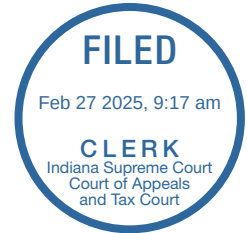
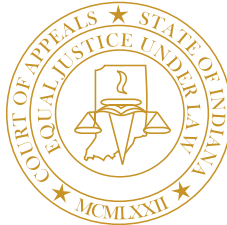


MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision is not binding precedent for any court and may be cited only for persuasive value or to establish res judicata, collateral estoppel, or law of the case.



IN THE Court of Appeals of Indiana

Tracy Talley,
Appellant-Defendant

v.

Cheswick Homeowners' Association, Inc.,
Appellee-Plaintiff

February 27, 2025

Court of Appeals Case No.
24A-SC-581

Appeal from the Marion County Small Claims Court

The Honorable A. Douglas Stephens, Judge

Trial Court Cause No.
49K05-2309-SC-2225

Memorandum Decision by Judge DeBoer
Judges May and Taviton concur.

DeBoer, J.

Case Summary

[1] After refusing to pay his homeowners association assessments in full, Tracy Talley (“Talley”) was sued in small claims court by the Cheswick Homeowners’ Association, Inc. (the “Association”) to recover the full amount, plus attorneys’ fees and costs. The small claims court awarded the Association \$673.38 in damages plus \$700 in attorneys’ fees. Talley appeals, proceeding pro se, raising two issues which we restate as: (1) whether the increase in the annual assessment was statutorily required to be approved by the Association’s membership and (2) whether the special assessment levied by the Association was proper.¹ In its Brief, the Association asks this Court to affirm the judgment and remand to the trial court to award appellate attorneys’ fees.

¹ Talley claims “[l]ate payment was the fault of the HOA and its payment system, it was always down when I try to make a payment for 2023. Went in person and the HOA would not accept payment because of Covid.” *Appellant’s Br.* at 6 (errors in original). He also accuses the Association of “blocking” his account after he filed a complaint with the Indiana Attorney General in January 2023. Talley fails to provide any cognizable argument regarding this issue. He presents no evidence regarding his attempts to pay, cites no caselaw that support his arguments, and cites to no applicable sections of the record. *See Dridi v. Cole Kline LLC*, 172 N.E.3d 361, 366 (Ind. Ct. App. 2021) (finding that a party “waives an issue where the party fails to

[2] We affirm and remand with instructions.

Facts and Procedural History

[3] The Association consists of members who own homes in the Cheswick Place Subdivision on the northwest side of Indianapolis. Established in 2005, the Association operates pursuant to its governing documents, which include the “Declaration of Covenants, Easements, Conditions and Restrictions for Cheswick Place Subdivision” (“Declaration”), and the “Code of By-Laws of Cheswick Homeowners’ Association, Inc.” (“By-Laws”).

[4] The Association raises revenue by charging an annual assessment to each member, “due and payable on the first day of each fiscal year of the Association.” *Appellee’s App. Vol. 2* at 29. The Declaration requires each owner to pay the Association “[a] pro-rata share . . . of the annual Assessments . . .” and “[a] pro-rata share . . . of any special Assessments . . .” *Id.* at 27. An owner’s liability for assessments is addressed in Article VII, Section 2 of the Declaration, which in relevant part, states:

Liability for Assessments. All Assessments shall be a prior lien on the Lots with respect to which said Assessments are in favor of the Association . . . and at the option of the Association Assessments may be foreclosed upon in any court of competent jurisdiction by the Association as plaintiff for the amount of the

develop a cogent argument or provide[] adequate citation to authority and portions of the record.”) Talley’s lack of cogent argument prevents us from providing meaningful appellate review of this issue.

Assessment with interest, attorneys' fees and costs . . . Each Owner of any of said Lots from the time of obtaining title thereto shall be held to have covenanted personally to pay the Association all charges and Assessments provided herein which were due and unpaid at the time he/she obtained title and all such charges and Assessments thereafter made or falling due during his/her ownership thereof.

