

COLORADO COURT OF APPEALS
Address: 2 East 14th Avenue, 3rd Floor
Denver, Colorado 80203

DISTRICT COURT, EAGLE COUNTY, COLORADO

Senior Judge Richard H. Hart
Senior Judge Richard P. Doucette
Case Number: 03-CV-516

FILED IN THE
COURT OF APPEALS
STATE OF COLORADO

SEP 30 2008

Clerk, Court of Appeals

**Appellants: BOOTH CREEK TOWNHOUSE
ASSOCIATION, INC., a Colorado nonprofit corporation,
and SUSAN RYCHEL, jointly and severally**

COURT USE ONLY

Appellee: E. WEBB BASSICK, IV

Case No. 07 CA 002531

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**ENTRY OF APPEARANCE AND SUBSTITUTION OF LEGAL COUNSEL
ON BEHALF OF
AMICUS CURIAE COMMUNITY ASSOCIATIONS INSTITUTE**

Tobey & Toro, P.C. enters its appearance in this matter and replaces Lynn S. Jordan, as legal counsel on behalf of the Community Associations Institute ("CAI"). Like Lynn S. Jordan (the attorney originally filing the Motion for Leave to

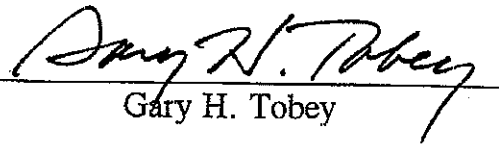
File an *Amicus Curiae* Brief in this matter), Gary H. Tobey is one of the original five authors of the Colorado Common Interest Ownership Act (CCIOA), C.R.S. Sections 38-33.3-101 through -319, and has participated in its subsequent amendments. However, unlike Ms. Jordan, Mr. Tobey has not testified in this case. CAI is a national organization with a significant presence in Colorado. Therefore, it is uniquely situated to assist this Court and should not be prevented from doing so by the fact that Ms. Jordan testified in the District Court case. The importance of the information presented by CAI and the reasons why it has significant interest in this case exist without regard to its choice of legal counsel. The interest of CAI and its presence in Colorado as demonstrated in its Motion for Leave to File an *Amicus Curiae* Brief previously filed in this case, remain the same. The determination of prevailing party and the reasonableness of attorney fees in this case is governed by Sections 123 and 114 of the CCIOA.

The Brief on Behalf of CAI is attached to this Entry of Appearance and Substitution of Counsel and is substantially unchanged from the original brief filed with the original motion except that it is executed by Mr. Tobey.

As a contributing author of the CCIOA, the undersigned has specific knowledge regarding interpretation of CCIOA and the legislature's intent concerning changes to CCIOA that are relevant to this matter.

Respectfully submitted this 30TH day of September 2008.

TOBEY & TORO, P.C.

By: 
Gary H. Tobey

ATTORNEYS FOR COMMUNITY
ASSOCIATIONS INSTITUTE

CERTIFICATE OF MAILING

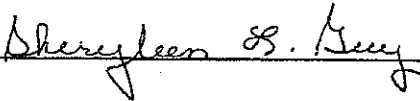
The undersigned certifies that a true and correct copy of the Entry of Appearance and Substitution of Counsel was mailed through the U.S. Mail, first class postage pre-paid, on this 30th day of September 2008, to the following at their respective address(es):

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<p>BRIEF OF AMICUS CURIAE COMMUNITY ASSOCIATIONS INSTITUTE</p>	

The Community Associations Institute submits this brief as *amicus curiae* in support of upholding the order of the trial court in this matter.

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INTRODUCTION

Amicus Curiae Community Associations Institute (“CAI”) is a national nonprofit research and education organization formed in 1973 by the Urban Land Institute and the National Association of Home Builders to provide effective and objective guidance for the creation and operation of condominiums, co-operatives, and homeowner associations. Nationally, members of CAI include a broad spectrum of parties, specifically homeowner associations and condominium associations, community managers, and attorneys, accountants, lenders, and related professionals, and service providers. CAI has 57 local chapters, with two chapters in Colorado: the Southern Colorado Chapter in Colorado Springs and the Rocky Mountain Chapter serving the mountain/resort areas and the Denver and Ft. Collins metropolitan areas. CAI estimates that approximately 57 million Americans live in 23.1 million housing units within nearly 286,000 community associations; i.e. nearly one out of every six Americans lives in a community association. Industry Data: National Statistics, Community Associations Institute (October 23, 2007). Based on national statistics, approximately 2,500,000 Coloradans reside in 12,000 communities with some form of an owners association. Clifford J. Treese, The Community Associations Factbook, The Community Associations Institute

Research Foundation, 19 (1999).

