Virginia Code § 8.01-249 contains indefinite and contingent accrual periods for the discovery of fraud or mistake, occupational disease, and sex abuse, as well as limitations periods subject to subsequent triggering acts such as written requests for funds on deposit

with a bank, contributions and indemnifications related to debt, and product liability claims for prosthetic implants. Likewise, Virginia Code § 8.01-229 tolls accrual periods for claims where infancy, incapacity and other causes are in play, with limitations periods running from the date of subsequent events. So too, Virginia Code § 8.01-243 extends limitations periods related to injury arising from foreign objects left in a patient's body, concealment of medical conditions, and/or failures to diagnose malignant tumors. Finally, as is well known, in *Keller v. Denny*, 232 Va. 512, 516 (1987), lawyers, doctors and other professional service providers who would be normally subject to an otherwise definite statutory limitations period are instead made subject to indefinite limitation that runs from the termination of a continuous or recurring course of professional service.

The HOA contended below that under the Tvardeks' interpretation a court would be unable to resolve the statute of limitations issue without first determining the validity of the amendment. JA147. But this argument erroneously conflates the distinction between "effectiveness" and "validity," each of which is separately reflected in the language of Subsection (E). Determining whether the amendment is "effective" is simple. The court need only look at whether the amendment was recorded with a certification that on its face satisfies the minimal requirements of § 55-515.1(F). If not,

then the amendment is not "effective," there is no bar to suit, and its "validity" can be challenged. In that regard, the Tvardeks have filed a motion for partial summary judgment (JA130) on grounds that the amendment was not "effective." If granted, the Court would declare that the amendment cannot be enforced against the Tvardeks because it was not effective as a matter of law. To that extent, it would also be invalid and the Tvardeks would be free to rent their property. The Tvardeks would nevertheless also have standing to proceed to litigate the remaining counts of the First Amended Complaint, including their claim of invalidity based on the conflicting and overriding provisions of the PCSA Declaration.

Far from being absurd or unduly complicated, conditioning the limitations period in § 55-515.1 on an unequivocal certification that the requisite majority of lot owners had signed the amendment (or ratifications) was simple and rationally aimed at protecting the valuable property rights of fee simple property owners. Otherwise, small cliques of homeowners would be empowered to push through restrictions on pre-existing real property rights by proxy or at randomly-called meetings. The General Assembly recognized the importance of common law property rights and required that amendments adopted by homeowner associations not only be *signed* by the requisite majority of property owners, but that certification of

that fact be made for the amendment to be effective. Absent compliance with the provisions of §§ 55-515.1(E) and (F), amendments not properly documented and certified are not effective and the limitations period does not commence to run.

F. Summary

The comparison of §§ 55-515.1(E) and (F) with parallel provisions of the Condominium Act, the legislative history, the common law tradition, the strict construction of decisions from other jurisdictions, and the rationality of the statutory provisions all demonstrate that the General Assembly intended for there to be no bar to challenges of purported amendments that were not legally "effective" under the requirements set forth in the statute. Because the statutory language is unequivocal, and the legislative intent is clear, it was error for the Circuit Court to bar the Tvardeks' suit.

III. IN THE EVENT THE COURT SUSTAINS THE CIRCUIT COURT'S RULING ON THE MERITS, AND WITHOUT PREJUDICE TO THE ARGUMENT MADE IN PART I, IT IS RESPECTFULLY SUBMITTED THAT THE COURT'S AWARD OF ATTORNEY'S FEES UNDER CODE § 55-515 WAS NEVERTHELESS UNREASONABLE IN THAT THE HOA DID NOT PREVAIL ON ITS DEMURRER, WAIVED ANY ENTITLEMENT TO ATTORNEY'S FEES OTHER THAN FOR WORK DONE IN REVIEWING THE COMPLAINT AND PROSECUTING ITS SPECIAL PLEA, AND CONTAINED IMPROPER REIMBURSEMENT FOR ATTORNEY TRAVEL TIME.

A. Standard of Review

The Circuit Court's decision to award attorney's fees is reviewed under the abuse of discretion standard. *Robinson-Huntley v. George Wash. Carver Mut. Homes Ass'n,* 287 Va. 425, 432 (Va. 2014); *Piney Meeting House Invs., Inc. v. Hart*, 284 Va. 187, 196 (Va. 2012). In applying that standard, the Court has stated that:

> A trial court may abuse its discretion by failing to consider a "relevant factor that should have been given significant weight"; by considering "an irrelevant or improper factor [and giving it] significant weight"; or by "commit[ting] a clear error of judgment." (citation and internal quotation marks omitted). A trial court may also abuse its discretion by basing its decision on an erroneous legal conclusion. [Lynchburg Div. of Soc. Servs. v.] Cook, 276 Va. [465] at 484, 666 S.E.2d [361] at 371 [2008).

