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DIVISION II

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STATE OF WASHINGTON

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NO. 39928-8-II

**IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II**

BARNES LAKE PARK OWNERS ASSOCIATION,

Respondent,

vs.

**MICHAEL G. GUSA; and WILLIAM R. HOUGHTALING and MARGARET
HOUGHTALING,**

Appellants.

**APPEAL FROM THURSTON COUNTY SUPERIOR COURT
Honorable James R. Orlando, Visiting Judge**

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

	Page
I. NATURE OF THE CASE	1
II. ISSUES PRESENTED	1
III. STATEMENT OF THE CASE	2
A. STATEMENT OF RELEVANT FACTS	2
1. The Declaration	2
2. Appellant’s Unit	4
B. STATEMENT OF PROCEDURE	5
IV. ARGUMENT	7
A. GENERAL RULES OF CONDOMINIUM LAW	8
B. SECTION XXI PRECLUDES ASSOCIATION LIABILITY FOR APPELLANTS’ DAMAGES	12
1. Section XXI Is Clear and Unambiguous	13
2. Section XXI Does Not Conflict with Section XV	20
3. Section XXI Does Not Violate Public Policy	22
C. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN AWARDING ATTORNEY FEES	30
D. THE CONDO ASSOCIATION IS ENTITLED TO ATTORNEY FEES ON APPEAL	34
V. CONCLUSION	35

TABLE OF AUTHORITIES

Washington Cases

	Page
<i>Ackerman v. Sudden Valley Community Association</i> , 89 Wn. App. 156, 944 P.2d 1045 (1997).....	15
<i>Adler v. Fred Lind Manor</i> , 153 Wn.2d 331, 103 P.3d 773 (2004)	27, 28
<i>Bellevue Pac. Center Condo. Owners Ass'n v. Bellevue Pac. Tower Condo. Ass'n</i> , 124 Wn. App. 178, 100 P.3d 832 (2004), <i>rev. denied</i> , 155 Wn.2d 1007 (2005)	10, 26, 27
<i>Boyce v. West</i> , 71 Wn. App. 657, 862 P.2d 592 (1993).....	19, 20
<i>Burton v. Douglas County</i> , 65 Wn.2d 619, 399 P.2d 68 (1965), <i>rev. denied</i> , 134 Wn.2d 1014 (1998)	15
<i>Danny v. Laidlaw Transit Services, Inc.</i> , 165 Wn.2d 200, 193 P.3d 128 (2008).....	22, 23
<i>Diamaco, Inc. v Mettler</i> , 135 Wn. App. 572, 145 P.3d 399 (2006), <i>rev. denied</i> , 161 Wn.2d 1019 (2007)	30
<i>Fawn Lake Maintenance Comm'n v. Abers</i> , 149 Wn. App. 318, 202 P.3d 1019, <i>rev. denied</i> , 166 Wn.2d 1014 (2009).....	14
<i>First Union Mgt., Inc. v. Slack</i> , 36 Wn. App. 849, 679 P.2d 936 (1984).....	17
<i>Gildon v. Simon Property Group, inc.</i> , 158 Wn.2d 483, 145 P.3d 1196 (2006).....	32
<i>Gold Creek North Limited Partnership v. Gold Creek Umbrella Association</i> , 143 Wn. App. 191, 177 P.3d 201 (2008)	11
<i>Holder v. City of Vancouver</i> , 136 Wn. App. 104, 147 P.3d 641 (2006), <i>rev. denied</i> , 162 Wn.2d 1011 (2008).....	6
<i>Hollis v. Garwall, Inc.</i> , 137 Wn.2d 683, 974 P.2d 836 (1999).....	16

<i>Keller v. Sixty-01 Associates of Apartment Owners</i> , 127 Wn. App. 614, 112 P.3d 544 (2005).....	9
<i>Lake v. Woodcreek Homeowners Association</i> , 142 Wn. App. 356, 174 P.3d 1224 (2007), <i>rev'd on other grounds</i> , 168 Wn.2d 694, 229 P.3d 791 (2010).....	10, 11
<i>Lindsay v. Pacific Topsoils, Inc.</i> , 129 Wn. App. 672, 120 P.3d 102 (2005), <i>rev. denied</i> , 157 Wn.2d 1011 (2006).....	35
<i>Mayer v. City of Seattle</i> , 102 Wn. App. 66, 10 P.3d 408 (2000), <i>rev. denied</i> , 142 Wn.2d 1029 (2001)	32
<i>McCorkle v. Hall</i> , 56 Wn. App. 80, 782 P.2d 574 (1989), <i>rev. denied</i> , 114 Wn.2d 1010 (1990)	20
<i>McCutcheon v. United Homes Corp.</i> , 79 Wn.2d 443, 486 P.2d 1093 (1971).....	24
<i>Rodruck v. Sand Point Maintenance Comm'n</i> , 48 Wn.2d 565, 295 P.2d 714 (1956).....	14
<i>Satomi Owners Association v. Satomi, LLC</i> , 167 Wn.2d 781, 225 P.3d 213 (2009).....	28
<i>Scott v. Pacific West Mountain Resort</i> , 119 Wn.2d 484, 834 P.2d 6 (1992).....	19
<i>Shorewood West Condominium Association v. Sadri</i> , 140 Wn.2d 47, 992 P.2d 1008 (2000).....	8, 9, 12, 25, 26
<i>State v. Aitken</i> , 79 Wn. App. 890, 905 P.2d 1235 (1995).....	13
<i>Steele v. Lundgren</i> , 96 Wn. App. 773, 982 P.2d 619 (1999), <i>rev. denied</i> , 139 Wn.2d 1026 (2000)	31
<i>Taliesen Corp. v. Razore Land Co.</i> , 135 Wn. App. 106, 144 P.3d 1185 (2006).....	31
<i>Thomas v. Housing Authority</i> , 71 Wn.2d 69, 426 P.2d 836 (1967).....	24
<i>Thompson v. St. Regis Paper Co.</i> , 102 Wn.2d 219, 685 P.2d 1081 (1984).....	23

<i>Torgerson v. One Lincoln Tower, LLC</i> , 166 Wn.2d 510, 210 P.3d 318 (2009).....	27
<i>Vodopest v. MacGregor</i> , 128 Wn.2d 840, 913 P.2d 779 (1996)	25
<i>Wagenblast v. Odessa School District</i> , 110 Wn.2d 845, 758 P.2d 968 (1988).....	25
<i>Zuver v. Airtouch Communications, Inc.</i> , 153 Wn.2d 293, 103 P.3d 753 (2004).....	28