CAI STATEMENT OF INTEREST

On July 1, 1992, the Colorado Common Interest Ownership Act, C.R.S. Section 38-33.3-101 *et seq.*, became effective ("CCIOA"). CAI was the sponsor of this legislation and has participated in every amendment since the legislature adopted this law in 1991. Additionally, the attorney writing this *Amicus Curiae* Brief was one of the authors of this legislation, has participated in writing these amendments, and is a recognized expert witness on this subject in Colorado courts. CAI has sponsored legislation in every state and has filed *amicus curiae* briefs in matters before the appellate and state supreme courts in many states. In particular, CAI was granted leave and thereafter filed an *amicus curiae* brief for the petitioner in Evergreen Highlands v. West, 7 P.3d 1 (Colo. 2003). Much of CAI's *amicus curiae* brief in the Evergreen case was adopted by the Colorado Supreme Court when it decided in favor of the petitioner.

CAI is uniquely situated to provide information to this Court because all parties within this industry are represented by this organization, and because the attorney authoring this Brief is familiar with the history of the CCIOA, other

legislation throughout the country, and cases construing provisions similar to those of the CCIOA at issue on this appeal.

CAI submits this brief in keeping with its longstanding interest in promoting understanding regarding the operation and governance of community associations and its role in the statute governing community associations, the CCIOA.

SUMMARY OF THE CASE

CAI directs this Court's attention to the Statement of the Case (which is complicated and incredibly lengthy) described in the Reply Brief filed by Appellee Bassick rather than reiterating the facts herein. However, CAI does want to emphasize certain determinative facts. Bassick is the record owner of Unit G-3, Booth Creek Townhouses and has been for 26 years. Record on Appeal ("ROA"), v.1, p.86. Booth Creek Townhouse Association, Inc. ("Booth Creek") is the owners association with responsibility to provide for the care, upkeep, and maintenance of the Booth Creek Townhouses pursuant to its Articles of Incorporation, Bylaws, and Declaration, as well as the CCIOA. Rychel is an individual owner and member of Booth Creek who was hired by Booth Creek as a property manager from 1989 - 2004 pursuant to an oral contract.

The Articles of Incorporation provide that Booth Creek has the duty to protect and maintain Booth Creek Townhouses and protect the value and desirability and enhance the safety and habitability of the properties pursuant to paragraph 10. The Bylaws, Article IV, Paragraph 4 state the duties of the association are to administer and enforce the covenants, maintain and repair common elements, protect the premises from loss, and employ a manager.

Bassick brought this action (comprised of several claims) seeking a court order requiring Booth Creek to perform in accordance with its governing documents. Over several years, Booth Creek failed and refused to maintain, improve, and repair the common elements as well as to repair specific damage within Bassick's Unit caused by the initial failure to honor its obligations as required by these documents and the CCIOA. The Appellants' actions were egregious. It is unusual to find an association so blatantly, repeatedly, and willfully refusing to perform its required duties as did the Appellant. It is unheard of for an owner to be forced to take several legal actions year after year for the sole purpose of forcing the association to honor its obligations and perform its duties as required by its governing documents and the CCIOA.

The trial court found in favor of Bassick on all claims and counterclaims awarded Bassick his reasonable attorney fees and costs pursuant to Section 123 of the CCIOA.

ARGUMENT

I. THE COLORADO COMMON INTEREST OWNERSHIP ACT IS THE CONTROLLING STATUTE IN THIS CASE.

A. Booth Creek Townhouses is a "common interest community," and many provisions under the CCIOA are applicable to this case, specifically Sections 123 and 114.

