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**NO. 69637-8-1**
COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON

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CINDY ALEXANDER; BLOCKER VENTURES, LLC; CHRIS CLARK; R. BRUCE EDGINGTON; KIPP JOHNSON and JENNIFER JOHNSON; GOPIKRISHNA KANURI and HIMABINDU KANURI; CHRIS KASPRZAK and ELIZABETH KASPRZAK; PAUL LARKINS and JOYCE HYOJUNG LARKINS; KRISTINE MAGNUSSEN; SCOTT McKILLOP; CAINE OTT and DANA OTT; MARA PATTON; PETER RICHARDS; DANTE SCHULTZ; WINFRED D. SMITH; ROBERT STODDARD and COLETTE STODDARD; NEIL WEST; LIANG XU and JIA LU DUAN,

Appellants

v.

GARY SANFORD AND JANE DOE SANFORD; PAUL BURCKHARD and MURIEL BURCKHARD; JAMES SANSBURN and JANE DOE SANSBURN; RICHARD PETER and JANE DOE PETER; SHANA HOLLEY and RICHARD HOLLEY; BRETT BACKUES and JANE DOE BACKHUES; JOSEPH CUSIMANO and JANE DOE CUSIMANO; JASON FARNSWORTH; PATRICIA HOVDA and JOHN DOE HOVDA; ALEXANDER W. PHILIP and NATALIA T. PHILIP; HUCKLEBERRY CIRCLE, LLC; LOZIER HOMES CORPORATION; DOE DECLARANT AFFILIATES 1-20; DIANE GLENN and JOHN DOE GLENN; CONSTRUCTION CONSULTANTS OF WASHINGTON, LLC,

Respondents.

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# BRIEF OF APPELLANTS



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**TABLE OF CONTENTS**

## TABLE OF AUTHORITIES

### CASES

**RULES**



**STATUTES**

**OTHER AUTHORITIES**

## I. Introduction

Eighteen condominium unit owners sued eleven former members of their condominium association's board of directors (three of whom had been appointed by the declarant), the declarant and its parent company, and a private inspector for causes of action based on their concealment of material information regarding the existence of serious construction defects in common elements, and ignoring advice of professionals to investigate signs of defects prior to expiration of warranty rights. Some defendants were motivated by the desire to avoid warranty responsibility for the project, others by the desire to sell their units before problems became widely known. Still others were simply negligent.

Plaintiffs' highly-detailed Complaint, filed in September of 2011, alleges a shocking history of misfeasance, malfeasance, and concealment by the Board members, but contains no hint that any plaintiff had reason to know of the misconduct until, at the earliest, October of 2009.

On a motion to dismiss on the pleadings, the trial court dismissed all claims on statute of limitations grounds, having concluded that all claims accrued when the Defendants resigned from the association's Board, regardless of discovery, and regardless of whether plaintiffs were on inquiry notice of the claims or not.

A similar motion brought by the final defendant, when decided by a newly-assigned judge, was denied.

## II. Assignments of Error

The trial court erred in dismissing plaintiffs' claims pursuant to defendants' CR 12(b)(6) motions for judgment on the pleadings.

## III. Statement of the Case

### A. Plaintiff's Complaint

The plaintiffs Complaint of September 7, 2011 alleges substantially as follows.

Each plaintiff is a residential unit owner at the Huckleberry Circle condominium complex ("the Project") in Issaquah, which is governed by the Huckleberry Circle Condominium Owners Association ("the Association"). Both the Project and the Association were created pursuant to the Washington Condominium Act ("WCA") at RCW 64.34 et seq. Accordingly, each plaintiff is an owner of an undivided fractional interest in all of the common elements of the Project, as well as separate owner of certain non-common elements. (CP 1-2).

Defendant Huckleberry Circle, LLC ("the LLC") was the declarant of the Project, with its sole member being defendant Lozier Homes Corporation ("Lozier"). The LLC is an alter ego of Lozier. (CP 5). The LLC and Lozier constructed the Project, which was completed in late

2000. (CP 6). The Association was created on June 29, 2000, and the first sale of a unit to a bona fide purchaser occurred on November 6, 2000. (Id.)

Defendants Sanford, Burckhard, and Sansburn ("the Developer Executives") were owners, officers and members of both the LLC and Lozier. (CP 3). All three were appointed to serve as officers on the Association's initial Board of Directors ("the Board.") (CP 3). The LLC and Lozier are vicarious liable for the acts of their agents, the Developer Executives. (CP 3). Together, the Developer Executives, the LLC and Lozier are referred to herein as "the Developers."

During construction of the Project, the Developers became aware, or should have been aware, that the Project was not designed or constructed in a manner consisted with minimum building code requirements with respect to weatherproofing, and was riddled with defective construction. (CP 6). The pervasiveness of seriously defective building envelope construction in the Puget Sound area at the time was well known to the Developers. (CP 7). In order to protect themselves from potential warranty liability under the WCA for such defective construction, the Developers took several steps. First, they prepared a "limited warranty" disclaimer for use in sale of the Project units, which were ineffective as a matter of law. Second, they developed an ostensible "maintenance" program and instructed the property manager they had

retained to hire a person whom they falsely described as a "licensed inspector" to do "periodic inspections" of the Project. (CP 7).

The actual purpose of the latter steps was to create an appearance of due diligence in inspection of the construction quality of the Project building envelopes, while in fact not undertaking the type of investigation necessary to reveal water intrusion and damage. Indeed, the recommended "maintenance" would not address the defective construction of the building envelopes, but would mask the effects of hidden defective construction of the weather barrier. (CP 7-8). The ostensibly "licensed inspector" the Developers hired had no relevant licenses; she was in fact a building industry political activist who tailored her views to meet the desires of her developer clients, and who took instruction from the Developers not to do an intrusive investigation of the Project. (CP 8).

As further protection against warranty liability, the Developers inserted a provision in the Association's declaration of condominium whereby the LLC reserved the right, *for the duration of its warranty responsibilities under the WCA*, to appoint a person "to serve as a full non-voting member of the Association Board (with all the rights and powers of a Board member except for the right to vote.)" (CP 8). The Developers included other provisions in the declaration of condominium purporting to

limit the Association's power to institute litigation against the LLC for warranty redress under the WCA. (CP 9).

Developer Executive Burkhardt resigned from the Board on May 15, 2001, having served for just under eleven months. When Burkhardt resigned, the LLC appointed defendant Holley, who was a unit purchaser, to serve on the Board, prior to transition of the Project to homeowner control, which would not occur for approximately another year. (CP 9-10).

During this latter final year of declarant control from May of 2001 to May of 2002, the Developer's chosen "licensed inspector" performed three exterior, non-intrusive "investigations," none of which revealed the serious underlying defects in the construction. (CP 9).

On May 9, 2002, the LLC held a meeting to turn control of the Board over to unit owners. Defendants Backues, Cusimano, and Peter were elected from among unit owners to the Board at that time. At the same time, the LLC appointed Developer Executive Sanford as its continuing Board member. Sanford's role was to monitor the Board's efforts to evaluate the construction quality of the Project, and dissuade it from prosecuting the Association's warranty rights. (CP 9-10).

On July 11, 2002, the Board discussed the need to have a "reserve study" performed, which would address the need to plan for capital repairs and replacements at the Project. (CP 10). Although this need was raised

in Board meetings many more times, no reserve study would be performed until October of 2003, due to Board inaction. (CP 11-15).

In August, 2012, the Board voted to retain an "experienced independent professional" consultant to participate in a "Project Walk Around" to indentify maintenance and repair items at the Project. The property manager retained by the Developers, at the Developer's suggestion, recommended the same "licensed inspector" to do that work. (CP 10). Sanford did not advise the Board that the "licensed inspector" in fact had no experience helping condominium owners identify concealed defects and damage, that she was not a licensed inspector, or that her interest was in protecting the LLC from warranty claims. (CP 11). The resulting "walk around" revealed none of the serious defects in the building envelope. (CP 11).

In early March of 2003, the Board was contacted by construction defect attorney Ken Harer, who is also a licensed architect. He advised the Board that he saw signs of potentially serious but hidden construction defects at the Project, and that the statute of limitations on the Association's warranty rights would soon expire. (CP 11).

