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Supreme Court No. 90642-4

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

Court of Appeals No. 69637-8-1

CINDY ALEXANDER, ET AL;

Petitioners,

v.

GARY SANFORD and JANE DOE SANFORD, ET AL;

Respondents.

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RESPONDENTS' JOINT SUPPLEMENTAL BRIEF

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## I. INTRODUCTION

This case will decide whether individual condominium unit owners (i.e., Homeowners)<sup>1</sup> can sue on their own behalf when the Association itself cannot pursue similar claims because they are clearly time-barred. Homeowners' complaint admits that the Developer Defendants ceased to control the Association after 2002, and that an attorney advised the Association to sue the developer in 2003 because of apparent defects. The Association failed to follow that advice, which the Homeowners contend resulted in an assessment for repairs eight years later that these Homeowners now seek to recover from all Respondents. Despite the above admissions, and the stipulation that all of the defendant board members had resigned their positions by no later than September 2008, the Court of Appeals held that the statutes of limitations on Homeowners' claims could generally be tolled by respondent board members' "adverse domination" until the assessment was declared in 2011.

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<sup>1</sup> In this supplemental brief, we adopt the naming conventions previously utilized in briefing and in the Court of Appeals' decision. Thus, we refer to all of the defendants as "Defendants" or "Respondents." We refer to defendants Sansburn, Sanford, and Burckhard (the declarant-appointed board members) along with Lozier Homes as the "Developer Defendants." We refer to defendants Backues, Cusimano, Holley, Hovda, Peter, and Philip, who were all unit owners and elected by other unit owners, as the "Elected Board Members." We refer to the plaintiffs as "Homeowners." We refer to the Huckleberry Circle Homeowners Association as the "Association," and to the declarant developer defendant Huckleberry Circle, LLC as the "Declarant." Because of space limitations, we do not attempt to address every issue raised in the petitions for review, but rely on the arguments and briefing previously provided.

In analyzing the limitations issue, the Court of Appeals failed to distinguish between the claims arising out of the Developer Defendants' involvement with the alleged construction defects and the claims arising out of the Elected Board Members' alleged omissions in failing to sue for such defects and later alleged concealment of the scope of the problem. Assuming that the Developer Defendants previously concealed information, or previously dominated the board, Homeowners' complaint admits such domination and concealment ended by 2003 when the Association discovered those claims and was advised to sue.

The Court of Appeals' decision to apply the theory of adverse domination here is particularly problematic. The doctrine has been criticized by other courts, has never before been adopted in Washington, and, when it has been adopted in other jurisdictions, is limited to tolling claims of the corporation itself against defalcating directors, rather than claims by individuals. The doctrine's rationale (that corrupt board members can prevent the corporate entity from pursuing claims against them, and the shareholders may be powerless to act) makes no sense in the context of condominium associations, where volunteer board members live among the unit owners they serve and share their interests.

If adverse domination will toll individual claims against volunteer board members in non-profit residential communities, the Court should at

least require that plaintiffs show that the domination and adversity is “complete.” The Court of Appeals’ presumption that non-adverse board members will not disclose the actions of the allegedly corrupt majority does not accord with the realities of residential condominium living.

But the Court of Appeals was correct in holding that condominium board members do not owe a duty to protect the economic interests of future purchasers. That decision is congruent with the explicit language of the governing statutes. It is also congruent with Washington law in the for-profit corporate context, which has long held that only those who hold shares at the time of a challenged board decision have standing to complain. Any other rule would put volunteer board members in an impossible position, as decisions that may be good for current unit owners could be challenged by those who purchase later. Few will volunteer for board service if their civic-minded instincts will result in potentially unending and ruinous liability to unknown future purchasers.

## **II. ASSIGNMENTS OF ERROR**

1. The Court of Appeals erred in failing to affirm the decision of the trial court dismissing Homeowners’ claims against the Developer Defendants and Holley as barred by the applicable statutes of limitations, as plaintiffs’ complaint admitted the facts underlying their claims were discovered or discoverable many years before Homeowners filed their complaint, and the Developer Defendants have unique statutory protections against such stale claims.

