No. 95969-2

SUPREME COURT
OF THE STATE OF WASHINGTON

BURIEN TOWN SQUARE CONDOMINIUM ASSOCIATION, a Washington non-profit corporation,

Respondent,

vs.

BURIEN TOWN SQUARE PARCEL 1, LLC, a Washington limited liability company; and BURIEN TOWN SQUARE, LLC, a Washington limited liability company; and JOHN DOES 1-100,

Petitioner.

ANSWER TO PETITION FOR REVIEW

Sidney Tribe, WSBA #33160
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A. INTRODUCTION

In this construction defect case, Burien Town Square Parcel 1, LLC and Burien Town Square, LLC (collectively "BTS") built a condominium with defective common elements. Faced with foreclosure, BTS then transferred its control of the building to a successor. The successor had no financial incentive to sue BTS and refused to do so. The successor retained control over the building's governing association for several more years.

Finally, in March 2014, the successor was required by statute to hand control over the building's association to individual unit owners. The association sued BTS for the construction defects. But BTS claimed that the statute of limitations had run while the building's homeowners' association was still controlled by the successor and not the individual unit owners.

The Court of Appeals, using the plain language of the Washington Condominium Act, RCW ch. 64.34 ("WCA") and the dictionary, determined that the statute of limitations on a common element construction defect claim tolls while the individual unit owners do not have control over the board of their building's governing association.

BTS seeks this Court's review, hoping for one last chance to escape liability on statute of limitations grounds. Its petition does not

reflect a case worthy of this Court's time and attention. Review should be denied.

B. STATEMENT OF THE CASE

BTS was the original developer and owner of a condominium complex in downtown Burien called the Burien Town Square ("Condominium"). CP 155.

The first unit in the condominium was conveyed to an individual owner on or before May 19, 2009. CP 382-87. Construction of the Condominium was substantially completed on May 1, 2009, and it was certified for occupancy by the City on July 8, 2009. CP 340, 342. All of the common elements were added by that date, and no additional common elements or units were added thereafter. *Id.*; CP 144.

BTS had taken out a construction loan from Corus Bank. In November 2009, less than four months after receiving the certificate of occupancy, BTS defaulted on the loan. CP 191. BTS owed approximately $35 million. CP 196. Corus Bank's successor in interest foreclosed. *Id.* In November 2010, the Condominium was conveyed in a settlement agreement to BTS Marketing, LLC ("Marketing"). CP 189-213.

From November 2010 forward, Marketing continued to sell units in the condominium, but did not give up its statutory right of control over

the building's operation. CP 403-04. It controlled the building by retaining the right to appoint the board of directors of the condominium association ("the Association"). *Id.*

Marketing was aware that there were construction defects in the common areas of the building in August 2013. CP 643-45; Appendix at 1-3. However, Marketing controlled the Association. CP 403. Marketing expressed concern that pursing a claim against BTS could jeopardize government financing and "$3.5 million dollars in closings" that Marketing was about to enjoy. *Id.* Marketing, through its appointed members of the Association board, chose not to act.

In January 2014, Marketing notified the Association that 75% of the units in the building had been sold to individual owners. CP 404. This meant that for the first time, individual owners had the statutory right to elect the majority of the board of directors of the Association. *Id.* In late February 2014, an election was held by the individual unit owners. On March 1, 2014, the new, unit-owner controlled board was seated. *Id.*

The Association, now controlled by individual unit owners rather than the corporate entities that had controlled the building, had concerns about the construction defects. CP 356. In February 2015, the Association notified BTS and Marketing of these defects, and requested that they be cured. *Id.* BTS and Marketing did not cure the problems.

On April 29, 2015, the Association filed claims against BTS under the Washington Condominium Act, RCW ch. 64.34 ("WCA"). CP 1-10. BTS moved for partial summary judgment dismissal of the WCA claims, arguing that the statute of limitations had expired on those claims. CP 138-48. The trial court granted BTS's motion. CP 418-19. The Association timely appealed. CP 466.

The trial court's decision was reversed. *Burien Town Square Condo. Ass'n v. Burien Town Square Parcel 1, LLC*, ___ Wn. App. 2d ___,[1] 416 P.3d 1286, 1288 (Wash. Ct. App. 2018). The relatively short and straightforward decision was rendered less than five weeks after oral argument.[2] The opinion was published, but this is likely due the fact that the decision interpreted a particular statutory provision that had not yet been considered.

