

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Case No. 06-2157

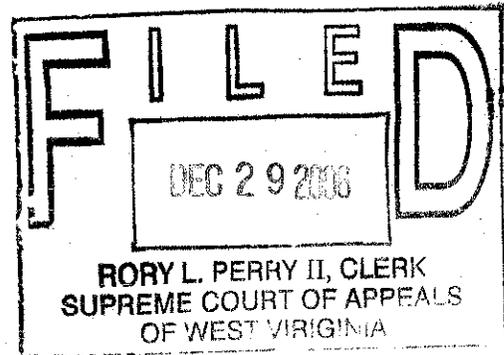
UNITED BANK, INC., *et al.*,

Appellants-Plaintiffs below

v.

STONEGATE HOMEOWNERS
ASSOCIATION, INC., *et al.*,

Appellee-Defendant below



APPELLANTS' BRIEF

Mark A. Sadd (W. Va. Bar No. 6005)
G. Nicholas Casey, Jr. (W. Va. No. 666)
Lewis Glasser Casey & Rollins PLLC
P. O. Box 1746
Charleston, West Virginia 25326
(o) (304) 345-2000
(f) (304) 343-7999
Counsel for the Appellants

TABLE OF CONTENTS

I.	TABLE OF AUTHORITIES	1
II.	INTRODUCTION	2
III.	ASSIGNMENT OF ERROR	2
IV.	KIND OF PROCEEDING AND NATURE OF RULING IN THE CIRCUIT COURT	2
V.	STATEMENT OF FACTS	4
VI.	ARGUMENT	5
VII.	CONCLUSION AND PRAYER	12

II. TABLE OF AUTHORITIES

A. Statutes

W. Va. Code § 36B-1-101 <i>et seq.</i> Uniform Common Interest Ownership Act	<i>passim</i>
W. Va. Code § 38-2-1 through 39	10, 11

B. Cases

<i>Appalachian Elec. Power Co. v. Koontz</i> , 138 W. Va. 84 (W. Va. 1953)	7
<i>Heldreth v. Rahamian</i> , 2006 W. Va. LEXIS 4 (W. Va. 2006)	10
<i>State v. Epperly</i> , 135 W. Va. 877 (W. Va. 1951)	7

TO THE HONORABLE SUPREME COURT OF APPEALS OF WEST VIRGINIA:

I. INTRODUCTION

COME NOW Joseph D. Stever and Bonnie M. Stever (the “Appellants”) and for their Appeal, the Appellants state:

II. ASSIGNMENT OF ERROR

The Circuit Court erred when it denied the Appellants as the prevailing parties under W. Va. Code § 36B-3-116 their costs and attorney’s fees in contravention of W. Va. Code § 36B-3-116(f).

**III. KIND OF PROCEEDING
AND
NATURE OF RULING IN THE CIRCUIT COURT**

As expressed in the Assignment of Error, the Appellants appeal only that ruling of the Putnam County Circuit Court contained in Section E of the Circuit Court’s final order (the “Final Order”), a true copy of which is attached as **Exhibit A**.¹ The ruling unlawfully denied the Appellants’ costs and attorney’s fees despite W. Va. Code § 36B-3-116(f).

The Appellants and others instituted the civil action against the Appellee — Stone Gate Homeowners Association, Inc. — in two counts seeking declaratory and equitable relief under the UCIOA². See Complaint. The litigation was and remains a costly affair for the homeowners.

¹

United Bank, Inc. et al. v Stone Gate Home Owners Association, Inc. et al. (Putnam County Circuit Court Civil Action No. 03-C-369).

²

W. Va. Code § 36B-1-101 *et seq.*

Meanwhile, the Appellee's insurer has picked up the cost of the homeowners association's attorney's fees. The Appellee vigorously disputed all of the plaintiffs' claims, including, ludicrously, even that the Appellee was subject to the UCIOA in the first instance. The Appellants prevailed on Count I (with judgment on the pleadings) and Count II (with summary judgment).³ The Circuit Court granted the Appellants ultimate relief in the form of adjudicating the invalidity and, thus, the unenforceability of a notice of lien for an unadjudicated homeowner's assessment that the Appellee unlawfully filed in the Putnam County Clerk's office against the Appellants' home in the Stone Gate Subdivision.

