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,

Appellants,

v.

GARY SANFORD AND JANE DOE SANFORD; PAUL BURCKHARD and MURIEL BURCKHARD; JAMES SANSBURN and JANE DOE SANSBURN; RICHARD PETER and JANE DOE PETER; SHANA HOLLEY and RICHARD HOLLEY; BRETT BACKUES and JANE DOE BACKUES; JOSEPH CUSIMANO and JANE DOE CUSIMANO; JASON FARNSWORTH and JANE DOE 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.

RESPONDENTS' JOINT PETITION FOR REVIEW

Jerret E. Sale, WSBA #14101
Bullivant Houser Bailey PC
1700 Seventh Avenue, Suite 1810
Seattle, Washington 98101
(206) 292-8930

Brian W. Esler, WSBA #22168
Tara M. O'Hanlon, WSBA #45517
Miller Nash LLP
601 Union Street, Suite 4400
Seattle, Washington 98101
(206) 622-8484

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OTHER AUTHORITIES

I. IDENTITY OF PETITIONERS

This petition is filed on behalf of "Declarant Board Members" (respondents Sanford, Burckhard, and Sansburn), Lozier Homes Corporation, and "Elected Board Members" (respondents Backues, Cusimano, Holley, Hovda, Peter, and Philip).[1]

II. COURT OF APPEALS' DECISION

The Court of Appeals issued its published opinion in this matter on May 12, 2014; the opinion can be found at *Alexander v. Sanford*, ___ Wn. App. ___, 325 P.3d 341 (2014). A copy of the decision is attached as Appendix B. The Court of Appeals issued its order denying all parties' motions for reconsideration on July 16, 2014.

III. ISSUES PRESENTED FOR REVIEW

1. Under the Washington Condominium Act (WCA), all claims for breach of declarant warranties accrue, regardless of the condominium purchaser's knowledge, within four years of sale or completion. Under the construction defect statute (RCW 4.16.310), claims against a contractor must accrue within six years of substantial completion or they are barred. Can a unit owner with its own independent right of action avoid application of these statutes by claiming board

[1] Defendants Glenn and Construction Consultants of Washington, LLC, were not parties to the appeal. Defendant Huckleberry Circle, LLC (the declarant), dissolved effective November 19, 2008, by voluntary dissolution by a Certificate of Cancellation.

members failed to timely sue the declarant or inform the unit owners to do so?

2. Plaintiffs allege that Elected Board Members controlled the board before the statute of limitations ran for claims against the declarant and that they were informed during that time of the elements of the association's potential causes of action. Can Declarant Board Members, who are not alleged to have been involved with the decision whether to sue, be held liable for failure to sue the declarant or inform the unit owners to do so?

3. Should the doctrine of adverse domination apply in the context of claims by individual unit owners against members of a non-profit condominium board, and if so, is "complete domination" a better test to apply in that context?

4. The WCA provides that a purchaser may not rely on any representation by the declarant or its agent unless the representation is contained in a public offering statement or other written statement. Can declarant-related defendants be liable for fraud or misrepresentation when a unit owner fails to allege that it relied on a statement contained in a public offering statement or other written statement by the declarant?

IV. STATEMENT OF THE CASE

Because this is a review of a CR 12(b)(6) motion to dismiss, the Court must accept as true all well-pleaded facts stated in the plaintiffs' complaint; nonetheless, claims that are facially barred by statutes of limitations should be dismissed under CR 12(b)(6). *Atchison v. Great W. Malting Co.*, 161 Wn.2d 372, 382, 166 P.3d 662 (2007). Plaintiffs' complaint is attached as Appendix A.

A. Factual background

In June 2000, the declarant formed the Huckleberry Circle Condominium Association to manage the Huckleberry Circle condominiums, construction of which was completed shortly thereafter. Plaintiffs ("Homeowners") are 18 unit owners in the 60-unit residential condominium complex. CP 1-2. Lozier is alleged to be the sole member of the declarant and to have built the condominiums. CP 5.

When it formed the association, declarant appointed Sanford, Sansburn, and Burckhard to the initial board. CP 6. The first sale to a bona fide purchaser (i.e., not associated with the declarant) occurred on November 6, 2000. CP 6.

On May 15, 2001, respondent Burckhard resigned from the board and was replaced by a unit owner (Holley). CP 9. On May 9, 2002, the declarant turned over control of the association to a board elected by unit

owners (consisting of Backues, Cusimano, and Peter), and all voting board members thereafter were unit owners. CP 9-10. By that date, Sansburn had resigned and had no further involvement. That same day, Sanford also resigned his voting position on the board but remained as a non-voting representative of the declarant. CP 9-10.

Homeowners allege that "[i]n or around early March of 2003, the Board was contacted by construction defect attorney Ken Harer. Attorney Harer, who is also an architect, informed the Board that there were signs of potentially serious hidden construction defects, and that the statute of limitations on the Board's [sic] warranty claims would soon expire." CP 11. Attorney Harer allegedly advised the elected board to perform an intrusive investigation, establish a scope of repairs, and commence defect litigation against the declarant. CP 12. The board allegedly did nothing. CP 12.

As admitted by Homeowners, by "November 6, 2004 the statute of limitations on the association's claims for breach of implied warranties as to common elements under the Washington Condominium Act expired." CP 18, 21. By March 24, 2006, Sanford had resigned from the Board. CP 19. There is no allegation that he (or Lozier) had any involvement with the condominiums, the board, or Homeowners after that time.

B. Procedural background

Homeowners' complaint was not filed until September 7, 2011, well over four years after all the board members had resigned. Declarant Board Members and Lozier moved to dismiss under CR 12(b)(6) on the basis that (1) all claims were barred by the applicable statutes of limitations, (2) unit owners who purchased after a board member resigned could not sue that person as a matter of law, and (3) the board members' spouses were not proper parties.

The trial court found that all claims against the moving parties were barred by the applicable statute of limitations and did not reach any of the other issues. Elected Board Members moved on the same grounds and were dismissed. The Court of Appeals reversed in part and affirmed in part, as discussed in more detail below.

V. ARGUMENT

A. Introduction

As a matter of first impression in this state, the Court of Appeals adopted the doctrine of "adverse domination" for tolling statutes of limitation. Whether the doctrine should apply in Washington and what form of the doctrine should apply in Washington are matters of substantial public interest that this Court should review.

Moreover, application of the doctrine to individual (as opposed to derivative) claims is unprecedented, unnecessary, and inappropriate as applied. The Court of Appeals' opinion effectively negates the statutes of limitation and repose for condominium and construction defect claims and, in adopting the doctrine of adverse domination, fails to account for the particular context of volunteer, non-profit condominium association boards, as opposed to boards of for-profit corporations.

Homeowners allege the board members failed to initiate suit against the declarant (Huckleberry Circle) or the contractor for construction defects and concealed from Homeowners information that would have apprised Homeowners of potential claims against the declarant or contractor. Defendants include both appointed and elected board members and Lozier, on the ground it was the sole member of the declarant and, as such, is vicariously liable for the conduct of Declarant Board Members.

The Court of Appeals reversed the trial court's dismissal of all claims on statute of limitations grounds and adopted the doctrine of "adverse domination" to toll the statute of limitations. That court's application of the doctrine is unnecessary for adjudication of Homeowners' claims against Declarant Board Members (and Lozier) because those claims should be governed by the statute of limitations in

the WCA and the construction defect statute of repose. Because condominium boards always start with declarant-appointed boards, allowing such unit owners to sue declarant-appointed board members for what amount to WCA warranty claims would defeat the legislatively-mandated statute of limitations and repose in every case.

Further, application of the adverse domination doctrine is inappropriate to hold Declarant Board Members liable for decisions made by later board members. Homeowners allege that after two Declarant Board Members resigned (Sansburn and Burckhard) and one was only a non-voting member (Sanford), elected board members were informed by an attorney that there were signs of potentially serious defects and of the applicable statute of limitations, but did nothing. Adverse domination should not apply to toll claims against Declarant Board Members because Homeowners do not allege they failed to act on that information, since they were not involved with and did not control that decision.

The Court of Appeals' application of the adverse domination doctrine to toll the statute of limitations was unnecessary because traditional principles of agency law are sufficient to determine when or if board members' knowledge should be imputed to Homeowners. But if adverse domination should apply, the "majority" test for determining adversity is not a fair test to apply to volunteer members of a non-profit

condominium association board. Condominium associations, even if incorporated, are not like for-profit corporations—they are self-governing residential communities. Absent unanimous board action and involvement, there can be no "domination," because dissident board members are unit owners who have their own individual rights and motives to sue for alleged defects.

Grafting concepts from cases involving for-profit corporations (in which shareholders' ability to sue directors directly is generally limited to derivative actions and the flow of information from the board to shareholders is limited) onto self-governing, non-profit condominium associations is inapt, and it will interfere with condominium governance by making board service prohibitively dangerous and unattractive.

The proper scope and limits of duty and liability for both condominium board members and condominium declarants are matters of substantial public interest. This Court should review the Court of Appeals' decision under RAP 13.4(b)(4), because this case of first impression creates unprecedented and potentially unlimited liability for condominium board members, and for declarants. This Court should examine whether to apply the doctrine of adverse domination to volunteer board members of condominium associations and, if so, how.

B. ISSUE 1: The WCA statute of limitations and construction statute of repose apply to preclude suit against Declarant Board Members and Lozier.

At its heart, Homeowners' claim is that the board members should be held liable for failing to timely bring a lawsuit on known information about alleged construction defects and then allegedly concealing such information about the defects from unit owners. Homeowners admit their claims under the WCA are time-barred but assert that they should be entitled to equivalent relief by suing the individual board members and Lozier.

The WCA has a strict statute of limitations: "A judicial proceeding for breach of any obligations arising under RCW 64.34.443 [express warranties], 64.34.445 [implied warranties], and 64.34.450 [implied warranties] must be commenced within four years after the cause of action accrues . . . ." RCW 64.34.452. Except for warranties of quality that explicitly extend to future performance or duration,[2] the Legislature abolished use of the discovery rule to extend the time period for bringing such suits: "a cause of action [for] breach of warranty of quality, ***regardless of the purchaser's lack of knowledge of the breach, accrues***" for common and limited common elements as of the latest of the date the

[2] There is no allegation that any such explicit warranties of future performance or duration are at issue here.

first unit was sold to a bona fide purchaser, the date the common element was completed, or the date the common element was added to the condominium.[3] RCW 64.34.452(2) (emphasis added). Homeowners admit this limitation period expired on November 6, 2004. CP 18.

All condominium associations necessarily start out with a declarant-appointed association board, since the association must be formed "no later than the date the first unit in the condominium is conveyed." RCW 64.34.300. A condominium board at its inception comprises members affiliated with the declarant that appointed them—that is, owners or employees of the declarant or its affiliates. To the extent that the declarant-appointed board members act in the interests of the declarant—i.e., that they favor the declarant's and their own associated interests over those of the unit owners, causing damages recoverable under a breach of warranty—the claim against the board members is no different from a breach of warranty claim against the declarant. A business entity acts through its agents. The policies supporting the limitation on claims against the declarant apply equally to claims against its agents. Unless the statute of limitations in RCW 64.34.452, which is not extended by the

[3] Homeowners are seeking to recover their proportional share of the costs associated with repairs to the common areas.

discovery rule, applies to such claims against declarant-appointed board members, the statute cannot achieve the result intended by the Legislature.

Similarly, Homeowners seek to evade the construction defect statute of repose (RCW 4.16.310) for claims against Lozier (whether for inspection, construction, relationship with the board members, or otherwise) for having allegedly "constructed, altered or repaired" the condominiums, or "having performed or furnished any design, planning, surveying, architectural or construction services, or supervision or observation of construction, or administration of construction contracts for any construction, alteration or repair." RCW 4.16.300.

Under RCW 4.16.310, all such claims must accrue within six years after completion of construction or be barred.[4] Homeowners' claims regarding the original construction of the condominiums had to accrue as a matter of law, at the latest, by 2006.[5]

The Court of Appeals' decision effectively guts the Legislature's crafted balance of extensive disclosures coupled with a defined time for

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[4] *See 1000 Va. Ltd. P'ship v. Vertecs Corp.*, 158 Wn.2d 566, 575, 146 P.3d 423 (2006).

[5] The association can institute litigation on behalf of itself, or two or more unit owners. RCW 64.34.304(1)(d). As has been held by other courts, "[b]ecause a condominium association is the contractually and statutorily designated agent of the unit owners with respect to the maintenance and repair of the common elements, notice to the association of defects in those areas is deemed to be notice to the owner." *Naranja Lakes Condo. No. Two, Inc. v. Rizzo*, 463 So. 2d 378, 379 (Fla. Dist. Ct. App. 1985) (citations omitted); *see also Bellevue Pac. Ctr. Ltd. P'ship v. Bellevue Pac. Tower Condo. Owners Ass'n*, 171 Wn. App. 499, 506, 287 P.3d 639 (2012) (rejecting as "plainly wrong" an argument that a settlement signed by the association cannot be enforced against individual unit owners).

liability that applies to construction and sale of condominiums. Whether Homeowners should be able to evade these statutes by suing Declarant Board Members or (derivatively) Lozier is a matter of substantial public interest, because the Court of Appeals' decision upsets the WCA's and construction defect statute's legislative schemes.

C. ISSUE 2: Homeowners do not allege any culpable conduct by Declarant Board Members.

At most, Homeowners' complaint alleges that Declarant Board Members did not conduct any destructive testing while they controlled the board between June 2000 and May 2002.[6] The board was turned over to the elected board on May 9, 2002—two and a half years before the statute of limitations for breach of implied warranties against the declarant expired on November 6, 2004. Homeowners allege that some Elected Board Members were informed in April 2003 that the association or its members had a cause of action against the declarant, and they were advised to bring suit. CP 11-12. Homeowners allege that Elected Board Members had additional information about defects at the site and potential claims before November 6, 2004. CP 13-16.

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[6] The complaint also alleges that Declarant Board Members "protect[ed] themselves from potential liability" by the manner in which they drafted disclaimers, set up and documented a maintenance program, hired a property manager, and arranged for a "non-voting" board member to be on the board. CP 7. But the complaint does not allege that these efforts resulted in any harm—namely, that they prevented any unit owner from learning the elements of a cause of action against the declarant or contractor until after the statute of limitations ran.

There are no allegations that Declarant Board Members had any role in concealing such information, and indeed the allegations are that they were not involved. There are, in other words, no allegations that Declarant Board Members adversely dominated the board when they served as board members with respect to the association's right to bring suit under the WCA.

Adverse domination is a variant of the doctrine of fraudulent concealment.[7] "[P]laintiffs may not generally use the fraudulent concealment by one defendant as a means to toll the statute of limitations against other defendants." *Griffin v. McNiff*, 744 F. Supp. 1237, 1256 n.20 (S.D.N.Y. 1990), *aff'd*, 996 F.2d 303 (2d Cir. 1993); *see also Passatempo v. McMenimen*, 461 Mass. 279, 295, 960 N.E.2d 275 (2012).

The Court of Appeals ignored this principle and essentially held that so long as any board member was accused of concealing anything, the statute of limitations was tolled as to all previous board members, whether they were involved with the particular concealment at all. Here, almost a year or more before the board was allegedly advised by Harer to sue, Sansburn and Burckhard had resigned and Sanford had relinquished his

[7] *E.g.*, *F.D.I.C. v. Henderson*, 61 F.3d 421, 430 (5th Cir. 1995); *In re O.E.M./Erie, Inc.*, 405 B.R. 779, 786 (Bankr. W.D. Pa. 2009); *Meridien Int'l Bank Ltd. v. Gov't of the Republic of Liberia*, 23 F. Supp. 2d 439, 446 (S.D.N.Y. 1998).

voting rights. CP 9-11. They could not have "dominated" anything and were not at all involved in any later decision not to sue.[8]

The Court of Appeals' application of the adverse domination theory essentially extends the statute of limitations for so long as a creative plaintiff can make any generalized allegation of concealment against successive board members. Homeowners' allegations that the elected board acted "adversely" are inadequate, but regardless, Homeowners should not be able to use that adversity to extend the statute of limitations against Declarant Board Members (or their alleged principal, Lozier). Whether non-profit corporation board members can be held liable based on the action of other board members is a matter of substantial public interest that should be decided by the Supreme Court.

D. ISSUE 3: The Court of Appeals unnecessarily and incorrectly applied the doctrine of adverse domination.

In the trial court and on appeal, defendants argued that even if the discovery rule applies to Homeowners' claims, the applicable statutes of limitations ran before suit was brought because the board members knew all relevant facts and their knowledge is imputed to the unit owners,

[8] The Court of Appeals determined that board members could owe independent duties even to future unit owners based on the California Supreme Court's analysis of whether board members could be held liable for physical injuries to a unit owner caused by third-party criminal conduct. *Frances T. v. Vill. Green Owners Ass'n*, 42 Cal. 3d 490, 733 P.2d 573 (1986). But as recognized even by that case, as a matter of law, only directors who actually can and do vote can be held liable for commission of an alleged tort. *Id.*, 462 Cal. 3d at 511.

including Homeowners. Brief of Respondents Sanford et al., at 26-27. Neither party briefed the issue of adverse domination.[9] The Court of Appeals nevertheless held that the doctrine of adverse domination applied to toll the statute of limitations—the board members' knowledge would not be imputed to Homeowners while the board was dominated by a majority of culpable directors.

1. The Court of Appeals' application of the doctrine of adverse domination was unnecessary under the facts of this case.

As noted, application of the adverse domination doctrine in Washington is a matter of first impression; applying it to the facts alleged in this case is unique. As recognized by the Court of Appeals, "Typically the doctrine of adverse domination applies to derivative actions brought by shareholders on behalf of the corporation." 325 P.3d at 356. In fact, petitioners' research has disclosed no cases in which it has been applied outside that context and several cases in which courts have expressly refused to apply it in any other context.[10] One opinion specifically

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[9] Brief of Respondents Sanford et al., at 32-33 asserts that "adverse domination" could not apply under the facts of this case, a statement that elicited no reply from Homeowners.

[10] *See, e.g., City of E. Chicago v. E. Chicago 2nd Century*, 878 N.E.2d 358, 381 (Ind. Ct. App. 2007), *aff'd in relevant part*, 908 N.E.2d 611, 622 n.2 (Ind. 2009); *Sundbeck v. Sundbeck*, No. 1:10-CV23-A-D, 2011 WL 5006430, *4 (N.D. Miss. Oct. 20, 2011) ("[T]he adverse domination doctrine is applicable to corporate actions, not direct actions pursued by an individual minority shareholder."); *Arthaud v. Brignati*, 10 Mass. L. Rptr. 403, 1999 WL 674328, *3, n.4 (Mass. Super. Ct. August 6, 1999); *Berish v. Bornstein*, 21 Mass. L. Rptr. 530, 2006 WL 2221924, *10 (Mass. Super. Ct. May 22, 2006).

questions whether as a matter of law the doctrine should apply to the volunteer board of a property association (but the facts did not support the doctrine's application). *Prairie W. Condo. Ass'n, Inc. v. Wiseman*, 203 P.3d 88, 2009 WL 743322, *3-4 (Kan. Ct. App. Mar. 13, 2009).