Other Jurisdictions

<i>Anderson v. Council of Unit Owners</i> , 404 Md. 560, 948 A.2d 11 (2008).....	13
<i>Cornell v. Council of Unit Owners Hawaiian Village Condominiums, Inc.</i> , 983 F. Supp. 640 (D. Md. 1997).....	13, 14, 24, 25
<i>DP Solutions, Inc. v. Rollins, Inc.</i> , 353 F.3d 421 (5 th Cir. 2003).....	33
<i>Franklin v. Marie Antoinette Condominium Owners Association</i> , 19 Cal. App. 4 th 824, 23 Cal. Rptr. 2d 744 (1993).....	8, 13, 15, 20, 21, 23, 24, 27, 28, 29
<i>Hensley v. Eckerhart</i> , 461 U.S. 424, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983).....	33, 34
<i>Hidden Harbour Estates, Inc. v. Basso</i> , 393 So.2d 637 (Fla. Dist. App. 1981)	12
<i>Kelley v. Astor Investors, Inc.</i> , 106 Ill. 2d 505, 478 N.E.2d 1346 (1985).....	14, 24
<i>Kleinman v. High Point Condominium</i> , 108 Misc. 2d 581, 438 N.Y.S.2d 47 (1979).....	23
<i>Nido v. Ocean Owners' Council</i> , 237 Va. 664, 378 S.E.2d 837 (1989).....	11, 13, 14, 15, 22, 24, 29
<i>Noble v. Murphy</i> , 34 Mass. App. 452, 612 N.E.2d 266 (1993)	26

<i>Preston Tower Condominium Association v. S.B. Realty, Inc.</i> , 685 S.W.2d 98 (Tex. App. 1985).....	11, 12
<i>Villa De Las Palmas Homeowners Association v. Terifaj</i> , 33 Cal. 4 th 73, 82, 90 P.3d 1223, 14 Cal. Rptr. 3d 67 (2004)	11
<i>Winterrowd v. American General Annuity Insurance Co.</i> , 556 F.3d 815 (9 th Cir. 2009)	33, 34

Statutes

RCW ch. 64.32	
Horizontal Property Regimes Act.....	9, 10, 17, 27, 34
RCW 64.32.010	18
RCW 64.32.040	18, 24
RCW 64.32.050(1).....	24
RCW 64.32.060	10, 12, 20, 25, 26
RCW 64.32.140	11
RCW 64.32.250(1).....	10, 12, 20, 25, 26
RCW ch. 64.34	
Condominium Act.....	9, 10
RCW 64.34.010	9, 10, 34
RCW 64.34.010(1).....	9, 16, 17
RCW 64.34.010(2).....	9
RCW 64.34.328	17
RCW 64.34.360(3).....	17
RCW 64.34.364	32, 34, 35
RCW 64.34.364(14).....	34

RCW 64.34.45534, 35

Rules and Regulations

RAP 10.3(g)1, 13

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I. NATURE OF THE CASE

Appellant attorney refused to pay monthly assessments on his condominium unit, claiming that the condo association had not fully repaired the unit or the common areas around it damaged by water intrusion. However, the condo declaration immunizes the condo association from liability for damages caused by water intrusion and, as permitted by statute, places ultimate responsibility for paying for such repairs on the affected unit owners. The trial court ruled that the condo association was entitled to recover the delinquent assessments and that the cost of repairs made to or for the benefit of appellant's unit and less than all units should be specially assessed exclusively against the units benefited.

II. ISSUES PRESENTED

A. Did the trial court err in dismissing appellant attorney's damages claims where the condominium declaration relieved the association of liability for damages for water intrusion?

B. Is the declaration's provision relieving the association of liability for damages for water intrusion enforceable?

C. Should this court review appellant's attorney fee argument where appellant, in violation of RAP 10.3(g), failed to assign error to any of the trial court's findings of fact supporting the attorney fee award?

D. Did the trial court abuse its discretion in awarding attorney fees for the condo association's unsuccessful first summary judgment motion where (1) that motion addressed the only real issue on the merits, (2) the motion was denied solely on the ground that appellant's counterclaims had to be decided first, (3) once the counterclaims were dismissed, the condo association reused the motion to obtain entry of judgment, and (4) the condo association was successful overall?

E. Is the condo association entitled to attorney fees on appeal if it is the prevailing party on appeal?

III. STATEMENT OF THE CASE

A. STATEMENT OF RELEVANT FACTS.

Barnes Lake Park is a multibuilding condominium with 66 units. (CP 395) Its declaration was recorded on March 13, 1975. (CP 117)

1. The Declaration.

The declaration contained the following provisions about repair expenses:

XV AUTHORITY OF THE BOARD

Section 15.1 The Board . . . for the benefit of the condominium and the owners shall enforce the provisions of this Declaration and of the By-Laws, shall have all powers and authority permitted to the Board under the Act and the Declaration, and shall acquire and shall pay for out of the common expense fund hereinafter provided for, all goods and services requisite for the proper functioning of

the condominium, including but not limited to the following:

....

15.1.5 Painting, *maintenance, repair* and all landscaping and gardening work *for the common area*, and such furnishings and equipment for the common area as the Board shall determine are necessary and proper, and the Board shall have the exclusive right and duty to acquire the same for the common area; *provided, however, that the interior surfaces of each unit shall be painted, maintained and repaired by the owners thereof, all such maintenance to be at the sole cost and expense of the particular owner.*

15.1.6 *Any other materials, supplies, labor, services, maintenance, repairs, structural alterations, insurance, taxes or assessments which the Board is required to secure by law or which in its opinion shall be necessary or proper for the operation of the common area or for the enforcement of this Declaration; provided that if for any reason such materials, supplies, labor, services, maintenance, repairs, structural alterations, insurance, taxes, or assessments are provided for particular apartments or their owners, the cost thereof shall be specially assessed to the owner of such apartments.*

(CP 127) (emphasis added).

In addition, the declaration contains the following limitation of liability (CP 133):

XXI. LIMITATION OF LIABILITY

The Board shall not be liable for any failure of any utility or other service to be obtained and paid for by the Board, or for injury or damage to person or property caused by the elements, or resulting from electricity, water, rain, dust or sand which may lead or flow from outside or from any parts of the buildings, or from any of its pipes, drains, conduits, appliances, or equipment, or from any other place. . . . This exemption and limitation of liability extends to the entire Association as well as the Board. This

section shall not be interpreted to impose any form of liability by any implication upon the Board or the Association. . . .

(Emphasis added.)

2. Appellant's Unit.

In 1985 appellant and others (collectively referred to hereinafter as "appellant" or "appellant attorney") purchased a 3-story unit in one of the condominium buildings. (CP 4-5, 8-9, 34, 37) The unit is at one end of a building consisting of five units. (CP 76, 107, 118, 395)

In mid-2004 appellant complained of water intrusion and mold in his unit.¹ (CP 39) Since July 2004 through at least 2005, the condo association has paid a total of \$23,841.65 for repair work associated with the problems in appellant's unit (CP 109, 396):

- (1) \$2,619.67 for a mold remediation protocol,
- (2) \$3,632.25 for mold remediation services, including implementation of the remediation protocol and removal of the drywall,
- (3) \$2,493.20 for removal and replacement of stud framing, trimmers, sheeting and flooring, as well as installation of cedar siding, a sliding glass door, and an overhang thereto,

¹ Appellant's testimony conflicted. In his declaration, he claimed flooding first occurred in 1996 and that the association was aware of it and did some repairs. In his deposition, he claimed to have first reported water intrusion problems in mid-2004. (CP 39, 109)

(4) \$3,358.23 for removal of the second and third level deck floor joists, flooring, soffit and wing wall members, and rebuilding the decks,

(5) \$1,788.96 for repair of an external water leak by removal and extension of the second-floor roof area, installation of cedar siding, replacement of a leaking skylight, repair of water damage to a beam by installation of a resin, and installation of a new section of floor decking. (CP 396-97)

Appellant admits that some of the water intrusion problems have been corrected. (CP 44, 58, 67-68, 70-74) Nonetheless, in 2005, his payments of regular condo assessments became sporadic. (CP 297-98) By mid-January 2006 he had stopped paying altogether. (CP 294-97)

B. STATEMENT OF PROCEDURE.

In August 2007 the condo association sued appellant attorney to foreclose its statutory lien for the past due assessments. (CP 4-7) Subsequently, the association added a damages claim for back assessments. (CP 104; RP 29) (Brief of Appellant 6).