2. The Court of Appeals erred in adopting and applying the doctrine of adverse domination in this instance, as application of the doctrine will

interfere with the governance of residential condominiums and Defendants could not have dominated anything after resignation.

3. The Court of Appeals erred in ignoring the explicit language of the Washington Condominium Act (WCA) and precedent, which precludes Homeowners' fraud and misrepresentation claims here.<sup>2</sup>

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

We adopt the statements of facts previously provided in briefing, and refer to the particular facts only as necessary for the arguments below.

### **IV. ARGUMENT**

#### **A. Homeowners' claims against the Developer Defendants (and Holley) are barred by the statute of limitations.**

##### **1. The Association discovered the Developer Defendants' alleged fault in 2003.**

The Association was created by Declarant, Huckleberry Circle, LLC, on June 29, 2000. CP 6. As required by law (RCW 64.34.300), the first board members of the Association (Sansburn, Burckhard, and Sanford) were appointed by and affiliated with Declarant. CP 6. But Homeowners admit that any "domination" by the Developer Defendants ended on May 9, 2002, when "*control* of the Association was turned over to a Board elected by unit owners." CP 10 (emphasis added).<sup>3</sup>

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<sup>2</sup> With respect to this assignment of error, we rely on the arguments already made in the petition for review. *See* Respondents' Joint Petition for Review, at 19-20.

<sup>3</sup> Defendants Sansburn, Burckhard and Holley had all resigned by that time; defendant Sanford remained only as a nonvoting board member. CP 10. Defendant Sanford resigned as even a non-voting board member "[b]y March 24, 2006." CP 19.

Homeowners' extensive allegations against the Developer Defendants (CP 6-11) repeat two points: (1) that the Developer Defendants knew that the condominiums were "were riddled with defective construction" (CP 6) and (2) that the Developer Defendants undertook various actions "to protect themselves from potential liability under the implied warranties of the Washington Condominium Act for selling seriously defective construction." CP 7.

But Homeowners admit that the Developer Defendants' attempts to conceal those defects and their liability for those defects failed. Instead, the Association discovered those claims in March 2003:

2.31 In or around early March of 2003, the Board was contacted by construction defect attorney Ken Harer. Attorney Harer, who is also an architect, informed the Board that there were signs of potentially serious hidden construction defects, and that the statute of limitations on the Association's warranty claims would soon expire.

\* \* \* \* \*

2.36 On or about April 3, 2003, Peter conveyed to the [Elected] Board the content of written materials from attorney Harer advising several steps: a preliminary assessment of potential problem areas by Harer, ***establishing a timeline for action before the warranty statute of limitations expires***, selecting an acceptable investigating professional, performing an intrusive investigation either with or without involvement of Declarant, development of a scope of repairs, initiation of an alternative dispute resolution process if possible, ***and or commencement of defect litigation*** if alternative dispute resolution proved infeasible.

CP 11-12 (emphasis added).<sup>4</sup>

“[E]ven in an action for fraud where a fiduciary relation exists, the burden is upon the plaintiff to show that the facts constituting the fraud were not discovered *or could not [be] discovered* until within 3 years prior to the commencement of the action.” *Interlake Porsche & Audi, Inc. v. Bucholz*, 45 Wn. App. 502, 518, 728 P.2d 597 (1986) (emphasis added). By pleading that attorney Harer was able to determine the existence of alleged defects in 2003, Homeowners admit that the Developer Defendants’ alleged malfeasance was discovered (or discoverable) then. *E.g., Cawdrey v. Hanson Baker Ludlow Drumheller*, 129 Wn. App. 810, 818, 120 P.3d 605 (2005) (party who knows of any claims arising out of transaction is deemed to have discovered sufficient facts for all claims to accrue); *Smith v. Super. Ct.*, 217 Cal. App. 3d 950, 954, 266 Cal. Rptr. 253 (1990) (finding claims against condominium board director barred by statute of limitations on similar facts). Any other holding would allow

