No. 99017-4
Court of Appeals No. 77017-9-I

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

SHAMIM MOHANDESSI; JOSEPH GRACE, individually as residential owners and derivatively on behalf of 2200 RESIDENTIAL ASSOCIATION, a Washington non-profit corporation, and derivatively on behalf of 2200 CONDOMINIUM ASSOCIATION, a Washington non-profit corporation,

Petitioners,

v.

URBAN VENTURE, LLC, a Washington limited liability company; VULCAN, INC., a Washington corporation; 2200 CONDOMINIUM ASSOCIATION, a Washington non-profit corporation; 2200 RESIDENTIAL ASSOCIATION, a Washington non-profit corporation; GARY ZAK, an individual; BRIAN CROWE, an individual; BRANDON MORGAN, an individual; and JOHN DOES 1-15, individuals or entities,

Respondents.

PETITION FOR REVIEW

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I. INTRODUCTION & IDENTITY OF PETITIONERS

This case concerns 2200 Westlake, a mixed-use condominium in Seattle's Eastlake neighborhood, and the developer who retained control over the condominium, conspired to harm the residential unit owners, and evaded responsibility. This case presents issues that are of great importance to the public, to condominium governance, and to 2200 Westlake's hundreds of residential unit holders, including plaintiff petitioners, Joseph Grace and Shamim Mohandessi.

The plaintiffs alleged breaches of statutory and fiduciary duties by association directors for acts occurring within three years before filing the complaint. Even so, the Court of Appeals incorrectly concluded that the claims accrued when the declaration was first recorded, contravening not only statute of limitations law, but also its own conclusion that the declaration is not a contract. *See* App. A ("Op.") at 9–14 & 14 n.6 (*Mohandessi v. Urban Venture LLC*, No. 77017-9-I, 13 Wn. App. 2d 681, 468 P.3d 622 (June 29, 2020), *reconsideration denied* Sept. 2, 2020).

The court also held that unit owners could not pursue a derivative action on behalf of a condominium association organized as a nonprofit. *Id.* at 14–16. This holding is at odds with the Condominium Act and precedent, and raises an issue of substantial public interest.

Finally, the court held that over half a million dollars' worth of attorney's fees could be imposed on the plaintiffs based on a fee-shifting provision in a settlement agreement to which the plaintiffs were not party. It concluded that the association's power to make contracts authorizes it to bind individual unit owners to *personal liabilities* without notice, contrary to the Condominium Act and to basic fiduciary principles. *Id.* at 19–21.

The Court of Appeals' decision runs counter to its own and this Court's precedents. It throws condominium governance into peril by suggesting that condominium boards can (i) breach their duties with impunity so long as the declaration was recorded outside the limitations period, (ii) avoid a derivative suit by incorporating as a nonprofit, and (iii) impose personal liabilities on owners without notice or approval. Discretionary review is warranted under RAP 13.4(b)(1), (2), and (4).

II. ISSUES TO BE REVIEWED

A. This Court has held that claims only accrue once every element is present. Did the Court of Appeals err in holding the claims here accrued in 2006, years before the plaintiffs were harmed?

B. This Court has held that the derivative remedy is available at common law to redress the malfeasance of faithless directors and has held that the common law is only abrogated when the Legislature intends to do so. Did the Court of Appeals err in holding that the Nonprofit

Corporation Act precludes employing the common law remedy of a derivative suit, where there is no evidence of such legislative intent?

C. The Legislature has determined that a condominium association may "institute" or "defend" litigation on behalf of itself or two or more unit owners and "make contracts and incur liabilities." RCW 64.34.304(1)(d), (e). Did the Court of Appeals err in holding that these provisions authorize a residential condominium association to impose personal liabilities on individual unit owners for prevailing party attorney's fees in future disputes, *including* the fees of the residential association itself, through a settlement agreement relating to construction defects for which no litigation was ever filed, and where the unit owners were unaware of the settlement agreement's terms?

III. STATEMENT OF THE CASE

2200 Westlake is organized under a master declaration and governed by a master condominium association ("MA"), comprised of four units: three commercial and one residential. The high-rise residence itself constitutes a residential condominium, with a corresponding residential declaration and governing residential association ("RA").

2200 Westlake was developed by Vulcan, Inc., and its affiliate Urban Venture, which set up a scheme to benefit themselves at the expense of residents. First, they created a cost allocation system in which

the residential units were unfairly forced to subsidize the commercial units, which were owned by declarant Urban Venture. The allocations—which discriminated in favor of the declarant and were not based on any method or formula—violated the Condominium Act's requirements at RCW 64.34.224(1). CP 377, 5282. The declaration also misrepresented that costs would be allocated based on square footage, and residents were prevented from obtaining the information and documents needed to discover actual cost allocations. CP 7018, 7176, 7800–02, 7807, 7816–18.

To perpetuate the scheme, Urban Venture and Vulcan retained the right to appoint three directors to the condominium board and then appointed, as directors, Vulcan employees with undisclosed conflicts of interest. The Vulcan-appointed directors admitted to using the 2200 Westlake board to favor Urban Venture and Vulcan, including maintaining the unfair cost structure in each year's budget. *E.g.*, CP 5607, 7438–39, 7444. Through these actions, the directors violated their fiduciary duties. *See* RCW 64.34.308(1)(a) ("The … members of the board of directors are required to exercise . . . [i]f appointed by the declarant, the care required of fiduciaries of the unit owners[.]").

To rectify this unlawful conduct, Plaintiffs, who are two residential owners at 2200 Westlake, brought direct and derivative claims against Vulcan/Urban Venture, the MA, the RA, and MA board members, raising

common law and statutory claims, including for violations of the WCA, the Consumer Protection Act (CPA), and breaches of statutory and fiduciary duties. CP 1, 8579. The trial court dismissed Plaintiffs' claims in full, and awarded certain attorney's fees in the defendants' favor.

In a published opinion, the Court of Appeals held that the common expense allocation violated the Condominium Act and reversed the dismissal of claims against the MA. App. B at 10–14. However, the court subsequently granted the defendants' motion for reconsideration, withdrew its opinion, and substituted a new opinion. *See* Op.

This superseding opinion held that the claims against the MA and Urban Venture/Vulcan were time barred. Op. at 10. It reasoned that all claims "arose" out of the 2006 declaration and accrued then. *See id*. at 11.

The Court of Appeals also held that the plaintiffs could not pursue derivative claims on behalf of the RA or MA. It concluded that a derivative action could not be brought on behalf of a nonprofit corporation because the Legislature did not explicitly provide for such relief, despite the statutory reference to a "proceeding by the [nonprofit] corporation … acting … through members in a representative suit, against the officers or directors[.]" Op. at 15; *see* RCW 24.03.040(2).

Finally, the court concluded that attorney's fees could be awarded based on a 2012 agreement relating to construction defects entered into by

the RA, MA, and Urban Venture. Op. at 20. The settlement agreement defined "RA" to include the residential unit owners, CP 19410, though it is undisputed the owners did not assent to its terms. The agreement contained mutual releases and provided for prevailing party fees arising from enforcement of the agreement, CP 19416. The court held that RCW 64.34.304(1)(d) and (e), which gives an association the power to engage in litigation and make contracts, enabled the RA to bind individual unit owners to fee-shifting even though they never approved the agreement, never were given notice of it, never signed it, never authorized it, and were not told it even existed until after it had been executed.[1] Op. at 20; CP 19390, 19397, 19555–57, 19567–68.

IV. ARGUMENT

The Court of Appeals' affirmance of defendants' summary judgment motions conflicts with this Court's precedents and presents an issue of substantial public interest. The decision conflicts with (1) the basic principle that a claim cannot accrue before harm exists, (2) the law of derivative standing, which provides a mechanism for members or shareholders to protect their interests from conflicted fiduciaries' breach of duty, and (3) the principle that contract formation requires assent by a party or its authorized agent. The Court of Appeals' failure to follow its

[1] The settlement agreement is included as Appendix C.

own and this Court's precedents, and the public's interest in preserving the most basic common law principles designed to protect individuals' interests, warrants review. RAP 13.4(b)(1), (2), (4).[2]

A. The Court's Precedents Establish that All Claims Did Not Accrue in 2006, and Are Not Time-Barred

The Court of Appeals departed from this Court's precedents by dismissing claims that accrued within the limitations period. By holding the claims accrued when the declaration was recorded in 2006, the opinion erroneously suggests that all claims that arise due to condominium governance accrue upon the establishment of the condominium.

This ruling is at odds with the evidence, presented in opposition to summary judgment, showing that the defendants violated the CPA, breached duties, and tortiously interfered in 2014, 2015, and 2016. The plaintiffs' direct claims were based on Vulcan paying its appointed directors to conspire with Vulcan on MA matters in order to benefit Vulcan to the detriment of the MA, RA, and residents. *E.g.*, CP 5607 (defendant Zak admitting he obtained a benefit for Vulcan at the expense

[2] Petitioners assert that the facts of this case are part of a systemic problem: Developers, aided by hand-selected property operators and other professionals, can weaponize nonprofit associations to drive up their profits and, in turn, strip unwitting residential owners of their property rights and agency. The issues herein illustrate that residents suffer when developers' actions are rubber-stamped despite legislative and common law protections for consumers.

of the MA), 7438–39 (defendant Zak admitting that during 2014 he "defend[ed] the interests of Vulcan"), 7813-16 (expert declaration describing unlawful conflicts of interest), 8579–8601 (claims 1, 2, 3, 7, 8 in the third amended complaint).[3]

These actions, violating the Condominium Act and CPA, are imputed to the directors' principals and employers—the MA, Vulcan, and UV—based on agency and respondeat superior. RCW 64.34.090 (good faith); RCW 64.34.308(1)(a) (fiduciary duty); RCW 19.86.020 (prohibiting unfair and deceptive acts). Their wrongful actions and resulting damages occurred each and every year, including after the complaint was filed—*not* upon recordation of the declaration in 2006. As Washington precedents establish, these claims could not accrue until the plaintiffs knew or reasonably should have known all essential elements of their cause of action—at earliest, when the act or omission actually occurred. *E.g.*, *Gevaart v. Metco Constr., Inc.*, 111 Wn.2d 499, 501, 760 P.2d 348 (1988); *Shepard v. Holmes*, 185 Wn. App. 730, 739, 345 P.3d 786 (2014). The dismissal of these claims, contrary to such precedents, warrants review under RAP 13.4(b)(1) and (2).

[3] These direct claims are authorized by RCW 64.34.455.

Likewise, claims relating to the unlawful allocations in the 2006 declaration cannot be time barred until *after* the unlawful cost allocations are actually applied to cause harm.[4] It is well-established that claims do not accrue until every element is susceptible of proof, including actual loss or damage where that is an element of the claim. *See Haslund v. City of Seattle*, 86 Wn.2d 607, 619, 547 P.2d 1221 (1976).

If permitted to stand, the Court of Appeals' decision will have far-reaching implications. As current precedents establish, intentional torts do not accrue when a scheme is conceived, but when it is implemented and causes harm. Breach of contract claims do not accrue upon execution, but upon breach and injury. *1000 Va. Ltd. P'ship v. Vertecs Corp.*, 158 Wn.2d 566, 590, 146 P.3d 423 (2006).[5] And unconstitutional statutes may be

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[4] If, for example, an employment contract provided for wages below minimum wage, or employment benefits to be distributed on a discriminatory basis, it would not follow that a plaintiff still employed under the contract five years later would have no recourse because the employment contract was executed outside the statutory period. To the contrary, the plaintiff would have claims related to the prior three years' worth of discriminatory or unlawful paychecks, as the claims accrue upon injury—not upon execution of a contract. *See O'Donnell v. Vencor*, 465 F.3d 1063, 1068 (9th Cir. 2006) (each discriminatory paycheck is deemed a separate and independent violation of the Equal Pay Act with a cause of action accruing upon receipt of each paycheck).

[5] The Court of Appeals analogized the claims here to contract claims, Op. at 14 n.6, but this goes a step too far. While courts apply principles of contract law when examining a declaration, to the extent consistent with the governing condominium act, they widely recognize that a declaration is itself a creature of property law governed by statute. *See Bellevue Pac. Ctr. Condo. Owners Ass'n v. Bellevue Pac. Tower Condo. Ass'n*, 124 Wn. App. 178, 188, 100 P.3d 832 (2004) ("But the declaration itself is not a contract . . . . [i]t is a document that unilaterally

challenged if "the harm inflicted by the statute is continuing" or when "the statute is enforced"—not just upon enactment. *Levald, Inc. v. City of Palm Desert*, 998 F.2d 680, 688 (9th Cir. 1993); *see DeYoung v. Providence Med. Ctr.*, 136 Wn.2d 136, 960 P.2d 919 (1998) (invalidating eight-year statute of repose, enacted two decades before suit was brought, as unconstitutional). These precedents establish that harm is a necessary prerequisite to accrual, contrary to the Court of Appeals' decision here.

The decision is also at odds with the Condominium Act, which gives "any person" who is "adversely affected" by a failure to comply with the Act "a claim for appropriate relief." RCW 64.34.455. Under this provision, the unit owners were adversely affected—and thus gained a cause of action—when defendants took actions that harmed plaintiffs. These actions occurred within three years of plaintiffs filing their claims and throughout 2016. *E.g.*, CP 7438–39, 7814–16. The plaintiffs do *not* claim that the mere recording of the declaration in 2006 harmed them.

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creates a type of real property."). Because a condominium is a creature of statute, the declaration itself must comply with statutory requisites and may be reformed if it fails to comply. *See* RCW 64.24.208(1) (noting that all provisions of a declaration are severable). Moreover, when "a party alleges a breach of a duty imposed by an external source, such as a statute," the party "does *not* bring an action on the contract, even if the duty would not exist in the absence of a contractual relationship." *Boguch v. Landover Corp.*, 153 Wn. App. 595, 615, 224 P.3d 795 (2009) (emphasis added). Instead, the action sounds in tort and cannot accrue until the plaintiff has been harmed.

The Court of Appeals' reasoning and conclusion are at odds with this Court's precedents, and risk confusing trial courts as to basic principles of accrual. As this is an issue of substantial public interest and contrary to long-standing precedents and the Condominium Act itself, the Court should grant discretionary review under RAP 13.4(b)(1)–(2), (4).

B. This Court's Precedents Establish that a Derivative Remedy Is Available as a Matter of Common Law that Can Only Be Abrogated by Clear Legislative Intent, Which Is Absent Here

The Court of Appeals' ruling that the nonprofit act disallows derivative actions means that, with respect to a nonprofit condominium, the directors can breach their fiduciary duties, and harm their member's proprietary interests, with impunity. This ruling is contrary to this Court's grant of equitable derivative standing and provides unwarranted protections to dishonest directors. The ruling on derivative standing involves an issue of substantial public interest warranting review.

A condominium association can be organized as either a profit or nonprofit corporation. RCW 64.34.300. The Court of Appeals held that because RA and MA are organized as nonprofit corporations, a derivative action is foreclosed. Op. at 15–16. The court reasoned that the Washington Business Corporation Act (WBCA) "expressly authorizes" derivative actions, while the Washington Nonprofit Corporation Act (WNCA), does not. Op. at 15. It further reasoned that its decision in *Lundberg ex rel.*

Orient Found. v. Coleman, 115 Wn. App. 172, 60 P.3d 595 (2002), precluded the plaintiffs from bringing a derivative suit.

But nothing in the WNCA or WBCA suggests the Legislature intended to abrogate the common law of derivative standing with respect to nonprofit corporations. And *Lundberg* considered only the question of whether directors or private individuals—*i.e.*, individuals with no proprietary interests at stake—have standing to bring a derivative action on behalf of a nonmember nonprofit corporation. *Id.* at 176. That decision is inapposite here, where the nonprofit corporation has members—the residential unit owners—who have *proprietary* interests in the condominium, interests that are controlled by the association.

What is applicable here are Washington precedents relating to derivative standing. Derivative standing is a common law doctrine that allows a member owning a protectable interest to sue on behalf of the entity. *Haberman v. Wash. Pub. Power Supply Sys.*, 109 Wn.2d 107, 149, 744 P.2d 1032 (1987) (noting that derivative standing requires proprietary interests); *Donlin v. Murphy*, 174 Wn. App. 288, 298, 300 P.3d 424 (2013) ("Standing is a common law doctrine that prohibits a litigant from raising another's legal right.").

