

FILED  
Court of Appeals  
Division II  
State of Washington  
7/15/2020 9:16 AM

NO. 54365-6-II

COURT OF APPEALS  
STATE OF WASHINGTON  
DIVISION TWO

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LOST LAKE RESORT CONDOMINIUM  
ASSOCIATION, A Washington nonprofit corporation,

Appellant,

vs.

LOST LAKE RESORT, LLC, a Washington limited liability  
corporation; LOST LAKE DEVELOPMENT, LLC, A Washington limited  
liability corporation; BRENT McCAUSLAND and JANE DOE McCAUSLAND  
and the marital community composed thereof; and DAVID BLOCK and  
JANE DOE BLOCK, and the marital community composed thereof,

Respondents.

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BRIEF OF RESPONDENTS

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Daniel R. Kyler  
Attorney for Respondents  
WSBA #12905  
RUSH, HANNULA, HARKINS  
& KYLER, LLP  
4701 So. 19<sup>th</sup> St., Suite 300  
Tacoma, WA 98405  
Phone: 253-383-5388

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## I. NATURE OF THE CASE

This appeal arises out of a Condominium Association's Board filing a lawsuit on behalf of the Association alleging a breach of contract with third parties. The Board failed to comply with the Condominium Covenants' requirements for the prosecution of such a lawsuit and it therefore lacked standing to pursue its claims against defendants. Defendants moved for summary judgment on the Board's lack of standing to pursue its lawsuit. The Trial Court, Judge Helen Whitener, dismissed plaintiff's claims on the basis of the Board's failure to comply with the Condominium Association's own Declarations and Covenants and entered an order of dismissal, with prejudice.

## II. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENT OF ERROR

- A. Whether the Board's failure to comply with mandated Condominium Declaration procedures for the prosecution of a lawsuit against third parties requires the dismissal, with prejudice of the Condominium Association's lawsuit?**
- B. Is a decision of the Trial Court on the validity of Condominium Declaration requirements for the Board to prosecute a lawsuit a decision on the merits of the Board's "standing" for a dismissal, with prejudice, of the lawsuit?**

### **III. STATEMENT OF THE CASE**

On March 11, 2019, Brent McCausland and David Block were served with the instant lawsuit commenced at the direction of the five Board members of the Lost Lake Homeowners Association (hereinafter “HOA”) without notice to, or the required affirmative vote of, the Unit Owners as required by the Covenants governing Lost Lake. (RCP 286-289). The Board is a 5-member group elected by Unit Owners to run the business of the Condominium Association subject to the limitations and restrictions of the Declarations and Covenants. (CP 176-177) Lost Lake Resort is a condominium that is governed by a document entitled “Declaration and Covenants, Conditions, Restrictions and Reservations for: Lost Lake Resort, a Condominium” (hereinafter the “Covenants”) (CP 74). With certain exceptions as set forth in paragraph 10.12.2, none of which are not applicable here, Section 10.12.3 of the Covenants prohibits the HOA, or the Board acting on behalf of the HOA, from instituting or defending any lawsuit without first having a detailed litigation summary prepared, having that summary distributed to the owners of each condominium unit, and then obtaining approval by the Unit Owners. (CP 79)

Section 10.12.2(e) of the Covenants does allow a Board on behalf of the HOA to commence a lawsuit before getting Unit Owner approval to

avoid the running of a statute of limitations, but nothing else: not even service of process. (CP 78) The Covenants provide:

10.12.2 The provisions of this Section 10.12 shall not apply to Legal Proceedings, as a result of which the Association could not be held responsible for costs of suit (including fees for attorneys, experts, witnesses, investigations and other costs of suit) in a (sic) aggregate amount of not more than \$5,000 (including without limitation fees contingent on a result), and which involve:...

\* \* \*

(e) The filing of a complaint, answer or other pleading for the limited purpose of satisfying a statute of limitation deadline, avoiding entry of a default order or judgment, or preventing personal injury or serious harm to the Condominium (if such purpose is certified in good faith by the Association's attorney), but except for this limited purpose the other conditions Section 10.12 must be satisfied.