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<sup>4</sup> The Association had the legal authority to institute such defect litigation on behalf of itself, or two or more Homeowners. RCW 64.34.304(1)(d). Because the Elected Board (consisting of unit owners) was advised of these claims in 2003, the Association and its members (i.e., the unit owners) would be deemed to know the same information. RCW 64.34.308(1); *Deep Water Brewing, LLC v. Fairway Resources Ltd.*, 152 Wn. App. 229, 269-70, 215 P.3d 990 (2009) (board president’s knowledge imputed to homeowners association); *Stuart v. Coldwell Banker Commercial Grp, Inc.*, 109 Wn.2d 406, 417, 745 P.2d 1284 (1987) (unit owners’ and association’s knowledge is coextensive); *see also Interlake Porsche & Audi, Inc. v. Bucholz*, 45 Wn. App. 502, 517-18, 728 P.2d 597 (1986) (board members’ knowledge imputed to corporation).

individual unit owners (or corporate shareholders) to circumvent statutes of limitations at will by simply claiming personal ignorance of the knowledge that the corporation is deemed to have as a matter of law.<sup>5</sup>

Washington case law confirms that because the Association knew of the alleged defects in 2003, the statute of limitations on all claims against the Developer Defendants (and Holley) ran before Homeowners filed suit. In one of the earliest cases on this issue, this Court held that once the corporation had notice of the alleged defalcations, the statute of limitations for the shareholders' claims began to run at the latest when the allegedly defalcating directors resigned.<sup>6</sup> *Grussemeyer v. Harper*, 187 Wash. 508, 510, 60 P.2d 702 (1936). In a later case, after surveying Washington law, this Court held that the shareholders' action against resigned directors was barred by the statute of limitations "whether appellants had actual knowledge of the various transactions or not, for the

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<sup>5</sup> Only plaintiffs Smith, Kasprzak, Blocker Ventures and West purchased their units before the four year statute of limitations for WCA claims expired on November 6, 2004, which statute expires "regardless of the purchaser's lack of knowledge of the breach." RCW 64.34.452(2). They are the only plaintiffs who could plausibly claim to have "lost" a chance to sue under the WCA if there were any deception.

<sup>6</sup> In this, Washington corporate law tracks the law of professional malpractice liability. Once the client has facts sufficient to know that there has been a problem, its cause of action accrues, although any limitations period may be tolled during the course of the professional's representation of the client on that matter. *Quinn v. Connelly*, 63 Wn. App. 733, 741, 821 P.2d 1256, rev. denied, 118 Wn.2d 1028 (1992); *Janicki Logging & Constr. Co. v. Schwabe, Williamson & Wyatt, P.C.*, 109 Wn. App. 655, 661, 37 P.3d 309 (2001), rev. denied, 146 Wn.2d 1019 (2002); *Matson v. Weidenkopf*, 101 Wn. App. 472, 3 P.3d 805 (2000).

reason that the facts were open and appeared upon the records of the corporation, subject to inspection by the stockholders.” *Davis v. Harrison*, 25 Wn.2d 1, 22, 167 P.2d 1015 (1946). More recently, the Court of Appeals held that once one director learned of the facts constituting the other director’s alleged fraud, the statute of limitations on a minority shareholder’s claim with respect to that transaction began to run (even if that shareholder did not have personal knowledge of that transaction). *Interlake Porsche & Audi*, 45 Wn. App. at 517-18.