Defendant Peter met with attorney Harer, who reiterated his concerns. Thereafter, defendant Peter emailed defendants Backues and Cusimano about the meeting, expressing concern over the fact that he,

Peter, had a conflict of interest because he worked for a Lozier affiliate. Peter suggested that Developer Executive Sanford, as a full Board member, should be advised of the meeting. (CP 11-12). Defendant Cusimano in reply noted that the Board was investigating whether to have further inspection done due to their concern about "water drainage issues in units with a roof deck." (CP 12). Within days, Peter notified the others that he intended to resign on April 3, 2003, and gave the Board the materials he received from attorney Harer. (Id.)

Instead of resigning, however, the Board had Peter "switch terms" with another member, so his slot would be open for election at the annual Association meeting at the end of May, 2003. By this means, the Board hid from homeowners the real reason for Peter leaving the Board: his conflict of interest and concerns about potential warranty claims. (CP 12).

The Board took no action on attorney Harer's advice, and did not consult him again. (CP 12).

Board meeting minutes (the records available to homeowners) contain no mention of attorney Harer's advice, defendant Peter's meeting with him, Peter's conflict of interest, the Board's roof-deck concerns, or the approaching expiration of WCA warranties. This omission was part of an effort to conceal this information from unit owners. (CP 13.)

Shortly after April 30, 2003, the Board leaned that a unit owner was complaining that her bedroom window was leaking into her unit. That information was not reported in the minutes. (CP 13).

At the May 29, 2003 annual association meeting, the Board revealed none of these facts to the assembled owners. (CP 13-14).

On August 20, 2003, the property manager contacted a noted building envelope specialist and repair contractor, Mark Jobe, to solicit bids for deck maintenance, and investigation of deck drainage problems. Jobe replied: "Yes, that is a project I am familiar with. **There appears to be a serious problem** with deck slope. Ponded water is present under the sleeper. Also while I was there I noted **the flashing above the brick veneer has been caulked closed. Closed flashing is a serious problem that generally leads to big issues. Also it is often used to mask other problems. This should be looked into**. Would be glad to assist." (CP 14) (Emphasis added). However, on learning of Mr. Jobe's concerns, the Board took no action. (Id.)

A month later, on September 22, 2003, defendant Cusimano emailed the other Board members noting a problem with "Water leaks in a unit with a deck over the den/office. This is the second deck to have water intrusion. Do we have a design flaw that needs to be addressed?" (CP 14). The Board took no action in response. (Id.)

About two weeks later, the property manager received a draft reserve study, and asked its author to inspect the elastomeric decks where leaks had been occurring. The specialist refused, noting that "We do not perform forensic investigation and have assumed that these decks were instal!ed correctly" and recommending "an envelope investigation for this property..." (CP 15). This advice was conveyed to the Board, but it took no action on it, nor did it act on the prior urgent warnings of Harer and Jobe, nor even in response to the two roof/deck leaks and window leak. (Id.) Over the next three months, the Board continued to do nothing, even when another unit owner complained of water leaking into his unit. (Id.)

In early January, 2004, Developer Executive Sanford wrote to the property manager the Developers had hired, misleadingly blaming the latest leak on a supposed lack of maintenance, and volunteering to have Lozier inspect all the roof/deck areas. (Id.)

In mid January, 2004, defendant Backues abruptly resigned from the Board. (CP 16).[1]

Near the end of January, 2004, a unit owner raised the issue of leaking roof/decks at an annual owner's meeting. The Board responded "that it was working to solve issues surrounding." (Id.) But for the next three months, the Board in fact did nothing. (CP 16).

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[1] The Complaint does not allege it, but defendant Farnsworth was apparently appointed to defendant Backues position. He served until March of 2005. (CP 18).

In mid March, 2004, another complaint of a roof/deck leak was made directly to Lozier. A Lozier employee responded to the complaint. (Id.) Sanford, meanwhile, wrote a letter to the property manager again falsely and misleadingly blaming the leak in the roof/deck on gaps in caulking in the siding and wood trim and clogged weepholes in window frames, even though he had no evidence these were the source of the leaks (and in fact he knew or should have known that there were serious envelope deficiencies). (Id.) Developer Executive Sanford offered to have the LLC do deck maintenance work at no cost, as part of an effort to allay Board concerns and discourage its prosecution of a warranty claim. (Id.) The Board accepted that offer, but did not retain an independent consultant as it had three times been advised to do. (Id.)

Instead, in May of 2004, the Board authorized the Developer to "inspect" the decks at no cost to the Association, and recoat those with coating failures. (CP 17). At Developer Executive Sanford's suggestion, the Developer-retained property manager met with the so-called "licensed inspector" to arrange those roof/deck "inspections." (Id.) The resulting "inspections" were exterior only, performed from ground level, and were not reasonably calculated to determine the actual source of leaks. (Id.) She of course failed to note the serious signs of hidden defects that Harer and Jobe had spotted. She principally recommended the use of more caulk

(which Mr. Jobe had noted would disguise and ultimately exacerbate the actual problem of hidden water intrusion), and described her recommendation as merely "general in nature." (CP 17-18).

On October 15, 2004, the Board decided to commission a "Building Envelope Inspection." The Developer-retained property manager solicited a proposal from the same "licensed inspector" who (predictably) recommended a 4-hour, non-intrusive inspection costing $500, which was not calculated to reveal the actual causes of leaks or the extent of damage, and as such would accomplish little or nothing of value. (CP 18). She performed that desultory inspection on November 2, 2004. (Id.) Ultimately, her "inspection" report of November 24, 2004 of course revealed nothing of the actual defects, and her recommendations consisted of yet more caulk and paint. (Id.)

In the meantime, on November 6, 2004, the WCA warranty on common elements expired. (Id.)

A new Board consisting of defendants Cusimano, Philip and Hovda was in place by March 21, 2005. (Id.) Developer Executive Sanford continued as Board member for the next year. (CP 19).[2]

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[2] Sanford stayed on the Board after the warranty on common elements expired, presumably because the WCA warranties on unit elements had not fully expired. Unit warranties run from the date of sale of a unit, rather than from the sale of the first unit in the project, as is generally the case for common element warranties. RCW

By the end of April, 2005, the Developer's deck recoating efforts were complete. But within six weeks, another owner complained of damage inside his den from a leaking deck. In response, and again at Developer Executive Sanford's recommendation, the Board again hired the same "licensed inspector" to inspect the Developer's deck recoating work. (CP 18). She of course failed to identify the source of leaks, and predictably recommended more caulk. (CP 19).

Through the summer of 2005 to mid January of 2006, the Board received more complaints of leaking windows, doors, and decks. The Board did not retain a specialist to perform an intrusive inspection as it had repeatedly been advised to do. (CP 19).

In February of 2006, the Board requested the property manager to solicit proposals for recaulking all the windows and doors on the south and west exposures of buildings. This was described in Board minutes as "a preventative measure against future water leaks." (Id.)

By March 24, 2006, Developer Executive Sanford resigned from the Board. (Id.)

None of the material information described in the Complaint was conveyed to homeowners via meeting minutes. (CP 419-420).

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64.34.452(2)(a). Presumably Sanford could have resigned earlier had all of the warranties expired along with the warranties on the common elements.

From February of 2006 through November of 2006, the Board received complaints of more leaks into unit interiors, including in the homes of Board members Philip and Cusimano. Nevertheless, the Board continued to conceal the severity of the problem from the homeowners at large, and characterized the proposed caulking work as a "preventative measure" rather than a response to known leaks. (CP 19-20).

Defendant Philip was attempting to sell his unit, and the other Board members agreed to conceal the scope of the problem so as to retain property values at the Project. (CP 20). On June 27, 2006, Cusimano resigned from the Board because he was moving. (Id.) On July 20, 2006, Philip, too, resigned from the Board because he was moving. (Id.)[3]

On December 29, 2006, the Project property manager was advised that a contractor "has found the mother lode of dry rot at Huckleberry Circle." (CP 20). In the months that followed, the Board received more leak complaints, but took no systematic action to address the problem. Instead, they continued to conceal the scope of the complaints and the level of their concern from unit owners at large, and negligently continued to believe that Lozier or the LLC still had warranty responsibility for the Project. (CP 20).

