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COURT OF APPEALS
DIVISION ONE

AUG 5 2013

No. 69637-8-1
COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON

CINDY ALEXANDER; BLOCKER VENTURES, LLC; CHRIS CLARK;
R. BRUCE EDGINGTON; KIPP JOHNSON and JENNIFER
JOHNSON; GOPIKRISHNA KANURI and HIMABINDU KANURI;
CHRIS KASPRZAK and ELIZABETH KASPRZAK; PAUL
LARKINS and JOYCE HYOJUNG LARKINS; KRISTINE
MAGNUSSEN; SCOTT McKILLOP; CAINE OTT and DANA OTT;
MARA PATTON; PETER 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 SANSBURN and JANE DOE
SANSBURN; RICHARD PETER and JANE DOE PETER; SHANA
HOLLEY and RICHARD HOLLEY; BRETT BACKUES and JANE DOE
BACKHUES; 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.

REPLY BRIEF OF RESPONDENTS/CROSS-APPELLANTS
SANFORD, BURCKHARD, SANSBURN AND LOZIER HOMES
CORPORATION ON CROSS-APPEAL

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DIVISION ONE
SEATTLE, WASHINGTON
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I. OVERVIEW OF REPLY ON CROSS-APPEAL

While the trial court was correct to dismiss all of appellants/cross-respondents' claims against the Developer Defendants below, it abused its discretion in not also deciding that the claims were "frivolous and advanced without reasonable cause." RCW 4.84.185. To make that determination, the trial court was required to look at each individual plaintiff's claims against each individual defendant to decide whether the claims between each plaintiff and defendant had merit. *Eller v. East Sprague Motors & RV Co.*, 159 Wn. App. 180, 194, 244 P.2d 447 (2010). Unfortunately, that was not done.

As shown by the appellant/cross-respondents' own documents, these dissident unit owners should have known about alleged problems at the building from the Board's own discussions in Association meetings and from board minutes available to each of these unit owners. Indeed, some of the appellants/cross-respondents themselves (or their predecessors-in-interest) complained to the Board or the Association's property manager (non-party CDC Management Company) within the statute of limitations about the very defects upon which they now contend that the Board failed to sue. Those unit owners could have pursued their own claims against the developer at that time, but failed to do so. Since

those unit owners failed to pursue their own rights, they should never have tried to sue the Board for making that same decision.

As to each of the Developer Defendants, the claims brought were legally and factually meritless. With respect to the spouses of the Board members (who were all named as individually-liable defendants), there are no factual allegations involving them at all. It has been the law for over 30 years that spouses do not need to be included to create community liability if it exists, and that spouses will only be individually liable for their own torts. *DeElche v. Jacobson*, 95 Wn.2d 237, 246-47, 622 P.2d 835 (1980); *Farman v. Farman*, 25 Wn. App. 896, 899, 611 P.2d 1314 (1980). The spouses should have never been named as defendants.

With respect to the actual Board member defendants, Messrs. Burckhard and Sansburn resigned from the Board about a decade before these dissident unit owners filed suit. These defendants had minimal involvement with governance of the Association, and were replaced on the Board early on by actual unit owners. Messrs. Burckhard and Sansburn could not influence or control those unit owners, nor hide anything from them, as they were not involved at all with the governance of the Association after they were replaced, and there is no allegation otherwise. Further, none of the appellants/cross-respondents were unit owners during Messrs. Sansburn's and Burckhard's tenure. Such later-purchasing unit

owners could not credibly have relied on anything that Board members did or did not do many years before they purchased their units.

Similarly, Mr. Sanford was only a non-voting Board member from May 9, 2002 through his resignation on March 24, 2006. Plaintiffs' own pre-filing investigation showed that (1) Mr. Sanford was excluded from the Board's investigations, meetings and discussions in 2003 regarding a possible construction defect lawsuit and (2) throughout his tenure, Mr. Sanford was urging the Board to do more investigations and maintenance to avoid more costly repairs in the future, but the Board failed to heed his advice. Only half of the plaintiffs ever owned a unit during Mr. Sanford's tenure, so the other nine plaintiffs should never have brought a claim against him.