(CP 78)

Rather than complying with the Declarations and Covenants, the Board filed the instant action and proceeded with the lawsuit by serving the defendants, (RCP 286-289) participating in discovery (CP 158), filing a confirmation of service (RCP 290), and otherwise prosecuting its claims. (CP 48-60; CP 61-68)

On August 1, 2019 defendants filed and served a motion for summary judgment asking that the HOA's claims be dismissed for lack of authority of the Board to bring the action. (RCP 293-294) That motion was never heard. On September 25, 2019, defendants filed and served

their Amended Motion for Summary Judgment (CP 19-20). Like the previous motion for summary judgment, that motion asked the Court to dismiss the action because it had been brought without: (1) the preparation of a litigation summary; (2) the distribution of the litigation summary to each Unit Owner; and (3) an affirmative vote of the Unit Owners to approve litigation as required by the Covenants. (CP 20; 23-25) Although it was originally scheduled for October 25, 2019 (RCP 303), due to the Court's schedule and difficulty obtaining a hearing date, the motion was continued to November 22, 2019. (RCP 315) Despite having almost 4 months from the date of service of the original motion for summary judgment asking that this case be dismissed for the failure of the Board to comply with the requirements of the Covenants for prosecuting an action, the Board did not have a litigation summary prepared, distribute a summary to its Unit Owners, or obtain Unit Owner approval for prosecuting the action as required by the Covenants. Instead, the Board, as directed by its five Board members, defended the summary judgment in further violation of the Covenants. (CP 48-60; 69-83, 61-68)

The Board raised three defenses to defendants' summary judgment motion. They included:

- (1) That the defendants who had filed the summary judgment motion were successor declarants and that their defense to the action was subject to an arbitration provision of the Covenants; (CP 53-54)
- (2) That the Board was authorized to pursue the litigation without providing a litigation summary, or obtaining Unit Owner approval under the Covenants, because the action was filed to avoid the running of the statute of limitations on its claims; (CP 54-58)
- (3) That it would be inequitable to grant summary judgment because, the Board alleged, the defendants breached the contract at issue in the case. (CP 58-59) That argument was not supported by any legal authority. (CP 58-59)

At oral argument of the summary judgment motion, counsel for the Board essentially abandoned its third argument and concentrated on its argument that the defendants' defenses to the Board's claims had to be heard in arbitration. It was the position of the Board that the *defenses* to the Board's claims were to be heard in a separate venue from the pending litigation brought by the Board. (CP 53-54)

The Trial Court correctly ruled that the Condominium Association had no authority to pursue this action beyond the filing of a complaint to toll the statute of limitations. Judge Whitener ruled that because the action was not one of the Section 10.12.2 enumerated exceptions to the requirements of providing the Unit Owners with a litigation summary and obtaining Unit Owner approval before pursuing litigation, beyond the

mere filing of the complaint to avoid the running of the statute of limitations, the Board had no authority to involve the Association in litigation. Serving the lawsuit and pursuing the litigation without complying with the Covenants violated Covenant Sections 10.12.3 and 10.12.2(e). The Court adopted the defendants' argument that the litigation could not be pursued without providing the Unit Owners with the litigation summary and obtaining the required Unit Owner approval.

An order was entered on the date of the summary judgment hearing. (CP 140-142) Counsel for the Board did not provide an alternative proposed order and did not make any objection to the order presented. No request for reconsideration was filed on this issue and this appeal followed.

#### **IV. LAW AND LEGAL ARGUMENT**

##### **A. Standard of Review.**

There is no substantial dispute between the parties, in general, as to the scope and standard of review of this Court. Insofar as the issues on review before this Court concern Condominium Declarations and the Trial Court's application of the factual circumstances herein and those Declarations, summary judgment is appropriate where there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. CR 56(c). To the extent that a Condominium

Declaration is at issue in a motion for summary judgment, the Washington Supreme Court has held that a Condominium Declaration is like a deed, “the review of which is a mixed question of law and fact”. *Lake v. Woodcreek Homeowners*, 169 Wn.2d 516, 526, 243 P.3d 1283 (2010). The possible or potential factual issue from a Condominium Declaration, is the “declarant’s intent”, which the *Lake* Court stated that the Court should “discern from the face of the Declaration”. *Lake*, 169 Wn.2d at 526. The legal consequences of the Declaration are questions of law which an Appellate Court reviews de novo. *Lake*, 169 Wn.2d at 526.

Contrary to Appellant’s argument in its Opening Brief under Standard of Review, a reviewing Court is simply discerning the Declarant’s intent from the face of the Declaration. Construing that “intent” most favorably to a non-moving party on summary judgment is without support in the authority cited by Appellant.

**B. Errors claimed by the Board on appeal were not raised or addressed in the Trial Court and RAP 2.5(a) should prohibit their argument before this Court.**

Except for the argument that the Covenants allowed this action to be brought to avoid the running of the statute of limitations, none of the arguments now made by the Board on appeal were made in the Trial Court. RAP 2.5(a) generally does not allow parties to raise claims for the first time on appeal. *State v. Locke*, 175 Wn. App. 779-796-797, 307 P.3d

771, 779-780 (2013). There are three exceptions contained in RAP 2.5(a)

to the general rule which are:

1. Lack of jurisdiction in the Trial Court;
2. Failure to establish facts upon which relief can be granted; and
3. Manifest error affecting a constitutional right.

