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76502-7-1

COURT OF APPEALS STATE OF WASHINGTON

BURIEN TOWN SQUARE CONDOMINIUM ASSOCIATION, a
Washington non-profit corporation,

Plaintiff.

v.

BURIEN TOWN SQUARE PARCEL 1, LLC, a Washington limited
liability company; and BURIEN TOWN SQUARE, LLC, a Washington
limited liability company; and JOHN DOES 1-100,

Defendants.

RESPONDENT'S PETITION FOR REVIEW

Steven G. Wraith, WSBA No. 17364
Dirk J. Muse, WSBA No. 28911
Kellan W. Byrne, WSBA No. 49825
Of Attorneys for Respondent

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I. IDENTITY OF PETITIONER

Petitioner, Burien Town Square Parcel 1, LLC and Burien Town Square, LLC (collectively “BTS”), a defendant at the trial court and a respondent at Division One of the Court of Appeals, asks this Court to accept review of the decision identified in Part II below.

II. CITATION TO COURT OF APPEALS DECISION

BTS petitions this Court to review Division One’s decision in *Burien Town Square Condominium Association v. Burien Town Square Parcel 1, LLC*, 416 P.3d 1286 (2018), No. 76502-7-I, issued on May 14, 2018, which reversed the King County Superior Court’s order dismissing on summary judgment plaintiff Burien Town Square Condominium Association’s (“the Association”) claims under the Washington Condominium Act (“WCA”). This decision is attached in Appendix A.

III. ISSUES PRESENTED FOR REVIEW

Whether this Court should accept review because Division One’s decision interpreting the WCA was a case of first impression, and because the decision necessarily involves issues of substantial public interest under RAP 13.4(b)(4)?

IV. STATEMENT OF THE CASE

A. Statement of the facts.

This case arises out of the construction and sale of a condominium complex in Burien, Washington (“the Condominium”).

BTS was the original owner and developer of the Condominium. On May 1, 2009, BTS’ general contractor, Rushforth Taylor Construction, achieved substantial completion of the Condominium. CP 340. BTS conveyed the first unit at the Condominium on or before May 19, 2009. CP 382-387. On July 8, 2009, the City of Burien issued a Certificate of Occupancy for the Condominium. CP 342.

On May 7, 2009, BTS filed the Declaration of Covenants. CP 234-329. On July 15, 2009, BTS filed the First Amendment to Declaration of Covenants. CP 331-338.

In November 2009, BTS defaulted on its loan to develop the Condominium, and the lender’s agent subsequently foreclosed on the loan. CP 189-228. On October 28, 2010, BTS entered into a Settlement, Release, and Cooperation Agreement with the lender’s successor and its affiliates. *Id.* Pursuant to the agreement, the title to the Condominium was transferred to BTS Marketing, LLC (“Marketing”), which had no affiliation with BTS. *Id.* On November 2, 2010, the Trustee’s Deed was recorded in King County. CP 348-354. Thus, as of November 2, 2010, BTS had relinquished, and Marketing had assumed, any ownership or declarant rights in the Condominium.

By summer 2013, the Association knew of potential defects in the Condominium, and accordingly sought legal advice regarding warranty claims under the WCA. CP 633. The Association's property manager consulted with Barker Martin, P.S., a well-known construction defect law firm in Seattle, which advised that the warranty period would expire four years after the date of the first recorded sale. *Id.* The property manager recommended that it was the Board's fiduciary responsibility to explore pursuing the WCA claims against BTS, as well as the negative repercussions of failing to do so. *Id.* Despite the fact that the Association was incorrect regarding the actual date of the first recorded sale, which was actually May 19, 2009, it understood that, in order to preserve any warranty claims against BTS, it would need to act by summer 2013. CP 457; 633. Ultimately, the Association served a Notice of Construction Defects in August 2013. CP 389-396. Regardless of the fact that the Notice was untimely due to the mistake regarding the date of accrual, the Association quashed the Notice for other reasons, and ultimately declined to pursue a lawsuit against BTS in 2013. CP 409-410; 643.