Appellant asserted unclean nonfulfillment of statutory and

contractual duties as a counterclaim.² There was no claim for negligence.
(CP 10)

Although appellant conceded that many of the past leakage problems had been fixed, he claimed that not all repairs he thought should be made had been made and that some leakage was still occurring. (CP 44, 58, 60, 67-68, 70-74, 78, 109)

In October 2008, the condo association's attorney retained a construction company to inspect appellant's unit. (CP 86) The construction company's president determined that water was entering the unit from outside and that it would cost \$13,063 to make repairs particular to appellant's unit. These repairs would fix existing damage, provide for proper drainage away from the unit, and prevent further leaking of the type claimed. (CP 87) Also recommended was an additional \$6,380 in repairs not particular to just appellant's unit that would impact the drain at one end of the building and its catch basin. (CP 88)

The condo association moved for partial summary judgment (1) dismissing the counterclaims and (2) declaring that it was entitled to specially assess appellant's unit for repairs to common areas that specially

² Appellant also brought a tortious interference claim, but has not mentioned it in his brief. He is deemed to have abandoned it. *Holder v. City of Vancouver*, 136 Wn. App. 104, 107, 147 P.3d 641 (2006), *rev. denied*, 162 Wn.2d 1011 (2008).

benefited the unit and that appellant would be liable for such assessments. (CP 21) The trial court granted the condo association's motion by letter ruling. (CP 283, 398-99)

On June 3, 2009, the summary judgment order was entered. It provides in pertinent part (CP 285):

A. Defendants' claims for damages based upon plaintiff's alleged failure to fulfill its statutory and contractual duties are dismissed with prejudice;

B. Defendants' claims for tortious interference with a business expectancy are dismissed with prejudice; and

C. The cost of repairs made to or for the benefit of Unit 11 after the date of this Order, and which benefit less than all of the units at Barnes Lake Park, shall be specially assessed exclusively against the units benefited, if they comply with the condominium declaration and statutes.

In a separate judgment, the trial court awarded the condo association the amount of the delinquent assessments plus prejudgment interest, plus attorney fees, costs, and expenses. (CP 373-77). To support its attorney fees award, the trial court entered findings of fact and conclusions of law. (CP 374-76)

IV. ARGUMENT

Appellant attorney devotes most if not all of his brief to arguing that the Board has an obligation to repair and maintain common areas. That argument is irrelevant because the issue here is not whether the Board has an obligation to repair and maintain common areas. As the

condo association told the trial court, “there is no dispute that Barnes Lake Park is obligated to repair damage to common areas to the extent required by the Declaration and Washington law.” (CP 207; *see also* RP 20, 25.)

Had appellant attorney wished to enforce the Association’s repair and maintenance obligation, he should have moved for injunctive or declaratory relief.³ Instead, appellant sued only for money damages, claiming “damages are the only adequate remedy.” (Brief of Appellant 23) *Cf. Franklin v. Marie Antoinette Condominium Owners Association*, 19 Cal. App. 4th 824, 832, 23 Cal. Rptr. 2d 744, 749 (1993) (condo unit owner may enforce declarations without breach of contract suit).

The issue here is therefore whether the Association is liable for *money damages* arising out of the claimed water intrusion damage to appellant’s unit. As will be discussed, the Association is not so liable.

A. GENERAL RULES OF CONDOMINIUM LAW.

Preliminarily, a thorough understanding of the basics of condominium law is necessary. Condominiums are creatures of statute. *Shorewood West Condominium Association v. Sadri*, 140 Wn.2d 47, 52, 992 P.2d 1008 (2000). As a result, the rights and duties of individual

³ Appellant attorney does not dispute that the condo association made repairs to the second and third floors of his unit, but complains that in 14 years no preventative repairs were made to the ground floor. But appellant never bothered to sue the association in those 14 years and then did so only after it first sued him for delinquent assessments.

owners are not the same as those of real property owners under the common law. *Id.* at 53. Rather, in exchange for the benefits of associating with other owners, a condominium unit owner gives up a degree of freedom of choice that he or she might otherwise have if the property were separately and privately owned. *Id.*

Statutes thus determine a condo unit owners' responsibilities. *Shorewood*, 140 Wn.2d at 53. Washington has two condominium statutes, the Horizontal Property Regimes Act, RCW ch. 64.32, and the Condominium Act, RCW ch. 64.34. The latter applies to all condominiums created after July 1, 1990. RCW 64.34.010(1). Except as otherwise provided, the former applies to all condominiums created before July 1, 1990. *See* RCW 64.34.010(1)-(2). *See generally Keller v. Sixty-01 Associates of Apartment Owners*, 127 Wn. App. 614, 618-19, 112 P.3d 544 (2005).

Barnes Lake was formed in 1975. (CP 117) It is therefore subject to RCW ch. 64.32, except as might otherwise be provided by law. RCW 64.34.010. In fact, the declaration expressly acknowledges the Horizontal

Property Regimes Act's applicability. (CP 117) Thus, appellant's general reliance on RCW ch. 64.34 is misplaced.⁴ (Brief of Appellant 16-18)

RCW 64.32.250(1) of the Horizontal Regimes Act provides:

All apartment owners, tenants of such owners, employees of such owners and tenants, and any other person that may in any manner use the property or any part thereof submitted to the provisions of this chapter, ***shall be subject to this chapter and to the declaration*** and bylaws of the association of apartment owners adopted pursuant to the provisions of this chapter.

(Emphasis added.) In addition, RCW 64.32.060 provides:

Each apartment owner shall comply strictly with the bylaws and with the administrative rules and regulations adopted pursuant thereto, as either may be lawfully amended from time to time, and ***with the covenants, conditions and restrictions set forth in the declaration or in the deed to his apartment.*** Failure to comply with any of the foregoing shall be ground for an action to recover sums due, for damages or injunctive relief, or both, maintainable by the manager or board of directors on behalf of the association of apartment owners or by a particularly aggrieved apartment owner.

