IN THE MAINE SUPREME JUDICIAL COURT

THE VILLAGE AT OCEAN'S END CONDOMINIUM ASSOCIATION,	:	**Docket No. BCD-23-395**
Plaintiff-Appellant,	:	Appeal from the Business and Consumer Court
-vs-	:	
SOUTHWEST HARBOR PROPERTIES LLC, et al.,	:	
Defendants-Appellees	:	

REPLACEMENT BRIEF OF APPELLANT

THE VILLAGE AT OCEAN'S END CONDOMINIUM ASSOCIATION

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TABLE OF AUTHORITIES

CASES:

STATUTES

Maine Court Rules:

Maine Statutes:

Other Statutes:

SECONDARY AUTHORITIES:

I. Statement of the Issues Presented for Review

(1) Can a successor declarant developer of a Condominium transfer to itself for no consideration paid to the unit owners, common element land on the ocean shoreline in a Condominium without obtaining written unit owner consent to the transfer or filing consents with the Register of Deeds, and if not is the transfer void?

(2) Should a Condominium Association seeking to void the transfer by the developer of its common element land as a breach of fiduciary duty and violation of the homeowner consent requirements of statutory law, recover its attorney's fees incurred in the litigation?

II. Summary of the Argument

Maine law prohibits a successor declarant of a Condominium from transferring common element land in the Condominium, other than as a part of a sale of a unit, without written consent of the unit owners.

III. Argument

A. STANDARD OF REVIEW

This appeal is from the denial of partial summary judgment regarding whether the transfer of the shoreline portion of the Condominium common element property breached the developer's fiduciary duty to the unit owners and was void for the failure to obtain and record the consent to the transfer by the unit owners.

This Court has consistently ruled that review of summary judgment decisions is *de novo*. *Yankee Pride Transportation and Logistics, Inc. v. UIG, Inc*., 264 A.3d 1248, 1250 (Me. 2021); *McCandless v. Ramsey,* 211 A.3d 1157, 1160 (Me. 2019). Only the legal effect of the undisputed facts is at issue here. The evidence is to be construed in the light most favorable to the party against whom judgment has been entered, *Tucker v. Lilley,* 114 A.3d 201 (Me. 2015), who in this case is the plaintiff Condominium Association representing the unit owners of the Condominium. Cross motions for summary judgment, which were presented here, do not alter the basic Rule 56 standards and are also reviewed de novo. *F.R.Carroll, Inc. v. TD Bank, N.A*., 8 A.3d 646 (Me. 2010).

B. Statement of the Case and Procedural History

1. Statement of the Case

This is a case about a successor declarant of a land only condominium taking the most valuable ocean front portion of the common elements owned in common by the unit owners, and transferring it to themselves for no compensation to the owners during a period of 7 years of exclusive declarant control of the Condominium, then leasing it back to the homeowner's association for 99 years, the lease giving homeowners the non-exclusive right to walk on the land to the shorefront in Southwest Harbor, and to use a firepit and screened gazebo for a total

rent of $5.6 million [Ex. 36]. The Maine Condominium Act in §1603-112, makes such a transfer void unless approved in a writing by 80% of the homeowners, which is filed with the Register of Deeds, which approval was never sought or obtained. The original Declaration raised the required approval percentage to 100%, Declaration Section 7.1, as permitted by the Condominium Act, 33 MRS §1603-112(a), for any withdrawal of property from the Condominium. Other than to use development rights to build units and to convey a fee-simple title to land immediately underneath a new unit to a buyer, neither the Declaration nor the Condominium Act permit the removal of common element land from the Condominium without written approval of the unit owners in the Condominium, and the common elements may not be divided (partitioned) or transferred except when conveyed with a unit, without written approval of the unit owners, 33 MRS §1602-107(e). Any such transfer made without unit owner approval is void. 33 MRS §1603-112(d).

2. Procedural History

The original declaration for the Condominium was created in 2009. After completing and selling only 1 house in 3 years, the bank threatened foreclosure and the original developer (Declarant) gave the development rights to the bank through a deed in lieu of foreclosure in late 2012. Shortly before signing the deed in lieu, the original declarant added the shoreline property to the Condominium as

common element land, which was contemplated by Section 4.1 of the original Declaration. Eight months later the development rights were sold, for about half of the outstanding loan balance, to a newly created entity called Southwest Harbor Properties LLC, owned by 3 brothers from Portland. In little more than a month, the new successor declarant attempted to withdraw the shoreline property from the Condominium, by signing for the old declarant who did not then own the development rights. Months later they used the correct declarant entity to withdraw the land with a revised Fifth Amendment to the Declaration. That common element shoreline was owned at all times in common by all of the unit owners, from whom defendants never got written homeowner consent.

The declarants controlled the homeowner's association from 2009 to 2021, when the homeowners took over control of the Association by electing 3 homeowners as directors, appointing officers, and removing the declarant appointed directors. After 6 months of reviewing numerous records dating back over 12 years, the new Condominium Association Board approved filing a lawsuit to determine that the theft of the shoreline property was a breach of fiduciary duty by the developers and the transfer of the shoreline land was void in violation of specific protections of common element land contained in the Maine Condominium Act. The complaint was filed in Superior Court in Hancock County in August of 2021, but removed by the developers to the Business and Consumer

Court. Both sides moved for partial summary judgment as to who properly owned the shorefront and a variety of other issues. The Business Court, by Justice Thomas McKeon, granted partial summary judgment to the developers (defendants) finding that in using their development rights any of the common element lands could be removed from the Condominium by the declarants without compensation to the homeowners and without obtaining the written consent required by the Condominium Act. Other issues in the case were resolved by a settlement dictated into the record shortly before a jury trial was set to begin in July of 2023, but the issue of who properly owned the shoreline was preserved for appeal, which was filed by the Association in October of 2023. Since the defendants prevailed on the issue of who owned the shoreline, the Court did not award attorney's fees mandated by the Declaration and the Condominium Act, to the plaintiff Association.

C. Factual Allegations

As used in this Brief, the Exhibit numbers used are from the original Motion for Partial Summary Judgment filed on December 28, 2002, and the portions of the Statement of Material Facts cited herein will use the designation SMF which were sequentially numbered by both parties and all are contained in A-122-127 and A-157-206.

