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IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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CINDY ALEXANDER, ET AL,

Petitioners,

v.

GARY SANFORD and JANE DOE SANFORD, ET AL,

Respondents,

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**AMICUS CURIAE BRIEF OF  
BUILDING INDUSTRY ASSOCIATION OF WASHINGTON  
IN SUPPORT OF RESPONDENTS**

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Washington State Supreme Court

APR 14 2015 *kyh*

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 ORIGINAL

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## I. INTRODUCTION

The Washington Condominium Act (WCA) provides protection to owners of condominium units in the form of a right of action for individuals or associations to recover damages caused by defective construction. RCW 64.34.452; RCW 64.34.455. While the long-established discovery rule in Washington allows applicable statutes of limitation to be tolled until the plaintiff knows, or has reason to know, of the elements of a particular claim (*Allen v. State*, 118 Wash.2d 753, 758, 826 P.2d 200 (1992)), the Legislature abolished use of the discovery rule with respect to condominium defect claims. RCW 64.34.452(2).

In this case, Homeowners<sup>1</sup> and their Association failed to timely pursue WCA or construction defect claims, so they are now attempting to make new claims of “concealment” to stand in their place. The new claims allege that the Association missed its chance to make WCA claims, and that therefore Homeowners should be allowed to recover from Respondents instead, which Respondents include board members and a contractor associated with the original Declarant.

Allowing such claims to proceed would turn the WCA on its head, and with respect to the Developer Defendants, would negate the certainty

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<sup>1</sup> For purposes of brevity and consistency, Amicus BIAW adopts the naming conventions used in Respondents’ Joint Supplemental Brief, including the terms “Developer Defendants,” “Homeowners,” “Defendants,” “Petitioners,” “Respondents, and “Association.”

and repose that is the *quid pro quo* for the extensive warranties required of developers under the WCA. The adoption by the Court of Appeals of the doctrine of adverse domination is unwarranted and without legal justification in this case, where individual, non-corporate plaintiffs are pursuing individual claims.

This Court should not allow these Homeowners to pursue claims against Developer Defendants that arise from an alleged breach of WCA warranties and that seek the same relief as those time-barred WCA warranty claims. From the perspective of the average BIAW member, the decision of the Court of Appeals wrecks and delegitimizes a clear statutory scheme. Adoption of the doctrine of adverse domination disrupts the balance achieved by the WCA between the interests of builders and developers working to provide affordable housing for Washingtonians while achieving the goals of the state's Growth Management Act, and of consumers who need safe and affordable homes in which to live.

Amicus BIAW also argues that the first application of the doctrine of adverse domination in Washington should not fall on appointed members of a non-profit homeowners' association board, some of whom had no dealings with the association for nearly a decade prior to commencement of the action by Petitioners, and who could not conceivably have "dominated" the board. Further, because the WCA itself

provides statutory tolling for the period of developer domination (RCW 64.34.452(1)), adoption of an additional common law tolling mechanism would be particularly inappropriate.

On behalf of its members, BIAW respectfully requests that this Court reject the adoption of the doctrine of adverse domination by the Court of Appeals, because it disrupts the carefully achieved balance of the WCA and chills participation on association boards for fear of liability well after service. BIAW further requests that this Court affirm the trial court's dismissal of the Developer Defendants to ensure that developers, contractors, and their employees will not be subject to a potentially unlimited tail of liability due to their statutorily-required<sup>2</sup> board service at the inception of all condominium associations.

**II. IDENTITY AND INTEREST OF AMICUS CURIAE  
BUILDING INDUSTRY ASSOCIATION OF  
WASHINGTON**

The Building Industry Association of Washington (BIAW) represents over 7,700 member companies who employ nearly 200,000 residents of Washington.

BIAW is made up of 14 affiliated local associations: the Building Industry Association of Clark County, the Central Washington Home

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<sup>2</sup> RCW 64.34.300 states, "A unit owners' association shall be organized no later than the date the first unit in the condominium is conveyed." Accordingly, all association boards will start with declarant-appointed board members.

