
IN THE SUPREME COURT OF WEST VIRGINIA

No. 33216

UNITED NATIONAL BANK, INC.,
JAMES PAUL ESTES, JOSEPH D.
STEVER, BONNIE M. STEVER,
GARY LOWTHER, TONI J. POSTER,
DALLAS M. McNAB, JAY S. STEVENS, III,
and VICKIE LYNN MARTIN STEVENS,

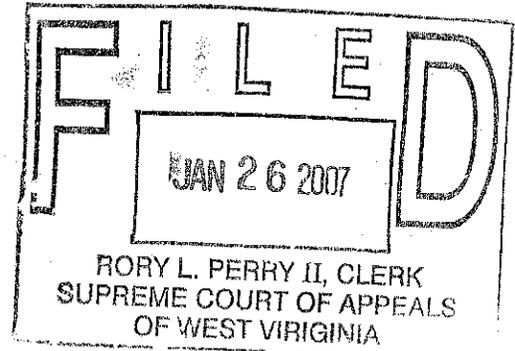
Plaintiffs below/Appellants,

v.

STONE GATE HOMEOWNERS
ASSOCIATION, INC., et al.,

Defendants below/Appellees.

BRIEF OF APPELLEE
STONE GATE HOMEOWNERS ASSOCIATION, INC.



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I. INTRODUCTION

“In the United States, parties are ordinarily required to bear their own attorney’s fees--the prevailing party is not entitled to collect from the loser.”¹ “This rule, known as the American rule, ‘promotes equal access to the courts for the resolution of *bona fide* disputes.’”² “However, there are exceptions to this general rule when authority to award attorneys’ fees is expressly provided by rule of court, statutory grant or contractual provision.”³ One such statute is West Virginia Code § 36B-3-116 (2005), which provides in section 113(f) that “[a] judgment or decree in any action brought under this section must include costs and reasonable attorney’s fees for the prevailing party.” Section 116, though, only applies to cases initiated by *homeowners associations*, and not to cases instituted (as here) by *individual homeowners*. The case here was not brought by a homeowners association. Thus, “[t]here are no fee-shifting exceptions that apply to this case to remove it from the realm of the ‘American rule,’ which requires individual responsibility for costs and fees.”⁴ The circuit court correctly found that the Petitioners were not entitled to attorneys fees. Therefore, this Court should affirm the decision of the circuit court denying attorneys fees.

¹*Buckhannon Bd. and Care Home, Inc. v. West Virginia Dep’t of Health and Human Resources*, 532 U.S. 598, 602 (2001). See *Kalany v. Campbell*, No. 33078, slip op at 15 n.15 (W. Va. Nov. 16, 2006) (quoting Syl. Pt. 2, *Sally-Mike Properties v. Yokum*, 179 W. Va. 48, 365 S.E.2d 246 (1986)) (“The applicable and controlling rule with respect to attorney’s fees, known as the American rule, is that ‘[a]s a general rule each litigant bears his or her own attorney’s fees absent a contrary rule of court or express statutory or contractual authority for reimbursement.’”).

²*State ex rel. Bronson v. Wilkes*, 216 W. Va. 293, 297, 607 S.E.2d 399, 403 (2004) (per curiam) (quoting *Sally-Mike Properties v. Yokum*, 179 W. Va. 48, 52, 365 S.E.2d 246, 250 (1986)).

³*Martinka Coal Co. v. West Virginia Div. of Environmental Protection*, 214 W. Va. 467, 469, 590 S.E.2d 660, 662 (2003).

⁴*Kalany*, No. 33078, slip op. at 15 n.15.

II. FACTS

The facts pertinent to this appeal⁵ are fairly simple.⁶ The Stevers purchased certain property in the Stone Gate Common Interest Community.⁷ The Stevers and the Board of Directors of the Stone Gate Homeowners Association became embroiled in a dispute as to whether the purchasers owed certain assessments.⁸ The Board filed notices of liens pursuant to West Virginia Code § 36B-3-116 against each of the Stevers and had the liens

⁵As can be discerned from the style of this appeal, the underlying case actually included considerable more parties and issues than the two parties and the single issue now before the Court. All the underlying issues, but for the one presented here, have been resolved. For example, all the other homeowners have executed releases of attorneys fees in exchange for Stonegate not pursuing the debts underlying the liens at issue.

⁶In their Brief, the Stevers allegedly “incorporate . . . for reference their Statement of Facts in their Petition for Appeal and also their remarks in the Petitioner’s Reply to the Stone gate Home Owner’s Association, Inc.’s Response to Petition for Appeal.” Brief of the Appellee at 4. This is improper for two reasons. First, matters raised in a petition for appeal must be re-raised in a merits brief. *See State v. Potter*, 197 W. Va. 734, 741 n. 13, 478 S.E.2d 742, 749 n.13 (W. Va. 1996). Second, this Court by minute order of October 26, 2006 refused the Stevers’ Motion to file a reply to the response to the petition for appeal; therefore, the reply is not properly before this Court. *See R. App. P. 3(g)* (“No reply to a response to a petition for appeal shall be filed.”).

⁷Rec. at 1249-50. A common interest community

means real estate with respect to which a person, by virtue of his ownership of a unit, is obligated to pay for real estate taxes, insurance premiums, maintenance or improvement of other real estate described in a declaration: Provided, That any resort owner which, prior to the effective date of this article, began the development of a resort and imposed fees or assessments upon owners of real estate in the resort for maintenance and care of the roads, streets, alleys, sidewalks, parks, common areas and common facilities in and around the resort, for fire and police protection and for such other services as may be made available to owners of real estate, may also impose the same fees and assessments to be used for the same or similar purposes upon persons purchasing real estate in the resort after the effective date of this article without creating a common interest community.