Fortunately, in all states, transactions involving or affecting real estate must be in writing and filed with a county recording office, which in Maine is the Register of Deeds. Maine is one of 17 states that have adopted part or all of the Uniform Condominium Act, doing so in 1982. The Act is portrayed as a consumer Bill of Rights for Condominium owners. Attached to the Summary Judgment Motion was the Affidavit of Counsel which attached all the recorded real estate records which set forth sales and transfers of units in the Condominium, which show what transpired over the initial 12 years of the Condominium while the original and successor declarant controlled this Condominium. [Kelm Affidavit, Exs. 16-30]. These records show that defendants, after getting a half-price deal in buying this development from a bank, [Crafts Affidavit at 8 and 14] stole the most valuable land fronting on the ocean without any compensation to the homeowner's that owned the land, then rented it back to them for 3 times their original investment over the next 99 years [Kelm Affidavit at 13]. All actions were performed while as declarants, defendants owed the homeowners a fiduciary duty established by Maine law, §1603-103(a).

The original Declaration [Ex. 1, A-207-230] was filed on May 5, 2009, setting up the Condominium on land owned by the Crafts family for centuries and submitting the land to the Declaration and the Maine Condominium Act [Ex.1 Article I, A-207, SMF 1, A-122]. Bylaws were also prepared and later Amended

[Ex. 2, Kelm Affidavit at 4, SMF 2, A-122]. The Town of Southwest Harbor approved the Final Subdivision Plan in October of 2009 [Ex. 3, A-231-2, SMF 3, A-123] allowing a maximum of 40 units on the 19.52 acres of property which Crafts put into the Condominium, with 16 of those units on the hillside overlooking the harbor, which is the only portion of the Condominium developed so far and is maintained by the Association. Crafts had deeded the shoreline property to Morrison Newell to secure a loan which when repaid resulted in the property being transferred back to Crafts Family Reserve in 2008 [Ex.4], then to Craft's company which was the original declarant, The Village at Ocean's End, LLC, on December 14, 2012 [Ex. 4 p. 4-5]. At the insistence of the bank, who thought the shoreline was always in the development, and since the property had substantially less value in selling it in foreclosure without the shoreline, Crafts added the shoreline [Crafts Affidavit at 9] to the Condominium with a Third Amendment to the Declaration on December 17, 2012 [Ex. 5, A-233-236], and filed an Amended and Restated Condominium Plat [Ex. 35, A-285-286] on December 19, 2012, which shows clearly that the Shore Parcel is a "Part of Common Elements"[A-286]. The original Declaration described the shoreline property as Schedule B Item 3 [A-229] and referred to it in Section 4.1 as being "Additional Land" which "may be added to the Condominium in whole or in parts from time to time, as the Declarant, in its sole discretion may determine." [A-208-

209]. The second page of Ex. 35 is an enlargement of the shoreline portion of the Plat which clearly shows the designation as being Common Elements [Ex. 35 Amended Plat page 2, A-286]. When Crafts signed over the Condominium development rights to the Bank on December 27, 2012, it included the shoreline property [Ex. 6 and 35, A-286] and another 14.54 acre and 10.91 acre adjacent parcels in back [Pl's Ex.7 and 8, SMF 6, A-123], which were separate from the Condominium that were purchased from the bank for $90,000, [Crafts Affidavit at 15]. Upon purchasing the development rights to the Condominium from the Bank, defendant Southwest Harbor Properties LLC was given a Deed on August 12, 2013 [Ex. 9, A-237-247, SMF 7, A-123] which specified that they were not conveyed the land but only development rights [A-256-257, SMF 7, A-123] since other than Declarant's right to place 16 or 40 units on the property, the common element lands, including the shoreline property, were owned in common by the unit owners [Kelm Affidavit at 20]. Once the Condominium was established by filing the Declaration in 2009, neither Crafts, nor the bank, nor the successor declarant owned the common element land unless they conveyed a unit with the land. All of the land in the Condominium, except the units, was common element land. 33 MRS §1601-103 (4). It became permanently the property of the unit owners in common and could not be withdrawn or conveyed without their written consent filed with the Register of Deeds. 33 MRS §1603-112. The common elements also

could also not be divided up and transferred to anyone unless underneath a unit that was sold. 33 MRS §1602-107(e). The Bank never owned a fee simple interest in the original 19.52 acres of common element lands in the Condominium, which remained owned in common by the unit owners throughout the existence of the Condominium [Crafts Affidavit at 17; Kelm Affidavit at 21, Ex. 6 , A-237-247]. The bank could only mortgage, foreclose on, and sell after foreclosure the development rights to the Condominium. The Deed from the Bank to defendant SWHP specifies that:

"The above described property is conveyed together with, and Grantee hereby assumes, all of Grantor's right, title and interest in and to all of the "Development Rights" and Special Declarant Rights" with respect to the Village at Ocean's End Condominium as set forth in the Declaration (the "Condominium") or defined in the Maine Condominium Act including without limitation all Development Rights and Special Declarant Rights necessary or appropriate to construct, create, market, sell or otherwise deal with all Condominium units created and which The Village at Ocean's End, LLC has reserved the right to create. Grantee executes this Deed for the purpose of assuming the Development Rights and Special Declarant Rights set forth herein." [Exhibit 9 Page 8 ¶4, A-256; see Acknowledgment of only getting development rights signed by Jeff Howland on Ex. 9, p 9, A-257].

The nature of what is included in the Condominium is required by law to be disclosed to new home purchasers, by delivering to them before a unit is purchased, a Public Offering Statement, which must "contain or fully and accurately disclose: "(18) A description of any common elements which may be alienated pursuant to Section 1603-112, and any conditions on that right to alienate", 33 MRS §1604-103(a)(18). Although Howland's, through their SWHP,

purchased the development rights in August of 2013 and prepared a Public Offering Statement on October 1, 2013 [Def's Ex. 55, A-264-276], which was given to every new home purchaser since then, they never disclosed that they intended to alienate the shoreline common interest land, which they first attempted unsuccessfully to withdraw from the Condominium through a Fifth Amended Declaration recorded on September 26, 2013, which was 5 days earlier. [A-259-263] They corrected that filing on April 16, 2014 with a Revised Fifth Amended Declaration using the name of the then correct Declarant. [Ex. 13, A-277-280]. So obviously before they prepared their October 1, 2013 Public Offering Statement, they knew they were going to alienate from the Condominium the common element shoreline property, but fraudulently never disclosed that to any purchasers. [SMF 97, A-198]. They also at no time disclosed in the Public Offering Statement that they have used to sell houses over the next 10 years, that the shoreline property was common element land owned by the Condominium previously until transferred for free to the them as the new successor Declarant. [Kelm Aff. ¶ 9, SMF 100 A-199]

Upon giving their depositions in July of 2022, which was 9 years after they purchased the development rights, the principals of SWHP, Jeffery and Jerry Howland, believed that they as the developers had been conveyed all of the land in the Condominium and not just the declarant development rights, which is all that

their predecessor declarant possessed once he created the Condominium. [Kelm Affidavit at 20 and 21].

