Supreme Court No. 90642-4

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

Court of Appeals No. 69637-8-1

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

Petitioners,

v.

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

Respondents.

JOINT ANSWER TO HOMEOWNERS' PETITION FOR REVIEW

ORIGINAL

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

STATE CASES

TABLE OF AUTHORITIES

Page

STATE: STATUTES, RULES, REGULATIONS, CONSTITUTIONAL PROVISIONS

I. INTRODUCTION

Petitioners, plaintiffs, and appellants below seek review of three issues: (1) whether the Court of Appeals correctly affirmed the trial court's dismissal of plaintiffs' Consumer Protection Act claims; (2) whether the Court of Appeals correctly held that condominium board members do not owe duties to persons who have not yet become unit owners; and (3) whether any person's knowledge of a board member's malfeasance ends the tolling of the statute of limitations under the doctrine of adverse domination.

Declarant Board Members (respondents Sanford, Burckhard, and Sansburn), respondent Lozier Homes Corporation, and Elected Board Members (respondents Backues, Cusimano, Holley, Hovda, Peter, and Philip) (collectively "Respondents") oppose this Court's review of the first two issues as review is not warranted by RAP 13.4(b).

As to the third issue: Respondents have filed their own petition for review asking this Court to review other issues surrounding whether the Court of Appeals should have adopted the doctrine of adverse domination to toll the statute of limitations against nonprofit condominium association board members in these circumstances. Petitioners' third issue corroborates Respondents' assertion that application of the adverse domination doctrine is not appropriate in the context of this case, or if it is,

then the scope of its application needs further explication. The application (if any) of the theory of adverse domination to non-profit condominium boards presents a matter of substantial public interest that this Court should decide. If this Court accepts review of Respondents' second and third issues,[1] then Respondents acknowledge that Petitioners' third issue should also be reviewed.

II. ISSUES PRESENTED FOR REVIEW

1. Petitioners ("Homeowners"[2]) seek review of the Court of Appeals' determination that they failed to state a Consumer Protection Act claim against Declarant Board Members and Lozier Homes as those defendants were not engaged in "trade or commerce" with these plaintiffs. Is review warranted under any RAP 13.4(b) consideration?

2. Homeowners seek review of the Court of Appeals' determination that board members did not owe duties under the Washington Condominium Act to persons who were not unit owners while

[1] Respondents' second issue questions whether adverse domination can be used to extend the statute of limitations against board members who were not alleged to be involved in the decision challenged. Respondents' third issue questions whether adverse domination is an appropriate doctrine to apply at all in the context of condominium boards and suggests that, if it does apply, the "complete domination" test is the better test for this situation.

[2] The Court of Appeals' opinion used this descriptive term for appellants; Respondents continue that usage here.

the board members served ("future owners"). Is review warranted under any RAP 13.4(b) consideration?

3. Homeowners seek review of the Court of Appeals' "suggestion" that any unit owner's knowledge of board malfeasance ends the tolling of the statute of limitations due to adverse domination. Is review warranted under RAP 13.4(b)(4)?

III. STATEMENT OF THE CASE

For purposes of this answer, Respondents incorporate by reference the Statement of the Case already contained in Respondents' Joint Petition for Review. Respondents summarize below the additional facts pertinent to denying review of Homeowners' first two issues.

These 18 Homeowners sued 10 former board members who had served on the board of the Huckleberry Circle Condominium Association. The initial board consisted of Sansburn, Burckhard, and Sanford ("Declarant Board Members"), all of whom were appointed by the declarant Huckleberry Circle, LLC (of which Lozier Homes is alleged to be the sole member). CP 6. On May 9, 2002, the declarant Huckleberry Circle turned over control of the association to a board

elected by unit owners, and all voting board members thereafter were unit owners.[3]