The claims against Lozier were also meritless. Plaintiffs sued Lozier on a claim that does not even exist (negligent construction), sued Lozier for "breach of board member duty of care" even though it was not a Board member, and continually equated Lozier with the developer/ declarant Huckleberry Circle, LLC even though they are separate entities. Like the spousal defendants, Lozier was included without any evidence that it ever did anything, simply because it had some association with actors against whom there were actual allegations. The trial court abused its discretion in not separately examining the claims against each

defendant, and in not awarding the Developer Defendants their reasonable costs and attorneys fees pursuant to RCW 4.84.185.

II. ARGUMENT

A. **THE TRIAL COURT SHOULD HAVE EXAMINED THE CLAIMS OF EACH PLAINTIFF AGAINST EACH DEFENDANT.**

Appellants/cross-respondents subtly misstate the law in explaining how RCW 4.84.185 is meant to apply. The dissident unit owners argue that an award is not proper if any of the claims are meritorious, such that the entire lawsuit must be frivolous for fees to be awarded. Reply, at 26-27. The law, however, is otherwise.

Prior to 1991, RCW 4.84.185 explicitly required that trial court judges “consider the action, counterclaim, cross-claim, third party claim, or defense *as a whole*” in determining whether the plaintiff’s complaint was frivolous. However, in 1991, the Legislature eliminated the “as a whole” requirement, which seemed to indicate that courts were thereafter free to proceed on a claim by claim basis in adjudging frivolousness. *Compare* Laws of 1987, ch. 212, § 201 *with* Laws of 1991, ch. 70, § 1.

In 1992, the Supreme Court held that, under the 1987 version of the statute, if any cause of action between the plaintiff and the defendant was non-frivolous, then fees could not be awarded. *Biggs v. Vail*, 119 Wn.2d 129, 136-37, 830 P.2d 350 (1992). In doing so, the Court also

suggested in dicta that the Legislature's later elimination of the words "as a whole" from the statute in 1991 would not change that result. *Biggs*, 119 Wn.2d at 136. See also *State ex rel. Quick-Ruben v. Verharen*, 136 Wn.2d 888, 903, 969 P.2d 64 (1998); *Koch v. Mutual of Enumclaw Ins. Co.*, 108 Wn. App. 500, 510, 31 P.3d 698 (2001) (both continuing to apply "as a whole" requirement to 1991 version of statute).

Regardless, in cases involving multiple parties, the statute does require at least that the trial court examine the claims asserted against each individual party to determine if, as to that particular party, the claims were frivolous. *Camer v. Seattle School Dist.*, 52 Wn. App. 531, 539, 762 P.2d 356 (1988). As noted by Division III, "the only reasonable reading of the statute is that a defendant drawn into an action without reasonable cause and subjected to claims against it that, considered as a whole, are frivolous, may be awarded expenses under RCW 4.84.185, regardless of the merit of the plaintiff's claims against other defendants." *Eller v. East Sprague Motors & RV Co.*, 159 Wn. App. 180, 194, 244 P.2d 447 (2010). Hence, even if one of the plaintiffs here may have a viable claim against one of the defendants, that does not preclude an award of attorneys fees to other defendants against whom the claims were not viable. As explained below, taken individually or as a whole, these claims were all frivolous.

B. PLAINTIFFS' OWN EVIDENCE SHOWED MANY OF THE UNIT OWNERS HAD ACTUAL KNOWLEDGE OF THE DEFECTS ALLEGED.

Plaintiffs' strategy here was to aggregate a minority of unit owners to increase the potential size of any damages demand, and to sue multiple defendants (regardless of their involvement with respect to any particular plaintiff) in the hopes of creating a large enough pool to spur a settlement offer. However, the documents that the dissident unit owners offered to show a factual basis for their claims instead showed just the opposite. Numerous of the dissident unit owners (or their predecessors-in-interest) had actual knowledge of water-intrusion or other problems with their units, yet did nothing at the time to pursue their rights. Further, all of the plaintiffs purchased units after Messrs. Burckhard and Sansburn resigned, and half purchased after Mr. Sanford resigned.

Plaintiffs' own documents showed that: In October 2003, the Board reported in its publicly available minutes that it was considering hiring a structural engineer to inspect apparent problems with the decks. CP 559-62. In January, 2004 there was a public discussion at the annual unit owners' Association meeting regarding numerous reports of leaking flat decks, and the need to investigate and repair such decks. CP 575-77. Appellants Smith, Kasprzak and Blocker Ventures, LLC were all unit

owners at that time, and would have received those minutes, and should have attended that meeting.