Whether a board member's knowledge can and should be imputed to Homeowners can be determined upon principles of agency law. Agency law provides that an agent's knowledge will be imputed to the agent's principal unless the agent is acting adversely to the principal's interests. *See, e.g., Deep Water Brewing, LLC v. Fairway Resources Ltd.*, 152 Wn. App. 229, 269, 215 P.3d 990 (2009).

It was unnecessary in this case for the Court of Appeals to adopt a doctrine never before adopted in Washington and to define its parameters under circumstances in which the doctrine has never been applied before, in Washington or elsewhere.

2. The Court of Appeals incorrectly required "complete domination" under the facts alleged.

As the Court of Appeals noted, there is a difference of opinion among courts as to whether "complete domination" or "majority domination" is necessary to toll the statute of limitations when adverse domination applies. 325 P.3d at 355-56. Under the "complete domination" test, all directors or officers must be culpable for the doctrine

to apply. Under the "majority" test, a majority of the controlling directors or officers must be wrongdoers.

As explained in *Wilson v. Paine*, 288 S.W.3d 284, 288 (Ky. 2009), the "majority" test is supported by two rationales:

> First, a culpable majority can control the flow of information and thereby prevent disclosure of incriminating information. . . . Second, it is unreasonable to expect the culpable directors to bring suit against themselves and that as a practical matter, only when a majority of the board no longer consists of wrongdoers can an action be initiated. . . .

(Citations omitted.)

Neither rationale applies to a lawsuit brought by individual unit owners against volunteer board members of a condominium association. First, volunteer board members are elected by and live among other unit owners. For policy purposes, there are no reasons to ***presume*** that board members of a condominium association can conceal information from unit owners who have an interest in learning it. The "flow of information" is not the same among condominium unit owners as it is between corporations and shareholders, as considered by the cases adopting the majority test for adversity.

Second, a presumption that Elected Board Members had an interest in protecting the declarant and affiliated persons or entities from suit is not reasonable generally or in this case. Rather, under the facts alleged, it is

reasonable to expect an elected board member to bring suit against the declarant, if the board member thought there was reason and opportunity to do so. Again, for purposes of making policy, there is no basis to ***presume*** that elected board members would not act in their own interests by recommending suit against the declarant.

The doctrine of adverse domination should not apply under these facts. Agency law is sufficient and appropriate. But even if the doctrine were to apply under these facts, it should require complete domination of the board—when ***all*** members of the board are controlling the sources of information and are in a position to protect ***themselves*** from suit—not majority domination, which may be appropriate to for-profit corporations.

3. This issue presents a matter of substantial public interest that this Court should decide.

Not only is application of the adverse domination doctrine a matter of first impression in Washington, the significance of which the Court of Appeals presumably recognized by ordering that its opinion be published, the Court of Appeals has applied adverse domination in a context that is likely to recur, providing an attractive opportunity for owners to avoid the effect of the statutes of limitation and repose. What laws govern such lawsuits, including the scope of adverse domination, is a matter of substantial public interest on which this Court should be heard.

E. ISSUE 4: Homeowners cannot allege reliance to support their fraud claims against Declarant Board Members.

The Court of Appeals held that Homeowners had stated cognizable fraud claims against Declarant Board Members and Lozier for fraud: "[b]ecause condominium unit sellers have a duty to disclose to purchasers pursuant to RCW 64.06.020, the board members have reason to expect that the representations they make to owners will be transmitted to purchasers." 325 P.3d at 367. RCW 64.06.020 does not apply at all to condominium sales.[11] RCW 64.06.020 specifically exempts the sale of residential condominiums "subject to the public offering statement requirement in the Washington condominium act, chapter 64.34 RCW" from the definition of "improved residential real property." RCW 64.06.005(2)(b). Instead, declarants must provide condominium purchasers with a detailed public offering statement. RCW 64.34.410.

As previously determined by the Court of Appeals, the public offering provisions "of the WCA do not require the disclosure of construction defects." *Kelsey Lane Homeowners Ass'n v. Kelsey Lane Co.*, 125 Wn. App. 227, 242, 103 P.3d 1256 (2005). Even during the period of declarant control, the declarant and its appointed board members

[11] The disclosures required by this statute "are made ***only*** by the Seller . . . ." RCW 64.06.020(1) (emphasis added). Sellers only have a duty to disclose matters of which they have "actual knowledge." RCW 64.06.050(1).

have no duty under the WCA to disclose alleged construction defects. *Id.* at 243. Further, a "purchaser may not rely on any representation or express warranty [regarding quality] unless it is contained in the public offering statement or made in writing signed by the declarant or declarant's agent identified in the public offering statement." RCW 64.34.443(2). Homeowners are not relying on any such writing.

Lozier was a member of the declarant and is alleged to be the alter ego of the declarant and thus could have no greater duty than the declarant. Similarly, defendants Burckhard, Sansburn, and Sanford were appointed by the declarant and could have no greater duty to disclose than the declarant. The Court of Appeals' decision relies on a statute that is inapplicable here to find a duty to disclose that runs contrary to both its previous decision in *Kelsey*, and the express provisions of the WCA regarding the disclosures required of declarants and their appointed board members. Supreme Court review of this issue should be granted in consideration of RAP 13.4(b)(2).

VI. CONCLUSION

For the reasons stated above, this Court should grant review.

DATED this 15th day of August, 2014.

BULLIVANT HOUSER BAILEY PC

for

Jerret E. Sale, WSBA #14101

Attorneys for Respondents Backues, Burckhard, Cusimano, Holley, Hovda, Lozier Homes Corporation, Peter, Philip, Sandford, and Sansburn

MILLER NASH LLP

Brian W. Esler, WSBA #22168
Tara M. O'Hanlon, WSBA #45517

Attorneys for Respondents Lozier Homes Corporation, Sanford, Burckhard, and Sansburn

SEADOCS:467337.10

APPENDIX A

Efiled

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

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

Plaintiffs,

v.

GARY SANFORD and JANE DOE SANFORD, and their marital community; PAUL BURCKHARD and MURIEL BURCKHARD, and their marital community; JAMES SANSBURN and JANE DOE SANSBURN, and their marital community; RICHARD PETER and JANE DOE PETER and their marital community; SHANA HOLLEY and RICHARD HOLLEY and their marital community; BRETT BACKUES and JANE DOE BACKUES and their marital community; JOSEPH CUSIMANO

NO.

COMPLAINT

STEIN, FLANAGAN, SUDWEEKS & HOUSER, PLLC
901 FIFTH AVENUE, SUITE 3000
SEATTLE, WA 98164
PHONE 206.388.0660 FAX 206.286.2660

and JANE DOE CUSIMANO and their marital community; JASON FARNSWORTH and JANE DOE FARNSWORTH and their marital community; PATRICIA HOVDA and JOHN DOE HOVDA, and their marital community; ALEXANDER W. PHILIP and NATALIA T. PHILIP and their marital community; HUCKLEBERRY CIRCLE, LLC, a Washington limited liability company; LOZIER HOMES CORPORATION, a Washington corporation; DOE DECLARANT AFFILIATES 1-20; DIANE GLENN and JOHN DOE GLENN, and their marital community; CONSTRUCTION CONSULTANTS OF WASHINTON, LLC, a Washington limited liability company,

Defendants.

Plaintiffs, Cindy Alexander, Blocker Ventures, LLC, Chris Clark, R. Bruce Edgington, Kipp Johnson and Jennifer Johnson, Gopikirishna Kanuri, Himabindu Kanuri, Chris Kasprzak, Elizabeth Kasprzak, Paul Larkins, Joyce Hyojung Larkins, Kristine Magnussen, Scott McKillop, Caine Ott, Dana Ott, Mara Patton, Peter Richards, Dante Schultz, Winfred D. Smith, Robert Stoddard and Colette Stoddard, Neil West, Liang Xu, and Jia Lu Duan, hereby assert the following claims for relief:

I. PARTIES

1.1 Huckleberry Circle Condominiums ("the Project") is a condominium complex situated in Issaquah, Washington, created pursuant to the Washington Condominium Act, RCW 64.34 et seq.

1.2 Non-party Huckleberry Circle Condominium Owners Association ("the Association") is the condominium owners association for the Project.

1.3 Plaintiffs are owners of residential units at the Project, and members of the Association. Each plaintiff is the owner of an undivided fractional interest in the common and

STEIN, FLANAGAN, SUDWEEKS & HOUSER, PLLC
901 FIFTH AVENUE, SUITE 3000
SEATTLE, WA 98164
PHONE 206.388.0660 FAX 206.286.2660

limited common elements of the Project, and owner of certain non-common elements of the Project.

1.4 Defendants Gary Sanford ("Sanford") and Jane Doe Sanford are husband and wife, and residents of King County, Washington. Sanford was at all material times an officer of the Board of Directors of the Association ("the Board"), and an owner, officer or member of defendants Huckleberry Circle, LLC, Lozier Homes Corporation, and Doe Declarant Affiliates. All acts and omissions of defendant Sanford alleged herein were done on behalf of the marital community of Sanford and Jane Doe Sanford. Huckleberry Circle, LLC, Lozier Homes Corporation, and Doe Declarant Affiliates are vicariously liable for Sanford's acts and omissions.

1.5 Defendants Paul Burckhard and Muriel Burckhard are husband and wife, and residents of King County, Washington. Paul Burckhard ("Burckhard") was at all material times an officer of the Board of Directors of the Association ("the Board"), and an owner, officer or member of defendants Huckleberry Circle, LLC, Lozier Homes Corporation, and Doe Declarant Affiliates. All acts and omissions of defendant Burckhard alleged herein were done on behalf of the marital community of Burckhard and Muriel Burckhard. Huckleberry Circle, LLC, Lozier Homes Corporation, and Doe Declarant Affiliates are vicariously liable for Burckhard's acts and omissions.

1.6 Defendants James Sansburn ("Sansburn") and Jane Doe Sansburn are husband and wife, and residents of King County, Washington. Sansburn was at all material times an officer of the Board of Directors of the Association ("the Board"), and an owner, officer or member of defendants Huckleberry Circle, LLC, Lozier Homes Corporation, and Doe Declarant Affiliates. All acts and omissions of defendant Sansburn alleged herein were done on behalf of the marital

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community of Sansburn and Jane Doe Sansburn. Huckleberry Circle, LLC, Lozier Homes Corporation, and Doe Declarant Affiliates are vicariously liable for Sansburn's acts and omissions.

1.7 Defendants Richard Peter ("Peter") and Jane Doe Peter are husband and wife, and residents of King County, Washington. Peter was at all material times an officer of the Board of Directors of the Association ("the Board"), and on information and belief was an owner or employee of defendants Huckleberry Circle, LLC, and/or Lozier Homes Corporation, and/or Doe Declarant Affiliates. All acts and omissions of defendant Peter alleged herein were done on behalf of the marital community of Peter and Jane Doe Peter. Huckleberry Circle, LLC, Lozier Homes Corporation, and Doe Declarant Affiliates are vicariously liable for Peter's acts and omissions.

1.8 Defendants Shana Holley and Richard Holley are wife and husband, and residents of King County, Washington. Shana Holley was at material times an officer of the Board. All acts and omissions of defendant Shana Holley alleged herein were done on behalf of the marital community of Shana and Richard Holley.

1.9 Defendants Brett Backues and Jane Doe Backues are husband and wife, and residents of King County, Washington. Brett Backues was at material times an officer of the Board. All acts and omissions of defendant Brett Backues alleged herein were done on behalf of the marital community of Brett and Jane Doe Backues.

1.10 Defendants Joseph Cusimano and Jane Doe Cusimano are husband and wife, and residents of King County, Washington. Joseph Cusimano was at material times an officer of the Board. All acts and omissions of defendant Joseph Cusimano alleged herein were done on behalf of the marital community of Joseph Cusimano and Jane Doe Cusimano.

1.11 Defendants Jason Farnsworth and Jane Doe Farnsworth are husband and wife, and residents of King County, Washington. Jason Farnsworth was at material times an officer of the

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SEATTLE, WA 98164
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Board. All acts and omissions of defendant Jason Farnsworth alleged herein were done on behalf of the marital community of Jason Farnsworth and Jane Doe Farnsworth.

1.12 Defendants Patricia Hovda and John Doe Hovda are wife and husband, and residents of King County, Washington. Patricia Hovda was at material times an officer of the Board. All acts and omissions of defendant Patricia Hovda alleged herein were done on behalf of the marital community of Patricia Hovda and John Doe Farnsworth.

1.13 Defendants Alexander W. Philip and Natalia T. Philip are husband and wife, and residents of King County, Washington. Alexander W. Philip ("Philip") was at material times an officer of the Board. All acts and omissions of defendant Philip alleged herein were done on behalf of the marital community of Alexander W. Philip and Natalia T. Philip.

1.14 Defendant Huckleberry Circle, LLC ("Declarant") is a Washington limited liability company, and the declarant for the Project. Declarant's sole member is Lozier Homes Corporation. On information and belief, Declarant is a mere alter ego of Defendant Lozier Homes Corporation and the latter's owners.

1.15 Defendant Lozier Homes Corporation ("Lozier") is a Washington corporation, and an "affiliate" of Declarant under the Washington Condominium Act and Uniform Fraudulent Transfers Act. On information and belief, Lozier is a mere alter ego of Sanford, Burckhard, Sansburn and Doe Declarant Affiliates.

1.16 Defendants Doe Declarant Affiliates are currently unidentified persons and entities who reside in Washington, do business in King County, and qualify as "affiliates" of Declarant under the Washington Condominium Act, or otherwise as alter egos of Declarant and/or Lozier.

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SEATTLE, WA 98164
PHONE 206.388.0660 FAX 206.286.2660

1.17 Defendants Diane Glenn and John Doe Glenn ("Glenn") are husband and wife, and residents of King County, Washington. At all relevant times, Glenn did business as "The Construction Consultants."

1.18 Defendant Construction Consultants of Washington, LLC ("CCW") is a Washington limited liability company doing business in King County, Washington. On information and belief, CCW is a mere continuation of Glenn's business under the name "The Construction Consultants."

II. FACTS

2.1 On information and belief, the Project was constructed by Declarant, Lozier, and Doe Declarant Affiliates.

2.2 During the course of construction and prior to any sales of units at the Project, Declarant, Lozier, Doe Declarant Affiliates, Sanford, Sansburn and Burckhard became aware, or in the exercise of reasonable care, should have become aware, that the Project was not being designed or constructed in a manner consistent with minimum requirements of building code with respect to weatherproofing, and was, as built, riddled with defective construction.

2.3 The Association was created on June 29, 2000. The incorporator was defendant Sansburn.

2.4 The initial Board of Directors of the Association consisted of defendants Sansburn, Burckhard and Sanford.

2.5 The Project consists exclusively of residential units.

2.6 The first sale of a unit at the Project to a bona fide purchaser occurred on November 6, 2000.

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SEATTLE, WA 98164
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2.7 Seriously defective construction, in particular defects in the construction of building envelopes, was a pervasive and construction industry-wide problem in the Puget Sound area during the time that the Project was built and marketed. The pervasiveness of this problem was known to Declarant, Lozier, Doe Declarant Affiliates, Sanford, Sansburn and Burckhard.

2.8 In order to protect themselves from potential liability under the implied warranties of quality of the Washington Condominium Act for selling seriously defective construction at the Project, Declarant, Lozier, Doe Declarant Affiliates, Sanford, Sansburn and Burckhard prepared a "limited warranty" for the units which included warranty disclaimers. Said disclaimers would have been ineffective as a matter of law to prevent the Association from imposing liability for damages on Huckleberry Circle, LLC for violation of the implied warranties of quality under the Washington Condominium Act at RCW 64.34.445.

2.9 To further protect themselves from potential liability under the implied warranties of quality of the Washington Condominium Act for selling seriously defective construction at the Project, Declarant, Lozier, Doe Declarant Affiliates, Sanford, Sansburn and Burckhard developed an ostensible recommended "maintenance" program for Project common elements. The ostensible purpose of the "maintenance" program was to ensure that the Project common elements would remain "well maintained." To that end, Declarant, Lozier, Doe Declarant Affiliates, Sanford, Sansburn and Burckhard undertook to hire what they described as a "licensed inspector" to do "periodic inspections."

2.10 On information and belief, the actual purpose of the "maintenance" program and hiring of the "licensed inspector" was to give the appearance of due diligent inspection of the construction quality of the building envelope, while not in fact undertaking an intrusive investigation of building components which would have revealed water intrusion and resulting

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901 FIFTH AVENUE, SUITE 3000
SEATTLE, WA 98164
PHONE 206.388.0660 FAX 206.286.2660

damage. The so-called "maintenance" program would have and could have no effect on underlying defective construction of the building envelope, and would at most mask the effects of defective construction.

2.11 In order to carry out this scheme, Declarant, Lozier, Doe Declarant Affiliates, Sanford, Sansburn and Burckhard instructed the property management firm they had hired for the Project, CDC Management, Inc., to retain defendant Glenn dba The Construction Consultants to act as the "licensed inspector." On information and belief, Glenn was instructed not to do any intrusive investigation of the building envelopes at the Project.

2.12 On information and belief, Glenn was not at any material time a licensed home inspector, architect, or engineer.

2.13 Glenn is a building industry political activist who claims to have expertise in building envelope design and construction, but whose views and opinions in reality are tailored to meet the desires of her developer clients.

2.14 As a further measure to protect themselves from potential liability under the implied warranties of quality of the Washington Condominium Act for selling seriously defective construction at the Project, Declarant, Lozier, Doe Declarant Affiliates, Sanford, Sansburn and Burckhard included in the Project Declaration and Covenants, Conditions Restrictions and Reservations for Huckleberry Circle Condominium ("the Declaration") a provision stating that "the Declarant (or a representative of Declarant) shall have the right (which may not be terminated by amendment to the Declaration or Bylaws, and which shall continue so long as any Special Declarant Rights or Development remain in effect or Declarant has any obligation or liability of any express or implied warranty) to serve as a full non-voting member of the Association Board (with all of the rights and powers of a Board member except for the right to vote.)"

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901 FIFTH AVENUE, SUITE 3000
SEATTLE, WA 98164
PHONE 206.388.0660 FAX 206.286.2660

2.15 As a further measure to protect themselves from potential liability under the implied warranties of quality of the Washington Condominium Act for selling seriously defective construction at the Project, Declarant, Lozier, Doe Declarant Affiliates, Sanford, Sansburn and Burckhard included in the Declaration a provision purporting to severely limit the power of the Association's Board and the Association to engage in litigation against the Declarant for violation of the implied warranties of quality under the Washington Condominium Act.

2.16 Defendant Holley was the first unit owner appointed to the Association Board of Directors by Declarant. This occurred on or about May 15, 2001.

2.17 Defendant Burckhart resigned from the Association's Board of Directors on May 15, 2001.

2.18 Glenn performed non-intrusive inspections of certain common elements, including the exteriors of windows, decks, and doors at the Project between May 30, 2001 and June 2, 2001. Glenn's reports following these inspections revealed minor repair and maintenance items, but because it was not intrusive, did not reveal the serious underlying building envelope deficiencies in the construction of the Project.

2.19 In November, 2001, at Declarant's request, Glenn performed further non-intrusive inspections of Project roofs, decks, siding, flashing, and other components. Again, Glenn's reports following these inspections revealed only minor repair and maintenance items, but because it was not intrusive, did not reveal the serious underlying building envelope deficiencies in the construction of the Project.