The CCIOA is based, in large part, upon the Uniform Common Interest Ownership Act, parts or all of which have been enacted in over half of the United States. Enacted in 1991, the CCIOA became effective on July 1, 1992. All provisions of the CCIOA are applicable to all common interest communities created on or after July 1, 1992 or which were created prior to that date but have elected to be governed entirely by the CCIOA. Additionally, to a large extent, the CCIOA is applicable to those common interest communities which were created prior to July 1, 1992 ("pre-existing" communities). C.R.S. Section 38-33.3-117.

As defined by the CCIOA: "Common interest community means real estate described in a declaration with respect to which a person, by virtue of such person's ownership of a unit, is obligated to pay for real estate taxes, insurance premiums, maintenance, or improvement of other real estate described in a declaration."

C.R.S. Section 38-33.3-103(8). Associations, defined in Section 103(3) of the CCIOA, operate and manage the common interest communities pursuant to Section 302 and other provisions of the CCIOA. Associations present a unique form of self-governance where common interests -- responsibility for maintenance of the property, expenses, compliance with restrictions, and other matters -- are shared among the owners and between each owner and the community association for the benefit of the community as a whole.

Booth Creek is the association that operates and manages the common interest community known as "Booth Creek Townhouses." This common interest community is a "condominium" pursuant to Section 103(9), which defines a condominium as a common interest community in which portions of the real estate are designated for separate ownership and the remainder of which is designated for common ownership solely by owners of the separate ownership portions.

As a condominium, the common elements are owned by all of the owners as

tenants in common, but managed, operated, maintained, improved, and controlled by the association (in this case, Booth Creek). As is the case with all common interest communities, Booth Creek Townhouses was created by recording a Declaration in the real property records for Eagle County, Colorado. Since this Declaration was recorded prior to July 1, 1992, Booth Creek Townhouses is a "preexisting" common interest community. C.R.S. Section 38-33.3-117. As a preexisting common interest community, Booth Creek, all owners, and all others dealing with this association are subject to numerous provisions of the CCIOA (see list at C.R.S. Section 38-33.3-117). Specifically, all the parties to this case are subject to Sections 123 and 114, which are applicable to this case. C.R.S. Sections 38-33.3-123, 38-33.3-114.

B. The trial court found in favor of Bassick throughout the lengthy proceedings, including the Findings of Fact, Conclusions of Law, Order and Decree.

The trial court, in its Findings of Facts, Conclusions of Law, Order and Decree dated August 13, 2007, following a two-week trial (ROA v.10, p.2849), found "the HOA has always maintained the exterior of the windows. The fact that the Association requires the homeowner to pay for the replacement of the window system is not consistent with the HOA maintaining the exterior." ROA v.10,

p.2837. Further, the trial court found that Paragraph 7(b) of the Declaration (Ex. 8) placed the burden on the Association to maintain, repair, and replace general common elements and that Booth Creek “failed to exercise its rights under this paragraph and further failed to exercise its remedies contained in Paragraph 8(a) and (b) by which they could have recovered unpaid common expenses from Bassick, or assess the same which would constitute a lien.” ROA v.10, p.2836).

The trial court held that because the parties could not agree on the method of investigation “does not excuse the HOA [Booth Creek] and their manager [Rychel] from their obligation to protect the common elements and Plaintiff’s [Bassick] unit from damage.” The court found “an exterior examination would have been the best way to find the sources of water intrusion as testified by Mr. Lanci,” and therefore “the stubborn refusal to make that investigation by the HOA was not rational in view of their obligation to maintain and protect the Plaintiff’s and the Association’s property,” thereby contributing to the escalation of attorney fees. ROA v.10, p.2840. The trial court made specific findings that the affirmative defenses of Booth Creek and Rychel were “not supported by the evidence and are rejected.” ROA v.10, p.2831.

Attorney fees were awarded to Bassick as the prevailing party on all claims and counterclaims.

II. SECTION 123 IS MANDATORY: IT REQUIRES THE COURT TO DETERMINE A PREVAILING PARTY AND AWARD TO THE PREVAILING PARTY ITS REASONABLE ATTORNEY FEES AND COSTS. THEREFORE, THE TRIAL COURT CORRECTLY INTERPRETED C.R.S. SECTION 38-33.3-123 TO REQUIRE AN AWARD OF REASONABLE ATTORNEY FEES AND COSTS.