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[3] The Complaint does not specifically allege it, but the evidence will disclose that in fact Cusimano and Philip had sold their units, according to their plan.

In July of 2008, the Board finally approved an intrusive building envelope investigation by a competent engineering firm and an architectural firm. The firms advised the Board that they thought the situation would prove very serious and expensive. The Board panicked over the possible effect of this news on property values at the Project. It misleadingly told the unit owners that the investigation was "pertaining to future building maintenance and repair issues," with no mention of the evidence of serious, present construction defects requiring immediate correction. (CP 20-21). Indeed, defendant Peter asked by email that the Board actually be kept ignorant of the specialists' findings, so as not to impair marketability of the units! (CP 21). The Board agreed, and did not tell the unit owners that it had decided to deliberately ignore the results of what was in fact a construction defect investigation. (Id.)

On February 24, 2009, the Board received a legal opinion from construction defect attorneys Goff & DeWalt that the limitations period on the common element warranties had expired. The Board did not advise the unit owners of this fact, either. (Id.)

On March 23, 2009, the architect issued a preliminary draft report which noted that "**every major component of the building envelope** is suffering from **poor or deficient construction and waterproofing detailing throughout**, resulting in varying degrees of failure around the

property...the pace of intrusion and related damage will continue and accelerate until comprehensive and proper repairs are made to the building envelope." (Id., Emphasis added.) The report's findings were not shared by the Board with unit owners. (Id.)

At an October 27, 2009 Association meeting, homeowners presented questions about the details of possible water intrusion repairs. The Board replied that the answers were "not known." (CP 22). The Board retained an attorney to sue the LLC for failing to repair 22 decks at the Project, but instructed him not to answer unit owner questions about the claims being asserted. (Id.)[4]

In March of 2011, the Board received a *partial* estimate of repair costs totaling about $2.4 million. In May the Board imposed a $2.5 million special assessment on unit owners, including plaintiffs. The Complaint alleges that future special assessments will be levied for repair costs totaling about $3 million. (Id.)

The plaintiffs sued all of the defendants for breach of their duties of care as Board members in failing to act reasonably to evaluate the construction of the Project, failing to heed the advice of attorneys and construction professionals to inspect, failing to respond to known complaints, failing to retain legal counsel and relevant professionals,

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[4] This action was filed within 2 years of that meeting.

failing to institute timely repairs, failing to advise plaintiffs of material information, deliberately remaining ignorant of construction defects in order to serve their own personal interests, and failing timely to commence a warranty action or other claim. (CP 23-24).

The plaintiffs sued the LLC and Lozier for negligence in that, having undertaken between the Spring of 2004 and the Spring of 2005 to inspect, repair, and report on the condition of the Project, they failed to exercise due care in that undertaking. (CP 24).

The plaintiffs sued the Developers for breach of the Consumer Protection Act, alleging that their actions were unfair or deceptive acts in trade or commerce with an impact on the public interest under RCW 19.86 et seq. (CP 24-25).

The plaintiffs sued the Developers for negligent misrepresentation in failing to disclose what they knew about construction defects at the Project, failing to disclose what they learned about the defects, and failing to procure additional information as they represented they would do, and in reasonable response to what they knew. (CP 25-26).

The plaintiffs sued the Developers and defendant Peter for fraud by omission and misrepresentation for failing to disclose the existence of defects, the advice of counsel to prosecute a warranty claim, the actual

purpose of the "maintenance" program, and the "licensed inspector's" lack of qualifications and conflict of interest. (CP 26-27).

The plaintiffs sued the LLC, Lozier, and Sanford for civil conspiracy in agreeing to work toward causing the Association to lose its warranty rights by breaching their fiduciary duties, fraudulently concealing the existence of defects, pretending to do a comprehensive investigation and repairs with knowledge that what was done and proposed was inadequate, misrepresenting the nature and cause of leaks, and placing Developer Executive Sanford on the Board, etc. (CP 29).

**B. CR 12(b)(6) Motion by Developer Executives and Lozier**

On December 22, 2011, the Developer Executives and Lozier filed a motion to dismiss pursuant to CR 12(b)(6).[5] (CR 77-95). They contended that because the Developer Executives had resigned from the Board no later than March 24, 2006, all claims against them accrued by that time. They contended that none of the claims had a limitations period longer than four years, so all were time-barred because the plaintiffs filed suit on September 7, 2011. (CP 78, 86-88).

Alternatively, Developer Executive Sansburn contended that because plaintiffs all purchased after he had resigned, he owed them no duties of care. Developer Executive Sanford similarly argued that he had

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[5] Lozier allowed a default to be taken against its wholly-owned subsidiary, the declarant LLC. (CP 352-54).

resigned before half of the plaintiffs purchased their units, so he owed the later-purchasing plaintiffs no duties. (CP 78-79, 92-94).

With respect to negligence claims, Developers asserted that there is no cause of action for "negligent construction," that the concealment claims are governed by the two year injury limitations period for injury to real property, and that plaintiffs discovered their causes of action as a matter of law by virtue of knowledge of the corrupt Board and property manager (as plaintiffs' supposed "agents"), or should have discovered them from a due diligence inquiry. (CP 88-90).

With respect to the CPA, civil conspiracy, fraud and misrepresentation claims, the Developer Executives and Lozier similarly argued either that all claims accrued when they resigned from the Board, or that knowledge of some leaks on the part of plaintiffs' "agents" (to wit, the Board members who deliberately deceived the rest of the owners, and the Developer-hired property manager) should be imputed to the plaintiffs so as to constitute "inquiry notice," and begin the running of the limitations period. (CP 91-93).

Finally, the Developer Executives objected to inclusion of their wives as parties defendant. (CP 94).

Plaintiffs responded that fraud and misrepresentation by omission, breach of director's duty, negligent misrepresentation, violation of the

CPA, and negligence are all subject to accrual upon discovery of all elements of such claims, especially where the defendants are alleged to have concealed the basis for the claims. (CP 182-3, 187-191).

Plaintiffs argued further that the alleged facts show that plaintiffs could not reasonably have learned of all the elements of their claims in time to sue within the applicable limitations period following the Developer Executives' resignations. (CP 187-89).

Plaintiffs contended that the Developers, having undertaken to inspect, report, and repair, had an independent duty to do so with due care, to which the discovery rule also applies. (CP 189-190).

Plaintiffs pointed out that the Developers' duties as Board members ran to future owners of units as statutorily protected persons under the WCA, who would foreseeably be injured by the Developers' misconduct. (CP 192-196).

Finally, plaintiffs argued that joinder of Developer Executives' spouses was appropriate to establish community liability. (CP 196-7).

**C. CR 12(b)(6) Motion by Defendant Cusimano**

Defendant Cusimano joined the Developers' Motion, noting that he had resigned more than two years before the filing of suit (that is, in June of 2006), and requesting dismissal on the same grounds as the Developer Executives. (CP 201-203).

**D. CR 12(b)(6) Motions by Unit Owner Board Member Defendants**

The trial court granted the Developers' and Cusimano's motions, concluding in a memorandum opinion that all claims accrued against them when each resigned from the Board, and that they could not have been engaged in any "continuing fraud or omission." (CP 278-80, 281-283).

Thereafter, the remaining defendants filed similar motions pursuant to CR 12(b)(6). (CP 376-84, 385-87, 388-98).

Plaintiffs opposed those motions, relying on its prior arguments, and noting also the analogous rule of tolling in cases of "adverse domination" of a board by corrupt members. (CP 835-840).

The motions were all granted. (CP 860-65).

**E. Motion for Award of Attorney Fees**

Developer Defendants moved for an award of attorney fees, alleging that the Complaint was frivolous. (CP 361-73).

In opposition, Plaintiffs filed extensive documentary evidence establishing the factual basis of many of the core allegation of the Complaint. (CP 399-817).

The motion for fees was denied. (CP 855-56).