Homeowners cannot use alleged concealment or domination by other board members to toll the statute of limitations against the Developer Defendants. “[T]he doctrine of fraudulent concealment tolls the statute of limitations only as to those defendants who committed the concealment, and plaintiffs may not generally use the fraudulent concealment by one defendant as a means to toll the statute of limitations against other defendants.” *Griffin v. McNiff*, 744 F. Supp. 1237, 1256 n.20 (S.D.N.Y. 1990); accord *Barker v. Am. Mobil Power Corp.*, 64 F.3d 1397, 1401-02 (9th Cir. 1995) (citing numerous cases); *Passatempo v. McMenimen*, 461 Mass. 279, 295, 960 N.E.2d 275, 289-90 (2012). This principle was implicitly acknowledged in the leading Washington case on fraudulent concealment: *Giraud v. Quincy Farm & Chem.*, 102 Wn. App. 443, 6 P.3d 104 (2000). There, the plaintiffs claimed the defendant

concealed the fact that a pesticide had been improperly applied, so the statute of limitations should be tolled until they personally discovered the facts. *Giraud*, 102 Wn. App. at 454-55. But because the plaintiffs' employees had actually applied the pesticide, the defendants could not have concealed that information from the plaintiffs (even if those employees may have concealed that misapplication from the plaintiffs), so no tolling applied. *Giraud*, 102 Wn. App. at 455-56.

Similarly, that a director may not be acting in the best interests of the corporation does not toll the statute with respect to claims against third parties.<sup>7</sup> Homeowners' complaint admits that the Developer Defendants (and Holley) were not part of the Elected Board's decision not to sue the developer. CP 11-12. Even if the independent elected board members failed to inform these individual unit owners (most of whom did not even own units at the time)<sup>8</sup> about the advice the board received in 2003, that does not extend the statute of limitations against the Developer

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<sup>7</sup> *E.g.*, *FDIC v. Smith*, 980 P.2d 141, 146 (Or. 1999); *FDIC v. Shrader & York*, 991 F.2d 216, 226-227 (5<sup>th</sup> Cir. 1993). As explained by another court, the board members' knowledge is imputed to the corporation as a matter of law regardless of whether that knowledge is communicated to others unless it can be shown that the board member has completely abandoned the corporation's interests and is acting "entirely for his own purposes." *USACM Liquidating Trust v. Deloitte & Touche LLP*, 764 F. Supp. 2d 1210, 1218 (D.Nev. 2011).

<sup>8</sup> Only plaintiffs Smith and Kasprzak owned a unit in April 2003.

Defendants. These Developer Defendants had no ability to conceal that information from the Association or its members, or prevent such suit.<sup>9</sup>

**2. Defendant Holley concealed nothing.**

The above arguments apply with even more force to Holley. She resigned from the board in May 2002. In addition, Homeowners do not allege that Holley (unlike the allegations against the Developer Defendants) had any knowledge of construction defects nor do they allege she learned of, or had the opportunity to learn of, any defects during the time she served. She had nothing to conceal. The trial court was correct in dismissing Plaintiffs' claims against Holley as a matter of law.

**3. The Developer Defendants have unique statutory defenses.**

Allowing the claims against the Developer Defendants to proceed would upset the Legislature's statutory scheme. All condominium associations start out with declarant-appointed boards, because the association must be formed (as a corporation with a board) before any units can be sold. RCW 63.34.300. The WCA already accounts for any potential conflict of interest that may exist with respect to those initial

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<sup>9</sup> See, e.g., *Smith*, 217 Cal. App. 3d at 954 (rejecting application of adverse domination doctrine to toll nearly identical claims against condominium board director who resigned "over 15 months before the statute of limitations expired" on the condominium association's defect claims); *FDIC v. Carlson*, 698 F. Supp. 178, 180 (D. Minn. 1988) (director who resigned more than three years before lawsuit filed may have statute of limitations defense despite allegations of adverse domination).

declarant-appointed board members' loyalties by tolling the statute of limitations on certain claims during the period of declarant control. RCW 64.34.344, .452(1).

But the WCA also provides that claims arising out of alleged breaches of the warranty of quality construction accrue as a matter of law and "regardless of the purchaser's lack of knowledge of the breach"<sup>10</sup> as of the date on which the first unit was purchased (for common area defect claims), or the date each unit was first purchased (for individual unit claims). RCW 64.34.452(2). The Legislature limited the time for bringing such claims to encourage condominium development, which provides an affordable source of housing. RCW 64.34.005. The Legislature has also limited application of the discovery rule with respect to claims against contractors. RCW 4.16.310 (claims against licensed contractors must accrue within six years after substantial completion of construction or termination of the services or they "shall be barred").

