STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Appeal No. 2013AP001585

RONALD FOUTS,

Plaintiff-Appellant,

v.

BREEZY POINT CONDOMINIUM ASSOCIATION,

Defendant-Respondent.

ON REVIEW OF A DISMISSAL OF COMPLAINT IN THE CIRCUIT COURT FOR DODGE COUNTY, THE HONORABLE STEVEN G. BAUER PRESIDING.

BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT, RONALD FOUTS

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ISSUES PRESENTED

1. In determining ***summary*** judgment, did the Circuit Court err when it assumed that attorney-client privilege was the only relevant law in determining whether directors of condominium associations may be prevented from seeing association records?

   Without reference to the fiduciary duties of directors to their association under Wisconsin Statutes, the Circuit Court held that associations may prevent a director from seeing association records.

2. In determining ***summary*** judgment, did the Circuit Court err when it did not apply Wisconsin statutory authority that requires certain resolutions to be supported by a 75% vote of directors?

   Without reference to the relevant statute, the Circuit Court held that an association president could unilaterally amend a board resolution.

3. In determining ***summary*** judgment, did the Circuit Court err when it found summary judgment in favor of the defendant when the defendant never moved for summary judgment?

   Appearing to use plaintiff's summary judgment motion as a fact-finding motion, the Circuit Court ruled on May 21, 2013 that summary judgment was granted for the defendant.

4. In determining ***declaratory*** judgment, did the Circuit Court err when it determined a question that was different from the Plaintiff's complaint?

   Even though the complaint asked if the plaintiff was authorized to access certain withheld records, the Circuit Court held that associations may withhold attorney-client privileged material.

5. In determining ***declaratory*** judgment, did the Circuit

Court err when it failed to clarify the uncertainty presented in plaintiff's complaint?

Even where it was clear that the plaintiff was trying to follow up on an investigate that had identified clear financial impropriety, but was hampered by information being hidden by attorney-client privilege, the Circuit Court held only that associations could withhold attorney-client privileged documents. The Circuit Court did not take any other steps that would clarify how plaintiff should proceed with his follow-up investigation to known financial impropriety.

6. In determining ***declaratory*** judgment, did the Circuit Court err when it made conclusions of law without citation to law?

   In its declaratory judgment opinion dated May 31, 2013, the Circuit Court did not identify any law on which it relied. It may have relied upon law previously recited in a summary judgment action, but that remains unclear on the record.

7. In determining ***declaratory or summary*** judgment, did the Circuit Court err when it awarded "statutory attorneys fees" in the May 21, 2013 order where the declaratory judgment statute does not allow for attorneys fees and there is no finding of bad faith as required for fees under the summary judgment statute?

   Though it remains unclear as to what statute the Circuit Court cited, the Circuit Court granted "statutory attorney's fees" to the defendant.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Fouts requests oral argument to clarify any questions the Court may have. Publication is warranted to clarify the use of summary judgment in deciding declaratory judgment.

STATEMENT OF THE CASE AND FACTS

Background

On August 20, 2012, Plaintiff Ronald Fouts filed this action requesting a declaratory judgment stating that he, as a director and member-owner of Breezy Point Condominium Association ("Breezy Point"), is entitled to full access to association records without redaction or claim of privilege. (R1 at ¶¶ 1-2; ¶ a.; p. 3, attached as Appendix A.)

Fouts filed for summary judgment, which was denied on March 19, 2013. (R12, attached as Appendix H.)

Following that order, the court below entered a stipulation on May 16, 2013. (R15, attached as Appendix I.) Based solely upon that stipulation, in an order dated May 31, 2013, the court *sua sponte* dismissed the Complaint. (R17 at judgment ¶ 1, attached as Appendix K.)

As will be cited below, circuit courts need to establish facts sufficient to determine the rights of parties in a declaratory judgment action. Courts have wide discretion on how to establish these facts.

As suggested above and argued below, the court below erred when it combined fact-finding during a summary judgment motion, a *sua sponte* summary judgment motion, a stipulation, and findings of fact and law without citing any facts or law to ultimately determine declaratory judgment. As a result, the standards of law that apply to the various decisions of the court below change. Care will be taken herein to identify which standard of law will later be applicable to which set of facts.

Fouts herein appeals both the Circuit Court's denial of his motion for summary and its corresponding *sua sponte* dismissal of his Complaint.

The facts below recite the record in three parts: (1) general background information for this Court, (2) the facts admissible for Fouts' motion for summary judgment which

accepts the facts as favorable to the non-moving party and (2) the facts admissible for the declaratory judgment opinion which admitted *only* the stipulation entered May 16, 2013.

General Background:
Facts Not Disputed by Any Party

Breezy Point is a small condominium association composed of member-owners, all of whom are directors.[1] Fouts is a member-owner and director in good standing of Breezy Point. (R1: ¶ 1; *admitted* R2:1 ¶ 1.)

Pursuant to Breezy Point's bylaws, the directors are equally responsible for the daily operations of Breezy Point. (R1: ¶¶ 8, 9; *admitted* R2: ¶ 1; Wis. Stat. §§ 703.365(2), 703.365(3)(a).) The directors have a fiduciary duty to other member-owners to operate Breezy Point efficiently. (R1: ¶¶ 8, 10; *admitted* R2: ¶ 1.) To accomplish this, the board of directors is required to establish the policies. (R1: ¶ 9; *admitted* R2: ¶ 1.) As a director of Breezy Point, Fouts has a fiduciary responsibility and legal obligation to oversee the association. (R1: ¶ 10; *admitted* R2: ¶ 1.)