The Board has not argued any of these three bases to justify making its new arguments in this Court which were not raised or addressed in the Trial Court. This Court should not consider any of the new defenses raised by the Board in this appeal that were not presented in the Trial Court where the defendants would have been in a position to make a proper record and respond. The only issue raised in this appeal that was also argued in the Trial Court, is the Board's allegation that this action was properly filed and pursued without Unit Owner approval to avoid the running of the statute of limitations.

**C. The Trial Court's decision that the Board was without authority to pursue this action without providing a litigation summary and obtaining approval by Unit Owners as required by the Covenants, was on the merits and the Trial Court should be affirmed and this appeal dismissed.**

The Board's argument on appeal is that the Trial Court erred in entering an order of dismissal with prejudice. It fails for two (2) reasons: First, counsel for the Board did not object to an order containing a

dismissal with prejudice, nor was an alternative order submitted to the Trial Court. This Court should not address the Board's current claim raised for the first time on appeal. RAP 2.5(a) and State v. Locke, supra.

Second, the Trial Court did consider on the merits whether the Board had authority to bring this action without having a Litigation Summary prepared, distributing it to the Unit Owners and thereafter obtaining approval to commence this litigation by the Unit Owners as required by the Covenants. The Trial Court ruled, based on the clear language of the Covenants, that the Board was without legal authority and therefore had no standing to bring the action, because it had neither prepared, nor distributed, a Litigation Summary to each Unit Owner, nor obtained the required vote of Unit Owners as provided in the Covenants. While the Trial Judge did not reach the merits of the substantive contract claims alleged by the Board, the Trial Court did decide that the Covenants required a Litigation Summary and approval by 80% of the approximately 270 Unit Owners before the litigation could be commenced. That decision by the Trial Court was on the merits.

Substantial authority supports defendants' position that dismissal of a case on the basis of lack of standing, or lack of jurisdiction, is on the merits and precludes a subsequent action even though the dismissal was not on the merits of the underlying dispute. Frank C. Minvielle, LLC v.

Atl. Ref. Co., 2007 U.S. Dist. LEXIS 65981 (W.D.La., Sept. 6, 2007) addressed whether a prior dismissal of a case based on lack of standing, without reaching the underlying claim merits, precluded a second lawsuit on the same issue. When a second action was brought by the same party, on the same claim, the Court held that it was barred by *res judicata* which, in Louisiana, includes both claim and issue preclusion, more commonly known as *res judicata*. The Minvielle Court explained and held as follows:

Minvielle first asserts that the Minvielle I decision was not a judgment on the merits. Although it is technically correct, it does not preclude application of *res judicata* in this case. In Minvielle I, the District Court granted IMC's summary judgment based upon Minvielle's lack of standing, a jurisdictional issue. Cobb v. Cent. States, 461 F.3d 632, 635 (5<sup>th</sup> Cir. 2006) "[T]he issue of standing is one of subject matter jurisdiction . . .)". Although a jurisdictional ruling is technically not an adjudication on the merits, "[I]t has long been the rule that principles of *res judicata* apply to jurisdictional determinations – both subject matter and personal." Ins v. Corp. of Ireland, 456 U.S. at 702 n. 9; accord Beiser v. Weyler, 284 F.3d 665, 673 (5<sup>th</sup> Cir. 2002). As we have explained,

although the dismissal of a complaint for lack of jurisdiction does not adjudicate the merits so as to make the case *res judicata* on the substance of the asserted claim, it does adjudicate the Court's jurisdiction, and a second complaint cannot command a second consideration of the same jurisdictional claims.

Boone v. Kurtz, 617 F.2d 435, 436 (5<sup>th</sup> Cir. 1980) (*per curiam*).

Minvielle, 15-16.

The Court in Kendall v. Overseas Dev. Corp., 700 F.2d 536 (9<sup>th</sup> Cir. 1983) held that a case dismissed for lack of *in personam* jurisdiction precludes subsequent re-argument of personal jurisdiction in a subsequent, second suit and requires dismissal of the second suit in the same jurisdiction even though the original action was previously dismissed on jurisdictional grounds and could have been brought in a jurisdiction where there was in fact jurisdiction over the moving defendant.

