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COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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AVERA LEE DEHLS,

Appellant,

vs.

KIONA PARK ESTATES,

Respondent.

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ON APPEAL FROM THE SUPERIOR COURT OF  
THE STATE OF WASHINGTON FOR LEWIS COUNTY

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**APPELLANT'S REPLY BRIEF**

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## TABLE OF CONTENTS

I. INTRODUCTION.....	1
II. ARGUMENT.....	1
1. Contract law governs the interpretation of CC&Rs and therefore the six year statute of limitations should apply.....	1
2. Kiona Park’s argument that the Legislature’s silence means no period of limitations was intended is illogical.....	4
3. Member of Corporation.....	7
4. A cause of action accrued when the annual dues became delinquent, at which point the statute of limitations began to run.....	8
5. The law governing installment contracts provides guidance here.....	10
6. RCW 4.16.020 and 4.16.150 do not apply.....	11
7. Kiona Park sat on its rights.....	15
III. CONCLUSION.....	16

## TABLE OF AUTHORITIES

### CASES

<i>Bellingham Bay Imp. Co. v. Fairhaven &amp; N.W.R. Co.</i> , 17 Wn. App. 371, 49 P. 514 (1897).....	13
<i>Cedar W. Owners Ass'n v. Nationstar Mortgage, LLC</i> , 7 Wn. App. 473, 434 P.3d 554 (2019) .....	8-11, 15
<i>Chicago, M. &amp; S. P. R. Co. v. Frye &amp; Co.</i> , 109 Wn. 68, 186 P. 668 (1919).....	13-14
<i>Child v. Idaho Hewer Mines</i> , 155 Wn. 280, 284 P. 80 (1930).....	7
<i>In re Dalziell</i> , 608 B.R. 245, 250 (2019).....	15
<i>Dietrich Bros. v. Anderson</i> , 183 Wn. 574, 48 P.2d 921 (1935).....	13
<i>Edmundson v. Bank of Am., NA</i> , 194 Wn. App. 920, 378 P.3d 272 (2016).....	11
<i>Garey v. Pasco</i> , 89 Wn. 382, 154 P. 433 (1916).....	14
<i>Halme v. Walsh</i> , 192 Wn. App. 893, 370 P.2d 42 (2016).....	3
<i>Herzog v. Herzog</i> , 23 Wn.2d 382, 161 P.2d 142 (1945).....	11
<i>Mohandessi v. Urban Venture, LLC</i> , 12 Wn. App. 2d 625, 459 P.3d 407 (2020).....	9
<i>Rodruck v. San Point Maint. Com</i> , 48 Wn.2d 565, 295 P.2d 714 (1956).....	7
<i>Sanwick v. Puget So. Title Ins. Co.</i> , 70 Wn.2d 438, 423 P.2d 624 (1967).....	2
<i>Seattle Trust Co. v. Pitner</i> , 18 Wn. 401, 51 P. 1048 (1898).....	7
<i>Wash. Fed. Nat'l Ass'n v. Azure Chelan, LLC</i> , 195 Wn. App. 644, 663, 382 P.3d 20 (2016).....	8

STATUTES

RCW 4.16.020.....11-12  
RCW 4.16.040.....passim  
RCW 4.16.150.....12-14  
RCW 64.34.364..... 5  
RCW 64.38 et seq.....6  
RCW 64.90.075.....5  
RCW 64.90.485.....5

## I. INTRODUCTION

The issue before this court is the applicable statute of limitations on Homeowners Association (HOA) dues. Kiona Park would have this court believe that there is no statute of limitations on HOA dues, or if there is, that the 10-year statute of limitations governing judgment liens & adverse possession should apply. For the reasons explained below, Kiona Park's position is untenable. Rather, the six-year statute of limitations governing contracts, agreements in writing and the use and occupation of real estate is the appropriate period of limitations.

## II. ARGUMENT

1. Contract law governs the interpretation of CC&Rs and therefore the six-year statute of limitations should apply.

Ample case law provides that CC&Rs shall be interpreted under contract law and Kiona Park agrees with this proposition – except when it comes to the application of the statute of limitations. Because such an interpretation no longer serves its needs, Kiona Park argues against application of the six-year statute of limitations. Such a position is incongruous.

First, Kiona Park misunderstands Mr. Dehls' argument regarding the applicability of RCW 4.16.040, and focuses on whether the CC&Rs are

a literal “contract” between the Association and Mr. Dehls. RCW 4.16.040 governs a “contract in writing” or a “written agreement.” RCW 4.16.040(1) (Emph. Added). If these two phrases were synonymous, why would the legislature go to the trouble to say the same thing twice? Quite simply, it would not.