Sometime prior to 2009, Fouts came to believe that Breezy Point had wrongfully paid for personal legal expenses of other directors and member-owners from the association accounts. (R7: ¶ 3.) Fulfilling what he believed to be his obligation as a director, Fouts asked to review association

[1] Breezy Point Condominium Association is a small residential condominium located at W9743 Breezy Point Road, Fox Lake, WI 53933. (R1: ¶ 2; *admitted* R2: ¶ 1.) Under Wis. Stat. § 703.365(3)(c), every unit of a small condo association must provide one director to the board.

The bylaws of the association are not on record, and Breezy Point contended the fact in argument section on summary judgment at 4-5. However, the fact was admitted to in the Answer (R2: ¶ 1) which specifically cites the Complaint which states that Breezy Point is "organized under Wis. Stat. § 703.365." (R1: ¶ 2.)

records. (R7: ¶ 3.) Fouts identified the attorney in question as Walter Stewart, who was then and is now the attorney for Breezy Point, and personal attorney for at least 2 of the directors. (R7 (Exhibits): Preliminary Determination on Legal Issue at 1, attached as Appendix L[2]; R7: ¶ 3; Answer.)

Fouts filed suit to be provided copies of attorney bills to Breezy Point. (R7 (Exhibits): Preliminary Determination on Legal Issue at 1.) By order dated December 18, 2009, the circuit court in Dodge County Case No. 08-CV-893 found that "unit owners do have a definite interest in all association expenses and should be able to discover not only the amount of such expenses, but also the reason for such expenses being incurred." (*Id.* at 2.) The court further held that "the simplest audit of the association records, as a common sense measure, requires the underlying records to verify [the] accuracy" of accounting entries. (*Id.* at 3.) It was ordered that, "the legal services bills incurred by the association were subject to examination by the plaintiff [Fouts] pursuant to Wis. Stat. § 703.20(1)." (*Id.* at 4-5.)

After this order, Fouts continued to try to obtain records from Breezy Point. On September 4, 2010, at Fouts' request, Breezy Point passed a resolution granting permission for any director to review the records of the association contained in the office of the association's attorney. (R7: ¶ 5.)

However, on September 9, 2010, Breezy Point's president limited this resolution unilaterally. (R7: ¶ 6.) He curtailed the September 4, 2010, resolution to reviewing only those records to those paid for by Breezy Point, to "closed cases", and to visual examination with no copies to be made. (R7: ¶ 6.)

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[2] This order was included as an exhibit to Fouts' Affidavit. It was also referenced by Fouts' Affidavit (R7: ¶ 16) and is, therefore, (a) in the record below and (b) even if not, is subject to being judicially noticed by this Court. Also attached to Fouts' Affidavit and referenced by ¶ 16 are the Judgment (attached as Appendix N) and Findings of Fact and Conclusions of Law (attached as Appendix M) associated with the order quoted above.

Evidence for the authority on which the president made this decision is not on record. On November 8, 2010, Attorney Stewart informed Fouts that Fouts was not his client and that "nothing falling under the guise of privilege" would be made available. ((R7: ¶ 7.)

By this action and by Fouts' suit of the president and treasurer, both of which are on record, it should be understood that this is not a clear case of Fouts against the entire board. Though the details are ambiguous as to who was on which side, this case is about the rights of directors acting in good faith to fulfill their duties to Breezy Point when there are directors seeking to prevent them from doing so. [3]

In order to be allowed to review the records, Attorney Stewart demanded that Fouts, personally, pay him $350 (R7: ¶ 8.) Attorney Stewart indicated that this fee was to review the records and remove privileged communications. (*Id.*) Fouts paid this amount on December 7, 2010. (*Id.*)

Attorney Stewart further billed Breezy Point for 2.3 hours of time to "review the files and eliminate confidential communications" from the records to be inspected by Fouts. (R7: ¶ 10.)

Pursuant to the review, Fouts realized that a substantial amount of Breezy Point's records were missing. (R7: ¶ 9.) Attorney Stewart explained that, in compliance with the September 4, 2010, resolution, privileged communications had been removed. (*Id.*) Further definition or itemization as to what constituted "privileged communications" or who was the holder of the privilege is not on record. Through even this litigation, where Breezy Point continued to claim that Fouts as director is not entitled to see the association legal records due to privilege, no privilege log or anything akin to one has ever been produced, nor have the standards employed to determine what falls under the category of privilege been

[3] In the filings below, there is a confusion or conflation of directors and officers and their respective duties. Evidence clarifying any differences between officers and directors – the bylaws – is not on record.

divulged.

Over the next few weeks, Fouts requested by three separate letters that Breezy Point inform Attorney Stewart that Fouts had the right to review all Breezy Point records in accordance with Breezy Point's September 4, 2010, resolution, without a claim of privilege. No action was taken on these requests by Breezy Point or Attorney Stewart. (R7: ¶ 11.)