While without precedential value before this Court, GR 14.1(a), the *unpublished* decision of Gardiner v. Fannie Mae Corp., 127 Wn. App. 1016, 2005 Wn. App. LEXIS 1757 (2005) is instructive on the issue of standing and the legitimate, *res judicata* impact on a decision of the Trial Court that reaches the merits of the standing issue, but not the merits of the underlying, substantive issue in the case. Gardiner v. Fannie Mae Corp., 127 Wn. App. 1016, 2005 Wn. App. LEXIS 1757 (2005)

The issue therefore of whether or not the Board can prosecute a lawsuit against any of the defendants in this case, purporting to act on behalf of the HOA, without first providing a Litigation Summary to each Unit Owner and obtaining approval of Unit Owners as required by the

Covenants *has been decided on the merits*. The Board had no standing to pursue this action without that authorization and the Court's ruling on that issue is on the merits and precludes the Board bringing a second action against defendants without proper Unit Owner approval.

Defendants' reliance on the case of Zucker v. Nadreau, 35 Wn.2d 735, 214 P.2d 652 (1950), is misplaced and provides no authority for the particular circumstances of the dismissal of plaintiff's claims herein with prejudice. Zucker involved suit on a contract which had a number of components including the defendant's payment of specific expenses and bills related to a piece of property. At the time the appellants brought suit in Zucker, the time period for the completion of the contract had not expired and as established by the testimony in the trial court in that case, the purchaser defendants were not in default and "that appellants had not been damaged or prejudiced by any act of the respondents." Zucker, 35 Wn.2d at 738. At the conclusion of the trial, the court found in favor of the respondents and awarded them their costs as prevailing parties. The Trial Court then dismissed appellants' complaint and dismissed it with prejudice.

On appeal, the Zucker Court, apparently upon its own initiative, modified the dismissal of the appellants' complaint to be a dismissal of the action without prejudice. Even though the matter was substantively tried,

appellants still had a continuing and ongoing contract with the defendants and the implication of the Court's modification of the Trial Court's dismissal obviously pertained to the potential for a future breach of contract between the parties in which an additional or further legal action between them might be appropriate. That is not the situation presented by the case at bar. Contrary to the *Zucker* decision, nothing about the covenants and the requirements required of the Board in pursuing a lawsuit on behalf of its Association can change. The Court's determination that the Board must comply with its covenants to pursue a lawsuit was decided on its merits and a dismissal of the Board's claims, with prejudice as to that issue, was appropriate.

The Board's appeal is without merit. The Trial Court should be affirmed and this appeal dismissed.

**D. The Trial Court's dismissal of the lawsuit, with prejudice, was not based on a "technicality" and the Trial Court should be affirmed and this appeal dismissed.**

The Board next argues before this Court that the Trial Court's dismissal should not have been with prejudice because the basis for the dismissal was based on a "technicality". The Trial Court dismissed the Board's lawsuit because the Board did not have authority, or standing, to pursue a lawsuit. The Board did not make this argument that the Trial

Court's dismissal should not be with prejudice because the Trial Court's decision was based on a technicality. That argument should be rejected by this Court simply for that reason, RAP 2.5(a); *State v. Locke, supra*. This argument by the Board was not addressed or raised by any of the pleadings in this case at the Trial Court level and therefore defendants were not able to create a record for this Court to review on appeal so that the Trial Court's order could be appropriately considered in this regard. This Court should not consider the Board's argument that the dismissal, with prejudice, was based on a "technicality".

In addition to the fact that this second argument of Appellant is also raised for the first time on appeal, the primary authority cited by the Board on this issue actually supports the Trial Court's dismissal with prejudice. RCW 64.34.304(1)(d), relied upon as the basis for Appellant's argument that this statute allows the Board to prosecute this action, expressly makes the right of the Association to prosecute this suit "subject to the provisions of the declarations". The Covenants in this case have express provisions that must be followed before an action can be pursued on behalf of the HOA. While the Board could have prosecuted this suit by following the provisions of the Covenants, it chose not to do so. Without complying with the Covenants and obtaining approval of the requisite Unit

Owners as provided by the Covenants, the Board had no authority and no standing to pursue such an action.

The Board also cites RCW 64.34.455 in support of this same argument at page 10 of its opening brief claiming that the Trial Court's dismissal is based on a technicality and therefore should not have been entered with prejudice. Again, that argument was also not made in the Trial Court and should not be considered by this Court. Regardless, a plain reading of the cited statute makes it clear that this claimed authority is completely irrelevant to the Board's contract claims against the defendants. RCW 64.34.455 provides:

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.

By its express terms, this statute applies to the failure to comply with the provision of the condominium statute, or the declarations, or the bylaws of the condominium. It does not apply to a breach of contract claim between the HOA and a third party.

The Board has not cited any authority in its opening brief that supports its argument that because the dismissal of its claims in the Trial Court was based on a "technicality" the dismissal should be without

prejudice. The Board's second argument on appeal should be summarily rejected as it is without authority.

