IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

CHRISTOPHER BO BERGESON, ON BEHALF OF HIMSELF AND
AMY LYNN BERGESON, HIS SISTER, A MINOR CHILD, AND THE CHILDREN
OF LYNN RENEE BERGESON, DECEASED,
Plaintiff/Appellant,

v.

WEST FRONTIER CONDOMINIUMS HOA, INC.,
AN ARIZONA CORPORATION,
Defendant/Appellee.

No. 2 CA-CV 2016-0134
Filed August 10, 2017

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Civ. App. P. 28(a)(1), (f).

Appeal from the Superior Court in Gila County
No. CV20080002
The Honorable Bryan B. Chambers, Judge

REVERSED AND REMANDED

COUNSEL

Lloyd Law Group, P.L.L.C., Payson
By Arthur E. Lloyd

Miller, Pitt, Feldman & McAnally, P.C., Tucson
By Stanley G. Feldman and Timothy P. Stackhouse
Counsel for Plaintiff/Appellant

Tyson & Mendes, L.L.P., Phoenix
By Lynn M. Allen
Counsel for Defendant/Appellee

MEMORANDUM DECISION

Presiding Judge Staring authored the decision of the Court, in which Judge Espinosa and Judge Kelly[1] concurred.

S T A R I N G, Presiding Judge:

¶1 Christopher and Amy Bergeson appeal from the trial court's grant of summary judgment in favor of West Frontier Condominiums HOA, Inc., asserting the court erred by concluding the owners of a condominium unit had exclusive control over electrical wiring in a space above the unit's ceiling. For the reasons that follow, we reverse.

Standard of Review

¶2 In reviewing a grant of summary judgment, we view the evidence in the light most favorable to the non-moving parties and draw all reasonable inferences in their favor. *State v. Mabery Ranch Co.*, 216 Ariz. 233, ¶ 23, 165 P.3d 211, 217 (App. 2007). But "we determine de novo whether any genuine issues of material fact exist and whether the trial court properly applied the law." *Neal v. Brown*, 219 Ariz. 14, ¶ 11, 191 P.3d 1030, 1033 (App. 2008). Summary judgment

---

[1]The Hon. Virginia C. Kelly, a retired judge of this court, is called back to active duty to serve on this case pursuant to orders of this court and our supreme court.

is appropriate "if the facts produced in support of the claim or defense have so little probative value, given the quantum of evidence required, that reasonable people could not agree with the conclusion advanced by the proponent of the claim or defense." *Orme Sch. v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990).

Factual and Procedural Background

¶3 West Frontier is the unit owners' association for the Frontier Condominiums. In October 2005, David and Joan Levengood rented their unit to Lynn Bergeson. In 2006, with the Levengoods' permission, Lynn replaced an overhead light with a ceiling fan. In 2007, she was found dead in the unit, as a result of carbon monoxide poisoning. The parties agree improper installation of the ceiling fan at least in part caused the ceiling insulation to combust and produce lethal levels of carbon monoxide.

¶4 The Bergesons brought a wrongful death action against the Levengoods and West Frontier. At the time, American Family Insurance Group insured West Frontier. Under the insurance policy, individual unit owners were covered for any liability arising out of the "ownership, maintenance, or repair of that portion of the premises which is not reserved for that unit-owner's exclusive use or occupancy." American Family denied the Levengoods' claim for liability coverage under the policy.

¶5 American Family subsequently obtained a declaratory judgment in the United States District Court, which found that because the ceiling fan and its wiring were under the Levengoods' exclusive control, they were not covered under the policy. *Am. Family Ins. Grp. v. Bergeson (Bergeson I)*, No. CV09-0360 PHX DGC, 2010 WL 3705344, at *3-4 (D. Ariz. Sept. 14, 2010). The United States Court of Appeals for the Ninth Circuit affirmed the district court's ruling. *Am. Family Ins. Co. v. Bergeson (Bergeson II)*, 472 F. App'x 604, 606 (9th Cir. 2012).

¶6 After the federal litigation concluded, West Frontier moved for summary judgment in this case, arguing the doctrine of issue preclusion prohibited the Bergesons from arguing West Frontier had control over the wiring powering the ceiling fan because the

federal court had determined that the ceiling fan and its wiring were in the Levengoods' exclusive control. The trial court granted summary judgment, and the Bergesons appealed to this court. We reversed the trial court, holding the outcome of the federal litigation did not preclude the Bergesons from proceeding on three separate theories of negligence: (1) West Frontier negligently failed to oversee the installation of the ceiling fan; (2) West Frontier negligently failed to investigate a burning odor; (3) West Frontier negligently failed to maintain wiring and failed to install a junction box in a common area under its control.[2] *Bergeson v. W. Frontier Condos. HOA, Inc. (Bergeson III)*, No. 2 CA-CV 2013-0045, ¶¶ 16-22 (Ariz. App. Dec. 24, 2013) (mem. decision).

