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COURT OF APPEALS  
DIVISION II

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No. 43157-2-II

STATE OF WASHINGTON

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**COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON**

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GRANVILLE CONDOMINIUM HOMEOWNERS ASSOCIATION,  
a Washington non-profit corporation,

Appellant/Cross-Respondent,

v.

MICHAEL K. KUEHNER and  
BRENDA K. KUEHNER,

Respondents/Cross-Appellants.

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**REPLY BRIEF OF APPELLANT/CROSS-RESPONDENT**

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## **I. ARGUMENT**

### **A. Privity is not relevant to the enforcement of the terms of a recorded condominium declaration.**

This case is not about whether there is "privity" between a tenant of a unit and the homeowners association, but rather, about whether the conditions, covenants and restrictions set forth in a properly recorded Condominium Declaration are binding upon a tenant of a unit as well as the unit owner. Condominiums, originally referred to as horizontal regimes, are created by statute, in this case, RCW 64.34. The obvious intent, as well as the legal effect, of creating a condominium is to bind the units and the common areas with certain covenants and restrictions for the benefit of all persons using the property affected by the condominium declaration. In the case at bar, the Condominium Declaration provided that each unit would have to pay a monthly assessment for common expenses. CP 26. There is no question but that the unit owners are personally liable for that obligation.

The recorded declaration, which by its recording is constructive notice to the entire world, allowed a unit owner to rent or lease his unit to a tenant, provided that the lease or rental agreement would incorporate all of the terms of the condominium declaration. See Section Eleven (b). CP 25. The declaration goes on to require that any lease or rental agreement

be approved by the homeowners association (CP 25), and, most importantly, provided that the homeowners association could collect from the tenant, and the tenant was obligated to pay to the association, such portion of the rent as necessary to pay the monthly assessments for common expenses. CP 28.

In this particular case, the unit owner, Ingels, was delinquent in the payment of monthly assessments and then installed the Kuehners as a tenant, without the prior knowledge or consent of the homeowners association, and apparently without any written rental agreement or lease.

The Kuehner's argument that a tenant is not bound by the provisions of the declaration regarding payment by the tenant for the monthly assessments for common expenses because there was no "privity" between the tenant and the homeowners association is illogical. Under that argument, a tenant could ignore all of the provisions of the condominium declaration. For example, in a residential condominium, a tenant without a written lease or rental agreement, who had not been approved by the homeowners association, could use a rented unit for commercial purposes and then argue that the "unit owner never told me it was restricted to residential use, and because I have no privity with the homeowners association, I can ignore the residential restriction."

The tenant's argument that he is not liable for the monthly assessments because neither he nor his lessor (the unit owner) intended that he be liable for the monthly assessments is irrelevant. The recorded Condominium Declaration, which did bind the unit owner, and did obligate tenant to pay the monthly assessments if the unit owner did not pay them, and did obligate the lessor to include all of that in any lease or rental agreement, is not something that the lessor could invalidate by simply ignoring it. The tenant cannot argue that he had no reason to believe that he might have to pay the monthly assessments for common expenses if the unit owner did not pay them because the tenant had constructive knowledge, through the recording of the Condominium Declaration, that he might be so obligated.

As argued in Appellant's Opening Brief, the recording of the condominium declaration is notice to the entire world, and a tenant, like everyone else, is deemed to have constructive notice of that declaration. *Strong v. Clark*, 56 Wn.2d 230, 352 P.2d 183 (1960) holds that a properly recorded instrument gives notice of its contents to all the world. RCW 65.08.030 provides:

An instrument in writing purporting to convey or encumber real estate or any interest therein, which has been recorded in the auditor's office of the county in which the real estate is situated, although the instrument may not have been executed and acknowledged in accordance with the law in force at the time of its

execution, shall impart the same notice to third persons, from the date of recording, as if the instrument had been executed, acknowledged, and recorded, in accordance with the laws regulating the execution, acknowledgment, and recording of the instrument then in force.

The tenant's argument that a Condominium Declaration is not even a contract between a homeowners association and the condominium owners, a statement which is taken from *Bellevue Pac. Cntr. Condo Owners Ass'n. v. Bellevue Pac. Tower Condo Ass'n*, 124 Wn. App. 178, 188, 100 P.2d 832 (2004), is irrelevant to the case at bar. The tenant isn't obligated to pay the monthly assessment because of any contract, but rather, because there is an obligation to do so which runs with the land as a result of the recording of the condominium declaration. In the *Bellevue Pac Tower Condo* case cited above, the court was being asked by the owners association to find that the declaration was a contract, and that the court could find a portion of that contract to be unconscionable. The court said the condominium declaration was not a contract, but rather, the creation of an interest in property, which the court could not find unconscionable if it was created in accordance with the terms of the Condominium Act.