**F. CR 12(b)(6) Motion by the "Licensed Inspector"**

The "licensed inspector" then moved for dismissal pursuant to CR 12(b)(6). The inspector argued, among other things, that claims for against her accrued when she last had contact with the Association, or last performed an inspection for it. She argued that like the other defendants, her last opportunity to commit any fraud, negligence, or misrepresentation was more than 6 years before the filing of the Complaint, so she, like them, could not have been engaged in any continuing fraud or omission. She further argued that as a matter of law, the exercise of due diligence in investigating other homeowners' complaints would have disclosed to plaintiffs their causes of action against her. (CP 868-883).

The plaintiffs opposed the motion, among other things arguing that the discovery rule tolled the limitations period as to the inspector's misconduct. In this regard, plaintiffs made the same arguments they had made previously. (CP 884-904).

This time the trial court (a new judge having been appointed) *denied* the motion to dismiss. (CP 911-913). A request for reconsideration was briefed by both sides, and also denied. (CP 914-25, 931-38, 945-50, 951-54).

## IV. Argument

### A. Decisional Standard

On a motion to dismiss under CR 12(b)(6) the court presumes that all facts alleged in the plaintiff's complaint are true, even hypothetical facts. *Kinney v. Cook*, 159 Wn.2d 837, 842, 154 P.3d 206 (2007). Such dismissals are disfavored, and warranted only if the court concludes, beyond a reasonable doubt, that the plaintiff cannot prove *any* state of facts justifying recovery. *West v. Wash. Ass'n of County Officials*, 162 Wn.App. 120, 128, 252 P.3d 406 (2011). The "cases have so narrowed the function of a CR 12(b)(6) motion that it has been concluded that CR 12(b)(6) motions should be granted "sparingly and with care." *Orwick v. Seattle,* 103 Wn.2d 249, 245-255 (1984).

This court engages in de novo review of the trial court's determination of the CR 12(b)(6) motions. *Gorman v. City of Woodinville*, 175 Wn.2d 68, 71, 283 P.2d 1082 (2012).

**B. The Discovery Rule Applies to Claims for Breach of Board Member Fiduciary and Due Care Duties, Fraud and Misrepresentation, Negligent Misrepresentation By Omission, and Violation of the Consumer Protection Act, Irrespective Of When a Member Resigns.**

**1. Nature of Duties Owed By Defendants**

Under RCW 64.34.308(1), the Developer Executives as board members were "required to exercise...the degree of care required of fiduciaries of the unit owners..." Under the same provision, Cusimano, Peter, Backues, Hovda, and Philip ("the Owner Defendants") as board

members had a duty to exercise "ordinary and reasonable care." The responsibility of a condominium association board includes the power to act in all instances on behalf of the association. Id. An association's responsibility, which the Board was charged with fulfilling, includes maintenance, repair and replacement of common elements, and instituting litigation on behalf of itself or two or members on matters affecting the condominium. RCW 64.34.304.

Accordingly, as Board members, the Developer Executives and Owner Defendants had either a fiduciary duty (in the case of the former), or at a minimum a special relationship of trust and confidence (in the case of the latter) which justified plaintiffs' reliance on the Board to discharge its statutory responsibilities with integrity and diligence.

The Developer Executives and the Owner Defendants had a duty of reasonable care to disclose to owners the material facts. Insofar as the Developer Executives had knowledge of defective construction, they were duty-bound to disclose that as well.

These duties of disclosure arose in the context of a fiduciary and/or special relationship of trust and confidence because (1) the defendants were entrusted with care of the property, (2) the material facts were peculiarly within the defendants' knowledge, and (3) those facts could not be readily obtained by plaintiffs – because the Board failed to report them

in its minutes, and misled owners about its actual conduct. *Favors v. Matzke*, 53 Wn.App. 789, 796, 770 P.2d 686 (1989).

Concealment of material facts in the face of a duty to disclose will support both negligent misrepresentation claims, *Colonial Imps. Inc., v. Carlton Nw., Inc.,* 121 Wn.2d 726, 731, 853 P.2d 913 (1993), and fraud claims, *Tokarz v. Frontier Fed. Sav. & Loan Ass'n,* 33 Wn. App. 456, 459, 656 P.2d 1089 (1982).

Moreover, such misrepresentations and fraud, as well as the defendants' obstinate failure to act, are both a breach of the Developer Executives' fiduciary duty to unit owners, and a breach of the Owner Defendants' duties of due care as Board members.

**2. The Discovery Rule Applies to All Causes of Action Alleged.**

Limitations periods on such claims do not begin to run until the cause of action accrues. *Janicki Logging & Const. Co., Inc. v. Schwabe, Williamson & Wyatt, P.C.,* 109 Wn.App. 655, 659, 37 P.3d 309 (2001). Under Washington's discovery rule, a cause of action does not accrue until a plaintiff knows, or in the exercise of reasonable diligence should know, *all* of the essential elements of the cause of action. *Green v. A.P.C.*, 136 Wn.2d 87, 95, 960 P.2d 912 (1998).

This discovery rule applies to claims for breaches of fiduciary duty. *Douglass v. Stanger*, 101 Wn.App. 243, 256, 2 P.3d 243 (2000).

The discovery rule also applies, by statute, to claims for fraud or misrepresentation by omission. RCW 4.86.080(4), *Young v. Savidge*, 155 Wn.App. 806, 823, 230 P.3d 222 (2010).

The discovery rule also applies to claims for negligent misrepresentation. *First. Md. Leasecorp v. Rothstein*, 72 Wn.App. 278, 286, 864 P.2d 17 (1993) (The discovery rule's "principles of accrual are the same whether negligent misrepresentation or fraudulent misrepresentations are at issue...")

Obviously, the rule applies to simple common law negligence claims, such as a board member's breach of duty of care. *In re Estates of Hibbard*, 118 Wn.2d 737, 752, 826 P.2d 690 (1992).

Finally, the discovery rule applies to claims for breach of the Consumer Protection Act. *Mayer v. Sto Indus. Inc.*, 123 Wn. App. 443, 463, 98 P.3d 116 (2004), *affirmed in part, reversed in part on other grounds*, 156 Wn.2d 677, 132 P.3d 115 (2006).

In an effort to defeat application of the discovery rule, defendants make two arguments. First is a bright-line argument wherein the former board members claim that all causes of action accrued against them, at the latest, when they resigned from the Board. The second argument is that

the allegations of the Complaint establish sufficient knowledge on the part of plaintiffs to put them inquiry notice sufficient to preclude reliance on the discovery rule as a matter of law. The trial court accepted the first argument, and did not reach the second. (CP 280).

As demonstrated below, the proposed bright-line rule is not supported by applicable law, and would amount to a special license to corporate directors to commit fraud, if they do so particularly well. The trial court's insistence that the limitations period on all claims commenced on resignation from the Board, absent some "continuing fraud or omission" by the defendants (CP 280) is flatly contrary to law.

As further demonstrated below, the due diligence argument fails because there is no allegation that the plaintiffs had knowledge of any of the material facts. Even if they were shown to have had such knowledge, whether it was sufficient to create "inquiry notice" and prevent tolling of the limitation periods is ordinarily a question of fact for the jury, not amenable to determination on a CR 12(b)(6) motion. Nor is there any basis on which to impute knowledge of the half-dozen or so homeowners (out of 60) who experienced leaks to plaintiffs. Finally, there is no basis in law to impute knowledge of the Developer-retained property manager or the corrupt owner Board to the plaintiffs, where the plain allegations of

the Complaint are that both *in fact* did not communicate information they were duty-bound to relay.

**3. The Resignation of Developer Executives and Owner Defendants from the Association's Board of Directors Is Not the Legal Equivalent of Plaintiffs Having Discovered the Elements of Their Causes of Action, and the Law Does Not Require a Showing of a "Continuing Fraud or Omission" to Invoke the Discovery Rule.**

The Developer Executives contended below that "a claim against a fiduciary such as a board member accrues as a matter of law, at the latest and regardless of discovery, at the time that fiduciary resigns his or her position." (CP 87). The trial court accepted that proposition. The Developer Executives cited *Quinn v. Connely,* 63 Wn.App. 733, 741, 821 P.2d 1256 (1992) and *Gillespie v. Seattle First Nat'l Bank*, 70 Wn.App. 150, 158-59, 855 P.2d 680 (1993). Neither case is apposite.