Commonwealth ex rel. Fair Hous. Bd. v. Windsor Plaza Condo. Ass'n, 768 S.E.2d 79**,** *2014 Va. LEXIS 198* (Va. 2014).

B. The Attorney's Fee Award Was Unreasonably Excessive and Should be Reduced

Virginia Code § 55-515 provides that a "prevailing party" in an action against an association under a Declaration may recover "reasonable" attorney's fees. This Court has made clear that "[t]he amount of the fee award rests within the sound discretion of the trial court," including "whether the services were necessary and appropriate. . . ." *Manchester Oaks Homeowners Ass'n, Inc. v. Batt,* 284 Va. 409, 429-30, 732 S.E.2d 690 (2012), quoting *Ulloa v. QSP, Inc.*, 271 Va. 72, 82, 624 S.E.2d 43 (2006).

Rule 3:25 of the Rules of the Supreme Court of Virginia requires that a party seeking such fees specify the basis for the demand in the applicable pleading. The pertinent provisions of Rule 3:25 of the Rules of the Supreme Court of Virginia provide:

> **Rule 3:25. Claims for Attorney's Fees**
>
> **. . . .**
>
> B. *Demand.* --A party seeking to recover attorney's fees shall include a demand therefor in the Complaint filed pursuant to Rule 3:2, in a counterclaim filed pursuant to Rule 3:9, in a cross-claim filed pursuant to Rule 3:10, in a third-party pleading filed pursuant to Rule 3:13, or *in a responsive pleading filed pursuant to Rule 3:8.* The demand must identify the basis upon which the party relies in requesting attorney's fees. (Emphasis added)
>
> C. *Waiver.* --The failure of a party to file a demand as required by this rule constitutes a waiver by the party of the claim for attorney's fees, unless leave to file an amended pleading seeking attorney's fees is granted under Rule 1:8. **. . . .**

In the present case, the trial court awarded the HOA all of its requested prevailing party attorney's fees. However, the HOA failed in its Demurrer and in its Answer to "identify the basis upon which the party relies in requesting attorney's fees," as required by Supreme Court Rule 3:25(A). The purpose of Rule 3:25's notice requirement is to give parties

notice of the basis for a claim for attorney's fees early on in the litigation.[22] The HOA could have pled its Special Plea at the outset and avoided the further legal work that proved to be unnecessarily incurred in the case. *See* Rule 3:8; Va. Code § 8.01-235. Instead, it initiated the Demurrer, in which it failed to identify any basis for recovery of alleged attorney's fees. When it did not prevail on the Demurrer, it then filed its Answer, specifically denying counts of the Complaint requiring factual development, but again with no identification in its Answer of the basis to recover alleged attorney's fees and costs.

Under Supreme Court Rule 3:25(B), the HOA's failure to make a properly pled demand for attorney's fees in its Demurrer and later in its Answer "constitutes a waiver by the party of the claim for attorney's fees" with regard to legal work incurred with reference to those pleadings. The practical impact is that the only prevailing party attorney's fees for which the HOA can be compensated are those incurred in conjunction with review of the Complaint and prosecution of the Special Plea because only in the latter pleading did the HOA identify the basis of its demand of attorney's fees.

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[22] Advisory Committee on Rules of Court of The Judicial Council of Virginia, Boyd Graves Conference, September 26, 2008, available at http://valawyersweekly.com/wp-files/pdf/Rule3-25.pdf.

Notwithstanding its failures to comply with Rule 3:25, the Circuit Court also granted the HOA's request for all of the fees incurred in the case which included 14.3 hours for fees for preparation, briefing and argument on its Demurrer (on which it did not prevail) ($3,932.50)[23] and for 6.2 hours for responding to discovery based on its Answer to the First Amended Complaint (for which it failed to make a proper Rule 3:25 demand) ($1,705.00),[24] for a total amount of $5,637.50. This included $1,100.00 in fees for four hours of attorney travel time to and from Virginia Beach and Williamsburg for hearings on the Demurrer ($550.00)[25] and on a motion to defer briefing on which the HOA did not prevail. ($550.00).[26]

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[23] JA172, Items 12/10/13 through 3/20/14.

[24] JA172, Items 4/18/14 through 6/10/15.

[25] JA172, Item 3/20/14.

[26] JA172, Item 5/30/14. The HOA's itemized list showed justifiable prevailing party work related to (1) review of the Complaint and Amended Complaint totaling 2.3 hours ($632.50, JA172, Item 12/6/13) and 0.20 hours ($55.00 JA172, Item 3/21/14), and (2) presentation of the Special Plea (as well as the work required to respond to the directly related motion for partial summary judgment) totaling twenty-one and one-half (21.5) hours of work. ($5,912.50, JA172, Items 7/1/14 through 9/2/14),[26] for a total of $6,600.00. However, the latter total included 2 hours for the HOA's counsel to travel from Virginia Beach to and from Court in Williamsburg ($550.00, JA172, Item 7/15/14), leaving a total justified amount of prevailing party fees of $6,050.00.

