

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 26, 2008

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2007AP2534

Cir. Ct. No. 2007CV643

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

CHARLES ZABLER,

PLAINTIFF-RESPONDENT,

v.

COACHLIGHT VILLAGE TOWN HOUSES CONDOMINIUM IV,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Waukesha County:
KATHRYN W. FOSTER, Judge. *Affirmed.*

Before Brown, C.J., Anderson, P.J., and Snyder, J.

¶1 PER CURIAM. Coachlight Village Town Houses Condominium IV appeals from the summary judgment awarded to Charles Zabler. Coachlight Village argues that the circuit court erred because it improperly interpreted the condominium documents, improperly considered and applied a local ordinance on

utility billing practices, and erred when it determined that the condominium association acted improperly. Because we conclude that Zabler is entitled to summary judgment as a matter of law, we affirm the judgment of the circuit court.

¶2 Coachlight Village is a condominium located in New Berlin, and consists of four buildings with four individual units. Coachlight Village is governed by an Association, and the Association is governed by a Board of Directors. Zabler owns a condominium unit in Coachlight Village. Zabler brought this declaratory judgment action against Coachlight Village alleging that the Association had violated the Declaration and By-Laws in three respects.

¶3 First, he claimed that the Association was improperly allocating costs for water, sewage, and salt. When Coachlight Village began receiving its water from the Milwaukee Metropolitan Sewage District, the water costs substantially increased. The Association historically had divided the water costs into sixteen equal payments. Some residents felt that this was unfair. At a meeting in January 2005, the majority of owners present voted to allocate the costs for each building among the residents of that building. As a result, Zabler's water costs significantly increased. Zabler argued that the Association violated its own rules when it changed the allocation of the water costs.

¶4 Second, Zabler alleged that the Association acted improperly when it did not pay for painting fences. Each building in the complex is surrounded by "limited common areas" that includes fences. The Association repaired the fences but required that the unit owner pay for painting the fence. Zabler argued that the painting of the fences is a common expense, and should be shared equally by all of the owners.

¶5 Third, Zabler had notified the Association that there were carpenter ants around his building. The Association responded that if there were carpenter ants, then the Association would split the cost of extermination of the carpenter ants with the building. Zabler again argued that this was a common expense that should be borne entirely by the Association.

¶6 Zabler brought this declaratory judgment action alleging that the Association had required him to pay a sum of money in excess of that provided for by the By-Laws and Declaration. Both Coachlight Village and Zabler moved for summary judgment. The circuit court held a hearing, and granted summary judgment to Zabler. Coachlight Village appeals.

¶7 Our review of the circuit court's grant of summary judgment is de novo, and we use the same methodology as the circuit court. *M&I First Nat'l Bank v. Episcopal Home Mgmt., Inc.*, 195 Wis. 2d 485, 496, 536 N.W.2d 175 (Ct. App. 1995). That methodology is well known, and we need not repeat it here. Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.* at 496-97.

¶8 Coachlight Village first argues that the circuit court improperly interpreted the condominium documents and that the court improperly construed a City of New Berlin ordinance when it granted summary judgment to Zabler. Specifically, it argues that the circuit court erred when it found that the Condominium Declaration defines water, salt, and sewage costs as common expenses.

¶9 The circuit court, in a very thorough decision, explained that the Association is governed by WIS. STAT. ch. 703 (2005-06),¹ the Association's Declaration, and the Association's By-Laws. The court concluded that a City of New Berlin Municipal Ordinance, Section 276-10(a)(2), provides that billings to condominiums shall be considered a common expense of the condominium association under ch. 703. WISCONSIN STAT. § 703.02(3) provides that common expenses are expenses of the association.² The court concluded that: "Through the Ordinance, the City assured that all multi-tenant billings, and any other Association expenses, are common expenses" under the statute. The court further concluded that water, salt, and sewage costs are multi-tenant billings, and hence common expenses. The court further found that the Declaration provided that each unit shall be liable for an equal share of the common expenses. Because these expenses for water, sewage, and salt are common expenses, the court held they must be allocated equally among all the unit owners.

¶10 The court also concluded that the Declaration provides that a majority of all condominium owners is needed to amend the Declaration. In January 2005, a majority of the owners present, and not a majority of all owners, voted to amend the Declaration. The Declaration, therefore, was not properly amended, and Zabler was entitled to summary judgment. We are not convinced that the circuit court improperly considered and applied the city ordinance, and we agree with the circuit court's conclusion.

¹ All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

² The appellant correctly notes that the circuit court cited to WIS. STAT. § 703.02(2), when it should be § 703.02(3).

¶11 Coachlight Village also argues that the circuit court erred when it concluded that maintenance of fences was the responsibility of the Association. Coachlight argues that the circuit court erred when it considered limited common areas to be a subset of “common areas.” While the Declaration defines “limited common areas,” it does not distinguish between common areas and limited common areas when establishing responsibility for maintenance. We agree with the circuit court that a “limited common area” is a specific type of common area. The Declaration provides that each unit owner shall be liable for an equal share of common expenses, and that common expenses include the maintenance of common areas. Because the fence is a common area, the maintenance of the fence is also a common expense.

¶12 The circuit court also concluded that responsibility for the maintenance of the common areas includes the responsibility for the costs associated with carpenter ant extermination. We again agree.

¶13 Coachlight Village also argues that the circuit court erred when it determined that the Association acted improperly when it reallocated the costs. It argues that the Association is authorized by statute to allocate assessments and make changes in the day-to-day operations of the condominiums without amending the Declaration. Coachlight Village further argues that the procedure of amending the Declaration is, in essence, too cumbersome to be practical because it requires that the unit owners get the written consent of their mortgage-holder.

¶14 We are not convinced by Coachlight Village’s argument. The circuit court concluded that the Declaration provides that each unit owner is liable for an equal portion of common expenses. We agree. When the Association decided to change the allocation of a particular common expense so that the expense was

shared equally by the building and not equally by the unit owners, it needed to amend the Declaration to do so. Because the Association did not properly amend the Declaration, the Association must either allocate the costs equally among the unit owners, or properly amend the Declaration. For the reasons stated, we affirm the judgment of the circuit court.

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