(Emphasis added.) Thus, appellant, like all other unit owners, was and is subject to the declarations. *See Lake v. Woodcreek Homeowners*

⁴ Appellant attorney's claim that legislative acts that modify a previous statute are an interpretative guide to prior law completely misses the mark. (Brief of Appellant 18-19 n. 1) Except as provided in RCW 64.34.010, RCW ch. 64.34 did not purport to modify RCW ch. 64.32. And appellant's claim that RCW ch. 64.32's purpose is the same as RCW ch. 64.34's proves nothing. This court must look to the specific statutes that actually apply to Barnes Lake Park. *See generally Bellevue Pac. Center Condo. Owners Ass'n v. Bellevue Pac. Tower Condo. Ass'n*, 124 Wn. App. 178, 100 P.3d 832 (2004), *rev. denied*, 155 Wn.2d 1007 (2005).

Association, 142 Wn. App. 356, 361, 174 P.3d 1224 (2007) (“All owners are subject to the condominium's declaration and bylaws”), *rev'd on other grounds*, 168 Wn.2d 694, 229 P.3d 791 (2010).

Often referred to as “the development’s constitution”, “[d]eclarations are the operative documents for condominiums” and “spell out the true extent of the purchased interest.” *Gold Creek North Limited Partnership v. Gold Creek Umbrella Association*, 143 Wn. App. 191, 203-04, 177 P.3d 201 (2008); *Villa De Las Palmas Homeowners Association v. Terifaj*, 33 Cal. 4th 73, 82, 90 P.3d 1223, 1226, 14 Cal. Rptr. 3d 67 (2004). Not only do they set forth the condominium’s governance structure, but they also “serve to give notice to individual buyers of the significant terms of any encumbrances, easements, liens, and matters of title affecting the condominium development.” *Gold Creek*, 143 Wn. App. at 204.

Declarations must be recorded and thus are public. RCW 64.32.140. As a result, if a potential buyer of a condominium unit does not like a provision in the condominium’s declarations, he or she need not buy into the condominium. *Nido v. Ocean Owners’ Council*, 237 Va. 664, 378 S.E.2d 837, 838 (1989) (potential unit owners on notice of declaration provision limiting condo board’s liability). Indeed, in some states, “the provisions of a declaration are entitled to a strong presumption of validity because the purchaser knows of and accepts the restrictions imposed.”

Preston Tower Condominium Association v. S.B. Realty, Inc., 685 S.W.2d 98, 102 (Tex. App. 1985) (citing *Hidden Harbour Estates, Inc. v. Basso*, 393 So.2d 637 (Fla. Dist. App. 1981)).

Even when a declaration is amended after a unit owner has bought into the condominium, those amendments are valid and binding on that owner so long as adopted in accordance with the applicable condominium statute. RCW 64.32.250(1), 64.32.060; *Sadri*, 140 Wn.2d at 52-54.

B. SECTION XXI PRECLUDES ASSOCIATION LIABILITY FOR APPELLANTS' DAMAGES.

Section 16.1 of the Barnes Lake Park condo declarations requires the Board to levy annual assessments against each unit and allows the board to levy further assessments if the annual assessments are inadequate.⁵ (CP 235) Section 17.1 provides (CP 236):

Each annual assessment and each special assessment shall be joint and several personal debts and obligations of the owner or owners . . . for which the same are assessed as of the time the assessment is made and shall be collectible as such. The amount of any assessment, whether regular or special, assessed to the owner . . . of any apartment and the apartment, plus interest at the highest legal rate, and costs, including reasonable attorneys' fees shall be a lien upon such apartment. . . .

In the instant case, Finding of fact 1 provides (CP 374):

⁵ Unit owners may pay the annual assessments in equal monthly installments. (CP 235)

From early 2005 to the present time, defendants have failed to pay required condominium assessments. Defendants are delinquent in the payment of required condominium assessments in the amount of \$13,840.76 for that time period. The Association also imposed late fees totaling \$1,275.00 over the same period.

Appellant has not assigned error to this finding of fact as required by RAP 10.3(g). It is therefore a verity on appeal. *State v. Aitken*, 79 Wn. App. 890, 893, 905 P.2d 1235 (1995).

In any event, appellant attorney does not dispute he was delinquent in his payments to the condo association. Instead, he claims he should not have to pay on the ground that the condo association owes him money damages due to water intrusion in his unit. (CP 9)

1. Section XXI Is Clear and Unambiguous.

However, Section XXI of the Declarations provides:

*The Board shall not be liable . . . for injury or damage to person or property caused by the elements, or resulting from electricity, water, rain, dust or sand which may lead or flow from outside or from any parts of the buildings, or from any of its pipes, drains, conduits, appliances, or equipment, or from any other place. . . . This exemption and limitation of liability extends to the entire Association as well as the Board. This section shall not be interpreted to impose any form of liability by any implication upon the Board or the Association. . . .*⁶

⁶ Such clauses are not unusual. See *Anderson v. Council of Unit Owners*, 404 Md. 560, 948 A.2d 11 (2008); *Nido v. Ocean Owners' Council*, 237 Va. 664, 378 S.E.2d 837 (1989); *Franklin v. Marie Antoinette Condominium Owners Ass'n*, 19 Cal. App. 4th 824, 23 Cal. Rptr. 2d 744 (1993); *Cornell v. Council of Unit Owners Hawaiian Village*

(CP 133) (emphasis added). This section clearly immunizes the Board and the Association from liability for damages for injury or damage to persons or property caused by the elements, including water and rain.⁷ This type of liability is precisely what appellant attorney is seeking to impose on the Association.

Nido v. Ocean Owners' Council, 237 Va. 664, 378 S.E.2d 837 (1989), considered a similar provision. There, water leakage from the common areas damaged a beachfront condominium unit due to the nearby surf and ocean spray. The condo association attempted repairs, but leakage continued to occur during severe rainstorms.

The unit owner sued the condo association council. The condo declarations and bylaws placed the duty to repair common areas on the association. The bylaws, however, contained the following provision:

The Council shall not be liable . . . for injury or damage to person or property caused by the natural elements . . . or resulting from . . . water, snow or ice which may leak or flow from any portion of the Common Elements.

Condominiums, Inc., 983 F. Supp. 640 (D. Md. 1997). *Kelley v. Astor Investors, Inc.*, 106 Ill. 2d 505, 478 N.E.2d 1346 (1985), involved a broad exculpatory clause freeing board members and officers from *all* liability for any mistake in judgment or other act or omission of *any* nature whatsoever, except for willful misconduct.

⁷*Rodruck v. Sand Point Maintenance Comm'n*, 48 Wn.2d 565, 295 P.2d 714 (1956), and *Fawn Lake Maintenance Comm'n v. Abers*, 149 Wn. App. 318, 202 P.3d 1019, *rev. denied*, 166 Wn.2d 1014 (2009), cited at pages 32-33 of appellant's brief, are thus inapplicable because neither involved a condominium declaration with a limitation on liability such as Section XXI.