Builders Association, the Jefferson County Home Builders Association, the Master Builders Association of King and Snohomish Counties, the Home Builders Association of Kitsap County, the Lower Columbia Contractors Association, the North Peninsula Building Association, the Olympia Master Builders, the Master Builders Association of Pierce County, the San Juan Builders Association, the Skagit-Island Counties Builders Association, the Spokane Home Builders Association, the Home Builders Association of the Tri-Cities, and the Building Industry Association of Whatcom County.

BIAW's members engage in every aspect of residential building—from site development to remodeling. They are often the ones building the communities served by the homeowners' associations that they also form, and on the boards of which they are *required* to initially serve prior to turning over control to elected unit owners.

### **III. ISSUE OF CONCERN TO AMICUS CURIAE**

Whether the doctrine of adverse domination should be adopted to toll the statute of limitations against appointed homeowners' association board members when (i) the WCA already provides for tolling during the period of developer control, and (ii) such tolling would upset the statutory scheme and be contrary to legislative pronouncements as to the running of statutes of limitations in the construction and condominium realms.

#### IV. STATEMENT OF THE CASE

BIAW adopts the Statement of the Case presented in Respondents' Joint Supplemental Brief, as well as in the Brief of Respondents Sanford, Burckhart, Sansburn and Lozier Homes Corporation in the Court of Appeals.

#### V. ARGUMENT

**A. The tolling doctrine created by the Court of Appeals disrupts the balance created by the Washington Condominium Act to advance the goals of the Growth Management Act.**

The WCA strikes a careful and appropriate balance between predictable developer liability and consumer protection, and it embodies the Legislature's intent to achieve the goals of the Growth Management Act. That balance is disrupted by the decision of the Court of Appeals to extend the statute of limitations on claims ultimately arising from alleged construction defects.

The WCA provides much greater rights to condominium purchasers than are available to any other real estate purchasers, but it does so in a balanced manner that also protects the rights of developers so as to encourage development of this uniquely affordable form of housing. To understand why the Court of Appeals' decision is so disruptive to the legislative scheme, the Court needs to look at the historic context from which the WCA arose.

Historically, in the realm of residential real property, Washington has long followed the rule that a buyer has his or her own independent duty to investigate the property for defects before purchase, and has limited remedies beyond those stated in the purchase contract to recover for defects that could have been discovered by such inspection. *E.g.*, *Puget Sound Services v. Dalarna Management*, 51 Wn. App. 209, 215, 752 P.2d 1353, *rev. denied* 111 Wn.2d 1007 (1988) (affirming dismissal of buyer's claims against seller because buyer knew of some evidence of water penetration so it had a duty to investigate further before purchasing); *Alejandre v. Bull*, 159 Wn.2d 674, 153 P.3d 864 (2007) (buyer's failure to follow through on inspection items barred its claims against seller); *Douglas v. Visser*, 173 Wn. App. 823, 825, 295 P.3d 800 (2013) (buyer's failure to inquire further about extent of observable rot barred its claims against seller). While the common law recognizes a limited implied warranty of structural soundness with respect to those who purchase a new home from an original builder (*House v. Thornton*, 76 Wn.2d 428, 435-36, 457 P.2d 199 (1969)), those limited warranties have never extended to future purchasers (i.e., those who purchase from the original purchaser). *Nguyen v. Doak Homes, Inc.*, 140 Wn. App. 726, 167 P.3d 1162 (2007). Similarly, Washington has never recognized a tort of "negligent construction." *Stuart v. Coldwell Banker Commercial Group, Inc.*, 109

Wn.2d 406, 745 P.2d 1284 (1987); *Atherton Condo. Apartment-Owners Ass'n Bd. of Dirs. v. Blume Dev. Co.*, 115 Wn.2d 506, 799 P.2d 250 (1990).

In the WCA, the Legislature codified and modified the common law with respect to condominium construction. It mandated specific warranties of quality that go well beyond the limited common law implied warranties. RCW 64.34.443 - .450. It allowed even those who did not purchase directly from the developer to enforce those warranties. RCW 64.34.452. However, it also mandated that an action seeking to recover for allegedly defective construction had to be commenced within four years of (generally) the date of first sale or it would be barred. RCW 64.34.452. It eliminated use of the discovery rule to extend that deadline. RCW 64.34.452(2).