B. Procedural history.

On February 26, 2015, the Association served BTS and Marketing with a Notice of Construction Defects, pursuant to RCW 64.50.020. CP 356-360. On April 29, 2015, the Association filed an action against BTS,

but not Marketing, for alleged construction defects. CP 1-10. The Association alleged several causes of action against BTS, including misrepresentation and breach of the WCA, RCW 64.34.405 and .410. *Id.* The Association also alleged causes of action for breach of implied warranty of habitability, breach of contract, breach of fiduciary duty, and violation of Washington's Consumer Protection Act. *Id.* The Association's claims were based on alleged construction defects related to the Condominium's "common elements" or "limited common elements," as defined by the WCA and the Condominium Declarations. CP 1-10; 373-380.

On April 1, 2016, BTS moved for partial summary judgment on the Association's WCA claims, on the basis that those claims were time-barred. CP 138-148. On May 6, 2016, the trial court granted dismissal of the Association's WCA claims. CP 418-419.

On May 16, 2016 the Association moved for reconsideration of the court's decision. CP 420-430. On May 31, 2016, the trial court denied the Association's Motion for Reconsideration. CP 445-446.

On June 30, 2016, the Association moved for interlocutory discretionary review of the trial court's decisions granting partial summary judgment and denying reconsideration. CP 447-448. On October 27, 2016, Division One denied discretionary review, finding no obvious or

probable error in the trial court's conclusions that the Association's WCA claims were time-barred. CP 456-461. The Commissioner's Ruling Denying Discretionary review specifically noted that the Association conceded that the construction was complete and all common elements were added and completed by July 8, 2009, and that the Association did not dispute that "BTS lost its developmental rights as of November 2, 2010." *Id.* The Commissioner found it reasonable for the trial court to conclude that BTS' period of declarant control necessarily terminated two years after its right to add new units ended, and found no obvious or probable error in the conclusion that the Association's WCA claims were time-barred. *Id.*

On February 21, 2017, upon the Association's motion for voluntary dismissal, the trial court entered an Order Dismissing Plaintiff's Remaining Claims, thereby eliminating the Association's non-WCA claims against BTS. CP 508-510. On February 28, 2017, the Association filed a Notice of Appeal to the Court of Appeals, Division One, and on June 29, 2017, the Association filed its Brief of Appellant. BTS filed its Brief of Respondent on August 30, 2017. The Association filed a Reply Brief on October 26, 2017. On April 9, 2018, the parties held oral argument before a panel of three Division One judges. On May 14, 2018, Division One issued a published opinion reversing the trial court's

dismissal of the Association's claims and remanding the matter for further proceedings.

V. ARGUMENT

A. This Court should accept review pursuant to RAP 13.4(b)(4) because the Court of Appeals' decision involves an issue of substantial public interest.

This case is appropriate for review because the question of when a period of declarant control terminates under the WCA is an issue of substantial public interest, affecting both condominium developers and consumers alike. Indeed, the determination of whether a condominium developer can be subjected to a potentially unending statute of limitations, even well after being foreclosed upon and ceding all rights and involvement in a condominium to an unaffiliated successor declarant, will have a profound impact on the real estate development and condominium construction industry as a whole. This too will affect consumers significantly, as less and less affordable housing becomes available as the result of developers' uncertainty concerning extended liability exposure.

In this case, BTS was foreclosed upon, and had surrendered all of its development rights to Marketing as of November 2, 2010. At that point, BTS had no ability to take any of the actions that would trigger the termination of declarant control under RCW 64.34.308(5)(b). The Trustee's Deed specifically precluded BTS from taking any such

development action; it had no ability to add new units (RCW 64.34.308(5)(b)(iii), and no right to file an amendment to the declaration (RCW 64.34.308(5)(b)(iv), once it had relinquished its development rights to Marketing.

After defaulting on its loan and being forced to transfer its rights to Marketing, an entirely independent entity, BTS had no involvement whatsoever in the Condominium. Yet, under the Court of Appeals' decision, BTS remained exposed to suit indefinitely, subject to whatever actions Marketing, over whom BTS had no affiliation or control, might take that could trigger the provisions of RCW 64.34.308(5)(b).