Each Owner, by accepting title to any Lot or Lots and by accepting membership in the Association shall be held to have vested the Association with the right and power in its own name to fix charges and levy Assessments and to prosecute all suits, legal or equitable or otherwise which may, in the opinion of the Association; be necessary or advisable for the collection of such charges and Assessments.

Id. at 27-28.

[5] As further discussed in the By-Laws:

[E]ach Member is obligated to pay the Association annual and special assessments which are secured by a continuing lien upon the property against which the assessment is made. Any assessments which are not paid when due shall be delinquent. If the assessment is not paid within thirty (30) days after the due date, the assessment shall bear interest from the due date at a rate of ten percent (10%) per annum, and the Association may bring an action at law against the Owner personally obligated to pay same or foreclose the lien against the property, and interest, costs, and reasonable attorneys' fees incurred by such action shall be added to the amount of such assessment.

Id. at 53.

The Association's annual assessments are due on January 1st of each year, with late fees for the 2023 annual assessment and special assessment imposed on March 15th. *Transcript* at 31.

- [6] The Declaration also contains a separate attorneys' fees provision in Article IX, Section 3:

Attorneys' Fees. As to any legal or equitable proceedings for the enforcement of, or to restrain the violation of, this Declaration or any provision thereof, if the party bringing such action is successful in obtaining any remedy against any defaulting Owner, such defaulting Owner shall pay the reasonable attorneys' fees of such successful party, in such amount as may be fixed by the Court in such proceedings.

Appellee's App. Vol 2. at 35.

- [7] The Association is led by a three-person Board of Directors (the "Board"), elected by the membership. The Board is responsible for establishing an annual budget "prior to the beginning of each fiscal year." *Id.* at 28. The Board must hold a "public hearing on the proposed annual budget and approve the annual budget by a two-thirds (2/3) vote of the Directors." *Id.* at 47. A two-thirds vote of the Directors is also required to "fix annual General and Special Assessments[.]" *Id.* If annual assessments fail to cover the Association's expenses, the Board of Directors, "may, at any time, and from time to time, levy special Assessments . . ." *Id.* at 28.

- [8] In a letter dated October 1, 2022, the Board of Directors informed the Association’s members that the Board approved a one-time special assessment of \$35 per lot. *Appellant’s App. Vol. 2* at 13. Enclosed with the letter was an invoice for the special assessment and instructions to “pay this upon receipt,” with no specific due date. *Id.* The letter also told owners to “anticipate a 10 to 20% increase for 2023 regular assessment [sic].” *Id.* Talley, an Association member since 2015, testified he received this letter on November 28, 2022 but did not pay the special assessment.
- [9] In another letter from “Associa Community Association Services of Indiana,”² received by Talley on December 10, 2022, the Association’s members were told of an annual assessment increase of “\$73 . . . resulting in a total annual assessment of \$425 for each owner.” *Id.* at 12. The letter stated the Board would not “strictly enforce late fees until after March 15th 2023.” *Id.* It also stated that the increase was “slightly less than the 10% of annual assessments allowed per your covenants, without a vote for 2023.”³ *Id.* On March 20, 2023, Talley paid \$352 towards the annual assessment, leaving a \$73 balance for his 2023 annual assessment.

² The evidence in the record does not explicitly indicate Associa’s relationship to the Association, however, as Associa was responsible for noticing assessments and delinquent assessment collection, we infer that Associa was performing property management duties for the Association.

³ This language, apparently, was an error as the Association’s covenants do not include such language.

[10] When Talley did not pay the \$35 special assessment, the remaining \$73 balance on his annual assessment for 2023, or the \$425 annual assessment for 2024, the Association sued to collect unpaid assessments and collection fees, totaling \$673.38,⁴ plus attorneys' fees.