W. Va. Code § 36B-1-103(7).

⁸Rec. at 1250-51.

recorded in the County Clerk's office.⁹ The Stevers sued alleging in the Complaint, *inter alia*, that:

132. Plaintiffs Joseph D. Stever and Bonnie M. Stever acquired Lot No. 25 of Section IV in Stone Gate Subdivision by a deed from Raymond C. Brainard and Joanie S. Brainard, dated May 4, 1999, and recorded in the aforesaid Clerk's office in Deed Book 401, at Page 162.

...

134. The Board of Directors of the Association tendered a Notice of Lien for Unpaid Buy-in Fee to Plaintiffs Joseph D. Stever and Bonnie M. Stever to "secure an unpaid and delinquent Buy-In Fee of \$1,500, beginning on, and continuing, until the full amount of the unpaid and delinquent buy-in fee and dues has been paid in full, together with interest thereon at a rate of 8% per annum [including costs]. [sic] The tender of said Notice of Lien was an improper and unlawful exercise of the powers of the Board of Directors of the Association, in contravention of the U[niform] C[ommon] I[nterest] O[wnership] A[ct] and other laws of West Virginia.

...

136. Under West Virginia law, Plaintiffs Joseph D. Stever and Bonnie M. Stever . . . have no liability to the Association whatsoever for the so-called Buy-In Fees.¹⁰

In its summary judgment order, the circuit court found that the time to challenge the assessments had expired under the one-year statute of limitations,¹¹ but that the time limit for enforcing the liens had also expired.¹²

⁹*Id.* at 1250.

¹⁰*Id.* at 39-40.

¹¹*Id.* at 1257-58.

¹²*Id.* at 1258. There appears to be some discrepancy among the complaint, the stipulation of facts, and the circuit court order. Although the complaint and circuit court order reference buy-in fees, Rec. at 40 (Complaint); Rec. at 1251 (circuit court order ["The parties now raise the issue of whether [the] above liens placed on the Plaintiffs' properties for failure to pay the buy-in fee are enforceable."]), the stipulation of facts entered into by the parties indicates that the Stevers' notice of lien was for unpaid dues. Rec. at 778. In any event, the legal analysis is not altered whether
(continued...)

In response to the Stevers' request for attorney fees under the attorney fee provision of the Uniform Common Interest Ownership Act,¹³ the circuit court found 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 homeowners association attempts to collect such assessment or fee in accordance with this section, the prevailing party is entitled to attorney's fees."¹⁴ Consequently, the circuit court denied fees finding that "the Association did not attempt to avail itself of West Virginia Code § 36B-3-116(f). Therefore, the Court finds that the Plaintiffs are not entitled to attorney's fees."¹⁵

¹²(...continued)

termed fees or assessments or dues—the money at issue are all obligations due to the Association.

¹³W. Va. Code § 36B-3-116(f).

¹⁴Rec. at 1262.

¹⁵*Id.* In their statement of facts, the Appellants contend they are prevailing parties as a matter of fact. Appellants' Brief at 4. However, when the question of prevailing party status revolves around the meaning of a statute, it is a question of law. *See, e.g., Rice Services, Ltd. v. United States*, 405 F.3d 1017, 1021 (Fed. Cir. 2005) (citation omitted) ("The question of whether a party qualifies as a 'prevailing party' . . . is a question of law."); *Browder v. City of Moab*, 427 F.3d 717, 721 (10th Cir. 2005) (footnote omitted) ("the determination of prevailing party status is generally a question of law, we will address that issue in particular."); *Jenkins by Jenkins v. Missouri*, 127 F.3d 709, 713-14 (8th Cir.1997) ("the question of prevailing party status, a statutory term, presents a legal issue"); *Outdoor Systems, Inc. v. City of Clawson*, ___ N.W.2d ___, ___ (Mich. Ct. App. 2006) ("Federal case law uniformly holds that the issue of determining prevailing party status . . . is a legal question subject to de novo review."); *Maryland Green Party v. State Bd. of Elections*, 884 A.2d 789, 798 (Md. Ct. App. 2005) ("A determination of prevailing party status is a question of law . . ."); *Melton v. Frigidaire*, 805 N.E.2d 322,324 (Ill. Ct. App. 2004) (citation omitted) ("The primary issue, whether plaintiff is a 'prevailing party' for purposes of the fee-shifting statute, is one of statutory construction. 'Construction of a statute is a purely legal question . . .").

III. STANDARD OF REVIEW

The Appellant does not set forth a standard of review. It is “customary [to] begin by examining the standard of review applicable to the issue before the Court.”¹⁶ This case deals with a statute. “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[,]”¹⁷ that is, “[i]f the language employed by the Legislature in the given enactment is plain, we apply, rather than construe, such provision.”¹⁸ “Where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review.”¹⁹

IV. ARGUMENT

The Appellants properly recognize that a statute which is plain on its face must be applied and not construed.²⁰ The Appellant’s actual argument, though, is “[r]ather like

¹⁶*Younker v. Eastern Assoc. Coal Corp.*, 214 W. Va. 696, 698, 591 S.E.2d 254, 256 (2003) (per curiam).

¹⁷Syl. pt. 2, *State v. Epperly*, 135 W. Va. 877, 65 S.E.2d 488 (1951).

¹⁸*In re Jon L.*, ___ W. Va. ___, ___, 625 S.E.2d 251, 256 (2005).

¹⁹Syl. Pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W. Va. 138, 459 S.E.2d 415 (1995). See also *supra* n.16.

