**PRELIMINARY ANALYSIS**

**Snead v. Village on the Green**

Prepared By

EMS

October 20, 2022

# SHORT SUMMARY OF CASE

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# Parties / Significant Figures

|  |  |
| --- | --- |
| **Name of Party** | **Significance to Underlying Matter/Dispute** |
| Susan Snead (“Client”) | Client / HOA Member |
| Elizabeth Moore (Moore) | Co-client, Spouse, "Libby" |
| Village on the Green HOA | HOA |

This table may be amended from time to time as new information/evidence comes in regarding new “parties” and/or witnesses.

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# Statement of Facts / Evidentiary Support

|  |  |  |
| --- | --- | --- |
| **Date / NA** | **Fact** | **Evidence Supporting That Fact** |
| 4/19/19 | THIS IS AN EXAMPLE. REPLACE IT WITH ACTUAL DATA.  Client closed escrow on the property. | Client Timeline |
| N/A | THIS IS AN EXAMPLE. REPLACE IT WITH ACTUAL DATA.  Client notified HOA of sprinkler leak into Client’s unit. | Email from Client to Mgmt. Co. |
| N/A | REMEMBER TO DELETE ANY EXCESS ROWS IN THE TABLE BY DRAGGING YOUR MOUSE OVER THE ROWS TO BE DELETED AND THEN PRESSING **BACKSPACE** and then pressing **DELETE ENTIRE ROW**. | \*\* |
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This table may be amended from time to time as new information/evidence comes in that require significant revisions to Client’s pre-litigation strategy.

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# Notable Provisions of the Governing Documents

|  |  |
| --- | --- |
| **Document**  **Article / Section No.** | **Text of the Selected Article/Sections No.**  **(if none, put “N/A”; delete rows that you didn’t use; maintain formatting)** |
| CC&Rs  Section 6.01 | THIS IS AN EXAMPLE. REPLACE IT WITH ACTUAL DATA.  The HOA shall paint, maintain, repair and make necessary improvements to the common areas, as well as the exteriors of the garage, deck, and balcony elements of the Units, in good condition and repair. |
| Operating Rules  P. 20 | THIS IS AN EXAMPLE. REPLACE IT WITH ACTUAL DATA.  [I]n the event of any water damage, mold infestation, or related damage arising from an owner’s negligence, or arising from any pipe leak or similar failure for which this owner has the maintenance responsibility, the owner shall be responsible for all repairs and resulting damage. |
| N/A | REMEMBER TO DELETE ANY EXCESS ROWS IN THE TABLE BY DRAGGING YOUR MOUSE OVER THE ROWS TO BE DELETED AND THEN PRESSING **BACKSPACE** and then pressing **DELETE ENTIRE ROW**. |
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The table may or may not contain all the significant provisions of Client’s governing documents. Its sole purpose, in fact, is to help make the Firm’s analysis of Client’s pre-litigation case more convenient. The provisions contained in the table, therefore, should neither be viewed as an exhaustive list of key provisions/evidence, nor be used as a measure of what provisions of the governing documents might strengthen (or weaken) Client’s pre-litigation case.

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# Additional Information/Clarification Needed From Client

The Firm should follow up with Client regarding the following items/issues:

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This section of the Preliminary Analysis may be amended from time to time as new information becomes known.

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# Additional Documents Needed From Client

The Firm needs to ask Client for the following documents:

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This section of the Preliminary Analysis may be amended from time to time if Client locates additional documents, or if a third party produces additional documents.

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Potential Causes of Action and the Strengths/Weaknesses of Each

## Breach of CC&Rs / Breach of Equitable Servitudes / Violation of Civ. Code, § 5975

Elements—Breach of CC&Rs.

— Restrictive covenants and recorded declarations are written agreements governed by contract principles. (*Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US) LLC* (2012) 55 Cal.4th 223, 240.) Restrictive covenants and recorded declarations are of a contractual nature and are enforceable by statute unless unreasonable. (*Id.* at 237; and see Civ. Code, § 5975.) Because the Declaration of CC&Rs is a recorded declaration of restrictive covenants, it is enforceable provided it is not unreasonable. “[S]ettled principles of condominium law establish that an owners association, like its constituent members, must act in conformity with the terms of a recorded declaration. (See Civ. Code, § 5975, subd. (a); *Lamden v. La Jolla Shores Clubdominium Homeowners Assn.* (1999) 21 Cal.4th 249, 268 [homeowner can sue association to compel enforcement of declaration's provisions];(Citations.)” (*Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US) LLC*, supra, 55 Cal.4th at p. 239.)

