Noted for: September 1, 2017, 8:30 am
Before the Honorable Judge Hancock

IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF ISLAND

ROBOERT WILBUR and DUSTIN FREDERICK, Plaintiffs, v. ADMIRAL'S COVE BEACH CLUB, a Washington non-profit corporation; and JEAN SALLS, MARIA CHAMBERLAIN, KAREN SHAAK, ROBERT PEETZ, ELSA PALMER, ED DELAHANTY AND DAN JONES, individuals, Defendants.	Case No.: 13-2-00741-4 OPPOSITION OF INTERVENOR SUE CORLISS TO DEFENDANT'S AND PLAINTIFF'S SECOND MOTION FOR SUMMARY JUDGMENT
SUE CORLISS, Intervenor, v. DUSTIN FREDRICK, ROBERT WILBUR, ADMIRAL'S COVE BEACH CLUB, a Washington non-profit corporation, and its BOARD OF DIRECTORS. Defendants.	

INTRODUCTION

Intervenor Susan Corliss prevailed completely on the recent appeal of this case. After *sua sponte* cancelling oral argument, the Court of Appeals ruled unanimously that the trial Court's

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prior order -- invalidating the 2013 vote to decommission the swimming pool -- was error. The Court of Appeals ruled that Wilbur presented no basis to conclude that the 2013 vote was invalid, and it rejected every specific basis for this Court's prior summary judgment ruling in Wilbur's favor. "As a matter of law, Wilbur fails to establish the invalidity of the May 2013 vote." *See* Carlson Declaration, Exhibit 1 at 9. They further ruled that "the Club has the authority, pursuant to its governing documents, to remove the pool at any time." *Id.* The Court of Appeals remanded the case back to this Court "for further proceedings **consistent with this opinion**." *Id.* at 11 (emphasis added).

In seeking summary judgment again, the Board asks this court to issue a ruling that is ***directly inconsistent*** with the ruling of the Court of Appeals. They ask this Court to simply ignore the Court of Appeals ruling and give it zero effect. But the issues in this case have already been decided in favor of Intervenor. The Court of Appeals ruling must be enforced under principles of *res judicata* and *collateral estoppel*.

The 2013 vote was entirely valid, it was wrongfully enjoined, and summary judgment was wrongfully granted to the pool proponents. The community's original democratic decision on this issue should have been enforced years ago. In conformity with the ruling from the Court of Appeals, that 2013 democratic decision should be enforced now. Accordingly, Corliss respectfully renews her prior, fully briefed Motion for Summary Judgment that was previously argued to this Court. The Court declined to rule on that Motion as "moot," after erroneously granting summary judgment to Wilbur. The Court of Appeals opinion compels this Court to now GRANT Corliss' prior motion. Such a ruling would be ***consistent with*** the Court of Appeals ruling that the 2013 vote of the Cove community was valid.

Moreover, as discussed below, the duplicative 2016 vote of the community was hopelessly tainted. The Board has admitted that the entire justification for that second vote was

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an attempt to comply with this Court's overturned summary judgment ruling. **Moreover, the primary rationale provided to the Cove community with the 2016 ballot materials was that this Court had ordered to Cove community to maintain and repair the pool.** So the 2016 vote is infused throughout with the error of this Court's prior ruling. In addition, fully 40% of the Cove's voting members were disenfranchised from being able to vote on the 2016 ballot. Some of them were disenfranchised shortly before the vote took place. Yet those 40% of members are still subject to the special assessment, as defined by the Board. This is fundamentally unfair.

Also, the Court should be mindful that throughout this litigation, Wilbur (the plaintiff) and the Board (the defendant) have been colluding together, in secret. Throughout this litigation, "pro-pool" Board members provided direct financing and strategic cooperation to Wilbur, the person who is suing them. These members coordinated Board activities with the ongoing litigation. This collusion and the obvious conflict of interest of these Board members has never been disclosed, either to the Court or to the Cove community. So Wilbur and certain Board members actively litigated before this Court and asked this Court to overturn a vote of the community that they disagreed with. But they never disclosed their behind the scenes cooperation and mutual financing. This conduct should not be rewarded by a second summary judgment in favor of the pro-pool faction.

FACTS AND ARGUMENT

A. This Court previously ruled that new arguments regarding the 2013 vote were barred from this case. The Board offers no explanation for why it completely ignores that prior ruling.

