

**No. 43157-2-II**

**THE COURT OF APPEALS**  
**State of Washington**

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GRANVILLE CONDOMINIUM HOMEOWNERS ASSOCIATION, a  
Washington non-profit corporation,

Appellant/Cross-Respondent

v.

MICHAEL K. KUEHNER and BRENDA W. KUEHNER,  
husband and wife,

Respondents/Cross-Appellants

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**Response and Opening Brief on Cross-Appeal**

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## INTRODUCTION

This case is about the simple concept of the lack of contractual privity between a homeowners' association and the tenants of the condominium owners within that association.

No Washington State statute or case law holds that there exists privity between a homeowners' association and a condominium owner's tenant-at-will, outside of some contractual relationship between the two. Courts outside of Washington that have considered this issue have held that no such privity exists. *See Winsor Green Owners Association, Inc. v. Allied Signal et al.*, 362 S.C. 12, 605 S.E.2d 750 (S.C. Ct. App. 2004) (homeowners' association had no standing to sue tenant for a tenant's tortious conduct because "[u]nder this rational, a homeowners' association could directly hold a tenant contractually responsible for assessments, association dues, or any other expenses even though the parties did not intend this result by virtue of entering into a rental agreement.").

In 2010, the Respondents/Cross-Appellants, Michael and Brenda Kuehner ("the Kuehners") worked on business projects with Casey and Gwen Ingels ("the Ingels"), for which the Ingels incurred over \$100,000 in debt to the Kuehners. When the Ingels were unable to repay the Kuehners, the Ingels and the Kuehners agreed that the Ingels would pay the debt off by granting the Kuehners a tenancy-at-will in a condominium

owned by the Ingels and located at 207 Broadway, Unit 500, Tacoma, Washington (“Unit 500”).

A few months after the Kuehners moved into Unit 500, the homeowners’ association, Granville Homeowners’ Association (“Granville HOA”), approached them and asked that they pay assessments due by the Ingels under the Condominium Declaration, or risk their utilities, garbage, and maintenance services being shut off. While nothing in the Condominium Declaration required that tenants-at-will such as the Kuehners pay those assessments, the Kuehners paid anyway, for fear of losing those services. When the Kuehners ceased to pay the assessments, Granville HOA brought an action against them for the amounts due by the Ingels.

No Washington State statute or case law creates privity between a homeowners’ association and a property owners’ tenants-at-will without a contract providing for such. Not only does the Condominium Declaration here not require the condominium owners’ tenants-at-will to pay any assessments due, but condominium declarations are not even contracts between the homeowners’ association and the condominium owners. *Bellevue Pac. Ctr. Condo. Owners Ass’n v. Bellevue Pac. Tower Condo. Ass’n*, 124 Wn.App.178, 188, 100 P.3d 832 (2004).

The Superior Court therefore did not err in granting the Kuehners' motion to dismiss pursuant to CR 12(b)(6) because Granville HOA does not have a claim against the Kuehners.

We urge the court to affirm this ruling because, as has been made plain from the beginning in the Answer filed by the Kuehners, *see* CP 8; and the Kuehners motion for dismissal, CP 170-174; and again here on appeal, Granville HOA's action should have been against the unit owners of the condominium, the Ingels, *not* the Kuehners, who simply rent the Ingels' condominium unit.

The Kuehners therefore only cross-appeal the part of the Superior Court's order denying them attorney fees and costs for the proceedings below, and would request this Court grant them attorney fees and costs for these appellate proceedings.

## **ASSIGNMENTS OF ERROR**

The court erred in not granting attorney fees to the Respondents/Cross-Appellants under CR 11, RCW 4.84.185, and RCW 64.34.455.

