

FILED

FEB 26 2014

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No.319130
COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

CLUB ENVY OF SPOKANE, LLC a Washington limited liability company;
DAVID LARGENT, a married man dealing in his separate property;
RIDPATH PENTHOUSE, LLC, a Washington limited liability company; 515
SPOKANE PARTNERS, LLC, a Nevada limited liability company,

Respondents,

vs.

RIDPATH REVIVAL, LLC, a Washington limited liability company
Appellant,

Appellant

and

THE RIDPATH TOWER CONDOMINIUM ASSOCIATION, a Washington
non-profit corporation; FEDERAL DEPOSIT INSURANCE CORPORATION, as
Receiver for Bank of Whitman,

Non-Appealing Defendants

BRIEF OF RESPONDENTS

M CASEY LAW, PLLC
Marshall Casey, WSBA #42552
1318 W College
Spokane, WA 99201
(509) 252-9700

Attorney for Respondent

TABLE OF CONTENTS

I. Introduction7

II. Assignment of Error7

III. Statement of Case7

IV. Argument.....12

 A. Standard of Review 12

 B. Grant of the Unit Owners’ summary judgment motion was proper and denial of Revival’s cross motion was proper.....13

 1. The trial court’s grant of summary judgment to the Unit Owners was proper13

 a. Violation under RCW 64.34.264..... 14

 i. The certificate does not meet evidentiary standards... 17

 ii. The First Amended Declaration requires a “sworn and signed” statement.....18

 iii. Even if admissible and properly executed, the Certificate only calls Mr. Person’s testimony into question..... 21

 b. Violation under RCW 64.34.348..... 24

 2. Interpretation of RCW 64.34.264(2) as a matter of law 28

 3. There are insufficient facts for estoppel.....32

 4. There is no case for laches.....35

 C. Summary judgment on all issues was appropriate37

 D. Judge Eizten had no duty to recuse herself 38

V. Conclusion.....41

Table of Authorities

Cases

American Condominium Ass'n v. IDC, Inc., 844 A.2d 117, 130 (R.I. Sup Ct., 2004)31

Bellevue Pac. Center Condo. Owners Ass'n v. Bellevue Pacific Tower Condo. Ass'n., 124 Wn. App. 178, 188, *fn* 5 29

Bellevue Pac. Center Condo. Owners Ass'n, at *fn.* 5.....15

Bellevue Pac. Ctr. Condo. Owners Ass'n v. Bellevue Pac. Tower Condo. Ass'n, 124 Wn. App. 178, 188 (2004) (Review denied, 124 Wn.2d 1007 (2004))..... 14

Bigelow v. Mood, 56 Wash.2d 340, 341, 353 P.2d 429 (1960).....25

Blanck v. Pioneer Min. Co., 93 Wash. 26, 159 P. 1077 (1916).....34

Bogomolov v. Lake Villas Condo. Ass'n of Apartment Owners, 131 Wn. App. 353, 370-371 (2006)..... 31

Brust v. McDonald's Corp., 34 Wn. App. 199, 208-209 (1983) 32, 35

Chrast v. O'Connor, 41 Wash. 360, 83 P. 238 (1906).....23

Codd v. Westchester Fire Ins. Co., 14 Wn.2d 600, 606, 128 P.2d 968, 971 (1942)..... 33

Codd, 14 Wn.2d at 607 34

Colonial Imports v. Carlton Northwest, 121 Wn.2d 726, 735 (1993)..... 32

Davis v. Fred's Appliance, Inc. 171 Wn. App. 348, 357-358 (2012)..... 24

Hearst Commc'ns, Inc. v. Seattle Times Co., 154 Wn.2d 493, 504, 115 P.3d 262, 267 (2005)..... 19

Homeowners' Ass'n v. Hal Real Estate, 148 Wn.2d 319, 331 (2002)..... 14

Howell v. Inland Empire Paper Co., 28 Wash.App. 494, 495, 624 P.2d 739, 740 (1981).....25

Kim v. Lee, 174 Wn. App 319, 326-7, 300 P.3d 431, 435 (2013) 18

Kim, 174 Wn. App at 326-327 19

<i>Kok v. Tacoma School Dist. No. 10</i> , ___ Wn. App. ____, 317 P.3d 481, 488 (2013 No. 44517-4-II)	41
<i>Lake v. Woodcreek Homeowners Ass'n</i> , 169 Wn.2d 516, 526-527 (2010)	28
<i>Lanterman v. Nestor</i> , 146 Wash. 37, 42, 261 P. 800, 802 (1927).....	23
<i>Marincovich v. Tarabochia</i> , 114 Wash.2d 271, 274, 787 P.2d 562 (1990)	13
<i>Meyer v. Univ. of Wash.</i> , 105 Wash.2d 847, 852, 719 P.2d 98 (1986).....	13
<i>Michak v. Transnation Title Ins., Co.</i> , 148 Wn.2d 788, 794-795 (2003)..	12
<i>Michak</i> , 148 Wn.2d at 794-795.....	14
<i>Morris v. International Yogurt</i> , 107 Wn.2d 314 (1986)	32
<i>Nichols Hills Bank v. McCool</i> , 104 Wn.2d 78, 82, 701 P.2d 1114, 1116 (1985).....	27
<i>Nickell v. Southview Homeowners Ass'n</i> , 167 Wn. App. 42, 54, 271 P.3d 973, 980 (2012).....	32
<i>Nickell</i> , 167 Wn. App. at 57, 271 P.3d at 981.....	34
<i>Pierce v. King Co.</i> , 62 Wn.2d 324, 332 (1963)	36
<i>Public Employees Mut. Ins. Co. v. Sellen Const. Co., Inc.</i> , 48 Wash.App. 792, 796, 740 P.2d 913, 915 (1987).....	20
<i>Ranger Ins. Co. v. Pierce Cnty.</i> , 164 Wn.2d 545, 552, 192 P.3d 886, 889 (2008).....	12
<i>S. Tacoma Way v. State</i> , 146 Wn. App 639, 649 (2008)	35
<i>Schroeder v. Excelsior Mgmt. Grp.</i> , 177 Wn.2d 94, 108-109 (2013).....	32
<i>Sherman v. State</i> , 128 Wn.2d 164 (1995)	39
<i>Smith v. Shannon</i> , 100 Wn.2d 26, 37 (1983)	38
<i>State ex rel. Carroll v Junker</i> , 79 Wn.2d 12, 26 (1971)	39
<i>State v. Dominguez</i> , 81 Wn. App. 325, 914 P.2d 141 (1996).....	40
<i>Tatham v. Rogers</i> , 170 Wn. App. 76, 87 (2012).....	13, 38, 39
<i>United States v. Partin</i> , 312 F.Supp. 1355, 1358 (E.D. La. 1970)	40

v. 13

Vallandigham v. Clover Park Sch. Dist. No. 400, 154 Wash.2d 16, 26, 109 P.3d 805 (2005).....13