Intervenor was quite surprised to see that the Board's current Motion relies heavily on the argument that there is a defect in the 2013 ballot, in that a "no" option was not included. This Court already ruled that this issue is barred from the litigation. In denying in part Wilbur's motion to amend his complaint, this Court clearly ruled that this new argument regarding the

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2013 vote will not be allowed in the case. At the March 6, 2017 hearing on the motion to amend, this Court held: "So I rule that the portion of the amended complaint that would challenge the 2013 ballot on the grounds that it didn't include the no-action alternative cannot be permitted. This should have been raised in the previous matters that were heard by the Court that resulted in a final judgment by this Court, and the Court of Appeals has issued its decision. Of course, that's binding on this court and the Court will follow that, naturally." Carlson Decl., Ex. 2 at 19-20. Moreover, the Court signed an order on this motion, ruling: "Plaintiff Wilbur will not be permitted leave to amend to [add] new claims or assertions regarding the 2013 vote of the ACBC community regarding the swimming pool. Claims regarding the 2013 vote have already been litigated including through a full merits appeal." Order, March 6, 2017.

Mr. Nye, counsel for the Board, was present at this hearing and argued that this amendment should be allowed. So he was present when the Court denied this specific issue. It is unclear why Mr. Nye nevertheless feels free to argue the merits of this issue extensively on summary judgment. He offers no explanation as to why he ignored the prior order of this Court.

Intervenor Corliss will rely upon the prior ruling of this Court and assume that the Court does not intend to reconsider its prior ruling. Intervenor does not feel it necessary to further address the merits of this argument. Intervenor does request that the Court evaluate whether to admonish or sanction the Board for this conduct, perhaps to pay the attorney fees expended in responding, a second time, to this already decided issue.

It is also worth noting that since the Court's ruling on the motion to amend, plaintiff Wilbur – who filed the Motion – has apparently never filed an Amended Complaint that conforms with the Court's order. Wilbur has never asked Intervenor to review any such proposed Amended Complaint for approval of filing. This means that the additional issues addressed in the Board's current motion regarding the 2016 vote have never been formally reintroduced into this

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case by valid amendment. It is premature for the Board to seek summary judgment on claims that are not formally present in this litigation. And it is unfair to ask Intervenor to address these claims on the merits, when the specific language and content of these claims remains unknown.

B. The issues in this case have been fully and finally decided in favor of Intervenor. Plaintiff and the Board are not entitled to new rulings that directly contradict the final decision of the Court of Appeals.

As noted above, the Court of Appeals ruled entirely in favor of Intervenor. They remanded the case back to this Court for proceedings "consistent with" that ruling. So fundamentally, the Board's new request for a second "pro-pool" summary judgment violates basic principals of *res judicata* and *collateral estoppel*. "The doctrine of *res judicata* rests upon the ground that a matter which has been litigated…, in a former action in a court of competent jurisdiction, should not be permitted to be litigated again. It puts an end to strife, produces certainty as to individual rights, and gives dignity and respect to judicial proceedings." *Marino Prop. Co. v. Port Comm'rs*, 97 Wn.2d 307, 312, 644 P.2d P.2d 1181 (1982); *see also Walsh v. Wolff*, 32 Wn.2d 285, 287, 201 P.2d 215 (1949). *Res judicata* bars subsequent litigation when the new claim is identical in respect to "(1) persons and parties, (2) causes of action, (3) subject matter, and the quality of the persons for or against who the claim is made." *Landry v. Luscher*, 95 Wn.App. 779, 783, 976 P.2d 1274 (1999); *see also Ensley v. Pitcher*, 152 Wn.App. 891, 898-902, 222 P.3d 99 (2009).

In this remanded matter, the same parties are litigating the same issues regarding the same facts. The validity of the 2013 vote to decommission the pool has been established through final adjudication. The validity -- and therefore the enforceability -- of that vote cannot now be overturned based on new litigation. The Board and Wilbur cannot simply ignore the impact of a Court of Appeals ruling they do not like. Nor can they orchestrate a change in facts on the ground to somehow eliminate the preclusive effect of the litigation that Wilbur himself chose to

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file. Wilbur filed this case, and now he has to live with its results. That is the gravamen of the *res judicata* and *collateral estoppel* doctrines. Litigants do not get a "do over."

It is worth noting that the Board chose to go forward with the second vote, having prevailed at the trial court **but with the appeal pending.** The Board certainly understood that it could lose the appeal, yet it went forward with the second vote anyway, rather than waiting for the appeal to play out. The Board further tainted the 2016 process by relying heavily on this Court's summary judgment ruling -- which we now know was erroneous -- to justify and advance the second vote. Therefore, the Board (acting as proxy for Wilbur) knowingly assumed the risk that the second vote would be directly contrary to an eventual ruling of the Court of Appeals. They chose to create that scenario. Now that the risk of inconsistent results has come to pass, they should bear the burden of their decision. Intervenor had no control over the timing and manner of the 2016 vote, nor how it was presented to the community. The Board – the moving party here – had complete control over those decisions. They should not be rewarded for their attempt to pre-empt the appellate ruling by being granted a second summary judgment. The downside risk of their actions should be imputed to the Board, not Intervenor.