*Quinn* involved a claim of attorney malpractice during a criminal trial. The court adhered to the rule that "'"in a case based upon malpractice occurring during trial, ...upon entry of the judgment, a client, as a matter of law, possesses knowledge of all the facts which may give rise to his or her cause of action for negligent representation."'" 63 Wn. App. at 736 (quoting *Richardson v. Denend*, 59 Wn. App. 92, 96-97, *review denied*, 116 Wn.2d 1005 (1991)). Malpractice *at trial* and resulting injury is in many ways uniquely apparent to the client: "Unlike the situation with the provision of other professional services...the damages, if any, resulting

from the error or omissions of an attorney allegedly occurring during the course of litigation are embodied in the judgment of the court..." 63 Wn. App. at 737 (quoting *Richardson*, 59 Wn.App. at 95-97).

In *Quinn*, the plaintiff knew full well that his attorney had failed him the moment the verdict was read. He was present at the trial to witness all the conduct that constituted the claimed malpractice. Here, in contrast, the plaintiffs had no reason to know that they would be responsible for a massive special assessment, that the Board had failed to heed the advice of professionals, that the Project was riddled with concealed defects known to the Developer Executives, that the inspections by the "licensed inspector" had been a sham, or that they were deliberately deceived by the Defendants. *Quinn* is a rule of particular circumstances that simply does not apply here.

*Gillespie* is likewise a narrow rule applicable to claims by beneficiaries of an express testamentary trust. There, plaintiffs were beneficiaries of an express testamentary trust containing a fractional interest in three commercial properties, with the defendant bank acting as trustee. As to the remaining fractional interests in the properties, *some* plaintiffs were beneficiaries of a property management agreement by the same bank. 70 Wn.App. at 153-54 and FN 1 and 2. Both relationships were thus fiduciary in nature, but the first – the express trust – was

governed by RCW 11.98 et seq., while the latter was governed by the common law. 70 Wn.App. at 161. Developer Executives studiously ignore this key point.

The *Gillespie* plaintiffs proved at trial that the bank had breached its duties by negligently recommending a highly-leveraged exchange of one trust property for a poorly-performing commercial property, by concealing that the new property had been operating at a loss, and by negligently managing the new property. 70 Wn.App. at 156-57.

On appeal, the bank contended that the breach of fiduciary duty and trust violation claims were untimely. The bank's first argument was that under RCW 11.98.060, which applied to the express trust, a cause of action must be brought within three years of the *earlier* of the time the breach was or reasonably should have been discovered, *or* the time of termination of the express trust. The bank maintained that the express trust by its terms had "terminated" with the death of the trustor, more than three years before suit was filed. 70 Wn.App. 158. The court held that "termination" of the express trust was undefined in the statute, and applied the common law rule that the termination occurred when the bank completed its work as trustee, which was much later than the death of the trustee. The claim was thus timely under the second prong of RCW 11.96.060. 70 Wn.App. 165-66.

*Gillespie* tells us when an express trust terminates for purposes of applying a narrow limitations rule. It adopts no general rule that claims against board members accrue upon their resignation from a board. The portion of the case Defendants relied on deals only with the statutory limitations period for claims for a trustee's breach of an express trust, which would ordinarily involve an accounting on termination. Defendants' obligations to the plaintiffs do not arise out of an "express trust" governed by RCW 11.98.[6] Rather, the Developer Executives' and Owner Defendants' duties arose from the WCA and their position of trust and confidence. RCW 64.34.308(1). This is not an "express trust": they did not hold title to any trust property for the benefit of anyone else. Nor did they have the many powers enumerated for trustees under RCW 11.98.070. Thus the Washington Trust Act's statutory limitation period, and the *Gillespie* court's understanding of that rule, simply do not apply here.

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[6] The Washington Trust Act applies to "express trusts executed by the trustor," and essentially nothing else. An "express trust" is defined in Washington as "a fiduciary relationship with respect to property, subjecting the person by whom the title to property is held to equitable duties to deal with the property for the benefit of another person, which arises as a result of a manifestation of an intention to create it." *In re Marriage of Lutz*, 74 Wn. App. 356, 365, 873 P.2d 566 (1994).

In addition to stating that it applies to express trusts executed by the trustor, the Act specifically excludes "resulting trusts, constructive trusts, business trusts where certificates of beneficial interest are issued to the beneficiary, investment trusts, voting trusts, trusts in the nature of mortgages or pledges, liquidation trusts, or trusts for the sole purpose of paying dividends, interest, interest coupons, salaries, wages, pensions or profits, trusts created in deposits in any financial institution pursuant to chapter 30.22 RCW..." RCW 11.98.060.

In short, Defendants' entire argument that the claim for their breaches accrued when they resigned, regardless of discovery, is utterly without supporting authority.

**4. There Is No Legal or Alleged Factual Basis to Impute Knowledge of Defects and Misrepresentations to the Plaintiffs, and Even if there Were, the Issue of "Inquiry Notice" is a Fact Question for the Jury.**

The discovery rule is not available to a plaintiff who knows enough facts to put him on "inquiry notice," such that a reasonable investigation would have disclosed all of the elements of his claim. See., e.g., *1000 Virginia Ltd. P'ship v. Vertecs*, 158 Wn.2d 566, 581, 146 P.3d 423 (2006); *Green, supra,* 136 Wn.2d at 96.

Here, there is no allegation in the Complaint that plaintiffs had any knowledge of any of the material facts. There is no allegation they knew of the existence of defects that Developer Executives knew about, or that some homeowners had complained of water intrusion, or about the specific warnings the Board had received that there were signs (visible to the trained eye from the exterior) of serious building envelope defects (and efforts to mask them through the misuse of caulk), or that the Board had twice received advice from separate sources to conduct a building envelope inspection and prosecute the Association's warranty rights before they expired, or of the Owner Defendants' self-serving efforts to

conceal knowledge of defects in order to sell their units, or the conflict of interest under which at least two Board members served, or that the true reason for Peter's resignation from the Board was his discomfort at the prospect of calling his employer to account for warranty violations.

On the contrary, the Complaint specifically alleges that this material information was deliberately and systematically suppressed by the defendants. These allegations must be taken as proved. The question of due diligence in discovery of a claim is ordinarily for the jury unless reasonable minds could reach only one conclusion. *Goodman v. Goodman*, 128 Wn.2d 366, 373, 907 P.2d 290 (1995); *Burns v. McClinton*, 135 Wn. App. 285, 300, 143 P.3d 630 (2006), review denied, 161 Wn.2d 1005 (2007); *Samuelson v. Community College Dist. No. 2*, 75 Wn.App. 340, 347, 877 P.2d 734 (1994). Plainly, then, dismissal on a CR 12(b)(6) motion concluding that discovery indisputably occurred would have been improper.[7]

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[7] Because it is likely to come up on remand, the court should note and perhaps comment on the fact that Washington case law as to who bears the burden of proving that the facts constituting the cause of action probably could or could not have been discovered in time is in a state of disarray. According to the Court of Appeals, Division 1, "The plaintiff bears the burden of proving that the necessary facts could not be discovered in time." *Burns, supra,* 135 Wn.App. at 299-300. In giving this formulation of the burden of proof, the *Burns* court cited to *Douglass*, *supra,* 101 Wn. App. at 256, which in turn relied on *Interlake Porsche + Audi, Inc. v. Bucholz,* 45 Wn.App. 502, 518, 728 P.2d 597 (1986), which in turn relied on *Bay City Lumber Co. v. Anderson*, 8 Wn.2d 191, 111 P.2d 771 (1941).

The *Bay City Lumber* court, however, was not addressing the question of due diligence or the discovery rule, which was not adopted as a general matter in Washington

until much later. Rather, it was considering whether to apply the statutory rule that accrual in cases of fraud requires discovery of the facts constituting the fraud under Rem. Rev. Stat. § 159, subd. 4. The court noted at page 209 that

> The case of *Reeves v. Davis & Co.*, 164 Wash. 287, 2 P.2d 732 [(1931)], discusses at some length the statute hereinbefore referred to, and the rule relative to the burden of proof in such cases. It is there stated that it is necessary, in order to state a cause of action, that the time of the discovery of the fraud be alleged; that it necessarily follows that it is incumbent upon the plaintiff to prove that allegation in order to make out a case; and that the same reason exists for placing upon the plaintiff the burden of showing the time when he discovered the fraud, in a case where a fiduciary relation exists, as it does in any other case.