Contrary to the argument of respondent, the homeowners association did not bring this suit under the Condominium Act (RCW

64.34), but rather, under the terms of the recorded Condominium Declaration. See the complaint CP 1-5.

There does not need to be privity between a condominium association and a tenant renting from an owner of a unit in order for the tenant to be bound by the terms of the Condominium Declaration.

Section Sixteen (k) of the recorded Condominium Declaration states:

Rental Units. If a Unit is rented by its Owner, the Board may collect and the Tenant shall be obligated to pay over to the Board so much of the rent for such Unit as is required to pay any amounts to for Assessments, together with interest and costs that might be owed to the Association in the event that said Assessments are in default over thirty (30) days. CP 28.

If the Condominium Declaration allows the board of the association to collect the assessment from the tenant, and obligates the tenant to pay the same to the board, then it naturally follows that the association is entitled to bring an action against the tenant to collect so much of the rent as is necessary to pay the assessment.

The Condominium Declaration, in Section Eleven (b), provides that:

An Owner of any Unit may lease or rent his or her Unit for any residential purpose (except hotel or transient purposes) at any time subject to the provisions of this Declaration. Each lease or rental agreement shall be in writing and by its terms shall provide that the terms of the lease or rental agreement are subject in all respects to

the provisions of this Declaration and the Bylaws of the Association, and all rules and regulations promulgated thereunder.

CP118. This provision was obviously intended complement Section Sixteen (k). The fact that the unit owner (Ingels) did not have a any written agreement with the tenant (Kuehner) does not negate the language of section Sixteen (k) cited above. The obvious intent of the recorded Condominium Declaration was to provide that any rental of a unit was subject to board approval. In this case, the unit owner did not even notify the board that a tenant had been allowed to move into the unit. CP 20.

The mere fact that a unit owner who was already delinquent (CP 3, 19) allowed the tenant to move in to his unit, without any written agreement (CP 163) and without approval of the board (CP 20), does not make the tenant immune from the obligation created under Section Sixteen (k).

Both the condominium declaration and RCW 64.34.364 give the Association a "lien for assessments" and provides that said lien may be enforced judicially or non-judicially. RCW 64.34.364(9). Subsection (10) does provide that if the Association commences an action to foreclose a lien, it shall be entitled to the appointment of a receiver who would have the power to collect rent from the tenant or terminate the tenant and re-rent the unit. However, there is nothing in the statute that says that the only

way to proceed to collect unpaid assessments is by a lien foreclosure proceeding, nor is there anything requiring that a receiver be appointed instead of a direct action to collect a portion of the rent from the tenant. In fact, subsection (16) of RCW 64.34.364 very specifically states: "To the extent not inconsistent with this section, the declaration may provide for such additional remedies for collection of assessments as may be permitted by law." Perhaps more importantly, section Sixteen (h) of the Condominium Declaration specifically provides: "suit to recover a money judgment for unpaid Assessments shall be maintainable without foreclosure or waiving the lien securing the same." CP 130-131.

**B. There is nothing in the Washington Condominium Act (RCW 64.34) which invalidates Section Sixteen (k) of the Condominium Declaration**

RCW 64.34.304(1)(i) grants the homeowners association the right to "impose and collect any payments, fees, or charges for the use, rental, or operation of the common elements, or other limited common elements described in RCW 64.34.204(2) and (4), and for services provided to unit owners..." Subsection (r) gives the Association the right to "Exercise any other powers conferred by the declaration or bylaws; ..." Surely, the Association has the right to bring an action to enforce its rights under Section Sixteen (k) of the declaration cited above. Subsection (s) of the statute gives the Association the right to "Exercise all other powers that

may be exercised in the state by the same type of corporation as the Association;..."

Subsection (t) of RCW 64.34.304(1) also gives the Association the right to "exercise any other powers necessary and proper for the governance and operation of the Association." Where a unit owner is long delinquent in the payment of monthly assessments for common expenses, and allows a tenant to occupy the unit, utilizing the benefits provided from the common expenses, the proper governance and operation of the Association dictates that it be allowed to exercise the rights conferred by section Sixteen k of the declaration, and collect a portion of the rent from the tenant sufficient to pay the monthly assessment.