The board member defendants served at various times over a period of about eight years starting in June 2000 when the condominiums were completed. The Homeowners purchased their units starting at the earliest in July 2002. The dates of purchase are cited in the Court of Appeals opinion. *Alexander v. Sanford*, ___ Wn. App. ___, 325 P.3d 341, 362 (2014). Respondents have attached a table as Appendix A that correlates the Homeowners' dates of purchase with the terms of the various board members, as set forth in the Court of Appeals opinion. *Id.*

Only appellants Kasprzak and Smith purchased their units directly from the declarant; the remaining Homeowners all purchased from other unit owners. CP 102-72; 325 P.3d at 368 n.35. As Homeowners admit (Complaint, ¶ 2.62; CP 18), the statute of limitations on any breach of warranty claims under the Washington Condominium Act (WCA) had expired on November 6, 2004. As shown in Appendix A, only four Homeowners—Smith, Kasprzak, Blocker Ventures, and West—purchased their units before that date. The other 14 Homeowners bought their units

[3] Sanford remained on the board as a non-voting board member until March 24, 2006, at which point he resigned (CP 19), and there are no allegations that any of the Declarant Board Members (or Lozier Homes) had anything to do with the condominiums or the unit owners after that time.

with constructive or actual knowledge that all WCA warranties had expired before they purchased.[4]

IV. ARGUMENT

A. Review is not warranted pursuant to RAP 13.4(b) of the Court of Appeals' holding that Homeowners had not pleaded a claim under the CPA.

1. The Court of Appeals correctly held that Homeowners failed to state a CPA claim.

Homeowners allege generally that Declarant Board Members (and derivatively Lozier) breached their duties as board members in failing to respond to complaints of construction defects and to bring suit against the declarant or developer or to inform unit owners so that they could bring suit.[5] *E.g.*, Complaint, ¶¶ 1.4, 1.5, 1.6; CP 3 (Declarant Board Members' liability rests on the fact that each "was at all material times an officer of the Board of Directors of the Association."). The complaint further alleges that their alleged breaches were motivated by a desire to "protect themselves under the implied warranties of quality of the Washington

[4] As discussed in Respondent's Joint Petition for Review at pages 9 - 10, a cause of action for breach of WCA warranties expires "regardless of the purchaser's lack of knowledge of the breach" four years after the first sale to a bona fide purchaser. RCW 64.34.452(2). Despite Homeowners' arguments that Respondents' actions somehow deprived these Homeowners of WCA warranty rights (e.g., Homeowners' Petition at 11, 13, 14, 17), only four of these plaintiffs ever had any warranty rights at all.

[5] Lozier Homes is alleged to be vicariously liable; Lozier Homes did not itself serve as a board member.

Condominium Act for selling seriously defective construction at the Project." Complaint, ¶¶ 2.8, 2.9, 2.14, 2.15; CP 7-9.

In fact, only two Homeowners purchased their units directly from the declarant Huckleberry (not from Lozier Homes or Declarant Board Members); the remaining Homeowners all purchased from other unit owners.[6] The Court of Appeals correctly ruled that Homeowners' allegations failed to state a claim under the CPA because they failed to allege that any Declarant Board Members' actions occurred in trade or commerce: "When Homeowners purchased their units, they were not engaged in trade or commerce with Lozier Homes, Sanford, Burkhard or Sansburn." 325 P.3d at 368. That conclusion is factually and legally accurate.

The conduct of a board member in making decisions for the board (especially a nonprofit condominium association) is not within trade or commerce. Board members are not in the "business" of being board members but are volunteering to provide direction and advice for the

[6] As noted in the Court of Appeals' decision, only plaintiffs Smith and Kasprzak had stated a potential CPA claim against the declarant Huckleberry Circle and had obtained a default judgment. 325 P.3d at 368 n.35. Whether Lozier Homes would be the alter ego or otherwise liable for the declarant's judgment is a separate question that the Court of Appeals' decision does not address. *Id.*

homeowners association. Such conduct is not entrepreneurial and is not subject to the CPA.[7]

Decisions from other jurisdictions are in accord. In *Office One, Inc. v. Lopez*, 769 N.E.2d 749, 759 (Mass. 2002), the court held that members of a condominium board were not engaged in trade or commerce under the state's statute prohibiting unfair or deceptive acts "in the conduct of any trade or commerce." The Supreme Court of Connecticut has also held that, under that state's Unfair Trade Practices Act, management of the condominium association did not constitute trade or commerce. *Rafalowski v. Old County Rd., Inc.*, 714 A.2d 675, 676-77 (Conn. 1998).

