

# West Virginia Record

## Justices grant summary judgment to subdivision for homeowners' delinquent assessments

by [Kyla Asbury](#) |  
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CHARLESTON – The West Virginia Supreme Court of Appeals issued a ruling that a subdivision was rightfully awarded summary judgment by a circuit court in 2016.

Summary judgment was granted for the subdivision's association and against Arthur Conkey Jr. and Jo Carol Conkey, according to an April 11 opinion.

Pursuant to that order, the Conkeys were ordered to pay \$1,215 in delinquent residential assessments and related charges. The association was also awarded \$10,061.25 in attorney's fees.

Justice Menis Ketchum authored the majority opinion. Justice Beth Walker concurred and authored a separate opinion.

“The Conkeys contend that the delinquent assessments represent certain increases in annual assessments which were never properly voted on by the Association,” the opinion states. “According to the Conkeys, the increases were, therefore, ultra vires with respect to the Subdivision's covenants and restrictions.”

In addition, the Conkeys contend that the Association's efforts to collect the delinquent assessments violated the West Virginia Consumer Credit and Protection Act and that the Association's imposition of 10 percent interest on the delinquent assessments was usurious, according to the opinion.

“The Conkeys ask this Court to reverse the summary judgment, grant them partial summary judgment on the Association's liability under the Consumer Credit and Protection Act, and remand this action for a determination of the Conkeys' damages and attorney's fees,” the opinion states.

The association contends that the assessments were expressly authorized and properly imposed by the required vote pursuant to the Subdivision's covenants and restrictions, the opinion states.

“The Association further contends that the imposition of the assessments and other charges were consistent with the law and that attorney fees were warranted,” the opinion states. “Upon review, we find that the circuit court reached the correct result.”

The Supreme Court affirmed the Dec. 22, 2016, order granting summary judgment in favor of the association and the Feb. 13, 2017, order awarding the association attorney's fees.

In April 2016, the association filed an action in Morgan Magistrate Court against the Conkeys to recover unpaid subdivision assessments, late fees, interests and costs and the Conkeys removed the action to circuit court.

The Conkeys claimed none of the increases in assessments of more than 10 percent per year had been obtained by the required “written affirmative vote” of two-thirds of the association's members.

The Conkeys claimed the association's debt collection efforts violated the West Virginia Consumer Credit and Protection Act and that the association's imposition of 10 percent interest on their alleged delinquent assessments was usurious.

On Dec. 22, 2016, the circuit court granted summary judgment in favor of the association. On Feb. 13, 2017, the circuit court entered an order awarded the association \$10,061.25 in attorney's fees.

The Conkeys then appealed the orders to the Supreme Court.

"The Conkey's assertion to the contrary is without merit," the opinion states.

The Supreme Court affirmed the circuit court's orders.

In her concurring opinion, Walker stated that while she agreed with the majority's outcome, she wanted to write separately to express her concern of the majority's analysis of the circuit court's award of attorney's fees to the association.

In this case, the Conkeys did not pay their assessments, failed to comply with the amended declaration and adversely affected the association and its members, according to Walker's opinion.

"I would not rely on § 36B-3-116 or the Association's Amended Declaration because the Association sued the Conkeys to recover the unpaid assessments, and not to enforce either the statutory lien on the Conkeys' property created by § 36B-3-116(a) or the consensual, common law lien on the Conkeys' property created by the Amended Declaration," Walker's opinion states. "Rather, the Association chose to sue the Conkeys to collect unpaid assessments, that is, to enforce the Conkeys' promise to pay their assessments. This choice matters."

Walker wrote that because the association sued to recover the Conkeys' unpaid assessments, and not to enforce the lien upon their properties created by § 36B-3-116(a), they were not entitled to attorneys' fees under § 36B-3-116(f).

"For those reasons, I would affirm the circuit court's grant of reasonable attorneys' fees to the Association pursuant to West Virginia Code § 36B-4-117, rather than for the reasons set forth by the majority," she wrote.

W.Va. Supreme Court of Appeals case number: 17-0141

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