¶7 On remand, the Bergesons moved to preclude West Frontier from introducing evidence relevant to whether the Levengoods had a duty "to install brackets supporting the [powering] wire, and a junction box, or to perform any other act occurring wholly within the space between floors or the other common areas." West Frontier separately moved to preclude the Bergesons from presenting evidence or arguing "the electrical wire powering the ceiling fan [or] the ceiling fan itself was under the control of anyone other than the unit owners."

¶8 The trial court ruled in favor of West Frontier on both motions. In particular, the court found:

> To date three separate courts have confirmed that not only was the ceiling fan, but also the electrical wire powering the fan and the electrical fixture into which the fan wire was connected were Limited Common

[2]The Bergesons alleged "the wiring . . . located between the ceiling of the condominium unit . . . and the floor of the condominium unit directly above was defective, dangerous, a violation of [building codes] and constituted a hazard for the reason that no terminal junction box was installed and attached to the floor joists."

> Elements and therefore reserved for the Levengoods' exclusive use. . . .
>
> . . . Were there supporting brackets, their purpose would be exclusively to support the wire. Were there a junction box, its purpose would be exclusively to support the ceiling fan. Therefore, both the wire bracket and junction box would serve only the one unit and be within the exclusive control of the Levengoods. . . . Both the bracket and the junction are "electrical fixtures" as contemplated in the declaration.

(Footnotes omitted.) The court, interpreting our prior decision, further concluded,

> The control of the ceiling fan and wiring was essential to the federal litigation, the district court entered a final judgment on the merits, and the party against whom the doctrine is being invoked was a party or in privity with a party at the previous proceeding. . . . [The Bergesons are] precluded from relitigating any fact essential to the federal decision, including control of the fan and the wiring powering it.

¶9 The Bergesons then sought a stay of all proceedings in the trial court in order to seek special action relief. They noted that, as a result of the court's ruling, "there [was] really nothing left to litigate" because they had "dropped [their] claim" that West Frontier failed to investigate a burning odor, and they did not believe West Frontier's alleged negligent failure to oversee installation was "worth going to trial over." The trial court denied the stay, directed West Frontier to file a motion for summary judgment, and subsequently granted summary judgment for West Frontier.

¶10 In its order granting summary judgment, the court agreed with the Bergesons that "the cumulative effect" of its rulings

foreclosed them from litigating their remaining claim. The Bergesons appealed and we have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1) and 12-2101(A)(1).[3]

Discussion

¶11 The rights and obligations of condominium owners and associations may be derived from statutes, declarations, or bylaws, which "must be read together, in relation to each other, and harmonized, if possible." *Mountain View Condos. Homeowners Ass'n v. Scott*, 180 Ariz. 216, 219, 883 P.2d 453, 456 (App. 1994). This case requires us to consider the interface between applicable provisions of the Arizona Condominium Act ("the Act"), A.R.S. §§ 33-1201 through 33-1270, and various declarations enacted by West Frontier.

¶12 We turn first to the Act, which provides mandatory and default rules governing the relationship between condominium associations and the owners of individual units. *See* §§ 33-1203, 33-1247(A). Pursuant to § 33-1247(A), associations are "responsible for maintenance, repair and replacement of the common elements and each unit owner is responsible for maintenance, repair and replacement of the unit." The Act defines "common elements" as "all portions of a condominium other than the units." § 33-1202(7). A "unit" is defined as "a portion of the condominium designated for separate ownership or occupancy." § 33-1202(22). The Act further defines a "limited common element" to be "a portion of the common elements specifically designated as a limited common element in the declaration and allocated by the declaration . . . for the exclusive use of one or more but fewer than all of the units." § 33-1202(17). Under the default rule of § 33-1247(A), therefore, condominium associations are responsible for the "maintenance, repair and replacement" of both common and limited common elements.

[3]Because the original judgment did not contain the requisite language of Rule 54(c), Ariz. R. Civ. P., we suspended the appeal and revested jurisdiction in the superior court, Ariz. R. Civ. App. P. 3(b), which subsequently entered a compliant final judgment.

¶13 As indicated, however, the Act permits a condominium association to modify some statutory default rules by the use of declarations, which amount to a contract between the association and its unit owners. *Id.*; *see Johnson v. Pointe Cmty. Ass'n*, 205 Ariz. 485, ¶ 23, 73 P.3d 616, 620 (App. 2003) (declaration containing covenants common to all properties forms contract). The interpretation of a contract is a question of law we review de novo. *Grosvenor Holdings, L.C. v. Figueroa*, 222 Ariz. 588, ¶ 9, 218 P.3d 1045, 1050 (App. 2009).