**E. The Board's argument that prosecuting its claim was permitted by the Covenants to avoid the statute of limitations is directly contrary to the language of the Covenants and erroneous and the Trial Court should be affirmed and this appeal dismissed.**

The Board argues in its opening brief, section D, that the action it took in filing and prosecuting this lawsuit was authorized by the Covenants because the case was filed to avoid the running of the statute of limitations. In making this argument, the Board does not address the controlling provision of the Covenants on this subject or the basis of the ruling by the Trial Court. Instead, it relies upon the Covenant language in an exception to the rule prohibiting the Board's lawsuit and then misapplies the exception.

Section 10.12.3 of the Covenants sets forth the requirements that must be met before the Condominium Association, or any Board acting on behalf of the Condominium Association may institute legal proceedings.

That section provides, in relevant part, as follows:

10.12.3. In order for the Association (or the Board acting on behalf of the Association) to institute, defend, or intervene in Legal Proceedings, and in order for the Association to become obligated in the aggregate sum in excess of \$5,000, to professionals, consultants or other experts in connection with Legal Proceedings, *the following conditions must first be satisfied:*

(a) The Board *has received a detailed, written summary* (“*Litigation Summary*”) concerning the substance of the proceeding, including: (i) agreements with lawyers, experts and consultants; issues involved; (ii) legal and factual basis of anticipated allegations on behalf of and against the Association; (iii) remedies to be sought on behalf of and against the Association; (iv) estimated amount to be sought on behalf of (and that could be sought from) the Association, (v) Association’s estimated costs of suit (including fees for attorneys, experts, witnesses, investigations and other costs of suit) and any third-party costs of suit that the Association would pay if the Association does not prevail; (vi) reports and recommendations by any professionals or consultants retained by the Association (and by any opposing party, if available); (vii) any written demands or settlement offers made by an opposing party (the Board shall request that an opposing party make such demand and settlement offer); and (viii) any negative consequences that the Association, Condominium or Owners could suffer during such proceedings including required disclosures to prospective purchasers, impediments to Unit refinancing or diminishment of Unit value...

(c) *A copy of the Litigation Summary shall be transmitted to all Owners*, together with a written notice of the Owner’s right of access to the Books and Records of the Association as provided in Section 10.6.1, and a written notice of a special Owner’s meeting to be convened as provided in this Declaration, at which meeting the Declarant (and its representatives shall be entitled to attend and participate in on a non-voting basis).

(d) *The Owners holding eighty percent (80%) of the total Association voting power must grant approval for the Association* (or the Board acting on behalf of the Association) to institute, defend, or intervene in legal proceedings . . .

(Italics added.)

Covenants section 10.12.3 requires the preparation of a Litigation Summary containing the information required by Section (a) before either:

- (1) Any litigation can be commenced; or
- (2) Before the Condominium Association can be obligated to paying more than \$5,000 in aggregate to any attorney, professional, consultant or expert in connection with the proceeding.

The primary argument made by defendants at the Trial Court and which the Court adopted, did not involve the second prong involving the \$5,000 cost incurred by the Board in litigation. It was that Covenant Section 10.12.3 requires Unit Owner approval for the Board to institute litigation regardless of the cost.

Irrespective of whether or not the \$5,000 spending limit has been, or will be reached, Covenants Section 10.12.3 prohibits the prosecution of a lawsuit by the Board until a Litigation Summary has been prepared, distributed to each Unit Owner, and 80% of the Unit Owners have voted in favor of the litigation.

The Board's brief, argues that there is an exception to Covenants Section 10.12.3 contained in 10.12.2 that permits the filing of a lawsuit by the Board, without approval of the Condominium Unit Owners, to avoid the running of the statute of limitations. The Board's brief and the argument therein misleadingly leaves out of its content the crucial and

limiting language of that section. The words left out of the Board's brief where 10.12.2 is quoted at page 12 are: "and which involve". The provision actually states:

10.12.2. The provisions of this Section 10.12 shall not apply to legal proceedings, as a result of which the Association could not be held responsible for costs of suit (including fees for attorneys, experts, witnesses, investigations and other costs of suit) in a (sic) aggregate amount of not more than \$5,000 (including without limitation fees contingent on a result), *and which involve:* (Emphasis added.)

There are five (5) paragraphs thereafter containing exceptions to the general rule that no action can be filed without homeowner consent as required by the Covenants. The exception relied upon by the Board both at the Trial Court, and before this Court, is contained in Section (e) which is an exception to the prohibition of the Board filing suit on the following basis:

(e) The filing of a complaint, answer or other pleading for the limited purposes satisfying a statute of limitation deadline, avoiding entry of a default order or judgment, or preventing personal injury or serious harm to the Condominium (if such purpose is certified in good faith by the Association's attorney), *but except for this limited purpose the other conditions of Section 10.12 must be satisfied.* (Emphasis added.)