In early February, 2004, lead plaintiff Cindy Alexander's deck was inspected and problems with the deck slope (i.e., an alleged design defect) were reported. CP 578-79. In March 2004, appellant Blocker Ventures reported a leak in its unit, which leak it admitted had been going on for at least six months. CP 585-87.

In June 2004, an inspection identified potential problems with appellants Stoddard's and Patton's units. CP 609-12. In June, 2005, visible water damage was reported at appellants Xu and Duan's unit. CP 657-58. In August 2005, water intrusion problems were reported at appellant Johnson's unit. CP 671-72. In January 2006, appellant Kasprzak herself reported that her wall was soaking wet from water intrusion. CP 718-21. Of course, the minutes of the Board meetings that were distributed to all Association members discussed numerous times issues of water intrusion, deck inspections or repairs and the need for more thorough inspections and maintenance. *E.g.*, CP 644-49, 654-56, 661-68, 673-75.

All of these dissident unit owners purchased their units after defendants Burckhard and Sansburn resigned from the Board. They could not have relied on those resigned Board members to protect their interests,

or to do anything on their behalf. Half of them purchased after defendant Sanford resigned, and similarly could not credibly claim reliance. The dates of purchase were matters of public record, and in other contexts, a plaintiff's failure to consult such publicly available property records had been deemed "inexcusable neglect." *North Street Ass'n v. City of Olympia*, 96 Wn.2d 359, 368-69, 635 P.2d 721 (1981). Regardless, each unit owner knew when he, she or it purchased its unit, and should not have sued Board members who had resigned well before that purchase.

Whether or not the Association pursued claims on behalf of all unit owners against the developers, each of these unit owners had an individual right to pursue an action under the Condominium Act with respect to alleged defects in their own units. *E.g.*, RCW 64.34.328 (unit owners, not association, responsible for repairs to individual units); RCW 64.34.452(2) (creating statute of repose for each purchaser's individual action). The plaintiffs identified above – and most especially appellants Blocker Ventures and Kasprzak, who themselves reported in writing the very issues about which they now claim ignorance – should never have brought suit against these Board members, as their claims were clearly barred by all applicable statutes of limitations based on the documents that plaintiffs themselves offered to show a factual basis for their claims. These unit owners' knowledge of potential defects with respect to their own units was

a sufficient basis for them to pursue their own rights if warranted, and they should not be able to come back years later and sue the Board failing to sue when plaintiffs themselves failed to sue. Those plaintiffs' claims were clearly "frivolous and advanced without reasonable cause." RCW 4.84.185.

C. AS TO EACH OF THE DEFENDANTS, THE CLAIMS BROUGHT WERE FRIVOLOUS AND ADVANCED WITHOUT REASONABLE CAUSE.

As explained above, plaintiffs' counsel's own pre-filing investigation should have resulted in at least some of the plaintiffs being eliminated from the potential suit based on their own documents. However, even were that not so, an examination of the claims against each individual defendant shows that the claims were frivolous and advanced without reasonable cause.

1. There was no basis whatsoever for the claims against the Board member spouses.

The trial court abused its discretion in not awarding fees with respect to the claims against the Board members' spouses. Factually, there were no allegations whatsoever that any of the spouses participated in any of the alleged wrongdoing of the Board members. The only allegation made against them was that they were married to a Board member, and because of that should be individually and separately liable. There was no factual or legal basis for naming the spouses individually.

With regards to torts committed by one member of a marital community, “there shall be no recovery against the separate property of the other spouse or other domestic partner except in cases where there would be joint responsibility if the marriage or the state registered domestic partnership did not exist.” RCW 26.16.190. In order for there to be such joint tort responsibility, each spousal defendant must be “liable to a claimant on an indivisible claim for the same injury, death or harm. . . .” RCW 4.22.030; *cf.* RCW 4.22.020 (contributory fault of one spouse shall not be imputed to the other).

The Supreme Court held over 30 years ago that a plaintiff could reach the defendant tortfeasor’s interest in the community’s property to collect a judgment, regardless of whether the other spouse was separately liable. *deElche v. Jacobsen*, 95 Wn.2d 237, 245-46, 622 P.2d 835 (1980). Hence, there is no need to name an innocent spouse as a defendant in order to reach community assets if a judgment is obtained. As affirmed (again) by the Court of Appeals that same year, “the spouse who does not commit the tort cannot be held personally liable.” *Farman v. Farman*, 25 Wn. App. 896, 899, 611 P.2d 1314 (1980) (citing cases).