²⁰Appellants’ Brief at 7. This, of course, they must accept, for, if the statute was ambiguous, it must be strictly construed as it is derogation of common law, see, e.g., *Fiala v. Metropolitan Life Ins.*, 776 N.Y.S.2d 29, 33 (App. Div. 2004); *Board of Comm’rs v. Wyant*, 672 N.E.2d 77, 81 (Ind. Ct. App.1996); *Burnside v. State Farm Fire and Cas. Co.*, 528 N.W.2d 749, 751 (Mich. Ct. App. 1995); *GFI, Inc. v. Franklin Corp.*, 227 F. Supp.2d 602, 605 (N.D. Miss. 2002); *E.E.O.C. v. Western Elec. Co.*, 1975 WL 225, *4 (D. Md.), and unless a party clearly and unmistakably falls within the Act’s ambit, the party is not entitled to attorneys fees. Cf. *GRP v. Eateries, Inc.*, 27 P.3d 95, 98 (Okla. 2001) (“Before counsel fees may be awarded the case must be one that falls clearly within the express language of the authorizing statute.”); *Lipschutz v. Gordon Jewelry Corp.*, 373 F. Supp. 375, 390 (S.D. Tex. 1974) (finding that an attorneys’ fees statute was penal in nature and had to be strictly construed so unless the claim fell within the classes enumerated in the statute the claim

(continued...)

Justice Scalia's observation about the famous contracts case of *Hadley v. Baxendale* (1854) 156 Eng. Rep. 145, it is an instance of . . . knowing the right rule but simply not applying it correctly."²¹ While the Appellants cite the proper rule of law, they do not apply it at all; instead, they disregard or contort statutory text, context, history, background,²² and pertinent out of jurisdiction authority.²³ The Appellants real argument is not an analysis of the statute, but an effort to have this Court usurp the legislative function and rewrite the statute to satisfy their view of proper public policy; far from applying the statute, they seek "a result that contravenes the statutory mandate and turns the statute on its head"²⁴

A. The Plain Language of the Act authorizes attorneys fees only to Homeowner Associations.

West Virginia Code § 36B-3-116 (adopted from the UCIOA, § 3-116)²⁵ provides in pertinent part:

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

²⁰(...continued)
must fail).

²¹*Eric J. v. Betty*, 90 Cal. Rptr.2d 549, 559 (Cal. Ct. App. 1999) (citing Honorable Antonin Scalia, *A Matter of Interpretation* 6 (1997)).

²²*See, e.g., Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997) ("The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole."); Syl. Pt. 1, *Appalachian Electric Power Co. v. Koontz*, 138 W. Va. 84, 76 S.E.2d 863 (1953) ("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.").

²³*See State ex rel. Games-Neely v. Sanders*, ___ W. Va. ___, ___, 637 S.E.2d 598, 603-04 (2006) (looking to decisions of other states' court interpreting the Uniform Criminal Extradition Act because West Virginia adopted the Act).

²⁴*Wagner v. Board of Ed.*, 335 F.3d 297, 302 (4th Cir. 2003).

²⁵7 (Part II) U.L.A. 123 (2002).

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.

The Stevers latch onto subsection (f) which provides, "[a] judgment or decree in any action brought under this section must include costs and reasonable attorney's fees for the

prevailing party.”²⁶ Specifically they contend that “the Appellant’s 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.”²⁷ This act of legerdemain attempting to substitute homeowners for homeowners associations ignores plain language of the statute.

“This Court has often noted that the paramount goal of statutory interpretation is to ascertain and give effect to the intent of the Legislature.”²⁸ “In order to determine this legislative intent, we must consider the precise language employed by the Legislature in promulgating the statutory provision enactment at issue[,]”²⁹ because “[i]n the law of statutory construction, it is axiomatic that where the language of a statute is clear and unambiguous and the intent of the Legislature is evident from the very terms thereof, the statute should not be interpreted but applied in a manner consonant with the legislative purpose for which it was enacted.”³⁰ Hence “[w]e look first to the statute’s language. If the text, given its plain meaning, answers the interpretive question, the language must prevail

²⁶Appellant’s Brief at 8.

²⁷*Id.*

²⁸*Leary v. McDowell County Nat. Bank*, 210 W. Va. 44, 48, 552 S.E.2d 420, 424 (2001).

²⁹*In re Stephen Tyler R.*, 213 W. Va. 725, 740, 584 S.E.2d 581, 596 (2003).

³⁰*State v. Abdella*, 139 W. Va. 428, 443, 82 S.E.2d 913, 921 (1954).

and further inquiry is foreclosed.”³¹ “Thus, our inquiry begins with the statutory text, and ends there as well if the text is unambiguous.”³²

Section 116 requires an award of attorneys fees and costs only “in any action brought *under this section . . .*” The actions under section 116 relate only to those to enforce an association’s rights. For example, the section authorizes “proceedings to *enforce* the lien” Nothing in West Virginia Code § 36B-3-116 authorizes a homeowner to take any action to *extinguish* liens; rather, it only grants the Homeowners Association a right of action to enforce the lien. Here, far from an action to *enforce* the lien, the Stevers confess in their Brief that their case was meant to demonstrate that the liens were invalid and were *not enforceable*.³³ Moreover, West Virginia Code § 36B-3-116(e) provides that “[t]his

³¹*State ex rel. Roy Allen S. v. Stone*, 196 W. Va. 624, 630, 474 S.E.2d 554, 560 (1996) (citations omitted). See also *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253-54 (1992) (citations and internal quotation marks omitted) (“We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: the judicial inquiry is complete.”).

³²*BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004). The Appellants quote the comment to section 1-110 of the UCIOA that “[t]his Act should be construed in accordance with its underlying purpose” However, a statute which is plain and clear should not be construed, but applied. See, e.g., *DeVane v. Kennedy*, 205 W. Va. 519, 529, 519 S.E.2d 622, 632 (1999) (“Where the language of a statutory provision is plain, its terms should be applied as written and not construed.”).