Section 10.12.2(e) allows the filing of a complaint to protect a statute of limitations without any further action being taken before a Litigation Summary is prepared and the Condominium Owners approve

the litigation. This section also makes it clear that **nothing** other than the filing of the complaint can be undertaken to pursue the litigation until a Litigation Summary is disseminated to the Owners and the Unit Owners approve the litigation. Under this exception, the Board has the authority to file the lawsuit without the dissemination of a Litigation Summary and Unit Owner approval. However, the same provision is equally clear that no action can be taken other than the filing of the complaint *without Condominium Unit Owner approval*. Even the service of the complaint on the defendants without Unit Owner approval is a violation of the Covenants. The drafter of these Covenants was obviously familiar with Washington statute RCW 4.16.170. That statute provides:

For the purpose of tolling any statute of limitations an action shall be deemed commenced when the complaint is filed or summons is served whichever occurs first. If service has not been had on the defendant prior to the filing of the complaint, the plaintiff shall cause one or more of the defendants to be personally served, or commence service by publication within 90 days from the date of filing the complaint. If the action is commenced by service on one or more of the defendants or by publication, the plaintiff shall file the summons and complaint within 90 days from the date of service. If following service, the complaint is not so filed, or following filing, service is not so made, the action shall be deemed to not have been commenced for purposes of tolling the statute of limitations.

RCW 4.16.170.

Under this statute, a lawsuit can be filed to toll the statute of limitations and the statute is tolled back to the date of filing if service occurs within 90 days thereafter. What the provision of the Covenants argued by the Appellant Board permits is the Board's filing suit to toll the statute of limitations, then dissemination of a Litigation Summary, and obtaining Unit Owner approval in time to then serve the filed lawsuit within the 90-day period after filing. In this case, that did not happen.

No Litigation Summary was ever prepared. No vote of the Unit Owners was ever taken. Instead, the Board served its lawsuit, participated in discovery, hired expert witnesses and filed a response to defendants' motion for summary judgment, all without obtaining approval of the Unit Owners as required by the Covenants. (CP 46, 47, 48-60, 61-68 and CP 158; RCP 286-289). All of the actions taken by the Board after the filing of its complaint violated the Covenants. Because of the long delay in having the defendants' motion for summary judgment heard, the fact that the complaint was filed March 6, 2019 meant that the Board had almost nine (9) months before defendants' summary judgment was heard during which it could have attempted to obtain Unit Owner approval. Instead, a rogue Board ignored the Covenants and proceeded with this litigation without authority or standing. The HOA's lawsuit was properly dismissed, with prejudice.

Even though proving \$5,000 had been, or would be, spent was not necessary for the Court to grant defendants' motion for summary judgment, the Board did not argue in the Trial Court that the \$5,000 limit had any relevance to the summary judgment before the Court and did not deny that far more than \$5,000 had been spent by the Board as shown by the Declaration of Michael C. Hasket of Vantage Community Management, Inc. supporting defendants' motion for summary judgment. (CP 40-47) Contained in the Clerk's Papers at page 44 is a bill from the attorney to the Board for this litigation. It shows that during the previous month, March 2019, the month of the filing of the complaint in this cause, a legal bill on this case for \$7,970 was submitted and that the amount had been paid. It also establishes that the retainer for the filing of the lawsuit was \$7,000. The following pages of the Clerk's Papers show thousands of additional dollars spent on this case. (CP 45-46) Even assuming the \$5,000 limit were relevant to the decision in the Trial Court in this case, which it was not, defendants in their summary judgment motion made a prima facie showing that the dollar amount limitation had been exceeded. That prima facie showing shifted the burden of proof to the Board to establish that the expenditure limit had not been met. The party moving for summary judgment has the initial burden of showing there is no dispute as to any issue of material fact; but once that burden is met, the

burden shifts to the non-moving party to establish the existence of an element essential to its case. *Hiatt v. Walker Chevrolet Co.*, 121 Wn. 2d 57, 66, 837 P.2d 618 (1992).

The Board and its counsel provided no such proof and did not allege, or even argue at any point, that the limit on expenditures without Unit Owner approval had not been met. Even if the Board was allowed to prosecute a suit against third parties on a contract claim without Unit Owner approval as required by the Covenants, so long as it would not cost no more than \$5,000, the evidence placed in the record by the defendants in their motion for summary judgment established a prima facie case that the dollar figure had been exceeded and the Board did not contest that fact in any way.