### **ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR**

- I. Whether the Superior Court erred in dismissing the Appellants/Cross-Respondents action pursuant to CR 12(b)(6) when no statute, case law, contract, or legal theory supported their claim that tenants-at-will must pay assessments due by a condominium owner to a home owners' association.
  - A. Whether a condominium owners' tenants-at-will must pay assessments due by the condominium owners to a home owners' association under a condominium declaration when no language in the declaration requires such.
  - B. Whether a tenant-at-will's sporadic payment of those assessments under threat of having their utilities, garbage, and maintenance services being discontinued by the home owners' association creates an ongoing obligation to pay those assessments.
  - C. Whether the Condominium Act requires that tenants pay assessments due by a condominium owner to a homeowners' association.
  - D. Whether the theory of Quantum Meruit requires that tenants-at-will must pay a condominium owner's assessments to a homeowners' association.
- II. Whether the Superior Court erred in denying attorney fees and costs to the Respondents/Cross-Appellants pursuant to CR 11 and

RCW 4.84.185, since the Appellants/Cross-Respondents filed a suit with no debatable issues; and pursuant to RCW 64.34.455, since the Appellants/Cross-Respondents filed a suit for a remedy that is not provided for in the Condominium Act.

A. Whether Attorney Fees And Costs Pursuant to CR 11 and RCW 4.84.185 Are Appropriate Where No Statute, Case Law, Contract or Legal Theory Supported The Appellant/Cross-Respondent's Contention That Tenants-At-Will Are Responsible for Paying Assessments Due by The Condominium Owners.

B. Whether Attorney Fees and Costs Under RCW 64.34.455 Are Appropriate Since Appellants/Cross-Respondents Brought Suit Under the Condominium Act Against Tenants, And Not Condominium Owners, as Provided by The Condominium Act.

III. Whether the Superior Court erred in denying attorney fees and costs to the Appellants/Cross-Respondents where a clause in a Condominium Declaration provides for those fees and costs in certain actions, but where the Appellants/Cross-Respondents did not bring an action for which the Condominium Declaration provides attorney fees and costs.

#### **OTHER ISSUES**

IV. Whether the Respondents/Cross-Appellants are entitled to fees for these appellate proceedings since the Appellants/Cross-Respondents present no debatable issues on which reasonable minds might differ.

## STATEMENT OF THE CASE

The Respondents/Cross-Appellants, Michael and Brenda Kuehner (“the Kuehners”) do not dispute the facts presented by the Appellant/Cross-Respondent, Granville Homeowners’ Association (“Granville HOA”), but would make the following additions and exceptions:

### **Factual Background**

During 2010 the Kuehners advanced Casey and Gwen Ingels (“the Ingels”) over \$100,000 for business projects they were working on together. CP 163. The Kuehners expected that money to be paid back, but it was not forthcoming in a timely way. CP 163. When the Ingels could not pay back what was owed the Kuehners, the Kuehners agreed to a month-to-month tenancy in a property owned by the Ingels and located at 207 Broadway, Unit 500, Tacoma, Washington (hereinafter “Unit 500”). CP 163. The Kuehners have no written agreement with the Ingels. CP 163.

In October of 2011, the Kuehners and their four children moved into the property. CP 164. Mr. Kuehner contacted Beaver Brinkman, Managing Member of the Granville HOA, at the direction of the Ingels. CP 164. Mr. Brinkman provided the Kuehners with the Key FOB, garage door opener, storage unit keys and mailbox keys for Unit 500. CP 164.

A Condominium Declaration between Granville HOA and its member condominium owners provided that unit owners were required to pay assessments for garbage, utilities, and other maintenance on the property to Granville HOA. CP 108, 133-138. There was no discussion of any unpaid HOA assessments when the Kuehners moved into Unit 500. CP 164.

In January of 2011, Mr. Brinkman asked Mr. Kuehner to pay HOA assessments which had gone unpaid by the Ingels under the Condominium Declaration. CP 164. Mr. Brinkman advised Mr. Kuehner that garbage, utilities, and other maintenance services would be shut off if the assessments were not paid. CP 164. Mr. Brinkman requested that Mr. Kuehner make the payments because a number of owners had not been paying the association dues. CP 164.