2.20 On May 9, 2002, Declarant held a meeting at which control of the Association was turned over to a Board elected by unit owners. However, pursuant to Article 10.2.2c, Declarant

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901 FIFTH AVENUE, SUITE 3000
SEATTLE, WA 98164
PHONE 206.388.0660 FAX 206.286.2660

exercised its right to appoint a "full non-voting" Board member to the new Board. That member was Sanford.

2.21 At the transition meeting, Declarant advised the owners that it was arranging to survey unit owners to discover maintenance items that need addressing, and a "Project Walk Around" with the Board to identify maintenance and repair items. The Declarant also told the new Board that it would agree to pay $1000 toward hiring a "private inspector" to do or assist in the non-intrusive "Project Walk Around," but only if the inspection occurred within the next 30 days.

2.22 Three members were elected to the Board on May 9, 2002: Backues, Cusimano, and Peter. Sanford was designated by Declarant to serve as its Board member. Sanford's role on the Board was to monitor its efforts to evaluate the construction quality of the Project, and dissuade the Board from prosecuting the Association's warranty rights.

2.23 On July 11, 2002, a motion was made at a Board meeting to hire a "professional inspector" to accompany the Board on the Declarant's "Project Walk Around." The motion was tabled "pending further study."

2.24 The Board also discussed the need for a "reserve study" which would have addressed the need for planning for capital repairs and replacements on July 11, 2002.

2.25 On August 13, 2002, the Board again took up the motion to hire "an experienced independent professional" consultant to participate in the "Project Walk Around." The property manager retained by the Declarant, through Yvonne Johnson, recommended Glenn as the "experienced independent professional" to perform this work. On information and belief, this recommendation was made at the behest of Declarant and Sanford. The recommendation was adopted, and the Board resolved to hire Glenn. Sanford did not advise the Board that Glenn had no experience in helping condominium associations identify concealed defects and damage, and

STEIN, FLANAGAN, SUDWEEKS & HOUSER, PLLC
901 FIFTH AVENUE, SUITE 3000
SEATTLE, WA 98164
PHONE 206.388.0660 FAX 206.286.2660

protect their warranty rights under the WCA. Sanford did not advise the Board than Glenn was only interested in protecting the interests of the Declarant, or that she was not a licensed inspector, architect, or engineer.

2.26 By November 12, 2002, Glenn had performed the "Project Walk Around" and failed to find the serious concealed construction defects. Sanford recommended that "maintenance" be done on stain and paint to address the minor issues found by Glenn.

2.27 Also on November 12, 2002, Sanford on behalf of Declarant made a response to Glenn's November 2002 report which was accepted by the Board.

2.28 On December 10, 2002 the Board again discussed the need for a reserve study, but tabled the discussion.

2.29 On January 21, 2003 the Board again discussed the need for a reserve study, but took no action.

2.30 On March 6, 2003, the Board again discussed the need for a reserve study, but took no action.

2.31 In or around early March of 2003, the Board was contacted by construction defect attorney Ken Harer. Attorney Harer, who is also an architect, informed the Board that there were signs of potentially serious hidden construction defects, and that the statute of limitations on the Association's warranty claims would soon expire.

2.32 Defendant Peter met with Attorney Harer, who reiterated his concerns, explained the Association's warranty rights, and the applicable limitations period.

2.33 On or about March 25, 2003, Peter emailed the other two unit owner board members about meeting with attorney Harer, noting that he had a potential conflict of interest because he worked for another Lozier affiliate, and inquiring whether it was legal to exclude

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SEATTLE, WA 98164
PHONE 206.388.0660 FAX 206.286.2660

Sanford from meeting with attorney Harer, given that Sanford in his opinion was "honest and forthright" and that he was a full member of the Board. Cusimano's reply focused on the fact that the Board was "concerned about the water drainage issues in units with a roof deck" such that they were "investigating whether to have further inspections done."

2.34 On or about April 1, 2003, Peter advised the Board by email that he would resign his position has Board member effective April 3, 2003, citing a "conflict of interest" and stating that "Since I am the only one so far who has met with Ken Harer, I will turn over all the information which he has given me at that time, as well as any Board documents that I may have in my possession."

2.35 On April 3, 2003, Peter did not resign his position, but did switch terms with another Board member, so that his slot would be open at the upcoming annual meeting scheduled for May 29, 2003. As a result, the fact of Peter's conflict of interest and concerns regarding potential warranty claims against the Declarant was not raised in front of homeowners at the annual meeting of the Association.

2.36 On or about April 3, 2003, Peter conveyed to the Board the content of written materials from attorney Harer advising several steps: a preliminary assessment of potential problem areas by Harer, establishing a timeline for action before the warranty statute of limitations expires, selecting an acceptable investigating professional, performing an intrusive investigation either with or without involvement of the Declarant, development of a scope of repairs, initiation of an alternative dispute resolution process if possible, and or commencement of defect litigation if alternative dispute resolution proved infeasible.

2.37 The Board took no action on Harer's advice, and did not consult him again.

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901 FIFTH AVENUE, SUITE 3000
SEATTLE, WA 98164
PHONE 206.388.0660 FAX 206.286.2660

2.38 Also on April 3, 2003, the need for a reserve study was again discussed and again tabled.

2.39 The Board meeting minutes fail to disclose Harer's advice, that Peter had met with attorney Harer about construction defect claims, that Peter was resigning or switching position because of a conflict of interest in that he worked for the developer, that the Board was concerned about deck drainage issues and Sanford's participation on the Board, or that attorney Harer had recommended prosecution of a warranty claim before the statute of limitations on implied warranties under the Washington Condominium Act expired. On information and belief, the decision to omit these facts from the minutes was part of a deliberate effort on the part of Defendant Peter and/or the other Board members to conceal material information from unit owners.

2.40 On or about April 30, 2003 the Project property manager was contacted by a homeowner (Unit 1471) complaining that her master bedroom window was leaking into the unit. This information was conveyed to the Board, but was not reported in any following meeting minutes.

2.41 The Board and the Association met on May 29, 2003. On information and belief, Farnsworth was elected or appointed to the Board at this time. The Board did not reveal to the homeowners at the Association meeting the nature or content of Harer's advice, that Peter had met with attorney Harer about construction defect claims, that Peter was resigning or switching position because of a conflict of interest in that he worked for the developer, that the Board was concerned about deck drainage issues, that the Board was concerned about Sanford's participation on the Board, that attorney Harer had recommended prosecution of a warranty claim before the

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901 FIFTH AVENUE, SUITE 3000
SEATTLE, WA 98164
PHONE 206.388.0660 FAX 206.286.2660

statute of limitations on implied warranties under the Washington Condominium Act expired, or that reports had been made of a window leaks.

2.42 Between June 5, 2003 and August 20, 2003, the Board met on several occasions, but took no action with respect to a reserve study, further meetings with Harer, its concerns about the decks, or the leaking window complaint.

2.43 On August 20, 2003, the Project property manager contacted Mark Jobe, a noted building envelope specialist and repair contractor, regarding bids for deck maintenance, and looking into deck drainage issues at the Project. Mr. Jobe relied: "Yes, that is a project I am familiar with. There appears to be a serious problem with deck slope. Ponded water is present under the sleeper. Also while I was there I noted the flashing above the brick veneer has been caulked closed. Closed flashing is a serious problem that generally leads to big issues. Also it is often used to mask other problems. This should be looked into. Would be glad to assist." Mr. Jobe's email was communicated to the Board.

2.44 On September 4, 2003, the Board met, but took no action on further meetings with Harer, its concerns about the decks, the leaking window complaint, or Mr. Jobe's recommendation that the noted "serious problems" that "mask other problems" should be "looked into."

2.45 On September 22, 2003, Cusimano emailed the other Board members noting a problem with "Water leaks in a unit with a deck over the den/office. This is the second deck to have water intrusion. Do we have a design flaw that needs to be addressed?"

2.46 On October 1, 2003, the Board met, but took no action on further meetings with Harer, its concerns about the decks, the leaking window complaint, Mr. Jobe's recommendation for investigation of "serious problems," or Cusimano's concerns about the two water leaks into den/office rooms.

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901 FIFTH AVENUE, SUITE 3000
SEATTLE, WA 98164
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2.47 On October 3, 2003, the Project property manager received a completed draft of the Association Reserves reserve study, and noted that the elastomeric coated decks (where leaks were occurring) had not been reviewed. She therefore requested that they be inspected by the reserve specialist, and the reserve study revised. The reserve specialist refused, noting that "We do not perform forensic investigation and have assumed that these decks were installed correctly" and recommending "an envelope investigation for this property..." This information was conveyed to the Board.

2.48 On October 17, 2003, the Board met and considered the possibility of hiring "an outside structural engineer to inspect the decks, outstanding maintenance with regards to the decks, and the difference between defects and maintenance issues." However, no action was taken to retain an engineer or other consultant to intrusively investigate the conditions of the Project as recommended by the reserve consultant, by Mr. Jobe, and by attorney Harer, and no effort was made to address the leaking window complaint.

2.49 Between October 17, 2003 and January 4, 2004, another homeowner complained of water leaking into his unit. In this same time frame, the Board met but took no action to retain an engineer or other consultant to intrusively investigate the conditions of the Project as recommended by the reserve consultant, by Mr. Jobe, and by attorney Harer, or to address the leaking window complaint.

2.50 On January 4, 2004, Sanford wrote to the Project property manager, blaming the leak or at least exacerbation of the problem on supposed lack of maintenance. Sanford volunteered Lozier and the Declarant to inspect flat-roofed deck areas at their own expense through Lozier employee Phil Dahl.

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SEATTLE, WA 98164
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2.51 On January 18, 2004, Brett Backues tendered his resignation from the Board of Directors, effective immediately.

2.52 On January 26, 2004 the Association held an annual meeting. A homeowner raised the issue of leaking flat decks. The Board's responded "that it was working to solve issues surrounding."

2.53 Between January 26, 2004 and March 4, 2004, the Board met several times, but did not take action to retain an engineer or other consultant to investigate by intrusive inspection the conditions of the Project as recommended by the reserve consultant, Mr. Jobe, and attorney Harer, and made no effort to address the leaking window complaint.

2.54 In the second half of March, 2004, another leak occurred through a rooftop deck and into a unit, this time at unit 1371. Lozier employee Phil Dahl responded to a direct request by the unit owner. Sanford wrote a letter to the project Property Manager on March 24, 2004, falsely and misleadingly blaming the leak on gaps in caulking in the siding and wood trim around the decks (resulting from alleged lack of maintenance) and clogged weepholes in window frames. Nevertheless, Sanford on behalf of Declarant offered to do some deck surface maintenance work at no cost – even though there was no evidence that this was the source of the leaks. On information and belief, the purpose of this conduct on Sanford's part was to allay Board concerns and discourage prosecution of a warranty claim.

2.55 The Board (Cusimano and Farnsworth) was made aware of the new leak at unit 1371 by or before its April 2, 2004 meeting. It accepted the Declarant's offer to do deck surface inspection and maintenance, but did not take action to retain an independent engineer or other consultant to investigate by intrusive inspection the conditions of the Project as recommended by

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901 FIFTH AVENUE, SUITE 3000
SEATTLE, WA 98164
PHONE 206.388.0660 FAX 206.286.2660

the reserve consultant, Mr. Jobe, and attorney Harer, and made no effort to address the leaking window complaint.

2.56 In the winter of 2004, Justin Dickens, owner of Unit 1435, complained to the Project property manager that a bedroom window was leaking. Neither the manager nor the Board took action in response.

2.57 On April 30, 2004, Sanford on behalf of Declarant wrote to the Project property manager and the Board regarding leaks into unit 1483 below the deck/roof surface. Sanford again falsely and misleadingly blamed the leak on lack of regular maintenance and inspection, clogged deck drains, plug window weep holes, tears or delaminating in the deck surface, and window and deck trim maintenance.

2.58 On May 7, 2004, the Board authorized Huckleberry Circle, LLC to inspect all the flat surface decks at no cost to the Association, and recoat those with coating failures. The Project property manager, at Sanford's request, met with Glenn to arrange these inspections and maintenance scheduling. However, the Board did not take action to retain an engineer or other consultant to investigate by intrusive inspection the conditions of the Project as recommended by the reserve consultant, Mr. Jobe, and attorney Harer, and made no effort to address the leaking window complaints.

2.59 Pursuant to the understanding described above, Glenn did an exterior visual inspection of the Project from ground level on June 16, 2004. Her inspection was not reasonably calculated to determine the actual source of water leaks. On June 25, 2004, she recommended maintenance consisting principally of caulk and paint, which would do little or nothing to solve the problem in the long term.

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901 FIFTH AVENUE, SUITE 3000
SEATTLE, WA 98164
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2.60 On July 3, 2004, Glenn noted to the Project property manager that she had not inspected upper decks, and that her recommendations were only general in nature.

2.61 The Board met on October 15, 2004. A motion to hire a Building Envelope Inspection was made and seconded. The Project property manager consulted with Glenn regarding the appropriate scope of such an inspection. Glenn proposed a 4 hour, $500 non-intrusive inspection; such a short and non-intrusive investigation was not calculated to reveal the actual causes of leaks or the extent of damage, and could accomplish little or nothing of value.

2.62 November 6, 2004 the statute of limitations on the Association's claims for breach of the implied warranties as to common elements under the Washington Condominium Act expired.

2.63 On or about November 24, 2004, Glenn reported on a November 2, 2004 exterior, non-intrusive, visual inspection. Her building envelope findings and recommendations again consisted primarily of maintenance of caulk and paint.

2.64 As of March 21, 2005, a new Board consisting of Joseph Cusimano, Alexander W. Philip, Patricia Hovda was in place.

2.65 By the end of April, 2005, Huckleberry Circle, LLC and Lozier had completed its deck recoating efforts.

2.66 On June 7, 2005, the owner of unit 1423 contacted Lozier to complain of water damage inside his den from a leaking deck. This information was passed on to the Board, which took no action at its June 15, 2005 meeting.

2.67 On July 15, 2005, the Board noted that the deck inspection of Declarant's work that it had wanted had never been done, and a "new firm," Glenn, was hired at board member Sanford's recommendation to do the inspections in August, 2005.

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901 FIFTH AVENUE, SUITE 3000
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2.68 In early August, 2005, the owner of Unit 1625, Rosa Linda, complained to the Project property manager of water intrusion at the back door under her deck. In addition, the owner of unit 1435 reiterated his complaint about leaking windows.

2.69 The Board met on August 17, 2005, but did not take action to retain an engineer or other consultant to investigate, by intrusive inspection, the conditions of the Project as recommended by the reserve consultant, Mr. Jobe, and attorney Harer, and made no effort to address the leaking door and window complaints.

2.70 Apparently in late August, 2005, Glenn reported on the exterior condition of the decks. She recommended some re-caulking, some cleaning and repainting as remedial measures, but did not identify the actual underlying defective construction conditions.

2.71 Between early August, 2005 and January 19, 2006, the Board received multiple complaints from homeowners regarding window, deck, and door leaks. The Board met multiple times in this time frame, but did not take action to retain an engineer or other consultant to investigate, by intrusive inspection, the conditions of the Project as recommended by the reserve consultant, Mr. Jobe, and attorney Harer, and made no effort to address the leaking door and window complaints.

2.72 On February 15, 2006, the Board met, including Sanford, and asked the property manager to get proposals to reseal and caulk around windows and doors on the south and west sides of the complex. This was reported in the Board minutes merely as "a preventative measure against future water leaks and damage."

2.73 By March 24, 2006, Sanford had resigned from the Board.

2.74 Between February 15, 2006 and early November, 2006, the Board received more complaints of leaks into the interior of units. Board members Alexander W. Philip and Joseph

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901 FIFTH AVENUE, SUITE 3000
SEATTLE, WA 98164
PHONE 206.388.0660 FAX 206.286.2660

Cusimano were among the owners complaining of leaks. Nevertheless, the Board continued to conceal the severity of the problem from the ownership at large, and characterized caulking work in budget as simple "preventative measures" rather than responses to known leaks.

2.75 Board member Philip was attempting to sell his unit, and on information and belief did not want the scope of the problem to be public knowledge. The other Board members cooperated or agreed that the scope of the problem should be concealed, so as to retain property values.

2.76 On July 20, 2006, Philip resigned from the Board because he was moving.

2.77 On or about December 29, 2006, Project property manager Jim Davidson was advised that "It appears that Gene (GM Const) has found the mother lode of dry rot at Huckleberry Circle." And that a "wall was opened they found dry rot extending to 1439."

2.78 In the months that followed, a steady stream of leak complaints made its way before the Board. However, the Board did not reveal the scope of the problem to the ownership at large, and consistently failed to take systematic action to address the defects. The Board continued to actively conceal the scope of the complaints and the level of their concerns about the potential water intrusion problem, and negligently continued to believe that Lozier and/or the Declarant still had warranty responsibility for the Project.

2.79 On or about June 27, 2006, Cusimano announced his resignation from the Board because he was moving.

2.80 It was not until July of 2008 that the Board finally approved an instrusive building envelope investigation. The engineering firm Improcon was retained for this purpose, and later Grace Architects was retained as well. However, because Improcon advised the Board that the

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901 FIFTH AVENUE, SUITE 3000
SEATTLE, WA 98164
PHONE 206.388.0660 FAX 206.286.2660

situation looked very serious and expensive, the Board became panicked about the effect on property values.

2.81 On August 17, 2008, the Board notified homeowners that an investigation was to be performed, but misleadingly represented that the inspection was being done "in order to provide your association with a preliminary assessment and a list of priorities pertaining to future building maintenance and repair issues." No mention was made of serious, present construction defects requiring immediate correction.

2.82 On October 5, 2008 Board member Peter requested in an email that the Board not receive or be informed of the results of the Improcon or Grace Architects studies because bad findings would impair the marketability of units. He suggested that the Board table receiving the reports. This suggestion was approved by the Board. The Board did not inform the owners that it was deliberately ignoring the results of a construction-defect investigation.

2.83 On February 24, 2009, the Board received a legal opinion from construction-defect attorneys Goff and DeWalt that the statute of limitations on the Association's warranty claims had expired. The Board did not advise the homeowners of this fact. At the same time, the Board postponed doing a reserve study pending its review of the construction-defect investigation.

2.84 On March 23, 2009, Grace Architects issued its preliminary draft report, noting that "every major component of the building envelope is suffering from poor or deficient construction and waterproofing detailing throughout, resulting in varying degrees of failure around the property...the pace of this intrusion and related damage will continue to accelerate until comprehensive and proper repairs are made to the building envelope." The report's findings were not shared by the Board with homeowners at that time.

STEIN, FLANAGAN, SUDWEEKS & HOUSER, PLLC
901 FIFTH AVENUE, SUITE 3000
SEATTLE, WA 98164
PHONE 206.388.0660 FAX 206.286.2660

2.85 Final results of Grace Architects' and Improcon's investigations confirmed the preliminary findings of widespread construction defects and damage noted above. These results were withheld from homeowners for a substantial period of time.

2.86 At an October 27, 2009 HOA meeting, homeowners presented questions about the details of water intrusion repairs. The Board replied that the answers were not known, and individuals with specific complaints were directed to the Project property manager.