The Court of Appeals' decision could have a significant chilling effect on the development of condominiums throughout Washington State; original developer declarants will likely be especially wary of beginning new projects in the event they lose or must transfer declarant control, if they could be subject to liability under the WCA without a clear limitations period. Likewise, this case presents significant ramifications for consumers, as the operative issues involve the rights of individual residential buyers.

Here, the Court of Appeals' decision is one of first impression, rendering review even more appropriate. The Court of Appeals is the first state court in Washington to address this issue of declarant control and the

statute of limitations under the WCA, and the decision turned on pure questions of statutory interpretation. Prior to the decision, the general public had no published Washington opinions to consult for guidance on the WCA declarant control and statute of limitations issues. The published opinion is remarkably light on case citations. Further, the case of *One Pac. Towers Homeowners Ass'n v. HAL Real Estate Invs., Inc.*, 148 Wn.2d 319, 61 P.3d 1094 (2002), referenced in the opinion and relied upon by Appellant, does not specifically address declarant control. Rather, it focused on whether subsidiaries and corporations acting in concert with such subsidiaries could be considered declarants under the WCA. Such facts do not exist in this matter. Without an established body of case law to provide guidance, all parties would benefit from review of this decision, and a bright line rule that defines precisely when the statute of limitations terminates for claims against an original developer declarant that has since relinquished all rights in the subject condominium.

VI. CONCLUSION

BTS requests the Supreme Court to accept review because the Court of Appeals' decision in this case involves issues of substantial public interest. The question of whether an original developer declarant may be subjected to a potentially indefinite statute of limitations, even after surrendering all development rights in a condominium, is one of first

impression in Washington State, as no other published decisions have previously addressed similar issues of declarant control and the statute of limitations under the WCA. Ultimately, the Court of Appeals' decision has wide-ranging and important consequences for both condominium developers and individual residential buyers. As such, review is proper under RAP 13.4(b)(4).

Respectfully submitted this 13th day of June, 2018.

LEE SMART, P.S., INC.

By: 

Steven G. Wraith, WSBA No. 17364

Dirk J. Muse, WSBA No. 28911

Kellan W. Byrne, WSBA No. 49825

Of Attorneys for Respondents

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

BURIEN TOWN SQUARE)	
CONDOMINIUM ASSOCIATION,)	No. 76502-7-1
a Washington non-profit corporation,)	
)	DIVISION ONE
Appellant,)	
)	
v.)	PUBLISHED OPINION
)	
BURIEN TOWN SQUARE PARCEL 1,)	
LLC, a Washington limited liability)	
company; and BURIEN TOWN)	
SQUARE, LLC, a Washington limited)	
liability company; and JOHN DOES)	
1-100,)	
)	
Respondents.)	FILED: May 14, 2018

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LEACH, J. — Burien Town Square Condominium Association (Association) sued Burien Town Square LLC and Burien Town Square Parcel 1 LLC (collectively BTS) for alleged violations of the Washington Condominium Act (WCA)¹. The Association appeals the trial court’s dismissal of those claims as barred by the statute of limitations. Because a period of declarant control tolled the statute of limitations, we reverse and remand for further proceedings consistent with this opinion.

¹ Ch. 64.34 RCW.

FACTS

BTS developed and owned a condominium complex in Burien. BTS substantially completed its construction by May 1, 2009. BTS sold the first unit on May 19, 2009. On July 8, 2009, the city of Burien issued a certificate of occupancy for the condominium.

In November 2009, BTS defaulted on its construction loan. The lender foreclosed. On November 2, 2010, BTS Marketing (Marketing) acquired the condominium as part of a settlement agreement. Marketing continued to sell units. It kept control of the building's operation by retaining the right to appoint the board of directors of the condominium association.

In August 2013, the Association, which Marketing still controlled, received notice of a construction defect. The Association took no action at that time.