³³The Appellants cite West Virginia Code § 36B-4-117. The Appellants cannot rely on this Code provision for at least three reasons: (1) it is waived before this Court as “[i]t is . . . well settled, . . . that casual mention of an issue in a brief is cursory treatment insufficient to preserve the issue on appeal[.]” *State v. Lilly*, 194 W. Va. 595, 605 n.16, 461 S.E.2d 101, 111 n.16 (1995) (citation omitted); (2) a more specific code provision, here West Virginia Code § 36B-3-116, controls over a more general provision, here West Virginia Code § 36B-4-117, see, e.g., *Porter v. Grant County Bd. of Ed.*, ___ W. Va. ___, ___, 633 S.E.2d 38, 43 (2006) (quoting Syl. Pt. 2, *State ex rel. Myers v. Wood*, 154 W. Va. 431, 175 S.E.2d 637 (1970)) (“[O]ur rules of statutory construction indicate that “[a] specific section of a statute controls over a general section of the statute.”); and (3) West Virginia Code § 36B-4-117 applies when “a declarant or any other person subject to this chapter *fails* to comply . . .” thus extending by its terms only to acts of omission rather than, as asserted
(continued...)

section does not prohibit actions to recover sums for which subsection (a) creates a lien” Homeowners are not entitled to recover for debts secured by a lien; *a priori* that is solely a right and benefit of the association.

B. The Comments to the Act support the conclusion manifest by the text that the Act authorizes attorneys fees only to Homeowner Associations.

Additionally, the comments to section 3-116 of the UCIOA bolster the plain meaning of the Act.³⁴ Comment 1 begins by identifying that the section is meant to “ensure prompt and efficient enforcement of the association’s lien for unpaid assessments[.]”³⁵ Even more tellingly, comment 3 notes that “[s]ubsection(f) [subsection (e) in the West Virginia Code] makes clear that the association may have remedies short of foreclosure of its lien that can be used to collect unpaid assessments.”³⁶ Comment 4 refers to “[t]he rights of the association against a unit upon non-payment of an assessment[.]”³⁷ When this section is

³³(...continued)
here, acts of commission.

³⁴The comments to uniform acts are not part of the actual statutory text, *see* Laurens Walker, *Writings on the Margins of American Law: Committee Notes, Comments, and Commentary*, 29 Ga. L. Rev. 939, 1011-1012 (1994); *Baker v. Lafayette College*, 504 A.2d 247, 250 (Pa. Super. Ct. 1986) (noting that the text of a uniform act controls over comments thereto). Although the use of extratextual sources of interpretation to address an unambiguous statute has been criticized on a number of grounds, courts have nonetheless employed extratextual sources when the sources are consistent with the statutory text. *See, e.g., United States v. Taylor*, 487 U.S. 326, 334 (1988); *Peralta v. Gonzales*, 441 F.3d 23, 32 (1st Cir. 2006). *See Justmann v. Portage County*, 692 N.W.2d 273, 277 (Wis. Ct. App. 2004) (citation omitted)(noting that “the legislative history . . . is not inconsistent with the text of the statute [and that] ‘legislative history is sometimes consulted to confirm or verify a plain-meaning interpretation.’”).

³⁵U.L.A. 121, cmt. 1.

³⁶*Id.* cmt. 3 (emphasis added).

³⁷*Id.* cmt. 4.

meant to protect homeowners, the section so provides.³⁸ The circuit court properly applied section 3-116 to deny attorneys fees.

C. The Statutory purpose of the Act demonstrates that the Act authorizes attorneys fees only to Homeowner Associations.

Of course, even if the language section 116(f) was not dispositive,³⁹ “[t]he limits of the application of a statute are generally held to be coextensive with the evil or purpose it was intended to suppress or effectuate, and neither stop short of, nor go beyond, the purpose which the Legislature had in view.”⁴⁰

“For over a century, increasing proportions of residential life in America have been organized into housing developments containing both individually owned residential units

³⁸See, e.g., *id.* (noting that foreclosure subsection is a modern power of sale provision that “provides reasonable protection of the unit owner and junior interests.”). The comment to UCIOA § 1-110 Appellants quote, Appellants’ Brief at 8 n.6, is not persuasive. It is the text of the statute which is controlling and such text cannot be changed by extra-textual sources. See, e.g., *Buckhannon Bd. and Care Home, Inc. v. West Virginia Dep’t of Health and Human Resources*, 532 U.S. 598, 607 (2001) (“We doubt that legislative history could overcome what we think is the rather clear meaning of ‘prevailing party’—the term actually used in the statute.”); *Adams v. Insurance Co. of North America*, 426 F. Supp.2d 356, 366 (S.D. W. Va. 2006) (citing *Pierce v. Underwood*, 487 U.S. 552, 566-68 (1988)) (Committee Report cannot alter an established legal rule because the declaration did not correspond to any new statutory language). The broad comment to section 1-110 is inconsistent with the much narrower actual language of that section, *cf.* n. 34 *supra*,—which requires construction only “to make uniform the law with respect to the subject of this chapter among the states enacting it.” The comment cannot be afforded any weight. While the comments may be helpful, “they should not become devices for expanding the scope of the Code sections where language within the sections themselves defies such an expansive interpretation.” *Leake v. Meredith*, 267 S.E.2d 93, 95 (Va. 1980).

³⁹See *State v. Patachas*, 96 W. Va. 203, 207, 122 S.E. 545, 546 (1924) (citations omitted) (“A statute is always construed in the light of the purpose for which it was passed and the evil it was designed to remedy. But the rules of construction have little application here. There is no ambiguity, no conflict with other parts or other acts. Where language is used which clearly and precisely expresses the intention of the Legislature, there is no need of interpretation.”).