On November 14, 2011, Fouts wrote to the other 10 directors of Breezy Point demanding an authority on which the association was permitted to continue to deny him access to association records despite the December 18, 2009, court order and September 4, 2010, resolution. (R7: ¶ 12.) Neither Breezy Point nor any of the individual other directors responded, nor was any action taken to Fouts' knowledge. (R7: ¶ 12.)

Prior to commencement of this action, on or about February 8, 2012, the plaintiff via his attorney notified Breezy Point by letter that as a director Fouts has an unqualified right to inspect all Association books, records and document, regardless of the Association's claims that the records are privileged, and demanded access to the records. (R1: ¶ 17; *admitted* R2: ¶ 4.) On April 13, 2012, Fouts, through counsel, again requested that Breezy Point respond to the letter. (R7: ¶ 13.) To date, Fouts has still never been allowed to see the association records without redaction or claim of privilege.

The record does not bear evidence of a privilege log or any other documentary recording of privilege. The record does not bear evidence of billing records,[4] which it seems the association continues to refuse to allow director Fouts to inspect. (R1: ¶ 13; *admitted* Answer ¶ 1; *see also* R7: ¶ 16.) The record does not bear evidence of the authority on which Breezy Point president relied to curtail a board resolution to prevent Fouts from seeing the full records. The record does not bear evidence of why Attorney Stewart has refused to provide an accounting of funds paid by Breezy Point itself or

[4] Axiomatically, these are not covered by attorney-client privilege.

by individual member-owners of Breezy Point.

The record does bear evidence of why Fouts made this request: "because the Association in the past has wrongfully paid personal legal expenses of the officers and other members of the Association from Association funds." (R7: ¶ 3.) The record does not bear evidence of whether Attorney Stewart has stated why Breezy Point files and member-owner files have not been kept separate. Further, no one has indicated how Fouts is to fulfill his fiduciary duties to Breezy Point without having the association's own files and billing records available to him.

Facts Favorable to Breezy Point Admitted for the Purposes of Fouts' Summary Judgment Motion

As recited above and cited below, motions for summary judgment accept the facts most favorable to the nonmoving party. In the court below, Breezy Point was the nonmoving party. Therefore, facts were admitted for the purposes of summary judgment but not for the purposes of declaratory judgment. Fouts expressly does not admit to the truth of the facts contained within the entirety of this section, and presents them solely for the convenience of this Court in reviewing the decision on summary judgment in the court below.

Fouts has filed three previous actions against members of Breezy Point in Dodge County Case Nos. 02-SC-1179, 03-CV-76, and 08-CV-893. (R8:1.)[5] In the only opinion on record below, Fouts was successful against the president,

[5] Breezy Point characterizes Fouts as a "serial litigator" but it's not clear how three cases raises that opinion in the first place, or if the characterization is accurate or factual in nature. Breezy Point does not even assert that any of these case are active or that Fouts would achieve a litigation advantage from seeing the files; from the old dates inherent in captions, the reason for the assertion of privilege is unclear. Further, in Breezy Point's Answer, Fouts is accused of being a "serial litigator" without any factual support. (R2: p2, ¶ 2.)

treasurer, and the association in 08-CV-893. (R7: ¶ 16.)

Some of the files that Fouts requested include litigation files from case 08-CV-893. (*Id.*) Through Attorney Stewart's affidavit, Breezy Point has warranted that it "has made full disclosure of the legal files, except for portions protected by the attorney-client privilege." (*Id.*) However, Attorney Stewart's affidavit only states that "Fouts was given full access to all of the [Breezy Point's] legal files which I maintain at my office, except for portions protected by the attorney-client privilege." (R9: ¶ 10.) That is, by this statement from Breezy Point, Fouts has not been allowed access to association records not kept in Attorney Stewart's office.[6]

These were the only relevant facts that Breezy Point disputed; this will conclude the section that accepts disputed facts as true for the purposes of summary judgment.

Procedural Facts of Fouts' Summary Judgment Motion

Fouts filed a complaint in Dodge County in the underlying instant case based upon the foregoing. (*See generally,* R1.) In addition to declaratory relief, Fouts also seeks punitive damages in an undetermined amount, as well as fees and costs. (*See generally,* R1.)

In his motion for summary judgment, Fouts argued that, as a director of the Association, he had an absolute right to inspect Breezy Point books and records, and that no privilege applied. Fouts made three arguments in support of his assertion: (1) it is settled law that the right of a current director to inspect the books and records is absolute and unqualified, (2) Breezy Point's privilege claims fail since a current director's right of access to books and records is necessary to fulfilling his duties to the association; moreover, in the event of litigation a

[6] If this section did not accept Breezy Point's facts as true, Fouts would point out that Breezy Point admitted that the records requested by Fouts cover attorney-client privileged documents only "in part" but not in full. (R1: ¶ 13; *admitted* Answer ¶ 1.)

special committee of directors to handle any such litigation could or should have been appointed and was not, and (3) the client files in possession of Attorney Stewart belong to Breezy Point, and should have been furnished to Fouts pursuant to the court order dated December 18, 2009, and association resolution dated September 4, 2010. (*See generally*, R8.)

In its response, Breezy Point argued under Wisconsin unincorporated association law of Wis. Stat. § 184 that Fouts does not have an absolute right to inspect the association's legal files due to attorney-client privilege because (1) "Wisconsin's entity rule establishes that the [Breezy Point] is the client," (2) "the attorney client privilege can only be waived by [Breezy Point's] officers," and (3) allowing Fouts access to the legal files would frustrate the policy underlying the attorney-client privilege. (R8:1-5.)