This Court should also be mindful that the Court of Appeals had occasion to rule on issues relating to the 2016 vote. After the 2016 vote was taken, Intervenor Corliss asked the Court of Appeals to enjoin implementation of that vote. Intervenor argued that she was likely to prevail on the appeal and that that without an injunction, the fruits of her successful appeal would be destroyed. The Board and Wilbur vigorously opposed this injunction request. The Court of Appeals agreed with Intervenor, and enjoined implementation of the 2016 vote. It ruled: "If appellant Corliss prevails on appeal and this court reverses the trial court order invalidating the vote to decommission the pool, the initial vote to decommission the pool would be upheld.... If the Board begins to spend some of the money it has collected and begin work on refurbishing

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the pool, Corliss could be deprived at least in part of the benefit of a successful appeal. A stay is warranted to preserve the benefit of a successful appeal." Carlson Decl., Ex 3 at 2. The Court of Appeals conditioned this injunction on the posting of a $30,000 bond, which was not posted.

Now, despite the "successful appeal," the Board is asking this Court to deprive Corliss of the benefits of her appeal. The Board does so on a summary judgment motion, arguing that despite Corliss winning the appeal outright, **as a matter of law** they should be allowed to ignore the Court of Appeal's ruling. Such a result would fly in the face of the concepts of judicial finality, *res judicata*, and *collateral estoppel* that are crucial to the fair and efficient administration of justice.

C. The Board should be judicially estopped from seeking litigation advantage by taking directly contradictory and inconsistent positions in the same litigation.

The Board is now taking litigation positions that directly contradict previous positions it took in this same litigation. The Board was once postured as the defendant in this case, actively defending the validity of the 2013 vote against challenge from Wilbur. Now, post-appeal, the Board has decided to completely switch positions. It now takes the lead in arguing that the 2013 vote is invalid, agreeing with, and no longer opposing, Wilbur.

The doctrine of "judicial estoppel" prohibits a party from taking directly contradictory positions on the same issues in litigation. "Judicial estoppel is an equitable doctrine that precludes a party from asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position." *Anfinson v. FedEx Ground Package System, Inc.*, 174 Wn.2d 851, 861, 281 P.3d 289 (2012) (citing *Arkison v. Ethan Allen Inc.*, 160 Wn.2d 535, 538, 160 P.3d 13; *Bartley-Williams v. Kendall*, 134 Wn.App. 95, 98, 138 P.3d 1103 (2006)). "There are two primary purposes behind the doctrine: preservation of respect for judicial proceedings and avoidance of inconsistency, duplicity, and waste of time." *Id.* "[A] trial court's

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determination of whether to apply the judicial estoppel doctrine is guided by three core factors: (1) whether the party's later position is "clearly inconsistent" with its earlier position, (2) whether acceptance of the later inconsistent position would create the perception that either the first or the second court was misled, and (3) whether the assertion of the inconsistent position would create an unfair advantage for the asserting party or an unfair detriment to the opposing party. *Id.* (citing *New Hampshire v. Maine*, 532 U.S. 742, 750-51, 121 S.Ct. 1808, 149 L.Ed.2d 968 (2001)) (internal quotation marks omitted).

Prior to the appeal, the Board was the defendant in this case, seeking to enforce the validity of the 2013 vote against challenge from Wilbur. Now, the Board is acting as the plaintiff, litigating as Wilbur's proxy in seeking to invalidate the 2013 vote. Judicial estoppel prohibits a party from taking such diametrically opposing positions in the same litigation.

This is especially true in a case like this one. The Board has not only switched positions and arguments in this case. It has gone from acting as the sole defendant, to acting as the primary plaintiff. Presumably using Cove insurance funding, the Board has assumed responsibility for filing all briefing in this case on behalf of plaintiff Wilbur, who simply joins in briefing prepared by the Board. Thus, the Board has taken the lead litigation role as the plaintiff, effectively suing itself. The elements of judicial estoppel are clearly met here and the Board should be dismissed from this action on that basis. At the very least, their current request for summary judgment should be denied because they should not be allowed to take directly contradictory positions in the same litigation.

D. The 2016 Vote was hopelessly tainted by this Court's prior erroneous ruling and the by Board's secret, undisclosed collusion with plaintiff Wilbur.