The Fifth Amended Declaration [Ex. 11, Section 1, A -259, 263], when filed in early October of 2013 was signed by Jeff Howland as Manager of Southwest Harbor Properties, LLC, the new successor declarant, purporting to act for the Village at Ocean's End LLC, Jeff Craft's company, which was no longer the declarant and did not own the property, only the unit owners owned it in common. [Kelm Affidavit at 20 and 21]. Since improperly drafted, the Fifth Amendment had no effect, and 6 months later a Revised Fifth Amended Declaration was filed on April 16, 2014 [Ex. 13, A-277-280] correcting that SWHP was the current successor Declarant. It was also signed by defendant Jeff Howland. Shortly after filing the ineffective Fifth Amended Declaration, on October 16, 2013, SWHP filed a Warranty Deed purporting to covey the shoreline property to a non-existent company, Howland Real Estate Properties, LLC [Complaint Ex. 1, A-59-61,SMF 13, A-124], and realizing their mistake 19 months later filed on May 5, 2015 a Corrective Deed [Ex.15, Pl's Ex. 33B Request 54, A-281-283 correcting the transferee name on the deed to be Howland Real Estate, LLC (removing the word Properties from the company name). SWHP has never filed with the Register of Deeds any written agreement with unit owners (compliant with Section 1603-112 (b) of the Condominium Act) consenting to the shoreline land transfer, from Moos,

Crafts, or Kelly [Ex. 33A Request 47 and 48, Ex. 33B Request 55, SMF16, A-124-125], who were unit owners when they were trying to complete the shoreline transfer. Throughout all of these mistaken filings and transfers of property they never owned, and severe breaches of fiduciary duty while under exclusive declarant control, defendants' lawyer Timothy Norton became the Condo Association's legal counsel and Clerk of the Association Executive Board [Ex. 33B Request 52], through the exercise of declarant control over the Homeowner's Association by SWHP as the successor declarants. [Ex. 1 §4.2 E, A-210]

After the Revised Fifth Amendment to the Declaration was filed in April of 2014, and the shoreline had been purportedly conveyed to a non-existent company, Jeff Howland signed a lease of the Shoreline Property by Howland RE to the Condo Association for 99 years [Complaint Ex. 2, A-62-72; Plaintiff's Ex. 36, and Ex. 32 Request 15]. As permitted by the Condominium Act, the new homeowner-controlled Condo Association Board cancelled the lease in December of 2022.

Beyond the serious breaches of fiduciary duty in taking the unit owners common element land without consent then leasing it back to them, the lessor Howland Real Estate LLC [Complaint Ex. 2, A-62-72] did not even own the land, but the non-existent Howland Real Estate Properties, LLC was the record owner [Complaint Ex. 1, A-59-61]. This was a serious error in title which was not corrected for 15 months [Ex. 15, A-281-283]. The transfer of the shoreline

property out of the condominium and giving it for free to a mis-named declarant related company violated multiple sections of the Condominium Act including the express provisions requiring 80% non-declarant consent to any transfer of common element land absent which the transfer is void, 33 MRS § 1603-112. [Ex. 34B], and the 100% written consent of unit owners required by Section 7.1 of the Declaration. [Ex. 1 A-214]

Under 33 MRS §1602-107 (e), the common elements are not subject to partition and any attempt to convey them or any voluntary or involuntary transfer of them is void, unless the transfer is done in compliance with Section 1603-112 (the 80% non-declarant unit owner approval requirement). The Declaration increased this requirement in Section 7.1 to 100%. [A-214] Although the Declaration [Ex. 1 Section 4.1, A-208-209] allows the declarant in exercising development rights to add or withdraw land from the Condominium, it can only withdraw land in compliance with the 80% approval requirement of 33 MRS § 1603-112 (a) and (b) and §1607-107(e). Neither the Declaration nor the Condominium Act specifies that common elements may ever be withdrawn or transferred without unit owner written approval. In any conflict between the Declaration and the Condominium Act, the provisions of the Condominium Act control, [Ex. 34A, 33 MRS §1602-103(c), Declaration Ex. 1 Section 14.2, A-224], and the provisions of the Condominium Act may not be varied by agreement nor

may any of the rights conferred by the Act be waived. [Plaintiff's Ex. 34A, Section 1601-104].

In discovery requests and requests for admissions plaintiff asked defendants to produce any unit owner consents to the transfer of the shoreline property and they produced none. [Ex. 31, 32, 33A and 33B, SMF 16, A-124-125]. The Condominium Act requires any agreement giving such consents to be filed with the Register of Deeds, 33 MRS §1603-112(b), and they produced no such filed agreements and admitted that they never received consents from Moos, Crafts, or Kelly [Plaintiff's Ex. 33A and B, Requests 47, 48, and 55]. Without those consents, any attempt to transfer the shoreline property is void. 33 MRS §1603-112 (d). If they had obtained consents, any proceeds from the transfer are an asset of the Association, 33 MRS §1603-112 (a), but they gave away the most valuable oceanfront property of the Condominium to themselves for free, then leased it back to the Association, a clear breach of fiduciary duty to the homeowners imposed by Section 1603-103(a) of the Condominium Act, [Ex.34A §1603-103(a)].

Review of the sales of units establishes who were the unit owners at the time of the attempted transfers of the shoreline to determine if they consented to the transfer of the shoreline property. [Ex. 16 A-284]. No consents to the transfer by any of them were produced in response to discovery requests [Plaintiff's Ex. 31 Request 2, 3, 4, 5, and 6], and they admitted they did not receive consents from

them. [Plaintiff's Ex 33A and B, Requests 47, 48, and 55, SMF 16 A-124-125]. Not a single document was ever produced in response to the Second Request for Documents [Plaintiff's Ex. 31].

There is no factual dispute that the shoreline property was a common element of the Condominium before any transfer of rights by the original declarant to The First, N.A. or to the successor declarant SWHP.[Plaintiff's Ex. 5 and 35, A-233 and A-285-6] There is no dispute that SWHP made several attempts to transfer the shoreline property from the common elements of the Condominium to itself and then to its wholly owned company, Howland RE, without any attempt to comply with the requirement of 80% non-declarant unit owner consent to the transfer Ex. 34B §1603-112 (a), SMF 16, A-124-5], or with the 100% written consent requirements of Section 7.1 of the Declaration [A-214], and never filed consents with the Register of Deeds as required by § 1603-112(b) of the Maine Condominium Act. [See Ex. 34B]. There is no factual dispute that Howland RE entered into a 99-year lease of the shoreline property with the plaintiff Condo Association [Complaint Ex. 2, A-62-72] with defendant Jeff Howland signing the lease on behalf of both the lessor and lessee during a time when SWHP had exclusive declarant control of the Condominium [§14.2(E). A-210], and that that transfer of the shoreline property was void [Plaintiff's Ex. 34B §1603-112(d)].