While the CC&Rs may not be a true contract in the sense of having two signatories who negotiated the various terms and conditions, it is a written agreement. An analogous situation arose in *Sanwick v. Puget Sound Title Ins. Co.*, 70 Wn.2d 438, 423 P.2d 624 (1967). In that case, the Washington Supreme Court found that escrow instructions controlling a title company’s participation in a sale of real estate constituted a written contract for the purposes of RCW 4.16.040(1) even though the title company did not sign an agreement. The Court concluded the title company’s acceptance could be implied from its conduct in acting under the escrow instructions. *Id.*

Similarly, in the case at hand, while Mr. Dehls did not sign any of the Association’s governing documents, he did sign a contract for the purchase of the subject property, which was subject to the Declaration of Protective Covenants and Easements for Kiona Park Estates at the time of purchase. Much like the title company in *Sanwick*, Mr. Dehls’ acceptance

of the terms of membership in the Association can be implied from his conduct in purchasing the property.

Second, Kiona Park admits that “restrictive covenants are enforceable promises relating to the use of land.” Respondent’s Brief at 13, citing *Halme v. Walsh*, 192 Wn. App. 893, 906, 370 P.2d 42 (2016). If the governing documents prescribe the rights, obligations, and procedures of the Association, then Kiona Park should be fully bound by the provisions of those written agreements now – including the application of RCW 4.16.040. Kiona Park drafted the restrictive covenants and had them recorded. The covenants are enforceable written promises, and as such, they are within the very definition RCW 4.16.040(1).

Furthermore, as Respondent has argued in its brief, we should interpret the entirety of the governing documents to give effect to the intent of the parties. Kiona Park’s own governing documents, which it drafted, provide that it is a written “agreement”. Specifically, the 1981 Declaration of Protective Covenants and Easements for Kiona Park Estates provides, in pertinent part:

Accepting an interest in and to any portion of the Real Property **shall constitute an agreement** by any person, firm, or corporation accepting such an interest, that they and each of them shall be bound by and subject to the provisions of this instrument.

[...]

The parties in interest in and to any part of the Real property, and each of them, **shall have the right and authority to enforce provisions hereof** and in addition to any other remedy for damages or otherwise, shall have the right and authority to enforce the provisions hereof and the right to injunctive relief. The prevailing party in any action to enforce any provisions hereof shall recover a reasonable sum as attorney's fees and the costs of the action including reasonable costs of searching and abstracting the public records which sums shall be paid by the unsuccessful party.

CP 60, CP 72 (emphasis added).

The foregoing provision gives both the homeowner-member and the Association the right to enforce the terms of the Declaration. As a written agreement, as defined as such by Kiona Park itself, the enforcement of the Declaration or any of the Association's governing documents should be governed by the statute of limitations set forth in RCW 4.16.040(1).

2. Kiona Park's argument that the Legislature's silence means no period of limitations was intended is illogical.

Why was the Legislature silent on the statute of limitations in the HOA statute? Kiona Park would have you believe that it intended for no statute of limitations to apply, for application of a 10-year statute of limitations, or for the statute on mutual open accounts to apply. However, like Occam's razor, perhaps the most obvious conclusion is the correct one

– that the SOL governing written agreements, contracts and the use of real estate applies.

Looking first to the Condominium Act set forth in RCW 64.34 et seq., we find that it provides for a three-year statute of limitations on lien enforcement. RCW 64.34.364. Specifically, in pertinent part, it states:

A lien for unpaid assessments and the personal liability for payment of assessments is extinguished unless proceedings to enforce the lien or collect the debt are instituted within three years after the amount of the assessments sought to be recovered becomes due.

RCW 64.34.364(8).

Then to the Common Interest Ownership Act, RCW 64.90 et seq., which governs all common interest communities, both homeowner associations and condominium associations, created in the state of Washington on or after July 1, 2018. RCW 64.90.075. This Act provides:

A lien for unpaid assessments and the personal liability for payment of those assessments are extinguished unless proceedings to enforce the lien or collect the debt are instituted within six years after the full amount of the assessments sought to be recovered becomes due.

RCW 64.90.485(9).