— Where enforcement is an issue in a breach of CC&Rs cause of action (as it is here), it tends to arise in two ways: (i) HOA not enforcing rules at all; or (ii) HOA applying different rules to different homeowners and/or issuing fines that are not supported by existing CC&Rs (i.e., selective enforcement).

• HOA Not Enforcing Rules.

→ A homeowner can sue his or her HOA to compel enforcement of the CC&Rs. (*Lamden v. La Jolla Shores Clubdominium Homeowners Assn., supra,* 21 Cal.4th at 268; *Pinnacle Museum Tower Assn. v. Pinnacle Market Development* *(US) LLC, supra,* 55 Cal.4th 223, 239.)

• Selective Enforcement.

→ In an improper enforcement situation, there a couple avenues of attack against the HOA. First is to examine the propriety of the rule itself. Use restrictions can be enforced unless they are wholly arbitrary, violate a fundamental public policy, or impose a burden on the use of affected land that far outweighs any benefit. (*Sui v. Price* (2011) 196 Cal.App.4th 933.)

→ The second avenue is to review the enforcement process used by the HOA. This enforcement must be “in good faith, not arbitrary or capricious, and by procedures which are fair and uniformly applied.” (*Liebler v. Point Loma Tennis Club* (1995) 40 Cal.App.4th 1600, 1610; *Nahrstedt v. Lakeside Village Condominium Assn.* (1994) 8 Cal.4th 361.) In other words, the HOA must enforce the CC&Rs in a uniform and fair manner, or else its enforcement will be deemed unlawful. (*Dolan-King v. Rancho Santa Fe Ass’n.* (2000) 81 Cal.App.4th 965, 975, citing former Civ. Code, § 1354; *Villas De Las Palmas Homeowners Ass’n. v. Terifaj* (2004) 33 Cal.4th 73, 84.)

→ When an HOA seeks to enforce the provisions of its CC&Rs to compel an act by one of its member owners, it is incumbent upon it to show that it has followed its own standards and procedures prior to pursuing such a remedy, that those procedures were fair and reasonable and that its substantive decision was made in good faith, and is reasonable, not arbitrary or capricious. [Citations.]” (*Ironwood Owners Assn. IX v. Solomon* (1986) 178 Cal.App.3d 766, 772.) “The criteria for testing the reasonableness of an exercise of such a power by an owners’ association are (1) whether the reason for withholding approval is rationally related to the protection, preservation or proper operation of the property and the purposes of the Association as set forth in its governing instruments and (2) whether the power was exercised in a fair and nondiscriminatory manner. [Citations.]” (*Laguna Royale Owners Assn. v. Darger* (1981) 119 Cal.App.3d 670, 683–684.)

— One of the fundamental duties of an HOA is to maintain the common areas. (Civ. Code, § 4775.) In performing its duties, an association shall perform a reasonably competent and diligent visual inspection of the accessible areas of the major components that the association is obligated to repair, replace, restore or maintain. (Civ. Code, § 5500(a).)

Applicable Statute of Limitations—

— The statute of limitations to enforce a restriction, which includes CC&Rs, is five years. (Code Civ. Proc., § 336(b).) Consequently, an action for a violation of a restriction must be commenced within five years after the party enforcing the restriction discovers, or through the exercise of reasonable diligence, should have discovered, the violation. [*As used here, a “restriction” means a limitation on, or a provision affecting the use of, real property in a deed, Declaration, or other instrument in the form of a covenant, equitable servitude, condition subsequent, negative easement, or other form of restriction.*] (Civ. Code, § 784.)