As prevailing parties under W. Va. Code § 36B-3-116(f), the Appellants sought their costs and attorney's fees. The Circuit Court denied the Appellants the benefit of the mandatory fee-shifting remedy:

The Plaintiffs argue that pursuant to West Virginia Code § 36B-3-116(f), they are entitled to attorney's fees. West Virginia Code § 36B-3-116(f) provides that '[a] judgment or decree in any action **brought under this section** must include costs and reasonable attorney's fees for the prevailing party.' (Emphasis added). Therefore, the Plaintiffs argue that if the Court grants their motion for summary judgment, they are entitled to attorney's fees.

The Court disagrees. The Court finds that West Virginia Code § 36B-3-116 provides the homeowners association a method by which it may recover assessments or fees incurred pursuant to West Virginia Code § 36B-3-102. In furtherance of this purpose, West Virginia Code § 36B-3-116(f) simply states that if a homeowner's association attempts to collect such assessment or fee in accordance with this section, the prevailing party is entitled to attorney's fees.

In the present matter, the Court finds that the Association did not attempt to avail itself of West Virginia Code § 36B-3-116. Therefore, the Court finds that the

3

Contrary to the Appellee's misstatements, there has been no adjudication of claims against the Appellants. Indeed, the alleged underlying liability was incurred, if at all, not by the Appellants but by the people who long ago sold the home to the Appellants and flew the coop.

Plaintiffs are not entitled to recover attorney's fees.

Final Order at 16 (Emphasis original).

The Appellants petitioned this Court to review the Circuit Court's ruling denying their costs and attorney's fees under W. Va. Code § 36B-3-116(f). The Supreme Court granted the Petition for Appeal on November 29, 2006.

IV. STATEMENT OF FACTS

The Appellants incorporate herein for reference their Statement of Facts in their Petition for Appeal and also their remarks in the Petitioners' Reply to the Stone Gate Homeowners Association, Inc.'s Response to Petition for Appeal. A synopsis of the most salient contextual facts follows:

(a) The Appellants have violated no law, rule or regulation of the homeowners association and have no liability — adjudicated or otherwise— to the Appellee whatsoever.

(b) Officers of the Appellee, without board approval, filed a notice of lien against the Appellants' home for an alleged unpaid assessment that the people who sold the home to the Appellants allegedly owe to the Appellee. The Appellee filed the notice of lien more than five years after it allegedly accrued.

(c) The Appellants had no knowledge of the assessment when they bought their home.

(d) The Appellants and others instituted a cause of action against the Appellee, among other things, to invalidate the unlawful notice of lien.

(e) The Appellants were the prevailing parties. The Circuit Court invalidated the lien and ordered the Appellee to file a release of the notice of lien in the Putnam County Clerk's office.

V. ARGUMENT

The Circuit Court erred when it unlawfully denied the Appellants their costs and attorney's fees under W. Va. Code § 36B-3-116(f) for prosecuting their claims in the Circuit Court despite that the Appellants were the prevailing parties under W. Va. Code § 36B-3-116.⁴ The Circuit Court,

4

West Virginia Code § 36B-3-116, *Lien for assessments*, provides in full:

(a) The association has a lien on a unit for any assessment levied against that unit or fines imposed against its unit owner from the time the assessment or fine becomes due. Unless the declaration otherwise provides, fees, charges, late charges, fines and interest charged pursuant to section 3-102(a)(10), (11) and (12) are enforceable as assessments under this section. If an assessment is payable in installments, the full amount of the assessment is a lien from the time the first installment thereof becomes due.