D. The Undisputed Material Facts

The salient facts in this case as set forth above, are not in dispute and only the legal effect of those facts is addressed in this appeal. There is no dispute as to any of the following material facts:

1. Once purchasing the development rights to the Condominium from the bank in August of 2013, the defendant SWHP owed a fiduciary duty to the unit owners. 33 MRS §1603-103(a) [Plaintiff's Ex. 34B].
2. As the successor declarant, SWHP had exclusive control of the Condominium Association for at least 7 years and exercised that control from 2013 until February of 2021 appointing all, or a majority, of the director seats on the Board of Directors of the Association during that time.
3. When SWHP purchased the development rights in August of 2013, the shoreline property was common element land [SMF 4, A-123], which had not been approved for development by the Town of Southwest Harbor [SMF 3, A-123].
4. The next month after acquiring the development rights, SWHP filed a Fifth Amended Declaration on September 26. 2013 ineffectively attempting to withdraw the shoreline from the Condominium (using the prior declarant as adopting the amendment when it was no longer the declarant). [Ex. 11, A-259. SMF 9, A-123].

5. SWHP prepared and distributed to all future unit owners a Public Offering Statement [Def's Ex. 55, A-264-276] dated October 1, 2013 which did not disclose that they intended to alienate the shoreline common element from the Condominium, violating Section 1604-103 and 1604-102(c) of the Condominium Act , and did not disclose that the shoreline was a common element that had been owned by the Condominium at the time of their purchase of the development rights, a material non-disclosure in violation of Section 1604-102(c). [Ex. 40, SMF 100, A-199, Kelm Aff. ¶9].
6. On September 30, 2013, defendant Jeff Howland as Manager of SWHP signed a Warranty Deed, not filed until October 16, 2013, transferring the shoreline property to Howland Real Estate Properties, LLC, a non-existent company. [SMF 13, A-124, Ex. 32 Request 13]. One of Jeff Howland's newly formed privately owned companies at the time, with a different name, was Howland Real Estate LLC. [Complaint Ex. 1, A-59-61, SMF 11, A-124].
7. On April 8, 2014 Jeff Howland, as manager of SWHP, the successor declarant, signed and on April 16, 2014 filed a Revised Fifth Amendment to The Declaration withdrawing the common interest shoreline property again from the Condominium. [Ex. 13, A-277-281, SMF 14, A-124].

8. On September 1, 2014, while the shoreline property was titled in the name of the non-existent company, Howland Real Estate Properties LLC, [Ex 32 Request 13] defendant Jeff Howland signed a 99-year non-exclusive lease of the shoreline property on behalf of both the lessor, Howland Real Estate, LLC as Manager, and using his declarant exclusive control rights on behalf of the lessee, The Village at Ocean's End Condominium Association, as its President. [Complaint Ex. 2, A-72, SMF 17, A-125, Ex. 32 Request 15].
9. On May 15, 2015 Jeff Howland, as the Manager of the non-existent Howland Real Estate Properties, LLC (stating it was correctly known as Howland Real Estate, LLC) signed a Corrective Deed filed on May 18, 2015 transferring the shoreland common element property from the non-existent Howland Real Estate Properties, LLC to Howland Real Estate, LLC. [Ex. 15, A-281, SMF 20, A-125, Ex. 33A Request 44, Ex. 33B Request 54].
10. At no time did defendant SWHP obtain or seek to obtain a written consent to the transfer of the shoreline common element property out of the Condominium from any non-declarant unit owner in the Condominium. [Ex. 32 Request 6, 7, 8, 11, 12, 33A, and 33B, Ex. 33A Request 31, 32, 34, 35, 47, and 48, Ex. 33B Request 55, SMF 16, A-124-125].
11. Prior to the attempts to transfer the shoreline common elements out of the Condominium, no one advised defendants of the need to comply with the

non-declarant consent provisions of Section 1603-112 of the Condominium Act. [Ex. 33A Request 40], and defendant and their Howland family members appointed to be directors and officers of the Condo Association had no prior experience or knowledge of condominiums or condominium laws prior to this lawsuit being filed in August of 2021, [SMF 118, A-205], which is 8 years after they took control of the Condominium and its Board of Directors, prior to which they had never read or studied the Declaration, Bylaws, or the Maine Condominium Act. [SMF 118, A-205]. At no time did SWHP pay any consideration to unit owners or the Condo Association for the transfer of the common element shoreline property out of the Condominium.

12. On August 11, 2021 the Condo Association filed a lawsuit against SWHP and Jeff Howland in Superior Court in Hancock County. [A-48-72].

13. In December of 2022 plaintiff Condo Association gave formal notice of its cancellation of the 99-year lease of the Shoreline, effective in 90 days.

14. On July 18, 2023 just before the start of a jury trial of other issues between the parties, a settlement was dictated into the record settling all issues between the parties except ownership of the shoreline, which was agreed to be preserved on appeal to this Court. [A-43-47].

15. On October 5, 2023 Justice Thomas McKeon enforced the settlement agreement and entered Final Judgment preserving the right of Plaintiff to appeal the issue of ownership of the shoreland land. [A-43-47]

E. Legal Status of Condominium Common Elements

The Maine Condominium Act [MCA] was adopted in 1982 and Maine is one of 17 states that have adopted all or part of the Uniform Act, which is viewed as a consumer protection statute for unit owners. *America Condominium Association, Inc. v. IDC, Inc*, 844 A.2d 117 (R.I. 2004) (as a whole the Act contains a strong consumer protection flavor and prohibits declarants from using any device to evade the limitations or prohibitions of the Act or of the declaration), *One Pacific Towers Homeowner's Association v. HAL Real Estate Investments, Inc.*, 148 Wash.2d 319, 61 P. 3d 1094, 1100 (2002) (Uniform Act created because of a perceived need for additional consumer protection to get the majority owner to follow all the statutes and the Declaration); *Artesani v. Glenwood Park Condominium Association,* 750 A.2d 961, 963 (R.I. 2000). The plaintiff Condominium Association under the Act is the legal representative of the unit owners of the free-standing houses within the Condominium. [33 MRS §1603-102(a)(4); Ex. 1, Declaration Section 14.6 ¶2, A-225]. Under the Act, there are two types of property in a Condominium, common elements and units. [See

§3.1(A), A-208]. In defining Common elements, the Act says that it means all portions of the condominium other than the units. 33 MRS §1601-103 (4). Development Rights allow the declarant to add real estate, create units and common elements or limited common elements, subdivide units or convert units to common elements, or "to withdraw real estate from a condominium". 33 MRS §1601-103(11). The Act specifically does not allow the declarant to withdraw or transfer common elements except to create units. This omission is very important in the context of this case. When the original declarant added the shorefront as a common element before the transfer of the development rights to the bank, he was exercising his right under §1601-103(11) to add common elements, also contemplated by Section 4.1 of the Declaration [Ex. 1, A-208-209], as to the shoreline which was additional land described therein and in Schedule B Item 3 at the end of the Declaration. [Ex. 1, Schedule B, A-229].