Remedies—

— While typically injunctive in nature, courts may fashion remedies to enjoin an ongoing breaches. (*Ritter & Ritter Inc. Pension and Profit Plan v. The Churchill Condominium Assn.* (2008) 166 Cal.App.4th 103.) Additionally, compensatory damages are available if plaintiff incurred monetary damages. (*Cutujian v. Benedict Hills Estates Assn.* (1996) 41 Cal.App.4th 1379, 1385; Civ. Code, §§ 3281, 3300.)

— As to whether attorneys’ fees are available to the prevailing party, see “Attorneys’ Fees and Costs” section below.

Application—Application of the Law to Client’s Facts.

— REPLACE THIS TEXT by restating applicable facts from above that support the elements of a cause of action for *breach of the CC&Rs*. If one or more provisions of the CC&Rs is/are relevant, you should cite to that/those provision(s) here (no need to quote or provide a snip). **By the same token, however, you need to determine whether the CC&Rs actually require the HOA to enforce the CC&Rs. Some do, and some don’t.**

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Conclusion—Strengths/Pros and Weaknesses/Cons of this Potential Cause of Action.

— REPLACE THIS TEXT by drawing a conclusion about the *strengths* of this particular cause of action given the evidence at our disposal.

— REPLACE THIS TEXT by drawing a conclusion about the *weaknesses*, if any, of this particular cause of action given the evidence at our disposal. If there are none, say so—e.g., “At this time, this cause of action is supported by the facts and the law.”

## Negligence

Elements—Negligence.

— To prove a claim for negligence, plaintiff must establish: (i) duty; (ii) breach of duty; (iii) proximate cause; and (iv) damages. (*Peredia v. HR Mobile Services, Inc.* (2018) 25 Cal.App.5th 680, 687.)

— An HOA that fails or refuses to abide by its contractual maintenance obligations is liable to the homeowner for damages caused by such negligence. (See, e.g., *White v. Cox* (1971) 17 Cal.App.3d 824, 895.)

— The “enforcement” issue raised in the context of the “Breach of CC&Rs” cause of action above is also applicable in the context of a negligence claim.

— The “failure to maintain” issue discussed in the context of the “Breach of CC&Rs” cause of action above is also applicable in the context of a negligence claim.

Remedies—

— Compensatory damages are available for all harm proximately caused by a defendant’s wrongful acts. (Civ. Code, §§ 3281, 3333-3343.7.)

— Injunctive Relief is available. Courts can fashion equitable relief to remedy negligent conditions. (*Ritter & Ritter Inc. Pension and Profit Plan v. The Churchill Condominium Assn.* (2008) 166 Cal.App.4th 103.)

— Damages for emotional distress are only available in connection with bodily injury. (*Potter v. Firestone Tire & Rubber* (1993) 6 Cal.4th 965.) Such relief, when available, arises out of a claim for *negligent infliction of emotional distress*, which often involve “bystander situations”—e.g., witnessing injury to a family member. (*Burgess v. Superior Court* (1992) 2 Cal.4th 1064.) Emotional distress damages for negligence *without* injury (e.g., fear of illness such as cancer if exposed to toxic substances threatening cancer) available if defendant acted with malice, fraud, or oppression, and the fear is based on knowledge corroborated by reliable medical or scientific evidence. (*Potter v. Firestone Tire & Rubber, supra*, 6 Cal.4th at pp. 999-1000.)

— As to whether attorneys’ fees are available to the prevailing party, see “Attorneys’ Fees and Costs” section below.

Applicable Statute of Limitations—

— Two years for personal injuries. (Code Civ. Proc., § 335.1.)

— Three years for claims related to injury to property. (Code Civ. Proc., § 335.1.)

Application—Application of the Law to Client’s Facts.

— REPLACE THIS TEXT by restating applicable facts from above that support the elements of a cause of action for *negligence*. If one or more provisions of the CC&Rs is/are relevant, you should cite to that/those provision(s) here (no need to quote or provide a snip).

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Conclusion—Strengths/Pros and Weaknesses/Cons of this Potential Cause of Action.

— REPLACE THIS TEXT by drawing a conclusion about the *strengths* of this particular cause of action given the evidence at our disposal.

— REPLACE THIS TEXT by drawing a conclusion about the *weaknesses*, if any, of this particular cause of action given the evidence at our disposal. If there are none, say so—e.g., “At this time, this cause of action is supported by the facts and the law.”