Visser v. Craig, 139 Wn. App. 152, 158, 159 P.3d 453, 456 (2007)..... 13

Visser, 139 Wn. App. at 157, 159 P.3d at 456..... 13

Visser, 139 Wn. App. at 158, 159 P.3d at 456..... 19

Voris v. Human Rights Comm., 41 Wn. App. 283, 287 (1985)36

Waldrip v. Olympia Oyster Co., 40 Wash.2d 469, 476, 244 P.2d 273 (1952)..... 34

Waples 21

Waples v. Yi, 169 Wn.2d 152, 158 (2010) 17

Statutes

RCW 19.100.03033

RCW 2.28.03040

RCW 26.16.03028

RCW 5.44.07022, 23, 24

RCW 64.04.02023, 26

RCW 64.3414

RCW 64.34.03027

RCW 64.34.020(2).....15

RCW 64.34.264 15, 24, 28, 29, 30, 31, 35, 37, 38

RCW 64.34.264(1)..... 15, 29

RCW 64.34.308(2).....14

RCW 64.34.264 15, 16, 25, 29, 30, 31, 32, 35, 37, 38

RCW 64.34.264(1)..... 15, 29, 30

RCW 64.34.264(4)..... 15, 16, 29, 30

RCW 64.34.308(2).....15

RCW 64.34.264(2).....29

RCW 64.34.32230

RCW 64.34.348	passim
RCW 64.34.348(1).....	25
RCW 64.34.348(4).....	25
RCW 64.348(2).....	26
RCW 9A.72.085.....	20

Other Authorities

Black’s Law Dictionary 1298 (5 th ed. 1979).....	22
Black’s Law Dictionary 1299 (5 th ed. 1979).....	21
Black’s Law Dictionary 1400 (5 th ed. 1979).....	21

Rules

56 F.R.D. 183, 315.....	22
CR 8(c).....	32
CR 56(c).....	13, 14, 17, 18, 27
CR 56(e).....	14
CR 60(b).....	38
ER 603	17, 18, 19
ER 801	22
ER 803(a)(14)	19, 22, 23, 24
ER 803(a)(15)	23, 24
GR 13	18, 21
RAP 2.5(a)	39
Rule 2.11 of the Code of Judicial Conduct.....	40

I. Introduction

The central question in this matter is whether individuals, acting under color of authority by virtue of their status as directors and officers of a condominium owners association may validly amend a condominium declaration to convert common element into unit and convey title thereto without complying with the Washington Condominium Act. Respondents argue that RCW 64.34.264 and 64.34.348 prohibit the acts that were taken by the former officers and directors of The Ridpath Tower Condominium Association, rendering *void ab initio* the amended and restated declaration that resulted. The trial court agreed, granting Respondents' motion for summary judgment. Revival's cross-motion for summary judgment was denied.

II. Assignment of Error

Respondents do not assign any error to the trial court's ruling, but will address the assignments of error by Revival as stated in its opening brief.

III. Statement of Case

The Ridpath Hotel is a historic hotel in Spokane, Washington that in 2007 and 2008 was owned by 515 Washvada, LLC, hereafter

“Washvada.” In February of 2008 Washvada filed a condominium declaration (“Original Declaration”), creating 18 condominium units and common elements within The Ridpath Tower Condominium. (CP 285) Each unit had a 5.555% voting interest with the owner of Unit 18 having only 5.555% vote. As the condominium’s declarant, Washvada was the sole owner of all the units at that time. The Board of Directors of The Ridpath Tower Condominium Association (“Association”) was made up of Douglas DaSilva, Grant Persons, and Gregory D. Jeffreys. In May of 2008 Washvada made its first conveyance of units: units 1 and 2 were conveyed to Sunrise Land, LLC (owned by Mr. Persons), Poacher’s Rock, LLC (owned by Mr. Jeffreys), and Red Tower, LLC¹ as tenants in common. (CP 61-63)

In June of 2008 the Original Declaration was amended and restated by the First Amended and Restated Declaration of Covenants, Conditions and Restrictions The Ridpath Tower Condominium (“First Amended Declaration”), creating unit 19 out of a portion of unit 18. Unit 19 was subsequently conveyed to Club Envy of Spokane, LLC (“Club Envy”), Ironcross, LLC, Cusines Northwest, LLC, and Gonzo Carrillo as tenants in

¹ Lawrence “Mickey” Brown is a member of Red Tower.

common.² (CP 579-583) The sole effect of the First Amended Declaration was the creation of unit 19, together with the attendant reallocation of voting interests and allocated interest. A unanimous consent was signed by all of the unit owners, including the individual members of Red Tower, to approve the First Amended Declaration.³ (*Id.*) At the end of this each unit had a 5.263% vote with the owner of unit 18 only having 5.263% vote. (CP 110-112)

On July 15, 2008 Mr. Dasilva signed the Second Amended and Restated Declaration of Covenants, Conditions and Restrictions The Ridpath Tower Condominium (“Second Amended Declaration”) as the manager of Washvada, agreeing on its behalf to the subdivision of unit 18 into units 18, 20 and 21. (CP 170-172) Mr. Jeffreys executed the Second Amended Declaration on behalf of the Association, and in their capacities as officers of the Association, Mr. Persons and Mr. Jeffreys signed a certificate stating that members holding 100% of the voting interests of the Association had voted to amend and restate the declaration. (CP 177) Messrs. Person and Jeffreys did not make the certificate under oath or under penalty of perjury. Their signatures on the certificate are not

² Due to defaults of tenants in common, ownership at this time is made up of David Largent and Club Envy. Club Envy is managed by David Largent, and Mr. Brown is a member of Club Envy.

³ While not part of this action, Mr. Jeffreys has pled guilty to wire fraud in relation to units 1, 2, and 19. This occurred in November of 2013 well after the summary judgment hearing in this matter. 13-CR-12-RMP in U.S. District Court of Eastern Washington

notarized. The Second Amended Declaration was recorded in the records of Spokane County on August 29, 2008.