The common law has always recognized a shareholder's "equitable right to sue derivatively" based on a proprietary interest. *Haberman*, 109

Wn.2d at 149; *see also Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 95, 111 S. Ct. 1711, 114 L. Ed. 2d 152 (1991) ("Devised as a suit in equity, the purpose of the derivative action was . . . to protect the interests of the corporation from the misfeasance and malfeasance of 'faithless directors and managers.'") (quoting *Cohen v. Beneficial Loan Corp.*, 337 U.S. 541, 548, 69 S. Ct. 1221, 93 L. Ed. 1528 (1949)); *Gustafson v. Gustafson*, 47 Wn. App. 272, 276, 734 P.2d 949 (1987) (explaining that a shareholder ordinarily cannot "sue for wrongs done to a corporation," but "because of the possibility of abuse by the officers and directors of a corporation," shareholder derivative suits are permitted).

At its inception, the derivative lawsuit was a judicially-created doctrine devised as an equitable remedy to prevent abuse by directors and officers. *Schoon v. Smith*, 953 A.2d 196, 201 (Del. 2008); *see also Caprer v. Nussbaum*, 36 A.D.3d 176, 187, 825 N.Y.S.2d 55 (2006) ("The derivative action . . . is not solely a creature of statute. Rather, the derivative action originated at common law as an equitable proceeding by which shareholders could assert claims necessary to protect their interest in a corporation, even in the absence of statutory authority to do so.") (internal citations omitted).

Common law derivative standing has never depended on court rule or legislative authorization. The court rules that concern derivative

standing make clear that they are not a *source* of standing, but instead merely recognize that such standing exists and provide procedural limitations on such actions. *See, e.g.*, *LaHue v. Keystone Inv. Co.*, 6 Wn. App. 765, 776–77, 496 P.2d 343 (1972). For example, CR 23.1 states that derivative actions may be brought by shareholders or "members" of corporations or *unincorporated* associations. The availability of derivative actions for unincorporated associations necessarily implies that derivative standing does not depend upon a statute granting such standing and that all manner of entities are afforded this form of common law standing. There is no basis for excluding nonprofit associations from this important equitable remedy.

This Court's precedents also hold that common law is abrogated only if "the Legislature intended to overrule the common law[.]" *Ballard Square Condominium Owners Ass'n v. Dynasty Constr. Co.*, 158 Wn.2d 603, 621, 146 P.3d 914 (2006). Nothing in the language of the statute or legislative histories indicates any legislative intent to abrogate the common law of derivative standing with respect to nonprofit corporations. Indeed, like the WBCA, the WNCA references derivative actions. *See* RCW 23B.07.400; RCW 24.03.040(2). And RCW 24.03.040(2) makes clear that derivative actions are available to members of a nonprofit

corporation in a suit against the directors "for exceeding their authority"—including the breaches of duty the plaintiffs allege here.

There is no indication that the Legislature explicitly considered—and rejected—derivative provisions with respect to the WNCA. Therefore, the absence of such provisions cannot be evidence of any legislative intent to disallow derivative suits. As the common law of derivative standing has not been abrogated, it remains in force, and those with proprietary interests in nonprofit corporations—such as owner-members in a condominium association—can sue derivatively.

Faithless directors should not have a free pass, nor should members' property interests be harmed without remedy simply because an entity is organized as a nonprofit. This is particularly true in the condominium context, because RCW 64.34.455 requires that any injured person be granted a "claim for appropriate relief." Because this is a matter of substantial public interest, and because the Court of Appeals' contrary decision conflicts with its own and this Court's precedents, the Court should grant review. RAP 13.4(b)(1), (2), (4).

C. An Association Cannot Bind Unit Owners to Fee Shifting Liability Without Their Knowledge or Consent

The Court of Appeals ruled that a condominium association can act on the owners' behalf, and in doing so oblige the owners to all manner of

personal contractual obligations without the owners' knowledge or consent and despite the association's clear conflicts of interest in doing so. This ruling finds no basis in the Condominium Act, is contrary to Washington precedents relating to basic principles of agency, contract law, and due process, and has profound impacts on the rights and risks of condominium owners. RAP 13.4(b)(1)–(2), (4).

This ruling means the plaintiffs—who are individual residents—must pay over half a million dollars in attorney's fees based on a settlement agreement that the defendants ironically claimed, throughout the litigation, the plaintiffs were not parties to.[6] The Court of Appeals held that, under RCW 64.34.304(1)(d) and (e), the RA could represent the residential owners and unilaterally bind them to a settlement agreement with a fee-shifting provision that impacts the owners individually, relating to claims that were never litigated, to the defendants' (including RA's) benefit. Op. at 20–21.

This provision allows no such thing. RCW 64.34.304(1)(e) allows the condominium association *itself* to "make contracts or incur liabilities"—it does not authorize the association to bind its unit owners or

[6] *See, e.g.*, CP 19438 ("Plaintiffs are not parties to any of the Settlement Agreement or any of the related Agreements.") (RA), 19462 (MA), 19579 n.25 ("Plaintiffs do not have standing to bring such a claim for which they are not a party"), 19587 (RA withholding discovery on the basis that plaintiffs are not parties to the settlement).

members individually. RCW 64.34.304(1)(d) only allows permits the association to:

> Institute, defend, or intervene in litigation or administrative proceedings in its own name on behalf of itself or two or more unit owners on matters affecting the condominium[.]

This provision only allows the association to act on behalf of condominium owners with respect to *litigation or administrative proceedings*—which in turn provide the unit owners with procedural safeguards such as notice and the opportunity to join or object to protect their interests. The availability and necessity of such procedural protections has been repeatedly recognized. *See Beazer Homes Holding Corp. v. Dist. Ct.*, 128 Nev. 723, 291 P.3d 128, 131, 136 (2012) (concluding that if action by homeowners association on behalf of homeowners fails to meet class action requirements, a trial court may provide alternative protections such as joinder and must ensure "notice to members represented by the association").[7]

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[7] *See also Candlewood Landing Condo Ass'n, Inc. v. Town of New Milford*, 44 Conn. App. 107, 686 A.2d 1007, 1009 (1997) (noting that similar uniform statute "contains no exceptions or limitations on a condominium association's authority to act on behalf of the unit owners *as long as at least two unit owners agree*") (emphasis added); *Clubhouse at Fairway Pines, L.L.C. v. Fairway Pines Estates Owners Ass'n*, 214 P.3d 451, 457 (Co. Ct. App. 2008) (noting that statute allowing an owner's association to defend litigation on behalf of itself or two or more unit owners "does not address the need to protect absent owners" and that adequacy of representation or joinder must be considered); *City of Middletown v. Meadows Assocs.*, 45 Conn. Supp. 261, 711 A.2d 1, 4 (1998) (noting that while "defense of litigation [is] a *permitted* activity of an association, [] it does not provide, as the

Here, there was no litigation or administrative proceedings: the RA settled the construction defect claims before any litigation was brought. The residents had no notice, no opportunity to join, no opportunity to have separate counsel, and no opportunity to see, much less give input, to terms that would harm their personal interests. Even if subsection 1(d) enables the RA to settle the residents' personal claims or impose personal liability on them, this subsection was not triggered here

Moreover, subsection 1(d) explicitly conditions the association's ability to institute, defend, or intervene in litigation as "subject to the provisions of the declaration." The RA declaration permits the RA to "institute, commence or intervene in any litigation or administrative proceedings" only if the owners holding at least 67 percent of the votes approve such action. CP 7228 (Section 13.4.4). Additional approval is not required "for settlement of *such* litigation or administrative proceedings"—i.e., proceedings that have already been approved by owners holding at least 67 percent of the votes. *Id.* (emphasis added).

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plaintiffs imply, that all suits against the interests of unit owners are to be brought against the association, without individual notice to the unit owners that their property rights are in jeopardy"); *Univ. Commons Riverside Home Owners Ass'n, Inc. v. Univ. Commons Morgantown, LLC*, 230 W. Va. 589, 741 S.E.2d 613, 619–20 (2013) (observing that statute allowing an association to institute litigation "offers no procedures to be utilized to approve any type of settlement" and such procedures should be determined by Virginia's Mass Litigation Panel but that "individual notice should be immediately given to all the members of the HOA to make them aware of the existence of this lawsuit and to advise them that they are currently represented by the HOA").

It is uncontested that no such approval to pursue claims was ever sought or obtained. Because the RA's declaration was not complied with, even if there *had* been litigation (there was not), the RA lacked authority under the declaration to proceed on the unit owners' behalf.

Presuming *arguendo* the RA had such authority, the principal-agent relationship has outer bounds. To the extent RA was acting on behalf of the residents (as it now claims), Washington precedents establish that it had a duty to refrain from self-dealing. *See, e.g.*, *Frisell v. Newman*, 71 Wn.2d 520, 526, 429 P.2d 864 (1967) (agent has duty of good faith and fidelity); *McRae v. Farmers' State Bank of Reardan*, 178 Wash. 642, 644, 35 P.2d 58 (1934) (noting agent will not be permitted to obtain benefit to his principal's detriment). Certainly, the attorneys who represented the RA in negotiations could not permissibly *also* represent the unit owners due to the conflict of interest in agreeing to shift fees onto the residential unit owners in order to benefit the RA itself. *See In re Eisenberg*, 43 Wn. App. 761, 769, 719 P.2d 187 (1986) (discussing breach of duty of loyalty). Such undisclosed, conflicted self-dealing transactions may be avoided. *E.g.*, RESTATEMENT (2D) OF CONTRACTS §§ 11, cmt. a ("Self-dealing may render a contract voidable"); 173 (1981).

The question of whether an association can simply enter into any contract on behalf of individual unit owners, binding them to personal

liabilities, is a question of immense public importance. The Court of Appeals' published decision holding that a condominium association has such statutory authority has wide-ranging implications not only for associations, but for other corporations that have authority to "make contracts" and "incur liabilities." *See* RCW 23B.03.020(g) (corporation); RCW 64.38.020(4), (5) (homeowners' associations). Review should be granted for this reason, as well as because the Court of Appeals' decision runs contrary to precedents establishing that a conflicted agent cannot act on behalf of its principal—particularly not to secure its own benefit to the principal's detriment. RAP 13.4(b)(1), (2), (4).

V. CONCLUSION

This case presents significant issues of substantial public interest relating to the accrual of actions, the management of a condominium, the availability of derivative actions for unit owners in nonprofit condominiums, and whether an association can bind unit owners to fee-shifting—including fee shifting in the association's own favor. The Court of Appeals resolved these questions contrary to precedents. For all these reasons, this Court should grant discretionary review.

RESPECTFULLY SUBMITTED this 16th day of October, 2020.

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State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

SHAMIM MOHANDESSI; JOSEPH, GRACE, individually as residential owners and derivatively on behalf of 2200 RESIDENTIAL ASSOCIATION, a Washington non-profit corporation, and derivatively on behalf of 2200 CONDOMINIUM ASSOCIATION, a Washington non-profit corporation, Appellants, v. URBAN VENTURE LLC, a Washington limited liability company; VULCAN, INC., a Washington corporation; 2200 CONDOMINIUM ASSOCIATION, a Washington non-profit corporation; 2200 RESIDENTIAL ASSOCIATION, a Washington non-profit corporation; GARY ZAK, an individual, BRIAN CROWE, an individual; BRANDON MORGAN, an individual; and JOHN DOES 1-15, individuals or entities, Respondents.	No. 77017-9-I consolidated with No. 77581-2-I DIVISION ONE PUBLISHED OPINION

MANN, C.J. — This case concerns condominium assessments. Shamim Mohandessi and Joseph Grace (collectively plaintiffs) appeal the trial court's dismissal

of their claims against the 2200 Residential Association (RA), the 2200 Condominium Association, Gary Zak, Brian Crowe, and Brandon Morgan (collectively MA), Urban Venture LLC, and Vulcan, Inc., (all collectively defendants). The plaintiffs brought direct and derivative claims alleging that the defendants violated the Washington Condominium Act (Condominium Act), chapter 64.34 RCW, the Washington Consumer Protection Act (CPA), chapter 19.86 RCW, breached statutory and fiduciary duties, and tortiously interfered with the MA Board's duties.

The plaintiffs contend that the trial court erred in (1) concluding that the statute of limitations barred their claims, (2) concluding that they could not bring claims derivatively on behalf of the RA and MA, (3) concluding that they lacked standing to bring claims against the MA for violations of the Condominium Act, (4) dismissing their breach of contract claims against the RA, (5) sua sponte dismissing their claim that a prior 2012 settlement agreement was void as the product of fraud and collusion, and (6) awarding fees under the 2012 settlement agreement and costs under the Uniform Declaratory Judgment Act, RCW 7.24.100. The defendants cross appeal and argue that the trial court erred: (1) in concluding that the common expense liability allocation in the master declaration violates the Condominium Act, RCW 64.34.224(1), and (2) in not awarding their full attorney fees under the 2012 settlement agreement, or alternatively, under the Condominium Act.

We affirm.

I.

A. 2200 Westlake

This appeal concerns a mixed-use development located at 2200 Westlake Avenue in downtown Seattle (2200 Westlake) comprising over 500,000 gross square feet, excluding underground parking. Milliken Urban Limited Partnership (Milliken) began the development of 2200 Westlake. Urban Venture LLC, a subsidiary of Vulcan Inc., invested in the project and developed it jointly with Milliken. Urban Venture bought out Milliken's interest midway through construction in 2005.

The development was completed in 2006. That same year Urban Venture executed and recorded a "master declaration" under the Condominium Act, creating a four-unit condominium called "2200, a condominium." The four units include: (1) the commercial unit, which leases 90,000 square feet of commercial retail shops; (2) the hotel unit, housing the 153-room Pan Pacific Hotel; (3) the food unit, leased to Whole Foods grocery store; and (4) the residential unit, comprised of 259 residential units, which has a separate sub-condominium association.

2200 Westlake is governed by, and acts through, the 2200 Condominium Association, a nonprofit corporation, which the parties refer to as the Master Association (MA).[1] The owner of each unit of 2200 Westlake is a member of the MA. The MA is administered by a four-person board, with each owner electing one representative to hold the single vote allocated to each owner.

In 2006, Urban Venture also recorded a separate declaration for the 259-unit residential unit of 2200 Westlake. The "residential declaration" covers the 2200

[1] The parties do not dispute that the 2200 Condominium Association is not actually a "master association" as that term is defined in the Condominium Act, RCW 64.34.020(28), .276.

Residential Association (RA). The RA is also organized as a nonprofit corporation. The RA board is elected by a majority of the residential unit owners. The RA board chooses a single member to represent it on the MA Board.

Urban Venture owned the commercial, hotel, and food store units from completion of the project, until selling the units to third parties: the commercial unit in March 2016, the food store unit in September 2016, and the hotel unit in February 2017. During Urban Venture's ownership, the MA board members were Vulcan employees, appointed by Urban Venture. The initial board members were Gary Zak, Hamilton Hazlehurst, and Brian Crowe.

B. Common Expense Liability

Central to this litigation is the common expenses associated with the common elements of 2200 Westlake and the division of the common expenses between the four condominium units in the MA. The master declaration defines the "Common Elements" as "all portions of the Property and the Project which are outside the boundaries of a Unit, and improvements within the boundaries of a Unit which are designated as Common Elements or Limited Common Elements under the provisions of Article 3." "Common Expenses" are defined as:

> expenditures made by, or financial liabilities of the Association, together with any allocations to reserves. Common Expenses are funded by each Owner in accordance with its Allocated Interest, except that certain Common Expenses are specifically allocated to fewer than all Units or are specially allocated among Units based on usage or benefit, as more specifically set forth in Section 10.4.

The common expense liability, and interest in the common elements, are determined by the units' declared value, which results in the "Allocated Interest

Percentage." Exhibit B to the MA declaration shows the unit data and allocated interests for each unit.

Unit Name	Unit Floor Area (Sq. Ft.)	Declared Value	CEL/ICE	Votes	Parking Spaces
Unit C (Commercial Unit)	24,352	$11,340,000	6.3	1	90 covered 36 uncovered
Unit R (Residential Unit)	259,447	$138,960,000	77.2	1	318 covered
Unit H (Hotel Unit)	120,309	$18,000,000	10.0	1	55 covered 2 uncovered
Unit F (Food Store Unit)	43,616	$11,700,000	6.5	1	272 covered 12 uncovered
Total		$180,000,000	100%	4	

"Declared value" is defined as "the value of each Unit as stated in Schedule B, which does not necessarily reflect market value and will not be affected by sales price." In contrast, the preamble to the MA declaration indicates that concerns about fair governance for all units culminated in "the decision to allocate many of the costs by square footage (for the sake of simplicity) or, if feasible, by separate metered usage." The common element liability, however, does not correspond to square footage. The RA declaration includes Schedule B, which allocates Unit R's common element liability to each condominium unit based on "relative area of Units."