Thus, the placing of the burden of proof on due diligence in discovering a cause of action as articulated in 2006 by Division 1 is not based on the general discovery rule, but instead is based on a misapplication of an outdated rule of pleading that predates the civil rules, and at most applies only in cases of fraud.

A formula imposing the burden of proving diligence on plaintiff in every claims for negligence or breach of fiduciary duty, however, is not an accurate statement of the general rule. According to *Mayer v. City of Seattle*, 102 Wn. App. 66, 76, 10 P.3d 408 (2000), and the Supreme Court, when the question with respect to diligence and discovery is when the plaintiff suffered an "appreciable harm," (that is, a harm that plaintiff could or should have been aware of) the burden of proof rests with the *defense*. Thus, in 2000 Division 1 wrote that

> In cases where a delay occurs between the injury and the plaintiff's discovery of it, the court may apply the discovery rule. *Crisman*, 85 Wn. App. at 20. The discovery rule will postpone the running of a statute of limitations until the time when a plaintiff, through the exercise of due diligence, should have discovered the basis for the cause of action. *Allen v. State*, 118 Wn.2d 753, 758, 826 P.2d 200 (1992). Once the plaintiff has notice of facts sufficient to prompt a person of average prudence to inquire into the presence of an injury, he or she is deemed to have notice of all facts that reasonable inquiry would disclose. *Vigil v. Spokane County*, 42 Wn. App. 796, 800, 714 P.2d 692 (1986). **Whether the plaintiff has exercised due diligence under the discovery rule is a question of fact.** *Pepper v. J.J. Welcome Constr. Co.*, 73 Wn. App. 523, 539, 871 P.2d 601 (1994)**. Because the statute of limitations is an affirmative defense, the burden is on the defendant to prove those facts that establish the defense.** *Haslund*, 86 Wn.2d at 620-21.

In *Haslund v. Seattle*, 86 Wn.2d 607, 620-21, 547 P.2d 1221 (1976), the Supreme Court noted that "**The determination of the time at which a plaintiff suffered actual and appreciable damage is a question of fact. Since the statute of limitations is an affirmative defense, CR 8(c), the burden was on appellant to prove those facts which established the defense.**"

Defendants make two contrary arguments, however. First, they argue that the plaintiffs should be presumed to know what the property manager and the corrupt board members knew, because they were plaintiffs' "agents." Second, they argue that plaintiffs may not rely on the later acts of co-conspirators to extend the limitations period once they resigned from the Board. Both arguments are specious.

**- Imputation of Knowledge to Plaintiffs Would Be Improper.**

The rule imputing an agent's knowledge to the principal is founded on a presumption that an agent can ordinarily be expected to do his duty. *Paulson v. Mont. Life Ins. Co.*, 181 Wash. 526, 536, 43 P.2d 971 (1935). But such a

> presumption is not conclusive. "Presumptions are the 'bats of the law, flitting in the twilight but disappearing in the sunshine of actual facts.' *Mockowik v. Kansas City, St. [Joseph] & [Council Bluffs] R.R.*, 196 Mo. 550, 94 S.W. 256, 262 (1906). The sole purpose of a presumption is to establish which party has the burden of going forward with evidence on an issue." *In re Indian Trail Trunk Sewer Sys.*, 35 Wn. App. 840, 843, 670 P.2d 675 (1983) (internal quotation mark omitted).

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Moreover, in *Green, supra,* 136 Wn.2d at 98-99 (1998), while not discussing the burden of persuasion on diligent inquiry, the Supreme Court noted that when the question is whether a plaintiff *should have known* of an injury, on summary judgment the defendant manufacturer "had to show there is no issue of material fact with regard to what [the plaintiff] should have known" and produce evidence on which the court could reach the conclusion that there was only one reasonable conclusion about what she should have known. To act on any other basis than actual evidence leaves the trial court in an "evidentiary void" such that summary dismissal on the basis of mere argument of counsel was error."

*Neuson v. Macy's Dep't Stores, Inc.*, 160 Wn.App. 786, 794, 249 P.3d 1054 (2011).

> Once there is contrary evidence, the presumption disappears. . . .To continue [then] to apply the presumption is "but to play with shadows and reject substance.".

*Sch. Dists.' Alliance for Adequate Funding of Special Educ. v. State*, 170 Wn.2d 599, 619-620, 244 P.3d 1 (2010) (Sanders, J., dissenting. Citations omitted.)

Here, the property manager and the Board did not convey any of the material information to the plaintiffs, but instead concealed it out of self-interest or conflicts of interest. In this setting, it would be improper to impute such knowledge to the plaintiffs because the presumption of imputed agent knowledge "will not prevail . . . as where the agent, though nominally acting as such, is in reality acting in his own or another's interest, and adversely to that of his principal." *Lowman v. Guie,* 130 Wash. 606, 611, 228 P. 845 (1924). See also *Lewis v. Bertero*, 198 Wash. 296, 309-310, 88 P,2d 433 (1939) and *State v. Jackson*, 112 Wn.2d 867, 873-74, 774 P.2d 1211 (1989).

Moreover, defendants fail to show that disclosure of the material facts known to the defendant Board members to homeowners, contrary to apparent instructions from the Board, was even a duty within the scope of the property managers' agency in the first place.

**- The Limitations Periods Were Tolled By Developer Executives' Own Fraud and Misrepresentation, And Developer Executives May Not in Equity Count On Co-Conspirators to End the Conspiracy of Silence.**

The Developer Executives' second argument, advanced on rebuttal, is that concealment of material facts by the Owner Defendants does not extend the limitations period for claims against the Developer Executives themselves, the latter having already resigned. Developer Executives cited to *United States v. Read,* 658 F.2d 1225, 1233 (7th Cir., 1991) (discussing *Hyde v. United States,* 225 U.S. 347, 369 (1912)) on the on hand, and *Barker v. American Mobil Power Corp.*, 64 F.3d 1397, 1402 (9th Cir. 1995) and a footnote in *Griffin v. McNiff*, 744 F.Supp. 1237 (S.D.N.Y. 1990) on the other.

*Read* and *Hyde* were cited for the proposition that Developer Executives' withdrawal from the conspiracy renders them immune from liability for the acts of other board members. *Barker* and *Griffin* were cited for the proposition that concealment by successor fiduciaries does not toll the limitations period as to claims against resigned fiduciaries. (CP 243-45).

A moment's consideration, and consultation of the cited authorities, reveals the Developer Executives' argument to be mere sophistry.

First, the Complaint alleges that the Developer Executives concealed information uniquely known to them, and not known to the other Owner Defendants – for example, that the Project was in fact riddled with defects, and that the "licensed inspector" they recommended was nothing of the sort. Insofar as the subsequent Boards did not know those material facts until shortly before the Complaint was filed, it is the Developer Executives' **own** fraud and misrepresentations that toll the statutes of limitation until reasonable discovery by plaintiffs. Later Board members (including Developer Executive Sanford) chose to conceal advice they had received, conceal the occurrence of half dozen or so similar leaks, and then others decided to remain willfully ignorant of later intrusive investigation findings after the warranty period had expired. All of this serves to explain why discovery of the Developer Executives' wrongdoing by plaintiffs was not reasonably possible, so that the limitations period **remained tolled**.[8]

Second, the authorities cited by the Executive Defendants in this connection do not even remotely support their argument. *Read* addresses the burden of production and proof where a defendant, charged with criminal conspiracy under federal law, contends that he withdrew from the conspiracy more than five years before the indictment, so as to make the

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[8] Of course, at the same time these facts also establish liability on the part of Sanford and the Owner Defendants, and tolling of claims against them.

prosecution untimely. The *Read* holding is that the burden of producing evidence of withdrawal rests on the defendant; when that burden of production is met, the government has the burden of disproving withdrawal beyond a reasonable doubt. 685 at 1236. The case in short has nothing whatsoever to do with tolling or accrual of claims against a board member for negligence, breach of fiduciary duty, civil fraud, negligent misrepresentation, and violation of consumer protection statutes.