The Second Amended declaration had the following effect on the Ridpath Condominium:

1. It changed the voting structure so that each unit had a 4.762% vote (*Id.*)
2. It created two new units out of unit 18, giving the owner of unit 18 now ownership and votes over units 20 and 21 for a combined 14.286% of the vote (4.762% for each of the three units) rather than the previous 5.263% vote (*Id.*); and
3. It conveyed common element of the condominium by converting to unit certain common elements comprised of interior and exterior walls and roof structure and surface. The east and west exterior wall of the building on the second floor became part of unit 18, except for the portion adjacent to unit 2 which became part of that unit; the south exterior wall on the second floor (fronting First Avenue) became part of units 1, 2 and 3; the interior wall between units 1 and 2, on one side, and unit 18, on the other side, became part of unit 18; and, the roof structure and surface above the newly created units 20 and 21 became part of those units. (CP 210-220).

The evidence is that no meetings to vote on the Second Amended Declaration were ever held and no written consent in lieu of a meeting of the members was ever executed. Mr. DaSilva, a director and officer of the condominium has testified to this. (CP 205-207) Mr. Persons has testified to this as well and that he was not involved in the creation of this Second Amendment, though he does not dispute that his signature appears on the certificate. (CP 202-204) Members of both Red Tower and Club Envy have testified to no meetings or approval of the Second Amended Declaration taking place. (CP 222-223; 208-209).

In October of 2008 Washvada sold units 20 and 21 to Poacher's Rock, LLC, an entity completely owned by Gregory Jeffreys. In January of 2013 Poacher's Rock transferred these units to the Appellant in this matter, Ridpath Revival, LLC ("Revival"). (CP 455-456) In contemplating the acquisition of these units, Revival investigated title by the use of a title company, asking the title company for the documents and authority to support the transfer. (CP 585-598)

Respondents are together the owners of units 4 through 19 of The Ridpath Tower Condominium, and are collectively referred to hereafter as the "Unit Owners." The Unit Owners moved for summary judgment on two matters: first, that the Second Amended Declaration violated RCW 64.34.264; and, second, that the Second Amended Declaration violated

64.34.348. The Unit Owners argued that both of these violations made the Second Amended Declaration *void ab initio*. The court granted summary judgment for The Unit Owners.

Revival moved for summary judgment that the Unit Owners claims were barred under RCW 64.34.264(2). The court denied summary judgment for Revival.

IV. Argument

A. Standard of Review

“Appellate review of summary judgment is de novo; the reviewing court engages in the same inquiry as the trial court and views the facts and the reasonable inferences from those facts in the light most favorable to the nonmoving party.” *Michak v. Transnation Title Ins., Co.*, 148 Wn.2d 788, 794-795 (2003).

"Summary judgment is subject to a burden-shifting scheme. The moving party is entitled to summary judgment if it submits affidavits establishing it is entitled to judgment as a matter of law." *Ranger Ins. Co. v. Pierce Cnty.*, 164 Wn.2d 545, 552, 192 P.3d 886, 889 (2008). "After the moving party submits adequate affidavits, the nonmoving party must set forth specific facts which sufficiently rebut the moving party's

contentions and disclose the existence of a genuine issue as to a material fact.” *Visser v. Craig*, 139 Wn. App. 152, 158, 159 P.3d 453, 456 (2007) (quoting *Meyer v. Univ. of Wash.*, 105 Wash.2d 847, 852, 719 P.2d 98 (1986)). “If the nonmoving party fails to do so, then summary judgment is proper.” *Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wash.2d 16, 26, 109 P.3d 805 (2005). “Summary judgment is appropriate ‘if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” *Visser*, 139 Wn. App. at 157, 159 P.3d at 456 (citing CR 56(c) and *Marincovich v. Tarabochia*, 114 Wash.2d 271, 274, 787 P.2d 562 (1990)).

The issue of Judge Eizten’s recusal is reviewed for an abuse of discretion. *Tatham v. Rogers*, 170 Wn. App. 76, 87 (2012). The trial judge is presumed to perform his or her functions regularly and properly without bias or prejudice. *Id.*

B. Grant of the Unit Owners’ summary judgment motion was proper and denial of Revival’s cross motion was proper

1. The trial court’s grant of summary judgment to the Unit Owners was proper

“A motion for summary judgment [should be] granted 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). Where the moving party brings forth admissible evidence supporting its claimed absence of any issue of material fact, the ‘adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, *must set forth specific facts* showing that there is a genuine issue for trial.’ CR 56(e)” *Michak*, 148 Wn.2d at 794-795 (emphasis in the original).

a. Violation under RCW 64.34.264

One of the main purposes Washington’s Condominium Act (RCW 64.34), hereafter “The Act,” is to provide protection for condominium purchasers. *Homeowners’ Ass’n v. Hal Real Estate*, 148 Wn.2d 319, 331 (2002). A condominium declaration is a document that unilaterally creates a type of real property. *Bellevue Pac. Ctr. Condo. Owners Ass’n v. Bellevue Pac. Tower Condo. Ass’n*, 124 Wn. App. 178, 188 (2004) (Review denied, 124 Wn.2d 1007 (2004)). As long as the declaration complies with the Washington Condominium Act it can only be amended in compliance with The Act. *Id.*

A condominium association board of directors may not amend a declaration, RCW 64.34.308(2), only the unit owners may do so. RCW

64.34.264. General amendments may be enacted only by a vote or agreement of sixty-seven percent (67%) of the votes allocated in the association, or any larger percentage the declaration specifies. RCW 64.34.264(1). Here the Original Declaration and First Amended Declaration required a ninety percent (90%) vote.

RCW 64.34.264(4) expressly forbids amendments that change the allocated interests of units, including voting interest,⁴ in the absence of the vote or agreement of every owner particularly affected. *Bellevue Pac. Center Condo. Owners Ass'n*, at *fn. 5*. In addition, if the affected owners are not all of the owners, as they were in this case, the statute requires a vote of ninety percent (90%) of non-declarant owners. The only units owned by non-declarant owners in July and August of 2008 were units 1, 2, and 19.

Since the Second Amendment changed the voting interests of all the members it had to be approved by all the owners. Unless this requirement was met, the Second Amended Declaration was not allowed under RCW 64.34.264.

The Unit Owners offered as proof of not all the owners approving the Second Amended Declaration the following items:

1. Declaration of David Largent, the manager of Club Envy that

⁴ RCW 64.34.020(2) defines votes in the association allocated to each unit as part of the allocated interests.