(b) A lien under this section is prior to all other liens and encumbrances on a unit except (i) liens and encumbrances recorded before the recordation of the declaration and, in a cooperative, liens and encumbrances which the association creates, assumes, or takes subject to, (ii) a first security interest on the unit recorded before the date on which the assessment sought to be enforced became delinquent, or, in a cooperative, the first security interest encumbering only the unit owner's interest and perfected before the date on which the assessment sought to be enforced became delinquent, and (iii) liens for real estate taxes and other governmental assessments or charges against the unit or cooperative. The lien is also prior to all security interests described in clause (ii) above to the extent of the common expense assessments based on the periodic budget adopted by the association pursuant to section 3-115(a) which would have become due in the absence of acceleration during the six months immediately preceding institution of an action to enforce the lien. This subsection does not affect the priority of mechanics' or materialmen's liens, or the priority of liens for other assessments made by the association. (The lien under this section is not subject to the provisions of (insert appropriate reference to state homestead, dower and curtesy, or other exemptions).)

(c) Unless the declaration otherwise provides, if two or more associations have liens for assessments created at any time on the same property, those liens have equal priority.

(d) A lien for unpaid assessments is extinguished unless proceedings to enforce the lien are instituted within three years after the full amount of the assessments

becomes due.

(e) This section does not prohibit actions to recover sums for which subsection (a) creates a lien or prohibit an association from taking a deed in lieu of foreclosure.

(f) A judgment or decree in any action brought under this section must include costs and reasonable attorney's fees for the prevailing party.

(g) The association upon written request shall furnish to a unit owner a statement setting forth the amount of unpaid assessments against the unit. If the unit owner's interest is real estate, the statement must be in recordable form. The statement must be furnished within ten business days after receipt of the request and is binding on the association, the executive board, and every unit owner.

(h) For the purpose of perfecting and preserving its lien, the association shall give notice to the unit owner in the manner set forth in section one (§56-2-1), article two, chapter fifty-six of this code, or by registered or certified mail, return receipt requested, and in a form reasonably calculated to inform the owner of his liability for payment of the assessment. The lien shall be discharged as to subsequent purchasers for value without notice unless the association shall cause to be recorded a notice of the lien in the office of the clerk of the county commission of any county wherein any part of the condominium is located. The notice shall contain:

- (1) A legally sufficient description of the unit;
- (2) The name or names of the owners of the unit;
- (3) The amount of unpaid assessments due together with the date when each fell due; and
- (4) The date of recordation.

The clerk of the county commission in whose office the notice is recorded shall index the notice in the appropriate deed books and lien books in the name of the unit owners and of the association. The cost of recordation shall be assessed against any unit owner found to be delinquent in a subsequent proceeding to enforce the lien. Upon payment of the assessment, the association shall execute a written release of the lien in the manner set forth in section one (§38-12-1), article twelve, chapter thirty-eight of this code. This release shall be recorded, at the expense of the association, in the office of the clerk of the county commission wherein the notice of the lien was filed.

(i) At any time before the association has disposed of a unit in a cooperative or entered into a contract for its disposition under the power of sale, the unit owners or the holder of any subordinate security interest may cure the unit owner's default and

contrary to the rules of statutory application in common law and the UCIOA itself, failed to plainly and unambiguously apply W. Va. Code § 36B-3-116(f). Our common law is clear: “A statutory provision which is clear and unambiguous and plainly expresses the legislative intent will not be interpreted by the courts but will be given full force and effect.” Syllabus Point 1, *State v. Epperly*, 135 W. Va. 877 (W. Va. 1951). “A statute is to be applied as written, not construed, where the intention thereof is made clear by the language used when considered in its proper context and as it relates to the subject matter dealt with.” Syllabus Point 1, *Appalachian Elec. Power Co. v. Koontz*, 138 W. Va. 84 (W. Va. 1953).