It is the intention of the MCA that common elements in a condominium are of a permanent character. Other than the use of common elements underneath units being built, they may not be divided or transferred unless there is compliance with the 80%-unit owner approval provisions of §1603-112, failing which the transfer is void. The MCA is very specific, "common elements are not subject to partition" and "any conveyance, … sale … or transfer" made without unit owner approval under 1603-112, is void. §1602-107 (e). The Declaration may increase

the percentage approval requirement, and this Declaration increased that to 100%. [Ex. 1 Declaration §7.1, A-214]. Many states require 100%-unit owner approval for any transfer of common element property. *America Condominium Assoc. Inc v. IDC, Inc.,* 844 A.2d 117 (R.I. 2004); *Carey v. Donley,* 261 Ill.App.3d 1002, 633 N.E. 2d 1015 (Ill App. 2nd Dist. 1994) (approval of all the owners required before common elements could be diminished); *Cuisimano v. Port Esplanade Condominium Association, Inc.*, 55 So.3d 931 (La. Ct. App. 4th Cir. 2011). Others require 80% like Maine. *McGill v. Lion Place Condominium Ass'n*, No. Cl 11-847 (Neb. Dist. Ct. 2013). Massachusetts requires 75%. *Levy v. Reardon*, 42 Mass.App.Ct. 431, 439, 683 N.E.2d 713 (Mass Ct. App. Norfolk 1997) (removal of Lots C,D, and E divided the common area in violation of the statutory requirements).

F. The Transfer of the Shoreline Property Out of the Condominium is Void

Plaintiff Condo Association brought this lawsuit as the legal representative of the unit owners of free-standing houses within the Village at Ocean's End Condominium [Ex. 1 Declaration Section 14.6 ¶2, A-225, MCA §1603-102 (4)]. Under Maine law, all of the common elements of the Condominium land, except the units, are owned in common by the homeowners subject to the right of the

developers to build 40 houses on the 19.52 acres of land looking out on the harbor and the Atlantic Ocean in Southwest Harbor. As defendants purported expert witness on the law in this case, Joseph G. Carleton, Jr., says in his seminar materials presented at the 2021 Summer Maine State Bar Association Conference, "[r]eal estate is not a condominium unless the undivided interests in the common elements are vested in the unit owners." The Condominium Act defines common elements as being "all portions of a condominium other that the units." 33 MRS §1601-103(5), see Declaration §3.1(A), A-208]. Approval for the building and sale of 40 units was granted by the Town of Southwest Harbor in 2009 [Ex. 3, A-23]. Once the developers (called Declarants) complete houses they can convey the house and the postage stamp size piece of land immediately under the house, in fee simple to purchasers of the dwellings. When initial approval of the development of 40 houses was granted, the condominium did not include the less than an acre of shorefront land on the harbor that was between Main Street and the ocean, directly across from the Condominium's 19 acres extending up the hillside [Ex. 3, A-231-232], and no approval by the Town of Southwest Harbor has ever been sought by SWHP for any type of development on the Shoreline land. In 2012, in advance of giving a deed in lieu of foreclosure to the Bank financing the development, the original developer Jeffrey Crafts, whose family had owned the land since the mid-1700's, conveyed the shorefront property directly to the Condominium [Ex. 5

Third Declaration Amendment, A-241], and since no one since 2012 ever sought development approval on that property from the township, no houses could be built on it. With the Third Amendment there was filed an Amended and Restated Condominium Plat [Ex. 35, A-285-286] showing the shoreline property as being Common Interest Land of the Condominium, [A-286]. Eventual transfer of the shorefront parcel was contemplated in the original 2009 Declaration in Section 4.1, [A-208-209] and it is listed in Schedule B as item 3. [Ex. 1 Declaration, A-229]. The initial developer borrowed $3.55 million of a $4 million loan to take out the forest on the property, blast out roads and put in streets and utilities, stormwater collection ponds and storm sewers and to build one house [Affidavit of Jeffrey Crafts at 5 and 8]. With the housing recession from 2008 to 2012, the bank in 2012, with only one new house sold, refused to allow Crafts to draw down further his $4 million line of credit and took back the property development rights through a deed in lieu of foreclosure. [Ex. 6, A-237-247] It sold the development rights 8 months later to a new entity, Southwest Harbor Properties LLC, for $1.8 million with the bank writing off the difference as a loss without recourse to the original developer. [Crafts Affidavit at 14]. The bank also sold to the new buyers, using a different corporate name of Howland Real Estate LLC, for $90,000 an additional 2 nearby parcels of over 25 acres, that had been given as additional security for the loan. [Plaintiff's Ex. 7, 8, and 10] [Crafts Affidavit at 15].

Shortly after buying the development rights, the new owner, controlled by 3 brothers from the Portland area, in 2013 attempted to transfer the shoreline property out of the condominium and to themselves for free on September 20, 2013 [Ex. 11, A-259-263], then proceeded to lease it back to the condo association for 99 years for rents in excess of $5.6 million on September 1, 2014 [Complaint Ex. 1, A-59-61], [Affidavit of Russell A. Kelm at 13]. In doing so they ignored compliance with the Maine Condominium Act, which requires the approval of 80% of the non-declarant homeowners to remove common interest land from the condominium, 33 MRS §1603-112 (a) [Ex. 33B], and with Section 7.1 of the Declaration raising the requirements for transfer of property out of the Condominium to 100%-unit owner written consent which is recorded. [Ex. 1 Section 7.1, A-214], as allowed by §1603-112 (a) of the Act. [Plaintiff's Ex. 33B]. Under the terms of the Condominium Act, the failure to get and to record the agreements giving 80% consent of the homeowners with the county Register of Deeds, unless a higher percentage is required by the Declaration, makes any transfer of common elements void. 33 MRS §1603-112 (a), (b), and (d) [Plaintiff's Ex. 33B]. For the first 7 years, the declarant had the right to appoint all directors to the Condo Association Board and to appoint the Board officers [Ex. 1 Declaration §4.2 (E), A-210, and Plaintiff's Ex. 38 MRS §1603-103 (d)], so that the transfers and lease were signed only by the Howland family successor

developers [Complaint Ex. 2, A-72, and Plaintiff's Ex. 36]. The Condominium Act in Section 1603-103(a), imposes a fiduciary duty on the declarant toward the homeowners, as long as it controls 50% of the Condominium Board of Directors, which defendants did until February 18, 2021 when the homeowners called a Special Meeting of the Association and voted to take over the Executive Board and replace them with directors who were homeowners [Kelm Affidavit at 14]. After taking over the Executive Board in 2021, the new Board investigated what had been done and filed this lawsuit in August of 2021 seeking the return of the land and damages [Kelm Affidavit at 15].