Club Envy and the other members of unit 19 never received notice and never consented to the Second Amended Declaration (CP 222-223);

2. Declaration of Mr. Brown, a member of Red Tower and Club Envy, that Red Tower as an owner of units 1 and 2, and Club Envy as an owner of unit 19 never consented to the Second Amended Declaration (CP 208-209);
3. Affidavit of Mr. DaSilva, an officer and director of the condominium association at the time of the Second Amended Declaration, stating no meeting or agreement in lieu of a meeting was held to approve the Second Amended Declaration (CP 205-207); and
4. Affidavit of Mr. Persons, an officer and director of the condominium association at the time of the Second Amended Declaration, stating no meeting or agreement in lieu of a meeting was held to approve the Second Amended Declaration. (CP 202-204)

To counter these four declarations, Revival has offered as evidence only the unsworn certificate of Mr. Person and Mr. Jeffreys attached to the Second Amended Declaration. Revival has tried to argue this is sufficient evidence because it meets the First Amended Declaration's certificate

requirement, set forth in Section 13.2 thereof, which reads, in part:

A certificate, signed and sworn to by two (2) officers of the Association, that the record Owners of the required number of Units (and the required number of first mortgagees, where applicable) have either voted for or consented in writing to any amendment adopted as provided above, when recorded, will be conclusive evidence of that fact. .

(CP 403). This argument is incorrect for three reasons, (i) the certificate does not meet evidentiary rules to avoid exclusion as hearsay, (ii) the words “signed and sworn to” are unambiguous in light of the drafting, and (iii) at best the certificate might be used in an attempt to impeach Mr. Persons’ testimony, but not the other three declarants.

i. The certificate does not meet evidentiary standards

It is an inherent power of the judicial branch to promulgate rules for its practice. *Waples v. Yi*, 169 Wn.2d 152, 158 (2010). Among these rules are the rules of evidence and the civil rules. CR 56(c) states that the items to be considered in a summary judgment are pleadings, depositions, answers to interrogatories, admissions on file and affidavits. ER 603 requires that all testimony in front of a court be done under oath in a form calculated to awaken the “witness’ conscience” and impress the importance of truthful testimony. The only exception for testimony under oath is in GR 13, allowing for unsworn statements in lieu of affidavits if certified under the penalty of perjury under laws of Washington. *Kim v.*

Lee, 174 Wn. App 319, 326-7, 300 P.3d 431, 435 (2013)(“CR 56(e) requires that evidence offered in support of or in opposition to a motion for summary judgment be in the form of sworn affidavits or declarations made under penalty of perjury.”).

It is clear that the certificate attached to the Second Amended Declaration is not sworn to as required by ER 603, not an affidavit as required by CR 56(c) and not an exception under GR 13. The certificate is therefore not admissible for the purpose of proving the truth of the matters asserted therein. While the Second Amended Declaration as a whole is admissible “as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed,” under ER 803(a)(14), that does not make the certificate admissible evidence that members holding one hundred percent (100%) of the Voting Interests of the Association [...] voted” to adopt the Second Amended Declaration.

ii. The First Amended Declaration requires a “sworn and signed” statement

The First Amended Declaration is clear that the certificate must be a “signed and sworn” statement. Revival argues that the Mr. Jeffreys must be presumed to know the correct format since he signed the same one in the First Amended Declaration. Mr. Jeffreys’ knowledge is irrelevant, though, since there is no evidence in the record as to what, if any,

knowledge he may have. Revival's statements regarding presumptions of Mr. Jeffreys' knowledge are no more than speculation, which *Visser* clearly states may not be relied upon by a non-moving party for opposition to a motion for summary judgment. *Visser*, 139 Wn. App. at 158, 159 P.3d at 456 (A non-moving party "may not rely on speculation or on argumentative assertions that unresolved factual issues remain.")

For purposes of intent the court should look first at the unambiguous language of the instrument. *Hearst Commc'ns, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 504, 115 P.3d 262, 267 (2005)("We generally give words in a contract their ordinary, usual, and popular meaning unless the entirety of the agreement clearly demonstrates a contrary intent. ... We do not interpret what was intended to be written but what was written." Citations omitted.). The unambiguous language used in the First Amended Declaration is "signed and sworn." The evidence also shows that these were drafted by an attorney. (CP 575). The word "sworn" has specific meaning as shown by our court rules and statutes and requires more than a signature as shown in the *Kim* case where they rejected a signed letter for lacking the characteristics insufficient for an oath. *Kim*, 174 Wn. App at 326-327. ER 603 provides that an oath is used to awaken the conscience and impress the importance of truth. Under RCW 9A.72.085, an "unsworn written statement" may be used in lieu of a "sworn written

statement, declaration, verification, certificate, oath, or affidavit” only if four requirements are met: 1) it recites that it is certified or declared by the person to be true under penalty of perjury; 2) is subscribed by the person; 3) it states the date and place of its execution; and, 4) it states that it is so certified or declared under the laws of the state of Washington. These requirements are incorporated by reference into GR 13.

Revival argues that the drafter of the First Amended Declaration meant “signed” when he wrote “signed and sworn.” This renders the words “and sworn” superfluous. “In construing a contract, the court should apply that construction that will give each part of the instrument some effect.” *Public Employees Mut. Ins. Co. v. Sellen Const. Co., Inc.*, 48 Wash.App. 792, 796, 740 P.2d 913, 915 (1987). The words “and sworn” must have some meaning, and it should be their ordinary, usual and popular meaning.

Interestingly, in its brief, Revival choses to define "certify" instead of "sworn" – “certify” is not used in the Section 13.2. Blacks' Law Dictionary defines "sworn" as follows: "Frequently used interchangeably with 'verified.' See Affirmation; Oath; Swear; Verify." Black's Law Dictionary 1299 (5th ed. 1979).

"Verify" is defined by Black's as: "To confirm or substantiate by oath or affidavit. Particularly used of making formal oath to accounts,

petitions, pleadings, and other papers. The word "verified," when used in a statute, ordinarily imports a ferity attested by the sanctity of an oath. It is frequently used interchangeably with 'sworn.' ..." Black's Law Dictionary 1400 (5th ed. 1979).

"Swear" is defined by Black's as: "To put on oath; to administer an oath to a person; to become bound by an oath duly administered. To declare on oath the truth (of a pleading, etc.). ..." Black's Law Dictionary 1298 (5th ed. 1979).

In light of those commonly used definitions, it is very difficult to understand how Revival maintains that the word "sworn" has no meaning. The interpretation of Section 13.2 of the First Amended Declaration urged by Revival does not stand up to scrutiny.