⁴⁰Syl. Pt. 2, *City of Charleston v. Charleston Brewing Co.*, 61 W. Va. 34, 56 S.E. 198 (1906).

and common areas or facilities.”⁴¹ Common interest communities “play an increasingly important role in American housing.”⁴² “Both the private-property owners in the community and the public have stakes in the association’s ability to maintain the common property and both may be affected by the association’s ability to carry out its other functions.”⁴³ “Deteriorating common property and facilities and lack of covenant enforcement are likely to depress property values, . . . as well as the wealth of the property owners.”⁴⁴

“In carrying out their crucial responsibilities for preservation of community infrastructure and common assets . . . associations vary greatly as to their financial strength, and the financial and personal management experience of their elected officers. The main source of financial and interpersonal strain on association boards is the association’s inability to collect assessments.”⁴⁵ In short, “[t]he assessment power is critical to the financial viability of most common-interest communities.”⁴⁶

⁴¹James L. Winokur, *Critical Assessment: the Financial Role of Community Associations*, 38 Santa Clara L. Rev. 1135, 1135 (1998).

⁴²*Restatement (Third) of Property* § 6.5 cmt. b. (2000).

⁴³*Id.*

⁴⁴*Id.*

⁴⁵James L. Winokur, *Meaner Lienor Community Associations: The “Super Priority” Lien and Related Reforms under the Uniform Common Interest Ownership Act*, 27 Wake Forest L. Rev. 353, 356-57 (1992) (footnotes omitted).

⁴⁶*Restatement (Third) of Property* § 6.5 cmt. b.

However, “[c]ontributing to many associations’ financial weakness, the collection of delinquent assessments has been an extremely inefficient and often frustrating process.”⁴⁷ Consequently, “[i]t is clear that . . . associations must be given teeth to enforce the payment of contributions” to support these services.⁴⁸ Thus, “[t]o facilitate collection, legislation and regulations contain enforcement measures to assist management associations in performing their task efficiently.”⁴⁹ This is what the Legislature in adopting the UCIOA did.

The lack of attorneys fees recoupment impacts an association’s ability to collect unpaid assessment. “Associations in weak financial condition cannot always justify the costs involved to pursue collection efforts for unpaid assessments actively, especially when they are unsure of the ultimate results of the enforcement effort.”⁵⁰ “[S]ince individual delinquencies are often small components of a substantial total of assessments owed by all residents in a community, enforcement of assessment delinquencies will often not take place if the association lacks recourse to recover its expenses.”⁵¹ Thus, the “UCIOA contains several measures to strengthen association collection powers as a means to increase associations’ financial viability.”⁵² The underlying purpose of section 3-116 is to protect the financial viability of associations and their vigor in filing actions to protect all the

⁴⁷Winokur, *Meaner Lienor Community Associations*, 27 Wake Forest L. Rev. at 357.

⁴⁸Cornelius van der Merwe & Luis Muñiz-Argüelles, *Enforcement of Financial Obligations in a Condominium or Apartment Ownership Scheme*, 16 Duke J. Comp. & Int’l L. 125, 154 (2006).

⁴⁹*Id.* at 128.

⁵⁰Winokur, *Meaner Lienor Community Associations*, 27 Wake Forest L. Rev. at 359.

⁵¹*Id.* at 363.

⁵²*Id.*

homeowners in the association. The circuit court correctly refused to contradict this manifest legislative intent.

D. Interpretation by other courts shows the Act authorizes attorneys fees only to Homeowner Associations.

Further, because West Virginia Code § 36B-1-110 provides that the UCIOA “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[,]” review of UCIOA by other state courts is directed. Review of this authority supports the circuit court’s decision.

In interpreting its UCIOA,⁵³ the Connecticut Superior Court has consistently held, that

“[t]he legislature has been clear in its intent to protect the financial integrity of common interest communities. See [General Statutes] § 47-257(g) (providing that a unit owner cannot unilaterally exempt him or herself from liability for payment of common expenses); [General Statute] § 47-244(a)(10) (allowing a common interest community to impose charges, fines and interest for the late payment of assessments); [General Statute] § 47-258(a) and (g) (granting a statutory lien on individual units to secure the collection of assessments and further providing for the recovery of costs and attorney fees incurred by the common interest community in enforcing its lien.)”⁵⁴

Thus, in interpreting a statutory provision identical to West Virginia Code § 36B-3-116(f), the Connecticut courts have rightly recognized that such a provision provides “for the recovery of costs and attorney fees *incurred by the common interest community in*

⁵³*Nicotra Wieler Inv. Mgt., Inc. v. Grower*, 541 A.2d 1226, 1229 (Conn. 1988) (“The Common Interest Ownership Act is a comprehensive legislative scheme regulating all forms of common interest ownership that is largely modeled on the Uniform Common Interest Ownership Act.”).

⁵⁴*Bella Vista Condominium Ass’n. v. Byars*, 2005 WL 3292533, *2 (Conn. Super. Ct.) (quoting *Broad Street School Condominium Corp. v. Minneman*, Superior Court, judicial district of New London at Norwich, Docket No. 0111179 (April 23, 1997, Solomon, J.)) (emphasis added). See also *Buddington Park Condo. Assn. v. Taverna*, 2005 WL 246609, *2 (Conn. Super. Ct.).

enforcing its lien [to] protect the financial integrity of common interest communities."⁵⁵

Making a homeowners' association pay attorneys fees is quite at odds with this legislative purpose of strengthening the powers of associations to protect their financial integrity.

E. The Appellants' reliance on the statutory law of mechanics liens is inappropriate because these statutes are not *in pari materia* and actually support the point that the Act authorizes attorneys fees only to Homeowner Associations.

Undaunted by their lack of authority under the UCIOA, the Appellants invite this Court to examine mechanic's liens.⁵⁶ However, simply because two code provisions address similar issues does not necessarily make the statutes *in pari materia*. So, for example, simply because two statutes both use the term "appeal" the statutes are not *in pari materia*.⁵⁷ And, the Appellants' argument is somewhat perplexing as resort to the Code provisions they cite actually undermine their argument.