In a lengthy and scholarly discussion of the existing precedents on the issue, including the seminal Supreme Court case of *Hyde*, the *Read* court explained that the *Hyde* decision signaled a new conceptualization of a criminal conspiracy as a continuous offense, such that the defense of

> [w]ithdrawal, the Court held, "requires affirmative action, but certainly that is no hardship. Having joined in an unlawful scheme...to be continuous until full fruition be secured, until he does some act to disavow or defeat the purpose he is in no situation to claim the delay of the law." . . . . "As the offense has not been terminated or accomplished he is still offending."

685 F.2d at 1234, quoting *Hyde*, 32 S.Ct. at 803. Interestingly, the court noted precedents establishing that a defendant's mere severing of relations with a company involved in a conspiracy was either not even evidence of withdrawal at all, or at most raises a jury issue on the question. Id. at 1235.

To the extent that *Read* or *Hyde* have any relevance here, it is this: merely resigning from a board does not establish a withdrawal from a

conspiracy, nor does it in any way absolve the defendant from the consequences of concealing his wrongdoing; the law presumes that the conspiracy and concealment will continue. Moreover, Developer Executive Sanford in fact *stayed* on the Board until his goal of diverting the Association from prosecuting its warranty rights in a timely way was *accomplished!*

Developer Executives' reliance on *Barker* and similar law is also very hard to fathom. In *Barker*, plaintiff employees sued three ERISA plan trustees for breach of fiduciary duty in allowing their retirement plan to be gutted by their employer. ERISA contains a limitations period on such claims of 6 years in cases of fraud or concealment. On *summary judgment*, the trial court found no *evidence* that two of the three trustees engaged in fraud or concealment, and dismissed claims against them. The appellate court agreed. The plaintiff, however, argued that a showing of fraud and concealment by the third, later trustee should toll claims against the earlier two. The court rejected this argument, noting that fraudulent concealment by one defendant does not toll claims against another defendant.

*Barker* has no application to our facts. Here, the Complaint specifically alleges that each of the defendants concealed material facts while they served on the Board. That is taken as established. There is

simply no question of ascribing to them the consequences of any later concealment of other material facts by others, as was at issue in *Barker*. And, having done nothing to reveal what they knew, the defendants are in no position to claim that concealment of other facts by later Board members excuses their conduct.[9]

Defendants' entire argument boils down to this: that Board members should not be subject to the usual discovery rule of tolling, and are uniquely privileged to escape liability if they can commit fraud or misrepresentation particularly well, so that it is not discovered by those they injure until some years have passed after they have stepped down from a Board. Defendants can offer no valid reason in law or public policy in support of this special dispensation to corporate directors.

### C. The Defendants' Duties of Due Care and Disclosure As Board Members Were Owed to Foreseeable Purchasers of Condominium Units, Including Some of the Plaintiffs.

Defendants claim, without citation to relevant authority, that they owed no duty to anyone who was not a unit owner while defendants

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[9] *Griffin,* 744 F.Supp. at 1356 n. 20, involved allegations of fraud against various participants in an oil and gas partnership scheme that had been set up as a tax shelter. The court found on a motion on the pleadings to dismiss that, by alleging that one defendant should have been on notice that further investigation into the partnerships was appropriate because of Price Waterhouse's withdrawal of its tax opinions, so too the plaintiffs were placed on inquiry notice by the same event so as to prevent application of the discovery rule. As to other events for which there was no knowledge shown by the allegations of the complaint, the motion to dismiss was denied. The court's footnoted discussion of tolling by virtue of fraudulent concealment by another defendant is cursory at best, and merely *dicta*.

served as Board members. That contention is nonsensical, unsupported by law, contrary to public policy, leads to absurd results, and amounts to an attempt to import concepts of privity into the tort law.

First, it was the very fact that the defendants Board members concealed the material facts which led, ineluctably and predictably, to some of the plaintiffs purchasing at the Project, with no idea what they were in for. Had the defendants performed their duties, the later purchasing plaintiffs would not have been injured.[10]

The existence and scope of a duty is often a question for the court.

> To decide if the law imposes a duty of care, and to determine the duty's measure and scope, we weigh "considerations of 'logic, common sense, justice, policy, and precedent.'" *Snyder v. Med. Serv. Corp. of E. Wash.*, 145 Wn.2d 233, 243, 35 P.3d 1158 (2001) (internal quotation marks omitted) (quoting *Lords v. N. Auto. Corp.*, 75 Wn. App. 589, 596, 881 P.2d 256 (1994)). . . . . "The concept of duty is a reflection of all those considerations of public policy which lead the law to conclude that a 'plaintiff's interests are entitled to legal protection against the defendant's conduct.'" *Taylor v. Stevens County*, 111 Wn.2d 159, 168, 759 P.2d 447 (1988) (quoting W. Page Keeton, et al., Prosser and Keeton on The Law of Torts § 53, at 357 (5th ed. 1984)). Using our judgment, we balance the interests at stake. See, e.g., *Hunsley v. Giard*, 87 Wn.2d 424, 435, 553 P.2d 1096 (1976) (balancing the interests and holding that the defendant owed the plaintiff "a duty to avoid the negligent infliction of mental distress").

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[10] This is so because had the defendants revealed the defects, the Association would have been bound to disclose them in resale certificates. RCW 64.34.425(1)(o).

*Affiliated FM Ins. Co. v. LTK Consulting Servs., Inc.*, 170 Wn.2d 442, 449-450, 243 P.3d 521 (2010). Every one of these relevant considerations demands recognition of a duty running to later unit purchasers.

**-Logic & Common Sense**

"The element of foreseeability plays a large part in determining the scope of defendant's duty." *Hunsley v. Giard*, 87 Wn.2d 424, 435-436, 553 P.2d 1096 (1976), citing *Wells v. Vancouver*, 77 Wn.2d 800, 467 P.2d 292 (1970). "[T]he defendant's obligation to refrain from particular conduct is owed only to those who are foreseeably endangered by the conduct and only with respect to those risks or hazards whose likelihood made the conduct unreasonably dangerous." Id., citing *Rodrigues v. State*, 52 Hawaii 156, 174, 472 P.2d 509 (1970).

Condominium units, of course, are regularly bought and sold. The maintenance of condominium projects is a long-term affair. It is entirely predictable that a decision to conceal defects leading in a matter of time to the "mother lode of dry rot," or to conceal advice and the loss of warranty rights, will redound to the injury of future purchasers. As a matter of logic and common sense, then, denying that a duty is owed to unit purchasers who happen to buy after a culpable association Board member resigns (having done the very damage his concealment was intended or expected to accomplish), would be to make legal rights of an entire class

of owners dependent on mere happenstance, arbitrarily deny them justice, and would tend to reward successful fraud and concealment.

**-Justice & The Balancing of Interests**

It makes no difference to the nature of a Board member's duties who the particular unit owners are. The duties at issue here, and the predictable consequences of their breach do not material change with a change in unit ownership. Since they have no interest in confining their duties to particular persons as unit owners, the only legitimate interest the defendants have at stake is, at most, protection against stale claims. That interest, however, is fully protected by correct application of the statute of limitations and discovery rule.

The interest of plaintiffs is far weightier. It amounts to the protection of what is, in many cases, the sum of their life's savings against a tortious scheme to avoid warranty liability under Washington law (in the case of the Developer Executives), or a scheme to preserve property values and sell before the truth is known (in the case of some of the Owner Defendants). It amounts, in many cases, to their ability to remain homeowners at all.

**-Public Policy**

The WCA announces a clear policy that duties of care are owed by Board members to "unit owners." RCW 64.34.308(1). It *does not* say that

these duties are owed to "unit owners, except those who purchase after a given Board member resigns," as the defendants would like it to say. That duty expressly includes planning for the future: establishing budgets, creating reserves, addressing maintenance needs, disclosing known defects in resale certificates, and so forth. RCW 64.34.304, .308 & .425. Accordingly, the public policy of the WCA is to charge Board members with a duty of care as to matters that predictably involve future owners.

In the case of the Developer Executives, the duty imposed (a fiduciary duty) is particularly stringent, again for sound public policy reasons. The WCA "imposes a very high standard of duty because the board is vested with great power over the property interests of unit owners, and because there is a great potential for conflicts of interest between the unit owners and the declarant." Official Comment 1 to §3-103 of the 1980 Model Uniform Condominium Act. That power over unit owner property interests, and the potential deleterious effects of conflict of interest in no wise diminish merely because one unit owner has been substituted for another.