- iii. Even if admissible and properly executed, the Certificate only calls Mr. Person's testimony into question

The certificate is an out-of-court statement and hearsay under ER 801. While not litigated below, ER 803(a)(14) and not RCW 5.44.070, creates the standard for bringing in hearsay before the courts. As stated above, the procedural rules are particularly within the jurisdiction of the courts and not the legislature *Waples, supra*. As the Advisory Committee's Notes to the Federal Rules of Evidence point out, admission of recorded documents affecting title to real property as an exception to

the hearsay rule creates a problem, since the recorder seldom has firsthand knowledge as to the contents of a given document. This could allow into evidence many instances of hearsay based on a party's recording for documents solely for that purpose. 56 F.R.D. 183, 315. This problem though is solved by documents generally having to satisfy specified statutory procedures to ensure authenticity by either "acknowledgement or form of probate." *Id.* For most deeds the requirement is acknowledgment by a notary. RCW 64.04.020. Note, though, that although the Second Amended Declaration is admissible under ER 803(a)(14) "as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed..." it is not admissible for all purposes. ER 803(a)(15) provides that the hearsay rule does not exclude,

[a] statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document *unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.* (Emphasis added.)

The declarations of Messrs. DaSilva, Person, Largent, and Brown are all inconsistent with the truth of the statement contained in the certificate, making the Second Amended Declaration inadmissible for purposes of proving the truth of that statement.

Furthermore, RCW 5.44.070, relied upon by Revival, does not

touch upon the evidentiary value of the certificate for purposes of establishing the truth of the statements contained therein. The statute only states that a certified copy of a recorded document is prima facie evidence of the existence of the original recorded document - not that the contents of the document are true. Like ER 803(a)(14), RCW 5.44.070 simply allows the certified copy to serve as "evidence that the instrument is what on its face it purports to be. It is presumed to be genuine, and to have been made for the purposes for which it purports on its face to have been made, and one asserting the contrary must prove it." *Lanterman v. Nestor*, 146 Wash. 37, 42, 261 P. 800, 802 (1927) (quoting *Chrast v. O'Connor*, 41 Wash. 360, 83 P. 238 (1906)) This addresses only whether the copy is an accurate reproduction of the original recorded document - not whether the original recorded document contained accurate information.

This case, as noted by Judge Eitzen, presents the unique problem of someone making a false statement, not made under oath or penalty of perjury, but filing the false statement in the public record. ER 803(a)(14) and RCW 5.44.070 may allow a certified copy into evidence for limited purposes, but ER 803(a)(15) prevents the Second Amended Declaration's certificate from being admitted as evidence of the truth of its own statements. It therefore does not raise a genuine issue of material fact as to the existence of approval of the Second Amended Declaration by members

of the Association holding 100% of the voting interests.

At best, if it were for some reason admitted as evidence of the truth of its own statements, the certificate might be used in an attempt to impeach Mr. Persons's testimony. See *Davis v. Fred's Appliance, Inc.* 171 Wn. App. 348, 357-358 (2012). However impeachment evidence cannot create a substantial basis for denial of summary judgment. *Id.* Instead each party must bring forward evidence to support its claims and defenses. This certificate though does nothing to impeach Mr. Largent, Mr. Brown, or Mr. DaSilva who all testified to their knowledge that no approval or vote ever occurred on the Second Amended Declaration. As it stands, however, it is an unsworn statement that is not evidence capable of supporting Revival's arguments against summary judgment, under *Kim v. Lee, supra*.

b. Violation under RCW 64.34.348

Assuming there is sufficient evidence of a vote under RCW 64.34.264, there is no evidence of the Second Amended Declaration meeting the requirements of RCW 64.34.348. RCW 64.34.348(4) makes any purported conveyance, in this case the Second Amended Declaration, void unless it complies with RCW 64.34.348: "Any purported conveyance, encumbrance, or other voluntary transfer of common elements, unless made pursuant to this section, is void."

RCW 64.34.348 states that portions of the common elements not necessary for the habitability of a unit may be conveyed by the association if approved by the owners of units to which at least eighty percent (80%) of the votes in the association are allocated, including at least eighty percent (80%) of the votes allocated to units not owned by a declarant or an affiliate of a declarant. RCW 64.34.348(1). The declaration may establish higher percentages. *Id.* It also requires that the conveyance must be evidenced by the execution of an agreement “in the same manner as a deed” by the requisite number of unit owners. RCW 64.34.348(2). The agreement and any ratifications must then be recorded, and the agreement is only effective upon recording. *Id.* The requisites of a deed are a writing, signature of the party bound by the deed, and acknowledgement before an authorized person. RCW 64.04.020. A deed must also contain a description of the land sufficiently definite to locate the land without recourse to oral testimony. *Howell v. Inland Empire Paper Co.*, 28 Wash.App. 494, 495, 624 P.2d 739, 740 (1981); *Bigelow v. Mood*, 56 Wash.2d 340, 341, 353 P.2d 429 (1960). If a written agreement of the required number of unit owners is not executed and recorded, then the conveyance is void. RCW 64.34.348.

It is clear the Second Amended Declaration conveyed common element to the newly formed units of 20 and 21: significant structural and

weatherproofing elements of the building comprise the portions of the roof structure and surface converted to “unit” by Sections 1.27(e) and (f). (CP 210-221). Moreover, significant aspects of the common elements, in the form of interior and exterior walls, were also purportedly converted into portions units 1, 2, 3, and 18. *Id.* These common elements are necessary for the habitability of the units, since without them the units would be missing all or much of their roof or demising walls, and therefore these common elements should not be transferable under RCW 64.34.348 at all.

But, assuming these common elements could be transferred by requisite consent, the fact that the Second Amended Declaration purported to convert these common elements into unit was an attempt to transfer ownership of them from the common ownership of the Association members to the private ownership of individual unit owners.

It is also clear that the only signature on the Second Amended Declaration that fits the deed requirements is Mr. DaSilva’s signature authorizing the creation of units 20 and 21 out of unit 18. Even this is a defective agreement under RCW 64.34.348, though, because he did not also consent to the conversion of interior and exterior wall common elements into unit. There are no signatures agreeing to these conveyances from any other owner acknowledged before an authorized person .

Revival is wrong when it argues that the certificate meets the

requirement of eighty percent approval under RCW 64.34.348. *Appellant Brief* p. 23-24. The statute clearly lays out the process and evidence that makes the conveyance correct. The statute clearly says that without these it is void. Not even the declaration can overrule the statute, despite the Revival's statements to the contrary. RCW 64.34.030 forbids agreements from varying the rights and requirements of the statute. There is no support for Revival's implied substantial compliance argument. The case cited by Revival, *Nichols Hills Bank v. McCool*, 104 Wn.2d 78, 82, 701 P.2d 1114, 1116 (1985), analyzes implied or express consent of a spouse to the other spouse's execution of a guaranty agreement. The court held that such consent is an issue of fact. It is totally inapplicable to this case, however, because the purported transfer of common element under the Second Amended Declaration is subject to a very specific set of statutory requirements, which were not addressed in *Nichols Hills Bank* at all. The statute that is addressed in that case, RCW 26.16.030, requires consent of a spouse to a transfer of community property, but the consent may be express or implied, and the statute does not provide any requirements for establishing such consent.