In these two instances, we are first presented with a statute of limitations of three years for condominium associations existing between July 1990 and July 2018. Thereafter, a six-year statute of limitations applies for both homeowner associations and condominium associations. *Supra.*

Why did the Legislature expressly set forth the applicable statute of limitations period in these two statutes but not in the chapter governing Homeowners' Associations, RCW 64.38 et seq.? The logical conclusion is that the Legislature did not need to expressly state the applicable period of limitations when drafting Ch. 64.38 because the six-year statute of limitations so clearly applies. But when the Condominium Act was drafted, the Legislature sought to shorten the applicable period of limitations, making it three years. *Supra*. In doing so, the Legislature limited an Association's powers; it did not expand them.

When the recent Common Interest Ownership Act was created, covering both homeowner associations and condominium owner associations, the Legislature was presented with two different applicable statutes of limitations then existing – three years for condominium associations and six years for homeowner associations. Accordingly, it would stand to reason that in drafting the Common Interest Ownership Act, the Legislature would necessarily be required to draft a provision in the Act rectifying this discrepancy. This is exactly what it did. Now, in the new Act, the statute of limitations on lien foreclosure is clearly stated to be six years.

At no time, did any of the laws governing the various types of property owner associations envision a statute of limitations beyond six years. Kiona Park's arguments in favor of a statute of limitations of ten

years or even no applicable period of limitations is inconsistent with the entirety of the statutory history related to lien enforcement by homeowner and condominium owner associations.

### 3. Member of Corporation

Kiona Park is organized as a non-profit corporation and each property owner of that corporation is a member. CP 133-138. Members of the Association agree to pay annual dues to the organization in exchange for the Association's performance of its obligations in the Declarations, Articles and Bylaws, including but not limited to the maintenance of roadways.

The Declarations, Articles and Bylaws are writings and previously stated, set forth the obligations of both the Association and its members. When a corporate member seeks to enforce the obligations of a corporation, the time period to bring a legal action is six years from the date of breach by the corporation. *See e.g., Rodruck v. San Point Maint. Co.*, 48 Wn.2d 565, 578, 295 P.2d 714 (1956), citing *Seattle Trust Co. v. Pitner*, 18 Wn. 401, 51 P. 1048 (1898), *Child v. Idaho Hewer Mines*, 155 Wn. 280, 284 P. 80 (1930) (The bylaws, in effect, constitute a contract between the commission/association and its members). The same statute of limitations

would apply to a corporation's suit to enforce a member's performance under the corporation's governing documents.

When assessments were being levied by Kiona Park, Mr. Dehls was a member of the Kiona Park non-profit corporation. Whether the court considers the Bylaws of Kiona Park as a contract between itself and its owners or the entirety of its governing documents, the fact remains that the statute of limitations governing written contracts or agreements in writing would apply.

4. A cause of action accrued when the annual dues became delinquent, at which point the statute of limitations began to run.

The dues at issue in this case are annual assessments. They become due on January 1<sup>st</sup> of each year, and if unpaid after 90 days, they are considered delinquent and shall become a lien. CP 83-85; CP 114-115. Kiona Park wants to paint this as a situation involving one single event. This is simply not the case.

A cause of action accrues when a party is entitled to bring suit to enforce its rights. See e.g., *Cedar W. Owners Ass'n v. Nationstar Mortgage, LLC*, 7 Wn. App. 473, 483, 434 P.3d 554 (2019). Moreover, "[t]he six-year statute of limitations on a deed of trust accrues 'when the party is entitled

to enforce the obligations of the note.” *Id.* at 483, quoting *Wash. Fed. Nat’l Ass’n v. Azure Chelan, LLC*, 195 Wn. App. 644, 663, 382 P.3d 20 (2016).

In *Mohandessi v. Urban Venture, LLC*, the applicable statute of limitations was not in dispute. 12 Wn. App. 2d 625, 459 P.3d 407, 2020 Wn. App. LEXIS 1908 at 13 (2020). In that case, plaintiff was a condominium owner who was challenging assessments based on the common expense allocation, which was set forth in the governing documents that were provided to the property owners before they closed on the purchase of their condominium units. *Id.* at 14. The court stated “...any challenge to the common expense liability allocation accrued at the time the residential units were sold in 2006.” *Id.* at 14.

The reason a new violation did not occur each year was because the Association had “no discretion or authority to deviate from the common expense liability allocation set forth in the original governing documents.” *Id.* at 15. “Because there is no discretion to change the common expense liability allocation, any challenge to the original allocation accrued in 2006.” *Id.* at 16-17. Whereas, had the Association had discretion to change the allocation each year, the statute of limitations would have run from each year’s assessment.

Similarly, because annual assessments were levied by Kiona Park each year, a cause of action to enforce delinquent payments of those assessments would also accrue annually.