In its Response Brief (and in all other filings in the court below) Breezy Point did not refute that Fouts was acting for the benefit of the association. (*See generally,* R8.) Breezy Point further did not refute that Fouts had a reasonable basis for his suspicion that Breezy Point money was being mismanaged by a minority few certain Breezy Point directors. (*See generally,* R8.) Breezy Point did not provide facts to dispute this basis; it should have been accepted as true by the court below. (*See generally,* R8.)

The Circuit Court issued its Decision on Plaintiff's Motion for Summary Judgment on March 19, 2013. (R12, attached as Appendix H.) In it, the Circuit Court determined that there were two legal issues at bar:

1. Does the lawyer-client privilege grant the Association the authority to withhold confidential lawyer-client communications from a current director of the Association; and
2. If the privilege applies, who can waive the Association's lawyer-client privilege?

The court found that "this isn't a corporation governed by

statute," (R12:5.) Further, the court understood that "privileged lawyer-client communications are far different from financial records." (R12:3.) Therefore, reasoned the Circuit Court, "The board of directors as an entity, and not just an individual director, has the exclusive authority to decide whether or not directors, or which specific directors, should have access to any or all information covered by the lawyer-client privilege. (R12:5.) Therefore, concluded the court, the "lawyer-client privilege grants the Association the authority to withhold confidential lawyer-client communications from a current director of the Association. (R12:5.)

Facts Admitted for the Purposes of Declaratory Judgment

Following the decision denying Fouts' motion for summary judgment, a stipulation by the parties was entered by the court. It read:

> On or about February 8, 2012 the plaintiff demanded that the association provide the requested records regardless of the claim of client-attorney privilege. The association did not waive the privilege and did not provide the records.

(R15, attached as Appendix I.)

Based upon this stipulation, the court did, "not believe that any issue of material fact remains for trial, and the Court grants summary judgment for the [Breezy Point]. This matter is dismissed on its merits and with statutory costs and statutory attorney's fees." (R16.)[7] The court subsequently issued a Judgment including the following conclusions of law:

> 1. The board of directors as an entity and not just an individual director, has the exclusive authority to decide whether or not directors, or which specific directors, should have access to

[7] Breezy Point never motioned for summary judgment.

> any or all information covered by the lawyer-client privilege.
>
> 2. The lawyer-client privilege grants the Association the authority to withhold confidential lawyer-client communications from a current director of the Association.
>
> 3. The only right to information covered by lawyer-client privilege that the defendant is entitled to is that granted to him by the board of directors of the Association.
>
> 4. Only the board of directors of the Association can waive a lawyer-client privilege.

(R17.)

Based on the foregoing conclusions of law, the court dismissed the complaint. (R17.)

This appeal follows.

GOVERNANCE OF SMALL CONDO ASSOCIATIONS

Under Wis. Stat. § 703.365, small condominium associations operate differently than other homeowner or condominium associations. *See, e.g.,* Wis. Stat. § 703.365(2)(a). For small condo associations, each unit must elect a director to serve on the board. *Id.* at § 703.365(3)(c). The representative director from each unit serves on the board with one vote, and all votes are equal. *Id.* at § 703.365(b)-(c). Perhaps most importantly for the instant action, though, "All actions taken by the board of directors of a small condominium under this chapter must be approved by an affirmative vote or written consent of at least 75% of the board." Wis. Stat. § 703.365(3)(d).

ARGUMENT

The central concern in this case is how a fiduciary is supposed to guard against the mismanagement of association funds when that fiduciary is denied access to the financial and legal records of that association. In other words, how can Fouts fulfill his fiduciary duties to the association when he, exclusively, is not allowed access to its fiduciary records?

This request for declaratory judgment seeks a court order that all association directors are allowed to "obtain [Breezy Point] records from every available source including without limitation attorney client files of the association, and *directing that the defendant furnish the plaintiff with all the records*." (R1: ¶ 14)(emphasis added).

Fouts does not maintain that it would not be possible for Breezy Point to limit his access to the association records, rather that proper procedures to do so were not followed in the instant case. No board resolution was ever duly passed limiting access to any of the association records (fiduciary, legal, or otherwise) to only certain members such as a litigation committee. Further, privilege was only broadly asserted, never specifically and in compliance with the rules pertaining to the same.

Further, the Circuit Court made two critical errors. First, it conflated the decision-making process between summary and declaratory judgment, ultimately confusing and misapplying the applicable standards. Second, it failed to answer the question presented by Fouts complaint; how can a director accomplish his fiduciary duties when he cannot investigate known financial wrongdoing? Additional reversible but more discrete errors are also reviewed below.

There are three orders that are appealed herein: (1) the March 19, 2013 order denying Fouts's motion for summary judgment, (2) the May 21, 2013 *sua sponte* order granting summary judgment for Breezy Point that dismissed the complaint and was marked as final for the purposes of appeal, and (3) the May 31, 2013 order issuing a declaratory judgment, dismissing the complaint, and marked as final for

the purposes of appeal. These three orders implicate two different standards of review, as discussed below.

I. Standard of Review and Argument for Circuit Court's error in Denying and Granting Summary Judgment.

The March 19, 2013 and May 21, 2013 orders are the subjects of this first argument.