2.87 On January 26, 2010, the Board resolved to hire J2 Engineers to do an analysis of the findings by Improcon, and prepare a repair plan. At approximately the same time, the Board retained legal counsel Onsager to pursue limited claims against Huckleberry Circle, LLC and others for failing to honor a commitment to repair 22 decks at the Project.

2.88 On August 4, 2010, the Board resolved that Onsager should be instructed not to answer individual homeowner questions about the claims being asserted by the Association.

2.89 On or about March 3, 2011, the Board received partial estimates for repair costs of approximately $2.4 million.

2.90 On April 24, 2011, the Board at a homeowners meeting declared a budget including a special assessment for a large portion of the anticipated repair costs to have been ratified by default.

2.91 The total repair costs for the defects and damage at the Project will be approximately $3 million.

2.92 On or about May 11, 2011, the Association has imposed special assessments in excess of $2.5 million on unit owners including plaintiffs to pay for the repairs. The Association will impose future special assessments or incur liabilities on behalf of unit owners including plaintiffs in order to pay for the remainder of the required repairs.

STEIN, FLANAGAN, SUDWEEKS & HOUSER, PLLC
901 FIFTH AVENUE, SUITE 3000
SEATTLE, WA 98164
PHONE 206.388.0660 FAX 206.286.2660

III. FIRST CAUSE OF ACTION: BREACH OF BOARD MEMBER DUTY OF CARE

3.1 Plaintiffs reallege and incorporate by reference paragraphs 1.1 through 2.92 above.

3.2 Defendants Declarant, Lozier, Doe Declarant Affiliates, Sanford, Burckhard, Sansburn, Peter, Holley, Backues, Cusimano, Farnsworth, Hovda, and Philip as Board members and officers and/or as principals or employers of Board members and officers, owed plaintiffs a duty of due care in the management and governance of the Association.

3.3 These defendants breached their duties of care as described above by, among other things: failing to evaluate the construction conditions at the Project, failing to follow advice of attorneys and construction professionals, failing to reasonably respond to known construction complaints, failing to secure advice of legal counsel and relevant professionals as to matters the Board was not reasonably competent to handle, failing to institute timely repairs, failing to advise the plaintiffs and others of consistently reported construction problems and other material information, misrepresenting the nature of investigations to plaintiffs, deliberately remaining ignorant of construction problems and the cost to cure them in order to serve their own interests instead of the Association's, and failing to commence a Washington Condominium Act warranty claims and/or other claims within applicable statutes of limitation.

3.4 Defendants' breaches have proximately caused damage to the plaintiffs in an amount to be determined at trial. Such damages include, but are not limited to: plaintiffs' proportional responsibility to pay for the cost to correct defective conditions and repair resulting property damage at the Project (including investigative costs, scope of repair development costs, design costs, inspection costs, contractor costs, project management costs, repair financing costs, and all other costs associated with such repairs); increased costs to correct defective conditions and repair resulting property damage as a consequence of inaction; loss of marketability, use and value

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901 FIFTH AVENUE, SUITE 3000
SEATTLE, WA 98164
PHONE 206.388.0660 FAX 206.286.2660

of plaintiffs' property; increased reserve expenses; relocation costs; and attorney fees and other costs incurred in prosecuting this action.

IV. SECOND CAUSE OF ACTION: NEGLIGENCE

4.1 Plaintiffs reallege and incorporate by reference paragraphs 1.1 through 3.4 above.

4.2 Defendants Glenn, CCW, Declarant, Lozier, and Doe Declarant Affiliates owed plaintiffs a duty of due care in undertaking the construction, inspection, condition reporting, and repair of the Project. Defendants breached their duties of due care as described in Paragraph 3.3.

4.3 As a direct and proximate result of these breaches of duty, the Project has been rendered unreasonably dangerous, and plaintiffs have been damaged in an amount to be determined at trial. Such damages include, but are not limited to: plaintiffs' proportional responsibility to pay for the cost to correct defective conditions and repair resulting property damage at the Project (including investigative costs, scope of repair development costs, design costs, inspection costs, contractor costs, project management costs, repair financing costs, and all other costs associated with such repairs); increased costs to correct defective conditions and repair resulting property damage as a consequence of the negligence of Glenn, Declarant, and Lozier; loss of marketability, use and value of plaintiffs' property; increased reserve expenses; relocation costs; and attorney fees and other costs incurred in prosecuting this action.

V. THIRD CAUSE OF ACTION: VIOLATION OF CONSUMER PROTECTION ACT

5.1 Plaintiff realleges and incorporates by reference paragraphs 1.1 through 4.3 above.

5.2 The conduct, acts, and omissions of defendants Sanford, Burckhard, Sansburn, Declarant, Lozier and Doe Declarant Affiliates constitutes unfair or deceptive acts or practices in trade or commerce in violation of RCW 19.86 et seq.

STEIN, FLANAGAN, SUDWEEKS & HOUSER, PLLC
901 FIFTH AVENUE, SUITE 3000
SEATTLE, WA 98164
PHONE 206.388.0660 FAX 206.286.2660

5.3 The conduct of these defendants impacted the public interest, had the capacity to deceive a substantial portion of the public, and, in fact, did deceive the plaintiffs.

5.4 As a proximate result of these unfair or deceptive acts or practices, the plaintiffs have been damaged in an amount to be determined at trial which includes, but is not limited to, plaintiffs' proportional responsibility to pay for the cost to correct defective conditions and repair resulting property damage at the Project (including investigative costs, scope of repair development costs, design costs, inspection costs, contractor costs, project management costs, repair financing costs, and all other costs associated with such repairs); increased costs to correct defective conditions and repair resulting property damage as a consequence of the acts of Sanford, Burckhard, Sansburn, Declarant, Lozier and Doe Declarant Affiliates; loss of marketability, use and value of plaintiffs' property; increased reserve expenses; relocation costs; and attorney fees and other costs incurred in prosecuting this action.

5.5 Pursuant to Chapter 19.86 RCW, the plaintiffs are entitled to reasonable attorneys' fees incurred in prosecuting this action, and civil penalties by way of treble damages up to $25,000 per violation.

VI. FOURTH CAUSE OF ACTION: NEGLIGENT MISREPRESENTATION

6.1 Plaintiff realleges and incorporates by reference paragraphs 1.1 through 5.4 above.

6.2 During the course of construction of the Project and/or subsequent inspections and work on the Project, Declarant, Lozier, Doe Declarant Affiliates, Sanford, Sansburn, Burkhard, Glenn and CCW learned of serious defects in the construction work at the Project unrelated to maintenance or upkeep of the Project.

6.3 Defendants represented that they would evaluate and disclose the nature and cause of leaks and other problems at the Project for the use and benefit plaintiffs.

STEIN, FLANAGAN, SUDWEEKS & HOUSER, PLLC
901 FIFTH AVENUE, SUITE 3000
SEATTLE, WA 98164
PHONE 206.388.0660 FAX 206.286.2660

6.4 Reasonably prudent persons with the type and level of knowledge of these defendants would, upon discovering defects in the work, have arranged a widespread intrusive investigation, which would have disclosed additional and more serious defects.

6.5 Theses defendants were negligent in failing to communicate the information they had learned regarding the existence of defects in the Project's construction, and in failing to procure additional information regarding the building envelope at the Project.

6.6 Plaintiffs justifiably relied on these defendants to disclose known and suspected defects, and the need for an intrusive investigation.

6.7 Defendants' failure to supply information to plaintiffs and/or others proximately caused plaintiffs to suffer damage, including property damage, in an amount to be determined at trial. Such damages include, but are not limited to plaintiffs' proportional responsibility to pay for the cost to correct defective conditions and repair resulting property damage at the Project (including investigative costs, scope of repair development costs, design costs, inspection costs, contractor costs, project management costs, repair financing costs, and all other costs associated with such repairs); increased costs to correct defective conditions and repair resulting property damage as a consequence of the negligence of Declarant, Lozier, Doe Declarant Affiliates, Sanford, Sansburn, Burkhard, Glenn and CCW; loss of marketability, use, and value of plaintiffs' property; increased reserve expenses; relocation costs; and attorney fees and other costs incurred in prosecuting this action.

VII. FIFTH CAUSE OF ACTION: FRAUD BY OMISSION AND MISREPRESENATION

7.1 Plaintiff re-alleges and incorporates by reference paragraphs 1.1 through 6.7 above.

7.2 Declarant, Lozier, Doe Declarant Affiliates, Sanford, Sansburn, Burckhard, Peter, Glenn and CCW breached their duties to plaintiffs to disclose existing material facts regarding the

STEIN, FLANAGAN, SUDWEEKS & HOUSER, PLLC
901 FIFTH AVENUE, SUITE 3000
SEATTLE, WA 98164
PHONE 206.388.0660 FAX 206.286.2660

presence of defective construction, the cause of water intrusion, the advice of counsel regarding prosecution of a Washington Condominium Act warranty claim, the actual purpose of the "maintenance" program developed by Lozier, and Glenn's and CCW's lack of qualifications and conflict of interest..

7.3 These material facts were not known to plaintiffs, but were known to Defendants.

7.4 By failing to disclose material facts that were not known to plaintiffs when they had a duty to speak, the Defendants, in law, falsely represented a material fact. *Guarino v. Interactive Objects, Inc.*, 122 Wn. App. 95, 127 (Wash. Ct. App. 2004).

7.5 Defendants knew that plaintiffs would rely on them to disclose known material facts, and intended plaintiffs to so rely.

7.6 Plaintiffs are presumed to have relied on Defendants' failure to disclose, and in fact did so rely.

7.7 Plaintiffs had a right under the Washington Condominium Act and the terms of engagement of Glenn and CCW to rely on Defendants to truthfully disclose these known material facts.

7.8 As hereinbefore described, Declarant, Lozier, Doe Declarant Affiliates, Sanford, Sansburn, Burckhard, Peter, Glenn and CCW made material misrepresentations to the plaintiffs of existing facts regarding the presence of defective construction, the cause of water intrusion, the advice of counsel regarding prosecution of a Washington Condominium Act warranty claim, the actual purpose of the "maintenance" program developed by Lozier, and Glenn's and CCW's lack of qualifications and conflict of interest..

7.9 These misrepresentations were false when made, and made with the intention that plaintiffs rely on them.

STEIN, FLANAGAN, SUDWEEKS & HOUSER, PLLC
901 FIFTH AVENUE, SUITE 3000
SEATTLE, WA 98164
PHONE 206.388.0660 FAX 206.286.2660

7.10 Defendants knew their representations were false, and intended the members to rely on them.

7.11 Plaintiffs believed that the misrepresentations were true.

7.12 Plaintiffs had a right under the Washington Condominium Act and the terms of engagement of Glenn and CCW to rely on Defendants' misrepresentations, and did rely upon them.

7.13 Defendants' false material representations and omissions proximately caused plaintiffs to suffer damage, including property damage, in an amount to be determined at trial. Such damages include, but are not limited to plaintiffs' proportional responsibility to pay for the cost to correct defective conditions and repair resulting property damage at the Project (including investigative costs, scope of repair development costs, design costs, inspection costs, contractor costs, project management costs, repair financing costs, and all other costs associated with such repairs); increased costs to correct defective conditions and repair resulting property damage as a consequence of the fraudulent concealment of material information; loss of marketability, use, and value of plaintiffs' property; increased reserve expenses; relocation costs; and attorney fees and other costs incurred in prosecuting this action.

VIII. SIXTH CAUSE OF ACTION: CIVIL CONSPIRACY

8.1 Plaintiff re-alleges and incorporates by reference paragraphs 1.1 through 7.13 above.

8.2 Declarant, Lozier, Sanford, Glenn and CCW combined and agreed to work toward causing the Association not to prosecute its warranty rights by, among other things, breaching their fiduciary duties to unit purchasers, fraudulently concealing the existence of defective construction, pretending to do comprehensive investigation and repair of conditions with knowledge that the

STEIN, FLANAGAN, SUDWEEKS & HOUSER, PLLC
901 FIFTH AVENUE, SUITE 3000
SEATTLE, WA 98164
PHONE 206.388.0660 FAX 206.286.2660

investigations and repairs were not adequate, misrepresenting the nature and cause of the leaks being experienced by unit owners, placing Sanford on the Board when he had no legal right under the Washington Condominium Act to remain, and other actions.

8.3 These defendants' conspiracy proximately caused plaintiffs to suffer damage, including property damage, in an amount to be determined at trial. Such damages include, but are not limited to plaintiffs' proportional responsibility to pay for the cost to correct defective conditions and repair resulting property damage at the Project (including investigative costs, scope of repair development costs, design costs, inspection costs, contractor costs, project management costs, repair financing costs, and all other costs associated with such repairs); increased costs to correct defective conditions and repair resulting property damage as a consequence of the conspiracy; loss of marketability, use, and value of plaintiffs' property; increased reserve expenses; relocation costs; and attorney fees and other costs incurred in prosecuting this action.

8.4 As a result, all co-conspirators are jointly and severally liable fort he acts and omissions of all other co-conspirators.

IX. PRAYER FOR RELIEF

Wherefore, plaintiff prays for relief as follows:

For judgment for damages against the defendants, jointly and severally, in an amount to be determined at trial. Such damages include, but are not limited to plaintiffs' proportional responsibility to pay for the cost to correct defective conditions and repair resulting property damage at the Project (including investigative costs, scope of repair development costs, design costs, inspection costs, contractor costs, project management costs, repair financing costs, and all other costs associated with such repairs); increased costs to correct defective conditions and repair resulting property damage as a consequence of the conspiracy; loss of marketability, use, and

STEIN, FLANAGAN, SUDWEEKS & HOUSER, PLLC
901 FIFTH AVENUE, SUITE 3000
SEATTLE, WA 98164
PHONE 206.388.0660 FAX 206.286.2660

value of plaintiffs' property; increased reserve expenses; relocation costs; exemplary damages as provided by statute; attorney fees and other costs incurred in prosecuting this action; and such other and further relief as the evidence, law and equity allow.

DATED this 7th day of September, 2011.

STEIN, FLANAGAN, SUDWEEKS & HOUSER, PLLC

Leonard Flanagan, WSBA No. 20966
Justin Sudweeks, WBBA No. 28755
Daniel S. Houser, WSBA No. 30323
Attorneys for Plaintiffs

STEIN, FLANAGAN, SUDWEEKS & HOUSER, PLLC
901 FIFTH AVENUE, SUITE 3000
SEATTLE, WA 98164
PHONE 206.388.0660 FAX 206.286.2660

APPENDIX B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

CINDY ALEXANDER; BLOCKER VENTURES, LLC; CHRIS CLARK; R. BRUCE EDGINGTON; KIPP JOHNSON and JENNIFER JOHNSON, husband and wife; GOPIKRISHNA KANURI and HIMABINDU KANURI, husband and wife; CHRIS KASPRZAK and ELIZABETH KASPRZAK, husband and wife; PAUL LARKINS and JOYCE HYOJUNG LARKINS, husband and wife; KRISTINE MAGNUSSEN; SCOTT McKILLOP; CAINE OTT and DANA OTT, husband and wife; MARA PATTON; PETER RICHARDS; DANTE SCHULTZ; WINIFRED D. SMITH; ROBERT STODDARD and COLETTE STODDARD, husband and wife; NEIL WEST; LIANG XU and JIA LU DUAN, husband and wife, Appellants/Cross Respondents, v. GARY SANFORD and JANE DOE SANFORD, and their marital community; PAUL BURCKHARD and MURIEL BURCKHARD, and their marital community; JAMES SANSBURN and JANE DOE SANSBURN, and their marital community; LOZIER HOMES CORPORATION, a Washington corporation; Respondents/Cross Appellants, RICHARD PETER and JANE DOE PETER, and their marital community; SHANA HOLLEY and RICHARD HOLLEY, and their marital community; BRETT BACKUES and JANE DOE BACKUES, and their marital community; JOSEPH CUSIMANO and JANE DOE	DIVISION ONE No. 69637-8-I PUBLISHED OPINION

CUSIMANO, and their marital community; PATRICIA HOVDA and JOHN DOE HOVDA, and their marital community; ALEXANDER W. PHILIP and NATALIA T. PHILIP, and their marital community,

Respondents,

JASON FARNSWORTH and JANE DOE FARNSWORTH, and their marital community; HUCKLEBERRY CIRCLE, LLC, a Washington limited liability company; DIANE GLENN and JOHN DOE GLENN, and their marital community; CONSTRUCTION CONSULTANTS OF WASHINGTON, LLC, a Washington limited liability company,

Defendants.

FILED: May 12, 2014

DWYER, J. — Eighteen condominium owners (collectively Homeowners) filed suit against Gary Sanford, Paul Burckhard, James Sansburn, Richard Peter, Shana Holley, Brett Backues, Joseph Cusimano, Jason Farnsworth, Patricia Hovda, Alexander Philip, Huckleberry Circle, LLC, Lozier Homes Corporation, Diane Glenn, and Construction Consultants of Washington, LLC[1] for breach of the board member duty of care, negligence, violation of the Consumer Protection Act[2] (CPA), negligent misrepresentation, fraud by omission and misrepresentation, and civil conspiracy. Pursuant to Civil Rule (CR) 12(b)(6), the trial court dismissed Homeowners' claims against Respondents as untimely

[1] Huckleberry Circle, LLC, Farnsworth, Glenn, and Constructions Consultants of Washington, LLC are not party to this appeal. All of the defendants who are party to this appeal are hereinafter referred to collectively as "Respondents."

[2] Ch. 19.86 RCW.

filed.[3] Homeowners appealed. Sanford, Burckhard, Sansburn, and Lozier Homes cross appealed, asserting that the trial court erred by declining to award attorney fees against Homeowners for filing a frivolous lawsuit.

Contrary to the trial court's ruling, we hold that Washington law does not provide that a cause of action necessarily accrues against a corporate board member no later than upon the board member's resignation. We hold, instead, that the doctrine of adverse domination applies in Washington. The application of that doctrine to the pleadings in this case demonstrates that several of Homeowners' claims should not have been dismissed on the face of the complaint as untimely filed. However, given that we also hold both that directors of a homeowners' association do not owe fiduciary-like duties to future purchasers and that Homeowners failed to plead all of the elements of a CPA claim, various of Homeowners claims were properly dismissed. Accordingly, we affirm in part and reverse in part.

I

A trial court's ruling on a motion to dismiss under CR 12(b)(6) presents a question of law, which we review de novo. Cutler v. Phillips Petroleum Co., 124 Wn.2d 749, 755, 881 P.2d 216 (1994). A CR 12(b)(6) motion questions only the legal sufficiency of the allegations in a pleading, asking whether there is an insuperable bar to relief. Contreras v. Crown Zellerbach Corp., 88 Wn.2d 735,

[3] Glenn and Construction Consultants filed similar motions, but the trial court declined to dismiss the claims against them. Homeowners' claims against Glenn and Construction Consultants were dismissed without prejudice upon stipulation of the parties on November 26, 2012.

742, 565 P.2d 1173 (1977). The purpose of CR 12(b)(6) is to weed out complaints where, even if that which the plaintiff alleges is true, the law does not provide a remedy. McCurry v. Chevy Chase Bank, FSB, 169 Wn.2d 96, 101, 233 P.3d 861 (2010).