The common expense liability allocation was set forth in the public offering statement and governing documents were provided to every original buyer at 2200 Westlake before they bought their units. The public offering statement included a draft budget for the MA and the RA. The MA declaration, including Exhibit B, were also recorded.

C. Prior Litigation

Plaintiff Grace bought a residential unit at 2200 Residential in 2006. Grace considers himself an experienced real estate purchaser. Grace purchased a second unit at 2200 Residential in 2015, after this litigation began. Plaintiff Mohandessi, an attorney, purchased a residential unit at 2200 Residential in 2010.

Grace has been in conflict with the RA since April 2007. In protest to the RA Board's actions and assessments, Grace stopped paying his full dues in 2008. The RA sued Grace in 2011 and 2013 to collect unpaid dues and late charges.[2] Grace asserted defenses and counterclaims, alleging that the RA breached its fiduciary duty, committed fraud, trespass, and conversion, and held an invalid election. The trial court dismissed Grace's counterclaims and defenses, finding in favor of the RA.

From 2009 until 2012, the RA and MA pursued claims against Urban Venture and Vulcan under the WCA and CPA for construction defects. In November 2012, the RA, MA, Vulcan, and Urban Venture entered a settlement agreement. Urban Venture agreed to pay the RA $26,000,000 in exchange for release of the RA's claims against Urban Venture. The RA received $3,120,000 to use as it deemed appropriate, with the remaining $22,800,000 set aside for remediation. The validity and fairness of the common expense liability and allocation in the master declaration were raised during settlement discussions but did not become part of the 2012 settlement agreement.

D. Current Litigation

The plaintiffs filed this lawsuit against the various defendants in October 2015. The original complaint sought declaratory judgment that the MA violated the

[2] 2200 Residential Association v. Grace, No. 72651-0 (Wash. Ct. App. July 25, 2016) (unpublished).

Condominium Act and the MA declaration by "improperly and disproportionately shift[ing] costs of 2200 Westlake onto plaintiffs and other residential owners." The plaintiffs alleged that: (1) the MA and RA declarations were contracts, and that the MA and RA breached those contracts and the implied covenant of good faith and fair dealing, (2) the MA and RA boards breached their fiduciary duties, and (3) Urban Venture breached its fiduciary duties, and tortuously interfered with the MA and RA's performance of their contractual obligations under their respective declarations. The plaintiffs made the claims on behalf of themselves, as well as derivatively on behalf of the RA and double derivatively on behalf of the MA.

The defendants moved for judgment on the pleadings under CR 12(c). On February 12, 2016, the trial court dismissed the plaintiffs' direct claims against the MA for lack of standing, and the breach of contract claims against the RA under res judicata, to the extent that the events occurred before December 2014 (the date of Grace's settlement in his prior litigation). The court also dismissed the breach of an implied covenant of good faith and fair dealing, finding that there was no legal authority for an implied covenant under a condominium declaration. The trial court limited the plaintiffs' remaining claims based on the statute of limitations, RCW 4.16.080, to the extent they were based on events occurring more than three years before the plaintiffs filed suit in October 2015.

The defendants then moved for summary judgment. On September 29, 2016, the trial court granted in part and denied in part the defendants' motions. The court dismissed all claims asserted by the plaintiffs derivatively on behalf of the RA and MA. No claims remained against Urban Venture and the MA after the September 29, 2019,

order. During the summary judgment hearing, the trial court expressed "real concern" that, although the issue of the statute of limitations was not before it, any claim challenging the common expense liability allocation under the master declaration was likely time-barred.

Nevertheless, in December 2016, the plaintiffs amended their complaint, adding new claims challenging the common expense liability and adding Vulcan as a party. The plaintiffs amended their claims against the RA to include a claim for breach of the residential declaration arising from the RA's entry into the November 2012 settlement agreement. On December 20, 2016, the plaintiffs voluntarily dismissed their claims against the RA.

The plaintiffs were granted leave to amend their complaint twice more, in March 2017 and May 2017. The plaintiffs' new claims alleged that: (1) Urban Venture and the MA violated the Condominium Act, (2) Urban Venture, Vulcan, and certain MA board members, breached duties under the Condominium Act, (3) Urban Venture and Vulcan aided and abetted the MA's alleged breach of duties, (4) Urban Venture violated the CPA, and (5) Vulcan tortuously interfered with the plaintiffs' expectancy that the MA and RA, and respective boards, would comply with all applicable laws and duties. The plaintiffs also sought a declaratory judgment that the 2012 settlement agreement was "void and unenforceable as collusive, fraudulent, and against public policy" (referred to as the "twenty first claim"). The plaintiffs named the RA as a "nominal" defendant.

Prior to the plaintiffs' third amended complaint, the defendants moved for summary judgment dismissal of the plaintiffs' remaining claims in March 2017. The plaintiffs also moved for partial summary judgment.

In May 2017, the trial court dismissed all remaining claims on summary judgment including the plaintiffs' newest claims added in their third amended complaint. The court dismissed the twenty-first claim because "there [was] no evidence of fraud, collusion or undue influence" to create an issue of fact regarding the settlement agreement's validity.[3] The trial court dismissed all other claims, finding the statute of limitations barred the plaintiffs' claims because all challenges related to the master declaration, which was recorded in 2006.[4]

Because plaintiffs' claims were dismissed with prejudice, the trial court concluded that the defendants were prevailing parties. The defendants sought their attorney fees as the prevailing party under the Condominium Act, the master declaration, and the 2012 settlement agreement. The defendants also sought their litigation costs under the master declaration, the 2012 settlement agreement, and the Declaratory Judgment Act, RCW 7.24.100. The trial court awarded limited fees under the 2012 settlement agreement alone, and awarded costs under RCW 7.24.100.

The plaintiffs appealed and the defendants cross appealed.

II.

The plaintiffs contend that the trial court erred in its May 27, 2017, summary judgment order by dismissing claims against the MA, Urban Ventures, and Vulcan based on the statute of limitations. While the plaintiffs agree that the relevant statute of

[3] Urban Venture and Vulcan, joined by the MA, argued that an alternative ground for dismissal was that the plaintiffs' claims were barred by the settlement agreement.

[4] As part of its ruling, the trial court concluded that the common expense liability allocation in the MA declaration "does not comply with RCW 64.34.224(1) because the [MA] Declaration did not state the formula or method used to establish the allocation of common expenses due to the fact that the Declarant did not use a formula or method to establish the allocation of common expenses." The court rejected the defendants' argument that the table in exhibit B is the formula or method used to establish the percentage allocation. Because the court dismissed the plaintiffs' claims, we agree with the defendants that the court's conclusion was dicta. We will not address the merits of the court's conclusion.

limitations is three years under RCW 4.16.080(2), they argue that a new cause accrues every year when the MA allocates the common expenses between the units, using the declared value in exhibit B. We disagree.

We review summary judgment decisions de novo. Int'l Marine Underwriters v. ABCD Marine, LLC, 179 Wn.2d 274, 281, 313 P.3d 395 (2013). "Summary judgment is proper only where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Int'l Marine Underwriters, 179 Wn.2d at 281; CR56(c).

RCW 4.16.080(2) states that "an action for taking, detaining, or injuring personal property, including an action for the specific recovery thereof, or for any other injury to the person or rights of another not hereinafter enumerated" shall be commenced within three years. The determination of whether the statute of limitations bars a plaintiff's claim depends on when the plaintiff's cause of action accrued. Haslund v. City of Seattle, 86 Wn.2d 607, 619, 547 P.2d 1221 (1976). The general rule is "that a cause of action accrues and the statute of limitations begins to run when a party has the right to apply to a court for relief." Haslund, 86 Wn.2d at 619.

Each of the plaintiffs' individual causes of action against the MA, Vulcan, and Urban Ventures arises out its claim that the original master declaration, and specifically the common element liability allocation, violate the Condominium Act, CPA, or a statutory or common law duty.[5] There is no genuine issue of fact, however, that the

[5] These include the following cause of action: (1) violation of Condominium Act by Urban Ventures, and the MA based on the common expense liability allocation, appointment of board members, and design of condominium structure; (2) breach of duty against Vulcan, Urban Ventures, and the MA arising from original condominium structure and common expense liability allocation; (3) aiding and abetting breach of duty by Vulcan and Urban Ventures arising from original condominium structure and common expense liability allocation; (5) breach of declaration against MA arising from common expense liability allocation; (6) breach of CPA against Urban Ventures arising from common expense liability

master declaration and common expense liability allocation in exhibit B, were created and recorded in 2006. Nor is there a genuine issue of fact that the common expense liability allocation was set forth in the public offering statement and governing documents were provided to every original buyer at 2200 Westlake before they bought their units. As such, any challenge to the common expense liability allocation accrued at the time the residential units were sold in 2006.

The plaintiffs argue first, without citation to authority, that a new cause of action should accrue each year that that the MA set the budget for the following year using the common expense liability allocation. The plaintiffs ignore, however, that the MA has no discretion or authority to deviate from the common expense liability allocation set forth in the original master declaration and exhibit B. The master declaration provides that "The Association, acting by and through the Board for the benefit of the Condominium and the Owners, shall enforce the provisions of this Declaration and of the Bylaws and shall have all powers provided in the Act[.]" The master declaration further provides that the owners must "comply strictly with the provisions of this Declaration, the Bylaws and the administrative rules and regulation passed hereunder[.]" Finally, the MA is required by both the master declaration and the Condominium Act to apply the common expense allocation in exhibit B. "[A]ll Common Expenses must be assessed against all the Units in accordance with the respective Allocated Interest of each Unit as set forth in Exhibit B." See also RCW 64.34.360(2) ("all common expenses must be assessed against all the units in accordance with the allocations set forth in the declaration pursuant to RCW 64.34.224(1)").

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allocation; and (7) tortious interference against Vulcan arising from the original master declaration and common expense allocation.

Plaintiffs assert that the MA amended the master declaration in 2010 to add section 10.4.10, which gave the MA discretion over annual common expense allocations. Section 10.4.10, however, applies only to limited common elements, not all of the common elements. Section 10.4.10 provides that "Any Common Expense, or portion thereof, benefitting fewer than all of the Units may be assessed by the Board exclusively against the Units benefitted." See also RCW 64.34.020 ("'Limited common element' means a portion of the common elements allocated by the declaration or by operation of RCW 64.34.204(2) or (4) for the exclusive use of one or more but fewer than all of the units"). Common expenses, and limited common expenses are different expenses, governed by different provisions of the master declaration, and subject to differing statutory requirements. Thus, for example, while the MA has discretion under Section 10.4.10 to approve a limited common expense that would benefit only the retail unit and assess that limited common expense only against the retail unit, Section 10.4.10 does not grant the MA the discretion to change the overall common expense liability allocation set out in exhibit B. Because there is no discretion to change the common expense liability allocation, any challenge to the original allocation accrued in 2006.

Plaintiffs next argue that there is at least a question of genuine fact over whether the limitations period should be tolled. This argument fails for two reasons. First, plaintiffs cite Green v. A.P.C., 136 Wn.2d 87, 95, 960 P.2d 912 (1998), Alexander v. Sanford, 181 Wn. App. 135, 325 P.3d 341 (2014), and Norris v. Church & Co., Inc., 115 Wn. App. 511, 514, 63 P.3d (2002), as authority for application of the discovery rule to their claims. These cases do not support the plaintiffs.

In Green, our Supreme Court extended the discovery rule to cover personal injuries arising from exposure to toxic substances where there was no evidence that the plaintiff should have known their injury existed more than three years before filing suit. Green, 136 Wn.2d at 100.

Alexander, involved claims against a condominium developer and board members of the condominium association arising from latent construction defects that the developer and condominium board knew about but hid from unit owners until after the statute of limitations had run. Alexander, 181 Wn. App. at 142-48. This court held that claims for breach of board member duty of care, CPA claims, negligent misrepresentation, and fraud by omission and misrepresentation, arising out of the latent defects were tolled until a 2011 meeting with the unit owners where the board declared a budget with a special assessment for the costs of the repairs. Alexander, 181 Wn. App. at 148, 168.

Similarly, Norris involved latent construction defects in a new home. While the homeowners learned that the home leaked shortly after moving in, it was not until four years later that a thorough inspection revealed significant damage resulting from defects during the original home construction. The court applied the discovery rule, holding that the cause of action for fraudulent concealment did not accrue until the homeowners discovered or could have discovered the latent defects. Norris, 115 Wn. App. 516-17.

All three of the cited cases concern latent defects or injuries—defects or injuries that could not reasonably be discovered within the relevant statute of limitations. In contrast, here, the claims asserted by the plaintiffs arise from the original master

declaration and common expense liability calculation—neither of which were hidden. The cases cited by plaintiffs do not support extension of the discovery rule to claims arising from condominium formation documents and we decline to do so.[6]

Second, while plaintiffs assert that the source of the "unfair" allocation was "newly discovered evidence," there is no dispute that the common expense liability allocation was set forth in the public offering statement and provided to every original buyer at 2200 Westlake before they bought their units. The master declaration, including exhibit B, were also recorded. Recording gives constructive notice to all future purchasers. Shephard v. Holmes, 185 Wn. App. 730, 740-41, 345 P.3d 786 (2014) (citing Strong v. Clark, 56 Wn.2d 230, 232-33, 352 P.2d 183 (1960)).[7]

Because the statute of limitations accrued in 2006 with the recording of the master declaration and exhibit B, the trial court did not err in dismissing the plaintiffs' claims against the MA, Vulcan, and Urban Ventures arising out of the master declaration.[8]

III.

The plaintiffs next argue that the trial court erred in its September 29, 2015, order on summary judgment, when it dismissed their derivative claims brought on behalf of

[6] While, as discussed below, a condominium declaration is not a contract, the plaintiffs' claims sound more in contract than construction defects or personal injury. Our Supreme Court has made clear that a breach of contract claim accrues on the date of the breach, not discovery of the breach. 1000 Virginia Ltd P'ship v. Vertecs, 158 Wn.2d 566, 576-78, 146 P.3d 423 (2006).

[7] Further, it is undisputed that at least Grace knew the basic facts of his claims. In October 2008, Grace complained about the governance structure and common expense allocation to other owners, arguing, "We are literally losing money to Vulcan from Master dues[.]" In the same email, Grace acknowledged that time for taking legal action to advance these concerns was limited, warning that "[t]ime (statute of limitations, money being lost, political inertia, falsified and missing records) is against us."

[8] The plaintiffs also challenge the trial court's order dismissing their individual claims against the MA based on lack of standing. Because we hold that the plaintiffs' claims against the MA are barred by the statute of limitations, we do not reach their standing argument.

the RA and MA. The plaintiffs contend that the trial court erred as a matter of law in concluding that individual condominium association members do not have derivative standing. We disagree.

The parties do not dispute that both the MA and RA were incorporated under the Washington Nonprofit Corporation Act (WNCA), chapter 24.03 RCW. The WNCA was enacted in 1967. See Laws of 1967, ch. 235. The WNCA governs all aspects of nonprofit corporations, including incorporation, permissible purposes, and dissolution. See, e.g., RCW 24.03.015, .020, .025, .220-276. Nonprofit corporations are managed by an elected or appointed board of directors according to the corporation's articles of incorporation or bylaws. RCW 24.03.095 - .100. In contrast to for-profit corporations, which are organized under the Washington Business Corporation Act (WBCA), chapter 23B.01 RCW, nonprofit corporations do not have shareholders, but instead may "have one or more classes of members or may have no members." RCW 24.03.065(1); compare RCW 23B.01.400(34).

The WBCA expressly authorizes shareholders of for-profit corporations to bring derivative actions on behalf of the corporation. RCW 23B.07.400. "In a derivative suit, a stockholder asserts rights or remedies belonging to the corporation for the corporation's benefit." Haberman v. Washington Pub. Power Supply Sys., 109 Wn.2d 107, 147, 744 P.2d 1032 (1987). The WNCA, in contrast, does not authorize members to bring derivative actions on behalf of the nonprofit corporation against third parties. Instead, the WNCA provides only two circumstances where a member may seek judicial relief on behalf of the nonprofit corporation: (1) a "representative suit" against an officer or director exceeding their authority, or (2) in order to seek dissolution of the nonprofit

where the directors have acted "in a manner that is illegal, oppressive, or fraudulent" or "where assets are being misapplied or wasted." RCW 24.03.040, .266(1).