In the March 19, 2013 order, as discussed above, the court below framed the dispute as whether "a current director of an unincorporated association has unfettered access to lawyer-client communications." Without mentioning fiduciary duties, resolutions, financial wrongdoing, or Wis. Stat. § 703, the court below reasoned using Wis. Stat. § 905.03 and the entity rule to find that unincorporated associations could limit the ability of directors to access attorney-client privileged files.

In the May 21, 2013 order, as discussed above, the court below relied on the stipulation of the parties that "the Association did not waive the [attorney-client] privilege nor did it provide the records." The court then found that no "issue of material fact remains for trial, [so] the Court grants summary judgment for the Defendant."

1. Standard of Review for Summary Judgment

Appellate courts reviewing summary judgment use *de novo* review. *Accuweb, Inc. v. Foley & Lardner*, 2008 WI 24, ¶ 16, 746 N.W.2d 447, 308 Wis.2d 258. Courts review whether there is a genuine issue of material fact and whether the moving party is entitled to judgment as a matter of law. *Williamson v.Hi–Liter Graphics, LLC*, 2012 WI App 37, ¶ 4, 340 Wis.2d 485, 811 N.W.2d 866. "Summary judgment materials, including pleadings, depositions, answers to interrogatories, and admissions on file are viewed in the light most favorable to the nonmoving party." *Accuweb*, 2008 WI at ¶ 16.

Moreover, the nonmoving party "may not rest upon the mere allegations or denials of pleadings." Wis. Stat. § 802.08(3). Rather, the nonmoving party "must set forth specific facts

showing that there is a genuine issue for trial. If the [nonmoving] party does not so respond, summary judgment, if appropriate, shall be entered." *Id.*

As cited above, summary judgment determines whether the moving party is entitled to relief as a matter of law while viewing the facts in the light most favorable to the nonmoving party. This is a bit of a confusing point, because Fouts was the moving party, but because the court granted summary judgment for Breezy Point, the facts should have been construed in favor of Fouts.

2. Argument on Summary Judgment

A. Directors are entitled to association records by virtue of their fiduciary duties.

Under Wis. Stat. § 703, the board of directors has wide ranging duties. The board of directors is responsible for "all policy and operational decisions of the association, including interpretation of the condominium instruments, bylaws, rules and other documents relating to the condominium or the association." Wis. Stat. § 703.15(1). To make informed decisions on these issues, the directors must have access to the association records.

Though the court below was right that Breezy Point is not a corporation under the corporation statute (R12:5), the court below was wrong to ignore the import of the legislature's choice of the word "director."[8] Being a director has meaning. The best place to explain the plain meaning of the term is from the place where a board of directors is most reasonably and most often associated: corporate law.

[8] The policies of condominium association can include "any policy as to who should have access to any of the records." (R12:5.) *See also* "no Court in Wisconsin has ruled on whether or not a current director of an unincorporated association has unfettered access to lawyer-client communication." *Id.* at 3.

In this issue of first impression, the best place to start with a review of corporate law is from the mecca of corporate law in the United States: Delaware. Under Delaware law, a board "can withhold privileged information once sufficient adversity exists between the director and the corporation such that the director could no longer have a reasonable expectation that he was a client of the board's counsel." *See* unpublished decision, *Kalisman v. Friedman* (Del Ch. 2013), attached hereto as Appendix O; *accord Deutsch v. Cogan*, 580 A.2d 100 (Del. Ch., 1989)(requiring good cause to be shown for shareholders to review the attorney-client privileged information of the corporate attorney rather than permitting it under a lack of an entity rule).[9]

Wisconsin is in accord. Unlike as reported by the court below, Delaware defines attorney-client privilege exactly as Wisconsin does; they appear to use the same uniform rules. The Delaware statute reads:

> [Rule 502(a)](2) A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication…
>
> (b) General rule of privilege. A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client (1) between the client or the client's representative and the client's lawyer or the lawyer's representative, (2) between the

[9] *Kalisman*, procedurally postured as discovery disputes on a motion to protect and compel, mentions privilege logs. (*Kalisman* at *9.) The procedural posture being different in the instant case, privilege logs will be mentioned below as good practice for a court with wide discretion in a declaratory judgment action.

> lawyer and the lawyer's representative, (3) by the client or the client's representative or the client's lawyer or a representative of the lawyer to a lawyer or a representative of a lawyer representing another in a matter of common interest, (4) between representatives of the client or between the client and a representative of the client, or (5) among lawyers and their representatives representing the same client.

Delaware Rule of Evidence 502. [10]

The entity rule does not block directors from acting for the benefit of the corporation. The problem with *Lane v. Sharp Packaging Systems, Inc.*, 2002 WI 28, 251 Wis.2d 68, 640 N.W.2d 788, cited by the court below is that *Lane* involves a "dissident [former] director." *Lane*, 2002 WI at ¶ 34. Uncited by the court below, a "dissident director is by definition not management and, accordingly, has no authority to pierce or otherwise frustrate the attorney-client privilege when such actions conflicts with the will of management." *Id.* at ¶ 34. In *Lane,* the "dissident former director [was alleged to seek] privileged documents for *personal* gain." *Id.* at ¶ 28.