Homeowners' claim is that Declarant Board Members (and Lozier) allegedly took actions as board members to protect themselves from potential liability under the WCA for ***selling*** condominiums that allegedly were defectively constructed. Complaint, ¶¶ 2.8, 2.9, 2.14, 2.15; CP 7-9. But Declarant Board Members and Lozier were not liable as sellers for

[7] *E.g.*, *Short v. Demopolis*, 103 Wn.2d 52, 61-62, 691 P.2d 163 (1984) (allegations that lawyer negligently gathered and evaluated facts, and failed to timely pursue claims, did not state a CPA claim, as those activities were not in "trade or commerce").

anything, as they did not sell anything to Homeowners, and the allegations involve what they did (or allegedly failed to do) as board members.[8]

Moreover, Declarant Board Members (and derivatively Lozier) did not have a relationship with Homeowners such as would establish any other connection in trade or commerce. Here, Homeowners' cause of action is based upon the fact that Declarant Board Members were acting as board members, and there is no allegation that any of these defendants ever had any direct interaction with any of these plaintiffs. By contrast, in each of the cases relied upon by Homeowners, there was a direct commercial relationship between the defendants and the injured person.

Thus, in *Salois v. Mutual of Omaha Ins. Co.*, 90 Wn.2d 355, 359-60, 581 P.2d 1349 (1978), the plaintiff sued the insurer from which he had purchased the policy. In *Stephens v. Omni Ins. Co.*, 138 Wn. App. 151, 174-76, 159 P.3d 10 (2007), *aff'd sub nom. Panag v. Farmers Ins. Co. of Wash.*, 166 Wn.2d 27, 204 P.3d 885 (2009), the plaintiffs sued their insurers and the collection agencies that had undertaken to collect from them. Similarly, in *Griffith v. Centex Real Estate Corp.*, the plaintiff class all "purchased homes from the builder-vendor Centex. . . ." 93 Wn. App.

[8] *E.g.*, *Blewett v. Abbott Labs.*, 86 Wn. App. 782, 789, 938 P.2d 842 (1997) (mere allegation that plaintiffs purchased product not sufficient to state a CPA claim against those who did not sell directly to plaintiffs).

202, 206, 969 P.2d 486 (1998). (As suggested there, in the context of real estate transactions, the CPA has only been applied to claims against sellers or those who directly induced a plaintiff to purchase. *Griffith*, 93 Wn. App. at 217.[9])

Although in *Salois* the insurer's wrongful act did not occur in the initial sale of the policy, it nevertheless occurred between the plaintiff and his insurer, which insurer had issued the policy directly to the plaintiff. The insurer's liability was not based upon its conduct as a board member but as the plaintiff's insurer, to whom the plaintiff had been paying premiums for coverage, which coverage the insurer denied in bad faith. Homeowners here do not allege that they paid anything to Declarant Board Members or Lozier, nor did they have any commercial relationship with them whatsoever. The Court of Appeals properly determined that these defendants were not acting in "trade or commerce" when they took or failed to take actions while on the board of the condominium association.

[9] As noted by the Supreme Court in *Eastlake Const. Co. v. Hess*, to state a CPA claim, the plaintiff must show that the defendant induced the plaintiff "to act or refrain from acting." 102 Wn.2d 30, 55-56, 686 P.2d 465 (1984). Here, there are no allegations that these Homeowners ever had any contact with the Declarant Board Members or Lozier, so those defendants could not have induced the Homeowners to do or not do anything.