Revival has brought forward no evidence as required by CR 56(c) to support its argument that there is a question of fact that the common areas were transferred by a sufficient vote, and that such approval is

recorded in deed format with the auditor's office as required by RCW 64.34.348. Therefore Judge Eizten was correct in holding that the purported transfer instrument, the Second Amended Declaration, was void as required by RCW 64.34.348.

2. Interpretation of RCW 64.34.264(2) as a matter of law

Discerning and implementing the intent of the legislature is the primary objective of a court when interpreting a statute. *Lake v. Woodcreek Homeowners Ass'n*, 169 Wn.2d 516, 526-527 (2010). This is done first by looking to the plain meaning of the statute. *Id.* If a statute is unambiguous after a review of the plain meaning then the inquiry is at an end. *Id.* If a statute is ambiguous, the next step is to resort to rules of statutory construction, legislative history, and relevant case law in order to resolve the ambiguity. *Id.* In statutory construction a court must not add words where the legislature has chosen not to include them and must construe statutes such that all language is given effect. *Id.*

RCW 64.34.264(2) reads “[n]o action to challenge the validity of an amendment adopted by the association pursuant to this section may be brought more than one year after the amendment is recorded.” *Emphasis added.* Revival reads this to say that any amendment recorded and claiming to be adopted under RCW 64.34.264 is afforded a one-year statute of limitations. Revival's reading would require the court to find

that the legislature meant to say “an amendment purportedly adopted by the association ...” . (CP 463) The plain language of the statute, though, clearly requires actual adoption of the amendment in compliance with all of RCW 64.34.264 in order for the protection of one-year limitation to challenges to arise.

RCW 64.34.264(1) lays out very particular requirements that must be met before an association is allowed to adopt an amendment to its declaration in general. RCW 64.34.264(4) forbids certain specific types of amendments unless even stricter guidelines are followed. As noted by our courts, the voting allocations under a condominium declaration may only be changed with the approval of all affected unit owners. *Bellevue Pac. Center Condo. Owners Ass’n v. Bellevue Pacific Tower Condo. Ass’n.*, 124 Wn. App. 178, 188, *fn* 5. Revival however would have the statute interpreted so that if officers of the association file a fraudulent amendment to a declaration and make a false statement of compliance with RCW 64.34.264, then the fraudulent amendment becomes valid after one year. This does not comport with the statute or case law.

Revival argues that its reading is the only logical reading since any challenge to process under RCW 64.34.264(1) or RCW 64.34.264(4) is a challenge to validity. This ignores the fact that there could be other challenges to validity of an amendment outside of RCW 64.34.264(1) or

RCW 64.34.264(4). While the types of challenges are as broad as the creativity of our legal bar, here are two examples of possible challenges arising outside RCW 64.34.264(1) or (4).

One example is a meeting notice that fails to comply with RCW 64.34.322. RCW 64.34.264 only specifies the voting percentages and requires approval by certain owners in order for the one-year limitation to arise; it does not require perfection in all other respects. An amendment could be “adopted by the association pursuant to” RCW 64.34.264 and still have been flawed in other ways. A challenge to the validity of an amendment based upon deficiency in the timing or delivery of a meeting notice, rather than an actual failure to get approval, would be barred after one year.

A second example could be a failure to get approval of lien holders or other non-owner approval. Like many others, declarations affecting the Ridpath give rights to lien holders to vote on certain declaration amendments. (CP 103). RCW 64.34.264 only requires approval of owners in order to be valid and subject to the one-year limitation of actions, where the declaration could give rights to more people. Here, the lien holders would likely face a one year bar.

In addressing a statute exactly the same as RCW 64.34.264, the Rhode Island Supreme Court held that without the vote of the requisite

percentage of owners, an amendment to a declaration was *void ab initio* since it violated the statute. *American Condominium Ass'n v. IDC, Inc.*, 844 A.2d 117, 130 (R.I. Sup Ct., 2004). Based on this, the court reasoned that no amount of time could make a void amendment valid, and the one-year limitation on actions set forth in the statute did not bar an action to challenge the void amendment. *Id.* at 133. The Washington Court of Appeals, Division 1, has upheld a trial court summary judgment ruling that an amendment to a condominium declaration is void where a unanimous vote was required, but not obtained. *Bogomolov v. Lake Villas Condo. Ass'n of Apartment Owners*, 131 Wn. App. 353, 370-371 (2006)(the condominium in *Bogomolov* was formed under RCW Ch. 64.32).⁵

Revival quotes the dissent in *American Condominium Ass'n* asking “what type of claim challenging the validity of an amendment is subject to the one-year period?” *Appellant's brief* p. 11. The answer is in the examples above. There are numerous types of challenges that would be subject to the one-year period, arising under other sections of the Condominium Act, so long as the requirements of RCW 64.34.264 itself are met.

⁵ See also *Keller v. Sixty-01 Assocs.*, 127 Wn. App 614, 324-626 (2005) analyzing an amendment to determine if the proper number of votes made it valid or if it was void ab initio

3. There are insufficient facts for estoppel

Estoppel is an affirmative defense under CR 8(c) and as such Revival has the burden of proof on this claim. *Brust v. McDonald's Corp.*, 34 Wn. App. 199, 208-209 (1983). Revival must produce evidence of (i) an admission, statement or act inconsistent with a claim later asserted by the Unit Owners, (ii) Appellant's reasonable reliance on that admission, statement or act, and (iii) injury to the Appellant if the court permits the first party to contradict or repudiate the admission, statement or act. *Schroeder v. Excelsior Mgmt. Grp.*, 177 Wn.2d 94, 108-109 (2013).

Because the doctrine of equitable estoppel restricts a party from making out their case according to the truth, it must be applied strictly, and should not be enforced unless substantiated in every particular. *Colonial Imports v. Carlton Northwest*, 121 Wn.2d 726, 735 (1993). "The burden is on the party claiming equitable estoppel to establish the estoppel elements by 'clear and convincing' evidence." *Nickell v. Southview Homeowners Ass'n*, 167 Wn. App. 42, 54, 271 P.3d 973, 980 (2012), review denied, 174 Wn.2d 1018, 282 P.3d 96 (2012).

