

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 31, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

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No. 00-0459

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

COURTYARD CONDOMINIUM ASSOCIATION, INC.,

PLAINTIFF-RESPONDENT,

V.

BARBARA DRAPER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Walworth County:
MICHAEL S. GIBBS, Judge. *Affirmed.*

Before Brown, P.J., Anderson and Snyder, JJ.

¶1 PER CURIAM. Barbara Draper has appealed from a judgment awarding \$52,315 to Courtyard Condominium Association, Inc. (the Association). The Association is an incorporated association of the unit owners of Courtyard

Condominium, a sixteen-unit condominium property. At all times pertinent to this action, Draper owned six of the units.

¶2 In March 1999, the Association commenced this action against Draper based on her failure to pay dues and assessments on the six units. After a trial to the court, judgment was entered against Draper. It included awards of \$9658 for past due assessments, late fees of \$37,500, attorney's fees of \$4262, and interest of \$894. We affirm the judgment.

¶3 Draper's primary challenge is to the late fees of \$37,500. The trial court made the award after determining that the bylaws and rules of the condominium permitted the Association to assess a monthly fee of \$125 for each unit, plus a late fee of \$50 per month for each month an assessment remained unpaid.

¶4 Courtyard Condominium was established in March 1996 pursuant to Wisconsin's Condominium Ownership Act as codified in WIS. STAT. ch. 703 (1999-2000).¹ The condominium declaration, which included ten articles and six exhibits, was recorded on March 20, 1996, with the Walworth county register of deeds, as required by WIS. STAT. § 703.07(1). Article V of the declaration set forth the bylaws of the condominium. Among other things, the bylaws described the Association and provided for the creation of a board of directors vested with the responsibility of operating the condominium, as set forth in WIS. STAT. § 703.10(2)(a).

¹ All references to the Wisconsin Statutes are to the 1999-2000 version.

¶5 WISCONSIN STAT. § 703.10(1) provides that the administration of every condominium shall be governed by bylaws. Pursuant to § 703.10(2)(e), the bylaws are required to express “[t]he manner of assessing against and collecting from unit owners their respective shares of the common expenses” of the condominium.

¶6 The record indicates that a meeting of the Association was held on December 17, 1997. The minutes of that meeting provide:

- II. Increase dues & late fee: Increase dues to \$125.00 a month & add \$50.00 late fee if not received before the 15th of the month (Each month payment is late the payment incurs (sic) another \$50.00 late fee....
Vote: All in favor.

¶7 Late dues were discussed again at meetings of the Association’s board of directors on March 21, 1998, and May 3, 1998. The minutes of the May 3, 1998 meeting provide a “[s]ummary of rules changes we have made” and reiterate the late fee of “\$50 per month/per payment.”

¶8 Draper argues that the bylaws were not properly amended to permit the assessment of late fees because the amendment was not recorded. In support of this contention, she relies on WIS. STAT. § 703.09(2), which provides:

Except as provided in s. 703.26, a condominium declaration may be amended with the written consent of at least two-thirds of the unit owners or a greater percentage if provided in the declaration. An amendment becomes effective when it is recorded in the same manner as the declaration....

In contrast, the Association relies on WIS. STAT. § 703.10(5), which provides:

The bylaws may be amended by the affirmative vote of unit owners having 67% or more of the votes. Each particular set forth in sub. (2) shall be expressed in the bylaws as amended.

¶9 Draper’s argument requires us to construe the provisions of WIS. STAT. ch. 703 and then apply the facts of this case to them. *See Newport Condo. Ass’n v. Concord-Wisconsin, Inc.*, 205 Wis. 2d 577, 582, 556 N.W.2d 775 (Ct. App. 1996). The “application of a statute and interpretation of an unambiguous written agreement involve questions of law, which we independently review.” *Id.* (quoting *Aluminum Indus. v. Camelot Trails Condo. Corp.*, 194 Wis. 2d 574, 581, 535 N.W.2d 74 (Ct. App. 1995)).