2. Review is not warranted pursuant to RAP 13.4(b).

Homeowners' petition, at 10, says that the Court of Appeals' holding "is reversible error meriting review under RAP 13.4(b) because under Supreme Court precedent, CPA liability does not require a sale transaction or consumer relationship," citing *Salois*, 90 Wn.2d at 359-60. Presumably, Homeowners rely on RAP 13.4(b)(1), which provides that a petition for review will be accepted by this Court if "the decision of the Court of Appeals is in conflict with a decision of the Supreme Court."

As noted above, however, the Court of Appeals' ruling that Homeowners did not plead a CPA claim because they did not allege that Declarant Board Members and Lozier Homes were acting in trade or commerce is ***not*** in conflict with *Salois*. The Court of Appeals noted that, contrary to Homeowners' arguments, there was no relationship between any Homeowner and the Declarant Board Members or Lozier Homes based upon a sale, nor was there any other allegation of a relationship in trade or commerce. *Alexander* and *Salois* coexist perfectly. The Court of Appeals' decision here is not in conflict with any appellate decision,[10] and

[10] Homeowners cite *State v. Ralph Williams' N.W. Chrysler Plymouth, Inc.*, 87 Wn.2d 298, 322, 553 P.2d 423 (1976) for the proposition that corporate officers can be held directly liable for CPA violations. However, in that case, the corporate officer held liable (Ralph Williams) solely owned all the stock in the defendant corporations, personally trained its managers to practice the accused deceptive acts, and controlled all finances; and thus the corporations "were part of a single financial entity owned, managed, and (FOOTNOTE CONT'D)

Homeowners themselves do not argue that there is any substantial public interest implicated by the Court of Appeals' decision with respect to the CPA issue. Review of this issue should be denied.

B. Review is not warranted pursuant to RAP 13.4(b) of the Court of Appeals' holding that board members did not owe a duty to future owners.

1. The Court of Appeals correctly held that the board members' statutory duty of care runs only to persons who owned a unit while the board member served.

The Court of Appeals held that board members did not owe duties of care under the WCA to future owners, citing *Nguyen v. Doak Homes, Inc.*, 140 Wn. App. 726, 732-33, 167 P3d 1162 (2007). 325 P.3d at 363. The Court of Appeals held that board members ***may*** be liable to future owners if they owed a "free-standing [non-statutory] duty of care to future owners," as that concept was explained in *Frances T. v. Vill. Green Owners Ass'n*, 42 Cal. 3d 490, 229 Cal. Rptr. 456, 723 P.2d 573 (1986).[11]

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controlled by Williams." 87 Wn.2d at 310. The allegations here are simply that the Declarant Board Members took actions or did not take actions in the course of serving on the board of the condominium association that allegedly caused these plaintiffs to lose warranty rights. Most of these plaintiffs purchased their units after all WCA warranty rights had expired anyway, but regardless, these Declarant Board Members are not liable for the declarant's warranties under the WCA (RCW 64.34.445) and their service as board members does not constitute "trade or commerce" under the CPA.

[11] Homeowners (in footnote 2 of their petition) criticize the Court of Appeals' reliance on *Francis T.* "to support its holding that condominium board member duties to not extend to 'future owners.'" Homeowners misapprehend the Court of Appeals' reliance on that case. The Court of Appeals cites *Frances T.* for its instructive analysis that, even if no statutory duty is owed, a "free-standing" duty of care may be owed and should be considered. 325 P.3d at 363-64. That is, a board member may, in some circumstances,

(FOOTNOTE CONT'D)

Id. But the complaint does not allege that board members or Lozier Homes breached any such free-standing duty. 325 P.3d at 364.

Homeowners argue that the Court of Appeals erred because (1) the WCA expressly provides that board members owe duties to future owners and (2) the fact that harm to future owners was foreseeable brings future owners within the scope of board members' duties. Homeowners are wrong.

a. Board members' statutory duty runs only to persons who currently own a unit.