The 2016 vote now relied upon by the pool proponents was hopelessly tainted by the legal error of this Court's prior ruling. Indeed, the Board admits that this Court's prior ruling was

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the entire rationale for even seeking the second vote. *See* Declaration of Ed Delahanty, ¶¶ 2-23 (In describing the 2016 vote: "The Board has taken steps to comply with the Order….The Board has acted to fulfill its obligation to 'maintain, repair and operate the swimming pool and its related facilities in a reasonable manner.'") Furthermore, in the advocacy materials sent to all Cove members with the 2016 ballot, the Board told the community this: "Why renovate the pool? Why now?: Island County Superior Court affirmed in 2015 that we are required to maintain and operate all club facilities under the existing articles of Incorporation, Bylaws, Covenants and other documents." Delahanty Decl., Ex B at 1 ("ACBC Pool Renovation Ballot Q&A.") This was the first, and the primary, justification the Board offered the community for why they were pushing a second vote to repair, rather than decommission, the pool. So the Board told the community that this Court had ***mandated*** a yes vote on the assessment. The Board further prohibited any opposing submission or argument to accompany the ballot. Chamberlain Declaration, ¶ 7; Kobylk Declaration, ¶¶ 2-3. So, a Cove member receiving the Board's ballot materials would believe that a "yes" vote was compelled by this Court's prior ruling. These members received no opposing or alternative materials.

Again, the Board made a conscious decision to assume the risk of proceeding this way. They knew that an appeal was pending when they organized the second vote. But rather than wait to see how the legal issues played out on appeal, they instead used this Court's favorable ruling as leverage to generate a close, "pro-pool" vote of the community. Now that the Court's ruling has been overturned, they seek to still benefit from that ruling by trying to enforce the 2016 vote which was entirely **based on** that ruling. The Board made the decision to try to "hedge their bets" in this manner while the appeal was pending. They should be responsible, in this litigation, for that decision. The fact that the appeal ultimately went against them – creating inconsistent results - was an entirely predictable outcome. This should be construed against the

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Board, not Intervenor.

It is also worth noting that fully 40% of Cove voters were disenfranchised by the Board prior to the vote on the 2016 pool ballot. This was apparently an unprecedented level of disenfranchisement that was of concern even to these pro-pool Board members. Kurt Blankenship, the current Board President, wrote: "I'm puzzled and concerned about the drastic drop in dues payments from last year to this….Obviously, a participation rate of only 40% decreases the amount we can readily raise for the pool without a laborious process of filing more claims in small claims court." Carlson Decl., Ex 5 at 2. The Board considered sending postcards to Cove members, reminding them to pay their dues prior to putting out the pool ballot. One member stated: "It took most of the year last year for us to get to the high percentage paid up." *Id.* at 1. But the Board never took that step and apparently did nothing to increase participation before mailing pool ballots in February, 2016. So rather than reminding members they needed to pay annual dues to vote on the pool, the Board knowingly pushed the pool ballot through with a very low participation rate. This is fundamentally unfair to the many members of the Cove who, for example, hadn't yet paid their annual dues by February. Fully 40% of the Cove membership was prohibited from voting. *See also* the Declarations of Bennett, Chamberlain, Daniel, Deegan, Firnstahl, Gardinier, Kobylk, and Lemmon in Opposition to the Board's Motion for Summary Judgment.

1. Wilbur has secretly colluded with current and former Board members in financing and guiding this litigation.

Since Wilbur started this litigation, he has been actively colluding with members of the Board to fund and guide his litigation **against the Board.** In other words, pro-pool Board members have acted in secret to fund and strategize this litigation with Wilbur, against the Board itself. Neither those Board members nor Wilbur has ever disclosed this obvious conflict of interest to this Court, or to the Cove community at large.

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Indeed, the current Board president, Kurt Blankenship, has been a long standing member of the "One thousand dollar club," which is a group of Cove property owners who provided substantial funding to Wilbur early on to pay for this litigation. Carlson Decl., Ex 4 at 1, 3. Board members provided that funding and strategic support to Wilbur at the same time that they served on the Board and acted as defendants in this case. This included Dustin Frederick, who was a former plaintiff in this case with Wilbur, but who withdrew from the litigation to begin serving on the Board. *Id.* So Wilbur and Board members actively colluded on issues pending in this litigation, coordinating the efforts of the Board **as the defendant** with the efforts of Wilbur **as the plaintiff**. Wilbur and the Board represented to this Court that there was a *bona fide* dispute between them. Meanwhile, Wilbur was colluding with members of the Board to get the Court to overturn a community vote those members disagreed with. They were successful in this effort.[1]

This is a form of litigation abuse that was never disclosed by Wilbur or the Board to the Court prior to its ruling on the 2013 vote. This sort of hidden collusion between a plaintiff and defendant should not be countenanced or rewarded. E-mails detailing this collusion, including payments by current and former Board members to Wilbur to fund litigation against the Board, are attached as Exhibit 4 to the Carlson Declaration.