The trial court correctly interpreted this statute to require an award of attorney fees to Bassick under the mandatory language contained in C.R.S. Section 38-33.3-123. Section 123 states in relevant part:

(b) For any failure to comply with the provisions of this article or any provision of the declaration, bylaws, articles, . . . the association, any unit owner . . . adversely affected by the failure to comply may seek reimbursement for collection costs and reasonable attorney fees and costs incurred as a result of such failure to comply, without the necessity of commencing a legal proceeding.

(c) **In any civil action** to enforce or defend the provisions of this article or of the declaration, bylaws, articles, or rules and regulations, the court **shall** award reasonable attorney fees, costs, and costs of collection to the prevailing party.

(d) Notwithstanding paragraph (c) of this subsection (1), in connection with any claim in which a unit owner is alleged to have violated a provision of this article or of the declaration, bylaws, articles, or rules and regulations of the association and in which the court finds that the unit owner prevailed because the unit owner did not commit the alleged violation:

(I) the court shall award the unit owner reasonable attorney fees and costs incurred in asserting or defending the claim; and

(II) the court shall not award costs or attorney fees to the association. (Emphasis added.)

At trial, Bassick sought to enforce the Declaration, Bylaws, and Articles of Incorporation; he was the prevailing party on all claims contained in his verified amended complaint; and he was the prevailing party in defending Booth Creek's counterclaim. "The 'shall award' language of § 38-33.3-123(1)(c) mandates an award of attorney fees and costs." Giguere v. S.J.S. Family Enterprises, 155 P.3d. 462, 471 (Colo. App. 2006) (construing an earlier version of the statute effective in 2006, which provided for a claim-by-claim analysis with respect to awards of attorney fees). "Courts have a fundamental responsibility to interpret statutes to effect the general assembly's intent, giving the words in the statute their plain and ordinary meaning." *Id.*, at 467.

While the Court in Giguere construed the previous statutory claim-by-claim approach, it is still the case that Bassick prevailed on each and every claim, Booth Creek's counterclaim, and every one of Booth Creek's affirmative defenses. At the request of members of the Colorado judiciary, subsequent to Giguere, the legislature amended the language contained in C.R.S. Section 38-33.3-123 to respond to and provide assistance to judicial interpretation by consolidating all claims into one in determining a prevailing party. Paragraph 1(c) was amended effective May 26, 2006, to provide that "in any civil action" the Court shall award reasonable attorney fees and costs to the prevailing party. See Welby Gardens v. Board of Assessment, 71 P.3d 992, 998, fn.8 (Colo. 2003).

Although Booth Creek and Rychel now argue Bassick's attorney fees should be allocated claim by claim, Booth Creek and Rychel acknowledged "interrelationship of issues" and stated, "**all of the Plaintiff's claims arise out of the same factual circumstances.**" ROA v.7, p.2254. It does not matter if the court finds a party to have prevailed on all counts or simply finds that a party has prevailed in the matter, the court is required to award reasonable attorney

fees and costs. Not only did Bassick prevail on a significant issue, Bassick prevailed on all issues, and achieved all of the benefits sought by the litigation. Board of County Commissioners v. Crystal Creek Homeowners Association, 891 P.2d 891 (Colo. 1995); Archer v. Farmer Brothers, 90 P.3d 228 (Colo. 2004).

The trial court found that Plaintiff (Bassick) prevailed on all of his claims and the Defendants' counterclaims. Therefore, pursuant to Section 123 of the CCIOA, the lower court correctly awarded to the Plaintiff his reasonable attorney fees and costs.

The legislative history of Section 123 and its amendments supports the objective of ensuring that regardless of the nature or dollar amount of the claims, if a party prevails, he shall be awarded reasonable attorney fees. This "evens the playing field" by awarding attorney fees not just to the association in matters of collection, but also to owners, who often have fewer monetary resources to bring actions against associations. Most important, under Section 123, an award of damages is not required in order to be a prevailing party or to be awarded attorney fees. A prevailing party may be one that is defending a claim or seeking declaratory or injunctive relief, even where there are no damages at issue.