It is respectfully submitted that it is unreasonable, in the case of a statutory award of prevailing party attorney's fees, for an opposing party to be required to compensate a litigant for matters on which a party did not prevail, or on which it waived its fees (20.5 hours –[$5,637.50], including the 4.0 hours of travel time) or for its choice to hire an out of town attorney who chooses to charge for time driving to and from court (totaling 6.0 hours –[$1,650.00]). *See SunTrust Mortg., Inc. v. AIG United Guar. Corp.*, 933 F.Supp.2d 762 (E.D. Va., 2013); *Abusamhadaneh v. Taylor*, Memorandum Opinion, 1:11cv939 (JCC/TCB), January 17, 2013 United States District Court for the Eastern District of Virginia, Alexandria Division (Available on FastCase).

The HOA asserted below that the Tvardeks' discovery added to the costs of the litigation, knowing that the Special Plea could be sustained. However, the discovery was aimed at the responsive pleading made in the HOA's Answer (concerning which no demand for attorney's fees was made) and was directed at narrowing the issues in the litigation. See *Manchester Oaks Homeowners Ass'n, Inc. v. Batt,* 284 Va. 409, 426 (2012). In any event, the HOA skirted discovery by interposing the special plea and other nominal objections as grounds for not answering

interrogatories or producing documents.[27] Had the HOA not filed its Demurrer, and its Answer, and brought on its Special Plea initially, none of this work would have been necessary.

The lower Court's award of all of the HOA's prevailing party fees was unreasonably excessive and constituted an abuse of discretion. Assuming the Tvardeks do *not* prevail on the merits of their appeal, it is respectifully submitted that the attorney fee award should be reduced by time incurred for non-prevailing, waived and unreasonable billing, and limited to the non-waived attorney fee demand for time incurred with regard to reviewing the First Amended Complaint and briefing and adjudication of the Special Plea, which constituted a total of $6,050.00 in prevailing party attorney's fees.

CONCLUSION

The Tvardek's First Amended Complaint should not have been dismissed under Virginia Code § 55-515.1(E) because the amendment in question was never "effective" within the meaning of the statute. The Circuit

[27] The HOA provided only nominal answers to 4 of 19 interrogatories, refusing to respond to several others because of the pendency of the Special Plea, and otherwise responding by simple reference to its demurrer brief, or interposing objections or similarly brief responses. The HOA produced documents on only 2 of the 25 requests for production, objecting to 15 on grounds of the Special Plea, and otherwise asserting objections or brief responses to the rest.

Court erred in departing from the plain meaning of the statute and in failing to interpret the statute in accordance with the legislative intent. In addition, the Circuit Court abused its discretion in awarding the HOA all of its requested fees.

For the foregoing reasons, the Tvardeks pray that the Court reverse the Circuit Court's Order that resulted in the dismissal of the Tvardeks' First Amended Complaint and the award of attorney's fee, and reinstate this action and remand it to the trial Court for further proceedings on the Tvardeks' Motion for Partial Summary Judgment and subsequent proceedings.

Dated: July 9, 2015.

Respectfully submitted,

STEVEN F. TVARDEK, JR., and
MARTA P. TVARDEK

By:____/s/ James J. Knicely_____
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CERTIFICATE

Pursuant to Rules 5:26(h) and 32(a)(3)(i) of the Rules of the Virginia Supreme Court, counsel for the Appellants Steven F. Tvardek Jr. and Marta P. Tvardek certifies that on July 9, 2015, the undersigned counsel:

1. Complied with the requirements of Rules 26 and 32 of the Rules of the Supreme Court of Virginia with regard to the filing and service of the Opening Brief of the Appellants and the Joint Appendix; and
2. Caused an electronic version, in Portable Document Format (PDF), of the Opening Brief of Appellants signed by counsel of record for the Appellants and of the Joint Appendix to be filed with Clerk of this Court by electronic transmission in accordance with the VACES Guidelines and User's Manual using the Virginia Appellate Courts eBriefs System; and
3. Caused to be served on opposing counsel copies thereof by CD disk mailed to said counsel's mail address stated below; and
4. Caused to be filed in the Office of the Clerk of this Court the correct number of printed copies of the Opening Brief of Appellants and the Joint Appendix; and

5. Caused such service on opposing counsel by mailing the true copies of the said Opening Brief and Joint Appendix, postage pre-paid, by first class mail to Appellee's counsel, Barry Dorans, Esquire, Wolcott Rivers Gates, 301 Bendix Road, Suite 500, Virginia Beach, Virginia 23452.

By:____/s/ James J. Knicely_____
Counsel