The Court of Appeals' holding now allows an association to learn of construction defect claims, do nothing about them before the limitations

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<sup>10</sup> Homeowners are presumed to know this limitations period. "The discovery rule does not toll the statute of limitations merely because the individual plaintiff was ignorant of the law on which to base a cause of action. A reasonable person is deemed to know the law, or, as the old cliché puts it, 'ignorance of the law is no excuse.'" *Retired Pub. Employees Council of Wash. v. State, Dep't of Ret. Sys.*, 104 Wn. App. 147, 152, 16 P.3d 65 (2001).

period runs, and then have individual unit owners sue the developer and its employees (in their required role as initial board members) to recover the same pecuniary damages arising out of alleged construction defects. The Legislature has limited the use of the “discovery rule” or its analogues to extend the time to pursue claims arising from such defects; the Court of Appeals’ decision interferes with those mandates.<sup>11</sup>

**B. Adverse domination should not apply here to toll individual Homeowner claims.**

The crux of Homeowners’ allegations is that the board members knew of defective construction, should have timely pursued a claim against the developer, but did nothing. Typically, courts apply adverse domination to situations in which the board’s domination of the corporation prevents *the corporation itself* from pursuing claims *against* the corrupt directors.<sup>12</sup> Here, the Court of Appeals applied adverse domination to toll individual unit owners’ direct claims, rather than corporate claims, and did so even though initial unit owners have their own right to sue for defective construction. RCW 64.34.452(2)(a). The

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<sup>11</sup> The Court of Appeals was correct in dismissing the Consumer Protection Act claims as the claims here do not involve “trade or commerce.” *See also Office One, Inc. v. Lopez*, 769 N.E.2d 749, 759 (Mass. 2002); *Rafalowski v. Old Country Rd., Inc.*, 714 A.2d 675, 676 (Conn. 1998). The Court of Appeals was incorrect in reaching the substance of those claims, since those claims (along with all the others) should have been barred by the applicable statute of limitations for the reasons explained above.

<sup>12</sup> *FDIC v. Howse*, 736 F. Supp. 1437, 1441 (S.D.Tex. 1990); *Hecht v. Resolution Trust Corp.*, 635 A.2d 394, 402 n.11 (Md. 1994).

Court of Appeals' use of the adverse domination doctrine here is unique and unwarranted.

The adverse domination doctrine is itself controversial, and has been rejected by a number of courts.<sup>13</sup> Indeed, Delaware (whose corporate law Washington courts generally look to for guidance<sup>14</sup>) has never adopted the doctrine of adverse domination. *In re AMC Investors, LLC*, No. 08-12264, *et al*, Slip Op. at 29 (Bankr. D. Del. Jan. 28, 2015). The doctrine is particularly suspect as a means of tolling homeowners' claims against board members in nonprofit condominium and homeowners associations. *Prairie W. Condo Ass'n, Inc. v. Wiseman*, 2009 WL 743322, at \*3-4 (Kan. Ct. App. Mar. 13, 2009); *Smith*, 217 Cal. App. at 954. This Court should reject its application here.

The theory of "adverse domination" is rooted in the concept that a corporation that is completely controlled by corrupt directors cannot sue those directors until they are replaced.<sup>15</sup> Hence, although the corporation "knows" that it has a claim against those directors, it is unable to act on

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<sup>13</sup> See, e.g., *Resolution Trust Corp. v. Armbruster*, 52 F.3d 748, 751-52 (8th Cir. 1995); *Resolution Trust Corp. v. Artley*, 28 F.3d 1099, 1102 n.4 (11th Cir. 1994); *Resolution Trust Corp. v. Everhart*, 37 F.3d 151, 155 (4th Cir. 1994); *Resolution Trust Corp. v. Wood*, 870 F. Supp. 797, 811-12 (W.D. Tenn. 1994).