[11] At a January 11, 2024 hearing, Talley admitted he did not pay the increased assessment of \$73 or the special assessment of \$35 because he believed it had “never been approved” by the homeowners. *Tr.* at 14. He admitted he was obligated to pay the \$352 annual assessment through the “last budget that was approved,” but argued neither the annual assessment increase nor the special assessment had been properly approved. *Id.* The trial court continued the hearing to February 1, 2024 to allow the Association time to gather documents establishing that the annual assessment increase and the special assessment were properly approved and charged to Talley.

[12] At the February 1, 2024 hearing, the Association's president testified that two of the three members of the Board of Directors were present at a December 2022 public hearing to approve the 2023 budget, the annual assessment increase and the special assessment. She testified that part of the reason for the special assessment was Talley's “run-in” with a landscaping company that caused it to

⁴ In addition to the \$35 special assessment, the \$73 remaining balance on his 2023 assessment, and his 2024 assessment of \$425, this amount includes a \$42 late fee on his 2023 annual assessment, a \$95 collection fee, and a \$3.38 legal fee.

leave the job, forcing the Association to pay a higher price for a new landscaper. *Id.* at 73. Talley claimed that the Board assessed the special assessment due to their “poor budgeting[,]” which was “not [his] problem.” *Id.* at 60. He also argued that he didn’t know the reason for the annual assessment increase and that the Association’s members had not had an opportunity to be heard or to vote on the issue.

[13] Through its attorney, the Association explained that while the Board sends notice to the Association’s members of the meeting at which budgeting and assessments are discussed, the Association’s governing documents only require two of the three Directors to approve a budget and assessments. Relying on language from the undated Associa letter notifying members of the annual assessment increase, Talley claimed that an annual assessment increase of more than 10% needed to be approved by a vote of homeowners. The Association argued this was simply an “error in a letter” and that such a letter cannot negate the language of the Association’s governing documents. *Id.* at 78. Talley did not present any legal arguments as to why the assessments were improper. He merely argued the Association failed to obtain homeowner approval, the assessments were the result of poor budgeting, and the Association’s assessments constituted “fraud.” *Id.* at 4.

[14] The trial court took the matter under advisement, and in its February 23, 2024 order, entered judgment in favor of the Association for \$673.38 plus \$700 in attorneys’ fees, for a total judgment of \$1,373.38.

Discussion and Decision

- [15] Facts determined in a bench trial are reviewed “under the clearly erroneous standard with due deference paid to the trial court’s opportunity to assess witness credibility.” *Branham v. Varble*, 952 N.E.2d 744, 746 (Ind. 2011); Ind. Trial Rule 52(A). “This deferential standard of review is particularly important in small claims actions, where trials are informal, ‘with the sole objective of dispensing speedy justice’ between parties according to the rules of substantive law.” *Morton v. Ivacic*, 898 N.E.2d 1196, 1199 (Ind. 2008) (quoting *City of Dunkirk Water & Sewage Dep’t v. Hall*, 657 N.E.2d 115, 116 (Ind. 1995)); Ind. Small Claims Rule 8(A). The clearly erroneous standard “does not apply to the substantive rules of law, which are reviewed de novo just as they are in appeals from a court of general jurisdiction.” *Trinity Homes, LLC v. Fang*, 848 N.E.2d 1065, 1068 (Ind. 2006).

I. Increase in Annual Assessment

- [16] Talley argues that Indiana Code Sections 32-25.5-1-1 and 32-25.5-3-3 require homeowner ratification of “all [assessment] increases over 10%.” *Appellant’s Br.* at 5. Under Indiana Code Section 32-25.5-3-3(a)-(b), homeowners associations in Indiana are responsible for “prepar[ing] an annual budget” that reflects “estimated revenues and expenses for the budget year” and an “estimated surplus or deficit as of the end of the current budget year.” This budget “must be approved at a meeting of the homeowners association members by a majority of the members of the homeowners association in attendance . . .”