Interestingly, it was revealed in discovery that the two principal Howland brothers involved in these activities, Jeffery and Jerry Howland, testified that until the lawsuit was filed in 2021, they had never read the controlling Declaration and Bylaws for the Condominium, or the Maine Condominium Act. [Kelm Affidavit at 16, SMF 118, A-205]. In fact, their lawyer repeatedly incorrectly prepared legal documents by transferring the shoreline land to a non-existent entity [Ex. 12, A-233-236], then tried to correct it 2 years later, [Ex.15, A-281-283] attempted to transfer the land out of the condominium using the name of the previous declarant [Ex.11, A-259-263], then corrected the filing [Ex. 13, A-277-280 and Ex. 33A Request 43], and never told the Howland's about the need for 80% homeowner approval or about the need to file that approval of record with the county Register

of Deeds. [Ex. 33A Request 40]. All of the monetary issues raised in the complaint were resolved by a settlement entered into just before a jury trial on those issues was to start on July 18, 2023.

The only legal issue remaining is whether the defendants, as the successor declarants, breached their fiduciary duty and failed to comply with clear provisions of the Maine Condominium Act in taking and transferring to their private company the most valuable shoreline portion of the common elements of the Condominium without obtaining at least 80% non-declarant unit owner approval and without paying compensation to the unit owners for it, then leasing it back to them for $5.6 million over 99 years and keeping the lease payments they wrongfully obtained for both the land and the docks attached to the land. There is no dispute as to any material fact that they did that when they had exclusive complete declarant control of the condominium and its homeowner's association Board of Directors [Plaintiff's Ex. 36], without compliance with the governing law and in doing so clearly breached their fiduciary duty to the unit owners, a duty imbedded in Section 1603-103(a) of the Maine Condominium Act. Here is how one Maine Court sums up the legal principals which are at play in this case:

> "Maine's Condominium Act mirrors the Uniform Condominium Act, and provides for control by a condominium declarant of day-to-day condominium affairs well beyond the incorporation of the unit owner's association. Although by law, the declarant must organize the unit owner's association as a nonprofit corporation before it conveys any units, the declarant often controls the association, including

officers, executive board members, and decisions in the first months and years of a condominium's existence. 33 M.R.S.A. § 1603-103(d). During this period of declarant control, the declarant may be held liable by statute to unit owners or the association for costs, including attorney fees, incurred by any wrongful acts or omissions of the declarant or its agents. 33 M.R.S.A. § 1603-111. Indeed, during this time, the declarant and its appointees to the association are held "to a higher standard of care than unit-owner elected directors."
8 RICHARD POWELL, POWELL ON REAL PROPERTY § 54A.04 (2000)(citing 33 M.R.S.A. § 1603-103(a)). That higher standard is reflected in Maine's statute, providing the declarant "is a fiduciary for unit owners with respect to actions taken or omitted at his direction by officers and members of the executive board appointed by the declarant and acting in those capacities or elected by the members [during the declarant control period]. 33 M.R.S.A. § 1603-103(a)(2004).6."

fn.6 The basis for this very high standard in the Uniform Condominium Act is attributed to the desire of lawmakers to hold declarant-appointed association board members "feet to the fire ... because the board is vested with great power over the property interests of the unit owners and because there is a great potential for conflicts of interest between unit owners and the declarant." 8 RICHARD POWELL, POWELL ON REAL PROPERTY § 54A.04.

Blanchard v. PHP Properties, Inc., No. CV-04-281, 2005 WL 375484 (York County Superior Court, January 24, 2005)(Brennan, J.).

Here, the successor declarants, ignored the "higher standard of care". Specifically, after buying the development rights for half of the investment in the development by their predecessor, acted as though they owned a fee simple interest in the common elements of the condominium, which they did not. Their actions effectively took the common element shoreline land on the Atlantic Ocean harbor in Southwest Harbor, withdrew it from the condominium without compensation, then sought to collect rents from the existing and future homeowners to the tune of $5.6

million through leasing it back to the homeowner's association for 99 years. Along the way, they fumbled through the process by repeated mistakes in the paperwork, that make their actions and intents clear. But can a fiduciary take someone's valuable property for nothing and lease it back to them for millions of dollars and do so without complying with the most fundamental provisions of Maine's Condominium law, that you need unit owner's 80% (or 100%) approval if you are going to take their property, and you need to share the proceeds with them. Case law says clearly that you can't, without even exploring whether you can lease property that you don't even own of record at the time the lease is created.

A fiduciary duty is imposed by general corporate law on managers of a corporation, which requires them to exercise the diligence, care, and skill that ordinarily prudent persons would exercise under similar circumstances in like positions. *Clianchette v. Cianchette*, 209 A. 3d 745, 756 (Superior Court 2019). Plaintiff is a Maine non-profit corporation. A claim for a breach of fiduciary duty is a tort claim. *Id* at 757. A fiduciary duty is established by statute for declarants who control 50% or more of a condominium Executive Board, 33 MRS §1603-103(a) [Ex. 34A Page 13], *Brown v. Compass Harbor Village Condominium Assoc*., 229 A.3d 158, 160 (Me.2020). Defendants were in that position from August 12, 2013 when they purchased the development rights to the Condominium from the Bank [Ex. 9, A-256] until the unit owners gained control of the Board on February 18,

2021 [Kelm Affidavit at 14], a period of 8 years, which was a total of 12 years after the Condominium was founded in 2009 [Ex. 1]. In addition to tort liability for breach of fiduciary duty, both the Condominium Act in Section 1603-111 [Ex. 34B], and Maine common law, *Seacoast Hangar Condominium II Assoc. v. Martel*, 775 A.2d 1166, 1172 (Me. 2001), make the declarant liable to the Association for all litigation expenses and reasonable attorney's fees