The WCA, RCW 64.34.308(1), explains that:

> [T]he board of directors shall act in all instances on behalf of the association. In the performance of their duties, the officers and members of the board of directors are required to exercise: (a) If appointed by the declarant, the care required of fiduciaries of the unit owners; or (b) if elected by the unit owners, ordinary and reasonable care.

Homeowners are incorrect when they argue this statute is not explicit whether the board's duty extends to future owners. [Pet. at 15] As stated there, "the board of directors shall act in all instances on behalf

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be liable for his or her own tortious conduct, even when not liable as a board member. *Id.* The Court of Appeals' reliance on *Frances T.* expanded, rather than restricted, the scope of liability of some of the respondents. *Id.* at 364, 367-68.

Moreover, Homeowners' description in that footnote of the holding in *Raven's Cove Townhomes, Inc. v. Knuppe Dev. Co.*, 114 Cal. App. 3d 783, 171 Cal. Rptr. 334 (1981) misrepresents the holding. *Raven's Cove* does ***not*** hold that a declarant-appointed board member owes duties to future owners. Nothing in that opinion indicates any of the unit owners who were represented by the association were "future owners," and nothing in the opinion purports to hold that future owners can make claim against board members for breach of fiduciary duty.

of the association,"[12] and as stated elsewhere in the WCA, the "membership of the association at all times shall consist ***exclusively*** of all the unit owners." RCW 64.34.300 (emphasis added). The definition of "unit owners" is limited to "a declarant or other person who ***owns*** a unit. . . ." RCW 64.34.020(42) (emphasis added). The use of the present tense "owns" was not accidental, as the WCA distinguishes between current "unit owners" and future "purchasers." *Compare* RCW 64.34.100 (31) ("purchasers") *with* RCW 64.34.100 (42) ("unit owners"); *see also* RCW 64.34.425 (unit owner's duties to future purchasers); 64.34.332, -.340 (voting restricted only to unit owners). Under the WCA, board members owe duties only to the association, comprising only unit owners. Accordingly, a board member is not a fiduciary of someone who does not own a unit, even if that person may in the future own a unit.

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[12] While the statute goes on to reference "unit owners" only with respect to the level of performance for declarant-appointed board members, it would make little sense to treat elected board members different from declarant-appointed board members, as noted by the Court of Appeals. 325 P.3d at 362. And it would be particularly perverse to impose a more rigorous burden on elected board members, who are expressly held to a lesser standard of care under RCW 64.34.308(1).

Indeed, even the comments to the Uniform Condominium Act relied on by Homeowners (Petition, at 15-16) make this point by again emphasizing the duty to "unit owners" as defined in the WCA: "Subsection (a) makes members of the executive board appointed by the declarant liable as fiduciaries of the unit owners with respect to their actions or omissions as members of the board." Official Comment 1 to § 3-103 of 1980 Model Uniform Condominium Act. Notably, whereas the Uniform Act states only that the board "may act in all instances on behalf of the association," Washington clarified the scope of duty by adopting the language "***shall*** act in all instances. . . ." RCW 64.34.308(1) (emphasis added). Thus, the WCA requires condominium board members to act only for the interests of current unit owners.

The Court of Appeals' holding here is congruent with this Court's holding in *Stuart v. Caldwell Banker Commercial Grp., Inc.*, 109 Wn.2d 406, 421, 745 P.2d 1284 (1987), where the Court refused to hold that a builder-developer owed a duty to future unknown purchasers.[13] If a builder-developer does not owe any duty to future purchasers, certainly volunteer board members of a nonprofit condominium association should not have any such duty. Notwithstanding Homeowners' concern that actions by board members may have an adverse effect on persons who later become unit owners, a fiduciary relationship should not reasonably exist between a person who is serving as a board member of the association and a person who has no current relationship with the association nor between a unit owner and a person no longer acting as a board member. Termination of board membership effectively precludes the creation of new fiduciary relationships thereafter.