## Negligent Misrepresentation

Elements—Negligent Misrepresentation.

— The elements of a claim for *negligent* misrepresentation are nearly identical to those required to allege intentional misrepresentation (or fraud), except that the second element requires the absence of reasonable grounds for believing the misrepresentation to be true instead of knowledge of its falsity. The elements, therefore, are: (i) a misrepresentation; (ii) made with no reasonable basis to believe the representation is true; (iii) with the intent to induce another’s reliance on the misrepresentation; (iv) actual and justifiable reliance; and (v) resulting damage. (*Daniels v. Select Portfolio Servicing, Inc.* (2016) 246 Cal.App.4th 1150, 1166; *Bock v. Hansen* (2014) 225 Cal.App.4th 215, 231.)

Remedies—

— For compensatory (money) damages, defrauded plaintiffs are generally limited to the “out-of-pocket” measure of damages, which seeks to restore plaintiffs to the financial position they were in before the fraud occurred. Plaintiffs receive the difference in value between what they gave to defendant and what they received in return, plus consequential pecuniary loss caused by reliance on misrepresentation. (*Alliance Mortg. Co. v. Rothwell* (1995) 10 Cal.4th 1226.)

— For misrepresentations involving the purchase and sale of real property, damages are governed by Civil Code section 3343. The defrauded party is entitled to recover the difference between the actual value given and the actual value of what they received, together with any additional damage arising from the particular transaction, including: (i) amounts actually and reasonably expended in reliance upon the fraud; (ii) amounts for loss of use and enjoyment of the property proximately caused by the fraud; and (iii) in the case of a party induced to sell income property, profits or other gains that might reasonably have been earned by use of the property had the person retained it. (Civ. Code, § 3343(a).) Additional damage calculations apply if the defrauded party was induced to purchase income property. (*Ibid.*) Damages are *not* calculated as the difference between what was represented and what the property is actually worth. (Civ. Code, § 3343(b).)

— Punitive damages and emotional distress damages are not available in the absence of physical injury. (*Butler-Rupp v. Lourdeaux* (2005) 134 Cal.App.4th 1220, 1227; *Branch v. Homefed Bank* (1992) 6 Cal.App.793, 799-800.)

— As to whether attorneys’ fees are available to the prevailing party, see “Attorneys’ Fees and Costs” section below.

Applicable Statute of Limitations—

— Three years. (Code Civ. Proc., § 338(d).)

Application—Application of the Law to Client’s Facts.

— REPLACE THIS TEXT by restating applicable facts from above that support the elements of a cause of action for *negligent misrepresentation*. If one or more provisions of the CC&Rs is/are relevant, you should cite to that/those provision(s) here (no need to quote or provide a snip).

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Conclusion—Strengths/Pros and Weaknesses/Cons of this Potential Cause of Action.

— REPLACE THIS TEXT by drawing a conclusion about the *strengths* of this particular cause of action given the evidence at our disposal.

— REPLACE THIS TEXT by drawing a conclusion about the *weaknesses*, if any, of this particular cause of action given the evidence at our disposal. If there are none, say so—e.g., “At this time, this cause of action is supported by the facts and the law.”

## Declaratory Relief

Elements—Declaratory Relief.

— The essential elements of a declaratory relief cause of action are: (i) an actual controversy between the parties’ contractual or property rights; (ii) involving continuing acts/omissions or future consequences; (iii) that have sufficiently ripened to permit judicial intervention and resolution; and (iv) that have not yet blossomed into an actual cause of action. (*Osseous Technologies of America, Inc. v. DiscoveryOrtho Partners LLC* (2010) 191 Cal.App.4th 357, 366–69.)

— In an action for declaratory relief, an “actual controversy” is one that “admits of definitive and conclusive relief by judgment within the field of judicial administration, as distinguished from an advisory opinion upon a particular or hypothetical state of facts; the judgment must decree, not suggest, what the parties may or may not do.” (*Selby Realty Co. v. City of San Buenaventura* (1973) 10 Cal.3d 110.)

— Code Civ. Proc., § 1060 explicitly permits declaratory relief claims to determine the rights and duties of an HOA/homeowner.