The WCA further announces a policy of holding those who deal in condominiums or the property interests of unit owners to their obligations. "Every contract or duty governed by this chapter imposes an obligation of good faith in its performance or enforcement." RCW 64.34.090. "[A]ny

right or obligation declared by this chapter is enforceable by judicial proceeding..." RCW 64.34.100. And, "[t]he remedies provided by this chapter shall be liberally administered to the end that the aggrieved party is put in as good a position as if the other party had fully performed." RCW 64.34.100.

The statutory duties which support all these policies would be severely diluted by holding that they do not run to future purchasers.

**-Precedent**

The analysis above suggests that the Board members' duties ran to future purchasers as a matter of law. Even if defendants could credibly argue that they never expected anyone else to buy a unit at the Project, or to rely on their having done their duties with basic competence and good faith, that would still only raise a jury issue as to foreseeability. It would not result in a conclusion that they had no duties as a matter of law.

> In many . . . types of tort actions, juries are generally charged with determining whether a person is a "foreseeable plaintiff" based on what the defendant knew or should have known under the circumstances and whether a reasonable person under those circumstances should have foreseen the harm

*Colbert v. Moomba Sports, Inc.*, 132 Wn. App. 916, 926, 135 P.3d 485 (2006) (Citations omitted.) When foreseeability of harm to a given plaintiff is an issue for the jury, it may only be decided as a matter of law

where reasonable minds cannot differ. *Christen v. Lee*, 113 Wn.2d 479, 492, 780 P.2d 1307 (1989).

Moreover, the plaintiff second-purchasers are within the class of persons intended to receive protection from the WCA's imposition of a duty of care on board members. Carving out later purchasers from the duty, as articulated above, is essentially an "arbitrary distinction not supported by the recognized purpose of the statute." *Schooley v. Pinch's Deli Market*, 134 Wn.2d 468, 474-478, 951 P.2d 749 (1998) (Vendor's duty not to sell liquor to minors extends to third party minors who receive liquor from minor purchaser if jury concludes this was foreseeable.)

Taken as a whole, every factor to be considered in deciding whether a condominium board member's duties run to future purchasers favors finding that they do. The modern trend in law is also to look to foreseeability in this setting. See Prosser and Keaton on the Law of Torts, Ch. 18, §107 at 743-45 (5th Ed. 1984); Prosser, *Misrepresentation and Third Persons*, 19 Vand.L.R. 231, 231-55 (1966); Restatement (2d) of Torts, §§ 531-533, 536.

### D. Lozier's Negligence Liability Is Not a Claim for "Negligent Construction," and is Subject to the Discovery Rule.

The Complaint alleges that Lozier and the LLC undertook to inspect and report on the condition of the Property, and that they did so

negligently. (CP 15, 24). Having undertaken the responsibility to inspect and report, even as a volunteer, Lozier was charged with a duty of reasonable care in fulfilling it. *Sheridan v. Aetna Casualty & Sur. Co.*, 3 Wn.2d 423, 439, 100 P.2d 1024 (1940) (Voluntary elevator inspection).

The statute of limitations for breach of a tort duty to inspect for construction defects in a building is three years, not two as Lozier claims. *G.W. Constr. Corp. v. Prof'l Serv. Indus.*, 70 Wn.App. 360, 367, 853 P.2d 484 (1993).[11]

Lozier's citation to *Will v. Frontier Contractors, Inc.,* 121 Wn.App. 119, 89 P.3d 242 (2004) for the proposition that any manifestation of injury to anyone starts the discovery period, was yet another bold invitation to error. The *Will* court actually said, "A negligence claim accrues when the plaintiff suffers an injury **unless, under the specific facts, the discovery rule applies**." 121 Wn.App. at 125 (emphasis added.) The law applicable to these specific facts is that the discovery rule applies to a claim for breach of a tort duty to inspect for concealed construction defects. *G.W. Constr. Corp.*, 70 Wn.App. at 367 (General contractor's claim for negligent inspection against professional inspector of steel reinforcement embedded in concrete, which contractor

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[11] The statute and case that Lozier cited to the trial court deal with *injury to raw land. Mayer v. City of Seattle*, 102 Wn.App. 66, 10 P.3d 408 (2000) deals with toxic fill contaminating land; *Will v. Frontier Contractors, Inc.,* 121 Wn.App. 119, 89 P.3d 242 (2004) deals with flooding of raw land.

had retained, sounded in tort and accrued on discovery of all elements of the claim.)

Lozier's claim that resignation of its executives from the Board started the limitations period as a matter of law has been debunked above. And, there is no relationship between the claims that the Developer Executives concealed material facts, and Lozier's failure (having undertaken to inspect and repair) to discover the actual causes of leaks and the extensive hidden property damage taking place.

Defendants' assertion that the claim for negligent *inspection* is equivalent to a claim for "negligent construction," and subject to the former economic loss rule (which has been reshaped as the "independent duty doctrine"), is unpersuasive. See *Affiliated FM,* 170 Wn.2d 442. The claim here is not about construction, but about incompetent and misleading inspections done by Lozier and the LLC, such that warranty rights were lost. Their obligation to inspect in a non-negligent manner arose not from the contracts of unit sales, but was an independent duty arising from their later assurances to the Association's Board that they would inspect, and fix the leaks. (Indeed, Lozier is not even in the chain of contract of sale, so no need to choose between contract remedies and tort remedies, which would implicate the independent duty doctrine, is

even involved.) The matter here is one of simple negligence on the part of defendants who undertook to provide an inspection service.

**E. The Developer Executives' Spouses Are Appropriate Parties.**

A marital community is liable for torts done for its benefit. *DeElche v. Jacobson*, 95 Wn.2d 237, 245, 622 P.2d 835 (1980). While Developer Executives contend that their spouses are "not necessary nor appropriate parties" to establish community liability, they offer no authority for this assertion. It may well be that liability would be imposed against marital community in the hands of the Developer Executives' spouses without expressly naming them. See, e.g., *LaFramboise v. Schmidt*, 42 Wn.2d 198, 254 P.2d 485 (1953).

However, it is common practice in claims against the marital community to name the spouse so as to ensure that any judgment includes community property in the hands of such a non-tortfeasor spouse. Thus, for example, both husband and wife were named in *Clayton v. Wilson*, 168 Wn.2d 57, 227, P.3d 278 (2010). In fact, the reported decisions are replete with actions naming married couples and alleging separate liability on the part of one spouse, and liability to the extent of community property on the part of both members for one tortfeasor's conduct.

There was thus nothing improper in naming the spouses, given that the marital communities are potentially liable for the Developer Executives' torts. Ultimately, because a marital community has no separate existence apart from its individual members, a judgment naming the spouse would be necessary for collection efforts against community property in the hands of the named spouses.

## V. Conclusion

The trial court may have understandably been troubled by a claim being asserted nearly five years (in the case of Sanford) or more (in the cases of Sansburn and Burckhard) after a Board member has resigned. But the fraud, misrepresentation, conspiracy, breach of fiduciary and board member duty, and unfair trade practices were all concealed. Thus, the discovery rule applies. The trial court's refusal to apply the discovery rule based on the allegations of the Complaint was error. This case should not have been dismissed on the pleadings.

DATED this 21st day of March, 2013.

STEIN, FLANAGAN, SUDWEEKS & HOUSER, PLLC

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## CERTIFICATE OF SERVICE

This is to certify that on this date I did cause to be served true and correct copies of the foregoing to be delivered to the persons listed below by the method(s) as indicated:

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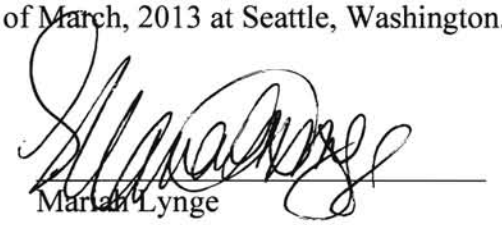
I certify under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

Dated this 21st day of March, 2013 at Seattle, Washington.



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