¶10 Our goal in construing a statute is to give effect to the intent of the legislature. *See Newport*, 205 Wis. 2d at 582. We look first to the language of the statute, and if it is unambiguous, we must give the statutory words their obvious and ordinary meaning. *Id.* at 582-83. A statute must not be read out of context, and in construing it, this court must consider the entire section of the statute and its related sections. *Id.* at 583. “Statutes relating to the same subject matter are to be construed together and harmonized.” *Id.*

¶11 Applying these principles, we reject Draper’s argument that the late fees were invalid because amendments to the bylaws were not recorded. WISCONSIN STAT. § 703.10(5) clearly provides for the amendment of the bylaws. The only statutory limitation is that the amendment be approved by unit owners having 67% or more of the votes. Similarly, Article V, Section C of the declaration recorded on March 20, 1996, which set forth the Association’s bylaws, stated:

Article V, the By-Laws, may be amended by the affirmative vote of Unit Owners having sixty-seven percent (67%) or more of the votes, except for Section B of this Article V which shall require the affirmative vote of one hundred percent (100%) of the Unit Owners.

¶12 Article V, Section B provided for assessments and fees. The record is undisputed that 100% of the unit owners, including Draper, voted in favor of increasing the monthly assessment on each unit to \$125 and requiring a late fee of \$50 per month for each month a particular monthly fee remained unpaid.

¶13 Nothing in WIS. STAT. § 703.10(5) or Article V, Section C of the declaration provides that amendments to the bylaws have to be recorded to be effective. Draper concedes that amendments to bylaws generally do not have to be recorded, but contends that recording was required here because the original bylaws were included in the recorded declaration. Because they were included in the recorded declaration, she contends that their amendment is subject to WIS. STAT. § 703.09(2), which requires both written consent and recording before an amendment to a condominium declaration is effective.

¶14 We reject this argument because the amendment of the bylaws does not go to the validity of the condominium declaration. The items that must be contained in a condominium declaration are specified in WIS. STAT. § 703.09(1). They do not include assessments and fees, or the methods of determining and collecting assessments or fees. The manner of assessing and collecting fees and expenses is required to be addressed in the bylaws, not the condominium declaration. *See* WIS. STAT. § 703.10(2)(e). In fact, in delineating what items are required or permitted to be included in the condominium declaration, § 703.09(1)(j) provides that the declaration shall include any other details which are consistent with WIS. STAT. ch. 703 and desired by the persons executing the declaration, “except those provisions which are required to be included in the bylaws.”

¶15 Because neither the increase in the monthly assessment nor the provision for late fees pertains to matters which were required to be addressed in the declaration, the mere fact that the bylaws were included when the declaration was recorded did not compel the Association to comply with WIS. STAT. § 703.09(2) when amending the assessment and fees. Reading WIS. STAT. §§ 703.10(5) and 703.09(2) together, it is clear that provisions for assessments and fees could be amended by a vote of the membership of the Association and did not require that the amendment be in writing or recorded. Because the entire membership of the Association voted to increase the assessment to \$125 per month and to provide for a late fee of \$50 per month for every month a fee remained unpaid, the bylaws were effectively amended.²

¶16 Draper argues that even if recording was not required, the amendment providing for the assessment of late fees should not be enforced because its terms were excessive and against public policy. She contends that the late fees are impermissible penalties because they bear no relation to any damages that the Association might sustain from the failure to timely pay the monthly assessment. She relies upon case law holding that a contractual provision for liquidated damages is penal, and therefore unenforceable, if the stipulated

² Draper contends that the record does not indicate that the bylaws were amended at the meeting of the members of the Association on December 17, 1997, because the minutes of that meeting merely state that the members voted to increase the monthly fee and to impose late fees of \$50 per month. She points out that the minutes do not use the word “bylaws” or state that the vote was to amend the bylaws. She contends that the language of the minutes was too indefinite to give rise to a binding agreement.