The Legislature also took into account the possibility of a developer using its control of the association to prevent suit during that four year period by stating explicitly in the WCA that the period for bringing suit “shall not expire prior to one year after termination of the period of declarant control....” RCW 64.34.452. The Legislature deemed that four year period (with the possibility of a one year extension) sufficient for unit owners or their association to uncover and pursue any defect claims. By including an explicit but limited extension of the WCA

statute of limitations for any “adverse domination” by the developer, it can be inferred that the Legislature intended to exclude any further and contradictory common law remedy. *Weyerhaeuser Co. v. Tri*, 117 Wn.2d 128, 134, 814 P.2d 629 (1991).

One senator spoke of the balance achieved by the WCA on the date of its initial passage in the Senate. He said that the Act “will do much to protect consumers in our state,” and that “it will be helpful to the industry in describing, in a clear-cut and straightforward fashion, the responsibilities that they have as sellers and developers of these kinds of property.” An Act Relating to Condominiums, S.S.B. 5208, 1989 Sess. (WA 1989) (statement of Sen. Talmadge) (<http://media.digitalarchives.wa.gov/Media/25/297/858/1b677d97-4c9f-45ae-a13a-9246400b7c90.mp3>). The Court of Appeals clouded the responsibilities of condominium sellers and developers and disrupted the balance between consumer and developer interests by adopting the inapplicable and uncertain doctrine of adverse domination.

The end result of the Court of Appeals’ decision is to throw that clear-cut and straightforward program into chaos. The Court of Appeals’ decision is not congruent with the common law or the WCA, and it throws more legislative goals out of balance, particularly with respect to the Growth Management Act.

The Legislature restated its intent in the 2004 amendments to the Act.<sup>3</sup> The Legislature determined that to meet the urban densities contemplated by the Growth Management Act, RCW Ch. 36.70A, “[q]uality condominium construction needs to be encouraged” to ensure the availability of “a broad range of ownership choices” for Washingtonians. RCW 64.34.005(1)(c). Vital to the health and stability of the market for condominium development is an assurance that the statute of limitations for claims against persons in the Developer Defendants’ position will not be extended several years longer than the statutory deadline.

The WCA’s goals of promoting affordable housing development are advanced by 1) limiting the liability of condominium developers in the form of a statute of repose that provides a date certain by which warranty claims must be made, RCW 64.34.452(1)-(2); 2) accounting for declarant (as opposed to unit owner) control of the association board by extending

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<sup>3</sup> In *One Pacific Towers Homeowners' Ass'n v. Hal Real Estate Investments, Inc.*, 148 Wn.2d 319, 61 P.3d 1094 (2002), this Court extended liability under the WCA to a developer’s principal, which had directed the marketing and sale of the condominiums, on the theory that the principal was “acting in concert” with the actual declarant. As a result, trial courts around the state started holding parent companies, individuals and anyone else tangentially involved with development of condominiums liable for defects under the WCA. Because that decision upset the Legislature’s balanced statutory scheme and threatened to reduce the availability of condominiums as an affordable form of housing, the Legislature removed the “persons acting in concert” language from the WCA the following year. Laws of 2004, Ch. 201. The Court should take care not to upset that balance again by allowing unit owners to bring what are in effect WCA condominium defect claims against developers and their employees long after the statute of limitations under the WCA has run.

the period for claims up to one year after the end of declarant's control, RCW 64.34.452(1); and by 3) giving individual unit owners as well as their Association the same right to sue for defects within the statutory period. *See* RCW 64.34.455.

Moreover, the Legislature has generally defined the liability period of builders and developers in the form of a statute of repose that bars construction claims past six years after substantial completion of a project. RCW 4.16.310; *see also 1000 Virginia Partnership Ltd. Partnership v. Vertecs Corp.*, 158 Wn.2d 566, 575, 146 P.3d 423 (2006) (explaining operation of the construction statute of repose). Applying the doctrine of adverse domination to toll claims related to general and WCA construction defect claims negates the legislatively-mandated predictability of those respective statutes of limitations and repose, and creates undue risk and uncertainty for developers of Washington's best supply of affordable housing. In addition to disrupting stated policy, the Court of Appeals lacks a sufficient legal basis here to apply the doctrine of adverse domination.