As the declarant with exclusive control over the Executive Board for the initial mandatory 7 years established by the Declaration [Ex.1, §4.2 (E), A-210], and continuing with a majority of the Board for another 5 years between 2016 and 2021 [Section 1603-103(a)] [Kelm Affidavit at 14], defendant had a statutory fiduciary duty to the unit owners. Beyond the statutory imposition of the duty, such fiduciary duties usually only exist when the disparate position of the parties and a reasonable basis for the placement of trust and confidence in the superior party cause the duty to arise. *Bryan R. v. Watchtower Bible and Tract Soc.*, 1999 ME 144, 38 A.2d 839 (1999). Here SWHP owed a statutory fiduciary duty to the unit owners imposed by the Condominium Act, and Jeff Howland, as the self-appointed President and a director on the non-profit corporate Executive Board of the Condo Association, with the exclusive declarant right to control all activities of the Association over a period of 8 years while he and his brothers controlled all but one position on the Executive Board during that time, owed a fiduciary duty to the

Condo Association, which he exclusively managed. *Clianchette v. Cianchette*, 209 A. 3d 745, 756 (Superior Court 2019). During the period of absolute control of the Association Howland took its most valuable property, without unit owner consent, then leased it back to the Condo Association for 99 years, and collected over $40,000 in rent [Kelm Affidavit at 17], that should have been returned to the rightful owners of the land. The lease gave them few rights that they didn't already have in the perpetual easement created by the deed and amended Declaration [Ex. 13 and 15, A-277 and 281] that defendants were required to give to the homeowners under the provisions of Section 103-112 (e) of the Condominium Act even if the homeowners had voted to consent to the sale (any vote to transfer the common elements "may not deprive any unit of its rights of access and support."). Thus, these developers, who controlled the Board, the checking account, the placement of new units, and set the amount of dues, absconded with the shore front and imposed a lease on the Association ultimately to cost it $5.6 million, and giving them the non-exclusive right to use a fire pit and screened in gazebo with a table and 6 chairs in it. [A-62-72]. It would be hard to find a clearer breach of fiduciary duty.

Partial summary judgment was denied by the trial court, which found that using their development rights the declarants could take any common element land in the Condominium at any time they wanted without compensation to the unit owners and without needing their consent [A-31-42], a decision which is clearly

reversible error in defiance of overwhelming legal authority throughout the jurisprudence of many different states, including many who have not adopted the uniform Condominium Act, which makes the protection of common element land a cornerstone of the protections needed by condominium unit owners.

Defendants responded to plaintiff's partial summary judgment motion by admitting what transpired but disclaiming the legal effects of their acts. They cited to laws not in effect in Maine, to case law from other states that are factually different and decided under different statutes than the Uniform Condominium Act enacted in Maine.

In reviewing defendant's arguments opposing summary judgment, we must first more closely examine the provisions of the Maine Condominium Act which sets the law as to this dispute and controls what can be provided in a Condominium Declaration in Maine. The Declaration here sets forth in paragraph 4.1 [A-208-209] that the Declarant has Development Rights to "add land" or to "withdraw land" from the Condominium and in Section 4.2 (A) that Declarant can "locate … common elements", [A-209-210]. Nowhere in the Declaration does it say that Declarant can remove common elements. In the only Public Offering Statement [Def's Ex. 55, A-264-276] prepared by defendants, they say on October 1, 2013 on page 4 that

"all units will share in the common areas", that "only residential Units may be added to the Condominium", and that "all land added to the Condominium will

be restricted to residential use with the exception of land used to provide common elements to the Units or the Association". Public Offering Statement page 4 [A-267].

Nowhere in the Public Offering Statement does it disclose that the Shoreline Property was once common interest land in the Condominium or that no approval was sought from the unit owners when the common interest shorefront land was removed from the Condominium, both of which are material omissions violating §1604-102 (c), which makes the declarant liable for an omission of material fact,

The Maine Condominium Act is an admittedly consumer protection piece of legislation to protect condominium unit owners from developers. In their opposition to summary judgment defendants at fn 7 cite to the Uniform Common Interest Ownership Act definition of development rights, but that was never adopted in Maine. Why not cite to the Maine Condominium Act definition? They also cite to cases in Massachusetts, which has never adopted the Uniform Act, and from North Carolina to a case involving land with no units on it, and to a Washington appellate case where the unit owners initially disclaimed any ownership rights in the common elements in an air space condominium. So, what does the Maine statute say? 33 MRS §1601-103 (11) says that development rights are defined as:

> any right reserved by a declarant in the declaration to "add real estate to a condominium, to create units, common elements or limited common elements within a condominium, or … to withdraw real estate from a condominium".

The statute is very specific that the declarant can create common elements but nowhere does it say that development rights include the right to withdraw common elements, other than through their ability to create units. That was not a drafting error. That was intentional since common elements once created are property owned in common by the unit owners. Common elements are defined in §1601-103(4) as "all portions of a condominium other than the units". The developer can create units in the common elements, but cannot otherwise alter the common elements without satisfying some very specific statutes. In the section on exercise of development rights, Section 1602-110 (a) tells how development rights can be exercised and that the "The declarant is the unit owner of any units thereby created". It only mentions creating units. The next subsection in Section 1602-110(b) says that development rights "may be reserved within any real estate added to the condominium", but nowhere does it allow development rights to be exercised to remove common element land, only to build units. The Act flat out bars any split-off (partition) of common interest land in Section 1602-107 (e) where it says that:

"the common elements are not subject to partition, and any purported conveyance, encumbrance, judicial sale or other voluntary or involuntary transfer of an undivided interest in the common elements made without the unit to which that interest is allocated is void, except as permitted in section 1603-112".

[That section 1603-112 is the 80% unit-owner approval section.]

So the language of the Act gets pretty strong when it talks about ever taking away common interest land except to build units. But it gets stronger in Section 1603-112 (d) where it says that:

"Any purported conveyance, encumbrance, judicial sale, or other voluntary or involuntary transfer of common elements, unless made in accordance with this section, or in accordance with section 1603-117, subsection (b), is void."

Section 1603-117 has an exception for a security interest in the common elements granted by the association to a creditor. Since other sections point to an exception for compliance with Section 1603-112 on Alienation of Common Elements, we have focused our case, as does the statute, on what you need to do to ever alienate the common elements. The requirements of that section are:

(a) get an 80% agreement of the non-declarant unit owners (100% under this Declaration), in which case the proceeds are an asset of the association, and (b) the consents must be in an agreement, "in the same manner as a deed" and that agreement must be void after a certain date if not recorded by that date and be "recorded in every county" where the condominium is located and is effective "only upon recording". Section 1603-112 (a) and (b).