We reject these arguments because regardless of whether the word “bylaws” was used by the Association members or in the minutes, the members’ intent to increase the monthly assessment and create a late fee, and thus to amend matters which were encompassed in the bylaws, was clearly expressed. Because the agreement as expressed in the minutes was clear and the consent of the members, including Draper, was unanimous, a definite and binding amendment of the bylaws occurred.

damages are grossly disproportionate to the actual damages. *See, e.g., Fields Found. v. Christensen*, 103 Wis. 2d 465, 475, 309 N.W.2d 125 (Ct. App. 1981).³

¶17 “A liquidated damages provision in a contract represents an attempt to predetermine damages in the event of a breach, to the extent those damages are reasonably contemplated by the parties at the time of the contract.” *Martinson v. Brooks Equip. Leasing, Inc.*, 36 Wis. 2d 209, 222, 152 N.W.2d 849 (1967). Nothing in the record provides a basis to conclude that the late fee provision in the bylaws is a provision for liquidated damages. The cases cited by Draper discussing liquidated damages are therefore inapplicable.

¶18 Draper’s argument regarding liquidated damages also mistakenly assumes that the bylaws of the Association are the same as an ordinary commercial contract. However, a condominium association is a private, voluntary organization created pursuant to statute. Courts are reluctant to interfere in the internal affairs of voluntary organizations, and any reasonable or permissible construction which a private organization gives to its own constitution, bylaws or rules will govern unless clearly subversive of personal or property rights. *See*

³ Although we do not rely on waiver in resolving this appeal, we question whether this issue was adequately raised by Draper in the trial court. It appears from the record that Draper’s only challenge to the amount of the late fee was a closing argument indicating that the bylaws preclude the Association from conducting a business for profit on behalf of the owners. Draper’s counsel contended that because there was no showing that the late fees were related to the expenses of the Association, their assessment in this case represented profit.

It does not appear that Draper ever argued in the trial court that the late fees violated public policy, or that they represented unenforceable provisions for liquidated damages. Generally, an appellate court will not consider an argument raised for the first time on appeal. *See State v. Bustamante*, 201 Wis. 2d 562, 571, 549 N.W.2d 746 (Ct. App. 1996). An objection or theory is waived on appeal unless it is raised with sufficient clarity to accurately inform the trial court of the nature of the objection or argument. *See State v. Rogers*, 196 Wis. 2d 817, 827, 539 N.W.2d 897 (Ct. App. 1995).

Attoe v. Madison Prof'l Policemen's Ass'n, 79 Wis. 2d 199, 206, 255 N.W.2d 489 (1977).

¶19 Every unit owner in a condominium association is required to strictly comply with the bylaws and with the rules adopted under the bylaws. *See* WIS. STAT. § 703.10(1). Failure to comply with any of the bylaws or rules is grounds for action by a condominium association to recover sums due, or for damages or injunctive relief. *See id.*

¶20 As already discussed, the bylaws as amended in 1997 provided for a \$50 per month late fee for each month a monthly assessment remained unpaid. Nothing in the declaration or WIS. STAT. ch. 703 prohibited the Association from providing for a late fee in its bylaws as part of its authority to assess and collect fees.⁴ Because Draper has failed to demonstrate that adoption of the late fee violated the Association's powers, and because she has presented no authority which compels this court to determine that the Association's decision was so unreasonable as to violate public policy, the award for late fees will not be disturbed.

¶21 Based upon our disposition of these issues, we need not address the issue of whether the board of directors had rule-making authority to increase the assessment or impose late fees, nor need we address the trial court's determination

⁴ Although it is unclear from Draper's brief, it appears that she might be arguing that late fees are impermissible because they violate WIS. STAT. § 703.16(2), which provides that funds for the payment of common expenses and the creation of reserves for future payments must be obtained by assessments against unit owners "in proportion to their percentage interests in the common elements or as otherwise provided in the declaration." She appears to contend that late fees are impermissible because they are not based on a unit owner's pro rata share of expenses. This argument fails because § 703.16(2) deals strictly with assessments for fees and establishes no requirements concerning late charges.

that Draper was estopped from challenging the fees and assessment. *See Newport*, 205 Wis. 2d at 580 n.1. Because Draper's appellant's brief indicates that she is challenging the attorney's fees award only if she succeeds in her challenge to the late fees, we also need not address attorney's fees.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