Id. at 378 S.E.2d at 838. The court held that this provision precluded the unit owner from recovering. *See also Franklin v. Marie Antoinette Condominium Owners Association*, 19 Cal. App. 4th 824, 23 Cal. Rptr. 2d 744 (1993) (applying somewhat similar limitation of liability clause to water damage to condo unit floor caused by leakage from central plumbing).

Here, to avoid application of Section XXI's plain language, appellant attorney claims it should be construed to apply only to "unforeseeable flooding and water intrusion." (CP 185) He argues that because Section 15.1.5 imposes a duty on the Association to maintain and repair common areas, Section XXI does not immunize the Board and Association from water intrusion caused by flood or natural elements "once such intrusion has taken place." (Brief of Appellant 23)

But that is not what Section XXI says. If the intent of Section XXI had been to apply only to unforeseeable flooding and water intrusion, it easily could have said so. "[C]lear and unambiguous language will be given its manifest meaning." *Ackerman v. Sudden Valley Community Association*, 89 Wn. App. 156, 163, 944 P.2d 1045 (1997) (quoting *Burton v. Douglas County*, 65 Wn.2d 619, 621-22, 399 P.2d 68 (1965), *rev. denied*, 134 Wn.2d 1014 (1998)). Courts will not construe clear and

unambiguous language by changing it. *See Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 698, 974 P.2d 836 (1999).

Furthermore, section 15.1.6 of the Declarations demonstrates that ultimate responsibility for the costs of the repair in this case falls on appellant and any other affected units, not on the Association as a whole. Section 15.1.6 provides that if materials, supplies, labor, services, maintenance, repairs, structural alterations, etc., are provided for particular units or their owners, the Board must specially assess those units or owners therefor.⁸ (CP 127) Appellant has not and cannot challenge the validity of section 15.1.6 because RCW 64.34.010(1) provides:

RCW 64.34.360(3) (common expenses—assessments) . . . appl[ies] to all condominiums created in this state before July 1, 1990; but th[at] section[] appl[ies] only with respect to events and circumstances occurring after July 1, 1990 . . .

⁸ Section 15.1.6 provides:

Any other materials, supplies, labor, services, maintenance, repairs, structural alterations, . . . which the Board is required to secure by law or which in its opinion shall be necessary or proper for the operation of the common area or for the enforcement of this Declaration; provided that if for any reason such materials, supplies, labor, services, maintenance, repairs, structural alterations, insurance, taxes, or assessments are provided for particular apartments or their owners, the cost thereof shall be specially assessed to the owner of such apartments.

(CP 127)

The events here all occurred after July 1, 1990. (CP 39, 109) RCW

64.34.360(3) provides in pertinent part:

(3) To the extent required by the declaration:

...

(b) Any common expense or portion thereof benefiting fewer than all of the units must be assessed exclusively against the units benefited;

....

Thus, RCW 64.34.010(1) and 64.34.360(3) authorize provisions such as Sections 15.1.6.⁹ RCW 64.34.328, relied upon by appellant attorney, is not one of the sections that applies to condominiums otherwise governed by RCW ch. 64.32. RCW 64.34.010(1). (Brief of Appellant 18)

⁹ That the condo association may not have always exercised its right to assess common expenses against only those units benefitted is irrelevant because the declarations include a nonwaiver provision. See *First Union Mgt., Inc. v. Slack*, 36 Wn. App. 849, 856, 679 P.2d 936 (1984). The nonwaiver provision provides (CP 132-33):

XX. FAILURE OF BOARD TO INSIST ON STRICT PERFORMANCE NO
WAIVER

The failure of the Board in any one or more instances to insist upon the strict performance of any of the terms, covenants, conditions or restrictions of this Declaration, or of the By-Laws, or to exercise any right or option contained in such documents, or to serve any notice or to institute any action, shall not be construed as a waiver or a relinquishment for the future of such term, covenant, condition or restriction, but such term, covenant, condition or restriction shall remain in full force and effect. The receipt by the Board of any assessment from an owner, with knowledge of any such breach shall not be deemed a waiver of such breach, and no waiver by the Board of any provision hereof shall be deemed to have been made unless expressed in writing and signed for the Board. . . .

Consequently, the trial court correctly ruled that the cost of repairs made to or for the benefit of appellant's unit and any other unit, but less than all units, had to be specially assessed exclusively against those units. (CP 285) Appellant does not even discuss this ruling.

Some of the needed repairs involve repair and painting of interior surfaces of appellant's unit. (CP 87) Section 15.1.5 of the declarations makes owners responsible for the painting, maintenance, and repair of interior surfaces of their units.¹⁰ (CP 127) Appellant has not challenged this section's validity either nor could he, since unit owners would be responsible for the repair, maintenance, and painting of the interior surfaces of their units even without Section 15.1.5. RCW 64.32.010, .040.

Nonetheless, appellant argues that because Section XXI does not specifically reference the duty to repair or maintain building exteriors, Section XXI does not apply. But the language of Section XXI is clearly broad enough to encompass that duty without additional words not included by the declarant that created the condominium.

¹⁰ Section 15.1.5 provides:

Painting, maintenance, repair . . . for the common area, . . . , and the Board shall have the exclusive right and duty to acquire the same for the common area; provided, however, that the interior surfaces of each unit shall be painted, maintained and repaired by the owners thereof, all such maintenance to be at the sole c[o]st and expense of the particular owner.

Moreover, the cases cited by appellant do not support his position. Instead, they demonstrate that clear and unambiguous exculpatory language will be enforced even if that language does not expressly mention the specific type of claim involved. For example, in *Scott v. Pacific West Mountain Resort*, 119 Wn.2d 484, 834 P.2d 6 (1992), the exculpatory clause purported to hold a ski school harmless “from all claims arising out of the instruction of skiing or in transit to or from the ski area.” *Id.* at 488. The plaintiff argued that because the clause did not specifically mention “negligence”, it did not apply to a negligence claim. The Washington Supreme Court rejected this argument, holding the language “sufficiently clear to give notice that the ski school was attempting to be released from liability for its negligent conduct.” *Id.* at 490.

Similarly, in *Boyce v. West*, 71 Wn. App. 657, 862 P.2d 592 (1993), the exculpatory clause purported to release the defendant from “all risks in connection with [the scuba diving] course . . ., including all risks connected therewith, whether foreseen or unforeseen . . .” *Id.* at 661 n.2. The claimant alleged that because the releasor had not specifically considered negligent instruction and supervision when he signed the release, the release did not apply. The court rejected this argument, declaring that the releasor’s failure to consider the specific risks “does not

invalidate his express assumption of all risks associated with his participation in the course.” *Id.* at 667 (emphasis omitted).

McCorkle v. Hall, 56 Wn. App. 80, 782 P.2d 574 (1989), *rev. denied*, 114 Wn.2d 1010 (1990), is irrelevant. The question there was whether a release in a membership application was sufficiently conspicuous. Appellant attorney here does not claim he even read the declarations, let alone that Section XXI was somehow inconspicuous. In any event, RCW 64.32.060 requires appellant attorney and all other unit owners to comply strictly with the declarations. *See also* RCW 64.32.250(1).