That is a very strong statute of frauds, and makes the Affidavit of Dana Moos they submitted in seeking to circumvent the clear terms of this enhanced statute of frauds, worthless and to be disregarded. If you fail to comply with the terms of 1603-112, any transfer of the common elements is void under section

1603-112 (d), which makes the purported withdrawal of the shoreline common elements by defendants here ineffective and void. There is no form of statutory construction that can avoid the relief which plaintiff seeks. The statute is clear and redundant on protecting the common element land in a condominium. And for good reason. The whole purpose of a condominium is the common ownership of all of the land except your unit, and the drafters of this Uniform Act enacted in 17 states, made sure by its terms that the intent of common ownership could not be abrogated without the homeowner's consent by an over-whelming majority of them.

The earlier Unit Ownership Act adopted in Maine in 1965, and still in effect, has similar provisions only it requires 100%-unit owner consent to take away common element land. It says "The percentage of the undivided interest of each unit owner in the common areas and facilities as expressed in the declaration shall have a permanent character and shall not be altered without the consent of all of the unit owners…" 33 MRS §565 (2). It further provides:

> that the common areas "shall remain undivided" and no unit owner or any other person shall bring any action for partition or division of any part thereof" …"any covenant to the contrary shall be null and void" . 33 MRS §565 (3).

That Act applies to an association of unit owners acting as a group in accordance with the bylaws and declaration. Many other states require unanimous approval of unit owners to take away common interest land.

By separate motions, plaintiff had sought to rule in limine and to strike the affidavits of Dana Moos, who attempts to circumvent the applicable statute of frauds, and of Joseph Carleton, who attempts to be an expert on the law, a type of expertise uniformly rejected by American courts. The Court never ruled on those motions. The substance of those motions will not be repeated here, but nothing in those motions seeks to strike any portions of the defendants Statement of Material Facts, which is precluded by Rule 56 (i), they merely seek to preclude such impermissible testimony. Those affidavits should have been ignored and obviously were not by the trial Court.

Defendants' additional arguments that the lease of the shoreline is valid and should be enforced falls by the wayside if defendants never properly owned the shoreline, but those claims were released in the settlement. Their lawyer not only messed up the deed transferring the land but he messed up the original attempt to withdraw the land, using the wrong declarant to attempt the withdrawal. Filing a corrective deed years later did them no good as to the lease. They cite to *Dumais v. Gagnon*, 433 A.2d 730 (1981), in claiming that the corrective deed makes the transfer retroactive. But judicial reformation of a deed is only done when it will not impair the rights of reliance interests requiring protection. That should include someone leasing the land only because the lessor signed the lease for them when he had exclusive declarant rights without ever informing the unit owners that first,

the lessor never properly owned the land, and second, that their attempt to acquire the land was void. The Association certainly did not have imputed knowledge of the initial mistake.

The trial court's denial of partial summary judgment to the plaintiff must be reversed and the case remanded with instructions to void the transfer of the shoreline to defendants and deed it back to the plaintiff Association for the benefit of the unit owners including the filing of an Amended Declaration and Plat showing the transfer back of the land as a common element. The denial of attorney's fees related to this claim must also be reversed.

G. Attorney's Fees

Recovery of the Condo Association's attorney's fees and expenses in pursuing these claims is specifically provided by The Maine Condominium Act and by Maine common law, regardless of whether the Association prevails. Section 1603-111 of the MCA provides that the declarant "is liable to the Association … for …. the wrongful act or omission … including …all litigation expenses, including reasonable attorney's fees, and recovery is not dependent on whether the Association prevails in the litigation, which has been implied in the two-way fee statute in actions to recover assessments under Section 11.1 of the Declaration, [A-220], since 1603-111 does not restrict the recovery of fees to just the successful party. *Seacoast Hangar Condominium II Assoc. v. Martel*, 775 A.2d 1166, 1172

(Me. 2001); *Bates Fabrics, Inc . v. LeVeen*, 590 A.2d 528, 531 (Me. 1991). A court should also award attorney's fees to the prevailing party in a tortious conduct or a breach of fiduciary duty case. *Murphy v. Murphy*, 1997 ME 103, 694 A.2d 932, 935 (1997)(breach of fiduciary duty); *In re Estate of Stowell*, 636 A.2d 440, 442 (Me. 1994)(breach of fiduciary duty); *FDIC v. Proia*, 663 A.2d 1252, 1255 (Me. 1995)(tortious conduct); *Bernhard v. Farmers Ins. Exchange*, 915 P.2d 1285, 1289 (Colo. 1996)(breach of fiduciary duty). Even the business judgment rule for actions taken by a director, does not insulate them from liability for breach of their fiduciary duties if they act in bad faith or commit fraud. *Rosenthal v. Rosenthal*, 543 A.2d 348, 254 (Me. 1988). One who breaches a fiduciary duty is accountable for any losses accruing from the breach of trust and chargeable with the amount required to restore to the estate values that have been lost. *Daigle v. Northwest Trailer Park Partnership*, No Civ. A-CV-93-722, 2002 WL 1065275 (Maine Superior Court May 1, 2002). The elements of a claim are 1) a fiduciary relationship, 2) breach of a fiduciary duty toward the plaintiff, and 3) damages proximately caused by the breach. *Meridian Medical Systems, LLC v. Epix Therapeutics, Inc.,* 250 A.3d 122 (Me. 2021); *Steeves v. Bernstein, Shur, Sawyer & Nelson, P.C.* 1998 ME 210, ¶10 n.8, 718 A.2d 186 (1998); *Moulton v. Moulton*, 1998 ME 31 ¶5, 707 A.2d 74 (1998). All of those elements are easily satisfied here.

The trial Court erred in failing to award plaintiff its attorney's fees and expenses in maintaining this action.

CONCLUSION

For these reasons the judgment of the Business Court denying partial judgment to plaintiff on the transfer of the shoreline property out of the Condominium to the declarant's private company for no consideration and without the written and recorded approval of 100% of the unit owners should be reversed and the case remanded to return the shoreline parcel to the Association and award plaintiff reasonable attorney's fees and expenses incurred in maintaining this action, the amount of which to be set by the Business Court on remand.

Dated: March 5, 2024

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CERTIFICATE OF SERVICE

This is to certify that two copies of the forgoing Replacement Brief of Appellant and one copy of the Replacement Appendix were this 5th day of March, 2024 sent by expedited U.S. Mail to the offices of the attorneys for Defendants-Appellees and one electronic copy was filed with the Court and sent by email to Appellees counsel:

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