By way of correction, the declaration in support of the association's original motion for partial summary judgment did in fact contain an erroneous interest calculation. However, that error was corrected, prior to the time of the hearing by the filing of another declaration which set out the correct interest calculation. CP 175 – 178.

**C. The Kuehners are not entitled to recover reasonable attorneys fees.**

The denial of attorneys fees to Kuehners was not error. Kuehners contend that, as a mere tenants, they are not bound by the language of the recorded Condominium Declaration because they have no privity of

contract with the homeowners Association. Kuehners cannot therefore argue that they have any entitlement to fees under the language of the declaration. The only way that they can, or could possibly be entitled to fees would be if the court were to find that the commencement of this action against Kuehner was frivolous under CR 11.

Under CR 11(a), a complaint must meet the following requirements:

(1) it is well grounded in fact; (2) is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law; (3) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation...

How can it be said that the Association's claim was not well grounded in fact when it was specifically based upon the language of the recorded condominium declaration which allowed forward of the Association to collect from the tenant?

The Kuehners are not entitled to reasonable attorney's fees on appeal. As was argued in their response and opening brief, the only way that they would be entitled to reasonable attorney's fees on appeal would be if the appeal itself was "frivolous." As set forth in *Carrillo v. City of Ocean Shores*, 122 Wn. App. 592, 94 P.3d. 961 (2004) "an appeal is frivolous if there are no debatable issues on which reasonable minds might differ, and the appeal is so totally devoid of merit that there was no

reasonable possibility of reversal." How can one read Section Sixteen (k) of the Condominium Declaration and not believe that the homeowners association has a right to collect a portion of the rent from the tenant to pay the monthly assessments?

**D. The homeowners association is entitled to recover its reasonable attorneys fees, both in the lower court and on appeal.**

The homeowners association is entitled to recover its reasonable attorneys fees under both the recorded Condominium Declaration, and the Washington Condominium Act. Section Sixteen (h) of the declaration specifically provides for recovery of "costs including reasonable attorney's fees." CP 134. RCW 64.34.364 (16) specifically provides:

The Association shall be entitled to recover any costs and reasonable attorneys' fees incurred in connection with the collection of delinquent assessments, whether or not such collection activities result in suit being commenced or prosecuted to judgment. In addition, the association shall be entitled to recover costs and reasonable attorneys' fees if it prevails on appeal and in the enforcement of a judgment.

**II. CONCLUSION**

Privity is not required to enforce the terms of a recorded condominium declaration against tenant occupying a condominium unit. The tenant had constructive and actual knowledge of the obligation to pay the monthly assessment for common expenses. There is nothing in RCW 64.34 which invalidates Section Sixteen (k) of the Condominium

Declaration. The trial court erred in dismissing the homeowners association's complaint, and its summary judgment dismissing the complaint should be reversed, and judgment entered in favor of the homeowners association.

The trial court did not err in denying Kuehners their attorneys' fees. The action initiated by the homeowners association was clearly based upon the fact that the recorded Condominium Declaration specifically authorized the Association to collect the monthly assessments for common expenses from the tenant if the owner of the unit was more than 30 days delinquent.

The trial court did err in denying the homeowners association its reasonable attorneys' fees, which are authorized by both the recorded Condominium Declaration and the Washington Condominium Act.

The homeowners association is entitled to recover its reasonable attorneys' fees on appeal as provided for in both the recorded Condominium Declaration and the Washington Condominium Act.

Respectfully submitted this 21<sup>st</sup> day of September, 2012.

KRILICH, LA PORTE, WEST & LOCKNER, P.S.

By 

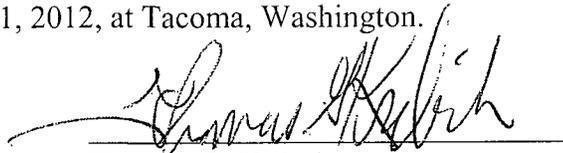
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DECLARATION OF SERVICE

I, Thomas G. Krilich, hereby certify under penalty of perjury under the laws of the state of Washington, that the following is true and correct:

On September 21, 2012, I personally delivered a true and accurate copy of this document to David Clement Smith, attorney for respondents/cross-appellants, at 201 St. Helens Avenue, Tacoma, Washington.

DATED: September 21, 2012, at Tacoma, Washington.



Thomas G. Krilich

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