C. ARGUMENT WHY REVIEW SHOULD BE DENIED

BTS argues that this Court should take review under RAP 13.4(b)(4). PFR at 6-9. This rule allows review at this Court's discretion if the case involves "an issue of substantial public interest that should be determined by the Supreme Court." RAP 13.4(b)(4).

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[1] Only the Pacific Reporter citation is currently available.

[2] Oral argument was held on April 9, 2018, and the Court of Appeals' published opinion issued on May 14, 2018.

By arguing only that review is merited under RAP 13.4(b)(4), BTS concedes that there is no conflict between the unanimous Court of Appeals decision here and any decision of this Court or of the Court of Appeals and that the decision raises no significant question of constitutional law. RAP 13.4(b)(1)-(3).

This Court has stated that "substantial public interest" under RAP 13.4(b)(4) refers to issues with "sweeping implications." *State v. Watson*, 155 Wn.2d 574, 578, 122 P.3d 903 (2005). In *Watson*, for example, the Pierce County Prosecuting Attorney distributed a memorandum to all Pierce County Superior Court judges stating that his office would no longer recommend certain drug sentences. *Id.* at 575. Nine months later, Watson was convicted of a drug offense and the prosecuting attorney attached a copy of the memorandum to the sentencing brief, showing it to defense counsel beforehand. *Id.* at 576. In affirming the trial court's sentence, the Court of Appeals declared *sua sponte* that the memorandum was an improper *ex parte* communication but determined that it was harmless in this particular case. *Id.* This Court accepted review, explaining that "substantial public interest" is a higher bar than simply "public concern":

> [The case] presents a prime example of an issue of substantial public interest. The Court of Appeals holding, while affecting parties to this proceeding, also has the

> potential to affect every sentencing proceeding in Pierce County . . . where [the drug] sentence was or is at issue."

Id. at 577. As a result, this Court noted that the decision "invites unnecessary litigation . . . creates confusion generally . . . [and] has the potential to chill policy actions taken by both attorneys and judges." *Id.* This Court granted the state's petition for review. *Id.* at 578.

Thus, what may be of general public interest – a standard which almost every case involving statutory interpretation might meet – is not always of "substantial" public interest. This Court's clarification of what is a "substantial public interest" helps to distinguish cases of general public interest from those actually warranting this Court's review.

(1) BTS Has Not Shown that the Court of Appeals Decision Merits This Court's Review, Regardless of Whether there is General Public Interest in the Statute of Limitations for Condominium Common Area Defect Actions

BTS claims that the Court of Appeals' decision involves an issue of substantial public interest. PFR at 6. It argues that the interest at stake is that of condominium consumers and developers alike, because the decision will drive up the cost of housing "as the result of developers' uncertainty concerning extended liability exposure." *Id.*

BTS fails to argue with specificity how properly interpreting the statute of limitations will significantly increase housing costs or harm consumers, such that there is a substantial public interest at stake here.

BTS suggests that if developers are allowed to build condominiums with defective common areas and then escape liability, it will allow them to build more cheaply. However, this will not decrease housing costs for condominium consumers, who will have to personally bear the costs of repairing their defective common areas.

Also, in arguing merely that this case involves an issue of public interest, BTS omits some language from RAP 13.4(b)(4). That rule permits review in cases of substantial public interest "that should be determined by the Supreme Court." This additional phrase suggests that review not is warranted in every case where a substantial public interest is alleged. It is only warranted in those cases where this Court's considerable time, expertise and resources are needed because the issue is particularly complex, controversial questions of law and policy are presented, or for some other reason. *See, e.g., In Re Adoption of T.A.W.*, 184 Wn.2d 1040, 387 P.3d 636 (2016) (granting RAP 13.4(b)(4) review in case involving applicability of ambiguous provision of Indian Child Welfare Act in case where one parent was non-Indian and one was Indian); *Matter of Arnold*, 189 Wn.2d 1023, 408 P.3d 1091 (2017), *rev'd,* 190 Wn.2d 136 (2018) (granting RAP 13.4(b)(4) review in case involving child rape laws where prior decisions appeared incorrectly decided and lower court had applied non-traditional "horizontal stare decisis rule").

Otherwise, the substantial public interest is satisfied by the Court of Appeals' opinion, and this Court's review is not warranted.

Almost any case heard at the Court of Appeals will involve some question of law that might be of general interest to the public. That does not mean every court of appeals opinion merits review by this Court. Instead, this Court's work should focus on difficult questions of law and policy that need the considerable investment of time, resources, and intellectual effort of its nine members to resolve.