But, most importantly, the *Lane* court noted "that our holding here is based *strictly* on the facts presented. We rely *largely* on the fact that Lane is a *former director*. ***We specifically do not address***, or speculate, on the outcome of any similar situation involving a *current member of a board of directors*." *Id.*at ¶ 35 (emphasis added).

The court below misapplied this law because Fouts is not a former director, nor is he seeking the documents for personal gain. Indeed, the court below assumed adversity when it reasoned that the entity rule "allows the corporate lawyer to focus on representing only the best interest of the client corporation…[and] does not need to worry about representing the interest of every" director. However, the adversity of Fouts to Breezy Point remains unspecified throughout the

[10] *See* Delaware Court website at http://courts.delaware.gov/forms/download.aspx?id=39388

court below's opinion on summary judgment.

On this law, unless and until Fouts is shown to be adverse to Breezy Point, he should be permitted unfettered access to Breezy Point files. The only basis on which directors can hide information from each other is when a director becomes a dissident director.

Even on the facts most reasonable to Breezy Point, Fouts cannot be considered a dissident director. Viewing the facts most reasonable to Breezy Point, Breezy Point only provided evidence that Fouts had sued Breezy Point three times in the past. Two of those cases are not on record. The third shows that Fouts was successful in showing that the president and treasurer had mismanaged Breezy Point's funds. In that action, Fouts was clearly acting for the benefit of Breezy Point. In the instant action, Fouts's requests were made in follow-up to that action and the *approved mandate of an association resolution*. He was trying to fulfill his fiduciary obligations and verify the financial well-being of Breezy Point. Breezy Point never stated anything to suggest that Fouts was not acting for the benefit of Breezy Point. It is not adverse to Fouts' position as a watchdog that he be named a serial litigator. There is no evidence on record that Fouts ever acted contrary to the interests of the association.

The prior cases between Fouts and Breezy Point referred to by Breezy Point appear closed on the record available. The only persons adverse to the disclosure of the information he seeks are those who may have mismanaged funds. Fouts, like all watchdogs, should be permitted to see all the files of Breezy Point because he is attempting to act for the benefit of the financial well-being of Breezy Point. Until Breezy Point produces evidence that Fouts is adverse to the well-being of Breezy Point, Fouts should be allowed unfettered access to Breezy Point files so that he may be permitted to exercise his fiduciary duties.

Ultimately, the Circuit Court failed to recognize that this case begins with the fiduciary duties espoused by Wis. Stat. § 703. Rather, the Circuit Court began with attorney-client privilege; that is, it started from the position that Fouts had no authority

on which to demand the records and was using inapplicable Delaware law to invent an authority. This was an error.

In summary, under Wis. Stat. § 703, Fouts had duties he had to fulfill. These duties are not specified by § 703, but are likely similar to those fiduciary duties of directors in corporations such as espoused by Delaware and Wisconsin law. Acting for the financial well-being of Breezy Point, Fouts demanded records so that he could satisfy his duties. Because Breezy Point failed to provide any evidence that Fouts was a dissident director or was somehow currently adverse to Breezy Point, there should not have been an inference that Fouts could not have access to attorney-client privileged material.

Specifically, the Circuit Court erred by characterizing Delaware law as inconsistent with Wisconsin law. It further erred when it characterized Fouts as "adversarial" to the board. Op. at 3. It further erred when it found that a board could block a member from viewing files short of the director being adverse to the board or that waiver of privilege was necessary for a director to view files. Op. at 5. It further erred when it did not make any mention of Wis. Stat. § 703.

B. The president's unilateral modification of the association's resolution granting Fouts access to the records was invalid because it was not supported by a 75% vote.

As cited above, "All actions taken by the board of directors of a small condominium under this chapter must be approved by an affirmative vote or written consent of at least 75% of the board." Wis. Stat. § 703.365(3)(d).

In its pleadings, affidavits, and summary judgment response brief, Breezy Point only really provided additional facts on whether Fouts was a serial litigator. Breezy Point did not dispute the passage of the September 4, 2010, resolution or that the president unilaterally modified that resolution to restrict Fouts' access. Therefore, the facts presented by Fouts should have been accepted as true.

That is, it should have been accepted as true that Breezy Point passed a resolution on September 4, 2010 "granting permission for any director to review the records of the Association in the office of the Association's attorney (Fouts [Affidavit], ¶5.)." (R10:2.) It should have been accepted as true that this included privileged material, as inferred from the statement that does not include any limitations, and also by the subsequent attempt of the president to limit the resolution to exclude "privileged" materials.

Further, the Circuit Court misapplied the law on summary judgment cited above that states that Breezy Point is not permitted to rest on allegations alone. Specifically, Breezy Point has not presented any specific or admissible facts that dispute Fouts' statement that the board resolution afforded him the right to review records.

The only admissible evidence on record on this issue is Fouts' statement that it was the president who unilaterally limited this resolution. (R10:2.) Breezy Point did not effectively dispute this assertion.[11] According to Wis. Stat. § 703.365, such an action would have required a 75% vote of the entire board. Accordingly, it was an erroneous exercise of discretion for the lower court to enforce the president's unilateral modification of the association's resolution which allowed Fouts access to the billing materials.

C. It was an erroneous exercise of discretion to find summary judgment for Breezy Point when it had not moved for summary judgment, causing Fouts to be deprived of his opportunity to argue his case using the benefits of being able to rebut factual assertions as the non-moving party.