After that, when Mr. Brinkman requested payment to cover utilities and maintenance, the Kuehners made payments to Granville HOA on a voluntarily basis. CP 164. The Kuehners believe they made a total of six payments. CP 164. The Kuehners made all payments to Mr. Brinkman and did so based on his representations that utilities would be shut off if they did not make the payments. Mr. Brinkman was on the Granville HOA board until June of 2011. CP 164.

The Kuehners did not think they were required or obligated in any way under their agreement with the Ingels to pay the HOA assessments to Granville HOA. CP 164. Until January 6, 2011, Mr. Kuehner was under the impression that the use of the condominium was in trade for the debt owed. CP 164. On January 6, Mr. Kuehner received a letter from the Ingels' attorney containing a 20-day notice to vacate. CP 164, 167-169. The letter indicated that that the Kuehners had not been paying rent, but cited no rent amount due, and asserted that the Kuehner family might be "trespassers." CP 164.

On the same day that Mr. Kuehner received the letter from the Ingels' attorney, Mr. Kuehner spoke with Mr. Ingel, who confirmed that he and his wife owed the Kuehners money, and that the Kuehners were living on the premises in exchange for the money due. CP 164.

### **Summary of Proceedings**

In granting the Kuehners' motion to dismiss pursuant to CR 12(b)(6), the trial court found that the Condominium Declaration held the owners of the condominium unit, Casey and Gwen Ingels, responsible for the assessments:

I have looked very closely at the statute. I have also looked very closely at the declaration, in particular, the pertinent sections that apply. I looked at, on page 25, Subsection 5 of the declaration talks about, "As set forth in Section 16-A above, all assessments, monetary penalties and other fees

and charges levied against a unit shall be the personal obligation of the unit owner's [sic] of the units at the time the assessments, monetary penalties, or other fees and charges become due." Further down in Section F, "Each unit owner shall be obligated to pay assessments made pursuant to 16-B and C of this declaration to the treasurer of the association."

No unit owner -- on page 26, "No unit owner may exempt themselves from liability of the payment of assessments, monetary penalties and other fees and charges levied pursuant to the declaration by waiver or non-use of any of the common elements or facilities or by abandonment of his or her unit."

Further down, Subsection H, "Each monthly assessment, any special assessment, shall be joint and several. Personal debts and obligations of the unit owner or owners, including contract purchasers of the units for which the same are assessed, shall be collectable as such."

Then page 27, Subsection K talks about if the unit is rented, the board may collect and the tenant shall be obligated to pay over to the board so much of their rent for such unit as is required to pay any amounts due for assessments. Talks about the ability to rent out units, earlier in the declaration, and the lease has to be in writing. That was not done in this case. There apparently was not a rent that was being paid by the defendants in this case, that had been something agreed to between the owner and the defendants, because of a debt that was owed to the defendants by the owner.

It appears very clear to the Court that the obligation is to the -- the obligation is that of the owner, that if the association wants to bring an action, they can -- or, take action against the tenant, they can do it to collect the portion of the rent that is being paid.

In this case we don't have any rent that is being paid. Appears to this Court that the obligation is that of the owner, not the tenant. It may not make a lot of sense that

they are allowed to stay there. The obligation is the owner's.

VRP Vol. I at 14-16.

The court did not, however, award the Kuehners' attorney fees, stating that "the Court would have to make a finding that it was frivolous or advanced without reasonable cause. I am not going to make that finding." *Id.* at 16.

On June 21, 2012, Granville HOA filed its appellate brief in these proceedings. Therein, Granville HOA incorrectly stated that 12% interest on the alleged principal delinquency of \$7,286.16 is \$4,085.79. The Kuehners have already addressed this miscalculation in their response to Granville HOA's motion for summary judgment in the proceedings below:

Apparently, the plaintiff is calculating the interest based upon 12% *per month* not per annum as described in the Condominium Declaration. Although the Court may not reach this issue, the claim for \$4,085.79 of interest accumulating for one year \$7,286.16 yields a rate of more 100% interest on each assessment alleged owed."

CP 39.