E. Intervenor is entitled to the attorney fees expended in opposing this Court's wrongfully entered injunction.

Washington law is clear that a party whom successfully opposes a wrongfully issued injunction is entitled to recover the attorney fees expended in making that opposition. CR 65(c) allows damages "for the payment of such costs and damages as may be incurred . . . by any party who is found to have been wrongfully enjoined or restrained." Generally, a wrongful temporary

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[1] The Court is encouraged to read through the entirety of Carlson Decl. Exhibit 4 to get a feeling for the full scope and secrecy of the collusion between plaintiff Wilbur and existing Board members that he was litigating against.

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restraining order is one dissolved at the conclusion of a full hearing. *Ino Ino, Inc. v. City of Bellevue*, 132 Wn.2d 103, 143, 937 P.2d 154 (1997); *Alderwood Assocs. v. Washington Envtl. Council*, 96 Wash.2d 230, 247, 635 P.2d 108 (1981); *Cecil v. Dominy*, 69 Wash.2d 289, 291-92, 418 P.2d 233 (1966). A temporary restraining order is "wrongful" if it is dissolved at the conclusion of a full hearing. *Cecil*, 69 Wn.2d at 293-94.

The purpose of the rule permitting recovery for dissolving a preliminary injunction or restraining order is to deter plaintiffs from seeking such relief prior to trial on the merits. *White v. Wilhelm*, 34 Wash.App. 763, 773-74, 665 P.2d 407 (1983). The award for attorneys' fees may exceed the amount of the bond required by Civil Rule 65(c). *Seattle Firefighters Union Local No. 27 v. Hollister*, 48 Wash.App. 129, 139, 737 P.2d 1302 (1987). The amount of a reasonable attorneys' fee is within the trial court's discretion.

Here, Intervenor Corliss expended significant time and money, in the form of attorney fees, opposing the temporary injunction originally imposed by this Court in 2013. She was required, as Intervenor, to step into the shoes of the defendant when the Board – working collusively with Wilbur - decided to abandon that role. The ruling of the Court of Appeals has now demonstrated that Intervenor's opposition to the injunction was correct and that the injunction was wrongfully entered. Pursuant to CR 65 and applicable case law, she is entitled to recovery of her attorney fees from Wilbur and from the Board (which has stepped into the shoes of Wilbur as plaintiff to defend the injunction, as they did on appeal). Intervenor therefore asks this Court to enter an order granting Intervenor her reasonable attorney fees expended in this case to date. Intervenor will submit a statement of her attorney fees for a reasonableness review and approval by the Court.

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CONCLUSION

Intervenor Corliss has had the courage of her convictions. Expending significant time and money, she has now prevailed on appeal. The Court of Appeals fully upheld the validity of the 2013 vote of the Cove community to decommission the pool. The Court of Appeals has now remanded this matter for proceedings "consistent with" that ruling. Accordingly, Intervenor asks this Court to grant her previous Motion for Summary Judgment, which is the only possible ruling "consistent with" the Court of Appeals decision.

As to the 2016 vote relied upon by the Board, there are multiple reasons, discussed above, to deny the present motion for summary judgment. This Court should remember that the Board made a conscious decision to proceed with that second vote, knowing full well an appeal was pending which could go against it. They chose to plow ahead anyway. Their decision created a risk of inconsistent results. This risk should be imputed to the party that made that decision and had control of that process. The 2016 vote is moot and it cannot be enforced.

Respectfully Submitted

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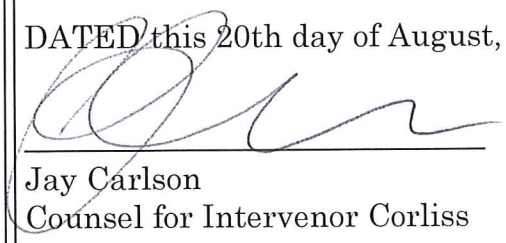
CERTIFICATE OF SERVICE

Pursuant to CR 5(b), I certify that copies of this document and all supporting declarations and exhibits were delivered to all parties or their counsel of record by email pursuant to prior agreement of the parties.

DATED this 20th day of August, 2017



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