There are no allegations of wrongdoing whatsoever against the innocent Board member spouses. Rather, the only allegation is that they are or were married to an alleged tortfeasor. *E.g.*, Complaint, ¶¶ 1.4-1.6

(all reciting the lone allegation that the defendant Board member and spouse are “husband and wife” and that “all acts and omissions of defendant [Board Member] alleged herein were done on behalf of the marital community. . .”). For at least 30 years (if not longer), Washington law has been clear that spouses are not viable defendants unless there is some claim against that spouse giving rise to potential liability independent of the mere fact of marriage. There is no such claim here, and the causes of action alleged against the Board member spouses were wholly “frivolous and advanced without reasonable cause.” RCW 4.84.185.

2. The claims against Burckhard and Sansburn were frivolous.

Messrs. Burckhard and Sansburn resigned from the Board about a decade before these dissident unit owners filed suit. None of the unit owners actually owned units during Messrs. Burckhard’s and Sansburn’s tenure. These gentlemen should never have been included as defendants.

All of the plaintiffs here knew when they purchased their units, and such purchases were a matter of public record. As noted above, failure to consult public property records has (in other contexts) been described as “inexcusable neglect.” *North Street Ass’n*, 96 Wn.2d at 368-69. Each of these plaintiffs knew that Messrs. Burckhard and Sansburn did not serve

on the Board when they bought their units, or any time thereafter. They should have known that they could not possibly have claims against those resigned Board members. See *Quick-Ruben*, 136 Wn.2d at 904-05 (obvious lack of standing is sufficient grounds for an award of fees under RCW 4.84.185).

As explicitly stated in the Washington Condominium Act, “the board of directors shall act in all instances on behalf of the association,”¹ not any individual unit owners or future purchasers. RCW 64.34.308. Even if these dissident unit owners did not read the Condominium Act, they should have at least read the publicly-filed Declaration that created the Huckleberry Circle Condominiums, which contained virtually the same language. CP 445-452 (stating that “the Board shall act in all instances on behalf of the Association.”). Under either the Condominium Act, or the Huckleberry Circle Declaration, the Association to whom Board members owe duties consists solely of present unit owners, not future or past owners. RCW 64.34.030(32); .300.

Moreover, none of these appellants could credibly claim to have relied on anything Messrs. Sansburn or Burckhard did or did not do while on the Board, when those gentlemen resigned years before any of these

¹ In their Reply Brief, appellants misquote the statute by substituting “for” in place of the actual statutory language “on behalf of.” Reply Brief, at 23.

plaintiffs ever purchased their units. Even now, the dissident unit owners' only response to that common-sense observation is to argue that the Association issues resale certificates (which appellants contend must disclose known code violations) so that, because a statute requires that disclosure, "one who makes a fraudulent misrepresentation in so doing is subject to liability to the persons for pecuniary loss suffered through their justifiable reliance upon the misrepresentation. . . ." Reply Brief, at 29-30 (quoting Restatement (Second) of Torts, § 536).

However, the statute appellants intended to cite² actually says that "a unit owner shall furnish to a purchaser . . . a resale certificate, signed by ***an officer or authorized agent of the association*** and based on the books and records of the association and the actual knowledge of the person signing the certificate" disclosing certain information. RCW 64.34.425(1) (emphasis added). Messrs. Sansburn and Burckhard had ceased being such officers over a year before any of these appellants purchased their unit, and there is no allegation that they had anything to do with providing such a resale certificate to any of these dissident owners. They had no statutory duty in that regard whatsoever. Further, they made no representations, misrepresentations or communications of any type to these dissident unit owners at any time, and none of these appellants/cross-

² Appellants cite to RCW 4.34.425, which does not exist.

respondents either allege or could credibly claim to have relied on anything that Messrs. Sansburn or Burckhard did or did not do while on the Board years before these plaintiffs bought their units. The appellants/cross-respondents' own arguments show that the claims against Messrs. Burckhard and Sansburn really are frivolous. None of these dissident unit owners should have ever sued Messrs. Sansburn and Burckhard, who had no control whatsoever over the Board or the Association when these unit owners purchased their units, and had no interactions with these appellants/cross-respondents at all.

3. The claims against Mr. Sanford were frivolous.

While nine of the 18 appellants did purchase their units during Mr. Sanford's tenure, that still means the other half of the plaintiffs should have known that they did not have any claims against Mr. Sanford. Further, all of the appellants should have known that Mr. Sanford resigned from the Board more than four years before appellants filed suit, such that it was likely from the beginning that the claims against him would be barred by all of the applicable statutes of limitations.