5. The law governing installment contracts provides guidance here.

Mr. Dehls is not arguing that Kiona Park's annual dues are an installment contract. However, the case law on installment contracts provides guidance in this matter. For example, in *Cedar W. Owners Ass'n v. Nationstar Mortgage, LLC*, Judith Allen was loaned money by Countrywide Bank in June 2008 to purchase a condominium. 7 Wn. App. at 477. She signed a promissory note requiring her to make monthly payments, as well as a deed of trust. *Id.* She also executed a "Condominium Rider" in which she agreed to pay condominium association (COA) dues and assessments. *Id.* at 478-79. Allen stopped making her monthly loan payments and stopped paying COA dues in June 2010. *Id.* at 479.

The COA foreclosed its lien and acquired title to the unit via auction. *Id.* Thereafter, the lender began nonjudicial foreclosure proceedings, and the COA brought suit to quiet title and enjoin the sale. *Id.* at 480-81. The COA argued that the statute of limitations barred the foreclosure. *Id.* at 481. The court disagreed, holding that for loans involving installment payments, "the six-year statute of limitations...accrues for each monthly installment

from the time it becomes due.” *Id.* at 484, citing *Edmundson v. Bank of Am., NA*, 194 Wn. App. 920, 930, 378 P.3d 272 (2016) (quoting *Herzog v. Herzog*, 23 Wn.2d 382, 388, 161 P.2d 142 (1945)).

Kiona Park argues that its annual assessments should not be considered installment payments but rather a revolving or mutual open account. Mr. Dehls concedes that the annual assessments are not installment payments. Rather, each annual assessment stands alone. As specified in Kiona Park’s governing documents, an annual assessment becomes due at the beginning of each year and is considered delinquent after 90 days.

A cause of action to enforce payment arises as soon as an owner fails to pay within 90 days. Therefore, akin to an installment contract where each installment gives rise to its own cause of action against which the period of limitations begins to run, so too does the statute of limitations begin to run against each annual assessment – separately and individually.

6. RCW 4.16.020 and 4.16.150 do not apply.

Kiona Park would prefer no statute of limitations be held to limit its right to enforce its assessment liens, but in the alternative, it has advocated for application of a 10-year statute of limitations under RCW 4.16.020. The 10-year period of limitations applies to actions for the recovery of real

property or for the possession thereof, for an action upon a judgment, or for past due child support. RCW 4.16.020.

This application of RCW 4.16.020 fails for several reasons. First, and quite simply, the lien arising from a delinquent assessment is not a judgment lien.

Second, Kiona Park's own governing documents prescribe how its liens will be treated. The original Declaration of Protective Covenants and Easements mandates that assessments "shall...be considered a lien against the property...and proceeded against as a lien for improving real property." CP 58-59. A lien arising from delinquent assessments does not involve the "recovery" of real property nor the "recovery of possession." At no time did Kiona Park have a right of possession or ownership of Mr. Dehls' property.

RCW 4.16.150 also does not apply. Kiona Park has argued as one of its many alternatives to the six-year statute of limitations that Mr. Dehls' delinquent assessments should be treated as a mutually open account. RCW 4.16.150 states:

In an action brought to recover a balance due upon a mutual open and current account, where there have been reciprocal demands between the parties, the cause of action shall be deemed to have accrued from the time of the last item proved in the account on either side, but whenever a period of more than one year shall have elapsed between any of a series of items or demands, they are not to be deemed such an account.

RCW 4.16.150.

A mutual open and current account does not arise in the context of property owner and property association. There are no reciprocal demands between the parties, nor last “items” proved. The case law governing the application of RCW 4.16.150 make it clear that the statute was intended to apply to mutually open accounts in which one party extends credit to another for the purchase of various goods.

For example, in *Dietrich Bros. v. Anderson*, Dietrich sold and delivered goods to the Andersons, the buyers, over a period of four years. 183 Wn. 574, 48 P.2d 921 (1935). In *Bellingham Bay Imp. Co. v. Fairhaven & N.W.R. Co.*, the contractor brought suit to have his lien declared superior to a mortgage lien after providing labor, supplies and materials to the railway company. 17 Wn. App. 371, 49 P. 514 (1897). In *Chicago, M. & S. P. R. Co. v. Frye & Co.*, plaintiff was a carrier who sued a shipper for freight charges incurred in connection with the shipment of hogs and cattle to a buyer during the years 1909 to 1914. 109 Wn. 68, 186 P. 668 (1919).