¶14 Here, West Frontier modified the statutory default rule of § 33-1247(A) by declaration, providing:

> Each Owner will be responsible for care, maintenance, cleanliness, and orderliness of the Limited Common Elements that are within his exclusive . . . control pursuant to the terms hereof . . . . Owners may not, however, modify, paint or otherwise decorate, or in any way alter such Limited Common Elements without prior written approval of the Board or its Architectural Control Committee.

The declarations further provide that "[e]ach Owner shall be responsible for the maintenance, repair, or replacement of . . . fans . . . [or] electrical fixtures . . . in the Unit or portions thereof that serve that Unit only."

¶15 West Frontier's declarations expressly adopt the definition of "common elements" contained in § 33-1202(7), "including all portions of the Condominium other than the Units." In addition, the declarations provide that common elements include "[t]he roofs, foundations, columns, girders, studding, joists, beams, supports, main walls . . . , bearing walls, floors, ceilings, windows, doors outside of Units, and all other structural parts of the buildings." Under the declarations, limited common elements are "items located outside of the Units' boundaries, which might ordinarily be considered Common Elements . . . serving single Units." Further, "any such portion of the Property lying partially within and partially outside of the designated boundaries of a Unit shall be a Limited Common

Element to the extent that it serves only that Unit and shall be a Common Element to the extent that it serves other Units or Common Elements." And, under the declarations, a unit "consist[s] of the space enclosed and bounded by the horizontal and vertical planes," but

> [n]o structural components of the building in which each Unit is located, and no pipes, wires, conduits, ducts, flues, shafts, or public utility, water or sewer lines situated within such Unit, and forming part of any system serving one or more Units or the Common Elements shall be deemed to be a part of any Unit.

¶16 The Bergesons argue the trial court erred in interpreting the declarations as having delegated West Frontier's "responsibility for the missing junction box and brackets to unit owners" by concluding they were "electrical fixtures." They maintain not only is the term "electrical fixture" undefined by either the Act or the declarations, but also had those items been installed they would have been entirely outside of the boundaries of the unit and "within the common element space." They also argue the wiring providing power to the ceiling fan was not within the exclusive control of the unit owners pursuant to the declarations.

¶17 West Frontier, citing our prior decision, contends the Bergesons are "precluded from arguing that the brackets and junction box are common elements under the control of West Frontier." Alternatively, it argues the trial court correctly found "the electrical wiring powering the ceiling fan is a limited common element within the exclusive control of the Levengoods."

¶18 As noted, we must read the Act and West Frontier's declarations "together, in relation to each other, and [in harmony], if possible." *Mountain View Condos. Homeowners Ass'n*, 180 Ariz. at 219, 883 P.2d at 456; *see also Aztar Corp. v. U.S. Fire Ins. Co.*, 223 Ariz. 463, ¶ 45, 224 P.3d 960, 973 (App. 2010), *quoting Chandler Med. Bldg. Partners v. Chandler Dental Grp.*, 175 Ariz. 273, 277, 855 P.2d 787, 791 (App. 1993) ("We interpret a contract 'so that every part is given effect, and each section of an agreement must be read in relation to

each other to bring harmony, if possible, between all parts of the writing.'"). Applying these principles in this instance leads us to conclude the trial court erred by finding the missing brackets and junction box were "electrical fixtures" for which the Levengoods bore exclusive responsibility.[4]

¶19 Although the declarations provide "[e]ach Owner shall be responsible for the maintenance, repair, or replacement of . . . fans . . . [or] electrical fixtures . . . in the Unit or portions thereof that serve that Unit only," they also provide (1) common elements include "joists, beams, supports, main walls . . . , bearing walls, floors, ceilings, . . . and all other structural parts of the buildings,"[5] (2) a unit "consists of the space enclosed and bounded by the horizontal and vertical planes," and (3) "[n]o structural components of the building in which each Unit is located, and no . . . wires, conduits, . . . or public utility . . . situated within such Unit, and forming part of any system serving one or more Units or the Common Elements shall be deemed to be a part of any Unit." Thus, the trial court's interpretation of "electrical fixtures" as encompassing hypothetical brackets and a junction box that would be located in the crawl space above the ceiling and, at least in the case of the brackets, attached to joists or other structural components, is inconsistent with the declarations as a whole. Accordingly, we conclude the default rule of § 33-1247(A) would apply to West Frontier, and the court erred in denying the Bergesons' motion to preclude West Frontier from introducing evidence relevant to whether the Levengoods had a duty to install brackets and a junction box.

¶20 Moreover, even were we to accept the court's interpretation of "electrical fixtures," that interpretation, by itself, does not lead automatically to the conclusion that the Levengoods would

---

[4]The resolution of this matter does not require us to define the term "electrical fixtures."