<sup>14</sup> E.g., *Sound Infiniti, Inc. v. Snyder*, 169 Wn.2d 199, 209-210, 237 P.3d 241 (2010), *In re F5 Networks, Inc.*, 166 Wn.2d 229, 240, 207 P.3d 433 (2009).

<sup>15</sup> E.g., *FDIC v. Smith*, 980 P.2d 141, 144-45 (Or. 1999); *FDIC v. Greenwood*, 739 F.Supp. 450, 453 (C.D. Ill. 1989).

that knowledge because of the directors' "adverse" domination, so the limitations period is tolled until that adverse domination ends.<sup>16</sup>

But unit owners in condominiums are not passive and remote investors. Rather, they reside in the condominium complex, and can observe first-hand the operations of the complex, the repairs (or lack thereof) to the complex, and anything else that affects the habitability of their homes. Neighbors in a condominium complex dine with their board members, bump into them in the hallway or take care of their dogs while they go away on vacation. Thus:

The board members of a homeowners association are seldom professional managers, are very often uncompensated and most often are neighbors. Undoubtedly, the specter of personal liability would serve to greatly discourage active and meaningful participation by those most capable of shaping and directing homeowner activities.

*Jaffe v. Huxley Architecture*, 200 Cal. App. 3d 1188, 1193, 246 Cal. Rptr. 432 (1988).<sup>17</sup> If disgruntled neighbors who may never have attended an

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<sup>16</sup> Directors are supposed to "dominate" the entity they serve by directing its actions. Only when the directors' interests are directly "adverse" to the entity itself, and those adverse interest remain undisclosed, is tolling appropriate. For that reason, many courts limit use of the doctrine to allegations of fraudulent conduct or self-dealing, rather than mere negligence. *E.g.*, *Resolution Trust Corp v. Farmer*, 865 F. Supp. 1143, 1157 (E.D. Pa. 1994); *FDIC v. Jackson*, 133 F.3d 694, 699 (9th Cir. 1998); *see also Schwartzmann v. Bridgehaven*, 33 Wn. App. 397, 403, 655 P.2d 1177 (1982) (condominium board members not liable unless fraud or dishonesty shown). "If adverse domination theory is not to overthrow the statute of limitations completely in the corporate context, it must be limited to those cases in which the culpable directors have been active participants in wrongdoing or fraud, rather than simply negligent." *FDIC v. Dawson*, 4 F.3d 1303, 1310 (5<sup>th</sup> Cir. 1993).

association meeting, much less volunteered for a board position, are allowed to second-guess and sue their more civic-minded neighbors years after decisions were made on the basis of vague allegations of “domination,” condominium board service will be discouraged.

C. **If the doctrine of adverse domination applies at all, the “complete domination” test is more appropriate for condominium associations.**

Because the elected board is made up of unit owners, each board member has his or her own right of action. Unless all the board members are colluding to hide information from their neighbors to serve their own adverse purposes, there is no reason to presume that noncolluding board members will remain silent.

In short, the fears expressed by other courts<sup>18</sup> regarding how corrupt board members in the for-profit corporate context could prevent even innocent board members from taking action are not present in the condominium context. If the adverse domination doctrine is to be adopted in Washington and applied to condominium boards, the plaintiff should have to show complete, not partial, domination.

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<sup>17</sup> As shown by the Association’s own records here, the Association was already having trouble getting anyone to volunteer for a board position, and could not even muster a quorum for elections. *See* discussion in Respondents’ Brief at 15.

<sup>18</sup> *E.g.*, *FDIC v. Smith*, 980 P.2d 141, 148 (Or. 1999); *FDIC v. Dawson*, 4 F.3d 1303, 1309 (5th Cir. 1993) (both expressing fears that majority could dominate nonculpable directors and control information).

**D. The Court of Appeals correctly held that the board members here did not owe duties to future purchasers.**

The Court of Appeals correctly held that board members did not owe duties of care under the WCA to future owners. 101 Wn. App. 135, 173 (2014). That conclusion is explicit in the statute:

[T]he board of directors shall act in all instances on behalf of the association. In the performance of their duties, the officers and members of the board of directors are required to exercise: (a) If appointed by the declarant, the care required of fiduciaries of the unit owners; or (b) if elected by the unit owners, ordinary and reasonable care.