The Appellants quote West Virginia Code § 38-2-37:

In case of the refusal of the party holding such lien to cause such clerk to enter a discharge of such lien, or to execute a release of such lien, in the manner provided in the preceding section of this article, 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 court to enter such discharge, which shall thereupon have the effect of a discharge entered under the provisions of the preceding section. *Such proceeding shall be at the cost*

⁵⁵See Amos B. Elberg, Note, *Remedies for Common Interest Development Rule Violations*, 101 Colum. L. Rev. 1958, 1997 n.7 (2001) (noting that the purpose of section 116's attorney's fees provision is to award fees "to collect an assessment on a [common interest development unit].").

⁵⁶Appellants' Brief at 11.

⁵⁷See Syl. Pt. 3, *In re Boggs*, 135 W. Va. 288, 63 S.E.2d 497 (1951) ("Code, 58-3, dealing with 'Appeals from County Courts', and Code, 58-4, dealing with 'Appeals from Courts of Record of Limited Jurisdiction', should not be read *in pari materia*"), *criticized on other grounds by Kinsey v. Kinsey*, 143 W. Va. 574, 103 S.E.2d 409 (1958).

*of the party so refusing.*⁵⁸

While the Appellants assert this section authorizes an award of “costs and attorney’s fees[,]”⁵⁹ this is incorrect. A cursory review of the section shows it provides only for costs and this Court has consistently held for almost a century that costs generally do not include attorneys fees.⁶⁰

The Appellants then apparently quote West Virginia Code § 38-12-10 which actually reads:⁶¹

In case of the failure of the party holding such lien to furnish and execute an apt and proper release upon request of the party entitled thereto as required by section one of this article, the circuit court having jurisdiction may, on motion, after reasonable notice to the party so failing, and if no good cause be shown against it, direct the clerk of the county commission 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 lienholder who so refuses without good cause and the court shall also award reasonable attorney fees and court costs to the person entitled to such release if such person be the prevailing party.

Since West Virginia Code § 38-12-10 applies to releases under section one, and section one provides for a “release . . . to the debtor whose obligation secured by such lien has been fully paid and satisfied,” West Virginia Code § 38-12-10 cannot be applied here

⁵⁸Appellants’ Brief at 11 (emphasis added by Appellant).

⁵⁹*Id.*

⁶⁰*Shafer v. Kings Tire Service, Inc.*, 215 W. Va. 169, 173, 597 S.E.2d 302, 306 (2004); *Nelson v. West Virginia Public Employees Insurance Board*, 171 W. Va. 445, 451, 300 S.E.2d 86, 92 (1982); *State ex rel. Citizens Nat’l Bank v. Graham*, 68 W. Va. 1, 69 S.E. 301 (1910).

⁶¹The Stever’s brief actually quotes the pre-1987 language of the statute which did not authorize attorneys fees. It was not until 1987 that the Legislature included the attorneys fees provision. Com. Sub. H.B. 2054, 1987 W. Va. Acts, 418, 419 (codified at W. Va. Code § 38-12-10 (2005 Repl. Vol.)).

since the Appellants have not paid and satisfied any debt and this Code provision is not *in pari materia* with West Virginia Code § 36B-3-116.⁶²

Moreover, West Virginia Code § 38-12-10 is evidence that the Legislature was well capable of drafting statutes explicitly providing for an award of attorneys fees for actions to remove liens. "Where a term is specifically included in one statute but excluded from another, courts can infer that the legislature intended to remain silent about the term excluded."⁶³ Similarly, had the Legislature intended attorneys fees to be awarded under the UCIOA to those challenging liens, it would have done so as it did in the explicit language of West Virginia Code § 38-12-10.⁶⁴ At best the Appellants posit a roundabout and strained reading of the statutes at issue which is not grounds for their reading of West Virginia Code § 36B-3-116.⁶⁵

⁶²*See Waldron v. Leevale Collieries*, 127 W. Va. 443, 448, 33 S.E.2d 227, 229 (1945) ("In view of the fact that the definition of 'mine', contained in the mining statute (Code, 22-2), is expressly limited to its use in that article by the words: 'In this article', that statute cannot be read *in pari materia* with Code, 21-6 (the Child Labor Law), upon the violation of which this action is based. Code, 21-6, contains no definition of 'mine.'").

⁶³*Da Cruz v. Towmasters of New Jersey, Inc.*, 217 F.R.D. 126, 133 (E.D.N.Y. 2003). *See* Syl. Pt. 2, *First Nat. Bank of Webster Springs v. De Berriz*, 87 W. Va. 477, 105 S.E. 900 (1921) ("An implication raised out of one statute cannot prevail over express provisions of another.").

⁶⁴*See, e.g., Bidon v. Department of Professional Regulation, Florida Real Estate Comm'n*, 596 So.2d 450, 453 (Fla. 1992) ("If the legislature had intended to provide for the recovery of attorneys' fees under subsection 475.482(1), it would have expressly done so, as it did with regard to reimbursement under subsection 475.482(2) and as it often has done with respect to other statutes."); *DeSpiegelaere v. Killion*, 947 P.2d 1039, 1046 (Kan. Ct. App. 1997) ("If the legislature had intended to provide recovery for expenses under the KCPA, it could have expressly done so as it did in K.S.A. 60-211, K.S.A. 60-237(a)(4), and K.S.A. 602007(b).").

⁶⁵*Cf.* Syl. Pt. 1, *First Nat. Bank of Webster Springs v. De Berriz*, 87 W. Va. 477, 105 S.E. 900 (1921) ("A barely possible, permissible, or conjectural implication arising from the terms and provisions of a statute does not justify judicial adoption thereof as a part of the statute.").

F. The Appellants improperly ask this Court to invade the legislative arena and rewrite West Virginia Code § 36B-3-116 to suit their own view of public policy.