**B. The doctrine of adverse domination should not be applied to toll the claims of non-corporate plaintiffs.**

The doctrine of adverse domination does not apply to claims brought by individual, non-corporate plaintiffs. The doctrine of adverse domination, as adopted in other jurisdictions, only applies to toll the

statute of limitations for the benefit of *corporate plaintiffs* that were under the control of wrongdoing directors. *See, e.g., Fed. Deposit Ins. Corp. v. Smith*, 328 Or. 420, 429, 980 P.2d 141 (1999); *see also, Hecht v. Resolution Trust Corp.*, 333 Md. 324, 346, 635 A.2d 394 (1994) (“The doctrine of adverse domination presumes that actual notice will not be available until the corporate plaintiff is no longer under the control of the erring directors.”); *Resolution Trust Corp. v. Chapman*, 895 F.Supp. 1072, 1078 (C.D.Ill. 1995) (“In sum, the adverse domination doctrine is simply a common sense application of the discovery rule to a corporate plaintiff.”).

The Court of Appeals erroneously held that the adverse domination doctrine can apply to claims brought by individuals, rather than the Association itself. The Court did so by analogizing to the continuous representation doctrine, previously adopted in Washington, which applies to attorney malpractice claims. “[T]he continuous representation doctrine ‘prevents an attorney from defeating a malpractice claim by continuing representation until the statute of limitations has expired.’” *Alexander v. Sanford*, 181 Wn.App. 135, 160, 325 P.3d 341 (2014) (quoting *Janicki Logging & Constr. Co. v. Schwabe, Williamson & Wyatt, PC*, 109 Wn.App. 655, 662, 37 P.3d 309 (2001), *rev. denied* 146 Wn.2d 1019 (2002)).

But in the present case, the Court of Appeals failed to complete the analogy. As admitted by Homeowners, Developer Defendants did not continue to control the board past any statute of limitations, and indeed turned over control “to a board elected by unit owners” on May 9, 2002. Complaint, ¶2.20 (CP 9). Developer Defendants relinquished control of the board nearly eighteen (18) months prior to the expiration of the WCA’s statute of limitations, and nearly ten (10) years prior to commencement of the action by Homeowners. Homeowners’ complaint itself negates any claim that the Developer Defendants controlled the Association or the board beyond the four year period for bringing warranty claims.<sup>4</sup>

Practically speaking, tolling the statute of limitations against the Developer Defendants in these circumstances leads to an absurd result with the potential to impose large and unpredictable costs on developers of affordable, multi-family housing units. Here, *none* of these Homeowners even owned their units during the admitted period of declarant control, which ended (per the Homeowners’ complaint) on May 9, 2002. Joint Answer to Homeowners’ Petition for Review, Appendix A. Homeowners’ complaint admits that the declarant’s appointed but non-voting board

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<sup>4</sup> And had Homeowner’s complaint actually alleged developer control past that four year period, the WCA itself would extend the time for bringing claims by one year. RCW 64.34.452(1). There is no reason to impose an ill-conceived judicial remedy in the guise of “adverse domination” when the Legislature has already provided a sufficient remedy.

member Sanford resigned from the board on March 24, 2006. Complaint, ¶2.73 (CP 19). Yet the Court of Appeals' decision suggests that the declarant's "domination" could theoretically have continued until April 2011 when the Association declared a special assessment. *Alexander*, 325 P.2d at 359.