— The “enforcement” issues discussed in the context of the “Breach of CC&Rs” and “Negligence” causes of action above are also applicable to a declaratory relief claim.

Remedies—

— The remedy for a declaratory relief cause of action is a judicial declaration specifying the rights and obligations of the parties. (Code Civ. Proc., § 1060.)

— As to whether attorneys’ fees are available to the prevailing party, see “Attorneys’ Fees and Costs” section below.

Applicable Statute of Limitations—

— The statute of limitations governing a request for declaratory relief is the one applicable to an ordinary legal or equitable action based on the same claim. (*Mangini v. Aerojet–General Corp.* (1991) 230 Cal.App.3d 1125, 1155.)

Application—Application of the Law to Client’s Facts.

— REPLACE THIS TEXT by restating applicable facts from above that support the elements of a cause of action for *declaratory relief*. If one or more provisions of the CC&Rs is/are relevant, you should cite to that/those provision(s) here (no need to quote or provide a snip).

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Conclusion—Strengths/Pros and Weaknesses/Cons of this Potential Cause of Action.

— REPLACE THIS TEXT by drawing a conclusion about the *strengths* of this particular cause of action given the evidence at our disposal.

— REPLACE THIS TEXT by drawing a conclusion about the *weaknesses*, if any, of this particular cause of action given the evidence at our disposal. If there are none, say so—e.g., “At this time, this cause of action is supported by the facts and the law.”

## Violation of Florida Statute \*\*\*\*\*

Elements—Violation of Florida Statute \*\*\*\*\*.

— Provide the elements AND statutory/case law of this cause of action.

— If you want, add snippets from other cases (see the examples above for ideas). Make sure to maintain the proper formatting and margins established in this document.

— If you have more than one cause of action to add, then cut and paste this one FIRST (before replacing the green highlights) as many times as there are causes of action to add. That way, you’ll be sure to keep everything consistent and standardized.

Remedies—

— What are the available remedies.

— As to whether attorneys’ fees are available to the prevailing party, see “Attorneys’ Fees and Costs” section below.

Applicable Statute of Limitations—

— What is the statute of limitations for this claim?

Application—Application of the Law to Client’s Facts.

— REPLACE THIS TEXT by restating applicable facts from above that support the elements of a cause of action for *violation of florida statute \*\*\*\*\**. If one or more provisions of the CC&Rs is/are relevant, you should cite to that/those provision(s) here (no need to quote or provide a snip).

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Conclusion—Strengths/Pros and Weaknesses/Cons of this Potential Cause of Action.

— REPLACE THIS TEXT by drawing a conclusion about the *strengths* of this particular cause of action given the evidence at our disposal.

— REPLACE THIS TEXT by drawing a conclusion about the *weaknesses*, if any, of this particular cause of action given the evidence at our disposal. If there are none, say so—e.g., “At this time, this cause of action is supported by the facts and the law.”

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Based upon the allegations made against Client thus far, and based upon the facts and evidence provided by Client and/or reflected in the documents the Firm has received and reviewed, the affirmative defenses discussed below appear to be applicable.

This section of the Preliminary Analysis may be amended from time to time if new information/evidence comes to light that supports additional affirmative defenses.

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# Strategic Considerations

## Applicability of Davis-Stirling Act

The Davis-Stirling Act does *not* apply to the facts of this dispute.

## Attorneys’ Fees and Costs

If this dispute is adjudicated, the prevailing party will be entitled to attorneys’ fees and costs under \*\*\*\*\* of the CC&Rs.

## Jurisdiction and Venue

Since there is no binding arbitration provision in the CC&Rs, any litigation related to the dispute must take place in superior court of the county in which Client’s property is located.

## Standing

Based upon the information/evidence that Client has provided thus far, Client has standing to pursue every cause of action described above against each of the intended defendants (excluding DOES, of course).

## Secondary Conflicts Check

No new potential or actual conflict of interest between the parties and/or significant figures came to light during the Firm’s preparation of this Preliminary Analysis.

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# Final Thoughts / Issues / Concerns / Comments

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This section of the Preliminary Analysis might be amended from time to time to reflect new information, strategies, or concerns that arise during the course of the litigation.

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