RCW 64.34.455 does not expand board members' duties. That statute permits any person adversely affected by a failure to comply with RCW Ch. 64.34 to make a claim for violation of the WCA. But that

[13] There, this Court held that the trial court's acceptance of "the plaintiffs' invitation to recognize a poorly-reasoned cause of action to grant recovery [under a theory of tort liability] to subsequent purchasers" was manifestly dangerous. Although *Stuart* preceded adoption of the WCA, its holdings have been confirmed as being congruent with and incorporated into the WCA. *Satomi Owners Ass'n v. Satomi, LLC*, 167 Wn.2d 781, 811, 225 P.3d 213 (2009).

provision cannot reasonably be read to expand board members' statutory duties. Board members' duties are as set forth in RCW 64.34.308(1), and RCW 63.34.455 does not change that result. Read together, the provisions simply mean that a failure to comply with the WCA gives rise to a claim, but a board member's duties are only so broad as described in RCW 64.34.308(1), and acts or omissions that do not violate the duty of care described in RCW 64.34.308(1), even if they can cause harm, do not constitute a failure to comply with the WCA (and so do not give rise to a claim under the WCA). To read RCW 64.34.455 as Homeowners do effectively reads the explicit description of board members' duties in RCW 64.34.308(1) out of the WCA.

b. The authorities relied upon by the Court of Appeals support its opinion and are not contrary to Schooley.

The Court of Appeals cited and relied upon its earlier decision in *Nguyen v. Doak Homes, Inc.*, 140 Wn. App. 726, 167 P.3d 1162 (2007), in determining that board members do not owe a duty to future owners. 325 P.3d at 363, 367. In their petition, Homeowners do not cite *Nguyen*, much less attempt to distinguish it.

Nguyen provides that a second purchaser of a house does not have an action for fraudulent concealment against a builder-developer who did not disclose a defect to the first purchaser, even though a subsequent sale

is foreseeable.[14] 140 Wn. App. at 733. That authority is controlling under the facts of this case.

Schooley v. Pinch's Deli Market, Inc., 134 Wn.2d 468, 951 P.2d 749 (1998) does not help Homeowners. In that case, a minor died when she dove into a pool after consuming beer purchased from the defendant market by other minors. A statute prohibited sale of alcohol to a minor. This Court held that the market could be held liable for the death of the deceased minor if her death was a foreseeable result of the market's having breached its duty not to sell alcohol to a minor.

Determining the scope of duty in a negligence claim for personal injury invokes a different analysis from a breach of fiduciary duty or fraudulent concealment claim resulting in economic harm. *Nguyen*, 140 Wn. App. at 732-33. As the Court of Appeals said in this case, "[W]hile foreseeability might be sufficient to establish a general tort duty, it is not sufficient to establish a fiduciary duty." 325 P.3d at 363. *Schooley* was a negligence claim for personal injury damages; like the *Hunter v. Knight, Vale & Gregory*[15] and *Pfeifer v. City of Bellingham*[16]

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[14] *Accord Stuart*, 109 Wn.2d at 421 (builder not liable to future purchasers in tort, even if resale is foreseeable).

[15] 18 Wn. App. 640, 571 P.2d 212 (1977).

[16] 112 Wn.2d 562, 772 P.2d 1018 (1989).

cases distinguished in *Nguyen*, 140 Wn. App. at 732-33, *Schooley* does not apply here.

2. Review is not warranted pursuant to RAP 13.4(b).

Homeowners' petition does not cite to or attempt to explain how or why RAP 13.4(b) considerations apply to this issue. They might have intended to argue that this Court's decision in *Schooley* conflicts with the Court of Appeals' opinion here, but for the reasons set forth above, it does not conflict. In the absence of any argument by Homeowners why this Court should accept review—other than Homeowners' mistaken argument that the Court of Appeals erred—the Court should deny review, as the Court of Appeals' decision is fully congruent with existing case law.

C. The parameters of the newly-adopted doctrine of adverse domination should be reviewed by this Court.

The Court of Appeals held that the doctrine of adverse domination should apply where the plaintiffs are individuals pursuing their own alleged claims against their neighbors who volunteered to serve on their condominium board, even though courts have generally restricted that doctrine to instances where the corporation itself is suing its board members. Homeowners ask this Court to accept review of only one issue with respect to that holding—namely, how the presumption of adverse domination is rebutted in these peculiar circumstances.