In March 2014, unit owners first made up the majority of the board and gained control of the Association. On February 26, 2015, the Association notified BTS and Marketing about certain construction defects and asked for them to be fixed. On April 29, 2015, the Association filed several claims against BTS, including claims under the WCA. BTS moved for summary judgment, asserting that the statute of limitations barred the WCA claims. The trial court agreed and dismissed the WCA claims. We denied the Association's request for discretionary review. At the Association's request, the trial court dismissed the

Association's remaining claims. This allowed the Association to appeal the dismissal of its WCA claims.

STANDARD OF REVIEW

We review a trial court's order granting summary judgment de novo.² Summary judgment is appropriate if, viewing the facts and reasonable inferences in the light most favorable to the nonmoving party, no genuine issues of material fact exist and the movant is entitled to judgment as a matter of law.³

Because statutory interpretation presents a question of law, we also review it de novo.⁴ The purpose of statutory interpretation is to determine the intent of the legislature.⁵ When interpreting a statute, we first look to its plain language.⁶ If a statute's language is plain, we will determine the legislature's intent from the words of the statute itself.⁷

² Michak v. Transnation Title Ins. Co., 148 Wn.2d 788, 794, 64 P.3d 22 (2003).

³ Michak, 148 Wn.2d at 794-95.

⁴ Agrilink Foods, Inc. v. Dep't of Revenue, 153 Wn.2d 392, 396, 103 P.3d 1226 (2005).

⁵ Campbell v. Dep't of Soc. & Health Servs., 150 Wn.2d 881, 894, 83 P.3d 999 (2004).

⁶ HomeStreet, Inc. v. Dep't of Revenue, 166 Wn.2d 444, 451, 210 P.3d 297 (2009).

⁷ Agrilink Foods, 153 Wn.2d at 396.

ANALYSIS

Statute of Limitations

The Association contends that the statute of limitations does not bar its claims because certain provisions in the WCA tolled the limitations period until after the Association filed its claim. We agree.

The WCA has a four-year statute of limitations for construction defects.⁸ But this statute does not bar an action for breach involving a common element of the condominium until one year after the period of declarant control ends.⁹ The statute states that an action

must be commenced within four years after the cause of action accrues: PROVIDED, That the period for commencing an action for a breach accruing pursuant to subsection (2)(b) of this section shall not expire prior to one year after termination of the period of declarant control, if any, under [RCW 64.34.308(5)].^[10]

Section (2)(b) provides that a cause of action involving a common element accrues at the latest of three dates: (1) when the first unit was conveyed to a bona fide purchaser, (2) when the common element was completed, or (3) when the common element was added.¹¹

Here, the Association's WCA claims involve the common elements of the condominium. The parties agree that BTS conveyed the first unit on May 19,

⁸ RCW 64.34.452(1).

⁹ RCW 64.34.452(1), (2)(b).

¹⁰ RCW 64.34.452(1).

¹¹ RCW 64.34.452(2)(b).

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2009. They also agree that construction was complete and all common elements were added and completed by July 8, 2009, the date the city of Burien issued the certificate of occupancy. Thus, the Association's cause of action accrued no later than July 8, 2009.

BTS contends that the statute of limitations expired in July 2013. If correct, this means that the Association's WCA claims, filed on April 29, 2015, are barred. The Association responds that the statute of limitations would have expired one year after the period of declarant control ended but was extended an additional 105 days, to June 11, 2015, by its giving written notice of its claims.

The phrase "period of declarant control" describes the period when a condominium developer retains control over the condominium unit owners' association.¹² "Declarant control" means the right of the declarant or persons designated by the declarant to appoint and remove officers and members of the board of directors, or to veto or approve a proposed action of the board or association."¹³

To create a condominium, the owner, as the "declarant," must record a declaration with certain information, including a description of the property and information about ownership.¹⁴ The WCA defines a declarant as

¹² RCW 64.34.308(5)(a).

¹³ RCW 64.34.020(16).

¹⁴ RCW 64.34.020(15), .200, .216.