## ARGUMENT

**I. THE SUPERIOR COURT DID NOT ERR IN GRANTING THE KUEHNERS' MOTION TO DISMISS UNDER CR 12(b)(6) BECAUSE NO STATUTE, CASE LAW, CONTRACT, OR LEGAL THEORY OBLIGATES THE KUEHNERS TO PAY GRANVILLE HOA THE ASSESSMENTS DUE BY THE INGELS.**

The Superior Court did not err in granting the Kuehners' motion to dismiss under CR 12(b)(6) because Granville HOA presented no authority for their claim that the Kuehners were required to pay the assessments owed by the Ingels to Granville HOA.

Courts of appeal apply de novo review to dismissals for failure to state a claim. *Dussault ex rel. Walker Van-Buren v. American Inter. Group, Inc.*, 123 Wn.App. 863, 99 P.3d 1256 (2004).

A claim should be dismissed under CR 12(b)(6) if there is no set of facts in support of the claim that would entitle the Appellant to relief. *Burton v. Lehman*, 153 Wn.2d 416, 422, 103 P.3d 1230 (2005). Dismissal may be based on insufficient facts under a cognizable legal theory, or where a claim is not recognized as a separate and distinct cause of action. *Dever v. Fowler*, 63 Wn. App. 35, 44, 816 P.2d 1237 (1991). A defendant may move for dismissal under CR 12(b)(6) when a plaintiff has failed to set forth allegations in the complaint that would entitle him to relief. *Haberman v. Wash Public Power Supply Sys., Inc.*, 109 Wn.2d 107, 120, 744 P.2d 1032 (1987). Read together with CR 8(a)(1), CR 12(b)(6)

requires the court to decide whether the allegations in a complaint constitute a short and plain statement of the claim showing that the pleader is entitled to relief. *Id.*

Dismissals pursuant to CR 12(b)(6) should be granted “sparingly.” *Orwick v. Seattle*, 103 Wn.2d 249, 692 P.2d 793 (1984). Granville HOA, citing *Orwick*, asserts in its appellate brief that a motion for dismiss should “be granted only if it appears beyond a *reasonable* doubt that the plaintiff could prove no facts” entitling it to the relief requested. App. Br. at 11 (emphasis added). Dismissal pursuant to CR 12(b)(6), however, does not require a it appear beyond a *reasonable* doubt that a plaintiff is not entitled to the relief requested, but rather that it appear beyond doubt that a plaintiff can show he is entitled to a remedy: “Dismissal for failure to state a claim may be granted only if ‘it appears beyond doubt that the plaintiff can prove no set of facts, consistent with the complaint, which would entitle the plaintiff to relief.’” 103 Wn.2d at 254; *see also Asche v. Bloomquist*, 132 Wn.App. 784, 133 P.3d 475 (2006).

There is no doubt that Granville HOA has an action against the owners of Unit 500, the Ingels. Both the Condominium Declaration and the Condominium Act, RCW 64.34, undoubtedly provide for such. *See infra* Parts A and C. It is beyond doubt, however, that Granville HOA has no action against the Kuehners under any of the arguments it has

propounded. As the Kuehners stated in their motion to dismiss pursuant, CP 170-174, and their opposition to Granville HOA's motion for summary judgment, CP 33-104, the Kuehners are not obligated to pay the assessments due by the Ingels under the Condominium Declaration because (A) the Condominium Declaration requires that the condominium owners, who are the Ingels, to pay such assessments, and makes no mention of such a duty for tenants-at-will such as the Kuehners; (B) the Kuehners' sporadic payments of those assessments under threat of having their utilities, garbage, and maintenance services shut off did not establish an ongoing duty to pay such assessments; (C) the Condominium Act does not provide homeowners' associations with remedies against unit owners' tenants, but provides instead for remedies against unit owners; and (D) Quantum Meruit similarly did not establish a duty to pay those assessments since the condominium owners were the ones requesting the services underlying those assessments. The Kuehners now review those arguments here again, in turn.