The Court of Appeals here applied plain, if technical, language in the WCA to determine that the statute of limitations had not run on a claim for construction defects. The decision is clear, short, and uncontroversial. It adequately resolves the question presented and does not suggest any controversy in need of this Court's valuable time.

BTS incorrectly claims that this Court's review is merited because the Court of Appeals' decision creates uncertainty about the statute of limitations. PFR at 6. If anything, the Court of Appeals' decision offers developers more certainty as to when the statute of limitations is tolled, not less. The uncertainty in this case is reflected in BTS's trial court briefing, which shifted rationales and explanations for how the tolling provisions were triggered. *See* Br. of Appellant at 23-24. This uncertainty was resolved by the Court of Appeals' opinion.

(2) BTS Policy Arguments for Review Are Not Well Founded and Are Contrary to the Public Policy Behind the WCA, as the Court of Appeals Correctly Concluded

BTS complains that the Court of Appeals decision exposes it to suit "indefinitely." PFR at 7. BTS argues that it is unfair in this case, where it built a defective condominium and then went bankrupt, to subject it to the tolling provisions of RCW 64.34.308(5)(b).

The Court of Appeals rejected the same policy argument that BTS makes here, that is unfair or bad for condominium prices if the original developers of defective condominium buildings cannot escape liability by transferring ownership of the property:

> [A]dopting BTS's interpretation of the period of declarant control would create a loophole in the WCA's protection for unit owners. ...But a statute of limitation should only protect against stale claims and not provide a shield from almost all liability. We reject an interpretation of the WCA that would allow a statute of limitations for claims involving condominium common elements to expire before the unit owners ever gain control of the unit owners' association.

Burien Town Square, 416 P.3d at 1290.

The other entity that rejected BTS' argument is the Legislature. In fact, the WCA specifically provides that builders of defective condominiums *retain* liability for their shoddy work even if they transfer the building to another owner's control:

> A transferor of special declarant rights is not relieved of any obligation or liability arising before the transfer and remains liable for warranty obligations imposed upon the transferor by this chapter.

RCW 64.34.316(2)(a).

BTS also argues that because it was foreclosed upon and forced to surrender ownership to a third party, it had no control over the date the termination of declarant control would obtain, and thus no control over when the statute of limitations would expire. PFR at 7.

BTS is wrong. Control by a successor declarant is not "potentially unending" under the WCA. The Legislature provided multiple avenues for declarant control to end regardless of whether the declarant wants to retain control or not. RCW 64.34.380. Of the many events that can trigger the end of declarant control, the statute provides that the earliest event applies, not the last. *Id.* BTS's claim of unfairness in the Legislature's decision to toll the statute of limitations until individual unit owners control their building's governance is not well taken.

Any alleged "injustice" that developers experience by being held liable for building shoddy condominiums is imposed by the plain language of the statute, not the Court of Appeals' decision. As such, its arguments should be addressed to the Legislature. Review will not aid BTS' plight;

this Court is just as bound by the plain language of the statute as the Court of Appeals.

(3) Not Every Issue of First Impression Merits Review by This Court, Particularly Where the Issues Were Easily Resolved Below by Consulting the Statute and a Dictionary

BTS contends that this Court should take review because this case involves an issue of first impression. PFR at 8. It notes that the Court of Appeals' opinion contains little reference to case law, and that "without an established body of case law for guidance, all parties would benefit from review of this decision." *Id.*

It is true that the Court of Appeals did not rely on much case law in its opinion. It did not need to. It was interpreting the plain language of a statute, and resort to judicial interpretation was not needed. *Burien Town Square,* 416 P.3d at 1291-92. Instead, the Court relied on the statute and on the dictionary where statutory language was undefined, such as the words "exercise" and "transfer." *Id.*

There is no support for the notion that a Court of Appeals' decision merits review because it contains an insufficient resort to case law. There is no need for judicial interpretation when the language of a statute is plain and unambiguous. *State v. Glas*, 147 Wn.2d 410, 415, 54 P.3d 147 (2002).

Review is not warranted in this straightforward case applying the plain language of a statute to undisputed facts.

(4) The Association Is Entitled to an Award of Fees Under RAP 18.1(j)

This Court should authorize the trial court to award fees incurred in answering BTS' petition if the Association prevails on remand. Under RAP 18.1(j), "reasonable attorney fees and expenses may be awarded for the prevailing party's preparation and filing of the timely answer to the petition for review."