> Under CR 12(b)(6), dismissal is appropriate only if "it appears beyond doubt that the plaintiff cannot prove any set of facts which would justify recovery." [Tenore v. AT&T Wireless Servs., 136 Wn.2d 322, 330, 962 P.2d 104 (1998)]. In undertaking such an analysis, "a plaintiff's allegations are presumed to be true and a court may consider hypothetical facts not included in the record." Id.

Burton v. Lehman, 153 Wn.2d 416, 422, 103 P.3d 1230 (2005).

II

Homeowners all own residential units at Huckleberry Circle condominium complex in Issaquah.[4] The declarant of the complex is Huckleberry Circle, LLC (Declarant). The Declarant's sole member is Lozier Homes Corporation (Lozier Homes). All unit owners in the complex are members of the Huckleberry Circle Condominium Owners Association (Association), which is governed by a three voting-member board of directors. The Association was created on June 29, 2000.

The Association's first board consisted of Sanford, Burckhard, and Sansburn. In their complaint, Homeowners allege that at the time of development, Declarant, Lozier Homes, Sanford, Burckhard, and Sansburn were aware, or should have been aware, that the complex "was not being designed or

[4] The substantive facts set forth herein are as presented in Homeowners' complaint, consistent with the CR 12(b)(6) standard of review. Burton, 153 Wn.2d at 422.

constructed in a manner consistent with minimum requirements of building code [sic] with respect to weatherproofing." Homeowners further allege that insufficient weatherproofing was a pervasive problem throughout this region, and that Declarant, Lozier Homes, Sanford, Burckhard, and Sansburn were aware of this fact at that time.

Declarant, Lozier Homes, Sanford, Burckhard, and Sansburn prepared a limited warranty, developed a "maintenance program," and hired a "licensed inspector" for the complex. Homeowners allege that the purpose of these actions "was to give the appearance of due diligent inspection of the construction quality of the building envelope, while not in fact undertaking an intrusive investigation of building components which would have revealed water intrusion." Declarant, Lozier Homes, Sanford, Burckhard, and Sansburn retained Glenn, d/b/a The Construction Consultants, as the complex's inspector. Glenn was not a licensed inspector but, rather, was a political activist for the building industry.

Homeowners further allege that, in order to protect themselves from liability, Declarant, Lozier Homes, Sanford, Burckhard, and Sansburn included provisions in the project declaration that allowed Declarant to appoint a fourth nonvoting member to the board and that limited "the power of the Association's Board and the Association to engage in litigation against the Declarant for violation of the implied warranties of quality under the Washington Condominium Act."

Burckhard resigned from the board on May 15, 2001, at which time he was replaced by Holley. Between May and November 2001, Glenn performed

multiple nonintrusive inspections of the complex, which revealed only minor repair issues. On May 9, 2002, Sansburn and Holley resigned from the board, and the Association elected Backues, Cusimano, and Peter in their place. On that same date, Declarant exercised its right to add a nonvoting member to the board. Declarant appointed Sanford to this position.[5] Homeowners allege that "Sanford's role on the Board was to monitor its efforts to evaluate the construction quality of the Project, and dissuade the Board from prosecuting the Association's warranty rights."

On August 13, 2002, the board hired Glenn to perform another inspection of the complex. Homeowners allege that "Sanford did not advise the Board that Glenn had no experience in helping condominium associations identify concealed defects and damage." Glenn's inspection again did not find any serious issues or defects.

In March 2003, Ken Harer, a construction defect attorney and architect, contacted the board in order to inform it that the complex showed signs of potentially serious hidden construction defects and that the statutory limitation period on any warranty claims would soon expire. Peter met with Harer, who explained his concerns. Shortly thereafter, Peter e-mailed Backues and Cusimano regarding the meeting and expressed concern that he might have a conflict of interest because he was employed by an affiliate of Lozier Homes. The board took no action based on Harer's advice.

[5] The complaint lists only Sansburn as resigning from the board on May 9. However, it asserts that Backues, Cusimano, and Peter were elected at this time as the new three-member board, with Sanford assuming the fourth, nonvoting, position.

Peter notified the board in April 2003 that he intended to resign, but the board instead had him switch terms with another member so that someone could be elected to replace him in May. Also that April, the board received its first complaint of water leaking through a window in one of the units. None of this information appeared in any of the board's minutes. Homeowners allege that "the decision to omit these facts from the minutes was part of a deliberate effort on the part of Defendant Peter and/or the other Board members to conceal material information from unit owners."

Peter resigned from the board on May 29, 2003, and Farnsworth was elected to replace him. On August 20, 2003, the property manager contacted contractor Mark Jobe regarding bids for deck maintenance and deck drainage issues. Jobe stated:

> Yes, that is a project I am familiar with. There appears to be a serious problem with deck slope. Ponded water is present under the sleeper. Also while I was there I noted the flashing above the brick veneer has been caulked closed. Closed flashing is a serious problem that generally leads to big issues. Also it is often used to mask other problems. This should be looked into. Would be glad to assist.

The board took no action upon receiving Jobe's warnings.

On September 22, 2003, the board received its second complaint of water leaking into a unit. On October 17, 2003, the board met to consider hiring a structural engineer to inspect the decks at the complex; however, no further action to hire an engineer was taken. The board thereafter received a third complaint about water leaking into a unit. Following the receipt of this complaint,

"Sanford volunteered Lozier and the Declarant" to perform deck inspections. On January 18, 2004, Backues resigned from the board.

In March 2004, a unit owner complained directly to Lozier Homes of a leak in the owner's unit. Sanford, who was still the board's nonvoting member, wrote a letter to the property manager, blaming the leak on "gaps in caulking in the siding and wood trim around the decks . . . and clogged weepholes in window frames." Sanford wrote a second letter to the property manager in April, alleging that the same conditions had caused a leak in another unit. Homeowners allege that Sanford wrote these letters in order to discourage prosecution of a warranty claim.

In June 2004, Glenn performed another exterior visual inspection at the complex. Homeowners allege that this inspection "was not reasonably calculated to determine the actual source of water leaks." Glenn recommended maintenance in the form of caulking and painting, but again found no major problems. Glenn performed another similar inspection in November 2004, and again recommended caulking and painting.

On November 6, 2004, the statutory limitation period applicable to a claim for breach of implied warranties on common elements under the Washington Condominium Act[6] (WCA) expired.

By March 21, 2005, Farnsworth had resigned from the board. The new board at that time consisted of Cusimano, Philip, and Hovda, with Sanford remaining as the nonvoting member. In August 2005, the board again hired

[6] Ch. 64.34 RCW.

Glenn to perform an inspection of the property and again she found no serious defects at the complex. Meanwhile, the board continued to receive multiple complaints from unit owners about leaks through windows, decks, and doors. Nonetheless, Homeowners allege, the board "did not reveal the scope of the problem to the ownership at large, and consistently failed to take systematic action to address the defects." Efforts to reseal and caulk windows and doors were represented as "preventative measures," instead of responses to the complained-of leaks. Philip and "[t]he other Board members cooperated or agreed that the scope of the problem should be concealed, so as to retain property values" and, thereafter, the board "continued to actively conceal the scope of the complaints and the level of their concerns about the potential water intrusion problem."

By March 24, 2006, Sanford resigned from the board. On June 27, 2006, Cusimano announced his resignation from the board. On July 20, 2006, Philip resigned from the board.

In July 2008, the board finally approved an intrusive inspection of the building envelope. However, the board told the unit owners that the purpose of the inspection was "to provide your association with a preliminary assessment and a list of priorities pertaining to future building maintenance and repair issues." In October 2008, Peter[7] sent an e-mail to the board requesting that the

[7] While it is unclear from the complaint when Peter rejoined the board, 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."

board decline to be informed of the results of the inspection until a later time, because "findings would impair the marketability of units." The board agreed. The board did not receive the results of the inspection until March 2009.

The inspection performed by Improcon and Grace Architects revealed that

> "every major component of the building envelope is suffering from poor or deficient construction and waterproofing detailing throughout, resulting in varying degrees of failure around the property . . . the pace of this intrusion and related damage will continue to accelerate until comprehensive and proper repairs are made to the building envelope."

(Alteration in original.) The board did not share the results of the inspection with the unit owners.

Homeowners allege that "[a]t an October 27, 2009 HOA meeting, homeowners presented questions about the details of water intrusion repairs. The Board replied that the answers were not known, and individuals with specific complaints were directed to the Project property manager." In January 2010, the board hired J2 Engineers to create a repair plan for the defects revealed by the inspection. On March 3, 2011, the board received a partial estimate for the cost of repair which totaled approximately $2.4 million. At a homeowners meeting on April 24, 2011, the board declared a budget that included a special assessment for the cost of repair. That May, the Association imposed a special assessment on the unit owners in excess of $2.5 million to fund the repairs.

In September 2011, Homeowners filed suit against all of the prior board members,[8] Declarant, Lozier Homes, Glenn, and Construction Consultants. In response, Cusimano, Lozier Homes, Sanford, Burckhard, and Sansburn filed CR 12(b)(6) motions to dismiss for failure to state a claim, asserting that Homeowners' complaint had been filed long after the statutory limitation period had run on all claims.

The trial court ruled that the statutory limitation period applicable to Homeowners' claims was three years and that "the statute of limitation for actions against the named defendants began to run at the time he or she resigned from the Board." Additionally, the trial court stated that it "need not reach the issue of whether the plaintiffs knew or should have known of the construction issues as to these defendants," because the defendants, once they left the board, "were not and could not have been engaged . . . in any continuing fraud or omission." The trial court therefore granted Cusimano's, Lozier Homes's, Sanford's, Burckhard's, and Sansburn's motions to dismiss.

Lozier Homes, Sanford, Sansburn, and Burckhard thereafter moved for an award of attorney fees, asserting that Homeowners' claim against them was frivolous. In response, counsel for Homeowners submitted extensive documentation of the research he had conducted prior to drafting the complaint.[9]

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[8] The complaint also named the spouses of the individual board members, alleging that all acts and omissions committed by the board members had been done on behalf of their marital communities.

[9] Counsel attached a total of 94 exhibits to his opposition to the request for attorney fees.

After considering all of the submitted documentation, the trial court declined to award fees to Lozier Homes, Sanford, Burckhard, and Sansburn.

Homeowners stipulated that all individually named board members had resigned at some unidentified time before September 2008.[10] Thereafter, Peter, Holley, Backues, Hovda, and Philip also filed CR 12(b)(6) motions to dismiss for failure to state a claim.[11] The trial court granted these motions for the same reason it had granted the prior motions.

Homeowners appeal the trial court's rulings on the motions to dismiss. Lozier Homes, Sanford, Burckhard, and Sansburn cross appeal the trial court's order denying their claim for an award of attorney fees.

III

Respondents contend that the trial court's dismissal of Homeowners' claim was proper because Homeowners lacked standing to file suit. This is so, Respondents assert, because the Washington Nonprofit Corporation Act[12] does not permit derivative actions. Because the claims asserted herein were not derivative claims, this contention fails.

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[10] As alleged in the complaint, the terms served by the board members are as follows:
Sanford – June 29, 2000 to March 24, 2006
Burckhard – June 29, 2000 to May 15, 2001
Sansburn – June 29, 2000 to May 9, 2002
Holley – May 15, 2001 to May 9, 2002
Backues – May 9, 2002 to January 18, 2004
Cusimano – May 9, 2002 to June 27, 2006
Peter – May 9, 2002 to May 29, 2003
Philip – March 21, 2005 to July 20, 2006
Hovda – March 21, 2005 to unknown date before September 2008

[11] Huckleberry Circle, LLC and Richard Holley (spouse of Shana Holley) failed to answer Homeowners' complaint, and the trial court granted default judgments against them. Farnsworth was never served with a copy of the complaint.

[12] Ch. 24.03 RCW.

"Standing is a threshold issue, which we review de novo." In re Estate of Becker, 177 Wn.2d 242, 246, 298 P.3d 720 (2013). "To have standing, one must have some protectable interest that has been invaded or is about to be invaded." Orion Corp. v. State, 103 Wn.2d 441, 455, 693 P.2d 1369 (1985).

Homeowners asserted that they sustained damages to their individual property.[13] In cases alleging property damage, homeowners' associations may file suit on behalf of unit owners. RCW 64.34.304(1)(d). However, absent allegations of damage to the association itself, the homeowners' association lacks independent standing to sue for physical damage to a unit owner's property.[14] Satomi Owners Ass'n. v. Satomi, LLC, 167 Wn.2d 781, 812, 225 P.3d 213 (2009). In such an instance, it is not the unit owners but the association whose claims are derivative. Satomi Owners Ass'n. v. Satomi, LLC, 139 Wn. App. 175, 180, 159 P.3d 460 (2007), rev'd on other grounds, 167 Wn.2d 781, 225 P.3d 213 (2009). Because Homeowners allege damage to their own

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[13] Homeowners' complaint seeks the following remedies: "Such damages include, but are not limited to: plaintiffs' proportional responsibility to pay for the cost to correct defective conditions and repair resulting property damage at the Project (including investigative costs, scope of repair development costs, design costs, inspection costs, contractor costs, project management costs, repair financing costs, and all other costs associated with such repairs); increased costs to correct defective conditions and repair resulting property damage as a consequence of inaction; loss of marketability, use and value of plaintiffs' property; increased reserve expenses; relocation costs; and attorney fees and other costs incurred in prosecuting this action."

[14] This is the case even when the alleged damages include the cost of repairs throughout the condominium complex. In Satomi, the association alleged damages including "'the cost of repairing the project . . . and resulting monetary and material harm.'" 167 Wn.2d at 811-12. The court held that these damages were sustained by the homeowners and not the association itself. "The only property identified in Blakeley Association's complaint, however, is the condominium project's units, common elements, and limited common elements, which are owned by the unit owners, not Blakeley Association. Thus, Blakeley Association has not alleged damage to any property in which it has a protectable interest." Satomi, 167 Wn.2d at 812 (footnote omitted). Here, the Association levied an assessment upon the unit owners for the repairs to the building envelopes. The "cost of repairing the project" is a damage sustained by the unit owners, not the association itself. Satomi, 167 Wn.2d at 812. Thus, the claims here belong to Homeowners.

property, they have standing to assert their claims.[15]

IV

A

Homeowners contend that the discovery rule delayed the accrual of the causes of action as to all defendants on all claims, regardless of when various board members resigned from the board.[16] We agree, insofar as the issue should not have been decided adversely to Homeowners as a matter of law on a CR 12(b)(6) motion.

The discovery rule is an exception to the normal rules governing when a cause of action accrues. In re Estates of Hibbard, 118 Wn.2d 737, 744-45, 826 P.2d 690 (1992).

> Application of the rule is limited to claims in which the plaintiffs could not have immediately known of their injuries due to professional malpractice, occupational diseases, self-reporting or concealment of information by the defendant. Application of the rule is extended to claims in which plaintiffs could not immediately know of the cause of their injuries.

Hibbard, 118 Wn.2d at 749-50. "Under the discovery rule, a cause of action accrues when the plaintiff knew or should have known the essential elements of

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[15] As Homeowners' claims are not derivative, we need not decide whether unit owners may bring a derivative suit on behalf of a homeowners' association.

[16] Respondents contend that because Homeowners' claims are essentially for loss of a chance to sue Declarant under the WCA for defective construction, their claims are time-barred by the WCA's statute of limitations. This is a mischaracterization of Homeowners' claims, which are based on alleged occurrences taking place after construction was completed. No claim for defective construction is asserted.

the cause of action."[17] Allen v. State, 118 Wn.2d 753, 757-58, 826 P.2d 200 (1992) (footnote omitted).

Here, the trial court ruled that the relevant statutory limitation period is three years.[18] The trial court did not apply the discovery rule, ruling instead that Homeowners' causes of action accrued no later than when each individual defendant resigned from the board. The trial court did not cite any authority for its conclusion. Respondents, however, in their CR 12(b)(6) motions and again on appeal, rely on Gillespie v. Seattle-First National Bank, 70 Wn. App. 150, 855 P.2d 680 (1993), and Quinn v. Connelly, 63 Wn. App. 733, 821 P.2d 1256 (1992), to support their assertion that "it is black-letter law that a claim against a fiduciary such as a board member accrues as a matter of law, at the latest and regardless of discovery, at the time that fiduciary resigns his or her position." To the contrary, neither Gillespie nor Quinn established any such general rule.

In Gillespie, we held that former RCW 11.96.060(1) (1985) mandates that "an action against the trustee of any express trust for any breach of fiduciary duty must be brought within 3 years from *the earlier of* the time the alleged breach was discovered or reasonably should have been discovered or the termination of the trust," and that, therefore, the limitation period commences no later than at the time the trust terminates. 70 Wn. App. at 161. In that case, we answered a

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[17] Homeowners claim that there exists inconsistency in our case law concerning which party bears the burden of proving when a plaintiff knew or should have known of the essential elements of a cause of action. This case was decided on a CR 12(b)(6) motion to dismiss, which does not impose a proof burden on either party. To the contrary, any fact alleged by plaintiffs is taken as true. Thus, we need not herein resolve the perceived lack of clarity, if any.

[18] Neither party disputes this ruling. However, the limitation period for a CPA claim is four years, not three. RCW 19.86.120.

question of statutory interpretation; we did not purport to establish a rule applicable to all fiduciary relationships. As former RCW 11.96.060(1) bears no relevance to the case at hand, Gillespie is inapposite.

In Quinn, we held that any fraudulent concealment by an attorney, which might serve to toll the commencement of a statutory limitation period, ends when the attorney-client relationship ends, unless the attorney takes further steps to extend the concealment. 63 Wn. App. at 741. We articulated two bases for our holding that the plaintiff had not brought his claim of legal malpractice within the applicable limitation period. First, we relied upon the rule established in Richardson v. Denend, 59 Wn. App. 92, 96-97, 795 P.2d 1192 (1990), which states that "upon entry of the judgment, a client, as a matter of law, possesses knowledge of all the facts which may give rise to his or her cause of action for negligent representation." Quinn, 63 Wn. App. at 737. Second, we held that the plaintiff had not alleged that his attorney took any steps after the entry of judgment to conceal his negligence. Quinn, 63 Wn. App. at 742. Again, we did not purport to establish a rule applicable to all fiduciary relationships. Indeed, Division Two has rejected the argument that a statutory limitation period automatically begins to toll when a fiduciary relationship ends. Doe v. Finch, 81 Wn. App. 342, 351, 914 P.2d 756 (1996) ("Although a breach of professional duty generally must occur before the professional relationship ends, the intentional concealment of a breach can continue after the relationship has ended." (footnote omitted)), aff'd, 133 Wn.2d 96, 942 P.2d 359 (1997).