RCW 64.34.308(1). As stated elsewhere in the WCA, the “membership of the association at all times shall consist *exclusively* of all the unit owners.”

RCW 64.34.300 (emphasis added). The definition of “unit owner” is limited to “a declarant or other person who *owns* a unit.” RCW 64.34.020(42) (emphasis added).<sup>19</sup>

Extending board members duties beyond the scope contained in the WCA would upset the Legislature’s scheme. *See Belvedere Condominium Unit Owners’ Ass’n v. R.E. Roark Cos.*, 617 N.E.2d 1075, 1083 (Ohio 1993) (recognizing that imposing duties beyond those explicitly set forth in analogous Ohio condominium association statute

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<sup>19</sup> The WCA further distinguishes between current “unit owners” and future “purchasers.” Compare RCW 64.34.020(31) (“purchasers”) with RCW 64.34.020 (42) (“unit owners”); see also RCW 64.34.425 (unit owner’s duties to future purchasers); RCW 64.34.332 - .340 (voting restricted only to unit owners).

would “literally shatter the statutory scheme”); *Jaffe*, 200 Cal. App. 3d at 1191-92 (recognizing that board members owed duty only to association). Any other result would create a potentially insoluble conflict for board members, as what may be good for (and indeed even demanded by) current unit owners could be second-guessed by those who purchased later. *E.g.*, *Lamden v. La Jolla Shores Clubdominium Homeowners Ass’n*, 21 Cal. 4<sup>th</sup> 249, 265-66, 980 P.2d 940, 87 Cal. Rptr. 2d 237, 247-48 (1999) (recognizing that community association board must act in the best interests of the association and its members as a whole, even if that decision may be detrimental to individual member).<sup>20</sup>

The Court of Appeals’ holding here is congruent with this Court’s holding in *Stuart*, 109 Wn.2d at 421, in which the Court refused to hold that a builder-developer owed a duty to future unknown purchasers. Its holding is also congruent with almost a century of corporate law. *E.g.*, *Davis*, 25 Wn.2d at 15-17. There, this Court adopted and applied the well-established common-law rule that “a [later] purchaser of stock cannot

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<sup>20</sup> As also recognized by the California Supreme Court in its *Lamden* decision, its previous decision in *Frances T. v. Village Green Owners Ass’n*, 42 Cal.3d 490, 229 Cal.Rptr. 456, 723 P.2d 573 (1986), which found that condominium board members could be held liable for negligence to a unit owner who suffered physical injuries as a result of foreseeable acts of a third party, was inapplicable where the plaintiff alleged only a failure to effect necessary “repairs, thereby causing her pecuniary damages, including diminution in the value of her unit.” *Lamden*, 21 Cal. 4<sup>th</sup> at 267. Homeowners’ claims here are similarly for pecuniary damages (i.e., their proportional share of assessments). Any duties owed by Defendants are limited to those set forth by the WCA.

complain of the prior acts and management of the corporation.” *Davis*, 25 Wn.2d at 16 (quoting *Home Fire Ins. Co. v. Barber*, 93 N.W. 1024, 1028 (Neb. 1903)). With respect to shareholder derivative actions, that holding was codified 20 years later into CR 23.1.<sup>21</sup>

It would be anomalous (to be mild) if for-profit directors’ duties and liabilities were more limited in scope than those of mostly volunteer board members in nonprofit residential associations. Just as a shareholder cannot sue a for-profit director who resigned before the shareholder purchased shares, so too should condominium unit owners be limited to relying on the board members who actually serve on the board when the unit owner owns his or her unit. Any other rule would result in every transfer of unit ownership creating a potentially new plaintiff to challenge the decisions of previous boards. Requiring ownership during a board member’s tenure also encourages the democratic process, because the owners who elected a board member have the opportunity to question, challenge, or even remove that director for alleged defalcations.<sup>22</sup> Later

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<sup>21</sup> See also discussion in Respondents’ Brief, at 18-19; *Hunter v. Knight, Vale and Gregory*, 18 Wn. App. 640, 644-45, 571 P.2d 212 (1977). The ownership requirement prevents a plaintiff from purchasing a breach of fiduciary duty claim. *Rosenthal v. Burry Biscuit Corp.*, 60 A.2d 106, 111 (Del. Ch. 1948).