Based on Homeowners' own pleading, such domination by Developer Defendants is a logical impossibility. But such absurd outcomes will be encouraged if the Court allows the doctrine of adverse domination to apply to individual claims, as opposed to restricting the doctrine to claims brought by or on behalf of a corporate entity. If the Court of Appeals' decision is allowed to stand, every individual condominium unit owner will be encouraged to claim ignorance of any problem until there is an assessment, and then argue that they were "adversely dominated" by the board such that the statute of limitations should be tolled. Corrupt board members may be able to keep the corporation they control from suing them, but the same cannot be said for individuals who have their own right of action, pursuit of which is not controlled by the board. That is why courts that have been asked to apply adverse domination to claims belonging to an individual, as opposed to the corporation, have rejected the invitation. *E.g.*, *City of East Chicago v. East Chicago Second Century*, 878 N.E.2d 358, 381 (Ind. Ct. App. 2007), *aff'd*

*in relevant part*, 908 N.E.2d 611, 622 n.2 (Ind. 2009); *Sundbeck v. Sundbeck*, No. 1:10-CV23-A-D, 2011 WL 5006430, \*4 (N.D. Miss. Oct. 20, 2011); *Arthaud v. Brignati*, 10 Mass. L. Rptr. 403, 1999 WL 674328, \*3, n.4 (Mass. Super. Ct. August 6, 1999); *Berish v. Bornstein*, 21 Mass. L. Rptr. 530, 2006 WL 2221924, \*10 (Mass. Super. Ct. May 22, 2006) (all refusing to extend the doctrine of adverse domination to individual claims).

“[A]ny rule that tolls the statute of limitations is in tension with the legislative policy of finality that the statute of limitations represents.” *Janicki*, 109 Wn. App. at 663. The Legislature has twice curtailed use of the discovery rule in the construction context (RCW 4.16.310; RCW 64.34.452), in part because once a builder turns over control of a project to the owners, it has no control over how that project will be used or maintained. Any building will be subject to future repairs as a result of age, wear and tear, which repairs will be greater if the owner fails to engage in proper maintenance. While condominium developers can be held liable for such repairs during the first four years of ownership, they and their employees should not be held liable over a decade after the project was built, especially as a result of issues that were discoverable during the statutory warranty period.

Homeowners' own complaint shows that the Developer Defendants did not dominate the board, nor did they or could they conceal the advice given to the board in 2003 regarding the Association's rights. Those admissions, coupled with the reality that a board's decision to not commence an action for warranty claims does not preclude individual unit owners from investigating potential defects and seeking their own remedies, makes this an exceptionally poor case for applying any equitable tolling doctrine, much less the complex doctrine of adverse domination.

Every condominium association starts with a board appointed by the initial developer. RCW 64.34.300. Thus, every condominium association is "dominated" by the developer until control of the board is turned over to independent unit owners. Applying the doctrine of adverse domination to individual unit owners' claims arising out of such statutorily-required board membership would create an unlimited tail of liability for developers and contractors, and would directly contradict the goal of the Growth Management Act to "[e]ncourage the availability of affordable housing to all economic segments of the population of this state, promote a variety of residential densities and housing types, and encourage preservation of existing housing stock." RCW 36.70A.020(4). Even if the doctrine of adverse domination could apply in the context of

individual claims, it should not be used here to allow these Homeowners to pursue these claims against these Developer Defendants, especially when the complaint itself admits that such domination ceased long ago, and well within the WCA's statutory period for bringing warranty claims. To hold otherwise would render the WCA's statute of repose illusory, as every individual unit owner who did not actually serve on his or her condominium association's board would otherwise claim that they were "adversely dominated" by the board's inaction and should be allowed to pursue what are essentially WCA warranty claims outside of the statutory period.

### **C. CONCLUSION**

The doctrine of adverse domination applies only to toll the statute of limitations for claims of corporate plaintiffs against wrongdoing directors, not individual unit owners pursuing individual claims. The application of this tolling doctrine to Developer Defendants, who the complaint admits had relinquished control, is especially inappropriate. The Court should reject the application of the doctrine of adverse domination and enforce the appropriate statute(s) of limitations on claims that have clearly expired. To uphold the decision of the Court of Appeals would be to expose builders of Washington's most affordable housing source to unpredictable, expensive, and protracted liability, in direct

contravention of the Legislature's mandates in the WCA and the construction statute of repose, as well as the housing goals of the Growth Management Act.

RESPECTFULLY SUBMITTED this 6 day of April, 2015.

By \_\_\_\_\_

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