Appellants/cross-respondents' central allegation is that the Board breached its duty to these unit owners by failing to bring a construction defect claim while there was still time. Appellants/cross-respondents' investigation showed that a construction defect attorney did advise the

voting members of the Board to bring a Condominium Act claim against the developer Huckleberry Circle, LLC before the statute of limitations ran out. CP 767-68. However, Mr. Sanford – as a non-voting representative of that developer – was specifically excluded from those discussions, and that decision. CP 512-518, 767-68. Appellants knew that Mr. Sanford was not part of the discussions with the attorney, yet sued him anyway for allegedly failing to follow that attorney’s advice.

With respect to the claims against all the Board members, the appellants also should have recognized that they were bringing derivative claims, not individual claims. Appellants now admit that they knew they were barred from bringing derivative claims (Reply Brief, at 1), yet claim that the Condominium Act somehow gave them different rights with respect to suits against board members. Reply Brief, at 1-5.

However, there is nothing in the Condominium Act that gives unit owners standing to sue board members for damages, and indeed it suggests just the opposite. Had the Legislature wanted to give unit owners that right, it would have done so explicitly, as it has in other contexts. *E.g.*, RCW 23B.07.400 (giving shareholders standing to sue derivatively on behalf of for-profit corporation).

Instead of providing for derivative standing if the Association failed to act, the Legislature seems to have barred such actions: “an action

alleging a wrong done by the association must be brought against the association and not against any unit owner or any officer or director of the association.” RCW 64.34.344. Here, the dissident unit owners claim that the Association should have sued the developer Huckleberry Circle on their behalf while there was still time, but rather than sue the Association for its failure to act, they seek instead to sue individual Board members. The Condominium Act itself bars such claims.

There is no conflict between the Condominium Act and the Nonprofit Corporations Act (RCW Ch. 24.03) on this point. As the Legislature made clear, normal principles of corporate law supplement the Condominium Act “except to the extent inconsistent” with the Act. RCW 64.34.070; *see also* RCW 64.34.300 (in the case of any conflict between the Nonprofit Corporations Act and the Condominium Act, the Condominium Act controls). Both the Condominium Act and the Nonprofit Corporations Act bar lawsuits for damages against board members for actions taken on behalf of the association while on the board.

Appellants try to create a non-existent conflict by noting that rights under the Condominium Act are “enforceable by judicial proceeding” (RCW 64.34.100(2)) and that “any person or class of persons adversely affected by the failure to comply has a claim for appropriate relief.” RCW

64.34.455. However, neither of these provisions gives standing or rights to unit owners to sue board members for damages.

While RCW 64.34.100(2) states that rights are enforceable by judicial proceedings, it does not say who gets to enforce those rights. *E.g.*, RCW 24.03.1031 (granting only the nonprofit corporation standing to sue directors in court for malfeasance). Further, the Condominium Act itself specifically excludes the right to sue board members for wrongs done by the association. RCW 64.34.344.

Similarly, that persons adversely affected by an alleged breach of the Condominium Act have a claim for appropriate relief does not mean that members have standing to sue board members directly for damages. The board members only owe a duty to the association, not individual members. RCW 64.34.308(1); *see also Myer v. Cuevas*, 119 S.W.3d 830, 835-36 (Tex. App. 2003), *Office One, Inc. v. Lopez*, 769 N.E. 2d 749, 759 (Mass. 2002) (board members owe duty only to association, not unit holders). It is the Association as a whole, not this minority of individual unit owners, who are adversely affected by the Board's decisions. Moreover, "appropriate relief" does not necessarily mean damages – rather, as established by the

Nonprofit Corporations Act, appropriate relief may mean removal,³ injunctive relief or other remedies, such as an Attorney General complaint.