[11] As reviewed in part in n.1, Breezy Point has backtracked on its admission that Wis. Stat. § 703.365 applies, and that the board of directors governs the association and makes association policies. (R1:¶¶ 2, 8, 9; *admitted by* R2: p1, ¶1.) Fouts would relish the opportunity to make arguments based on the bylaws, but they are not on record.

Using *de novo* review, it was an erroneous exercise of discretion to *sua sponte* grant summary judgment for Breezy Point. Though it has the power under § 803.08(6) to find for an opposing party, no summary judgment motion was pending on May 21, 2013. Moreover, even if § 803.08(6) provided the court below the authority to do what it did, the May 21, 2013 order does not acknowledge that it viewed the facts in the light most favorable to Fouts (thus disregarding any negative inferences that can be drawn from Breezy Point's accusations that Fouts is a serial litigator).

It was an erroneous exercise of discretion for the court to consider disputed facts without a trial or other fact-finding hearing or opportunity to decide facts. Fouts was never afforded the opportunity to rebut the factual assertions which were relied upon in granting summary judgment for Breezy Point, and the court's abrupt and *sua sponte* granting of summary judgment for Breezy Point was therefore in error.

Instead, the court applied facts beyond the stipulation in order to effectuate a dismissal. To dismiss the Complaint, Breezy Point still had to show that the board had legitimately exercised its authority to bar Fouts from obtaining information. That is not included in the stipulation and it was never the subject of argument, either in writing or orally. This factual finding is only implied, never overtly stated, in the court's order.

There is no plausible source for the implied factual finding that the association duly exercised its authority (as opposed to merely having the authority) to bar Fouts from accessing the association records. Even assuming *arguendo* that the conclusions of law are accurate, Fouts deserved the opportunity to be heard on the factual basis of whether Breezy Point (and not just the president) had properly exercised whatever authority it did have to block his access to the association records using the standards of law in summary judgment favorable to the nonmoving party.

According to Fouts, he had been granted this privilege by the September 4, 2010 resolution. Accordingly, a genuine issue of material fact remained, was never fleshed out, and the *sua*

sponte grant of summary judgment was therefore inappropriate.

II. Standard of Review, Rules and Argument for Circuit Court's error in rendering its Declaratory Judgment.

1. Standard of Review for Declaratory Judgment

The standard of review applied to a declaratory judgment varies depending upon the case involved. Generally, where the issue is the "granting or denying of relief," the Wisconsin Supreme Court has instructed that such decisions are within the discretion of the circuit court. *Hull v. State Farm Mut. Auto. Ins. Co.*, 586 N.W.2d 863, 866, 222 Wis.2d 627, 635-636 (¶ 11)(Wis. 1998); *accord J.G. v. Wangard*, 2008 WI 99, 753 N.W.2d 475, 313 Wis.2d 329; *accord Snyder v. Injured Patients and Families*, 2009 WI App 86, ¶ 6, 768 N.W.2d 271, 320 Wis. 2d 259; *interpreting* Wis. Stat. § 806.04(6). Therefore, discretionary declaratory judgment decisions will be upheld where the circuit court "examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could make." *Snyder v. Injured Patients and Families*, 2009 WI App 86, ¶ 6, 768 N.W.2d 271, 320 Wis. 2d 259.

Where circuit courts make errors of law, they erroneously exercise their discretion. *Hull*, 222 Wis.2d at ¶ 11. In these cases, questions of law are generally given *de novo* review. *Acuity v. Ross Glove Co.*, 2012 WI App 70, ¶ 5, 344 Wis.2d 29, 817 N.W.2d 455 (*de novo* review if there is no extrinsic evidence to contract interpretation); *accord Hull*, 222 Wis.2d at ¶ 12; *Olson v. Town of Cottage Grove*, 2008 WI 51, ¶¶ 4-5, 749 N.W.2d 211, 309 Wis. 2d 365 (declaratory judgment reviewed *de novo* where issues are ripeness and justiciability).

This appeal involves the Circuit Court's interpretation of both questions of law under a *de novo* standard and the proper declaratory judgment procedure under an erroneous exercise of discretion standard.

2. Rules governing Declaratory Judgment

The declaratory judgment herein is governed by the Uniform Declaratory Judgments Act. Wis. Stat. § 806.04. Jurisdiction is provided for circuit courts to "declare rights, [and] status" within their respective jurisdictions. *Id.* at 806.04(1). The purpose "is to settle and afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations; and is to be liberally construed and administered." *Id.* at 806.04(12).

As the comments suggest, in most declaratory judgment proceedings, a court needs to determine certain evidence before it can declare rights and status. Wis. Stat § 806.04 comments ("In most cases a court may not know that a declaratory judgment would not terminate a controversy giving rise to the proceeding until it has heard the evidence, but a court need not go through trial to arrive at a foregone conclusion when it appears on the face of the complaint that a declaratory judgment will not terminate the controversy.") This is in line with the above mandate that a court must examine the relevant facts, apply a proper standard of law, and use a demonstrated rational process.

To emphasize, a circuit court must explain its reasoning on the record in order for its reasoning to be deemed a "*demonstrated* rational process." *Loy v. Bunderson*, 107 Wis.2d 400, 415, 320 N.W.2d 175, 184 (Wis. 1982)("It is apparent that the trial judge carefully examined all the facts.")