[5]This is consistent with the definition of "common elements" contained in § 33-1202(7), which West Frontier adopts by declaration and interprets as "including all portions of the Condominium other than the Units."

have been responsible for the maintenance, repair, or replacement of the brackets or the junction box. Because they would not have been "in the Unit," to the extent the brackets and the junction box could be viewed as only serving one unit, they would have been limited common elements.[6] Per the declarations, unit owners are responsible for the care and maintenance of such items only to the extent they have exclusive control over them.[7]

¶21 Accordingly, as the Bergesons assert, the determinative issue is control. Per the declarations, "[e]ach Owner will be responsible for care, maintenance, cleanliness, and orderliness of the Limited Common Elements that are within his exclusive . . . control." According to the declarations, then, unit owners are not responsible for all limited common elements, but only for those over which they have exclusive control.[8] The trial court's ruling, to the contrary, assumes a unit owner is responsible for limited common elements, as such, regardless of whether the owner has control over them. The court conflated use with control when it found "[t]he fan and its wiring, including a junction box and brackets, are *limited common elements* and the sole responsibility of the homeowner."

¶22 Control is the "[p]ower or authority to manage, direct, superintend, restrict, regulate, govern, administer, or oversee."

---

[6] We need not decide whether the brackets and junction box, by reducing the risk of a fire that could damage other units or cause harm to their occupants, would therefore serve more than one unit.

[7] We would reach the same conclusion if we interpreted "portions thereof" to refer to the unit and not to the listed items because, in that case, there would be no responsibility for the missing items other than that which is mandated for limited common elements.

[8] The declarations also impose on owners a duty of care, maintenance, cleanliness, and orderliness of limited common elements within their joint control, but only if those limited common elements serve more than one unit. Because we assume the limited common elements in question here would only serve one unit, we omit any discussion of joint control.

Control, n., Black's Law Dictionary (6th ed. 1990). The declarations provide that unit owners are not permitted to "modify . . . or in any way alter" limited common elements "without prior written approval of the Board." Neither "shall [anything] be altered or constructed in or removed from the Common Elements except upon the prior written consent of the Board." As noted, "[t]he Common Elements include . . . joists, beams, supports, main walls . . . , bearing walls, floors, ceilings, . . . and all other structural parts of the buildings." Thus, the attachment of brackets to joists or other structural components, and the addition of a junction box in the crawl space above the ceiling, would have required the consent of West Frontier, which means the Levengoods did not have the requisite control.

¶23 Furthermore, neither the federal courts nor our previous decision determined whether the Levengoods were in control of the wiring providing power to the ceiling fan. As we previously explained, the federal litigation concerned "who had responsibility for the ceiling fan and its faulty wiring that caused the insulation to smolder and consequently caused Lynn's death." *Bergeson III*, No. 2 CA-CV 2013-0045, at ¶ 10. Under the insurance policy, individual unit owners were only covered "for liability arising out of the ownership, maintenance or repair of that portion of the premises which is not reserved for that unit-owner's exclusive *use* or occupancy." *Id.* (emphasis added), *quoting Bergeson I*, 2010 WL 3705344, at *3. The district court found "that the 'fan and its wiring . . . clearly were not common areas' and that therefore" liability did not arise out of the "'maintenance, ownership, or repair of a common area, but rather arose out of an item within their sole control—the ceiling fan.'" *Id.* ¶ 13, *quoting Bergeson I*, 2010 WL 3705344, at *3-4. Thus, "the ceiling fan and its wiring were 'limited common elements' within the meaning of the declarations so that by statute they could be considered 'designated . . . for the exclusive use'" of the unit owner. *Id.* "The Ninth Circuit affirmed this ruling, finding that '[t]he fire that caused Lynn Bergeson's death occurred in the insulation in the ceiling, but every negligent act alleged against the Levengoods related to their ownership, maintenance, or repair of property that was reserved for their *exclusive use*.'" *Id.* ¶ 14 (emphasis added), *quoting Bergeson II*, 472 F. App'x at 606.

¶24 Here, the trial court concluded "[t]he control of the ceiling fan and wiring was essential to the federal litigation," and precluded the Bergesons from "relitigating . . . control of the fan and the wiring powering it." But, as detailed, essential to the federal litigation was whether or not the ceiling fan and its wires were designated for the unit owner's exclusive *use*, which is different from whether the wires running throughout the space above the ceiling, and any items related to them, were within the unit owner's *control*. Accordingly, the court erred in precluding the Bergesons from producing evidence of West Frontier's control over the wire providing power to the ceiling fan, including the installation of brackets and a junction box.

Disposition

¶25 For the foregoing reasons, we reverse the judgment of the trial court and remand for proceedings consistent with this decision.