Respondents have also filed a petition for review from the Court of Appeals' decision (which the Court will consider at the same time as it considers Homeowners' petition), and in that petition, respondent board members and Lozier Homes have asked the Court to accept review of two issues related to the Court of Appeals' application of the adverse domination theory: (1) whether an allegation of adverse domination by some board members can be used by plaintiffs to toll the statute of limitations against other members who were not alleged to have dominated or even been involved with the challenged decision and (2) whether application of adverse domination in this context is proper at all, and if it is, whether the "complete domination" test is the more appropriate standard for proving domination in the context of volunteer members of a nonprofit condominium board. As argued in the board members' petition, review of the Court of Appeals' application of adverse domination here is appropriate under RAP 13.4(b)(4) because it involves an issue of substantial public interest that should be determined by this Court, as the application of the doctrine will affect the governance of not just condominium associations, but indeed all corporations in Washington. If the Court accepts review of Respondents' petition regarding adverse domination, it should accept review of Homeowner's petition on this lone issue as well.

V. CONCLUSION

The Homeowners have shown no basis under RAP 13.4(b) for accepting review of their first two issues, and the Court should deny review with respect to those issues. However, the issue of whether and how adverse domination should be applied to toll the statute of limitations for individual unit owner claims against unpaid board members of a nonprofit condominium association is a matter of first impression for this state, and a matter of substantial public interest. If the Court grants nonprofit the Respondents' petition for review regarding the application of the adverse domination doctrine here, the Court should also accept review of Homeowners' third issue only.

DATED this 8th day of September, 2014.

BULLIVANT HOUSER BAILEY PC

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Appendix A

PLAINTIFF'S DATE OF PURCHASE										
7/24/02				Smith	→	→	→	→	→	
9/19/02				Kasprzak	→	→	→	→	→	
5/9/03				Blocker Ventures	→	→	→	→	→	
5/27/04						West	→	→	→	
7/28/05						Alexander	→	→	→	
8/12/05						Stoddard	→	→	→	
9/1/05						McKillop	→	→	→	
11/3/05						Clark	→	→	→	
12/14/05						Schultz	→	→	→	
4/19/06							Edgington	→	→	
7/14/06								Ott	→	
8/1/06									Larkins	
8/8/06									Kanuri	
2/6/07									Duan	
8/15/07									Patton	
1/11/08									Magnussen	
3/19/08									Johnson	
9/2/09										Richards
BOARD MEMBER'S DATES OF SERVICE	6/29/00 - 5/15/01 Burckhard	6/29/00 - 5/9/02 Sansburn	5/15/01 - 5/9/02 Holley	5/9/02 - 5/29/03 Peter*	5/9/02 - 1/18/04 Backues	6/29/00 - 3/24/06 Sanford**	5/9/02 – 06/27/06 Cusimano	3/21/05 – 7/20/06 Philip	3/21/05 - 08/30/08 Hovda***	

* Peter rejoined the board at a later date after September 2008; however, Homeowners stipulated that "no conduct during his later term as member of the Association's Board of Directors was a cause of any additional injury to Plaintiffs for which Plaintiffs seek to recover in this matter." CP 398.

** Sanford served as only a non-voting board member from May 9, 2002 onwards. Complaint, ¶¶2.20, 2.22 (CP 9-10).

*** Hovda's actual resignation date was not specified by plaintiffs, but plaintiffs stipulated that Hovda resigned sometime prior to September 2008. CP 357-358

OFFICE RECEPTIONIST, CLERK

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Cc: Esler, Brian; O'Hanlon, Tara M.
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Attached for filing is the Joint Answer to Homeowners' Petition for Review with Certificate of Service in the following case:

Cindy Alexander, et al. v. Gary Sanford, et al.
Supreme Court No. 90642-4

Filed by:

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