B

Contrary to Respondents' assertion, Washington has no current "black-letter law" directly on point.[19] However, a distinct majority of jurisdictions to consider the issue hold that claims against a corporate board member do not necessarily accrue when that individual resigns from the board; rather, these jurisdictions follow what is known as the doctrine of adverse domination. E.g. Wilson v. Paine, 288 S.W.3d 284, 290-91 (Ky. 2009); Fed. Deposit Ins. Corp. v. Smith, 328 Or. 420, 430, 980 P.2d 141 (1999); Demoulas v. Demoulas Super Mkts., Inc., 424 Mass. 501, 523, 677 N.E.2d 159 (1997); Safecard Servs., Inc. v. Halmos, 912 P.2d 1132, 1135 (Wyo. 1996); Resolution Trust Corp. v. Grant, 901 P.2d 807, 809, 814 (Okla. 1995); Resolution Trust Corp. v. Scaletty, 257 Kan. 348, 356, 891 P.2d 1110 (1995); Hecht v. Resolution Trust Corp., 333 Md. 324, 352, 635 A.2d 394 (1994); Clark v. Milam, 192 W.Va. 398, 403, 452 S.E.2d 714 (1994); Favila v. Katten Muchin Rosenman LLP, 188 Cal.App.4th 189, 225 n.26 115 Cal.Rptr.3d 274 (Cal. App. 2 Dist., 2010); Lease Resolution Corp. v. Larney, 308 Ill. App. 3d 80, 86, 719 N.E.2d 165 (Ill. Ct. App. 1999); Mut. Sec. Life Ins. Co. by Bennett v. Fid. & Deposit Co. of Maryland, 659 N.E.2d 1096, 1102 (Ind. Ct. App. 1995). Contra Chinese Merchs. Ass'n v. Chin, 159 Ohio App.3d 292, 297,

[19] The closest Washington has come to deciding the issue presented here was in Interlake Porsche & Audi, Inc. v. Bucholz, 45 Wn. App. 502, 728 P.2d 597 (1986). In that case, the corporation was directed by three shareholders, only one of whom was named as a culpable defendant. Interlake Porsche, 45 Wn. App. at 505. One of the other directors had actual knowledge of fraud by the culpable board member; that knowledge was thus imputed to the corporation. Interlake Porsche, 45 Wn. App. at 518. In this case, however, Homeowners allege that *all* board members are culpable, raising a factual scenario distinct from that presented in Interlake Porsche.

823 N.E.2d 900 (Ohio Ct. App. 2004).[20] The doctrine of adverse domination presumes that a corporate plaintiff cannot have notice of wrongdoing by directors when those directors are in control of the corporation.[21] Hecht, 333 Md. at 346. This presumption is, of course, rebuttable by a showing that "someone other than the wrongdoing directors had knowledge of the basis for the cause of action, combined with the ability and the motivation to bring an action." Smith, 328 Or. at 427.

The doctrine of adverse domination is a corollary of the discovery rule. Hecht, 333 Md. at 346; see also Resolution Trust Corp. v. Farmer, 865 F.Supp. 1143, 1154 n.11 (E.D.Pa.1994). Some jurisdictions that have adopted the doctrine of adverse domination have done so on the basis that it is analogous to the discovery rule. See, e.g., Smith, 328 Or. at 430 ("Oregon recognizes the adverse domination doctrine, which is analogous to Oregon's discovery rule."); Larney, 308 Ill. App. 3d at 86 ("Logical application of the discovery rule and agency law principles leads to recognition of the adverse domination doctrine."). Washington applies the discovery rule to "claims in which the plaintiffs could not have immediately known of their injuries due to . . . concealment of information by the defendant." Hibbard, 118 Wn.2d at 749-50. We hold that because

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[20] In addition, some jurisdictions follow the doctrine of adverse domination without referring to it as such. E.g., United Park City Mines Co. v. Greater Park City Co., 870 P.2d 880, 885 (Utah 1993); Kahn v. Seaboard Corp., 625 A.2d 269, 275-77 (Del.Ch. 1993); Allen v. Wilkerson, 396 S.W.2d 493, 502 (Tex.Civ.App. 1965); Bates St. Shirt Co. v. Waite, 130 Me. 352, 156 A. 293, 297 (1931); Ventress v. Wallace, 71 So. 636, 641 (Miss. 1916). Contra Access Point Med., LLC v. Mandell, 106 A.D.3d 40, 45, 963 N.Y.S.2d 44 (N.Y.A.D. 1 Dept. 2013) ("[T]he statute of limitations on claims against a fiduciary," including corporate officers, "for breach of its duty is tolled until such time as the fiduciary openly repudiates the role.").

[21] The doctrine has also been applied to claims against third parties who act as board members' co-conspirators. Larney, 308 Ill. App. 3d at 89-90.

Washington utilizes the discovery rule, the doctrine of adverse domination is also applicable in this state.

C

Having concluded that Washington recognizes the doctrine of adverse domination, we must now decide which version of the doctrine best comports with Washington law. This inquiry requires us to answer two questions: (1) What is the level of culpability that the board members must exhibit in order for the doctrine to apply? and (2) Must the plaintiff implicate all board members, or only a majority thereof?

There exists disagreement among jurisdictions as to the level of culpability required in order for the doctrine of adverse domination to apply.

> Three theories have emerged. One theory holds that negligent conduct, without more, is sufficient to toll the statute of limitations. See Federal Deposit Ins. Corp. v. Carlson, 698 F.Supp. 178, 180 (D.Minn.1988). More recently, courts have held that negligent conduct is not enough to warrant the application of adverse domination. See [Fed. Deposit Ins. Corp. v.] Dawson, 4 F.3d [1303,] 1313 [(5th Cir. 1993)]; Resolution Trust Corp. v. Acton, 49 F.3d 1086 (5th Cir.1995); Farmer, 865 F.Supp. at 1157. These courts, however, have not defined exactly what level of culpability is required. Lastly, at least one court has held that the degree of culpability was irrelevant; because the reason for tolling the statute of limitations is that the plaintiffs cannot discover the cause of action. Clark, 452 S.E.2d at 719.

Wilson, 288 S.W.3d at 290.

The Kentucky Supreme Court held that the doctrine of adverse domination may be invoked only where intentional wrongdoing is alleged. Its reason for so holding, the court stated, was that

> [t]he doctrine is founded on the presumption that those who engage in fraudulent activity likely will make it difficult for others to discover their misconduct. "[T]he danger of fraudulent concealment by a culpable majority of a corporation's board seems small indeed when the culpable directors' behavior consists only of *negligence* . . . . " [Dawson, 4 F.3d] at 1312-13 (emphasis added).

Wilson, 288 S.W. 3d at 290 (alterations in original).

The West Virginia Supreme Court of Appeals, on the other hand, held that the doctrine of adverse domination could apply regardless of the directors' degree of culpability. That court determined that "regardless of whether the alleged wrongdoing was intentional or merely negligent, the knowledge of officers' and directors' wrongdoing cannot be imputed to the corporation because those officers' and directors' control over the corporation prevents it from learning of the misconduct that is injuring it." Clark, 192 W.Va. at 403. This was so, the court stated, because "a corporation . . . [can be] prevented from discovering its claims against those in control . . . by the sheer fact of their control." Clark, 192 W.Va. at 403. One such example, the court offered, was when "'the directors and officers may be so disengaged from their responsibilities that they themselves are unaware of the breach of their duty to the corporation.'" Clark, 192 W.Va. at 403 (quoting Hecht, 333 Md. at 348).

In our view, a standard similar to that applied by Kentucky courts better accounts for the reality of the modern corporate structure. In order for the discovery rule to apply, the situation must be one "in which plaintiffs could not immediately know of the cause of their injuries." Hibbard, 118 Wn.2d at 750. This type of situation is unlikely to exist where the directors are merely

"disengaged" and not concealing information from the shareholders. Although shareholders might not immediately know the cause of their injuries if they are inattentive to the corporation's mismanagement, the discovery rule does not apply where "the plaintiff [was] sleeping on his rights." Crisman v. Crisman, 85 Wn. App. 15, 20, 931 P.2d 163 (1997). In light of Washington's discovery rule, we hold that the doctrine of adverse domination applies only where the plaintiff alleges concealment by board members.[22]

D

This leads us to our second question: Must the plaintiff implicate all board members in the concealment, or only a majority? Among other courts, two different approaches have emerged:

> The more difficult test is the "complete domination" test, under which a plaintiff who seeks to toll the statute under adverse domination must show "full, complete and exclusive control in the directors or officers charged." Mosesian v. Peat, Marwick, Mitchell & Co., 727 F.2d 873, 879 (9th Cir. [1984]) (quoting International Rys. of Cent. Am. v. United Fruit Co., 373 F.2d 408, 414 (2d Cir.), cert. denied, 387 U.S. 921, 87 S. Ct. 2031, 18 L. Ed. 2d 975 (1967)), cert. denied, 469 U.S. 932, 105 S. Ct. 329, 83 L. Ed. 2d 265 (1984). Once the facts giving rise to possible liability are known, the plaintiff must effectively negate the possibility that an informed stockholder or director could have induced the corporation to sue. Id.
>
> Other courts have taken a more prophylactic approach known as the "majority test." Under this approach, the plaintiff need not show that the wrongdoers completely dominated the corporation, but rather must show only that a majority of the board members were wrongdoers during period the plaintiff seeks to toll the statute.

[22] This is not necessarily to say that the plaintiffs must plead a separate claim of concealment. Nor must the alleged concealment necessarily be fraudulent. Washington law does not require that concealment be fraudulent in order for the discovery rule to apply. See Doe, 133 Wn.2d at 101. The same principle holds true for the doctrine of adverse domination.

> [Fed. Deposit Ins. Corp. v.]Howse, 736 F.Supp. [1437,] 1441-42 [(S.D.Tex. 1990)]; Federal Sav. and Loan Ass'n v. Williams, 599 F.Supp. 1184, 1193–94 (D.Md.1984). These cases reason that the mere existence of a culpable majority on the board is so likely to preclude the corporation from filing suit against the wrongdoers that tolling is thereby justified. See, e.g., Williams, 599 F.Supp. at 1194.

Dawson, 4 F.3d at 1309-10.

Many states adopt the "majority test" for policy reasons. In Smith, the Oregon Supreme Court held that, "Because a board composed of a majority of culpable directors will rarely, if ever, facilitate the assertion of claims against its members, it is appropriate that those directors bear the burden of proving otherwise." 328 Or. at 432. The court noted that, "'While [culpable board members] retain control they can dominate the non-culpable directors and control the most likely sources of information.'" Smith, 328 Or. at 432 (quoting Fed. Sav. & Loan Ins. Corp. v. Williams, 599 F.Supp. 1184, 1193-94 n.12 (D.Md. 1984)). This approach comported with Oregon's discovery rule, the court held, because the plaintiff "would be required to plead and prove facts showing that [the corporate board] was adversely dominated." Smith, 328 Or. at 433.

On the other hand, states that adopt the "complete domination" test, also typically do so for policy reasons. In Aiello v. Aiello, 447 Mass. 388, 404, 852 N.E.2d 68 (2006), the Massachusetts Supreme Court determined that the "complete domination" test more closely comported with modern corporate law. Specifically, the court focused on the role of corporate shareholders. The court stated that "a corporate shareholder who discovers that directors or officers have injured a corporation may, in many cases, bring a derivative suit on that

corporation's behalf." Aiello, 447 Mass. at 403. As such, the court held, "[t]he mere existence of a majority of culpable directors should not lead to a presumption that a corporate plaintiff is unable to discover or redress the wrongs perpetrated by such directors, thereby tolling a statute of limitations." Aiello, 447 Mass. at 403.

We deem the "majority test" more consonant with Washington law. We agree with the Oregon Supreme Court that, "'While [culpable board members] retain control they can dominate the non-culpable directors and control the most likely sources of information.'" Smith, 328 Or. at 432 (quoting Williams, 599 F.Supp. at 1193-94 n.12). We can easily envision a scenario in which non-culpable minority board members are "kept out of the loop" or even intimidated into submission by culpable board members determined to conceal their wrongdoing. In instances such as these, the culpable majority can effectively prevent the shareholders from learning of their wrongdoing. In such a situation, "'it is appropriate for the directors to bear the burden of rebutting a presumption of control, because they have greater access to the relevant information.'" Wilson, 288 S.W.3d at 289 (quoting Grant, 901 P.2d at 818). Thus, we will apply the "majority test" for adverse domination.[23]

[23] Respondents contend that concealment by a board member tolls the statute of limitation against that particular board member only and not as to any other board member. Respondents rely on United States v. Read, 658 F.2d 1225 (7th Cir. 1981), and Barker v. American Mobil Power Corp., 64 F.3d 1397 (9th Cir. 1995), for this assertion. Neither case supports such a conclusion. Read is a criminal case regarding withdrawal from a conspiracy, a completely different issue than that asserted here. In Barker, the Ninth Circuit held that concealment by subsequent trustees did not toll the statute of limitation against prior trustees, where the plaintiff failed to allege any fraud or concealment by the prior trustees. Barker, 64 F.3d

E

Typically the doctrine of adverse domination applies to derivative actions brought by shareholders on behalf of the corporation. In this case, however, the claims were brought by the unit owners in their individual capacity, not on behalf of the Association. Thus, the question is whether the doctrine of adverse domination can apply to claims brought by individuals. We hold that it can, at least in lawsuits premised upon duties or obligations stemming from the WCA.

The doctrine of adverse domination stems from the same or similar principles that underlie other equitable tolling doctrines. The West Virginia Supreme Court of Appeals has recognized that the doctrine of adverse domination is similar to the doctrine of continuous representation. Smith v. Stacy, 198 W.Va. 498, 505, 482 S.E.2d 115 (1996) (citing Clark, 192 W.Va. 398). As the Stacy court noted, Clark applied the doctrine of adverse domination to claims against a corporation's attorneys, in addition to its board members, because the attorneys, "'owing fiduciary duties to the company, . . . took action contributing to the adverse domination of the company.'" Stacy, 198 W.Va. at 505 (quoting Clark, 192 W.Va. at 399). The Stacy court cited Clark among its bases for adopting the continuous representation doctrine in West Virginia. Stacy, 198 W.Va. at 505.

We, likewise, find these two doctrines similar. Washington law recognizes the doctrine of continuous representation in legal malpractice litigation. Janicki

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at 1401-02. Here, Homeowners allege concealment by all board members, rendering Barker inapposite.

Logging & Constr. Co. v. Schwabe, Williamson & Wyatt, PC, 109 Wn. App. 655, 663, 37 P.3d 309 (2001). We have suggested that the doctrine may also apply in cases of accounting malpractice. Burns v. McClinton, 135 Wn. App. 285, 299, 143 P.3d 630 (2006) (declining to apply continuous representation where plaintiff's claim was not for failure to "provide adequate accounting services"). As we have held previously, the continuous representation doctrine "prevents an attorney from defeating a malpractice claim by continuing representation until the statute of limitations has expired." Janicki, 109 Wn. App. at 662. The continuing representation doctrine prevents the limitation period from commencing so long as the attorney continues to represent the client on that particular matter. Janicki, 109 Wn. App. at 663-64.

The doctrine of adverse domination functions in a similar manner. The doctrine prevents corporate board members from defeating claims by continuing to dominate the board. See Hecht, 333 Md. at 351 ("This prevents the culpable directors from benefiting from their lack of action on behalf of the corporation."); In re Blackburn, 209 B.R. 4, 10 (Bankr. M.D.Fla. 1997) (adverse domination is "grounded in the equitable notion that the receiver should not be time barred from pursuing the management of an insurer in liquidation to recover for alleged wrongdoing that management committed while in control of the insurer"). Additionally, when a board is controlled by directors who continue the wrongdoing initiated by their predecessors, the board continues to "represent" the interests of the shareholders (or here, the unit owners) on the particular matter associated with that wrongdoing.

The two doctrines are based on similar rationales. One of the policy reasons underlying Washington's adoption of the continuing representation doctrine was that "'[t]he attorney has the opportunity to remedy, avoid or establish that there was no error or attempt to mitigate the damages.'" Janicki, 109 Wn. App. at 663 (quoting 3 RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 22.13, at 431 (5th ed.2000)). This rationale also rings true for corporate directors who, while they are in control of the board, have "the opportunity to remedy . . . or attempt to mitigate the damages" caused by prior board members. Shareholders (or unit owners), on the other hand, are generally limited to their ability to file suit or replace the board with new directors whom they hope will be more honest than their predecessors.

As one federal court noted, decisions adopting the doctrine of adverse domination "reflect an implicit appreciation of the realities of the shareholders' position, that, without knowledge of wrongful activities committed by directors, shareholders have no meaningful opportunity to bring suit." F.D.I.C. v. Bird, 516 F. Supp. 647, 651 (D.P.R. 1981). This reality is the same for the unit owners of a homeowners' association. The WCA defines the duties of board members in their governance of the association.[24] It is reasonable for unit owners to expect that the board members will properly discharge those duties. Where board members are concealing their wrongdoing, the unit owners are unlikely to know or to suspect that those duties are being breached, rather than properly

[24] As discussed in section V, infra, the board members' duties extend to the unit owners as well as to the Association.

discharged. Without knowledge of the wrongdoing, the unit owners have no meaningful opportunity to evaluate whether to bring suit against the directors. This is true regardless of whether the unit owners ultimately bring their claims individually or on behalf of the association.

In this case, some of the board member defendants owed a duty of "care required of fiduciaries," while others owed a duty of "ordinary and reasonable care." Regardless of the degree of care owed, the role of the board members is the same—to govern the homeowners' association. See RCW 64.34.300. It would make little sense to apply the doctrine of adverse domination to claims against some of the complicit board members but not to others where the allegations are that a series of directors acted in concert to the detriment of the unit owners. The doctrine of adverse domination concerns itself with directors' concealment of information from the corporation and its constituents. The degree of care owed to a corporate shareholder or association unit owner is unrelated to the danger of concealing their wrongdoing to the detriment of those to whom the duties are owed.

The doctrine of adverse domination applies to claims brought by the individual plaintiffs herein.

F

We must next determine whether the doctrine of adverse domination applies to all of Homeowners' claims or to only some of those claims. There is a split of authority as to whether there is a limit to the types of claims to which the doctrine of adverse domination can apply. For instance, Oklahoma limits the

doctrine of adverse domination to fraud claims. Grant, 901 P.2d at 815-16; Resolution Trust Corp. v. Greer, 911 P.2d 257, 265 (Okla. 1995). In Grant, the Oklahoma Supreme Court reasoned that the doctrine of adverse domination was designed to be narrow, and thus should not apply to all types of claims. 901 P.2d at 815. The court held,

> We find persuasive the reasoning of those courts which hold that to extend the doctrine to cases involving conduct less culpable than fraud would be to eliminate the statute of limitations in director-liability actions. Furthermore, this reasoning is supported by recent legislative enactments allowing the insertion of liability-limiting clauses in bylaws and certificates of incorporation. Therefore, we find that application of the doctrine of adverse domination to delay accrual or toll the statute of limitations is limited to situations involving fraudulent conduct.

Grant, 901 P.2d at 815-16.

For its holding, the Oklahoma Supreme Court relied heavily on a federal court decision explaining that, in Texas, the doctrine of adverse domination "must be limited to those cases in which the culpable directors have been active participants in wrongdoing or fraud, rather than simply negligent." Dawson, 4 F.3d at 1312. Applying that rule to the case at hand, the Dawson court explained,

> The facts of the instant case demonstrate that the adverse domination theory is inappropriate when the majority of the board is merely negligent. The FDIC's own evidence tended to show that most of TIB's directors may have been negligent in failing to supervise the lending functions. Yet, at the same time, the board never concealed its "serious deficiencies" from examination by the OCC or anyone else. Even after the OCC notified TIB's board of its shortcomings in supervising TIB's lending function, there is no evidence to suggest that an organized majority coalesced to prevent any other parties from discovering the problems. Thus, the danger of fraudulent concealment by a culpable majority of a

> corporation's board seems small indeed when the culpable directors' behavior consists only of negligence, and the presumption of such concealment that underlies the adverse domination theory is unwarranted.