**F. Neither party requested the Trial Court to stay these proceedings to allow the Board to attempt to comply with the Covenants.**

The Appellant also argues, in part F of its opening brief, that instead of a dismissal, the Trial Court should have stayed the underlying lawsuit and extended an opportunity for the Board to obtain Unit Owner approval to bring the suit as provided in its Covenants. No authority is cited for that argument and this Court should not consider it. *McKee v. Am. Home Prods., Corp.*, 113 Wn.2d 701, 782 P.2d 1045 (1989) [Issues not supported by argument and citation to authority will not be considered

on appeal.] This is yet another argument by Appellant in its opening brief where the argument was not made in the Trial Court; nor was this request ever made to the Trial Court. This new argument should not be considered on appeal. RAP 2.5(a); *State v. Locke, supra*.

The Board had almost nine (9) months after it filed its complaint before defendants' motion for summary judgment was heard. The Board elected to proceed without Unit Owner approval as required by the Covenants. Defendants' motion for summary judgment was appropriate. The Trial Court did not err. The Trial Court should be affirmed and this appeal dismissed.

**G. The Covenants' requirement that the Board obtain Unit Owners' approval to pursue a lawsuit is not a violation of the statute and the Trial Court should be affirmed and this appeal dismissed.**

The Appellant's final argument in its Opening Brief is that its lawsuit should not have been dismissed because "[the] limitation on the Association's power to commence judicial action to enforce rights and obligations under the Act is unenforceable". (Appellant's Brief at p. 16) This argument was not made in the Trial Court and once again, should not be considered on appeal. RAP 2.5(a); *State v. Locke, supra*.

This argument should also be summarily rejected as the Appellant's complaint herein did not raise any claims addressed under the

Condominium Act. All of the claims brought by the Appellant were contract claims arising out of a 2012 written agreement. (CP 1-8)

Although all of the claims, against all of the defendants, were third-party contract claims, the Board pled different contract claims against the individual defendants Block and McCausland than it did against the entity defendants LLR and LLD. As to the individual defendants Block and McCausland, the Board's complaint pled specifically a breach of a written agreement between those defendants and the HOA to repair and improve the water system, septic system and electrical system (CP 4). Those are not claims under the Condominium Act, but instead, pure third-party contract claims. As to Board's claims against defendants LLR and LLD, the Board's complaint alleges a breach of contract to pay monies it alleges were owed upon the sale of lots owned by LLR and LLD. (CP 5). Again, the Board's claims are pure third-party contract claims; there is no claim to enforce any provision of the Declarations or Bylaws addressed by the Condominium Act.

The Board pled its claims against LLR and LLD in the manner in which it did for two (2) reasons: Neither entity owned any lots in the Condominium Resort at the time this action was commenced. Therefore, these entities owned no property that could be foreclosed for non-payment of condominium dues. The condominium lots that had been owned by

LLR and LLD were subject to a Deed of Trust that was judicially foreclosed extinguishing the interest of those two entities in the condominium lots. (CP 99).

Second, pursuant to the Condominium Declarations and Covenants, the foreclosure brought by LLRIG TWO, LLC extinguished past-due dues that were more than six (6) months in arrears at the time of foreclosure. (CP 99, 190).

For these reasons, when the Board brought this lawsuit, it elected to sue LLR and LLD on contract claims for amounts it claimed were due back to 2012 and not for judgment, or foreclosure, on past-due Condominium dues that could have, at best, been for six (6) months of dues that had already been paid. There were no dues owed since the foreclosure. The Board did not argue a right to bring this action on past-due dues as a defense to defendants' motion for summary judgment because, just as there were no claims brought against Block and McCausland under the Covenants, or the Condominium Act, there were no claims brought against the entities LLR or LLD under the Covenants or the Condominium Act.

That there were no claims brought under the Condominium Covenants or the Condominium Act is also apparent because the Covenants themselves require that type of claim be brought in arbitration.

They could not have been brought in this action in Superior Court.

Section 25.2 of the Covenants requires disputes, by or among parties subject to the Declarations to be brought in arbitration. (CP 218) Had the claims brought by the Board not been third-party contract claims, the Board would have had to bring these claims in arbitration.

Insofar as there were no claims brought under the Condominium Act, the argument in the Board's appeal that RCW 64.34.455 and RCW 64.34.100(2) apply to the facts of this case is simply incorrect. Those statutes address claims for relief for violation of the Condominium Act, the Condominium Declarations, or Bylaws, none of which are the subject of this lawsuit.