Ind. Code § 32-25.5-3-3(d). However, Article 25.5 only applies to homeowners associations established after June 30, 2009, unless a majority (or a different number of members as required by the association’s governing documents) of the association’s members elect to be governed by it. I.C. § 32-25.5-1-1(a). There is no evidence in the record to indicate that members of the Association, established in 2005, elected to be governed by Article 25.5. Therefore, Indiana Code Section 32-25.5-3-3(d) simply does not apply to the Association and homeowner ratification of assessment increases is unnecessary.

[17] Because the statute Talley cited does not control the budgeting and levying of assessments of the Association, the Association’s governing documents control. Restrictions found in an association’s governing documents, “are clothed with a very strong presumption of validity which arises from the fact that each individual unit owner purchases his unit knowing of and accepting the restrictions to be imposed.” *Villas West II of Willowridge Homeowners Ass’n v. McGlothin*, 885 N.E.2d 1274, 1279 (Ind. 2008), *reh’g denied, cert. denied*, 555 U.S. 1213 (Mar. 2, 2009). These restrictions “will not be invalidated absent a showing that they are wholly arbitrary in their application, in violation of public policy, or that they abrogate some fundamental constitutional right.” *Id.*

[18] Here, the Association’s Declaration and By-Laws clearly and unambiguously state that the Association may approve a budget and levy assessments with the approval of two-thirds of the Board of Directors. A two-thirds vote of the Board of Directors is required to “fix annual General and Special

Assessments[.]” *Appellant’s App. Vol. 2* at 47. The evidence in the record reflects that the annual assessment increase was approved by two of the three Directors. While the increase was not approved by a majority of all homeowners, there is no statute or provision in the Association’s governing documents requiring such approval. Thus, the trial court did not clearly err when it awarded the Association the full amount of Talley’s overdue annual assessments plus the costs incurred by the Association in collecting the assessments.

II. Special Assessment

[19] Talley also claims the *reasons* the Association imposed the \$35 special assessment are inappropriate and accused the Association of “bad budgeting and mismanag[ing] funds.” *Appellant’s Br.* at 5. Talley frames the issue as “whether Indiana Code [section] 32-25.5-3-5(a)(2), was followed to determine if cutting grass meets the requirement of a special assessment.” *Id.* at 3. Later in his Brief, Talley argued “[i]t was not the responsibility for the HOA to upkeep the new addition common area for 2022. Funds were already allocated for the upkeep of the common area for 2022.” *Id.* at 5. He also claimed, “[f]ailure to manage and budget correctly and stay within the budget is not reason [sic] for a special assessment.” *Id.*

[20] Although Talley couches his qualms with the special assessment as an issue of imprudence on the part of the Association’s Board, our role here is limited to determining the permissibility of a special assessment imposed by the

Association. The evidence in the record reflects that both the special assessment and annual assessment were approved in accordance with the Association's governing documents and, despite several notices and ample opportunity to pay, Talley did not. *See Appellee's App. Vol. 2* at 28 (If annual assessments fail to cover the Association's expenses, the Board of Directors "may, at any time, and from time to time, levy special Assessments . . ."). The governing documents do not indicate that special assessments may only be levied for specific purposes or repairs, such as mowing grass or common area upkeep, and Talley provides no evidence to show otherwise. Talley cites the language of Ind. Code section 32-25.5-3-5(a)(2).⁵ However, as previously discussed, Article 25.5 does not apply to the Association. Even if it did, the section Talley cited, titled "Money borrowing," applies to an association borrowing money, not levying special assessments. Thus, it has no relevancy here. Talley agreed to be bound by the Association's Declaration and By-Laws when he purchased his home. Thus, the trial court did not clearly err when it awarded the Association Talley's overdue \$35 special assessment.

⁵ Ind. Code section 32-25.5-3-5(a)(2) states: "This section does not apply to money borrowed by a homeowners association that is needed to address an emergency that affects the public health, safety, or welfare."

III. Appellate Attorney's Fees

[21] Finding the Association has prevailed at the trial level and on appeal, we turn our analysis towards the issue of appellate attorney's fees. "[O]n appeal from an award of attorney's fees, we apply the clearly erroneous standard to factual determinations, review legal conclusions de novo, and determine whether the decision to award fees and the amount of the award constituted an abuse of the trial court's discretion." *H&G Ortho, Inc. v. Neodontics Intern., Inc.*, 823 N.E.2d 734, 737 (Ind. Ct. App. 2005).