4 F.3d at 1312-13. The court's primary concern was with concealment, more so than the nature of the underlying claim itself.[25]

In contrast, in Oregon and Kansas, the doctrine of adverse domination can apply to all types of claims. The Oregon Supreme Court determined that because the doctrine of adverse domination is a corollary to the discovery rule, the doctrine of adverse domination applies to the same claims that the discovery rule applies to. Smith, 328 Or. at 431. Similarly, the Kansas Supreme Court held that in "determining when . . . the injury to a corporation by its directors is readily ascertainable to the corporation[,] . . . there is no legal basis for us to pick and choose among negligence, gross negligence, or breach of fiduciary duty claims. The same rule must apply to all three types of claims unless the rule is legislatively modified." Scaletty, 257 Kan. at 359.

The view espoused by the Oregon and Kansas courts best comports with Washington law. Washington's discovery rule is not limited to fraud claims. See, e.g. Cox v. Oasis Physical Therapy, PLLC, 153 Wn. App. 176, 190, 222 P.3d 119 (2009) (negligence). "[W]ithholding the reach of adverse domination to cases involving negligence and breach of fiduciary duty would carve out unjustified

[25] Moreover, Texas did not have a general discovery rule at that time. Rather, the general rule was "that the tort statute of limitations begins to run when the tort is committed, absent a statute to the contrary or fraudulent concealment." Dawson, 4 F.3d at 1312 (citing Atkins v. Crosland, 417 S.W.2d 150, 153 (Tex. 1967)). The rule has since been expanded, but is still limited to "exceptional cases." Via Net v. TIG Ins. Co., 211 S.W.3d 310, 313 (Tex. 2006).

special exceptions from the . . . discovery rule for corporate officers and directors." Scaletty, 257 Kan. at 358 (citation omitted). The concern of courts such as Grant and Dawson that the doctrine of adverse domination would "overthrow the statute of limitations completely in the corporate context" if applied to negligence claims, Dawson, 4 F.3d at 1312, is adequately allayed by a requirement that the plaintiff must allege concealment in addition to the elements of the claim. Therefore, the doctrine of adverse domination should apply to all claims to which the discovery rule applies.

G

This general rule being established, we turn now to the specific claims asserted in Homeowners' complaint. Homeowners assert the following claims: breach of board member duty of care, negligence, violation of the CPA, negligent misrepresentation, fraud by omission and misrepresentation, and civil conspiracy. As pleaded, the doctrine of adverse domination applies to four of those types of claims.

The doctrine of adverse domination most clearly applies to the claims for breach of board member duty of care. The doctrine of adverse domination is frequently applied to claims for breach of corporate duties. Wilson, 288 S.W.3d at 286; Aiello, 447 Mass. at 389; Smith, 328 Or. at 431; Demoulas, 424 Mass. at 503; Scaletty, 257 Kan. at 359; Clark, 192 W.Va. at 401; Hecht, 333 Md. at 328; United Park City Mines Co. v. Greater Park City Co., 870 P.2d 880, 885 (Utah 1993); Kahn v. Seaboard Corp., 625 A.2d 269, 271 (Del.Ch. 1993). Indeed, the purpose of the doctrine is to protect the corporation and its constituents. It would

be inconsistent with this purpose to *not* apply the doctrine to board member duty of care claims. Thus, the doctrine applies so long as concealment is sufficiently alleged.

Homeowners' adequately plead concealment with respect to the board member duty of care claims. Homeowners allege that the board member defendants "fail[ed] to advise the plaintiffs and others of consistently reported construction problems and other material information, [and] misrepresent[ed] the nature of investigations to plaintiffs." Homeowners allege that the board remained culpable until April 24, 2011, when they declared a budget that included the special assessment. Thus, the Homeowners sufficiently allege that the board continued until that time to conceal the facts that established the basis for these claims. The doctrine of adverse domination therefore applies to these claims.[26]

We next analyze Homeowners' negligence claims against Lozier Homes. Homeowners allege that Lozier Homes breached its duty of reasonable care "in undertaking the construction, inspection, condition reporting, and repair of the

[26] The doctrine applies not only to claims against the individual board members, but also to claims against Lozier Homes. Homeowners allege that Lozier Homes is the sole member of Declarant. Pursuant to this allegation, we can envision a hypothetical set of facts, consistent with Homeowners' contention, establishing that Lozier Homes is the alter ego of Declarant. Homeowners also allege that Sanford, Burckhard, and Sansburn were appointed by Declarant. From this allegation, we can envision a hypothetical set of facts, consistent with Homeowners' contention, establishing that Sanford, Burckhard, and Sansburn were agents of Declarant and, thereby, agents of Lozier Homes. If Sanford, Burckhard, and Sansburn are indeed agents of Lozier Homes, then Lozier Homes could be vicariously liable for the actions of these three board members. Accordingly, the doctrine of adverse domination applies to Lozier Homes to the extent that it is implicated as vicariously liable for the actions of Sanford, Burckhard, and Sansburn.

Project."[27] None of the board members were implicated by these negligence claims. Because these claims bear no relation to the governance of the Association, the doctrine of adverse domination does not apply.

Homeowners' attempt to assert CPA claims against Sanford, Burckhard, Sansburn, and Lozier Homes. The discovery rule can apply to CPA claims. Mayer v. Sto Indus. Inc., 123 Wn. App. 443, 463, 98 P.3d 116 (2004), affirmed in part, reversed in part on other grounds, 156 Wn.2d 677, 132 P.3d 115 (2006). Thus, the doctrine of adverse domination can also apply to CPA claims.

Homeowners assert negligent misrepresentation claims against Lozier Homes, Sanford, Burckhard, and Sansburn. Generally, the discovery rule can apply to negligent misrepresentation claims. First Md. Leasecorp v. Rothstein, 72 Wn. App. 278, 286, 864 P.2d 17 (1993). Therefore, the doctrine of adverse domination also can apply to negligent misrepresentation claims.

Homeowners sufficiently plead concealment with respect to these claims. Homeowners allege that the board members continually ignored the advice of experts, and failed to disclose to the unit owners that they had received such advice. Homeowners also allege that the board members mischaracterized the resealing and caulking efforts as "preventative measures," and that the board members "continued to conceal the severity of the problem from the ownership at large." In fact, Homeowners specifically allege that Philip and "[t]he other Board members [in 2006] cooperated or agreed that the scope of the problem should be

[27] Specifically, these claims derive from the allegations that Lozier Homes hired Glenn and instructed her not to perform an intrusive inspection and that Lozier Homes volunteered to conduct a deck inspection.

concealed." Further, the Homeowners allege that the board purposely kept themselves in the dark about the results of an inspection and thereafter withheld the results of the inspection from the Homeowners. As pleaded, the board members continued their concealment until April 24, 2011, when they declared a budget which included the special assessment. Thus, the Homeowners sufficiently allege that the board continued to conceal the facts that established the basis for these claims. As such, the doctrine of adverse domination applies to Homeowners' negligent misrepresentation claims.

Homeowners assert fraud claims against Lozier Homes, Sanford, Burckhard, Sansburn, and Peter. The discovery rule can apply to fraud claims. RCW 4.16.080(4). It is also widely accepted that the doctrine of adverse domination can apply to fraud claims. See, e.g. Grant, 901 P.2d at 815-16.

Homeowners allege that these defendants acted fraudulently in two respects. Homeowners allege that these defendants "breached their duties to plaintiffs to disclose" and "made material misrepresentations . . . of existing facts regarding the presence of defective construction, the cause of water intrusion, the advice of counsel regarding prosecution of a Washington Condominium Act warranty claim, the actual purpose of the 'maintenance' program developed by Lozier, and Glenn's and CCW's lack of qualifications and conflict of interest." Homeowners allege that "the decision to omit these facts [regarding the advice of counsel] from the minutes was part of a deliberate effort on the part of Defendant Peter and/or the other Board members to conceal material information from unit owners." It is unclear from the face of the complaint when the concealment of

this alleged fraudulent act ended. Nonetheless, it is plausible from the face of the complaint that the concealment continued until April 24, 2011. Thus, the doctrine of adverse domination applies to Homeowners' fraud claims.

Finally, Homeowners assert civil conspiracy claims against Lozier Homes and Sanford. As Homeowners implicate only one board member, not a majority, the doctrine of adverse domination does not apply to these claims.

Therefore, with respect to the breach of board member duty of care claims, CPA claims, negligent misrepresentation claims, and fraud by omission and misrepresentation claims, the statute of limitations was presumptively tolled until April 24, 2011. On the face of the complaint, these claims were timely and the trial court erred by dismissing them as a matter of law.

H

For those claims to which the doctrine of adverse domination does not apply, i.e., Homeowners' negligence and civil conspiracy claims, the discovery rule may still apply.[28] However, Homeowners cannot rely on any presumptions for the application of the rule. As previously noted, "Under the discovery rule, a cause of action accrues when the plaintiff knew or should have known the essential elements of the cause of action." Allen, 118 Wn.2d at 757-58 (footnote omitted). Whether the discovery rule applies to toll the statute of limitations is a question of fact, and can only be decided as a matter of law "if reasonable minds can reach but one conclusion." Allen, 118 Wn.2d at 760.

[28] The discovery rule may also apply to claims against Lozier Homes to the extent that it is separately liable for Homeowners' fraud claims.

Pursuant to Homeowners' complaint, it is plausible that Homeowners did not know and could not reasonably have known of the facts underlying their causes of action until April 24, 2011, the date that the Association's board declared a budget that included the repair assessment. The trial court erred by determining that all causes of action accrued against each board member no later than upon the board member's resignation from the board and thus by dismissing all of Homeowners' claims. Whether the discovery rule serves to toll the accrual of Homeowners' negligence and civil conspiracy causes of action presents a question of fact to be decided on remand.

V

A

In the alternative, Respondents contend that Homeowners' claims fail as a matter of law because the board members did not owe a duty to Homeowners. This is so, Respondents assert, because board members owe a duty only to the Association. Respondents further assert that in the event that the board members do owe a duty to unit owners, the duty does not apply to future purchasers.[29] We disagree to the extent that the board members' duties do extend to current unit owners. With respect to future purchasers, however, we agree that the board members owed no duties to future purchasers with respect to Homeowners' claims for breach of the board member duty of care and negligent misrepresentation. Additionally, we hold that Homeowners failed to

[29] The trial court properly took judicial notice of Homeowners' deeds, which establish the dates on which each plaintiff purchased his or her unit. Rodriguez v. Loudeye Corp., 144 Wn. App. 709, 725-26, 189 P.3d 168 (2008).

plead the necessary elements of a CPA claim.

In order to establish liability under a tort theory, the plaintiff must prove duty, breach, causation, and damages. Xiao Ping Chen v. City of Seattle, 153 Wn. App. 890, 899, 223 P.3d 1230 (2009). The existence of a duty is a question of law, which we review de novo. Parrilla v. King County, 138 Wn. App. 427, 432, 157 P.3d 879 (2007).

The WCA articulates the nature of the duties owed by an association's board members:

> Except as provided in the declaration, the bylaws, subsection (2) of this section, or other provisions of this chapter, the 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.

RCW 64.34.308(1). The statute clearly dictates that the members of the board of directors owe duties to the unit owners when appointed by the declarant. RCW 64.34.308(1)(a); see also Kelsey Lane Homeowners Ass'n v. Kelsey Lane Co., 125 Wn. App. 227, 242-43, 103 P.3d 1256 (2005).

The statute further provides that elected board members owe to unit owners a duty premised upon a lesser standard of care than that applied to those board members who were appointed by the declarant. The statute does not indicate, however, that elected board members owe no duties to unit owners. A homeowners' association "has no life independent of the individual homeowners who are by statute . . . required to be members of the Association." Stuart v. Coldwell Banker Commercial Grp., Inc., 109 Wn.2d 406, 413-14, 745 P.2d 1284

(1987). Thus, by owing duties to the association, the elected board members necessarily owe those same duties to the current unit owners.

Indeed, it would make little sense if the board members owed duties to unit owners if appointed, but no duties to the unit owners if elected. Both sets of directors are tasked with operating the homeowners' association.[30] The directors owe duties to the unit owners as well as the association, regardless of whether they were appointed or elected. It is only the applicable standard of care that differs.

B

Each of the plaintiffs purchased their units on the following dates:[31]

Cindy Alexander	July 19, 2006
Blocker Ventures, LLC	February 7, 2003
Chris Clark	November 3, 2005
R. Bruce Edgington	April 19, 2006
Kipp and Jennifer Johnson	March 19, 2008
Gopikrishna and Himabindu Kanuri	August 8, 2006
Chris and Elizabeth Kasprzak	September 19, 2002
Paul and Joyce Hyojung Larkins	August 1, 2006
Kristine Magnussen	January 11, 2008
Scott McKillop	September 1, 2005

[30] Moreover, elected board members can, and in this case did, serve on the board with appointed members.

[31] The dates set forth in the following two tables are garnered from the complaint, the stipulation, and the uncontested public records submitted to the trial court.

Caine and Dana Ott	July 14, 2006
Mara Patton	August 15, 2007
Peter Richards	September 2, 2009
Dante Schultz	December 14, 2005
Winifred Smith	July 24, 2002
Robert and Colette Stoddard	August 12, 2005
Neil West	May 27, 2004
Liang Xu and Jia Lu Duan	February 6, 2007

Each of the defendant-board members left the board on the following dates:

Gary Sanford	March 24, 2006
Paul Burckhard	May 15, 2001
James Sansburn	May 9, 2002
Richard Peter	May 29, 2003
Shana Holley	May 9, 2002
Brett Backues	January 18, 2004
Joseph Cusimano	June 27, 2006
Patricia Hovda	Unknown date before September 2008
Alexander Philip	July 20, 2006

As the above tables demonstrate, a significant number of Homeowners'

claims are asserted against board members who resigned before certain of the plaintiffs purchased their respective units. Thus, Homeowners insist that the board members' duties extend not only to current owners but to future owners as well. Although board members owe duties to current unit owners, it does not necessarily follow that those duties extend to future owners. Homeowners' contention raises two separate questions: (1) Do the appointed board members owe a fiduciary duty to future owners? (2) Do any of the board members owe a freestanding duty of care to future owners independent of their WCA-defined duties to current owners?

A fiduciary relationship can arise either in law or in fact. Liebergesell v. Evans, 93 Wn.2d 881, 890, 613 P.2d 1170 (1980). A fiduciary relationship arises at law when "the nature of the relationship between the parties [is] historically considered fiduciary in character; *e.g.*, trustee and beneficiary, principal and agent, partner and partner, husband and wife, physician and patient, attorney and client." McCutcheon v. Brownfield, 2 Wn. App. 348, 356-57, 467 P.2d 868 (1970); accord Micro Enhancement Int'l, Inc. v. Coopers & Lybrand, LLP, 110 Wn. App. 412, 434, 40 P.3d 1206 (2002). On the other hand, a fiduciary relationship arises in fact when there is "'something in the particular circumstances which approximates a business agency, a professional relationship, or a family tie, something which itself impels or induces the trusting party to relax the care and vigilance which he otherwise should, and ordinarily would, exercise.'" Hood v. Cline, 35 Wn.2d 192, 200, 212 P.2d 110 (1949) (quoting Collins v. Nelson, 193 Wash. 334, 345, 75 P.2d 570 (1938)). "Superior

knowledge and assumption of the role of adviser may contribute to the establishment of a fiduciary relationship." Liebergesell, 93 Wn.2d at 891.

Homeowners contend that the appointed board members owe a fiduciary duty to future unit owners because it is foreseeable that the units will be sold. However, while foreseeability might be sufficient to establish a general tort duty, it is not sufficient to establish a fiduciary duty. Cf. Nguyen v. Doak Homes, Inc., 140 Wn. App. 726, 732-33, 167 P.3d 1162 (2007) (foreseeablility alone not enough to establish duty in fraudulent misrepresentation claim by second purchaser against original seller). The plaintiffs must allege "'something in the particular circumstances which approximates'" a fiduciary relationship. Hood, 35 Wn.2d at 200 (quoting Collins, 193 Wash. at 345). A board member's relationship to an individual who might purchase a unit sometime in the indeterminate future does not approximate a fiduciary relationship. Thus, the appointed board members of a homeowners' association do not owe fiduciary duties to future purchasers.

Accordingly, Homeowners' claims against board members that resigned before certain plaintiffs' units were purchased can survive Respondents' CR 12(b)(6) motions to dismiss only if those board members owe a free-standing duty of care to future owners independent of their WCA-defined duties. On this question, one California case, Frances T. v. Village Green Owners Ass'n, 42 Cal.3d 490, 229 Cal.Rptr. 456, 723 P.2d 573 (1986), is particularly instructive. In Frances T., the plaintiff filed suit against the condominium homeowners' association and the individual members of the board of directors for negligence,

breach of contract, and breach of fiduciary duties after she was raped in her unit. 42 Cal.3d at 495. The Supreme Court of California held that members of the board of directors could be held jointly liable with the corporation on the negligence claim. Frances T., 42 Cal.3d at 503. "Their liability," the court stated, "stems from their own tortious conduct, not from their status as directors or officers of the enterprise." Frances T., 42 Cal.3d at 503. This was so, the court held, because "like any other employee, directors individually owe a duty of care, independent of the corporate entity's own duty, to refrain from acting in a manner that creates an unreasonable risk of personal injury to third parties." Frances T., 42 Cal.3d at 505. The court held, however, that a board member's breach of statutorily-defined duties does not itself warrant separate liability for that board member. The court stated:

> [D]irectors are not personally liable to third persons for negligence amounting merely to a breach of duty the officer owes to the corporation alone. "[T]he act must also constitute a breach of duty owed to the third person. . . . More must be shown than breach of the officer's duty *to his corporation* to impose personal liability *to a third person* upon him." ([United States Liab. Ins. Co. v. Haidinger-Hayes, Inc.,] 1 Cal.3d [586,] 595[, 83 Cal.Rptr. 418, 463 P.2d 770 (1970)], italics in original.) In other words, a distinction must be made between the director's fiduciary duty to the corporation (and its beneficiaries) and the director's ordinary duty to take care not to injure third parties. The former duty is defined by statute, the latter by common law tort principles.

Frances T., 42 Cal.3d at at 505-06 (footnote omitted).

In Frances T., the plaintiff alleged in her complaint that the board members, who possessed knowledge of a recent increase in crime at the complex, created an unreasonably dangerous condition by failing to repair a

hazardous lighting condition within a reasonable period of time and by ordering her to disconnect her exterior lighting. Frances T., 42 Cal.3d at 509-10. The court found that those allegations were sufficient to state a negligence claim against the board members. Frances T., 42 Cal.3d at 509. Specifically, the court held that the board members' duty arose not by statute, but from their knowledge "that a condition or instrumentality under their control posed an unreasonable risk of injury to the plaintiff." Frances T., 42 Cal.3d at 510.