Relying on the "plain and unambiguous" language of the WNCA, as well as its legislative history, the court rejected the plaintiffs' argument that nonprofit members have an equitable common law right to bring derivative actions in Lundberg ex rel. Orient Found. v. Coleman, 115 Wn. App. 172, 176, 60 P.3d 595 (2002). In Lundberg, a director attempted to bring a derivative action on behalf of a nonprofit corporation against other directors, alleging that they had breached their fiduciary duties. 115 Wn. App. at 176. This court held that the legislature intended to limit derivative lawsuits to the narrow circumstances addressed in the statute, reasoning it "carefully delineates when actions may be brought on behalf of the corporation." Lundberg, 115 Wn. App. at 177 (citing RCW 24.03.040 and former RCW 24.03.265).

Under Lundberg, plaintiffs do not have a right to bring a derivative action on behalf of the nonprofit RA or MA. Their efforts to distinguish Lundberg are not persuasive. The trial court did not err when it dismissed the plaintiffs' derivative claims brought on behalf of the RA and MA.

IV.

The plaintiffs next challenge the trial court's decision in its February 12, 2016, order on the defendants' motion for judgment on the pleadings, concluding the plaintiffs' breach of contract claims against the RA were barred by res judicata. The trial court's decision was based on the prior litigation between Grace and the RA. While we agree that, based on the pleadings before the trial court, it appears Mohandessi's individual

claims would not be barred by res judicata, we need not reach this issue because the plaintiffs' complaint failed to state a cause of action for breach of contract.

We review a CR 12(c) motion for judgment on the pleadings de novo. M.H. v. Corp. of Catholic Archbishop of Seattle, 162 Wn. App. 183, 189, 252 P.3d 914 (2011). A dismissal under CR 12(c) is appropriate only if "it appears beyond doubt that the plaintiff can prove no set of facts, consistent with the complaint, which would entitle the plaintiff to relief." Haberman, 109 Wn.2d at 120 (internal quotation marks omitted).

The plaintiffs' original complaint alleged two claims against the RA: (1) breach of contract based on the assertion that the master and residential declarations were contracts and (2) breach of implied covenant of good faith and fair dealing again based on the assertion that the master and residential declarations were contracts. These claims fail as a matter of law.

"A contract is a promise or set of promises for the breach of which gives a remedy, or the performance of which the law in some way recognizes as a duty." Restatement (Second) of Contracts § 1 (1981); accord Washington Fed'n of State Emps., AFL-CIO, Council 28, AFSCME v. State, 101 Wn.2d 536, 549, 682 P.2d 869 (1984). In contrast, condominium declarations are not promises between parties, but are recorded real property instruments. Bellevue Pac. Ctr. Condo. Owners Ass'n v. Bellevue Pac. Tower Condo Ass'n, 124 Wn. App. 178, 188, 100 P.3d 832 (2004). Condominium owners are not bound to declarations under the same rules as parties to a contract. Rather, owners have the power to amend a declaration by vote. See RCW 64.32.090(13); RCW 64.34.264(1). Here, the residential declaration may be amended by consent of more than 67 percent of the owners.

Because the plaintiffs failed to allege a cause of action supporting a breach of contract claim against the RA, dismissal of the plaintiffs' breach of contract claims was appropriate.[9]

V.

The plaintiffs next contend that the trial court erred when it dismissed their twenty-first claim: that the 2012 settlement agreement was void as the product of fraud and collusion. The plaintiffs argue that the trial court dismissed their claim sua sponte. We disagree.

On March 17, 2017, the remaining defendants moved for summary dismissal of all the plaintiffs' remaining claims. Vulcan and Urban Venture argued, among other things, that the 2012 settlement agreement barred the plaintiffs' claims. Before the plaintiffs responded to the motions for summary judgment they sought leave to amend their complaint to add their twenty-first claim: that the 2012 settlement agreement was void as collusive, fraudulent, and against public policy. In support of their motion, plaintiff submitted argument and multiple exhibits in support of the twenty-first claim. The plaintiffs then argued in response to the motions for summary judgment that the 2012 settlement agreement was void as the product of fraud and collusion.

By the time of the summary judgment hearing, the trial court had granted leave to amend, and the plaintiffs had filed their third amended complaint. During argument Urban Venture and Vulcan confirmed that they were seeking dismissal of all claims,

[9] The plaintiffs subsequently amended their complaint to add claims against the RA for breach of the residential declaration arising from the RA's entry into the November 2012 settlement agreement. On December 20, 2016, the plaintiffs voluntarily dismissed their claims against the RA. Thus, as of December 20, 2016, there were no claims remaining against the RA.

including specifically the twenty-first claim based on the briefing submitted. The plaintiffs did not object that the issue had not been properly raised or adequately briefed. The plaintiffs instead argued the merits of their claim.

Because the plaintiffs did not object to the trial court deciding the twenty-first claim, the plaintiffs' argument that the dismissal was sua sponte fails. The plaintiffs have not explained how the twenty first claim can survive a motion for summary judgment and therefore have waived this argument on appeal.

VI.

All parties appeal the trial court's award of attorney fees and costs. The plaintiffs challenge the court's award of attorney fees under the 2012 settlement agreement. The defendants cross appeal and challenge the trial court's decision to reduce their attorney fees to the portion spent defending the 2012 settlement agreement. The defendants further challenge the trial court's failure to award attorney fees under Condominium Act. We affirm the trial court's award of fees under the 2012 settlement agreement to Urban Venture, Vulcan, and the RA.

In Washington, attorney fees may be awarded when authorized by a contract, a statute, or a recognized ground in equity. Fisher Props., Inc. v. Arden-Mayfair, Inc., 106 Wn.2d 826, 849-50, 726 P.2d 8 (1986). Whether a contract or law authorizes an attorney fee award is question of law and reviewed de novo. Kaintz v. PLG, Inc., 147 Wn. App. 782, 786, 197 P.3d 710 (2008). Whether the amount of fees awarded was reasonable is reviewed for abuse of discretion. Ethridge v. Hwang, 105 Wn. App. 447, 460, 20 P.3d 958 (2001). We review the trial court's interpretation of statutory costs

provisions de novo. McConnell v. Mothers Work, Inc., 131 Wn. App. 525, 532, 128 P.3d 128 (2006).

A.

The 2012 settlement agreement provides for prevailing party fees "arising from the need to take action to enforce this Agreement, including mediation, arbitration, or litigation." The trial court awarded defendants their attorney fees "they needed to incur to take action to enforce the Settlement Agreement."

The plaintiffs contend that the RA owners are not bound by the terms of the 2012 settlement agreement for several reasons. The plaintiffs contend, "the residents were not involved in negotiations, nor were they represented by counsel." And further, the RA owners "never voted on, let alone approved, the terms of the settlement agreement; the [RA owners] did not sign the settlement agreement; [RA owners] were not told that the settlement agreement could impact their personal rights or liabilities; and residents were not told that a settlement had been reached until after the agreement had been executed."

The plaintiffs' argument fails because RCW 64.34.304 provides unit owners' associations with the power to "institute, defend, or intervene in litigation or administrative proceedings in its own name on behalf of itself or two or more unit owners on matters affecting the condominium" and "make contracts and incur liabilities." RCW 64.34.304(1)(d), (e). The residential declaration provides the same owners association powers. In the 2012 settlement agreement, RA means "any officer, director, manager, member, unit owner, principal, partner, predecessor, successor, agent,

shareholder, and/or employee." Thus, the 2012 settlement agreement intended to bind RA members.

Our Supreme Court has recognized that in a condominium "each owner, in exchange for the benefits of association with other owners, must give up a certain degree of freedom of choice which he [or she] might otherwise enjoy in separate, privately owned property." Lake, 169 Wn.2d at 535 (citation and internal quotation marks omitted). Thus, the RA had the authority to enter and bind the RA owners because they agreed to give up certain freedoms, such as being signatories on a settlement agreement where the RA settled construction defects on behalf of the association and the RA owners. The plaintiffs have not cited any part of the residential declaration that requires the RA owners to vote before the RA enters a settlement agreement for construction defects, thus their argument that the RA owners are not bound because they did not vote fails.

The trial court did not err in awarding the defendants attorney fees under the 2012 settlement agreement.

B.

While the trial court awarded the defendants their attorney fees under the 2012 settlement agreement, it limited its award to time spent defending against the claim that the 2012 settlement agreement was void.

The RA originally requested attorney fees of $380,862.50 for its entire defense. The trial court subsequently granted the RA's reduced fee request of $74,245.00 for its work defending the 2012 settlement agreement. The court also granted the MA's

reduced fee request, awarding $49,521. The trial court rejected Urban Venture and Vulcan's reduced fee request of $813,605 and reduced it further to $299,198.

The defendants argue that the trial court erred because all of the plaintiffs' the claims involved a common core of facts or legal theories. The trial court carefully considered this claim below explaining:

> Plaintiffs brought a total of 21 claims, of which thirteen made no reference to the Settlement Agreement and sought no relief that would appear to require any of the defendants to incur fees arising from the need to enforce that agreement. Plaintiffs brought their first, second, third, fifth, seventh, eighth, twelfth, fourteenth, fifteenth, sixteenth, nineteenth, and twentieth claims individually and/or derivatively against various defendants for allegedly violating the Washington Condominium Act by failing to state the formulas and methods used to establish the "Declared Value" on which they allegedly based the allocation of common expenses, by oppressing RA and its owners, by aiding and abetting those actions, by breaching the Declaration, and by tortious interference. Plaintiffs' eighteenth claim sought an accounting, derivatively, on behalf of the RA against the MA. Those claims did not involve a common core of facts or are based on related legal theories arising from defendants' need to enforce the Settlement Agreement. Defendants are not entitled to an award of fees incurred in defense of those claims and must segregate those fees.
>
> Plaintiff's fourth, ninth, tenth, and seventeenth claims mentioned the Settlement Agreement. The first of those claimed breach of the Residential Declaration and Governing Documents by, among other things, failing to reach an adequate settlement for construction defects in the 2200 Condominium. Plaintiffs' ninth and seventeenth claims for unjust enrichment were against UV individually and Vulcan derivatively, respectively. Those claims related to UV and/or Vulcan's alleged receipt of benefits that should have flowed to residents, which allegedly included improper settlement proceeds, among others. Plaintiffs brought their tenth claim for violation of the Washington Condominium Act and Governing Documents derivatively on behalf of RA against UV and MA and derivatively on behalf of MA against UV. Plaintiffs primarily based this claim on the misallocation of common expenses and the appointment of conflicted board members, but that claim included a reference to the settlement of construction defect claims. Notably, none of those claims sought recession or otherwise indicated that the Settlement Agreement should not be enforced. But to the extent defendants can show that they incurred fees arising from the need to enforce the Settlement Agreement

> in relation to those claims and they segregate those fees, they would be entitled to such an award.
>
> Plaintiffs' twenty-first claim is the one claim that truly appears aimed at the enforceability of the Settlement Agreement. In that claim, plaintiffs contend that the Settlement is void, collusive, fraudulent, and against public policy. This claim also relates to plaintiffs' sixth prayer for relief that seeks a judgment declaring that agreement unenforceable (the other eight prayers for relief do not mention the Settlement Agreement). Defendants are entitled to those fees incurred in relation to this claim so long as they segregate them from those they did not incur arising from the need to enforce the Settlement Agreement.

We cannot conclude that the trial court abused its discretion in limiting the fees it awarded under the 2012 settlement agreement.

C.

The defendants next challenge the trial court's decision to not award attorney fees under the Condominium Act. The Condominium Act provides that "the court, in an appropriate case, may award reasonable attorney's fees to the prevailing party." RCW 64.34.455. The trial court denied the defendants' claim for attorney fees under the Condominium Act and denied their motions for reconsideration.

As the trial court explained in denying Urban Venture and Vulcan's motion for reconsideration:

> This Court held that UV and Vulcan were prevailing parties, but this Court did not believe this was an appropriate case to award their attorney's fees for the reasons stated on the record at the September 12, 2017 hearing. UV and Vulcan rely on Bilanko v. Barclay, [185 Wn.2d 443, 375 P.3d 591 (2016)] Defendants contend this Court erred in reaching the latter conclusion. They argue that Bilanko is "factually indistinguishable" from this case, apparently because the Supreme Court affirmed the dismissal of the plaintiff's claims on statute of limitations grounds and noted that the plaintiff could have moved.
>
> Despite those two similarities, Bilanko is dissimilar from this case in several critical respects that UV and Vulcan do not acknowledge.[9] Here, plaintiffs brought their claims not to enrich themselves but to derivatively

> benefit the 2200 Residential Association (RA) and directly benefit their fellow condo owners. They brought those claims as consumers to address what they perceived to be the unfair imposition of costs on RA by the [MA], Urban Venture LLC, and Vulcan Inc. Notably, this Court found merit to that claim and a violation by defendants of the Washington Condominium Act: the Declared Values that the Declaration used to apportion those costs were simply made-up values rather than being based on a method or formula that is capable of calculation. Further, while the defendants make much of this Court's reference to the "scorched earth" litigation in this case, this Court noted that both sides were to blame. Indeed, plaintiffs' opposition to defendants' motions for reconsideration sets forth many examples of defendants' own role in driving up the costs of this litigation.
>
> ---
>
> [9] Even if Bilanko was indistinguishable in all respects with this case, and it is plainly not, the Washington Supreme Court merely exercised its discretion to award fees in that case. Nowhere in that decision did the Washington Supreme Court hold that it would have been an abuse of discretion for a court to not award fees when faced with those facts.

Similarly, as the trial court explained in denying the RA's motion for reconsideration:

> RA contends this Court erred primarily by applying to RA its rationale for not awarding fees to [MA], and Vulcan and Urban Venture, LLC. . . . In its oral ruling this Court did emphasize that plaintiffs, in their role as consumers and on behalf of similarly situated residents, brought consumer protection claims of self-dealing and illegal control against the defendants. RA fails to acknowledge the reason why plaintiffs had to occupy those roles: RA failed to take any action to address the fact that the Declared Valued in the Declaration were based on made-up values rather than being based on a method or formula that is capable of calculation. Further, RA joined forces with the other defendants to actively oppose plaintiffs' claims at every turn. Finally, while RA makes much of this Court's reference to the "scorched earth" litigation in this case, this Court notes that RA shared much of the blame. Indeed, plaintiffs' opposition to the [defendant] motion for reconsideration sets forth many examples of defendants' own role in driving up the costs of this litigation.

We agree with the trial court. An award of attorney fees under RCW 64.34.455 is discretionary. We cannot conclude that the trial court abused its discretion in denying to award attorney fees under the Condominium Act.

We affirm the trial court's denial of attorney fees under the Condominium Act.

VII.

The plaintiffs finally argue that the trial court erred by awarding costs for "mediator fees, meals, travel, expert fees, consultant fees, or document review expenses" under the Declaratory Judgment Act, RCW 7.24.100. The plaintiffs contend that "costs" should have been limited to costs allowed under RCW 4.84.010. We disagree.

We review questions of statutory interpretation de novo. State v. Dennis, 191 Wn.2d 169, 172, 421 P.3d 944 (2018). If a statute's meaning is plain on its face, then the court must give effect to the plain meaning as an expression of legislative intent. Dep't of Ecology v. Campbell & Gwinn, LLC, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002).

RCW 7.24.100 provides "In any proceeding under this chapter, the court may make such award of costs as may seem equitable and just." RCW 7.24.100 "gives the court broader discretion with regard to costs than courts have in other kinds of proceedings." 15 DOUGLAS J. ENDE, WASHINGTON PRACTICE: CIVIL PROCEDURE § 42.24 (3d ed. 2018). The legislature's use of the word "may" confers discretion. Strenge v. Clarke, 89 Wn.2d 23, 28, 569 P.2d 60 (1977). Empowering a court to do what is "equitable" and "just" also indicated broad discretion. Farmer v. Farmer, 172 Wn.2d 616, 624, 259 P.3d 256 (2011). Nothing in the statute limits a court's discretion.

The trial court did not abuse its discretion in awarding costs under RCW 7.24.100.

VIII.

All parties request attorney fees on appeal. Under RAP 18.1, we may grant attorney fees "if applicable law grants to a party the right to recover reasonable attorney

fees or expenses on review." As discussed above, the Condominium Act grants discretion for the court "in an appropriate case," to award reasonable attorney fees to the prevailing party. RCW 64.34.455. Here, the MA, RA, Urban Venture, and Vulcan are the prevailing parties, subject to compliance with RAP 18.1 we award their attorney fees on appeal.