[22] "[C]onstruction of the terms of a written contract is a pure question of law for the court, reviewed de novo." *Village Pines*, 123 N.E.3d at 156 (citing *Harrison v. Thomas*, 761 N.E.2d 816, 818 (Ind. 2002)). Parties are permitted to enter into agreements, such as declarations of covenants, containing fee-shifting provisions as long as the provision does not violate public policy. *Walton v. Claybridge Homeowners Ass'n*, 825 N.E.2d 818, 824-25 (Ind. Ct. App. 2005). These fee-shifting provisions govern recovery of litigation costs. *See id.* at 825 (finding no error where trial court awarded appellate fees and costs to homeowners association based on the declaration's fee-shifting provision, not the Indiana Rules of Appellate Procedure, which imposed additional requirements for the recovery of appellate fees and costs). The purpose of these provisions is to make the prevailing party whole. *Id.* Furthermore, recovery of fees for time spent pursuing fee requests under these provisions does not contravene public policy. *Id.*

[23] Fee-shifting provisions that do not distinguish between trial and appellate fees and costs unquestionably apply to both. The prevailing party in an action under the Association’s Declaration is entitled to “reasonable attorneys’ fees.” *Appellee’s App. Vol. 2* at 35. Our Court has held that a statutory⁶ provision entitling a party to “reasonable attorneys fees” must include fees for services on appeal. *Parrish v. Terre Haute Sav. Bank*, 438 N.E.2d 1, 3 (Ind. Ct. App. 1982), *reh’g denied* (quoting *Templeton v. Sam Klain & Son, Inc.*, 425 N.E.2d 89, 95 (Ind. 1981)). The *Parrish* Court extended this holding to contractual provisions with identical language, finding “no . . . distinction between the scope of a statutory and a contractual provision for ‘reasonable attorneys fees.’” *Id.*

[24] Although over forty years have passed since *Parrish* and *Templeton*, our Court’s precedents have not changed. *See Cavallo v. Allied Physicians of Michiana, LLC*, 42 N.E.3d 995, 1010 (Ind. Ct. App. 2015) (finding “[a]s it is undisputed here that the Contract provides for attorney fees in the event that Allied prevails in enforcing the Contract, and Allied has prevailed on appeal, we grant Allied’s request and remand to the trial court for a determination of reasonable appellate attorney fees to award Allied.”); *see also Zollinger v. Wagner-Meinert Engineering, LLC*, 146 N.E.3d 1060, 1074 (Ind. Ct. App. 2020) (remanding case to trial court

⁶ The statute at issue was Indiana Code § 32-8-3-14 relating to the recovery of attorneys’ fees for enforcement of a mechanic’s lien. While this statute has been repealed, Ind. Code § 32-28-3-14 contains similar language that says, “a plaintiff or lienholder who recovers a judgment in any sum is entitled to recover reasonable attorney’s fees,” in any action to enforce a lien under Ind. Code § 32-28-3.

to determine reasonable appellate attorney fees to award prevailing party, under contract that provided for the recovery of “attorney fees and expenses incurred.”).

- [25] The Association unquestionably prevailed in this action. It obtained judgment at trial and has successfully defended that judgment on appeal against Talley’s arguments. The trial court properly awarded the Association reasonable attorneys’ fees for the action at trial. Furthermore, finding that Indiana law requires the award of appellate attorney’s fees to prevailing parties where, as here, such a contractual provision exists, we remand for the determination of reasonable appellate attorney’s fees.

Conclusion

- [26] We affirm the trial court’s judgment for the Association, including its award of attorneys’ fees incurred at the trial level. We remand with instructions to award reasonable attorney’s fees incurred by the Association in defending this appeal.

May, J., and Tavitas, J., concur.

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