The UCIOA addresses the manner in which courts must view the application of the rights and remedies set forth in the act:

- (a) The remedies provided by this chapter shall be liberally administered to the end that the aggrieved party is put in as good a position as if the other party had fully performed. However, consequential, special or punitive damages may not be awarded except as specifically provided in this chapter or other rule of law.
- (b) Any right or obligation declared by this chapter is enforceable by judicial proceeding.

W. Va. Code § 36B-1-113.

“If a declarant or any other person subject to this chapter fails to comply with any of its provisions or any provision of the declaration or bylaws, any person or class of persons adversely affected by the failure to comply has a claim for appropriate relief. Punitive damages may be awarded for a

prevent sale or other disposition by tendering the performance due under the security agreement, including any amounts due because of exercise of a right to accelerate, plus the reasonable expenses of proceeding to foreclosure incurred to the time of tender, including reasonable attorney's fees of the creditor.

willful failure to comply with this chapter. The court, in an appropriate case, may award reasonable attorney's fees."⁵ W. Va. Code § 36B-4-117. "This chapter shall be applied and construed so as to effectuate its general purpose to make uniform the law with respect to the subject of this chapter among states enacting it."⁶ W. Va. Code § 36B-1-110.

The text of W. Va. Code § 36B-3-116(f) is unambiguous and plain: "A judgment or decree in any action brought under this section must include cost and reasonable attorney's fees for the prevailing party." In fact, the Appellants prosecuted their Count II claims based on the section to which the foregoing refers: W. Va. Code § 36B-3-116. They did so particularly to obtain the adjudication of the invalidity and, thus, the unenforceability of the notice of lien for assessment that the Appellee unlawfully filed against their home. In granting the Appellants' Motion for Summary Judgment on the issue, the Circuit Court rightly reasoned that:

West Virginia Code § 36B-3-116(d) states that '[a] lien for unpaid assessments is extinguished unless proceedings to **enforce** the lien are instituted within three years after the full amount of the assessments becomes due.' . . . Therefore, the Court finds the requirements to enforce a lien pursuant to the UCIOA is similar to the requirements to enforce a mechanic's lien. . . . The Association has not instituted a law suit against any of the Plaintiffs in this action. Therefore, because more than three years has lapsed since the full amount of each Plaintiffs' assessments became

5

The writer especially notes that the UCIOA *per* W. Va. Code § 36B-4-117 authorizes a court to "award reasonable attorney's fees" in "an appropriate case" yet **mandates** a court to award "costs and attorney's fees" in "[a] judgment or decree" brought under W. Va. Code § 36B-3-116.

6

"This Act should be construed in accordance with its underlying purpose of making the law uniform with respect to all forms of common interest communities, as well as the purposes . . . of simplifying, clarifying, and modernizing the law of common interest communities, promoting the interstate flow of funds to common interest communities, and **protecting consumers, purchasers, and borrowers against common interest community practices which may cause unreasonable risk of loss to them.** Accordingly, the test of each section should be read in light of the purpose and policy of the rule or principle in question, and also of the Act as a whole." Comments, § 1-110, *Uniform Laws Annotated*, Uniform Common Interest Act (1982). (Emphasis supplied)

due, the liens are time-barred pursuant to West Virginia Code § 36B-3-116(d). Final Order at 15-16 (Emphasis original). Ultimately, based on the foregoing ruling under W. Va. Code 36B-3-116(d), the Circuit Court properly decreed: “Accordingly, the Court hereby **ORDERS** the liens placed upon the Plaintiffs’ Stone Gate properties to be released.” *Id.* at 17.

Despite that it ruled and decreed in favor of the Appellants under W. Va. Code § 36B-3-116 — the section to which W. Va. Code § 36B-3-116(f) applies — the Circuit Court inconsistently denied the Appellants their costs and attorney’s fees even though they were the prevailing parties. The Circuit Court rejected the Appellants’ request⁷ for costs and attorney’s fees:

The Court disagrees. The Court finds that West Virginia Code § 36B-3-116 provides the homeowners association a method by which it may recover assessments or fees incurred pursuant to West Virginia Code § 36B-3-102. In furtherance of this purpose, West Virginia Code § 36B-3-116(f) simply states that if a homeowner’s association attempts to collect such assessment or fee in accordance with this section, the prevailing party is entitled to attorney’s fees.