The Unit Owners deny the existence of all three elements of equitable estoppel, but in particular the second element is lacking here. Revival has cited *Morris v. International Yogurt*, 107 Wn.2d 314 (1986)

as support for its claim that Revival had a right to rely upon the Unit Owners' silence as to any defects relating to the Second Amended Declaration. However, *Morris* does not address equitable estoppel – in fact, neither the word “equitable” nor the word “estoppel” appear anywhere in the *Morris* decision. Instead, *Morris* deals with claims under the Franchise Investment Protection Act, RCW 19.100.030, and analyses claims of failure to disclose material facts under that act, the Securities Act of Washington and under the federal Securities and Exchange Commission’s Rule 10b. *Id.* at 322-323. Reliance upon omissions of material facts is presumed under the authority analyzed in *Morris*, but that is not the case in this matter. There is no rule that the neighbors of a seller are required to disclose any facts to a prospective buyer. The law of equitable estoppel requires strict proof as stated above, and equitable estoppel based upon silence requires yet more proof. “Estoppel by silence does not arise without full knowledge of the facts and a duty to speak on the part of the person against whom it is claimed.” *Codd v. Westchester Fire Ins. Co.*, 14 Wn.2d 600, 606, 128 P.2d 968, 971 (1942).

Full knowledge of the facts is essential to create an estoppel by silence or acquiescence [citing cases]. * * * Mere silence, without positive acts, to effect an estoppel, must have operated as a fraud, must have been intended to mislead, and itself must have actually misled. The party keeping silent must have known or had reasonable grounds for believing that the other party would rely and act upon

his silence. The burden of showing these things rests upon the party invoking the estoppel.

Codd, 14 Wn.2d at 607 (quoting *Blanck v. Pioneer Min. Co.*, 93 Wash. 26, 159 P. 1077 (1916)). “[M]ere silence or acquiescence will not operate to work an estoppel where the other party has constructive notice of public records which disclose the true facts.” *Nickell*, 167 Wn. App. at 57, 271 P.3d at 981 (quoting *Waldrip v. Olympia Oyster Co.*, 40 Wash.2d 469, 476, 244 P.2d 273 (1952)).

Mr. Coffey’s declaration states he met with Mr. Deters, Mr. Largent and Mr. Brown, but he does not allege that any of them made representations as to the validity of the Second Amended Declaration. Mr. Coffey instead states they simply did not “mention that the Second Amended Declaration was not valid or that Units 20 or 21 were improperly created or subdivided.” (CP 507-523). Mr. Coffey’s declaration however, does not state that he relied on these conversations to confirm title or the validity of the Second Amended declaration. In direct contradiction, the evidence in front of the court was that the Appellant and Mr. Coffey relied on the title insurance company to provide title information. (CP 585-598). Mr. Coffey also dealt directly with Mr. Jeffreys who signed the certification and on behalf of Revival could have asked Mr. Jeffreys for proof of unanimous consent for the adoption of the

Second Amended Declaration.

There is absolutely no proof of any reliance, much less reasonable reliance. Mr. Coffey does not explain why the failure of three neighboring unit owners – non-parties to Revival’s purchase transaction - to volunteer information regarding defects is more reasonably relied upon than his title insurance company and the seller who also apparently did not mention the failure of the Second Amended Declaration to comply with RCW 64.34.264 and RCW 64.34.348. Finally, the documents in the public record, or the lack thereof in the case of the agreement of the unit owners required by RCW 64.34.348, preclude any claim by Revival of equitable estoppel based on the silence of the Unit Owners.

4. There is no case for laches

Like estoppel, laches is an affirmative defense under CR 8(c) and as such Revival has the burden of proof on this claim. *Brust*, 34 Wn. App. at 208-209. As stated by the Appellant, the three elements of laches are (i) knowledge or a reasonable opportunity to discover on the part of a plaintiff that he has a cause of action against the defendant, (ii) unreasonable delay in commencing that cause of action, and (iii) damage to the defendant resulting from the unreasonable delay. Appellant brief p. 16. Laches is disfavored in the law. *S. Tacoma Way v. State*, 146 Wn. App 639, 649 (2008)(, *rev'd on other grounds* 169 Wn.2d 118 (2010)).

Mere delay and acquiescence in an act cannot make what is done without authority legitimate. *Pierce v. King Co.*, 62 Wn.2d 324, 332 (1963). The right to prevent actions taken under an authority that is void is not affected by the lapse of time. *Id.* The principle element in laches is not so much the delay but the factor of resulting prejudice and damage to others. *Id.*; *Voris v. Human Rights Comm.*, 41 Wn. App. 283, 287 (1985) (noting the need to prove the unreasonable delay resulted in the change that would make it inequitable to enforce the claim).

Revival's argument for laches fails on two issues. First they offer no evidence that the Unit Owners were aware of their rights and sitting on them. The testimony of Mr. Coffey is that he met with various members to discuss ownership before he purchased units 20 and 21. The claims of the Unit Owners are that they were harmed by a change of their voting rights, and transfer of the common elements without their permission. Here the evidence is that no association meetings were ever held, the condominium never exercised control over the common element, and just before this suit began the condominium association was administratively dissolved. (CP 205-207; 202-204; 480). The creation or even ownership of units 20 and 21 are not the harm, but the degrading of voting rights and conveyance of common elements in violation of the statute and case law is the harm and there is no evidence the Unit Owners knew of those items –

they had no reason to know because the Association was not functioning.

The second reason that laches does not apply in this matter is that there is no showing of harm directly related to the Unit Owners' delay. The record shows that Revival dealt directly with Mr. Jeffreys in the purchase of the units. The record also shows that Revival relied upon title insurance for securing its proper title. Revival or the title insurance company could have asked Mr. Jeffreys or the condominium association for proof of either unanimous consent or meeting notes showing a vote that qualified under RCW 64.34.264. Even more telling is the fact that the public record contains no agreement of the unit owners as required by RCW 64.34.348, and title insurance commitment or a review of the record would have disclosed that defect. It was not the delay in the action that caused the Revival's harm but rather a lack of due diligence in checking the public record and in asking for documents proving the authority Mr. Jeffreys claimed to have to transfer the units to Revival.

C. Summary judgment on all issues was appropriate

Revival raise a unusual argument that because the summary judgment did not give the Unit Owners everything the Unit Owners asked for in their complaint, it was invalid. The uniqueness of this is that such an argument seems to be one the Unit Owners should be raising and Revival should be content with a full resolution without one of the claims

being addressed. The Unit Owners did raise in the complaint an interpretation of the declaration, in particular the restriction on residential use. However, when the Second Declaration was declared void this was no longer an issue. Voting had been restored to the rights under the First Amendment and the Unit Owners will deal with the language through asking the owners to amend the declaration as is proper under RCW 64.34.264 and *Bellevue Pac. Center Condo. Owners Ass'n* 124 Wn. App. at 188, *fn* 5. The Unit Owners have no objection with Judge Eitzen's statement that resolving the validity of the Second Amended Declaration created an entire resolution to the matter. Since it is the Unit Owners' complaint they have no problem with abandoning this issue for the purpose of resolving the claim.