[a]ny person who is the owner of a fee interest in the real property which is subjected to the declaration at the time of the recording of an instrument pursuant to RCW 64.34.316 and who directly or through one or more affiliates is materially involved in the construction, marketing, or sale of units in the condominium created by the recording of the instrument.^[15]

Primarily, the parties dispute how long, for purposes of the statute of limitations, the period of declarant control lasted in this case. BTS asserts that the period of declarant control ended when its own control ended. The Association contends that the period of declarant control continued so long as any declarant, not just BTS, controlled the composition of the board. We agree with the Association.

The Association relies on RCW 64.34.316.¹⁶ The statute addresses what happens to declarant rights in a foreclosure: “[t]he declarant ceases to have any special declarant rights.”¹⁷ Whoever acquires the property succeeds to all special declarant rights.¹⁸ It also addresses the effect of a foreclosure on the period of declarant control: “[t]he period of declarant control as described in

¹⁵ RCW 64.34.020(15)(d).

¹⁶ BTS asserts that because the Association cites this provision for the first time on appeal, we should not consider it. But although courts generally do not consider new issues raised for the first time on appeal, they may consider new authorities. RAP 2.5(a); Zonnebloem, LLC v. Blue Bay Holdings, LLC, 200 Wn. App. 178, 183 n.1, 401 P.3d 468 (2017). Further, we determine the legislature’s intent by looking at the statute as a whole. Muckleshoot Indian Tribe v. Dep’t of Ecology, 112 Wn. App. 712, 720-21, 50 P.3d 668 (2002). This provision relates to the main issue disputed below and on appeal, and we consider it.

¹⁷ RCW 64.34.316(4)(a).

¹⁸ RCW 64.34.316(3).

[RCW 64.34.308(5)] terminates unless the judgment or instrument conveying title provides for transfer of all special declarant rights held by that declarant to a successor declarant.”¹⁹ Here, after the foreclosure, BTS transferred special declarant rights to Marketing as part of the settlement with its lender. BTS does not dispute that Marketing acquired all declarant rights in the condominium. Thus, under RCW 64.34.316, the period of declarant control continued after Marketing took over as declarant.

The statutory interpretation urged by the Association advances the strong consumer protection component of the WCA.²⁰ A principal purpose of the WCA is to provide protection to residential buyers of condominiums.²¹ When an original declarant transfers declarant rights to a successor declarant, it remains liable for the original construction.²² But BTS's interpretation would allow an original declarant to avoid liability by conveying property to a successor declarant and having the successor declarant keep control over the board until the statute

¹⁹ RCW 64.34.316(4)(b).

²⁰ Eagle Point Condo. Owners Ass'n v. Coy, 102 Wn. App. 697, 713, 9 P.3d 898 (2000).

²¹ Filmore LLLP v. Unit Owners Ass'n of Ctr. Pointe Condo., 183 Wn. App. 328, 343 & n.10, 333 P.3d 498 (2014); Park Ave. Condo. Owners Ass'n v. Buchan Devs., LLC, 117 Wn. App. 369, 374-75, 71 P.3d 692 (2003).

²² One Pac. Towers Homeowners' Ass'n v. HAL Real Estate Invs., Inc., 148 Wn.2d 319, 332, 61 P.3d 1094 (2002) (“A transferor is not relieved of any obligation or liability arising before the transfer and remains liable for warranty obligations imposed upon the transferor by this chapter.” (quoting RCW 64.34.316(2)(a))).

of limitations expires. While the successor declarant might have liability for breach of its fiduciary duties owed unit owners, that remedy might provide incomplete relief for unit owners depending on a variety of variables, including the capitalization of the successor and the unit owner's date of acquisition. Thus, adopting BTS's interpretation of the period of declarant control would create a loophole in the WCA's protection for unit owners.

BTS complains about the unfairness of leaving an original declarant open to liability under the WCA indefinitely, subject only to certain actions by a successor declarant. It also claims that the Association's interpretation frustrates the purpose of a statute of limitation, noting that "[t]he purpose of statutes of limitations is to shield defendants and the judicial system from stale claims."²³ But a statute of limitation should only protect against stale claims and not provide a shield from almost all liability. We reject an interpretation of the WCA that would allow a statute of limitations for claims involving condominium common elements to expire before the unit owners ever gain control of the unit owners' association.