In the present matter, the Court finds that the Association did not attempt to avail itself of West Virginia Code § 36B-3-116. Therefore, the Court finds that the Plaintiffs are not entitled to recover attorney’s fees.

Final Order at 16.

Its reading of W. Va. Code § 36B-3-116(f) is too narrow and wrongly biased in favor of the homeowners association. More pointedly, the Circuit Court’s denial of costs and attorney’s fees for the Appellants as prevailing parties is at complete odds with its ruling that made the Appellants the prevailing parties, that is, the ruling that invalidated the Appellee’s recorded notice of lien as

7

The Appellants as the prevailing parties actually need not have requested their costs and attorney’s fees because W. Va. Code § 36B-3-116(f) requires a court to include them in a judgment or decree for the prevailing party even if a party has not asked for them. Under W. Va. Code § 36B-3-116(f), the right to the award arises as a matter of law.

unlawful under W. Va. Code § 36B-3-116. The Circuit Court failed to “liberally administer the remedy” of costs and attorney’s fees in W. Va. Code § 36B-3-116(f). Instead, it attached unstated qualifications to the persons who would be entitled to the remedy without a textual basis for doing so in W. Va. Code § 36B-3-116(f) or elsewhere in the UCIOA. The Circuit Court failed to take the statute for its word. The mandatory fee-shifting statute does not modify the term “prevailing party” to exclude a homeowner who institutes a civil action under W. Va. Code § 36B-3-116. Nor does it confer the remedy solely on a homeowner’s association only when it institutes an action to enforce a lien for assessment. Moreover, the statute refers to “any action” — again without textual basis — and not only to an action that a homeowner’s association institutes to enforce a lien.

The Circuit Court’s ruling undermines the purposes of W. Va. Code § 36B-3-116(f) as a neutral mandatory fee-shifting statute. The purposes of W. Va. Code § 36B-3-116(f) and other fee-shifting statutes are well-known exceptions to the American rule. Fee-shifting statutes discourage bad behavior in certain consumer relationships, especially in which one member has an inherent power advantage over the other. They make it more economically feasible for parties to collect or defend against relatively low-dollar liabilities. They encourage competent counsel to pursue difficult claims.⁸

These incentives are reflected in the law of mechanic’s liens⁹, a compelling analogue for the

8

See e.g., *Heldreth v. Rahimian*, 2006 W. Va. LEXIS 4 (W. Va. 2006) (“Inherent in any statutory fee award made pursuant to W. Va. Code Ann. § 5-11-13(c) (Repl. Vol. 2002) is a recognition that the economic incentive provided by such a fee-shifting mechanism is necessary to attract competent counsel for the purpose of enforcing civil rights laws that serve to protect the interests of the state’s citizenry.”)

9

W. Va. Code §§ 38-2-1 through 39.

Supreme Court to ponder as it corrects the lower court's ruling. See W. Va. Code § 36B-3-116(a) and W. Va. Code § 38-2-1. Both kinds of lien arise automatically (that is, by operation of law) and are based on unadjudicated claims of liability.¹⁰ Because a mechanic's lien is unadjudicated, the West Virginia Legislature gave the countervailing power to a lienee — the owner of the real property to which the unadjudicated lien attaches — to challenge the underlying liability as well the validity and, thus, the enforceability of the lien itself. In W. Va. Code § 38-2-37, a property owner has a right to initiate and prosecute a civil action to remove a lien, and, if he prevails, to recover costs and attorney's fees for doing so:

In the case of the refusal of a the party holding such lien to cause such clerk to enter a discharge of such lien, or to execute a release of such lien . . . upon the request of the party entitled to such discharge or release, the circuit court of the county, or the judge thereof in vacation, in which such lien is recorded may, on motion, after reasonable notice of the party so refusing, and if no good cause be shown against it, direct the clerk of the county [commission] to enter such discharge, which shall thereupon have the effect of a discharge entered **Such proceeding shall be at the cost of the party so refusing.**

W. Va. Code § 38-2-37 (Emphasis supplied); also see W. Va. Code § 38-12-10 (“In case of the refusal of the party holding such lien to execute a release upon request of the party entitled thereto, the circuit court having jurisdiction may, on motion, after reasonable notice to the party so refusing, and if no good cause be shown against it, direct the clerk of the county court to execute such release, and it shall thereupon have the effect of releases executed under section one of this article. **The proceedings shall be at the cost of the party so refusing.**”(Emphasis supplied))

A lienee's right to his costs and attorney's fees for invalidating an unlawful adjudicated lien

10

In these respects, a homeowner's association lien and a mechanic's lien are precisely the same and are quite unlike a judgment lien (which, of course, is adjudicated) or a voluntary deed of trust lien or landlord's lien, which arise out of private agreements.

is critical to his ability to pursue the invalidation itself. Without it, a careless or, worse, malevolent lienor in no time flat could wreak great havoc with a lienee's title, without fear of economic disadvantage.¹¹ In this case of first impression, to permit the Circuit Court's construction of W. Va. Code § 36B-3-116(f) to stand would embolden reckless or lawless homeowners associations to file baseless notices of liens. Without the right to costs and attorney's fees, a victimized homeowner would have no economical recourse against his homeowners association. Without the right to costs and attorney's fees, the cost of filing a civil action to attack the lien would quickly surpass the value of the typical homeowners association lien.

VI. CONCLUSION AND PRAYER

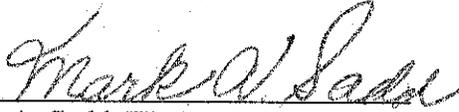
For all the foregoing reasons, the Appellants respectfully request that the Supreme Court reverse the judgment of the Circuit Court denying the Appellants costs and attorney's fees in contravention of W. Va. Code § 36B-3-116(f); to order that the Appellants are entitled as a matter of law to their costs and attorney's fees for prosecuting the underlying civil action and this Appeal; and to remand the case for ascertainment of the total costs and attorney's fees for prosecuting the underlying civil action and this Appeal, together with such other legal and equitable relief to which the Appellants may be entitled.

11

Such was the nightmare in which the Appellants found themselves. Rogue officers of the Appellee, lacking restraint or politesse, filed a series of spurious notices of liens for assessment without approval of the board of directors. So chaotic were the affairs of the Appellee that the lower court, at the request of many of the plaintiffs, appointed retired Judge James Holliday as special master of the election of the board of directors.

JOSEPH D. STEVER and BONNIE M. STEVER

By their counsel



Mark A. Sadd (W. Va. Bar No. 6005)

G. Nicholas Casey, Jr. (W. Va. No. 666)

Lewis Glasser Casey & Rollins PLLC

P. O. Box 1746

Charleston, West Virginia 25326

(o) (304) 345-2000

(f) (304) 343-7999

Counsel for the Appellants

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Case No. 06-2157

UNITED BANK, INC., *et al.*,

Appellants-Plaintiffs below

v.

STONEGATE HOMEOWNERS
ASSOCIATION, INC., *et al.*,

Appellee-Defendant below

CERTIFICATE OF SERVICE

I, Mark A. Sadd, counsel for Appellants, certify that on the 29th day of December, 2006, I served the foregoing **APPELLANTS' BRIEF** upon counsel for the Appellee by placing a true and correct copy thereof in the United States Mail, First Class Postage Pre-paid addresses as follows:

Ancil G. Ramey, Esquire
Scott Johnson, Esquire
Steptoe & Johnson, PLLC
P.O. Box 1588
Charleston, WV 25326-1588



Mark A. Sadd