Finally, the real gist of the Appellants argument is resort to claims that public policy supports their claims to attorneys fees. The Appellants have nailed their arguments to the wrong door since this Court cannot use the judicial power to thwart the Legislative intent clearly and plainly expressed in West Virginia Code § 36B-3-116 to limit attorneys fees to a homeowners association. A court's "compass is not to read a statute to reach what [it] perceive[s]—or even what [it] think[s] a reasonable person should perceive—is a 'sensible result'; [the Legislature] must be taken at its word unless [the judiciary is] to assume the role of statute revisers."⁶⁶

"Any time a State chooses to address a major issue some persons or groups may be disadvantaged. In a democratic system there are winners and losers."⁶⁷ There is nothing inherently unfair about "[e]lected legislators . . . determine[ing] the winners and losers in a statutory scheme."⁶⁸ The Legislature is obligated to draw lines,⁶⁹—"line drawing' is inherent to law making,"⁷⁰—and some will find themselves on one side (the "winning side," i.e. obtaining a benefit), and some on the other (the "losing side," i.e., not obtaining a

⁶⁶*Bifulco v. United States*, 447 U.S. 381, 401 (1980) (Burger, C.J., concurring).

⁶⁷*Washington v. Seattle School Dist.*, 458 U.S. 457, 496 (1982) (Powell, J., dissenting).

⁶⁸Gregory G. Schultz, *Statutory Deconstruction: An Examination of Critical Legal Studies in Context*, 26 *Cumb. L. Rev.* 459, 486 (1995-1996).

⁶⁹*Morgan v. City of Wheeling*, 205 W.Va. 34, 46, 516 S.E.2d 48, 60 (1999) (quoting *Metropolis Theatre Co. v. City of Chicago*, 228 U.S. 61, 69-70 (1913)) ("The problems of government are practical ones and may justify, if they do not require, rough accommodations[.]").

⁷⁰*Kalany*, No. 33078, slip op. at 14 (quoting *Greenville Women's Clinic v. Bryant*, 222 F.3d 157, 174 (4th Cir. 2000)).

benefit the “winning side” has secured). Such a result (absent some constitutional issue) is not a concern of the judiciary. “Courts are not concerned with questions relating to legislative policy.”⁷¹ “[I]t is the duty of the courts to interpret a statute as they find it, without reference to whether its provisions are wise or unwise, necessary or unnecessary, appropriate or inappropriate, or well or ill conceived.”⁷² “This Court has continually stressed on numerous occasions that ‘[i]t is not the province of the courts to make or supervise legislation, and a statute may not, under the guise of interpretation, be modified, revised, amended, distorted, remodeled, or rewritten[.]’”⁷³ “[T]he legislature is vested with a wide discretion in determining what the public interest requires, the wisdom of which may not be inquired into by the courts[.]”⁷⁴

It is perfectly reasonable and permissible for the Legislature to draw lines that may result in some inequality between classes,⁷⁵ especially here since “[t]he importance of enabling associations to collect attorneys fees for enforcement of assessments, whether by

⁷¹Syl. Pt. 1, in part, *State ex rel. Appalachian Power Co. v. Gainer*, 149 W. Va. 740, 143 S.E.2d 351 (1965).

⁷²73 Am. Jur.2d *Statutes* § 173 at 370-71 (2001) (footnotes omitted).

⁷³*Meadows v. Hopkins*, 211 W. Va. 382, 386, 566 S.E.2d 269, 273 (2002) (quoting *State v. General Daniel Morgan Post No. 548, V.F.W.*, 144 W.Va. 137, 145, 107 S.E.2d 353, 358 (1959) (citation omitted)).

⁷⁴*Id.*, 566 S.E.2d at 273 (quoting Syl. pt. 1, in part, *State v. Wender*, 149 W. Va. 413, 141 S.E.2d 359 (1965), *overruled on other grounds by Hartsock-Flesher Candy Co. v. Wheeling Wholesale Grocery Co.*, 174 W. Va. 538, 328 S.E.2d 144 (1984)).

⁷⁵ *Marcus v. Holley*, 217 W. Va. 508, 526, 618 S.E.2d 517, 535 (2005) (citing *Dandridge v. Williams*, 397 U.S. 471, 485 (1970) (quoting *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78 (1911)).

lien foreclosure or personal suit, cannot be overemphasized.”⁷⁶ Notwithstanding the effect on home owners, courts may not “nullify statutes, however hard or unexpected the particular effect[.]”⁷⁷ This Court has “emphasized that “[i]t is not for [courts] arbitrarily to read into [a statute] that which it does not say.”⁷⁸ “It is not within the judicial function . . . to rewrite the statute, or to supply omissions in it, in order to make it more ‘fair’ . . .”⁷⁹ “more ‘logical,’ or perhaps palatable, to a particular party or the Court.”⁸⁰ “[A]n omission or failure to provide for contingencies, which it may seem wise to have provided for specifically, does not justify any judicial addition to the language of a statute.”⁸¹

Thus, only recently, this Court has upheld the denial of attorneys fees to a plaintiff pursuing a common law discrimination claim who was unable to pursue a statutory claim because she worked for an employer of less than the statutory minimum of employees, even though a plaintiff pursuing a statutory cause of action against an employer with the requisite number of employees could recover fees.⁸²

The Appellant’s “issue, which essentially questions the wisdom of the Act’s

⁷⁶Winokur, *Meaner Lienor Community Associations*, 27 Wake Forest L. Rev. at 363.

⁷⁷*Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982).

⁷⁸*Raleigh General Hosp. v. Caudill*, 214 W.Va. 757, 760, 591 S.E.2d 315, 318 (2003) (quoting *Williamson v. Greene*, 200 W.Va. 421, 426, 490 S.E.2d 23, 28 (1997) (quoting *Banker v. Banker*, 196 W.Va. 535, 546-47, 474 S.E.2d 465, 476-77 (1996))).

⁷⁹*1841 Columbia Road Tenants Ass’n v. District of Columbia*, 575 A.2d 306, 308 (D.C. 1990).