We find the reasoning in Frances T. persuasive. Analyzing Homeowners' claims in the same manner as the Frances T. court, we hold that Homeowners have pleaded an independent duty owed to future unit owners with respect to only some of their claims.

With respect to their claims for breach of board member duty of care, Homeowners allege that the board members "owed plaintiffs a duty of due care in the management and governance of the Association." As this duty is exactly the duty the board members owe under the WCA, Homeowners have not pleaded an independent duty. All board member duty of care claims asserted against board members who left the board before the date of purchase of a particular plaintiff's unit[32] were thus properly dismissed. Each board member duty of care claim that was properly dismissed is indicated in the table below.

[32] We use the term "future unit owner" to refer to a plaintiff who purchased a unit after a particular defendant-board member left the board. Thus, certain plaintiffs are "future unit owners" with respect to certain defendants but not as to others. Other plaintiffs are "future unit owners" with respect to all defendant-board members.

	Sanford	Burckhard	Sansburn	Peter	Holley	Backues	Cusimano	Hovda	Phillip
Alexander	X	X	X	X	X	X	X		
Blocker Ventures		X	X		X				
Clark		X	X	X	X	X			
Edgington	X	X	X	X	X	X			
Johnson	X	X	X	X	X	X	X		X
Kanuri	X	X	X	X	X	X	X		X
Kasprzak		X	X		X				
Larkins	X	X	X	X	X	X	X		X
Magnussen	X	X	X	X	X	X	X		X
McKillop		X	X	X	X	X			
Ott	X	X	X	X	X	X	X		
Patton	X	X	X	X	X	X	X		X
Richards	X	X	X	X	X	X	X	X	X
Schultz		X	X	X	X	X			
Smith		X	X		X				
Stoddard		X	X	X	X	X			
West		X	X	X	X	X			
Xu	X	X	X	X	X	X	X		X

With respect to these claims, Lozier Homes was not a member of the board and could not have owed an independent duty to the plaintiffs. Thus, the board member duty of care claims are only cognizable against Lozier Homes pursuant to a theory of vicarious liability for the actions taken by Sanford, Burckhard, and Sansburn. Claims against Lozier Homes were thus properly dismissed where claims against all three of these individuals were properly dismissed.

With respect to their claims for negligent misrepresentation, Homeowners allege that Lozier Homes, Sanford, Burckhard, and Sansburn breached their duties to "disclose existing material facts" regarding the construction defects, Glenn's lack of credentials, and the advice received from Harer and Jobe. In order to state a claim for negligent misrepresentation, a plaintiff must allege that

> "(1) the defendant supplied information for the guidance of others in their business transactions that was false, (2) the defendant knew or should have known that the information was supplied to guide the plaintiff in his business transactions, (3) the defendant was negligent in obtaining or communicating the false information, (4) the plaintiff relied on the false information, (5) the plaintiff's reliance was reasonable, and (6) the false information proximately caused the plaintiff damages."

Austin v. Ettl, 171 Wn. App. 82, 88, 286 P.3d 85 (2012) (quoting Ross v. Kirner, 162 Wn.2d 493, 499, 172 P.3d 701 (2007). Ordinarily, "[a]n omission alone cannot constitute negligent misrepresentation, since the plaintiff must justifiably rely on a misrepresentation." Ross, 162 Wn.2d at 499. "When a duty to disclose does exist, however, the suppression of a material fact is tantamount to an affirmative misrepresentation." Crisman, 85 Wn. App. at 22.

"Ordinarily, the duty to disclose a material fact exists only where there is a fiduciary relationship." Tokarz v. Frontier Fed. Sav. & Loan Ass'n, 33 Wn. App. 456, 463-64, 656 P.2d 1089 (1982) (citing Oates v. Taylor, 31 Wn.2d 898, 903, 199 P.2d 924 (1948)). Outside of a fiduciary relationship, the court will only find a duty to disclose

> where the court can conclude there is a quasi-fiduciary relationship, where a special relationship of trust and confidence has been developed between the parties, where one party is relying upon the superior specialized knowledge and experience of the other, where a seller has knowledge of a material fact not easily discoverable by the buyer, and where there exists a statutory duty to disclose.

Favors v. Matzke, 53 Wn. App. 789, 796, 770 P.2d 686 (1989) (citations omitted). Homeowners do not allege any facts establishing that the relationship between the future unit owners and the board members resembled any one of the relationships listed in Favors.[33] Thus, Homeowners fail to allege that the board members had any duty to disclose *independent of their statutory duties*. Here, all negligent misrepresentation claims asserted by future unit owners were properly

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[33] Homeowners do not allege that Lozier Homes was ever a member of the board. Homeowners also do not allege that they purchased their units from Lozier Homes. In fact, Homeowners fail to allege any facts establishing that they were in a fiduciary relationship with Lozier Homes or that their relationship to Lozier Homes resembled any one of the relationships listed in Favors. This is true with respect to unit owners as well as future unit owners. Thus, Homeowners fail to plead any negligent misrepresentation claims against Lozier Homes in its individual capacity.

Homeowners do sufficiently allege facts from which we can envision a hypothetical set of facts, consistent with the complaint, establishing that Sanford, Burckhard, and Sansburn were agents of Lozier Homes. Accordingly, Homeowners state negligent misrepresentation claims with respect to Lozier Homes only to the extent that it is vicariously liable for the actions of Sanford, Burckhard, and Sansburn. Negligent misrepresentation claims against Lozier Homes were properly dismissed where claims against all three of these individuals were properly dismissed.

Homeowners also sufficiently allege facts from which we can envision a hypothetical set of facts, consistent with the complaint, establishing that Lozier Homes is the alter ego of Declarant. These claims have been reduced to default judgment against Declarant. Whether Lozier Homes is responsible for liability assigned to Declarant in that judgment is a question beyond the scope of the briefing and argument herein and will need to be addressed upon remand.

dismissed. Each negligent misrepresentation claim that was properly dismissed is marked in the table below.

	Sanford	Burckhard	Sansburn	Lozier Homes
Alexander	X	X	X	X
Blocker Ventures		X	X	
Clark		X	X	
Edgington	X	X	X	X
Johnson	X	X	X	X
Kanuri	X	X	X	X
Kasprzak		X	X	
Larkins	X	X	X	X
Magnussen	X	X	X	X
McKillop		X	X	
Ott	X	X	X	X
Patton	X	X	X	X
Richards	X	X	X	X
Schultz		X	X	
Smith		X	X	
Stoddard		X	X	
West		X	X	
Xu	X	X	X	X

In addition to their negligent misrepresentation claims, Homeowners also plead claims for fraud by omission and misrepresentation. In order to state a claim for fraud, the plaintiff must establish "(1) representation of an existing fact; (2) materiality; (3) falsity; (4) the speaker's knowledge of its falsity; (5) intent of the speaker that it should be acted upon by the plaintiff; (6) plaintiff's ignorance of its falsity; (7) plaintiff's reliance on the truth of the representation; (8) plaintiff's right to rely upon it; and (9) damages." Stiley v. Block, 130 Wn.2d 486, 505, 925 P.2d 194 (1996). Unlike for negligent misrepresentation claims, for claims of fraud a duty to disclose may exist independent of the board members' statutory duties. In Haberman v. Washington Public Power Supply System, 109 Wn.2d 107, 168, 744 P.2d 1032, 750 P.2d 254 (1987), our Supreme Court stated that "while a duty in a fraud case may be owed by a defendant to plaintiffs in privity, a fiduciary relationship, or a limited class of persons, a duty may also arise to those third persons whom the defendant intends or has reason to expect will receive the information." Haberman, 109 Wn.2d at 168. The court found that this was sound policy because, "while requiring . . . a fiduciary relationship . . . is warranted in negligent misrepresentation cases where a defendant is merely negligent and should not be held potentially liable to an unlimited number of plaintiffs, the same reasoning does not apply where a defendant knowingly makes a misrepresentation." Haberman, 109 Wn.2d at 167. As Homeowners note, it was foreseeable that condominium units would be bought and sold. Because condominium unit sellers have a duty to disclose to purchasers

pursuant to RCW 64.06.020, the board members have reason to expect that the representations they make to owners will be transmitted to purchasers.

This expectation, however, is informed by our decision in Nguyen, wherein we held that the original seller of a home has no duty to disclose a concealed defect to the second purchaser. 140 Wn. App. at 732-33. Whereas the Haberman plaintiffs asserted a claim for fraudulent misrepresentation, the Nguyen plaintiffs asserted a claim for fraudulent concealment. Nguyen, 140 Wn. App. at 729. Viewing Nguyen in light of Haberman, in order for a second purchaser to state a claim for fraud against the original seller, the subsequent purchaser must allege that the original seller made an affirmative misrepresentation; allegations of omissions alone will not suffice. Here, Homeowners allege both omission and misrepresentation. Homeowners allege that they relied on Lozier Homes, Sanford, Burckhard, Sansburn, and Peter, but what actions Homeowners undertook as a result of such reliance is unclear. However, given that Homeowners pleaded that Lozier Homes, Sanford, Burckhard, Sansburn, and Peter made affirmative misrepresentations, we can hypothesize a set of facts that will satisfy the duty requirement set out in Haberman. This is all that is required to survive a CR 12(b)(6) motion. Kinney v. Cook, 159 Wn.2d 837, 842, 154 P.3d 206 (2007). Hence, all plaintiffs sufficiently state a claim for fraud against Lozier Homes, Sanford, Burckhard, Sansburn, and Peter.

Finally, Homeowners assert a civil conspiracy claim against Lozier Homes and Sanford. In order to establish a civil conspiracy, a plaintiff

> must prove by clear, cogent, and convincing evidence that (1) two or more people combined to accomplish an unlawful purpose, or combined to accomplish a lawful purpose by unlawful means; and (2) the conspirators entered into an agreement to accomplish the conspiracy. Wilson v. State, 84 Wn. App. 332, 350–51, 929 P.2d 448 (1996), cert. denied, 522 U.S. 949[, 118 S.Ct. 368, 139 L.Ed.2d 286] (1997).

All Star Gas, Inc. of Wash. v. Bechard, 100 Wn. App. 732, 740, 998 P.2d 367 (2000). Homeowners allege that Lozier Homes and Sanford conspired to

> breach[ ] their fiduciary duties to unit purchasers, fraudulently conceal[ ] the existence of defective construction, pretend[ ] to do comprehensive investigation and repair of conditions with knowledge that the investigations and repairs were not adequate, misrepresent[ ] the nature and cause of the leaks being experienced by unit owners, plac[e] Sanford on the Board when he had no legal right under the Washington Condominium Act to remain, and other actions.

Homeowners allege, in other words, that Lozier Homes and Sanford conspired to commit the torts that formed the basis for their other claims. Homeowners' civil conspiracy claims thus incorporate all of Homeowners' other claims. As previously noted, a duty can arise to third persons where the defendant fraudulently misrepresents a material fact. Because the civil conspiracy claims incorporate Homeowners' fraud claims, Homeowners sufficiently allege a duty on behalf of Sanford independent of his duties as a board member. Homeowners' civil conspiracy claims therefore survive Respondents' CR 12(b)(6) objections.[34]

[34] Lozier Homes and Sanford further contend that Homeowners' civil conspiracy claims fail because an agent cannot conspire with its principal. However, from Homeowners' complaint, we can hypothesize a set of facts in which Sanford was not acting as the agent of Lozier Homes during the conspiracy. Conflicting theories of liability can be resolved on remand by the application of actual evidentiary facts, as opposed to our application of the CR 12(b)(6) standard of review.

C

Homeowners fail to properly plead their CPA claims. In order to prevail on a claim for violation of the CPA, the plaintiff must establish "(1) an unfair or deceptive act or practice (2) occurring in trade or commerce (3) with a public interest impact (4) that proximately causes [and] (5) injury to a plaintiff in his or her business or property." Douglas v. Visser, 173 Wn. App. 823, 834, 295 P.3d 800 (2013) (citing Svendsen v. Stock, 143 Wn.2d 546, 553, 23 P.3d 455 (2001); Indoor Billboard/Wash., Inc. v. Integra Telecom of Wash., Inc., 162 Wn.2d 59, 83-84, 170 P.3d 10 (2007)).

Homeowners allege that Lozier Homes, Sanford, Burckhard, and Sansburn, took various actions "[i]n order to protect themselves from potential liability under the implied warranties of quality of the Washington Condominium Act for selling seriously defective construction at the Project." However, none of the plaintiffs purchased their units from Lozier Homes, Sanford, Burckhard, or Sansburn.[35] Lozier Homes, Sanford, Burckhard, and Sansburn, were not in the business of selling condominiums. When Homeowners purchased their units, they were not engaged in trade or commerce with Lozier Homes, Sanford, Burckhard, or Sansburn. As they do not allege that Lozier Homes', Sanford's, Burckhard's, and Sansburn's actions occurred in trade or commerce,

[35] Smith and Kasprzak purchased their units from Declarant. Thus, Smith and Kasprzak stated a CPA claim against Declarant. These claims were reduced to default judgment against Declarant. These plaintiffs set forth no facts establishing Lozier Homes' individual liability on this claim. Whether Lozier Homes is the alter ego of Declarant, and thus responsible for the judgment entered against it, presents a separate question.

Homeowners fail to state a claim for violation of the CPA. Accordingly, all of Homeowners' CPA claims were properly dismissed.[36]

VI

Although not addressed by the trial court, Respondents contend that the naming of spouses as codefendants is not necessary to create community liability and, therefore, the spouses of the individual board members are not proper parties to the suit.[37] Respondents cite no authority that prohibits the naming of spouses as codefendants in a complaint, nor could they, as such a rule does not exist. It was not improper for Homeowners to name the board members' spouses as parties in their complaint.

VII

A

In their cross appeal, Sanford, Burckhard, Sansburn, and Lozier Homes contend that the trial court erred by denying their request for attorney fees

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[36] Lozier Homes makes two brief contentions as to why Homeowners' negligence claims fail, neither of which is availing. First, Lozier Homes contends that the allegations that it offered to perform deck inspections and that it recoated the decks is not sufficient to establish a duty. "[I]f someone gratuitously undertakes to perform a duty, they can be held liable for performing it negligently." Burg v. Shannon & Wilson, Inc., 110 Wn. App. 798, 808, 43 P.3d 526 (2002). It is conceivable based on Homeowners' complaint that Lozier Homes voluntarily undertook a deck project and completed it negligently. Accordingly, Lozier Homes' argument is better suited to a motion for summary judgment, not a CR 12(b)(6) motion.

Second, Lozier Homes contends that Homeowners' negligence claims fail because there is no such thing as a claim for negligent construction. This contention fails regardless of the accuracy of Lozier Homes' characterization of the law. Homeowners' claims are for negligence "in undertaking the construction, *inspection, condition reporting, and repair* of the Project." (Emphasis added.) Homeowners' negligence claims thus are not merely for negligent construction.

[37] The only case cited by Respondents, deElche v. Jacobsen, 95 Wn.2d 237, 622 P.2d 835 (1980), does not stand for this proposition. The court in deElche held that in cases of *separate liability,* a plaintiff may recover from the defendant's community property if the defendant's separate property is insufficient to satisfy the judgment. 95 Wn.2d at 246.

pursuant to RCW 4.84.185. This is so, they assert, because Homeowners' complaint was clearly frivolous, as Homeowners knew that the statutory limitation periods on their claims had long since expired. Our resolution of the issues in this appeal belies that assertion.

RCW 4.84.185 reads, in pertinent part, "In any civil action, the court . . . may, upon written findings by the judge that the action . . . was frivolous and advanced without reasonable cause, require the nonprevailing party to pay the prevailing party the reasonable expenses, including fees of attorneys, incurred in opposing such action." We review a trial court's decision under RCW 4.84.185 for an abuse of discretion. Rhinehart v. Seattle Times, 59 Wn. App. 332, 339-40, 798 P.2d 1155 (1990). "A frivolous action is one that cannot be supported by any rational argument on the law or facts." Rhinehart, 59 Wn. App. at 340. In order for the court to award attorney fees under RCW 4.84.185, the lawsuit must be frivolous in its entirety and "advanced without reasonable cause." N. Coast Elec. Co. v. Selig, 136 Wn. App. 636, 650, 151 P.3d 211 (2007). As some of Homeowners' claims should have survived Respondents' CR 12(b)(6) motions to dismiss, Homeowners' lawsuit was clearly not frivolous in its entirety. The trial court did not err by denying the request for an award of attorney fees.

B

Sanford, Burckhard, Sansburn, and Lozier Homes also request attorney fees on appeal pursuant to RAP 18.9(a).[38] Homeowners' appeal is frivolous,

[38] RAP 18.9(a) states:

they assert, because Homeowners' underlying claim was frivolous and Homeowners make no new arguments on appeal. "An appeal is frivolous if 'no debatable issues are presented upon which reasonable minds might differ, *i.e.*, it is devoid of merit that no reasonable possibility of reversal exists.'" Hartford Ins. Co. v. Ohio Cas. Ins. Co., 145 Wn. App. 765, 780, 189 P.3d 195 (2008) (internal quotation marks omitted) (quoting Olson v. City of Bellevue, 93 Wn.App. 154, 165, 968 P.2d 894 (1998)). As we reverse the trial court's decision with respect to some claims, Homeowners' appeal is not devoid of merit. The request is denied.

VIII

The decision of the trial court is reversed and remanded for further proceedings with respect to the following claims: all negligence claims against Lozier Homes; all civil conspiracy claims against Lozier Homes and Sanford; all fraud claims against Lozier Homes, Sanford, Burckhard, Sansburn, and Peter; all board member duty of care claims marked in the following chart,

	Sanford	Peter	Backues	Cusimano	Hovda	Phillip	Lozier Homes
Alexander					X	X	

The appellate court on its own initiative or on motion of a party may order a party or counsel, or a court reporter or other authorized person preparing a verbatim report of proceedings, who uses these rules for the purpose of delay, files a frivolous appeal, or fails to comply with these rules to pay terms or compensatory damages to any other party who has been harmed by the delay or the failure to comply or to pay sanctions to the court. The appellate court may condition a party's right to participate further in the review on compliance with terms of an order or ruling including payment of an award which is ordered paid by the party. If an award is not paid within the time specified by the court, the appellate court will transmit the award to the superior court of the county where the case arose and direct the entry of a judgment in accordance with the award.

Blocker Ventures	X	X	X	X	X	X	X
Clark	X			X	X	X	X
Edgington				X	X	X	
Johnson					X		
Kanuri					X		
Kasprzak	X	X	X	X	X	X	X
Larkins					X		
Magnussen					X		
McKillop	X			X	X	X	X
Ott					X	X	
Patton					X		
Schultz	X			X	X	X	X
Smith	X	X	X	X	X	X	X
Stoddard	X			X	X	X	X
West	X			X	X	X	X
Xu					X		

and all negligent misrepresentation claims marked in the following chart.

	Sanford	Burckhard	Sansburn	Lozier Homes
Alexander				
Blocker Ventures	X			X

Clark	X			X
Edgington				
Johnson				
Kanuri				
Kasprzak	X			X
Larkins				
Magnussen				
McKillop	X			X
Ott				
Patton				
Richards				
Schultz	X			X
Smith	X			X
Stoddard	X			X
West	X			X
Xu				

The decision of the trial court is affirmed in all other respects.

Affirmed in part, reversed in part.

We concur:

COX, J.