Further, if the association does not prevail, attorney fees shall be awarded to the owner and not charged back to that owner, and a claim-by-claim analysis of an award of attorney fees is not needed. 38-33.3-123(1)(d)(II).

III. THE TRIAL COURT PROPERLY DETERMINED REASONABLE ATTORNEY FEES.

Judge Doucette commented that Section 123 is simple and straight forward, but this was not a simple case. ROA v.23, p.267, ln.18. He further stated that the defense did their best to increase the attorney fees. ROA v.23, p.268, ln.16-25. Was there an easy solution? Yes. Booth Creek could have performed in the manner required by its governing documents.

As the trial court determined, "Booth Creek failed to mitigate its claims and avoid Bassick's escalating costs and attorney fees" by fixing the exterior at a cost of \$4,942.00, and simply doing what the Declaration required and exercising the remedies available to Booth Creek under paragraphs 6 and 8(a)(b). ROA v.10, p.2836; Ex.NNN; Ex.7, p.4; v.10, p.2836); Ex. 8, paragraphs (1)(d),(f). The fact is, for seven years Booth Creek kept this litigation going and, at every point, Bassick was the prevailing party.

The court further found that “the stubborn refusal to make that investigation by the HOA was not rational in view of their obligation to maintain and protect the Plaintiff’s and the Association’s property” thereby contributing to the escalation to attorney fees. ROA v.10, p.2840. The trial court made specific findings that the affirmative defenses of Booth Creek and Rychel were “not supported by the evidence and are rejected.” ROA v.10, p.2831. Again, attorney fees were awarded to Bassick as the prevailing party on all claims and counterclaims.

The trial court indicated that this statute requires an award of fees and subsequently reduced the fees to an amount it thought was reasonable. The trial court did not state it believed the statute required an award of a certain amount, but rather that the statute requires an award of fees, and the trial court correctly determined what was a reasonable amount.

When a statute provides for an award of reasonable attorney fees and costs, the district court has discretion in determining what amount is reasonable. Hartman v. Community Responsibility Center, Inc., 87 P.3d 254, 257 (Colo. App. 2004). The determination of the reasonableness of attorney fees is a

question of fact for the trial court. *Id.*

When a statute mandates an award of attorney fees to the prevailing party through the use of the word "shall," it "leaves nothing to the discretion of the trial court except to determine what is a reasonable fee." *Id.*, at 257. In other words, where a statute requires an award of attorney fees to the prevailing party through the use of the word "shall," as C.R.S. Section 38-33.3-123(1) does in the present case, then the determination of the reasonableness of attorney fees is a question of fact for the trial court and will not be disturbed on appeal unless patently erroneous and unsupported by the evidence.

In the present case, the trial court held a two-day hearing concerning the reasonableness of attorney fees and subsequently entered an order concerning same. The basis for the fee award was set forth in C.R.S. Section 38-33.3-123(1), as Bassick was the prevailing party on each and every claim, counterclaim, and affirmative defense.

Additionally, if a statute that provides for an award of fees does not provide a specific definition of "reasonableness," the amount of the award must be determined in light of all the circumstances, based upon the time and effort

reasonably expended by the prevailing party's attorney. Factors to be considered in determining "reasonableness" include, but are not limited to, circumstances, the amount in controversy, the complexity of the case, the value of the legal services to the client, and the length of time required to represent the client effectively. Hartman v. Freedman, 591 P.2d 1318 (Colo. 1979). In this case, Bassick prevailed on every claim, counterclaim, and affirmative defense, and the trial court held that Booth Creek failed to mitigate and caused much of the increase in attorney fees.

After listening to twelve days of testimony, including a discovery dispute and contempt hearing, the mandatory injunction hearing, eight days of trial, and two days of hearing on reasonableness of attorney fees, the trial court actually awarded Bassick less than he incurred. Clearly the trial court was determining reasonable attorney fees.