⁸⁰*Township of Casco v. Secretary of State*, 701 N.W.2d 102, 122 (Mich. 2005) (Young, J., concurring in part).

⁸¹73 Am. Jur.2d *Statutes* § 173 at 370 (2001) (footnote omitted).

⁸²Syl. Pt. 2, *Kalany*, No. 33078 and *id.* n. 14.

provisions, is a policy decision that is for the Legislature and not this Court to determine in the first instance.”⁸³ Thus, even though the Appellants “make[] public policy arguments in support of [their] position when a statute is clear and unambiguous, it generally is [the Court’s] task to apply the statute as written and not to interpret it in consonance with this Court’s policy preferences[,]”⁸⁴ even when it has thought the policy reasons advanced had “force”⁸⁵ or were “compelling.”⁸⁶ The Stevers “attempt to extend the statutory award of fees and costs . . . based on the theory that the same underlying public policy rationale that [applies to associations should extend to them] [but], the law does not permit [the Court] to make such an extension.”⁸⁷ “[T]his Court has no blanket power to recast the statute to meet its fancy.”⁸⁸ The Legislature has not “extended any roving authority to the Judiciary to allow counsel fees as costs or otherwise whenever the courts might deem them

⁸³*Perdue v. Wise*, 216 W. Va. 318, 327 n.27, 607 S.E.2d 424, 433 n.27 (2004).

⁸⁴*State ex rel. Miller v. Stone*, 216 W. Va. 379, 382 n.3, 607 S.E.2d 485, 488 n.3 (2004) (per curiam).

⁸⁵*State ex rel. Riffle v. Ranson*, 195 W.Va. 121, 128-29, 464 S.E.2d 763, 770-71 (1995) (“To be clear, the argument that the doctrine of *forum non conveniens* is helpful in the administration of justice in this State has force, but it is properly addressed to the West Virginia Legislature and not to this Court.”).

⁸⁶*State v. Richards*, 206 W.Va. 573, 576-77, 526 S.E.2d 539, 542-423 (1999) (footnote omitted) (“The State advances sound policy arguments justifying the circuit court’s action in the present case . . . [h]owever compelling this argument may be, the wording of § 25-4-6 simply does not support it.”).

⁸⁷*Kalany*, No. 33078, slip op. at 13.

⁸⁸*Riffle*, 195 W.Va. at 126, 464 S.E.2d at 768.

warranted.”⁸⁹ Hence, “courts are not at liberty to modify the act by construction in order to avoid special hardship.”⁹⁰

“In the past, this Court has wisely refused the temptation to use its power as an anodyne to remedy that which [it] might have thought personally to be objectionable.”⁹¹ Indeed, even if “[t]he circumstances . . . [that may] create a great deal of sympathy for Appellant . . . this issue is one of wider import that must be decided not only upon these facts, where our sympathies might well lie with Appellant[s], but in a larger context.”⁹² “Our duty, to paraphrase Mr. Justice Holmes in a conversation with Judge Learned Hand, is not to do justice but to apply the law and hope that justice is done.”⁹³ Thus, “[w]hen all factors have been weighed on the scales of justice . . . this Court remains constitutionally bound to follow the guiding precedents before us, to apply the law as it has been interpreted by our predecessors, and to reach the result prescribed thereby.”⁹⁴ And, in so doing, “given

⁸⁹*Alyeska Pipeline Serv. Co. v. Wilderness Society*, 421 U.S. 240, 260 (1975).

⁹⁰*Lang v. Commissioner of Internal Revenue*, 289 U.S. 109, 113 (1993). See also *St. Louis, I.M. & S. Ry. Co. v. Taylor*, 210 U.S. 281, 295 (1908) (“It is urged that this is a harsh construction. To this we reply that, if it be the true construction, its harshness is no concern of the courts. They have no responsibility for the justice or wisdom of legislation, and no duty except to enforce the law as it is written, unless it is clearly beyond the constitutional power of the lawmaking body.”).

⁹¹*State v. Arbaugh*, 215 W. Va. 132, 144, 595 S.E.2d 289, 301 (2004) (per curiam) (Davis, J. joined by Maynard, C.J., dissenting).

⁹²*State v. Phillips*, 205 W. Va. 673, 684, 520 S.E.2d 670, 681 (1999).

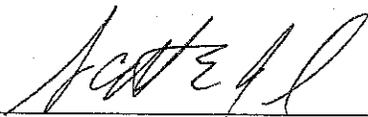
⁹³*Bifulco v. United States*, 447 U.S. 381, 401-02(1980) (Burger, C.J., concurring).

⁹⁴*Hart v. National Collegiate Athletic Ass’n*, 209 W. Va. 543, 548, 550 S.E.2d 79, 84 (2001) (per curiam).

the application of the statutory law in effect at the time of the events underlying this appeal, justice demands the result [the circuit court reached].”⁹⁵

V. CONCLUSION

For the foregoing reasons, the decision of the circuit court should be affirmed.



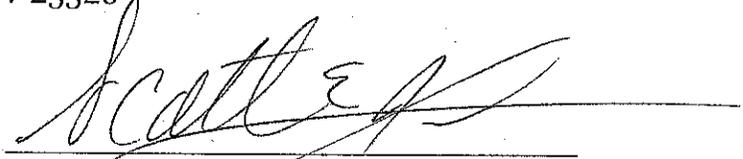
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⁹⁵*Bailey v. Kentucky Nat. Ins. Co.*, 201 W. Va. 220, 228, n. 13, 496 S.E.2d 170, 178 n. 13 (1997).

CERTIFICATE OF SERVICE

I, Scott E. Johnson, counsel for Appellee Stone Gate Homeowners Association certify that on the 26 day of January, 2007, I served the foregoing *Brief of Appellee Stone Gate Homeowners Association, Inc.* upon counsel for the Petitioner by placing a true and correct copy thereof in the United States Mail, First Class Postage Pre-Paid addressed as follows:

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