The Association requested an award of fees at the Court of Appeals under RCW 64.34.455, which affords courts in WCA cases discretion to award fees to a prevailing party at trial. Br. of Appellant at 23. The Court of Appeals reversed the trial court's award of fees to BTS under this provision, but stated that fees to the Association should abide remand. *Burien Town Square*, 416 P.3d 1292.

The Association respectfully requests that its fees incurred in responding to BTS' petition be authorized.

D. CONCLUSION

BTS has not shown that review is warranted. The Court of Appeals decision is clear and simple, applies plain statutory language,

addresses policy matters, and does not require correction or clarification by this Court.

Review should be denied, and fees should be awarded to the Association for having to answer BTS' petition.

DATED this 27th day of June, 2018.

Respectfully submitted,

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Attorneys for Respondent
Burien Town Square Condominium
Association

APPENDIX

Chris L. Winstanley

From: Greg Franks <gfranks@stresidential.com>
Sent: Thursday, August 08, 2013 10:46 AM
To: Stephen Durst
Cc: Cathy Kuratko; Caren Carrero; Greg Franks
Subject: FW: Fwd: bts legal docs served here todAy
Attachments: bts lawsuit.pdf

FYI, here is the letter we just discussed. I am being told that the timing of this letter could affect our recently approved Fanny Financing, which can't happen if we are going to be successful. No to mention, the $3.5 million dollars in closings that are scheduled in August.

We need to clean this up. As you and I discussed, the only thing that was to be noticed at this time was a letter to toll the warranty for 105 days while we organized a review of the building. This letter is alleging defect that is not substantiated with any official review or knowledge of a certified engineer or consultant.

Please call me this afternoon to verify that you have spoken with the attorney and that a follow up letter will be submitted today in line with our discussions.

Thanks.

Gregory W. Franks
Senior Vice President
ST RESIDENTIAL
175 W. Jackson Blvd.
Suite 540
Chicago, IL 60604
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BARKER • MARTIN
ATTORNEYS

Marlyn K Hawkins *marlynhawkins@barkermartin.com*
Admitted In Washington & Oregon

August 5, 2013

VIA PERSONAL SERVICE AND CERTIFIED MAIL, Return Receipt Requested

Burien Town Square Parcel 1, LLC
Burien Town Square, LLC
c/o Corporation Service Company
300 Deschutes Way SW, Suite 304
Tumwater, WA 98501

ST Residential
c/o Greg Franks
15100 6th Ave. SW, Suite 228
Burien, WA 98166

Re: Burien Town Square Condominiums

To Whom it May Concern:

This Notice is provided to you on behalf of the Burien Town Square Condominium Association ("Association") with respect to claims regarding potential defets in the construction of the Burien Town Square Condominium Association (the "Condominium). Burien Town Square Parcel 1, LLC is the named declarant in the declaration of the Condominium. Burien Town Square, LLC and ST Residential are being given notice of this claim as potential successor or other declarants.

The Association is providing written notice of claim to you pursuant to RCW Chapter 64.50. RCW 64.50.020 requires the Association to provide a general description of the defects discovered so far at the Condominium.

To date, the owners at the Condominium have identified defects in a number of decks, including lack of waterproofing at railing caps and railing-to-wall transitions, resulting in water intrusion and damage. Additional damage or defects relating to the construction of the Condominium may be discovered as the Association's investigation continues. Destructive testing will be performed to identify the cause of this defect and other defects. This notice of claim letter puts you on notice that damage may be pervasive and extend beyond those areas investigated.

RCW 64.50 has specific requirements regarding the content and timing of your response to this written notice. We request that you respond accordingly. In addition we request that you notify your Commercial General Liability insurance carrier that you have been given notice of claims for property damage in relation to the Condominium. Failure to do so could result in failure of coverage and personal liability.

We look forward to working with you to resolve these issues. Please feel free to contact me with any questions.

Sincerely,

Marlyn K Hawkins

MKH:ah

DECLARATION OF SERVICE

On said day below, I electronically served a true and accurate copy of the ***Answer to Petition for Review*** in Supreme Court Cause No. 95969-2 to the following:

Lafcadio H. Darling
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Steven G. Wraith
Dirk J. Muse
Lee Smart, P.S., Inc.
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701 Pike Street
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Original e-filed with:
Court of Appeals, Division I
Clerk's Office
One Union Square
600 University Street
Seattle, WA 98101-1176

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

DATED: June 27, 2018 at Seattle, Washington.

Brendon McCarroll, Legal Assistant
Talmadge/Fitzpatrick/Tribe

TALMADGE/FITZPATRICK/TRIBE

June 27, 2018 - 3:10 PM

Transmittal Information

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