Affirmed.

Mann, C.J.

WE CONCUR:

Chun, J.

FILED
3/9/2020
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

SHAMIM MOHANDESSI; JOSEPH, GRACE, individually as residential owners and derivatively on behalf of 2200 RESIDENTIAL ASSOCIATION, a Washington non-profit corporation, and derivatively on behalf of 2200 CONDOMINIUM ASSOCIATION, a Washington non-profit corporation, Appellants, v. URBAN VENTURE LLC, a Washington limited liability company; VULCAN, INC., a Washington corporation; 2200 CONDOMINIUM ASSOCIATION, a Washington non-profit corporation; 2200 RESIDENTIAL ASSOCIATION, a Washington non-profit corporation; GARY ZAK, an individual, BRIAN CROWE, an individual; BRANDON MORGAN, an individual; and JOHN DOES 1-15, individuals or entities, Respondents.	No. 77017-9-I consolidated with No. 77581-2-I DIVISION ONE PUBLISHED OPINION FILED: March 9, 2020

MANN, A.C.J. — This case concerns condominium assessments. Shamim Mohandessi and Joseph Grace (collectively plaintiffs) appeal the trial court's dismissal

of their claims against the 2200 Residential Association (RA), the 2200 Condominium Association, Gary Zak, Brian Crowe, and Brandon Morgan (collectively MA), Urban Venture LLC, and Vulcan, Inc., (all collectively defendants). The plaintiffs brought direct and derivative claims alleging that the defendants violated the Washington Condominium Act (Condominium Act), chapter 64.34 RCW, the Washington Consumer Protection Act (CPA), chapter 19.86 RCW, breached statutory and fiduciary duties, and tortiously interfered with the MA Board's duties.

The plaintiffs contend that the trial court erred in (1) concluding that the statute of limitations barred their claims, (2) concluding that they could not bring claims derivatively on behalf of the RA and MA, (3) concluding that they lacked standing to bring claims against the MA for violations of the Condominium Act, (4) dismissing their breach of contract claims against the RA, (5) sua sponte dismissing their claim that a prior 2012 settlement agreement was void as the product of fraud and collusion, (6) awarding fees under the 2012 settlement agreement and costs under the Uniform Declaratory Judgment Act, RCW 7.24.100. The defendants cross appeal and argue that the trial court erred: (1) in concluding that the common expense liability allocation in the master declaration violates the Condominium Act, RCW 64.34.224(1) and (2) in not awarding their full attorney fees under the 2012 settlement agreement, or alternatively, under the Condominium Act.

We affirm the trial court's dismissal of all claims against the RA, Urban Venture, and Vulcan. We affirm the trial court's conclusion that the master declaration violated the Condominium Act because the allocation of common expenses violates RCW

64.34.224(1). We reverse the trial court's dismissal of the plaintiffs' claims against the MA for violations of the Condominium Act.

We affirm the trial court's award of attorney fees under the 2012 settlement agreement in favor of the RA, Urban Venture, and Vulcan. We vacate the award of attorney fees in favor of the MA.

Affirmed in part, reversed in part.

I.

2200 Westlake

This appeal concerns a mixed-use development located at 2200 Westlake Avenue in downtown Seattle (2200 Westlake) comprising of over 500,000 gross square feet, excluding underground parking. Milliken Urban Limited Partnership (Milliken) began the development of 2200 Westlake. Urban Venture LLC, a subsidiary of Vulcan Inc., invested in the project and developed it jointly with Milliken. Urban Venture bought out Milliken's interest midway through construction in 2005.

The development was completed in 2006. That same year Urban Venture executed and recorded a "master declaration" under the Condominium Act, creating a four-unit condominium called "2200, a condominium." The four units are comprised of: (1) the commercial unit, which leases 90,000 square feet of commercial retail shops; (2) the hotel unit, housing the 153-room Pan Pacific Hotel; (3) the food unit, leased to Whole Foods grocery store; and (4) the residential unit, comprised of 259 residential units, which has a separate sub-condominium association.

2200 Westlake is governed by, and acts through, the 2200 Condominium Association, a nonprofit corporation, which the parties refer to as the Master Association

(MA).[1] The owner of each unit of 2200 Westlake is a member of the MA. The MA is administered by a four-person board, with each owner electing one representative to hold the single vote allocated to each owner.

In 2006, Urban Venture also recorded a separate declaration for the 259-unit residential unit of 2200 Westlake. The "residential declaration" covers the 2200 Residential Association (RA). The RA is also organized as a nonprofit corporation. The RA board is elected by a majority of the residential unit owners. The RA board chooses a single member to represent it on the MA Board.

Urban Venture owned the commercial, hotel, and food store units from completion of the project, until selling the units to third parties: the commercial unit in March 2016, the food store unit in September 2016, and the hotel unit in February 2017. During Urban Venture's ownership, the MA board members were Vulcan employees, appointed by Urban Venture. The initial board members were Gary Zak, Hamilton Hazlehurst, and Brian Crowe.

Central to this litigation is the common expenses associated with the common elements of 2200 Westlake and the division of the common expenses between the four condominium units in the MA. The master declaration defines the "Common Elements" as "all portions of the Property and the Project which are outside the boundaries of a Unit, and improvements within the boundaries of a Unit which are designated as Common Elements or Limited Common Elements under the provisions of Article 3." "Common Expenses" are defined as:

> expenditures made by, or financial liabilities of the Association, together with any allocations to reserves. Common Expenses are funded by each

[1] The parties do not dispute that the 2200 Condominium Association is not actually a "master association" as that term is defined in the Condominium Act, RCW 64.34.020(28), .276.

Owner in accordance with its Allocated Interest, except that certain Common Expenses are specifically allocated to fewer than all Units or are specially allocated among Units based on usage or benefit, as more specifically set forth in Section 10.4.

Common Expense Liability

The common expense liability, and interest in the common elements, are determined by the units' declared value, which results in the "Allocated Interest Percentage." Exhibit B to the MA declaration shows the unit data and allocated interests for each unit.

Unit Name	Unit Floor Area (Sq. Ft.)	Declared Value	CEL/ICE	Votes	Parking Spaces
Unit C (Commercial Unit)	24,352	$11,340,000	6.3	1	90 covered 36 uncovered
Unit R (Residential Unit)	259,447	$138,960,000	77.2	1	318 covered
Unit H (Hotel Unit)	120,309	$18,000,000	10.0	1	55 covered 2 uncovered
Unit F (Food Store Unit)	43,616	$11,700,000	6.5	1	272 covered 12 uncovered
Total		$180,000,000	100%	4	

"Declared value" is defined as "the value of each Unit as stated in Schedule B, which does not necessarily reflect market value and will not be affected by sales price." In contrast, the preamble to the MA declaration indicates that concerns about fair governance for all units culminated in "the decision to allocate many of the costs by square footage (for the sake of simplicity) or, if feasible, by separate metered usage." The common element liability, however, does not correspond to square footage. The RA declaration includes Schedule B, which allocates Unit R's common element liability to each condominium unit based on "relative area of Units."

Prior Litigation

Plaintiff Grace bought a residential unit at 2200 Residential in 2006. Grace considers himself an experienced real estate purchaser. Grace purchased a second unit at 2200 Residential in 2015, after this litigation began. Plaintiff Mohandessi, an attorney, purchased a residential unit at 2200 Residential in 2010.

Grace has been in conflict with the RA since April 2007. In protest to the RA Board's actions and assessments, Grace stopped paying his full dues in 2008. The RA sued Grace in 2011 and 2013 to collect unpaid dues and late charges.[2] Grace asserted defenses and counterclaims, alleging that the RA breached its fiduciary duty, committed fraud, trespass, and conversion, and held an invalid election. The trial court dismissed Grace's counterclaims and defenses, finding in favor of the RA.

From 2009 until 2012, the RA and MA pursued claims against Urban Venture and Vulcan under the WCA and CPA for construction defects. In November 2012, the RA, MA, Vulcan, and Urban Venture entered a settlement agreement. Urban Venture agreed to pay the RA $26,000,000 in exchange for release of the RA's claims against Urban Venture. The RA received $3,120,000 to use as it deemed appropriate, with the remaining $22,800,000 set aside for remediation. The validity and fairness of the common expense liability and allocation in the master declaration was raised during settlement discussions but did not become part of the 2012 settlement agreement.

Current Litigation

The plaintiffs filed this lawsuit against the various defendants in October 2015. The original complaint sought declaratory judgment that the MA violated the

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[2] 2200 Residential Association v. Grace, No. 72651-0 (Wash. Ct. App. July 25, 2016) (unpublished).

Condominium Act and the MA declaration by "improperly and disproportionately shift[ing] costs of 2200 Westlake onto plaintiffs and other residential owners." The plaintiffs alleged that: (1) the MA and RA declarations were contracts, and that the MA and RA breached those contracts and the implied covenant of good faith and fair dealing, (2) the MA and RA boards breached their fiduciary duties, and (3) Urban Venture breached its fiduciary duties, and tortuously interfered with the MA and RA's performance of their contractual obligations under their respective declarations. The plaintiffs made the claims on behalf of themselves, as well as derivatively on behalf of the RA and double derivatively on behalf of the MA.

The defendants moved for judgment on the pleadings under CR 12(c). On February 12, 2016, the trial court dismissed the plaintiffs' direct claims against the MA for lack of standing, and the breach of contract claims against the RA under res judicata, to the extent that the events occurred before December 2014 (the date of Grace's settlement in his prior litigation). The court also dismissed the breach of an implied covenant of good faith and fair dealing, finding that there was no legal authority for an implied covenant under a condominium declaration. The trial court limited the plaintiffs' remaining claims based on the statute of limitations, RCW 4.16.080, to the extent they were based on events occurring more than three years before the plaintiffs filed suit in October 2015.

The defendants then moved for summary judgment. On September 29, 2016, the trial court granted in part and denied in part the defendants' motions. The court dismissed all claims asserted by the plaintiffs derivatively on behalf of the RA and MA. No claims remained against Urban Venture and the MA after the September 29, 2019,

order. The trial court granted the plaintiffs' request for a CR 56(f) continuance to perform additional discovery on the remaining direct claims against the RA. During discovery, Urban Venture indicated that it could not identify a specific formula for the declared value or the common expense liability, but that the declared value was likely the product of completed construction costs.

In December 2016, the plaintiffs amended their complaint, adding new claims challenging the common expense liability and adding Vulcan as a party. The plaintiffs amended their claims against the RA to include a claim for breach of the residential declaration arising from the RA's entry into the November 2012 settlement agreement. On December 20, 2016, the plaintiffs voluntarily dismissed their claims against the RA.

The plaintiffs were granted leave to amend their complaint twice more, in March 2017 and May 2017. The plaintiffs' new claims alleged that: (1) Urban Venture and the MA violated the Condominium Act, (2) Urban Venture, Vulcan, and certain MA board members, breached duties under the Condominium Act, (3) Urban Venture and Vulcan aided and abetted the MA's alleged breach of duties, (4) Urban Venture violated the CPA, and (5) Vulcan tortuously interfered with the plaintiffs' expectancy that the MA and RA, and respective boards, would comply with all applicable laws and duties. The plaintiffs also sought a declaratory judgment that the 2012 settlement agreement was "void and unenforceable as collusive, fraudulent, and against public policy" (referred to as the "twenty first claim"). The plaintiffs named the RA as a "nominal" defendant.

Prior to the plaintiffs' third amended complaint, the defendants moved for summary judgment dismissal of the plaintiffs' remaining claims in March 2017. The plaintiffs also moved for partial summary judgment.

In May 2017, the trial court dismissed all remaining claims on summary judgment including the plaintiffs' newest claims added in their third amended complaint. The court dismissed the twenty-first claim because "there [was] no evidence of fraud, collusion or undue influence" to create an issue of fact regarding the settlement agreement's validity. The trial court dismissed all other claims, finding the statute of limitations barred the plaintiffs' claims because all challenges related to the master declaration, which was recorded in 2006.[3]

As part of its ruling, the trial court determined that the common expense liability allocation in the MA declaration "does not comply with RCW 64.34.224(1) because the [MA] Declaration did not state the formula or method used to establish the allocation of common expenses due to the fact that the Declarant did not use a formula or method to establish the allocation of common expenses." The court rejected the defendants' argument that the table in exhibit B is the formula or method used to establish the percentage allocation.

The trial court found that the defendants were prevailing parties since the plaintiffs' claims were dismissed with prejudice. The defendants separately sought their attorney fees as the prevailing party under the Condominium Act, the master declaration, or the 2012 settlement agreement. The defendants also sought their litigation costs under the master declaration, the 2012 settlement agreement, and the Declaratory Judgment Act, RCW 7.24.100. The trial court awarded limited fees under the 2012 settlement agreement alone, and awarded costs under RCW 7.24.100.[4]

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[3] Urban Venture and Vulcan, joined by the MA, argued that an alternative ground for dismissal was that the plaintiffs' claims were barred by the settlement agreement.

[4] The trial court's attorney fee award is more thoroughly explained in Section VIII below.

The plaintiffs appealed and the defendants cross appealed.

II.

The validity of the common expense liability allocation is central to the plaintiffs' grievances, thus we first address whether the declared value violates RCW 64.34.224(1). The trial court found that the declared value violated RCW 64.34.224(1). The defendants' cross appeals request that, if this court remands for further litigation, we review the trial court's conclusion. We agree with the trial court that the declared value used to determine the common expense liability violates RCW 64.34.224(1) because it does not state a method or formula for its basis.

We review questions of statutory interpretation de novo. Jametsky v. Olsen, 179 Wn.2d 756, 761-62, 317 P.3d 1003 (2014). The goal of statutory interpretation is to "ascertain and carry out the legislature's intent." Jametsky, 179 Wn.2d at 762. We give effect to the plain meaning of the statute, "derived from the context of the entire act as well as any related statutes which disclose legislative intent about the provision in question." Jametsky, 179 Wn.2d at 762 (internal quotations omitted). If the statute's language is unambiguous, then the inquiry ends. Jametsky, 179 Wn.2d at 762. If, however, the language is subject to more than one reasonable interpretation, we "may resort to statutory construction, legislative history, and relevant case law for assistance in discerning legislative intent." Jametsky, 179 Wn.2d at 762.

A.

The plain language of the Condominium Act provides that a condominium declaration must allocate the division of undivided interests in the common elements

and state the formula or methods used to establish those allocations. Under RCW 64.34.224(1):

> The declaration shall allocate a fraction or percentage of undivided interests in the common elements and in the common expenses of the association, and a portion of the votes in the association, to each unit and state the formulas or methods used to establish those allocations. Those allocations may not discriminate in favor of units owned by the declarant or affiliate of the declarant.

The defendants contend that exhibit B meets the requirements of RCW 64.34.224(1). First, the defendants contend that the "statute permits the declarant to allocate . . . by size, value, and numbers of units or other appropriate basis." Accordingly, the defendants contend that "[b]ased on a plain-meaning analysis, the statute requires disclosure of two facts: (1) the 'fraction or percentage' allocated to each unit, and (2) the 'formula or method' that is the basis of that allocation." The defendants contend that exhibit B allocates common element expenses to each unit and that the common expense liability is the method that represents the basis of the allocation.

The defendants' argument ignores the last sentence of RCW 64.34.224(1), which states "[t]hose allocations may not discriminate in favor of units owned by the declarant or affiliate of the declarant." To support their argument, the defendants contend that "[a]ttaching an appraisal to the declaration or otherwise disclosing how declared values were chosen would add nothing in terms of disclosing how common expenses are allocated in a condominium." We disagree that disclosing the method would add nothing because the statute requires that the method not discriminate in favor of the Declarant. Exhibit B does not provide this court with any basis to evaluate whether the declared value discriminates in favor of the Declarant, thus it fails to meet the requirements of RCW 64.34.224(1).

The second sentence of RCW 64.34.224(1) informs our interpretation of the first sentence because it directly references the allocations discussed in the first sentence. We interpret each word of a statute and accord it meaning. State v. Roggenkamp, 153 Wn.2d 614, 624, 106 P.3d 196 (2005). Disclosing the formula or method underlying the declared values ensures that the allocations do not discriminate in favor of units owned by the declarant or an affiliate of the declarant. A declarant cannot defend that their allocations do not discriminate in their favor without reference to the formula or method underlying the division of common expenses. Here, Urban Venture indicated that the declared value

> was not produced by a set formula, but rather was a product of the reasonable value and the cost of completed construction. The hotel, food, and commercial spaces were substantially completed for the condominium purposes prior to final tenant improvements that were part of various leases. The residential units included completed interior fixtures, finished, and appliances.