<sup>22</sup> Washington law has long recognized the danger of allowing a minority group of shareholders to subvert the corporate democratic process through litigation. *Goodwin v. Castleton*, 19 Wn.2d 748, 762, 144 P.2d 725 (1944).

purchasers should not be able to use their personal ignorance of previous decisions as a basis for extending the statute of limitations (by arguing that they were not informed about a particular decision, since they were not even unit owners at the time, even though they may have purchased from a unit owner with knowledge) while also claiming that the board members had a personal duty to protect them.

The scope of duty advocated by Homeowners would undermine condominium association governance, and further dissuade unit owners from volunteering for board service because of the potentially unlimited tail of liability to persons unknown that would attach to that service. Condominium boards that met the desires of current unit owners would find themselves tied up in litigation later when a new unit owner arrived who is unhappy with previous decisions. The Legislature set the scope of board members' duties – they extend only to the association, which is made up only of current unit owners. *Accord Myer v. Cuevas*, 119 S.W.3d 830, 835-36 (Tex. App. 2003); *Office One, Inc. v. Lopez*, 437 Mass. 113, 125, 769 N.E.2d 749, 759 (2002) (both holding that condominium board members owe no duties to future purchasers). Resignation from the board precludes liability to later purchasers.

## V. CONCLUSION

The trial court correctly determined that Homeowners' claims against the Developer Defendants and other board members were barred by the applicable statutes of limitations. The Court of Appeals adopted the adverse domination doctrine *sua sponte*, and misapplied that doctrine to these facts. While the Court of Appeals correctly determined that condominium board directors owe no duty to future purchasers, and correctly dismissed other of Homeowner's claims (such as the CPA claims), the Court of Appeals' unnecessary detour into the thickets of adverse domination doctrine will undermine condominium governance and ownership for decades to come if it is not reversed.

DATED this 6<sup>th</sup> day of February, 2015.

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Supreme Court No. 90642-4

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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GOPIKRISHNA KANURI and HIMABINDU KANURI; CHRIS  
KASPRZAK and ELIZABETH KASPRZAK; PAUL LARKINS and  
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RICHARDS; DANTE SCHULTZ; WINFRED D. SMITH; ROBERT  
STODDARD and COLETTE STODDARD; NEIL WEST; LIANG XU  
and JIA LU DUAN,

Appellants,

v.

GARY SANFORD AND JANE DOE SANFORD; PAUL BURCKHARD  
and MURIEL BURCKHARD; JAMES SANBURN and JANE DOE  
SANBURN; RICHARD PETER and JANE DOE PETER; SHANA  
HOLLEY and RICHARD HOLLEY; BRETT BACKUES and JANE DOE  
BACKUES; JOSEPH CUSIMANO and JANE DOE CUSIMANO;  
JASON FARNSWORTH and JANE DOE FARNSWORTH; PATRICIA  
HOVDA and JOHN DOE HOVDA; ALEXANDER W. PHILIP and  
NATALIA T. PHILIP; HUCKLEBERRY CIRCLE, LLC; LOZIER  
HOMES CORPORATION; DOE DECLARANT AFFILIATES 1-20;  
DIANE GLENN and JOHN DOE GLENN; CONSTRUCTION  
CONSULTANTS OF WASHINGTON, LLC,

Respondents.

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CERTIFICATE OF SERVICE

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I declare under penalty of perjury under the laws of the state of  
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DATED this 6<sup>th</sup> day of February, 2015, at Seattle, Washington.

  
Gillian Fadaie, Legal Assistant

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