In short, there is nothing in the Condominium Act that in any way conflicts with the Nonprofit Corporations Act on this issue, and there is no reason not to follow the teachings of *Lundberg v. Coleman*, 115 Wn. App. 172, 177-78, 60 P.3d 595 (2002). These dissident unit owners have suffered no injury unique to themselves, nor did the Board members owe any unique individual duty to each of this minority of unit owners. These dissident unit owners are seeking to recover their share of the increased assessments that have been visited on all unit owners for necessary repairs, which is the very definition of a derivative claim. *Hunter v. Knight, Vail and Gregory*, 18 Wn. App. 640, 646, 571 P.2d 212 (1977). However, the Legislature has decided to protect nonprofit board members – who are

³ These dissident unit owners do not need a lawsuit to hold board members accountable – rather, all they had to do was show up to an Association meeting and vote. CP 445-452, § 10.2.4 (“The Unit Owners, by a two-thirds vote of the voting power in the Association present and entitled to vote at any meeting of the Unit Owners at which a quorum is present, may remove any members of the Board with or without cause.”). Of course, there are 60 units in the Huckleberry Circle Condominiums, which means these dissident unit owners probably represent less than one-third of that voting power. Notably, “[i]n order for the Association (or the Board acting on behalf of the Association) to institute” litigation, the “owners holding sixty-seven percent (67%) of the total Association voting power must grant approval for the Association (or the Board acting on behalf of the Association) to institute” such litigation. CP 445-452, ¶10.12.3. In short, the dissident unit owners, unable to convince a sufficient number of their neighbors to approve litigation by the Association through the democratic process, simply circumvented that requirement by suing on their own. This again demonstrates why allowing such individual actions against non-profit condominium association board members will undermine the governance of such associations.

generally unpaid volunteers – from exposure to derivative litigation by barring it altogether. Instead of suing board members, these unit owners should have volunteered for a board position themselves if they wanted to control the Association’s decision-making. Their claims against the Board members were frivolous and advanced without reasonable cause.

4. Lozier was never a board member and should never have been a defendant at all.

Appellants/cross-respondents sued Lozier for “Breach of Board Member Duty of Care” even though Lozier was not on the Board. They sued Lozier for negligence in constructing or repairing the Condominiums, even though Washington has never recognized a cause of action for “negligent construction.” *Stuart v. Coldwell Banker Commercial Group, Inc.*, 109 Wn.2d 406, 417, 745 P.2d 1284 (1987). Courts have previously found that asserting such a negligent construction claim is sufficient grounds for Rule 11 sanctions. *Pacific Erectors, Inc. v. Gall Landau Young Construction Co., Inc.*, 62 Wn. App. 158, 169, 813 P.2d 1243 (1991). Appellants/cross-respondents now claim that they meant “negligent inspection,” but their own complaint states that Huckleberry Circle, LLC, not Lozier, inspected the decks. Moreover, any inspections done would have been by contract with the Association; these individual

unit owners did not allege that Lozier agreed directly with them to do anything.

Appellants accused Lozier of Consumer Protection Act violations based on its alleged concealment of construction defects. However, allegedly defective construction does not constitute a deceptive act or practice under the CPA. *Nguyen v. Doak Homes, Inc.*, 140 Wn. App. 726, 734, 167 P.3d 1162 (2007).

Appellants accused Lozier of negligent misrepresentation and fraud, but failed to allege that Lozier ever communicated or interacted at all with these unit owners. The Condominium Act itself states that condominium purchasers have no cause of action for misrepresentation by alleged omission: “A purchaser may not rely on any representation or express warranty [regarding quality] unless it is contained in the public offering statement or made in writing signed by the declarant or the declarant’s agent identified in the public offering statement. RCW 64.34.433(2). *See also Kelsey Ln. Homeowners Ass’n v. Kelsey Ln. Co.*, 125 Wn. App. 227, 242, 103 P.3d 1256 (2005) (holding that developer was not required to disclose construction defects in a public offering statement).

Finally, appellants accused Lozier of “civil conspiracy.” As with all the other claims, this claim is principally founded on the fact that

Lozier was a member of Huckleberry Circle, LLC. Throughout their complaint, appellants constantly conflate the declarant developer Huckleberry Circle, LLC with its member Lozier. Similarly, they attribute the alleged actions of Huckleberry Circle's non-voting representative on the Board, Mr. Sansburn, to Lozier. However, Lozier and Huckleberry Circle are separate corporations. Plaintiffs' own evidence shows that Mr. Sansburn was on the Board solely as Huckleberry Circle's representative. *E.g.*, CP 445-452, § 10.2.2 ("Declarant (or a representative of the Declarant) shall have the right . . . to serve as a full non-voting member of the Association's Board. . . ."); CP 568-570, 591-593 (Mr. Sanford's letters showing him acting as Huckleberry Circle's representative). Appellants/cross-respondents had no factual basis for including Lozier as a defendant at all.