2. Section XXI Does Not Conflict with Section XV.

Alternatively, appellant suggests that there is an “irretrievable conflict” between sections XV and XXI of the declaration. (Brief of Appellant 18) Section XV places on the condo association a duty of repair and maintenance of common areas. (CP 127) Section XXI releases the board and the association for liability for damages under certain circumstances including water intrusion. (CP 133)

Appellant attorney fails to appreciate the difference between duty on the one hand and damages liability on the other. *Franklin v. Marie Antoinette Condominium Owners Association*, 19 Cal. App. 4th 824, 23 Cal. Rptr. 2d 744 (1993), is illustrative. There a condominium unit

owner's hardwood floor was damaged from a slow leak in the condominium's central plumbing system. The unit owner sued the condo association for damages. The trial court found the association liable for more than \$74,000 in damages and nearly \$170,000 in attorney fees.

The condo declaration purported to relieve the association of liability for damage to property "resulting from . . . water . . . which may leak or flow from the outside of any unit or from any part of the building, or from any pipes, drains, conduits, appliances or equipment, or from any other place or cause" ¹¹ The unit owner claimed this clause was unenforceable on the ground that it relieved the association of its duty under statute and the declaration to repair and maintain common areas.

The court of appeals disagreed and reversed the damages award.

The court explained:

Here . . . the Association will be required to maintain the common area whether or not it is liable for breach of contract damages in this case. Enforcing the exculpatory clause in this case will not relieve the Association of its statutory duty to maintain and repair the common area. Moreover, a condominium owner may enforce the CC & Rs under the law of equitable servitudes without resorting to a breach of contract cause of action.

19 Cal. App. 4th at 832, 23 Cal. Rptr. 2d at 749 (citations omitted).

¹¹ The limitation on liability excluded gross negligence. 19 Cal. App. 4th at 829, 23 Cal. Rptr. 2d at 747.

Nido v. Ocean Owners' Council, 237 Va. 664, 378 S.E.2d 837 (1989), reached a similar conclusion. There the condominium declaration and bylaws required the condo association to repair common areas. The bylaws, however, relieved the condominium council of liability “for injury or damage to person or property caused by the natural elements . . . or resulting from electricity, water, snow or ice which may leak or flow from any portion of the Common Elements.” 378 S.E.2d at 838. Ruling that a unit owner could not recover damages due to water that leaked from the common areas during storms, the Virginia Supreme Court distinguished between duty and liability for damages:

. . . Section 6.5 of the By-Laws limits the Council’s liability for property damages resulting from certain listed events. We do not, however, view this limitation as an abrogation of the Council’s contractual duty to Nido to correct defects in the common elements established by Article 3(c) of the Declaration and Section 6.1(c) of the By-Laws.

378 S.E.2d at 667.

3. Section XXI Does Not Violate Public Policy.

Section XXI does not violate public policy because there is nothing in that section that violates any applicable statute or judicial pronouncement. “[C]ourts should proceed cautiously if called upon to declare public policy absent some prior legislative or judicial expression on the subject.” *Danny v. Laidlaw Transit Services, Inc.*, 165 Wn.2d 200,

208, 193 P.3d 128 (2008) (quoting *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 232, 685 P.2d 1081 (1984)).

As discussed *supra*, Section XXI is not inconsistent with any applicable statute. Indeed, the condo association has a duty to repair and maintain common areas as required by the declaration and by statute. This duty can be enforced in a suit for injunctive or declaratory relief. All Section XXI does is preclude the board's and the association's liability for damages in certain specified circumstances.¹² Appellant's claim that unit owners have been "denied a meaningful remedy" with "no legal consequence" to the Association is not true. (Brief of Appellant 30, 31)

Further, section XXI does not eliminate the Board's or the association's liability for damages in all circumstances. For example, suppose tree roots cause a common walkway to crack and bulge and someone falls as a result. Section XXI would not apply. Suppose a termite infestation causes deterioration in a condo building's wood framing. Section XXI would not apply.

¹² Board members are typically volunteers with no professional property management experience. The threat of personal liability can discourage active and meaningful participation in condominium management. *Franklin*, 19 Cal. App. 4th at 830 n.20, 23 Cal. Rptr. 2d at 748 n.10; *Kleinman v. High Point Condominium*, 108 Misc. 2d 581, 438 N.Y.S.2d 47 (1979).

Thus, every court thus far that has looked at the enforceability of a limitation of liability similar to Section XXI has upheld the provision.¹³ Appellant has failed to cite a single case to the contrary.

Appellant attorney's attempt to analogize condominiums to the landlord-tenant relationships in *McCutcheon v. United Homes Corp.*, 79 Wn.2d 443, 486 P.2d 1093 (1971), and *Thomas v. Housing Authority*, 71 Wn.2d 69, 426 P.2d 836 (1967), must fail. Unlike a tenant in a residential landlord-tenant relationship, a condominium unit owner has an equity interest in the common areas and actually has a say in how the condominium is run. RCW 64.32.040, .050(1). (CP 124-26) And, unlike a landlord in a residential landlord-tenant relationship, the condo association here is a nonprofit corporation (CP 145-46), not a commercial business for profit. *See Franklin*, 19 Cal. App. 4th, at 834, 23 Cal. Rptr. 2d at 750. Perhaps most importantly, unlike a tenant, a condominium unit owner's property rights are governed by statutes that say the unit owner "shall be subject to this chapter and to the declaration" and "shall comply

¹³ *Nido*, 378 S.E.2d at 838 ("Nor is this limitation on liability contrary to public policy"); *Franklin*, 23 Cal. Rptr.2d at 750 ("exculpatory clause does not [in case where condo association breached contract to repair] violate public policy"); *Cornell v. Council of Unit Owners Hawaiian Village Condominiums, Inc.*, 983 F. Supp. 640, 649 (D. Md. 1997) ("exculpatory clause is not so patently offensive in light of societal expectations to justify holding it violative of public policy"); *cf. Kelley v. Astor Investors, Inc.*, 106 Ill.2d 505, 478 N.E.2d 1346, 1348 (1985) ("We do not believe that the exculpatory clause [relieving board and officers of liability except for willful misconduct] violates public policy").

strictly . . . with the covenants, conditions and restrictions set forth in the declaration.” RCW 64.32.250(1); RCW 64.32.060; *Sadri*, 140 Wn.2d at 53.

Vodopest v. MacGregor, 128 Wn.2d 840, 913 P.2d 779 (1996), and *Wagenblast v. Odessa School District*, 110 Wn.2d 845, 758 P.2d 968 (1988), also do not apply. Those cases involved pre-injury releases absolving the releasee of negligence involving hazardous sporting activities (Himalayan trekking in *Vodopest*, interscholastic athletics in *Wagenblast*, and ski racing in *Scott*). In those situations, the releasor was indeed deprived of all remedies, because injunctive or declaratory relief after any injury would be useless.