D. Judge Eitzen had no duty to recuse herself

This issue is being raised for the first time in this court and the proper place to have raised it would have been at the trial court in a CR 60(b) motion before this appeal so Judge Eitzen could have been afforded the opportunity to correct the error had one existed. See *Tatham*, 170 Wn. App. at 87; RAP 2.5(a); *Smith v. Shannon*, 100 Wn.2d 26, 37 (1983). As such the Unit Owners request the court not address this error first raised on appeal. *Id.* Without waiving such a request the Unit Owners point to the following law.

Judge Eitzen's decision not to recuse herself is reviewed for an abuse of discretion and whether or not the decision was manifestly unreasonable or based upon untenable reasons or grounds. *State ex rel. Carroll v Junker*, 79 Wn.2d 12, 26 (1971); *Tatham*, 170 Wn. App. at 96. . The trial judge is presumed to perform his or her functions regularly and properly without bias or prejudice. *Id.*

The party asserting recusal does not have to show actual bias; it is enough to present evidence of potential bias. *Id.* at 95. A judicial proceeding satisfies the appearance of fairness doctrine if a reasonably prudent and disinterested party could conclude that all parties obtained a fair, impartial, and neutral hearing. *Id.* at 96. Typical bases for recusal are either ex parte communications as in *Sherman v. State*, 128 Wn.2d 164 (1995), or, as in *Tatham*, an outside connection between the judge and one of the parties. A judge is disqualified to act in certain circumstances, such as when he or she is a party, when he or she is related within three degrees to a party, or when he or she has been an attorney in that action for one of the parties. RCW 2.28.030. Similarly, Rule 2.11 of the Code of Judicial Conduct requires that “[a] judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned” based on a number of circumstances that are not present here.

Revival has cited no authority for the premise that a trial court

judge is disqualified from hearing a matter based simply upon being familiar with a non-party whose actions may be relevant, or who may even serve as a witness. In fact, there is case law interpreting a federal statute on this subject that comes to just the opposite conclusion:

Recusal cannot be based on the Court's rulings in other cases nor on remarks or findings pertaining specifically to the facts or law in other cases in which the defendant was involved but must instead be predicated on extra-judicial attitudes and conceptions formed outside of the courtroom.

United States v. Partin, 312 F.Supp. 1355, 1358 (E.D. La. 1970). Note that *Partin* involved the judge's familiarity with a party, not merely a witness or other non-party.

In Washington, potential bias was not demonstrated even where the judge had previously served in separate cases as both prosecutor and defense attorney as to a party, and that party had filed a bar complaint or lawsuit against the judge relating to his performance as defense counsel. *State v. Dominguez*, 81 Wn. App. 325, 914 P.2d 141 (1996).

Because Revival did not bring a motion before Judge Eitzen we have no way of knowing her grounds for not recusing herself. Instead we have on the record her statements in the hearing. Revival has selectively quoted pieces about Mr. Jeffreys and even included in the appearance of bias the Unit Owners' counsel's statements on Mr. Jeffreys.

Revival has given no evidence of Judge Eitzen's ex parte contact

or personal connection with Mr. Jeffreys. Along with this Judge Eizten ruled favorably to Revival in the motion to default the Ridpath Condominium Association which clearly counters the appearance of fairness problem as noted by *Kok v. Tacoma School Dist. No. 10*, ___ Wn. App. ____, 317 P.3d 481, 488 (2013 No. 44517-4-II).

Revival has given no record that allows this matter to be appealed to this court since it is first raised on appeal. Along with this the record provided does not give evidence that Judge Eizten was biased, appeared to be biased or should have recused herself.

V. Conclusion

The Second Amended Declaration is amended in direct violation of RCW 64.34.264 and conveys property in direct violation of RCW 64.34.348. No amount of time or actions by a third party should create legitimacy of an amendment or transfer of property where the legislature has forbidden it. Because of this the Owners request this Court to affirm the Superior Court's ruling that upholds the requirements of our legislature.

RESPECTFULLY SUBMITTED THIS 26 day of February, 2014.



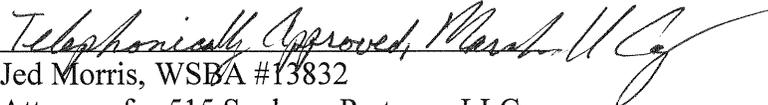
Marshall Casey, WSBA #42552
Attorney for Club Envy of Spokane, LLC
and David Largent doing joint response
for the Owners



Marshall Casey, WSBA #42552
Attorney for Club Envy of Spokane, LLC
and David Largent doing joint response
for the Owners



Spencer A. W. Stromberg, WSBA #23014
Attorney for Ridpath Penthouse, LLC



Telephonically Approved, *Marshall Casey*
Jed Morris, WSBA #13832
Attorney for 515 Spokane Partners, LLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, under penalty of perjury, that on the 26th of February, 2014, I caused to be served a true and correct copy of the foregoing document on the following:

<input checked="" type="checkbox"/>	HAND DELIVERY	Michael A. Agostinelli
<input type="checkbox"/>	US MAIL	LEE & HAYES, PLLC
<input type="checkbox"/>	FACSIMILE	601 W Riverside Ave, Ste 1400 Spokane, WA 99201
<input checked="" type="checkbox"/>	HAND DELIVERY	Spencer A.W. Stromberg
<input type="checkbox"/>	US MAIL	SULLIVAN STROMBERG, PLLC
<input type="checkbox"/>	FACSIMILE	827 W. First Avenue, Ste 425 Spokane, WA 99201
<input checked="" type="checkbox"/>	HAND DELIVERY	Jed W. Morris
<input type="checkbox"/>	US MAIL	LUKINS & ANNIS, P.S.
<input type="checkbox"/>	FACSIMILE	717 W. Sprague Ave, Ste 1600 Spokane, WA 99201
<input type="checkbox"/>	HAND DELIVERY	Teruyuki S. Olsen
<input checked="" type="checkbox"/>	US MAIL	RYAN, SWANSON &
<input checked="" type="checkbox"/>	FACSIMILE	CLEVELAND, PLLC
		1201 Third Avenue, Suite 3400 Seattle, WA 98101-3034 (206) 583-0359

Danisa LaKru