Both the language of the WCA and public policy concerns support our conclusion that the period of declarant control is a single period measured by the fact of declarant control, not the term of a specific declarant's control. Thus, the

²³ Burns v. McClinton, 135 Wn. App. 285, 293, 143 P.3d 630 (2006).

period of declarant control continued after BTS transferred control of the board to Marketing as successor declarant. We consider the parties' arguments about the end of the period of declarant control in light of this conclusion.

The WCA contains specific rules about the end of declarant control. The declaration can provide a date for the end of the period of declarant control.²⁴ But the WCA also provides for an end of the period of declarant control.²⁵ RCW 64.34.308(5)(b) specifically states that a period of declarant control ends no later than the earlier of

(i) Sixty days after conveyance of seventy-five percent of the units which may be created to unit owners other than a declarant; (ii) two years after the last conveyance or transfer of record of a unit except as security for a debt; (iii) two years after any development right to add new units was last exercised; or (iv) the date on which the declarant records an amendment to the declaration pursuant to which the declarant voluntarily surrenders the right to further appoint and remove officers and members of the board of directors.

The Association contends that the period of declarant control ended on March 1, 2014, when unit owners first gained control of the Association (section 308(5)(b)(i)). BTS contends that the period of declarant control ended either on November 2, 2010, when it last had ownership and declarant rights (section 308(5)(b)(iv)) or on November 2, 2012, two years after BTS last exercised any

²⁴ See RCW 64.34.308(5)(a).

²⁵ RCW 64.34.308(5)(b).

development rights (section 308(5)(b)(iii)). We address these contentions chronologically.

First, BTS contends that the period of declarant control ended on November 2, 2010. RCW 64.34.308(5)(b)(iv) states that the period of declarant control ends on “the date on which the declarant records an amendment to the declaration pursuant to which the declarant voluntarily surrenders the right to further appoint and remove officers and members.” BTS contends that it surrendered control when Marketing became the owner. But the plain language of this provision requires that the declarant record an amendment to the declaration in which the declarant surrenders declarant rights. BTS never recorded such an amendment. Further, although BTS gave up the power to appoint and remove officers in November 2010, Marketing acquired that right. The unit owners did not gain control but remained subject to the control of a declarant. We conclude that the condition described in section 308(5)(b)(iv) did not occur when Marketing became successor declarant.

Alternatively, BTS contends that the period of declarant control ended on November 2, 2012. RCW 64.34.308(5)(b)(iii) states that the period of declarant control ends “two years after any development right to add new units was last exercised.”

BTS asserts that it never exercised any development rights after November 2010, when it lost its rights. But it incorrectly equates exercising its rights with transferring its rights. The exercising of rights is not synonymous with transferring rights. "Exercise" means "[t]o make use of" or "to implement the terms of."²⁶ "Transfer" means "[t]o convey or remove from one place or one person to another; to pass or hand over from one to another, esp[ecially] to change over the possession or control of."²⁷ The exercise of a development right does not include a transfer of those rights. Nor does the WCA's definition of development rights indicate that conveying property to a successor declarant results in the end of the period of declarant control. The WCA defines "development rights" as

any right or combination of rights reserved by a declarant in the declaration to: (a) Add real property or improvements to a condominium; (b) create units, common elements, or limited common elements within real property included or added to a condominium; (c) subdivide units or convert units into common elements; (d) withdraw real property from a condominium; or (e) reallocate limited common elements with respect to units that have not been conveyed by the declarant.^[28]

BTS identifies no language in the WCA suggesting, let alone stating, that transferring these rights constitutes an exercise of development rights under

²⁶ BLACK'S LAW DICTIONARY 693 (10th ed. 2014).

²⁷ BLACK'S at 1727.

²⁸ RCW 64.34.020(18).

section 308(5)(b)(iii). Thus, the condition described in section 308(5)(b)(iii) did not occur when BTS transferred development rights to Marketing.