Moreover, *Vodopest* emphasized, “We wish to be very clear that it is only negligent conduct which cannot be the subject of a preinjury release.” 128 Wn.2d at 861 (emphasis omitted). Appellant attorney is not suing for negligence. (CP 10) In any event, at least one court has ruled that a similar limitation of liability clause in condominium bylaws did not violate criteria similar to those in *Vodopest* and *Wagenblast*. See *Cornell v. Council of Unit Owners Hawaiian Village Condominiums, Inc.*, 983 F. Supp. 640 (D. Md. 1997).

Appellant’s claims of procedural and substantive unconscionability as well as the absence of specific negotiation over Section XXI are

meritless. Appellant claims that Section XXI, being contained in the declaration, was offered on a “take it or leave it basis” with no negotiation and left him with no meaningful recourse.

But, significantly, none of the cases cited by plaintiff involves a condominium. Hence, while certain aspects of contract law are applicable to condominium declarations, “the property rights of individual condominium unit owners are creations of a condominium statute and are subject to that statute.” *Sadri*, 140 Wn.2d at 49.

Thus, in a condominium, “each owner, in exchange for the benefits of association with other owners, ‘must give up a certain degree of freedom of choice which he [or she] might otherwise enjoy in separate, privately owned property.’” *Id.* at 53 (quoting *Noble v. Murphy*, 34 Mass. App. 452, 456, 612 N.E.2d 266 (1993)). Indeed, RCW 64.32.250(1) says that unit owners “shall be subject to this chapter and to the declaration and bylaws of the association.” RCW 64.32.060 says that unit owners “shall comply strictly . . . with the covenants, conditions and restrictions set forth in the declaration.” *See Sadri*, 140 Wn.2d at 53 (“RCW 64.32 makes all owners subject to the chapter and ‘to the declaration . . .’”).

Consequently, the Washington Court of Appeals has explained:

But the [condominium] declaration itself is not a contract . . .
. . . It is a document that unilaterally creates a type of real

property. The declaration is not a contract that can be called unconscionable.

Bellevue Pacific Center Condominium Owners Ass'n v. Bellevue Pacific Tower Condominium Ass'n, 124 Wn. App. 178, 188, 100 P.d 832 (2004), *rev. denied*, 155 Wn.2d 1007 (2005); *see also Franklin*, 19 Cal. App. 4th at 828, 23 Cal. Rptr. 2d at 746-47 (recognizing condominium declaration may not be a contract). The doctrine of unconscionability, procedural or substantive, does not apply.

Even if a particular section of a condominium declaration could be declared unconscionable, Section XXI could not be. That section could not be procedurally unconscionable because RCW ch. 64.32 requires unit owners to comply with the declaration. Under appellant's theories virtually every provision in any condo declaration would be procedurally unconscionable because it is not specifically negotiated with potential unit owners. By making unit owners automatically subject to the condo declarations, the Legislature could not have intended this result.

Appellant's claim of substantive unconscionability is also meritless. A contractual provision is substantively unconscionable if it is one-sided or overly harsh. Its one-sidedness or over-harshness must "truly stand out." *Torgerson v. One Lincoln Tower, LLC*, 166 Wn.2d 510, 519, 210 P.3d 318 (2009). In other words, the provision must be "[s]hocking to

the conscience”, “monstrously harsh”, or “exceedingly calloused”. *See Adler v. Fred Lind Manor*, 153 Wn.2d 331, 344-45, 103 P.3d 773 (2004). The mere fact that a clause is unilateral is not enough. *Satomi Owners Association v. Satomi, LLC*, 167 Wn.2d 781, 815-16, 225 P.3d 213 (2009).

Appellant claims Section XXI is substantively unconscionable, arguing that it deprives him of any meaningful remedy or significant legal recourse. But as discussed *supra*, Section XXI does not eliminate the condo association’s duty of maintenance and repair of common areas or an owner’s ability to recover damages against the association in every case. In *no* case does it prevent a unit owner from suing to compel the Association to do necessary repair work.

Moreover, Section XXI is simply *not* “[s]hocking to the conscience,” “monstrously harsh”, or “exceedingly callous”. The condo association, comprised of the condominium’s unit owners including appellant attorney, is not in business to make a profit. (CP 124, 145-46) *See Franklin*, 19 Cal App. 4th at 834, 23 Cal. Rptr. 2d at 750. Unlike in *Zuver v. Airtouch Communications, Inc.*, 153 Wn.2d 293, 103 P.3d 753 (2004), where damages would be assessed against a for-profit entity independent of the claimant, any damages award here would ultimately be assessed against unit owners.

As one court has explained in upholding a provision similar to

Section XXI:

Nor is this limitation on liability contrary to public policy. All potential owners are on notice of the limitation. Any damage award would be assessed against all owners. *Contractually limiting the liability which a group may have to a member of the group . . . is not against public policy.*

Nido, 378 S.E.2d at 838 (emphasis added). Upholding a somewhat similar

provision, another court has expanded on this reasoning as follows:

By reducing the Association's risk of liability, the condominium owners have reduced their own risk. The condominium owners are, after all, the ones who are assessed to pay for improvements, insurance premiums, liability judgments not covered by insurance, and the like. Plaintiff is only one of many owners who collectively entered into the contract (CC & Rs) with the Association. A reasonable and fair reduction of the Association's risk which mutually benefits the condominium owners as a whole does not suddenly become violative of public policy upon the non-negligent infliction of property damage to an individual unit. While plaintiff may bear the loss in this case, she may benefit in the next. As was pointed out by our Supreme Court, "no public policy opposes private, voluntary transactions in which one party, for a consideration, agrees to shoulder a risk which the law would otherwise have placed upon the other party...."

Franklin, 19 Cal. App. 4th at 833-34, 23 Cal. Rptr. 2d at 750.

Appellant has failed to cite any case holding that a comparable provision in condominium declarations or bylaws is against public policy. Indeed, to the best of respondent's knowledge, there are none. The trial court correctly ruled for the condo association.

C. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN AWARDING ATTORNEY FEES.

Appellant claims the trial court abused its discretion in awarding attorney fees for a failed summary judgment motion. Because appellant has not assigned any error to the trial court's findings of fact in support of its attorney fee award (CP 374-76), they are verities on appeal. *Diamaco, Inc. v Mettler*, 135 Wn. App. 572, 575, 145 P.3d 399 (2006), *rev. denied*, 161 Wn.2d 1019 (2007).

For example, Findings of Fact 7-9 state (CP 375-76) :

7. The court further finds that:
 - A. The attorney fees and costs and other litigation expenses incurred by Heller Wiegenstein PLLC in prosecution of the Association's claims total \$13,222.09 through August 21, 2009.
 - B. The attorney fees and costs and other litigation expenses incurred by Heller Wiegenstein PLLC in defense of the counterclaims total \$37,712.70 through August 21, 2009.
 - C. The hourly rates charged by Heller Wiegenstein PLLC, in representing plaintiff were reasonable and appropriate for the nature of the work involved, the skill and experience of the attorneys, and the subject matter of the lawsuit and issues presented therein.
 - D. The court declines to award attorney fees and costs incurred by the

plaintiff in seeking discretionary review by the Court of Appeals of this court's denial of summary judgment by Order dated March 14, 2008.