Urban Venture was unable, however, to produce evidence supporting the calculation for the declared valued in exhibit B. Further, Urban Venture's explanation was not included in the MA declaration accompanying exhibit B.

The defendants also contend that Lake v. Woodcreek Homeowners Ass'n., 169 Wn.2d 516, 243 P.3d 1283 (2010), supports their interpretation that the allocation can be set arbitrarily, so long as the declarant discloses the values in the declaration. (2010). The defendants cite Lake for the proposition that there, the court found that "value" in the Horizontal Property Regimes Act (HPRA) "need not relate to an apartment's fair market value or any other criteria" and that under the HPRA, "the values may be set arbitrarily, as long as they are stated in the declaration." 169 Wn.2d at 534.

We disagree that Lake is relevant to our plain-meaning analysis. In Lake, our Supreme Court was interpreting RCW 64.32.050(1) which states, "[e]ach apartment owner shall be entitled to an undivided interest in the common areas and facilities in the percentage expressed in the declaration. Such percentage shall be computed by taking as a basis the value of the apartment in relation to the value of the property." RCW 64.32.050(1); see Lake, 169 Wn.2d at 529. The HPRA statutory language discussed in Lake is substantially different from the Condominium Act. The HPRA does not address discriminatory practices. In contrast, the Condominium Act states that the methods or formulas shall be stated and that allocations may not discriminate in favor of units owned by the declarant. Further, the HPRA does not reference methods or formulas. Thus, Urban Venture's argument that the declared value, without more, is itself a method or formula and compliant with the Condominium Act is without merit.

B.

Legislative history also supports our interpretation of the plain-meaning of RCW 64.34.224(1). On the issue of allocating costs for common expenses, the comments in the Senate Journal establish that the legislature wanted declarants to explain the formula or method underlying those allocations. The comments state that RCW 64.34.224(1) "does not require that the formulas used by the declarant be justified, but it does require that the formulas be explained." 2 SENATE JOURNAL, 51st Leg., Reg. Sess., App. at 2061 (Wash. 1990).

> If size is chosen as a basis of allocation, the declarant must choose between reliance on area or volume, and the choice must be indicated in the declaration. The declarant might further refine the formula by, for example, excluding unheated areas from the calculation or by partially discounting such areas by means of a ratio. Again, the declarant must indicate the choices he made and explain the formulas he has chosen.

2 SENATE JOURNAL, App. at 2061 (emphasis added). The legislature intended that the declarant include the formula or method underlying the common expense element cost allocations in the declaration.

The trial court did not err when it concluded that the declared valued in the MA declaration violates RCW 64.34.224(1).

III.

The plaintiffs contend that the trial court erred in its May 27, 2017, summary judgment order by dismissing claims against the MA based on the statute of limitations. While the plaintiffs agree the relevant statute of limitations is three years under RCW 4.16.080(2), they argue that a new cause accrues every year when the MA allocates the common expenses between the units, using the invalid declared value in exhibit B. We agree.

We review summary judgment decisions de novo. Int'l Marine Underwriters v. ABCD Marine, LLC, 179 Wn.2d 274, 281, 313 P.3d 395 (2013). "Summary judgment is proper only where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Int'l Marine Underwriters, 179 Wn.2d at 281; CR56(c).

RCW 4.16.080(2) states that "an action for taking, detaining, or injuring personal property, including an action for the specific recovery thereof, or for any other injury to the person or rights of another not hereinafter enumerated" shall be commenced within three years. The determination of whether the statute of limitations bars a plaintiff's claim depends on when the plaintiff's cause of action accrued. Haslund v. City of Seattle, 86 Wn.2d 607, 619, 547 P.2d 1221 (1976). The general rule is "that a cause of

action accrues and the statute of limitations begins to run when a party has the right to apply to a court for relief." Haslund, 86 Wn.2d at 619. The issue of how the statute of limitations applies to condominium association assessments that accrue on a yearly basis is an issue of first impression.

Generally, the right to apply to a court for relief requires each element of the action be susceptible to proof, this includes actual loss or damage. Haslund, 86 Wn.2d at 619. "The determination of the time at which a plaintiff suffered actual and appreciable damage is a question of fact." Haslund, 86 Wn.2d at 620. "In some circumstances, of course, a court may be able to conclude as a matter of law that no triable issue of fact exists as to when plaintiff suffered actual and appreciable damage giving rise to a practical legal remedy." Haslund, 86 Wn.2d at 621.

Here, the plaintiffs suffer actual and appreciable damage when they pay an assessment that violates RCW 64.34.224(1). Under RCW 64.34.090, "[e]very contract or duty governed by this chapter imposes an obligation of good faith in its performance or enforcement." The MA declaration was amended in 2010 to allow the MA board the discretion to use another method or formula to allocate the common expenses between the four units.[5] Each time the MA board chose to use the allocations in exhibit B, it violated its duty of good faith to the RA members by allocating in a manner that violates RCW 64.34.224(1). Thus, each time the MA board passes a budget, the RA members suffer actual and appreciable damage and a new cause of action accrues for violations of RCW 64.34.224(1) and RCW 64.34.090.

[5] The MA declaration amendment states "Any Common Expense, or portion thereof, benefitting fewer than all of the Units may be assessed by the Board exclusively against the Units benefitted."

Therefore, the trial court erred when it concluded that the plaintiffs' cause of action accrued in 2006. As members of the RA, the plaintiffs' causes of action accrue each time the MA board passes a budget. The plaintiffs may bring claims for their individual damages accruing between 2013 and 2016—three years before filing the complaint.

IV.

The plaintiffs next argue that the trial court erred in its September 29, 2015, order on summary judgment, when it dismissed their derivative claims brought on behalf of the RA and MA. The plaintiffs contend that the trial court erred as a matter of law in concluding that individual condominium association members do not have derivative standing. We disagree.

The parties do not dispute that both the MA and RA were incorporated under the Washington Nonprofit Corporation Act (WNCA), chapter 24.03 RCW. The WNCA was enacted in 1967. See Laws of 1967, ch. 235. The WNCA governs all aspects of nonprofit corporations, including incorporation, permissible purposes and dissolution. See, e.g., RCW 24.03.015, .020, .025, .220-276. Nonprofit corporations are managed by an elected or appointed board of directors according to the corporation's articles of incorporation or bylaws. RCW 24.03.095 - .100. In contrast to for-profit corporations, which are organized under the Washington Business Corporation Act (WBCA), chapter 23B.01 RCW, nonprofit corporations do not have shareholders, but instead may "have one or more classes of members or may have no members." RCW 24.03.065(1); compare RCW 23B.01.400(34).

The WBCA expressly authorizes shareholders of for-profit corporations to bring derivative actions on behalf of the corporation. RCW 23B.07.400. "In a derivative suit, a stockholder asserts rights or remedies belonging to the corporation for the corporation's benefit." Haberman v. Washington Pub. Power Supply Sys., 109 Wn.2d 107, 147, 744 P.2d 1032 (1987). The WNCA, in contrast, does not authorize members to bring derivative actions on behalf of the nonprofit corporation against third parties. Instead, the WNCA provides only two circumstances where a member may seek judicial relief on behalf of the nonprofit corporation: (1) a "representative suit" against an officer or director exceeding their authority, or (2) in order to seek dissolution of the nonprofit where the directors have acted "in a manner that is illegal, oppressive, or fraudulent" or "where assets are being misapplied or wasted." RCW 24.03.040, .266(1).

Relying on the "plain and unambiguous" language of the WNCA, as well as its legislative history, the court rejected the plaintiffs' argument that nonprofit members have an equitable common law right to bring derivative actions in Lundberg ex rel. Orient Found. v. Coleman, 115 Wn. App. 172, 176, 60 P.3d 595 (2002). In Lundberg, a director attempted to bring a derivative action on behalf of a nonprofit corporation against other directors, alleging that they had breached their fiduciary duties. 115 Wn. App. at 176. This court held that the legislature intended to limit derivative lawsuits to the narrow circumstances addressed in the statute, reasoning it "carefully delineates when actions may be brought on behalf of the corporation." Lundberg, 115 Wn. App. at 177 (citing RCW 24.03.040 and former RCW 24.03.265).

Under Lundberg, plaintiffs do not have a right to bring a derivative action on behalf of the nonprofit RA or MA. Their efforts to distinguish Lundberg are not

persuasive. The trial court did not err when it dismissed the plaintiffs' derivative claims brought on behalf of the RA and MA.

V.

While the WNCA does not authorize individual members to bring derivative actions on behalf of a nonprofit corporation, this does not resolve whether individual members may bring individual claims against RA or MA. The plaintiffs contend that the trial court erred in its February 12, 2016, order by dismissing the plaintiffs' individual claims against the RA and MA for breach of good faith due to their lack of standing. The plaintiffs also contend the trial court erred in denying their motion for leave to amend their complaint to add allegations of breach of the declaration or the Condominium Act due to standing. Because the plaintiffs have standing under the Condominium Act, we agree.

The MA governs all of 2200 Westlake based on the master declaration. One unit of the MA—the RA—is a residential condominium within the larger condominium. While individual residents of the RA are not directly parties to the master declaration, they own a portion of the overall master condominium and are bound by the terms of the master declaration. This includes the common expense allocation within the MA.

The Condominium Act broadly allows

> If a declarant or any other person subject to this chapter fails to comply with any provision hereof or any provision of the declaration or bylaws, <u>any person or class of persons adversely affected by the failure to comply has a claim for appropriate relief.</u> The court, in an appropriate case, may award reasonable attorney's fees to the prevailing party.

RCW 64.34.455 (emphasis added).

Further, the Condominium Act provides that "[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. Thus, by the plain language, the Condominium Act provides a direct action for members to sue their condominium association for violations of the Condominium Act or declaration.[6]

This interpretation is further supported by the legislative history. The Senate Journal comments state that RCW 64.34.455:

> provides a general cause of action or claim for relief for failure to comply with the Act by either a declarant or any other person subject to the Act's provision. Such person might include unit owners, persons exercising a declarant's right of appointment pursuant to RCW 64.34.308(4), or the association. A claim for appropriate relief might include damages, injunctive relief, specific performance, rescission or reconveyance if appropriate under the law of the state, or any other remedy normally available under state law. The section specifically refers to "any person or class of persons" to indicate that any relief available under the state class action statute would be available in circumstances where a failure to comply with this Act has occurred. This section permits attorney's fees to be awarded in the discretion of the court to any party that prevails in any action.

2 SENATE JOURNAL, App. at 2091. This comment indicates that the legislature intended to allow condominium members the right to sue their association for violations under the Condominium Act.

Accordingly, we conclude that the trial court erred when it dismissed the plaintiffs' direct action against the MA for breach of good faith, and denied the plaintiffs' motion to

[6] The defendants provided supplemental authorities explaining that an individual may not assert a claim that is derivative in nature. We agree with these authorities, but they do not aid in our analysis because RCW 64.34.445 provides direct standing for the plaintiffs against both the RA and MA.

amend and add claims against the MA for violations of the Condominium Act based on standing.[7]

VI.

The plaintiffs next challenge the trial court's decision in its February 12, 2016, order on the defendants' motion for judgment on the pleadings, concluding the plaintiffs' breach of contract claims against the RA were barred by res judicata. The trial court's decision was based on the prior litigation between Grace and the RA. While we agree that, based on the pleadings before the trial court, it appears Mohandessi's individual claims would not be barred by res judicata, we need not reach this issue because the plaintiffs' complaint failed to state a cause of action for breach of contract.

We review a CR 12(c) motion for judgment on the pleadings de novo. M.H. v. Corp. of Catholic Archbishop of Seattle, 162 Wn. App. 183, 189, 252 P.3d 914 (2011). A dismissal under CR 12(c) is appropriate only if "it appears beyond doubt that the plaintiff can prove no set of facts, consistent with the complaint, which would entitle the plaintiff to relief." Haberman, 109 Wn.2d at 120 (internal quotation marks omitted).

The plaintiffs' original complaint alleged two claims against the RA: (1) breach of contract based on the assertion that the master and residential declarations were contracts and (2) breach of implied covenant of good faith and fair dealing again based on the assertion that the master and residential declarations were contracts. These claims fail as a matter of law.

[7] As discussed above, the trial court concluded, and we agree, that the common expense allocation violates RCW 64.34.224(1). The WNCA also imposes an obligation of good faith in the performance of duties. RCW 64.34.090.

"A contract is a promise or set of promises for the breach of which gives a remedy, or the performance of which the law in some way recognizes as a duty." Restatement (Second) of Contracts § 1 (1981); accord Washington Fed'n of State Emps., AFL-CIO, Council 28, AFSCME v. State, 101 Wn.2d 536, 549, 682 P.2d 869 (1984). In contrast, condominium declarations are not promises between parties, but are recorded real property instruments. Bellevue Pac. Ctr. Condo. Owners Ass'n v. Bellevue Pac. Tower Condo Ass'n, 124 Wn. App. 178, 188, 100 P.3d 832 (2004). Condominium owners are not bound to declarations under the same rules as parties to a contract. Rather, owners have the power to amend a declaration by vote. See RCW 64.32.090(13); RCW 64.34.264(1). Here, the residential declaration may be amended by consent of more than 67 percent of the owners.

Because the plaintiffs failed to allege a cause of action supporting a breach of contract claim against the RA, dismissal of the plaintiffs's breach of contract claims was appropriate.[8]

VII.

The plaintiffs next contend that the trial court erred when it dismissed their twenty-first claim: that the 2012 settlement agreement was void as the product of fraud and collusion. The plaintiffs argue that the trial court dismissed their claim sua sponte. We disagree.

[8] The plaintiffs subsequently amended their complaint to add claims against the RA for breach of the residential declaration arising from the RA's entry into the November 2012 settlement agreement. On December 20, 2016, the plaintiffs voluntarily dismissed their claims against the RA. Thus, as of December 20, 2016, there were no claims remaining against the RA.

On March 17, 2017, the remaining defendants moved for summary dismissal of all of the plaintiffs' remaining claims. Vulcan and Urban Venture argued, among other things, that the 2012 settlement agreement barred the plaintiffs' claims. Before the plaintiffs responded to the motions for summary judgment they sought leave to amend their complaint to add their twenty-first claim: that the 2012 settlement agreement was void as collusive, fraudulent, and against public policy. In support of their motion, plaintiff submitted argument and multiple exhibits in support of the twenty-first claim. The plaintiffs then argued in response to the motions for summary judgment that the 2012 settlement agreement was void as the product of fraud and collusion.

By the time of the summary judgment hearing, the trial court had granted leave to amend, and the plaintiffs had filed their third amended complaint. During argument Urban Venture and Vulcan confirmed that they were seeking dismissal of all claims, including specifically the twenty-first claim based on the briefing submitted. The plaintiffs did not object that the issue had not been properly raised or adequately briefed. The plaintiffs instead argued the merits of their claim.

Because the plaintiffs did not object to the trial court deciding the twenty-first claim, the plaintiffs' argument that the dismissal was sua sponte fails. The plaintiffs have not explained how the twenty first claim can survive a motion for summary judgment and therefore have waived this argument on appeal.

VIII.

All parties appeal the trial court's award of attorney fees and costs. The plaintiffs challenge the court's award of attorney fees under the 2012 settlement agreement. The defendants cross appeal and challenge the trial court's decision to reduce their attorney

fees to the portion spent defending the 2012 settlement agreement. The defendants further challenge the trial court's failure to award attorney fees under Condominium Act. We affirm the trial court's award of fees under the 2012 settlement agreement to Urban Venture, Vulcan, and the RA. Because we reverse the trial court's dismissal of the plaintiffs' claims against the MA we vacate the award of fees to the MA.

In Washington, attorney fees may be awarded when authorized by a contract, a statute, or a recognized ground in equity. Fisher Props., Inc. v. Arden-Mayfair, Inc., 106 Wn.2d 826, 849-50, 726 P.2d 8 (1986). Whether a contract or law authorizes an attorney fee award is question of law and reviewed de novo. Kaintz v. PLG, Inc., 147 Wn. App. 782, 786, 197 P.3d 710 (2008). Whether the amount of fees awarded was reasonable is reviewed for abuse of discretion. Ethridge v. Hwang, 105 Wn. App. 447, 460, 20 P.3d 958 (2001). We review the trial court's interpretation of statutory costs provisions de novo. McConnell v. Mothers Work, Inc., 131 Wn. App. 525, 532, 128 P.3d 128 (2006).