Bassick prevailed on a motion for restraining order, motion to compel discovery, motion for contempt, motion for mandatory injunction, all seven claims for relief, defeated the counterclaim, and obtained a decree ordering remediation at the project, as well as damages and a judgment. In awarding

attorney fees, the trial court may consider, among other circumstances, the amount in controversy, the complexity of the case, the value of the legal services to the client, and awards in similar cases. Tallitsch v. CSS, Inc., 926 P.2d 143, 147 (Colo. App. 1996) (citing Hartman v. Freedman). The amount of an award must be determined in light of all of the circumstances, based upon the time and effort reasonably expended by the prevailing party's attorney. Id. In this case, the trial court made these determinations.

Finally, and perhaps most significantly, Section 114 is applicable to the parties and this case. Section 114 requires: "The remedies provided by this Article [CCIOA] shall be liberally administered to the end that the aggrieved party is put in as good a position as if the other party had fully performed." It also provides that any right or obligation of the CCIOA is enforceable by judicial proceeding. Section 123 is a remedy that must be "liberally administered."

The trial court properly determined reasonable attorney fees given the extreme length of the case, the numerous pleadings that were filed, the numerous times that the Defendants could have done the things that ultimately the Court found that they needed to do, and the number of motions in the case. The trial

court need not limit an award of attorney fees by the amount of the judgment on the merits, Hartman v. Freedman, 591 P.2d at 1322, nor does Section 123 permit a court to do so. Under CCIOA, the court is required to award reasonable attorney fees and costs to the prevailing party.

IV. IF BASSICK PREVAILS IN THIS APPEAL, HE IS ENTITLED TO HIS REASONABLE ATTORNEY FEES AND COSTS INCURRED ON APPEAL.

Bassick seeks his attorney fees on appeal pursuant to C.A.R. 28(b), C.A.R. 39.5, and C.R.S. Section 38-33.3-123. A party who is awarded attorney fees in the trial court is entitled to attorney fees incurred in successfully defending the resulting judgment on appeal. Kennedy v. King Soopers, Inc., 148 P.3d 385, 390 (Colo. App. 2006); Giampapa v. American Family Mutual Insurance, 12 P.3d 839 (Colo. App. 2000).

Section 123 of the CCIOA provides that the prevailing party shall be awarded its reasonable attorney fees and costs. The Courts have interpreted the plain meaning of the statute as mandating that the prevailing party be awarded reasonable attorney fees and costs incurred in the prosecution of their claim before the trial court and on appeal. Pagosa Lakes Property Owners Association, Inc. v. Caywood, 973 P.2d 698, 703 (Colo. App. 1998). Should Bassick prevail

in this Appeal, he should be awarded his reasonable attorney fees and costs incurred herein.

CONCLUSION

The trial court found that Bassick was the prevailing party and correctly awarded reasonable attorney fees and costs pursuant to Section 123 of the CCIOA.

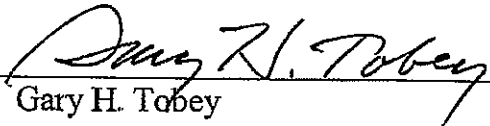
The attorney fees awarded were reasonable under Section 123. Any question as to reasonableness must be reviewed in light of the numerous Colorado cases as well as the trial court's obligation to construe liberally the CCIOA remedies (including, specifically, the award of attorney fees under Section 123) and to put Bassick in as good a position as he would have been if Booth Creek had fully performed its duties.

Contrary to Booth Creek's suggestion that a remand is necessary, Section 123 was designed to prevent exactly the type of behavior witnessed by the trial court and exhibited by Booth Creek and Rychel. The trial court appropriately determined that Section 123 required an award of reasonable attorney fees to Bassick. On appeal the trial court's ruling should not be disturbed.

Section 123 was drafted specifically for Colorado by requiring that the court shall award attorney fees for the sole purpose of making the award of reasonable attorney fees to the prevailing party mandatory, leaving the trial court to determine only the reasonableness of the fees.

Respectfully submitted this 30th day of September 2008.

TOBEY & TORO, P.C.

By: 
Gary H. Tobey
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AMICUS CURIAE COMMUNITY
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CERTIFICATE OF MAILING

I hereby certify that I have placed a true and correct copy of the foregoing **AMENDED AMICUS CURIAE BRIEF** in the U.S. Mail on the 30th day of September, 2008, addressed to:

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