Finally, although the Board alleges any "limitation" on the Board's power to commence litigation and enforce its rights is unenforceable under the Condominium Act, the Board never even articulates what limitation it refers to. (Appellant's Opening Brief at pgs. 16-18) Respondents should not be required to guess what limitation the Board is arguing is unenforceable. This Board had the right to bring this lawsuit if its Covenants were complied with. Instead, a rogue Board chose not only to file this lawsuit, which they could have done without Unit Owner approval, but to serve and prosecute the lawsuit without complying with its Covenants. The Trial Court's decision that this Board did not have the

authority to prosecute this action without Unit Owner approval as required by its Covenants, was correct and should be affirmed. Contrary to the Board's arguments, the HOA could have brought this suit had Unit Owner approval been obtained. It wasn't and summary judgment was appropriate. The Trial Court should be affirmed and this appeal dismissed.

**H. Respondents request that this Court award attorney's fees to them for the Board's non-compliance with its own Declarations and Bylaws pursuant to RCW 64.34.455 for the prosecution of this litigation and this appeal.**

Pursuant to RAP 18.1, respondents request an award of attorney's fees on appeal pursuant to RCW 64.34.455.

The Board, prosecuting this litigation on behalf of the HOA is certainly an entity subject to RCW 64.34.455. The Board continues its failure to comply with its own Declarations. There is no question but that Respondent defendants have been adversely affected by the Board's failure to comply with its Declarations in the defense of the Board's action in the Trial Court and now in the defense of the Board's appeal to this Court. Pursuant to RAP 18.1, respondents request an award of attorney's fees from this Court.

## V. CONCLUSION

The Board's Opening Brief is replete with new arguments and claims not asserted or argued in the Trial Court and raised for the first time on appeal, many without any citations to relevant authority. The only issue raised by the Board on appeal that was argued in the Trial Court pertains to the Board's claim that it filed this lawsuit to preserve the statute of limitations. That argument is without merit insofar as only the Board's filing of its underlying complaint was authorized by the Covenants, not the service and prosecution of the complaint without Unit Owner approval. The Board's contentions that somehow the Covenants in this case are unenforceable or inapplicable because of the Condominium Act is simply incorrect when the substance of that law is reviewed and an understanding of what the Board claimed and why it claimed it, is understood from the complaint herein. The Trial Court was correct in its dismissal of plaintiff's claims with prejudice. The issue of the Board's standing to bring these claims was on its merits and should be affirmed and this appeal dismissed.

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Pursuant to RAP 18.1, respondents request an award of attorney's fees based on RCW 64.34.455 for their attorney's fees and costs incurred on appeal.

DATED this 15<sup>th</sup> day of July, 2020.

RUSH, HANNULA, HARKINS & KYLER, LLP  
Attorneys for Respondents

By:   
Daniel R. Kyler, WSBA #12905

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that the following is true and correct:

I am over the age of 18, competent to testify and not a party to this action. On the date set forth below, I served the documents to which this certificate is attached via email and first-class mail on the following persons:

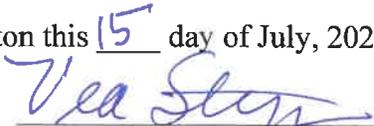
**Counsel for Defendant/Appellant**

Marlyn K. Hawkins  
Barker Martin  
701 Pike St., Suite 1150  
Seattle, WA 98101  
[MHawkins@barkermartin.com](mailto:MHawkins@barkermartin.com)  
[lstoffel@barkermartin.com](mailto:lstoffel@barkermartin.com)

Michael S. Rogers  
Christopher J. Nye  
Reed McClure  
1215 Fourth Avenue, Suite 1700  
Seattle, WA 98161-1087  
[mrogers@rmlaw.com](mailto:mrogers@rmlaw.com)  
[cnye@rmlaw.com](mailto:cnye@rmlaw.com)  
[knakasone@rmlaw.com](mailto:knakasone@rmlaw.com)

Elizabeth C. Thompson  
Law Office of Elizabeth Thompson, PLLC  
P.O. Box 1652  
Milton, WA 98354  
[ethompson@elizabeththompsonlaw.com](mailto:ethompson@elizabeththompsonlaw.com)

Signed at Tacoma, Washington this 15 day of July, 2020.

  
\_\_\_\_\_  
Veia Stepan  
Assistant to Daniel R. Kyler

**RUSH HANNULA HARKINS AND KYLER, LLP**

**July 15, 2020 - 9:16 AM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division II  
**Appellate Court Case Number:** 54365-6  
**Appellate Court Case Title:** Lost Lake Resort Condo Assn, Appellant v. Lost Lake Resort , Respondent  
**Superior Court Case Number:** 19-2-06000-5

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