A.

The 2012 settlement agreement provides for prevailing party fees "arising from the need to take action to enforce this Agreement, including mediation, arbitration, or litigation." The trial court awarded defendants their attorney fees "they needed to incur to take action to enforce the Settlement Agreement."

The plaintiffs contend that the RA owners are not bound by the terms of the 2012 settlement agreement for several reasons. The plaintiffs contend, "the residents were not involved in negotiations, nor were they represented by counsel." And further, the RA owners "never voted on, let alone approved, the terms of the settlement agreement;

the [RA owners] did not sign the settlement agreement; [RA owners] were not told that the settlement agreement could impact their personal rights or liabilities; and residents were not told that a settlement had been reached until after the agreement had been executed."

The plaintiffs' argument fails because RCW 64.34.304 provides unit owners' associations with the power to "institute, defend, or intervene in litigation or administrative proceedings in its own name on behalf of itself or two or more unit owners on matters affecting the condominium" and "make contracts and incur liabilities." RCW 64.34.304(1)(d), (e). The residential declaration provides the same owners' association powers. In the 2012 settlement agreement, RA means "any officer, director, manager, member, unit owner, principal, partner, predecessor, successor, agent, shareholder, and/or employee." Thus, the 2012 settlement agreement intended to bind RA members.

Our Supreme Court has recognized that in a condominium "each owner, in exchange for the benefits of association with other owners, must give up a certain degree of freedom of choice which he [or she] might otherwise enjoy in separate, privately owned property." Lake, 169 Wn.2d at 535 (citation and internal quotation marks omitted). Thus, the RA had the authority to enter and bind the RA owners because they agreed to give up certain freedoms, such as being signatories on a settlement agreement where the RA settled construction defects on behalf of the association and the RA owners. The plaintiffs have not cited any part of the residential declaration that requires the RA owners to vote before the RA enters a settlement

agreement for construction defects, thus their argument that the RA owners are not bound because they did not vote fails.

The trial court did not err in awarding the defendants attorney fees under the 2012 settlement agreement.

B.

While the trial court awarded the defendants their attorney fees under the 2012 settlement agreement, it limited its award to time spent defending against the claim that the 2012 settlement agreement was void.

The RA originally requested attorney fees of $380,862.50 for its entire defense. The trial court subsequently granted the RA's reduced fee request of $74,245.00 for its work defending the 2012 settlement agreement. The court also granted the MA's reduced fee request, awarding $49,521. The trial court rejected Urban Venture and Vulcan's reduced fee request of $813,605 and reduced it further to $299,198.

The defendants argue that the trial court erred because all of the claims involved a common core of facts or legal theories. The trial court carefully considered this claim below explaining:

> Plaintiffs brought a total of 21 claims, of which thirteen made no reference to the Settlement Agreement and sought no relief that would appear to require any of the defendants to incur fees arising from the need to enforce that agreement. Plaintiffs brought their first, second, third, fifth, seventh, eighth, twelfth, fourteenth, fifteenth, sixteenth, nineteenth, and twentieth claims individually and/or derivatively against various defendants for allegedly violating the Washington Condominium Act by failing to state the formulas and methods used to establish the "Declared Value" on which they allegedly based the allocation of common expenses, by oppressing RA and its owners, by aiding and abetting those actions, by breaching the Declaration, and by tortious interference. Plaintiffs' eighteenth claim sought an accounting, derivatively, on behalf of the RA against the MA. Those claims did not involve a common core of facts or are based on related legal theories arising from defendants' need to

> enforce the Settlement Agreement. Defendants are not entitled to an award of fees incurred in defense of those claims and must segregate those fees.
>
> Plaintiff's fourth, ninth, tenth, and seventeenth claims mentioned the Settlement Agreement. The first of those claimed breach of the Residential Declaration and Governing Documents by, among other things, failing to reach an adequate settlement for construction defects in the 2200 Condominium. Plaintiffs' ninth and seventeenth claims for unjust enrichment were against UV individually and Vulcan derivatively, respectively. Those claims related to UV and/or Vulcan's alleged receipt of benefits that should have flowed to residents, which allegedly included improper settlement proceeds, among others. Plaintiffs brought their tenth claim for violation of the Washington Condominium Act and Governing Documents derivatively on behalf of RA against UV and MA and derivatively on behalf of MA against UV. Plaintiffs primarily based this claim on the misallocation of common expenses and the appointment of conflicted board members, but that claim included a reference to the settlement of construction defect claims. Notably, none of those claims sought recession or otherwise indicated that the Settlement Agreement should not be enforced. But to the extent defendants can show that they incurred fees arising from the need to enforce the Settlement Agreement in relation to those claims and they segregate those fees, they would be entitled to such an award.
>
> Plaintiffs' twenty-first claim is the one claim that truly appears aimed at the enforceability of the Settlement Agreement. In that claim, plaintiffs contend that the Settlement is void, collusive, fraudulent, and against public policy. This claim also relates to plaintiffs' sixth prayer for relief that seeks a judgment declaring that agreement unenforceable (the other eight prayers for relief do not mention the Settlement Agreement). Defendants are entitled to those fees incurred in relation to this claim so long as they segregate them from those they did not incur arising from the need to enforce the Settlement Agreement.

We cannot conclude that the trial court abused its discretion in limiting the fees it awarded under the 2012 settlement agreement.

C.

The defendants next challenge the trial court's decision to not award attorney fees under the Condominium Act. The Condominium Act provides that "the court, in an appropriate case, may award reasonable attorney's fees to the prevailing party." RCW

64.34.455. The trial court denied the defendants' claim for attorney fees under the Condominium Act and denied their motions for reconsideration.

As the trial court explained in denying Urban Venture and Vulcan's motion for reconsideration:

> This Court held that UV and Vulcan were prevailing parties, but this Court did not believe this was an appropriate case to award their attorney's fees for the reasons stated on the record at the September 12, 2017 hearing. UV and Vulcan rely on Bilanko v. Barclay, [185 Wn.2d 443, 375 P.3d 591 (2016)] Defendants contend this Court erred in reaching the latter conclusion. They argue that Bilanko is "factually indistinguishable" from this case, apparently because the Supreme Court affirmed the dismissal of the plaintiff's claims on statute of limitations grounds and noted that the plaintiff could have moved.
>
> Despite those two similarities, Bilanko is dissimilar from this case in several critical respects that UV and Vulcan do not acknowledge.[9] Here, plaintiffs brought their claims not to enrich themselves but to derivatively benefit the 2200 Residential Association (RA) and directly benefit their fellow condo owners. They brought those claims as consumers to address what they perceived to be the unfair imposition of costs on RA by the [MA], Urban Venture LLC, and Vulcan Inc. Notably, this Court found merit to that claim and a violation by defendants of the Washington Condominium Act: the Declared Values that the Declaration used to apportion those costs were simply made-up values rather than being based on a method or formula that is capable of calculation. Further, while the defendants make much of this Court's reference to the "scorched earth" litigation in this case, this Court noted that both sides were to blame. Indeed, plaintiffs' opposition to defendants' motions for reconsideration sets forth many examples of defendants' own role in driving up the costs of this litigation.

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[9] Even if Bilanko was indistinguishable in all respects with this case, and it is plainly not, the Washington Supreme Court merely exercised its discretion to award fees in that case. Nowhere in that decision did the Washington Supreme Court hold that it would have been an abuse of discretion for a court to not award fees when faced with those facts.

Similarly, as the trial court explained in denying the RA's motion for reconsideration:

> RA contends this Court erred primarily by applying to RA its rationale for not awarding fees to [MA], and Vulcan and Urban Venture, LLC. . . . In its oral ruling this Court did emphasize that plaintiffs, in their

> role as consumers and on behalf of similarly situated residents, brought consumer protection claims of self-dealing and illegal control against the defendants. RA fails to acknowledge the reason why plaintiffs had to occupy those roles: RA failed to take any action to address the fact that the Declared Valued in the Declaration were based on made-up values rather than being based on a method or formula that is capable of calculation. Further, RA joined forces with the other defendants to actively oppose plaintiffs' claims at every turn. Finally, while RA makes much of this Court's reference to the "scorched earth" litigation in this case, this Court notes that RA shared much of the blame. Indeed, plaintiffs' opposition to the [defendant] motion for reconsideration sets forth many examples of defendants' own role in driving up the costs of this litigation.

We agree with the trial court. An award of attorney fees under RCW 64.34.455 is discretionary. We cannot conclude that the trial court abused its discretion in denying to award attorney fees under the Condominium Act.

We affirm the trial court's denial of attorney fees to Urban Venture, Vulcan, and the RA under the Condominium Act.

IX.

The plaintiffs finally argue that the trial court erred by awarding costs for "mediator fees, meals, travel, expert fees, consultant fees, or document review expenses" under the Declaratory Judgment Act, RCW 7.24.100. The plaintiffs contend that "costs" should have been limited to costs allowed under RCW 4.84.010. We disagree.

We review questions of statutory interpretation de novo. State v. Dennis, 191 Wn.2d 169, 172, 421 P.3d 944 (2018). If a statute's meaning is plain on its face, then the court must give effect to the plain meaning as an expression of legislative intent. Dep't of Ecology v. Campbell & Gwinn, LLC, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002).

RCW 7.24.100 provides "In any proceeding under this chapter, the court may make such award of costs as may seem equitable and just." RCW 7.24.100 "gives the

court broader discretion with regard to costs than courts have in other kinds of proceedings." 15 DOUGLAS J. ENDE, WASHINGTON PRACTICE: CIVIL PROCEDURE § 42.24 (3d ed. 2018). The legislature's use of the word "may" confers discretion. Strenge v. Clarke, 89 Wn.2d 23, 28, 569 P.2d 60 (1977). Empowering a court to do what is "equitable" and "just" also indicated broad discretion. Farmer v. Farmer, 172 Wn.2d 616, 624, 259 P.3d 256 (2011). Nothing in the statute limits a court's discretion.

The trial court did not abuse its discretion in awarding costs under RCW 7.24.100.

X.

All parties request attorney fees on appeal. Under RAP 18.1, we may grant attorney fees "if applicable law grants to a party the right to recover reasonable attorney fees or expenses on review." As discussed above, the Condominium Act grants discretion for the court "in an appropriate case," to award reasonable attorney fees to the prevailing party. RCW 64.34.455. Here, RA, Urban Venture, and Vulcan are the prevailing parties, thus we grant them attorney fees on appeal. Because the plaintiffs prevail in their claim against the MA, we award the plaintiffs their reasonable attorney fees on appeal of claims against the MA.

SUMMARY

We affirm the trial court's dismissal of all claims against the RA, Urban Venture, and Vulcan. We affirm the trial court's conclusion that the master declaration violated the Condominium Act because the allocation of common expenses violates RCW 64.34.224(1). We reverse the trial court's dismissal of the plaintiffs' claims against the MA for violations of the Condominium Act.

We affirm the trial court's award of attorney fees under the 2012 settlement agreement in favor of the RA, Urban Venture, and Vulcan. We vacate the award of attorney fees in favor of the MA.

Affirmed in part, reversed in part.

Mann, ACJ

WE CONCUR:

Chun, J.

Schindler, J.P.T.

SETTLEMENT AGREEMENT & MUTUAL RELEASE

This Settlement Agreement & Mutual Release ("Agreement") is made by and between the Parties, as that term is defined below in Section I, and is effective as of November 9, 2012 (the "Effective Date").

I. DEFINITIONS

A. The term "RA" shall refer to the 2200 Residential Association and any officer, director, manager, member, unit owner, principal, partner, predecessor, successor, agent, shareholder, and/or employee.

B. The term "MA" shall refer to the 2200 Condominium Association, consisting of its four members (i.e., the Hotel Unit, the Food Store Unit, the Commercial Unit, and the Residential Unit), and any officer, director, manager, member, unit owner, principal, partner, predecessor, successor, agent, shareholder, and/or employee.

C. The term "UV" shall refer to Urban Venture, LLC, Urban I, LLC, City Investors I, LLC, City Investors, LLC, City Investors MM, Inc., Vulcan Inc., and all affiliated entities, related companies, employees, principals, shareholders, managers, members, assigns, attorneys, insurers, predecessors and successors.

D. The term "Party" or "Parties" shall refer to the RA, the MA, and UV, both collectively and/or individually, depending on the context.

II. RECITALS

A. The RA and the MA are the owners and/or organizations of owners of the 2200 Condominium (the "Condominium") created by the Condominium Declaration for 2200 A Condominium, King County Recording No. 20060929000067. The Condominium includes but is not limited to the Commercial Unit, the Residential Unit, the Hotel Unit, and the Food Store Unit. Further, the Condominium specifically includes but is not limited to 2200 Residential, A Condominium, created by King County Recording No. 20060929000069.

B. The RA and MA have made separate and collective demands arising from claims relating to several alleged defects on and/or at the Condominium.

C. The Parties, along with other parties that are not signatories to this Agreement, entered into tolling agreements and a Dispute Resolution Agreement ("DRA") to attempt to resolve the claims amongst them without litigation. As part of the DRA, the Parties participated in a joint investigation that has resulted in two scopes of repair prepared by RDH Building Sciences (on behalf of UV) and Amento Group (on behalf of the RA). Pricing of the scopes of repair was performed by Tatley-Grund, Inc.

D. To further the interests of all the Parties, avoid the uncertainty of litigation and trial, and for other good and valuable consideration as set forth herein, the Parties agree to resolve and forever waive, mutually release and otherwise compromise any and all claims each Party to this Agreement may have against any other Party to this Agreement, except as specifically set forth and reserved herein or in other documents related to the settlement or resolution of any claims between some of the Parties to this Agreement in relation to the Condominium.

E. The Parties anticipate that as a result of this settlement there will be a remediation project that will be undertaken by the RA, the MA and UV to correct any and all past, current or future construction or design defects or deficiencies at the Condominium ("Remediation Project").

III. AGREEMENT

NOW, THEREFORE, in consideration of the actions, forbearances, and mutual promises of the Parties contained herein, the sufficiency of which are hereby acknowledged, the Parties agree as follows:

1. Definitions and Recitals. The foregoing definitions and recitals set forth above are hereby incorporated by reference herein and made a part hereof.

2. Formal Terms. Although this Agreement constitutes a final settlement and binds the Parties to the terms set forth herein, the Parties agree that this Agreement may be more formally documented and supplemented in future related settlement documents. To the extent that the Parties cannot agree on certain specific terms or settlement language, the Parties agree that Christopher Soelling shall be the sole and single arbiter of such disputed language.

3. Incorporation of Related Settlement Documents. The Parties, at times along with other parties that are not signatories to this Agreement, have entered into other documents in relation to the settlement and resolution of claims related to the Condominium, and now wish to incorporate those documents into this Agreement. The documents the Parties wish to incorporate into this Agreement are:

a. Global Release Agreement: A November 9, 2012 "Global Release Agreement" ("Global Release") between the RA, the MA, UV, Turner (as that term is defined in the Global Release), and the Design Team (as that term is defined in the Global Release). The Parties agree that to the extent there is a conflict between this Agreement and the Global Release, this Agreement shall control and govern.

b. Fire-Stopping Agreement: An August 23, 2012 "Indemnity, Defense, and Hold Harmless Agreement, 2200 A Condominium" and an October 8, 2012 "Addendum No. 1, Indemnity, Defense, and Hold Harmless Agreement, 2200 A Condominium" (collectively referred to as the "Fire-Stopping Agreement") in relation to certain fire protection issues at the Condominium. The Parties agree that to the extent there is a

conflict between this Agreement and the Fire-Stopping Agreement, the Fire-Stopping Agreement shall control and govern.

c. Uponor Warranty: An October 31, 2012 "Warranty Addendum: Extended Warranty and Periodic Monitoring of PEX System Agreement, 2200 A Condominium" ("Uponor Warranty") in relation to a 25-year extended and modified warranty in relation to the PEX plumbing at the Condominium. The Parties agree that to the extent there is a conflict between this Agreement and the Uponor Warranty, the Uponor Warranty shall control and govern.