8. Attorney fees, costs and litigation expenses incurred by Heller Wiegenstein PLLC and the Association totaling \$8,490.69 were reasonable and appropriate in light of the legal issues involved, the nature and amount of the claims asserted by the defendants, and the specific tasks that were undertaken in the prosecution of the Association's claims.
9. Attorney fees, costs and litigation expenses incurred by Heller Wiegenstein PLLC and State Farm Fire and Casualty Company on behalf of plaintiff totaling \$37,712.70 were reasonable and appropriate in light of the legal issues involved, the nature and amount of the claims asserted by the defendants, and the specific tasks that were undertaken in the defense of defendants' counterclaims.

The trial court awarded attorney fees, costs, and expenses of \$46,203.39 out of the total of \$50,934.79 (\$13,222.09 + \$37,712.70) requested. (CP 376) Because no error has been assigned to the findings that the attorney fees awarded were reasonable and appropriate,¹⁴ appellant's attorney fee challenge on appeal should be rejected.

¹⁴ The trial court need not engage in an explicit hour-by-hour analysis of each lawyer's time sheets. *Taliesen Corp. v. Razore Land Co.*, 135 Wn. App. 106, 143, 144 P.3d 1185 (2006). All that is required is that the trial court have made the award after considering the relevant facts and the reasons given for the award are sufficient for review. *Steele v. Lundgren*, 96 Wn. App. 773, 786, 982 P.2d 619 (1999), *rev. denied*, 139 Wn.2d 1026 (2000).

In any event, the trial court was well within its broad discretion to award fees for the unsuccessful summary judgment motion. “A court abuses its discretion when its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons.” *Gildon v. Simon Property Group, inc.*, 158 Wn.2d 483, 494, 145 P.3d 1196 (2006).

Although time spent on successful *claims* must ordinarily be segregated from time spent on unsuccessful *claims*, *Mayer v. City of Seattle*, 102 Wn. App. 66, 79-80, 10 P.3d 408 (2000), *rev. denied*, 142 Wn.2d 1029 (2001), that is not the case here, where, for all practical purposes, the only claim was whether appellant had to pay the condo association delinquent assessments plus interest and penalties. Appellant’s counterclaims were intended as a defense and offset to his liability to the association.

Before asking for summary judgment on appellant’s counterclaims, the condo association filed an initial 6-page summary judgment motion seeking a ruling that appellant was in default for failing to pay assessments and to foreclose on the association’s lien imposed by RCW 64.34.364. (CP 389-94) The trial court denied that motion, stating that foreclose “cannot be granted until defendants’ counterclaim, and any offset based on same, are resolved on the merits.” (CP 15)

Consequently, the condo association moved for summary judgment on the counterclaims. That motion was successful. (CP 17-27, 284-86)

After the counterclaims were dismissed, the condo association moved for entry of judgment for the unpaid assessments, plus interest, late fees, and for an attorney fee award. (CP 352-60) In that motion, the condo association expressly referred the court to its first summary judgment motion (CP 353) The trial court entered judgment for the unpaid assessments, plus interest, late fees, and attorney fees. (CP 373-77)

Thus, the trial court was within its considerable discretion in awarding fees for the first summary judgment motion. Not only was that motion addressed primarily to the one real claim in the case—whether appellant owed back assessments, but it was ultimately used for the association’s later successful motion to enter judgment for those assessments.

Furthermore, fees incurred for an unsuccessful motion are recoverable so long as the overall claim is successful. *See, e.g., DP Solutions, Inc. v. Rollins, Inc.*, 353 F.3d 421, 434 (5th Cir. 2003); *Winterrowd v. American General Annuity Insurance Co.*, 556 F.3d 815, 827-28 (9th Cir. 2009). The United States Supreme Court has declared:

Where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee. Normally this will encompass all hours reasonably

expended on the litigation In these circumstances the fee award should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit.

Hensley v. Eckerhart, 461 U.S. 424, 435, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983). If failed motions are “reasonably related to the ultimate victory”, fees attributable to them are compensable. *Winterrowd*, 556 F.3d at 828. The fees incurred for the unsuccessful summary judgment motion here were reasonably related to the condo association’s ultimate victory. The trial court did not abuse its discretion in awarding them.

D. THE CONDO ASSOCIATION IS ENTITLED TO ATTORNEY FEES ON APPEAL.

Having been created before 1990, the condo association here is governed primarily by the Horizontal Property Regimes Act, RCW ch. 64.32. However, pursuant to RCW 64.34.010, RCW 64.34.364 and RCW 64.34.455 also apply to the condo association.

RCW 64.34.364(14) provides:

The association shall be entitled to recover any costs and reasonable attorneys’ fees incurred in connection with the collection of delinquent assessments, whether or not such collection activities result in suit being commenced or prosecuted to judgment. In addition, *the association shall be entitled to recover costs and reasonable attorneys’ fees if it prevails on appeal and in the enforcement of a judgment.*

(Emphasis added.) Consequently, if the condo association prevails in this appeal, it is entitled to its reasonable attorney fees and costs on appeal, because it brought this action to collect delinquent assessments.

RCW 64.34.455 also authorizes recovery of attorney fees on appeal. That statute provides:

If a declarant or any other person subject to this chapter fails to comply with any provision hereof or any provision of the declaration or bylaws, any person or class of persons adversely affected by the failure to comply has a claim for appropriate relief. The court, in an appropriate case, may award reasonable attorney's fees to the prevailing party.

Here, appellant failed to comply with declarations by refusing to pay his assessments. If the condo association prevails, it is entitled to attorney fees on appeal, even though the statute, unlike RCW 64.34.364, does not specifically mention attorney fees on appeal. *Lindsay v. Pacific Topsoils, Inc.*, 129 Wn. App. 672, 686, 120 P.3d 102 (2005), *rev. denied*, 157 Wn.2d 1011 (2006).

V. CONCLUSION

Appellant attorney was not only on notice of the contents of the condominium declaration, but by statute, he is required to strictly comply with those declarations.

The declarations immunize the association from liability for money damages under the circumstances of this case. Consequently, the trial

court here did not err in dismissing appellant's damages claims against the
condo association and awarding it attorney fees. This court should affirm.

DATED this 24th day of September, 2010.

REED McCLURE

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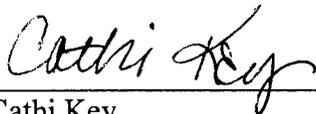
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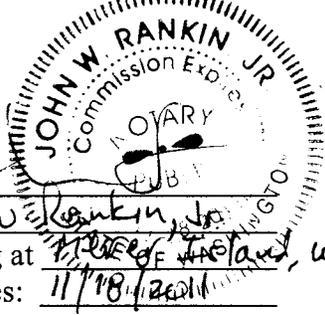


Cathi Key

SIGNED AND SWORN to (or affirmed) before me on
September 29, 2010 by Cathi Key.



Print Name: John W. Rankin, Jr.
Notary Public Residing at 1100 E. Island, WA
My appointment expires: 11/18/2011



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