Further, and most obviously with respect to Lozier, appellants/cross-respondents knew or should have known that their claims would be barred by the statute of limitations. Reduced to their essence, all of these dissident unit owners' claims boil down to a complaint that the Board failed to sue the developer declarant Huckleberry Circle, LLC in a timely manner for alleged condominium defects under RCW Ch. 64.34, and that because those claims are now time-barred, the Association itself will have to pay for those repairs, which has increased these appellants'

Association assessment (along with that of all other unit owners). Appellants' claims are really no different than those of a client suing its attorney for malpractice for failing to file a lawsuit before the statute of limitations ran. As explained more thoroughly in Respondents' Brief (at pages 21-31), the trial court was correct in dismissing all of the claims as being barred by the applicable statutes of limitations, as (assuming standing and some duty owed) the claims against each Board member accrued, at the latest, when that Board member resigned from the Board.

However, even without that analysis, it should have been obvious that any claims against Lozier were uniquely time-barred. No matter how denominated, the claims against Lozier boil down to claims arising from Lozier's alleged involvement with the construction or repair of the Condominiums. All such "claims or causes of action . . . shall accrue, and the applicable statute of limitations shall begin to run only during the period within six years after substantial completion of construction, or during the period within six years after the termination of the services . . . whichever is later." RCW 4.16.310. Any claim of any type relating to the construction of the Condominiums that had not accrued within that six years "shall be barred." RCW 4.16.310. The Condominiums were constructed in 2000. Any claim of any type against the contractor brought eleven years later – as these appellants tried to do – was obviously barred

by the construction statute of repose. The trial court was correct in dismissing all claims against Lozier as being barred by the applicable statutes of limitations; however, the trial court abused its discretion in not awarding Lozier fees, as especially with the construction statute of repose, there could be no credible basis for including Lozier in the lawsuit.

D. THE DISSIDENT UNIT OWNERS WERE WARNED BY OTHER ATTORNEYS THAT THEIR CLAIMS WERE LIKELY TO FAIL.

Almost a year before these dissident unit owners decided to embark on a frolic of their own by suing their neighbors who had volunteered to serve on the Association's Board, the Association shared the Association's own attorney's pessimistic analysis regarding the likely success of any lawsuit. In appellant/cross-respondent Ott's own words:

It is hard to believe the incompetency of the previous Huckleberry Circle Boards and their irresponsibility on letting the statute of limitations run out on possible recourse with regards to recovery and liability. It seems the guiltiest parties will now be absolved entirely. After reviewing the synopsis of our situation by [attorney] David Onsager dated May 5th, 2010 (Regarding our potential judgment against Huckleberry Circle LLC and Diane Glenn dba "The Construction Consultants") our position seems tenuous at best with limited possibility of success.

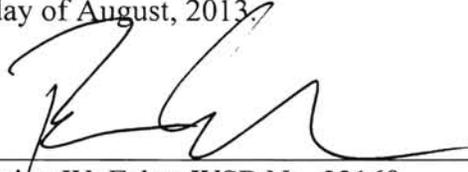
CP 803-808 [Ex. 91]. Yet despite being so advised, these dissident unit owners decided to ignore that advice, most likely on the assumption that regardless of their chances of success, they could never be personally

liable for pursuing such frivolous claims. The law, however, is otherwise. Appellants knew before they filed that their claims “had limited possibility of success,” yet persisted in suing anyway, which should render them liable to the Developer Defendants for attorneys fees and costs under RCW 4.84.185.

III. CONCLUSION

With respect to each of the Developer Defendants, appellants’ claims were frivolous and advanced without reasonable cause. While the trial court was correct in dismissing all the claims, it abused its discretion in not undertaking an examination of each plaintiff’s claims against each defendant, as required by RCW 4.84.185. Such an examination would show that the claims as to each defendant were frivolous and advanced without reasonable cause. The Court of Appeals should reverse the trial court’s denial of the Developer Defendants’ request for an award of fees, and remand to the trial court for calculation and award of such fees. The Developer Defendants should also be awarded their fees on appeal for obtaining that reversal. RCW 4.84.185; RAP 18.1; 18.9.

DATED this 5th day of August, 2013.



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CERTIFICATE OF SERVICE

The undersigned certifies that on this 5th day of August, 2013, I caused to be served the foregoing document to the persons listed below by the method indicated:

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STATE OF WASHINGTON

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 5th day of August, 2013, at Seattle, Washington.



Gillian Fadaie