In the *Chicago* case, the plaintiff framed its complaint on the theory that a mutual, open and current account existed and therefore, the statute of limitations began to run only from the last item. *Id.* at 12. The court noted that while multiple shipments were sent to the defendant buyer, the defendant paid for the portion of the shipments it deemed to be correct and

any portion disputed were rejected and returned. *Id.* at 13. Finding that “...no credit was allowed to be extended and no credit was extended,” the court concluded that “the simple fact that, from time to time, there were disputes or misunderstandings as to the amount due upon a freight shipment, and the defendant refused to pay a particular item, or paid less than the amount claimed, and that this action is an action embracing all such separate and individual items, does not make it ‘a mutual, open and current account’ within the statute.” *Id.*, quoting *Garey v. Pasco*, 89 Wn. 382, 154 P. 433 (1916).

In this matter now before the Court, first and foremost, the facts and circumstances, simply do not meet the definition of mutual open and current account. This was not a situation where credit was extended to Mr. Dehls. The amount owed did not fluctuate up and down as it would with a credit account for the purchase of varying amounts or types of goods. Therefore, RCW 4.16.150 cannot apply.

Moreover, the fact that Kiona Park is attempting to circumvent the proper statute of limitations by lumping all annual assessments into a single amount due will not stand. As the Court noted in the *Chicago v. Frye* case, the mere fact that the lawsuit lumps the separate and individual items together in a case does not change the underlying factual determination made by the Court in deciding the appropriate period of limitations.

7. Kiona Park sat on its rights

Kiona Park admits to filing “several liens” against Mr. Dehls’ property. In fact, they filed three. The first lien was recorded in 2003 for dues owed for 2002. CP 239-240. They took no action to enforce that lien. The second was filed in 2006 for dues owed in 2004 and 2005. CP 242-243. They took no action to enforce that lien.

Notably, the 2006 lien made no mention of the 2003 lien, nor did it seek to incorporate the amount owed for 2002 into the 2006 lien. Presumably, this is because in 2006, the six-year statute of limitations on the 2002 delinquent assessment had not yet run. Therefore, Kiona Park had no incentive to roll it into the 2006 lien in an underhanded attempt to circumvent the statute of limitations.

By 2018, however, Kiona Park had sat on its rights for years. The Association had continued to operate, year after year, issuing annual dues to Mr. Dehls, but failing to take any action to collect those delinquent amounts. Washington law disfavors stale claims and “provides that undue delay in pursuing a claim can bar recovery.” *In re Dalziell*, 608 B.R. 245, 250 (2019), citing *Cedar West Owners Ass’n, v. Nationstar Mortg., LLC*, 7 Wn. App. 2d 473, 489, 434 P.3d 554 (2019).

Kiona Park is attempting to cover up its failure to act by rolling all unpaid amounts into a single bill. For the reasons outlined above, the statute of limitations begins to run against each year's assessments when each became delinquent. Kiona Park's failure to bring an action to enforce payment of its assessments should not be overlooked or excused.

### **III. CONCLUSION**

A cause of action on Kiona Park's assessments accrues in the same manner its assessments are issued – annually. The statute of limitations on a written agreement is six years and the limitations period began to run on each year's assessment once they went unpaid after 90 days, in accordance with the Association's governing documents.

Kiona Park's own behavior in recording liens in 2003 and 2006 demonstrate its awareness of the six-year statute of limitations. It now seeks to cover up its own undue delay in pursuing legal action by attempting to circumvent the statute of limitations by rolling all years' assessments into one single bill. This type of underhanded behavior should not be permitted by the courts.

Mr. Dehls respectfully requests this Court grant his appeal and hold that a six-year statute of limitations applies to HOA assessments, and begins to run after each such assessment becomes delinquent. Mr. Dehls further

requests this Court remain this case with a directive that Kiona Park may only recover dues for 2013-2018. Lastly, he requests an award of his attorney fees and costs incurred in connection with this appeal.

Respectfully submitted this 5<sup>th</sup> day of October, 2020.



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CERTIFICATE OF SERVICE

The undersigned certifies that on October 5, 2020, that this Reply Brief of Appellant was filed electronically with the Court of Appeals and served upon counsel below by way of the Washington State Appellate Courts' Portal and via email.

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The foregoing is true and correct, based upon my own personal knowledge and made under the penalty of perjury under the laws of the state of Washington.

Dated this 5<sup>th</sup> day of October, 2020, at Olympia, WA.

  
CHRISTI C. GOELLER

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