3. Argument on Declaratory Judgment

A. It was an erroneous exercise of discretion to make a decision on a question that was different from the Plaintiff's complaint.

The question in the complaint was whether Fouts *had been properly* excluded from seeing the records. This involved distinct factual questions that the stipulation did not cover. Relevant to the court's order, this included whether the documents were covered by attorney-client privilege and whether he had been excluded from seeing privileged

documents.

Made apparent by the conclusions of law in the May 31, 2013 Judgment, the question posed by the court below was whether the board *could* exclude individual directors from seeing the directors. The court seems to have adopted the summary judgment facts as true, which is an improper confusion of summary judgment and declaratory judgment standards.

Even assuming *arguendo* that a board can exclude a director, remaining unanswered is whether the board *in this case* properly excluded Fouts. Failing to answer this question evidences a lack of a determined, reasoned process. Therefore, it was an erroneous exercise of discretion not to answer that question.

B. It was an erroneous exercise of discretion to fail to clarify the uncertainty.

The uncertainty in this case is identifiable: where there is conclusive evidence proving financial foul play (the opinions in case 08-CV-893 attached as Appendices K-M), how is a small condominium association director supposed to investigate those financial misdeeds of certain members of the board if the possible foul play is hidden by the guise of attorney-client privilege?

The order of the court below exacerbates this uncertainty. The court below found that boards can exclude watchdogs from obtaining any information, much less attorney-client privileged information.

There are a myriad of ways that the court below could have clarified the uncertainty. It could have ordered that Fouts had access to the records on the law argued above. Even if the court had a legitimate factual authority to believe that Fouts was a dissident member, the court still could have used a privilege log or third party mediator to challenge and review the files in question, just as a court may do in an *in camera* review during a discovery dispute.

The court below only indicated that associations could

exclude directors. Fouts anticipates that Breezy Point will interpret this as a declaratory judgment declaring that Fouts cannot view the records. However, Fouts interprets this only as a declaration that Breezy Point could exclude him, but it has not yet done so. This exacerbates the uncertainty around whether Fouts should have the records or not.

Moreover, it remains unclear how Fouts as a director should fulfill his fiduciary duties. 08-CV-893 indicates that financial wrongdoing has occurred between Breezy Point officers and Breezy Point's attorney in the past. If the association excludes Fouts from records, it remains unclear how Fouts is supposed to investigate that known wrongdoing. If further remains unclear if the wrongdoing continues.

C. It was an erroneous exercise of discretion to make conclusions of law without citation to law.

In its May 31, 2013 order, the court below found four separate conclusions of law in numbered paragraphs. It is not clear on the record what the sources or reasoning was for these conclusions of law.

By intuition, Fouts suspects that these conclusions of law may have originated from Breezy Point's response to summary judgment brief.[12] If so, the court should have so explicitly stated so as afford certainty to the litigation. To the extent that this is what the court did, then this is an erroneous application of law as discussed above, as it misapplies summary judgment standards of law to declaratory judgment and mistakenly uses summary judgment as fact-finding for declaratory judgment.

[12] Summary judgment is also mentioned in the opening of the Judgment.

III. Under either summary judgment or declaratory judgment, it was an erroneous exercise of discretion to award "statutory attorneys fees" in the May 21, 2013 order where the statutes do not allow for attorneys fees.

The court, in its May 21, 2013 order held that "This matter is dismissed on its merits with statutory costs and statutory attorneys fees." This May 21, 2013 order was the erroneously issued *sua sponte* summary judgment order as argued above.

Under the Uniform Declaratory Judgment Act, Wis. Stat. § 806.04(1) does not allow attorneys fees to be awarded. *See also*, Wis. Stat. § 806.04(1) at comments ("Attorneys fees are ***not*** recoverable as 'costs' under sub. 10.")(emphasis added); *accord Reid v. Bern,* 2001 WI 106, 245 Wis. 2d 658, 629 N.W.2d 262.

Under the summary judgment statute, fees are only awarded when supporting affidavits are made in bad faith. *See generally*, Wis. Stat. § 802.08; *specifically* Wis. Stat. § 802.08(5). No such finding is on record.

Under a *de novo* review, the circuit court misapplied the law when it awarded "statutory attorneys fees" because neither the declaratory judgment nor the summary judgment authorize fees on the facts herein. Ordering "statutory attorneys fees" was an erroneous exercise of discretion.

CONCLUSION

Based upon the foregoing, Fouts requests that the March 19, 2013, May 16, 2013, May 21, 2013 and May 31, 2013 decisions in this case be vacated, and the case remanded for proceedings consistent with correct summary and declaratory judgment procedure and rules, or for such other relief as this Court deems appropriate.

Dated this ____ day of September, 2013.

Respectfully submitted,

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CERTIFICATION AS TO FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of the brief is 7,281 words. Including the cover, tables, and certifications, the length is 8,111 words.

_____
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ELECTRONIC CERTIFICATION

I hereby certify that the text of the electronic copy of this brief is identical to the text of the amended paper copy of the brief.

_____
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CERTIFICATION AS TO APPENDICES

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains: (1) a table of contents; (2) relevant trial court record entries; (3) the findings or opinion of the trial court; and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have so reproduced to preserve confidentiality and with appropriate references to the record.

_____

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TABLE OF APPENDICES