The parties agree that the period of declarant control ended no later than March 2014. RCW 64.34.308(5)(b)(i) states that the period of declarant control ends 60 days after the conveyance of 75 percent of the units to unit owners other than a declarant. In January 2014, Marketing notified the Association that 75 percent of the units in the building had been sold to individual owners. On March 1, 2014, a majority of the Association board members were unit owners. Because the period of declarant control ended in March 2014, the time for filing a WCA claim expired in March 2015, unless otherwise extended.²⁹

The Association claims its written claim to BTS extended the statute of limitations an additional 105 days to June 11, 2015, relying on RCW 64.50.020 and RCW 64.34.452(4). BTS provides no argument to the contrary. We agree with the Association.

RCW 64.50.020(1) provides that in a construction defect action, the claimant must provide notice to the construction professional 45 days before filing a lawsuit. The claimant cannot file an action until that 45 days has passed.³⁰ RCW 64.34.452(4) tolls the statute of limitations until 60 days after this 45 day period. It states,

²⁹ RCW 64.34.452(1)

³⁰ RCW 64.50.020(1); see also RCW 64.34.452(4).

If a written notice of claim is served under RCW 64.50.020 within the time prescribed for the filing of an action under this chapter, the statutes of limitation in this chapter and any applicable statutes of repose for construction-related claims are tolled until sixty days after the period of time during which the filing of an action is barred under RCW 64.50.020.

The Association gave notice to BTS on February 26, 2015, within the time for filing a WCA action. Thus, the statute of limitations tolled until 105 days later, June 11, 2015.³¹ The Association timely filed its complaint on April 29, 2015, before the statute of limitations expired.

Attorney Fees

The Association challenges the trial court's award of fees to BTS. The WCA permits the court to award, "in an appropriate case," reasonable attorney fees to the prevailing party:

If a declarant or any other person subject to this chapter fails to comply with any provision hereof or any provision of the declaration or bylaws, any person or class of persons adversely affected by the failure to comply has a claim for appropriate relief. The court, in an appropriate case, may award reasonable attorney's fees to the prevailing party.^[32]

In view of our decision, no party has yet prevailed on the WCA claims, so neither party has established an entitlement to fees in the trial court. We vacate the trial court's award of fees.

³¹ The Association claims that the statute of limitations tolled until June 10, but this is based on the date on the notice letter (February 25), not the date the letter was delivered (February 26).

³² RCW 64.34.455.

Both parties request fees on appeal. Although the Association prevails here, no party has yet prevailed on the merits of the WCA claims. Thus, an award of fees is premature. But the Association is entitled to an award of costs upon its compliance with the applicable court rules.

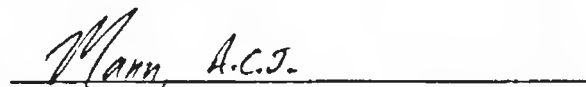
CONCLUSION

We reverse. The period of declarant control tolled the statute of limitations contained in RCW 64.34.452. The Association timely filed its WCA claims. We reverse and remand for further proceedings consistent with this opinion.

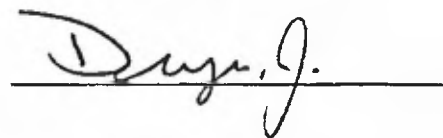
WE CONCUR:



Seach, J.



Mann, A.C.J.



Dwyer, J.

DECLARATION OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington, that on June 13, 2018, I caused service of the foregoing pleading on each and every attorney of record herein:

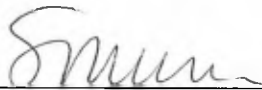
VIA LEGAL MESSENGER

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DATED this 13th day of June, 2018 at Seattle, Washington.



Susan Munn, Legal Assistant

LEE SMART

June 13, 2018 - 3:40 PM

Transmittal Information

Filed with Court: Court of Appeals Division I
Appellate Court Case Number: 76502-7
Appellate Court Case Title: Burien Town Square Condominium Assoc., App vs. Burien Town Square Parcel 1, LLC, et al., Resps
Superior Court Case Number: 15-2-10515-9

The following documents have been uploaded:

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