4. Settlement Amount. UV agrees to pay the RA the total sum of Twenty-six Million U.S. Dollars ($26,000,000) ("Settlement Amount") in full and final settlement of any and all of the RA's claims against UV as set forth, and subject to the exceptions, in paragraphs 5, 6, and 7 below. The MA agrees, for the benefit of the receipt of the full Settlement Amount by the RA (a significant portion of which will be allocated to the RA and the MA for the Remediation Project), to fully and finally settle any and all of the MA's claims as set forth, and subject to the exceptions, in paragraphs 5, 6, and 7 below. UV shall pay the Settlement Amount to the RA by check payable to "Ashbaugh Beal Attorney Trust Account" (Tax ID No. 91-1387700), and delivered to Jesse Miller at Ashbaugh Beal, 701 Fifth Avenue, Suite 4400, Seattle, Washington, as follows:

a. The first payment shall be for Five Million One Hundred Eighty-eight Thousand U.S. Dollars ($5,188,000) and be made within 45 days after the Effective Date of this Agreement.

b. The second payment shall be for Five Million Five Hundred Ninety-six Thousand Eight Hundred Twelve Dollars and Eighty Cents ($5,596,812.80) and be made within 105 days after the Effective Date of this Agreement;

c. The third payment shall be for Three Million Eight Hundred Three Thousand Seven Hundred Ninety-six Dollars and Eighty Cents ($3,803,796.80) and be made within 135 days after the Effective Date of this Agreement;

d. The fourth payment shall be for Three Million Eight Hundred Three Thousand Seven Hundred Ninety-six Dollars and Eighty Cents ($3,803,796.80) and be made within 165 days after the Effective Date of this Agreement;

e. The fifth payment shall be for Three Million Eight Hundred Three Thousand Seven Hundred Ninety-six Dollars and Eighty Cents ($3,803,796.80) and be made within 195 days after the Effective Date of this Agreement; and

f. The sixth and final payment shall be for Three Million Eight Hundred Three Thousand Seven Hundred Ninety-six Dollars and Eighty Cents ($3,803,796.80) and be made within 225 days after the Effective Date of this Agreement.

5. **Mutual Release.** Subject to the exceptions set forth below in paragraphs 6 and 7, for good and valuable consideration, including but not limited to the RA receiving the full Settlement Amount as set forth above, the Parties agree to mutually release and forever discharge each other from any and all claims, demands, rights, or any other actions or causes of action, known or unknown, accrued or not yet accrued, arising from or related in any way to the materials, design, construction, marketing and/or sale of the Condominium, the marketing and/or sale of units therein, and/or the management of the RA or the MA, including but not limited to claims involving alleged breach of implied warranty/warranties under the Washington Condominium Act, breach of express warranty, breach of contract, breach of covenants, breach of the implied warranty of habitability, Consumer Protection Act violations, indemnification, costs of litigation and claims for attorneys' fees, improper asset transfers, breach of fiduciary duty, and/or breach of duty of reasonableness and good faith, or similar claims which were asserted or could have been asserted by any of the Parties, either through the DRA or in any civil lawsuit related to the Condominium. The Parties agree this release and discharge extends to the Parties' members, officers, directors, employees, agents, successors, assigns, insurers, attorneys, and consultants. The RA's and the MA's releases as set forth in this Agreement are to the fullest extent allowed under RCW 64.34.304(1)(d).

6. **Exceptions to Mutual Release.** There are claims, issues and obligations between the RA, the MA and/or UV that are related to the Condominium and addressed through separate documents or agreements that are not affected, released, or extinguished by this Agreement. The following claims, issues and obligations are not affected or extinguished by this Agreement:

a. The Fire-Stopping Agreement, meaning that the Fire-Stopping Agreement and the rights, duties, obligations and terms contained in the Fire-Stopping Agreement remain fully intact and enforceable.

b. The Uponor Warranty, meaning that the Uponor Warranty and the rights, duties, obligations and terms contained in the Uponor Warranty remain fully intact and enforceable. The Parties recognize that UV has no obligations or duties to the RA or the MA for the Uponor Warranty and that all such claims against UV are covered by the release in paragraph 5 above and as set forth in paragraph 7.

c. The Parties do not release, resolve and/or settle any individual personal injury or bodily injury claims against the other Parties, or insurance that may apply to such claims, although no such claims are known at this time.

d. The Parties recognize that they are current owners at the Condominium and have an ongoing business relationship as to the operation and governing of the Condominium pursuant to the Condominium's governing documents. Therefore, the Parties do not release each other from any future claims relating to their ongoing business relationship as to the operation and governing of the Condominium pursuant to the Condominium's governing documents.

7. **Responsibility for Non-RA PEX Plumbing.** "Non-RA 2200 PEX Plumbing" shall refer to the Hotel Unit's, the Food Store Unit's, and/or the Commercial Unit's PEX

plumbing system and shall include the tubing, manifolds, fittings, and all other plumbing products that are components of the PEX plumbing system in existence at the Condominium's Hotel Unit, the Food Store Unit, or the Commercial Unit as of the Effective Date of this Agreement. The Parties agree that the RA shall have no Common Expense Liability (as defined in the Condominium's governing documents) or financial or other responsibility or liability with respect to the Non-RA 2200 PEX Plumbing. As a result, the MA, the Commercial Unit, the Food Store Unit, the Hotel Unit, and/or UV may not seek to hold the RA financially or otherwise responsible or liable for any alleged, potential or real, known or unknown, future, past or current problem, failure, deficiency or defect with the Non-RA 2200 PEX Plumbing, or for any repair or replacement work or costs associated with the Non-RA 2200 PEX Plumbing, or for any consequential damages associated with the Non-RA 2200 PEX Plumbing. The Parties agree that they will work together in good faith to execute additional necessary documents within 60 days, including but not limited to an amendment(s) to the Condominium's governing documents, to adequately and fully memorialize the obligations, duties and rights set forth in this paragraph.

8. Allocation of Settlement Amount. The Parties agree that 12 percent of the Settlement Amount, which is Three Million One Hundred Twenty Thousand U.S. Dollars ($3,120,000), shall be distributed solely to the RA to be used as the RA deems appropriate in its sole discretion, and will be paid to the RA out of the first payment for $5,188,000 that is described above in paragraph 4(a). As to the remaining 88 percent of the Settlement Amount (i.e., $22.88 million), the Parties agree that it shall be used for the Remediation Project and shall be placed in a bank account that the RA and the MA agree upon, with all interest that accrues on these funds being used toward the Remediation Project, and that these funds may not be accessed or used without the consent of both the RA and the MA. Further, if after final completion of the Remediation Project there are any remaining funds with respect to the 88 percent of the Settlement Amount (i.e., $22.88 million), those funds shall be distributed to the RA and the MA as follows: 77.2 percent to the RA and 22.8 percent to the MA (or more specifically: 77.2 percent will be distributed to the Residential Unit, 10 percent to the Hotel Unit, 6.5 percent to the Food Store Unit, and 6.3 percent to the Commercial Unit), and the Parties agree that those funds shall be maintained by the RA and the MA in reserve accounts (meaning, the MA will need to establish a reserve account for the benefit of the Hotel Unit, the Food Store Unit and the Commercial Unit) solely for purposes of maintaining the Condominium and repairing any future problems at the Condominium. The Parties agree that they will work together in good faith to execute additional necessary documents within 60 days, including an amendment(s) to the Condominium's governing documents, to adequately and fully memorialize the obligations, duties and rights set forth in this paragraph.

9. Remediation Project. The Parties agree to work together in good faith and in the spirit of cooperation to design and implement a process to go about the Remediation Project. This process will comply with the MA's and the RA's governing documents and the primary focus will be to carry out repairs to properly and adequately address all deficiencies and defects at the Condominium. The Parties agree that they will work together in good faith to execute any additional necessary documents to implement the process for the Remediation Project.

10. Extinguishing of Vulcan's Guaranty. Vulcan Inc. provided the RA with a September 3, 2010 Guaranty in relation to the RA's claims in this matter against UV. The RA

agrees that upon this Agreement taking effect, Vulcan Inc.'s September 3, 2010 Guaranty is extinguished.

11. No Admission of Liability or Fault. By executing this Agreement, no Party admits to fault or liability for the claims or allegations raised during the pendency of this matter.

12. Dissemination. The Parties agree that no Party may disseminate copies of this Agreement, or share any information about the terms of this Agreement or the terms of the Parties' settlement to any nonparty to this Agreement, other than as follows:

a. Upon request, the RA and/or the MA may provide a copy of this Agreement to a unit owner at the Condominium and/or member of the RA or MA (collectively referred to as a "Unit Owner");

b. The Parties may disseminate copies of this Agreement as may be required by law or its governing documents, including but not limited to disclosures required by: (1) Section 13.6 of the 2200 Residential Association Condominium Declaration for 2200 Residential, A Condominium; (2) Section 16.8 of the 2200 Condominium Association Condominium Declaration for 2200 A Condominium; (3) RCW 64.34.372(1); and (4) RCW 24.030.135, as the same may be amended from time to time;

c. A Party may disclose this Agreement or identify its terms (i) to the extent required by a court order; (ii) to any reinsurer or reinsurance intermediary of any Party in connection with reinsurance obligations; (iii) to a Party's auditors, accountants, property managers, and attorneys; (iv) in any action or proceeding where the existence or terms of this Agreement are at issue; and (v) by written agreement of the Parties;

d. In order to effectively govern the RA and/or the MA, the RA and/or the MA may disclose the terms of this Agreement to Unit Owners (e.g., letting the Unit Owners know that the claims have been settled and the ultimate results of the Parties' settlement); or

e. To ensure that the obligations, duties and rights of this Agreement are enforceable (e.g., the obligations, duties and rights set forth in paragraphs 7 and 8 above and paragraph 13 below), including the recording of any documents necessary to ensure that the obligations, duties and rights of this Agreement run with the land.

Further, the Parties acknowledge that if the RA and/or the MA disclose this Agreement to a Unit Owner or other third party, and the disclosure was made in compliance with this paragraph, the RA and/or the MA has no control over what the Unit Owner or other third party does with this Agreement after its disclosure, and the RA and/or MA will have no liability for subsequent disclosures by Unit Owners or third parties.

13. Binding Nature. The provisions of this Agreement shall inure to the benefit of and be binding on the Parties and their respective heirs, representatives, successors, and assigns. The provisions of this Agreement shall constitute covenants running with the land and running with the Condominium. The Parties agree that they will work together to execute additional

necessary documents within 60 days, including an amendment(s) to the Condominium's governing documents, to adequately and fully memorialize the obligations, duties and rights set forth in this Agreement and to ensure that the obligations, duties and rights set forth in this Agreement run with the land.

14. Dispute Resolution and Attorneys' Fees. In the event of any dispute between any or all of the Parties relating to or arising out of this Agreement, the Parties agree that such dispute shall be first mediated, then arbitrated by Christopher Soelling, or another arbitrator on which the Parties can agree. To the extent the parties to the dispute cannot agree, such arbitrator may be determined by application to the Superior Court of King County, Washington. The Parties further agree that all such costs and fees arising from the need to take action to enforce this Agreement, including mediation, arbitration, or litigation, shall be recoverable by the prevailing party. Such costs and/or fees shall be awarded, including reasonable attorneys' fees incurred in connection with the dispute, by the Arbitrator as part of any arbitration award.

15. Governing Law. This Agreement shall be governed by and construed in accordance with the substantive laws of the state of Washington without reference or regard to Washington's or any other state's conflict or choice of law principles that would result in the application of any law other than the law of the state of Washington.

16. Joint Effort. Preparation of this Agreement has been a joint effort of the Parties, and the resulting document(s) shall not be construed more severely against any one of the Parties than against any other.

17. Modification. The Parties agree that this Agreement may only be modified in writing signed by all Parties.

18. Warranty of Capacity to Execute Agreement. Each party represents and warrants that no other person or entity has, or has had, an interest in the claims, demands, obligations, or causes of action referred to in this Agreement, except as otherwise set forth herein; that the party has the sole right and exclusive authority to execute this Agreement for the good and valuable consideration set forth herein; and that it has not sold, assigned, transferred, conveyed or otherwise disposed of any of the claims, demands, obligations or causes of action referred to in this Agreement.

19. Effectiveness. This Agreement shall become effective immediately following execution by the Parties. Further, this Agreement may be signed in counterpart copies and shall be effective when each party hereto has signed at least one copy, and an assembled set of such counterpart copies shall have the same force and effect as an original. A facsimile or computer-

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transmitted (PDF) signature shall be as binding as an original. At the request of any Party, a Party having delivered a signature by facsimile or electronic mail shall promptly deliver an original signature as well.

2200 RESIDENTIAL ASSOCIATION

By: Linda D. Miller
Its: Board President
Dated: November 13 2012

2200 CONDOMINIUM ASSOCIATION

By:
Its: BOARD PRESIDENT
Dated: 11/13/2012

VULCAN INC.

By: Adam Lenz
Its: Vice President
Dated: 11/13/12

URBAN VENTURE, LLC

By: Adam Lenz
Its: Vice President
Dated: 11/13/12

URBAN I, LLC

By: Adam Lenz
Its: Vice President
Dated: 11/13/12

CITY INVESTORS I, LLC

By: Adam Lenz
Its: Vice President
Dated: 11/13/12

CITY INVESTORS, LLC

By: Adam Lenz
Its: Vice President
Dated: 11/13/12

CITY INVESTORS MM, INC.

By: Adam Lenz
Its: Vice President
Dated: 11/13/12

STATE OF WASHINGTON)
) ss.
COUNTY OF KING)

On this 13th day of November, 2012, before me, the undersigned, a Notary Public in and for the State of Washington, duly commissioned and sworn, personally appeared Linda D. Winges, to me known to be the Board President of the 2200 Residential Association, the entity that executed the within and foregoing instrument, and acknowledged said instrument to be the free and voluntary act and deed of said entity for the uses and purposes therein mentioned; and an oath stated that he/she was authorized to execute the said instrument on behalf of said entity.

WITNESS my hand and official seal hereto affixed the day and year first above written.

TERESA MACDONALD
STATE OF WASHINGTON
NOTARY PUBLIC
MY COMMISSION EXPIRES
01-23-15

[PRINTED NAME] Teresa MacDonald
NOTARY PUBLIC in and for the state of Washington, residing at Seattle
My commission expires: 1-23-15

STATE OF WASHINGTON)
) ss.
COUNTY OF KING)

On this 13th day of November, 2012, before me, the undersigned, a Notary Public in and for the State of Washington, duly commissioned and sworn, personally appeared Curt Archambault, to me known to be the Board President of the 2200 Condominium Association, the entity that executed the within and foregoing instrument, and acknowledged said instrument to be the free and voluntary act and deed of said entity for the uses and purposes therein mentioned; and an oath stated that he/she was authorized to execute the said instrument on behalf of said entity.

WITNESS my hand and official seal hereto affixed the day and year first above written.

TERESA MACDONALD
STATE OF WASHINGTON
NOTARY PUBLIC
MY COMMISSION EXPIRES
01-23-15

[PRINTED NAME] Teresa MacDonald
NOTARY PUBLIC in and for the state of Washington, residing at Seattle
My commission expires: 1-23-15

STATE OF WASHINGTON)
) ss.
COUNTY OF KING)

On this 13th day of November, 2012, before me, the undersigned, a Notary Public in and for the State of Washington, duly commissioned and sworn, personally appeared Ada Healey, to me known to be the Vice President of Urban Venture, LLC, Urban I, LLC, City Investors I, LLC, City Investors, LLC, City Investors MM, Inc., and Vulcan Inc., the entities that executed the within and foregoing instrument, and acknowledged said instrument to be the free and voluntary act and deed of said entities for the uses and purposes therein mentioned; and an oath stated that he/she was authorized to execute the said instrument on behalf of said entities.

WITNESS my hand and official seal hereto affixed the day and year first above written.

[PRINTED NAME] VIRGINIA E. KLEVJER
NOTARY PUBLIC in and for the state of Washington, residing at Renton
My commission expires: 9/19/2014

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that on November 16, 2020, I caused a copy of the foregoing document to be served on counsel of record stated below, via the Washington Courts E-Portal:

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S. Jay Terry, WSBA No. 28448
Michael B. King, WSBA No. 14405
Parker R. Keehn, WSBA No. 40555
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Attorneys for 2200 Condominium Association, Brian Crowe, Brandon Morgan, Gary Zak

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

DATED this 16th day of November, 2020, at Seattle, Washington.

By: s/Thao Do
Thao Do, *Legal Assistant*

MCNAUL EBEL NAWROT AND HELGREN PLLC

November 16, 2020 - 4:00 PM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	77017-9
Appellate Court Case Title:	Shamim Mohandessi and Joseph Grace, Apps/Cross-Res. v. Urban Venture, LLC, et al., Res/Cross-Apps.

The following documents have been uploaded:

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