**A. The Condominium Declaration Requires Condominium Owners, And Not Tenants-At-Will, To Pay The Assessments Listed In That Declaration.**

Granville HOA's main argument is that the Kuehners were obligated to pay HOA assessments under the Condominium Declaration

because the Condominium Declaration is a recorded document, and requires that each lease or rental agreement is subject to that Declaration. App. Br. at 6.

First and foremost, the Condominium Declaration requires that the condominium owners, and not their tenants-at-will, pay the assessments outlined in that Declaration. CP 107-162. The Superior Court reviewed the Condominium Declaration and read into the record the specific portions of the Condominium Declaration that placed such responsibility on the owners. VRP Vol. I at 14-16. No language in that Declaration placed any such requirements on a condominium owner's tenants-at-will. This Court is free to review the Condominium Declaration for itself. *See* CP 107-162.

Second, the Condominium Declaration is not a contract, but rather is a document that unilaterally creates a type of real property. *See Bellevue Pac. Ctr. Condo. Owners Ass'n v. Bellevue Pac. Tower Condo. Ass'n*, 124 Wn.App. 178, 188, 100 P.3d 832 (2004) (holding condominium declaration could not be challenged as "unconscionable" because it is not a contract). This is because Condominium Declarations can be changed by vote of the condominium owners, who are members of the homeowners' association. *See id.*; RCW 64.32.090(13); RCW 64.34.264(1). Tenants such as the Kuehners have neither the right to vote

on what assessments will be charged under the Condominium Declaration nor to make changes to the Condominium Declaration. Condominium Declarations, therefore, cannot impose any requirements on the owners of the condominium, much less their tenants-at-will. *See Bellevue Pac. Ctr. Condo. Owners Ass'n*, 124 Wn.App. at 188.

Because it is the Ingels who have any standing under the Condominium Declaration, it is the Ingels, and not the Kuehners, who should have been named in Granville HOA's suit.

**B. The Kuehners' Sporadic Payments of The Assessments Owed by The Ingels Did Not Establish An Ongoing Duty To Pay.**

Granville HOA argues in its brief that the Kuehners acknowledged their obligation to pay the assessments by making four payments to the Granville HOA for those assessments. App. Br. at 7. As previously stated, the Condominium Declaration does not require tenants-at-will to pay those assessments, CP 107-162, and Mr. Brinkman, representing Granville HOA, asked that the Kuehners either pay the assessments due by the Ingels under the Condominium Agreement, or have their utilities, garbage, and maintenance services shut off. CP 163-169. The Kuehners therefore voluntarily paid those assessments as to not have their services discontinued.

Other than arguing that the Condominium Declaration obligates the Kuehners to pay those assessments, Granville HOA cites no statute or case law under which a tenant-at-will's sporadically paying assessments due under a Condominium Declaration creates an obligation, grants title to real property, or creates contractual privity between a tenant-at-will and a homeowners' association. As stated in the Kuehners' reply to Granville HOA's response to the Kuehners' motion to dismiss under CR 12(b)(6), CP 197-203, no Washington State Court has considered the issue, but other courts have held there is no privity of contract between a homeowners' association and a third party tenant. *Winsor Green Owners Association, Inc. v. Allied Signal et al.*, 362 S.C. 12, 605 S.E.2d 750 (S.C. Ct. App. 2004) (holding homeowners' association had no standing to sue tenant because "[u]nder this rational, a homeowners' association could directly hold a tenant contractually responsible for assessments, association dues, or any other expenses even though the parties did not intend this result by virtue of entering into a rental agreement.").

Therefore, because Granville HOA provided no authority for the proposition that the Kuehners' sporadic payments of a few months' assessments obligated them to pay all of the assessments due by the Ingels to Granville HOA, and because the courts that have considered the issue have held that no privity exists between homeowners' associations and

tenants-at-will, the Superior Court did not err in dismissing Granville HOA's action against the Kuehners.

**C. The Condominium Act, RCW 64.34, does not require that tenants pay assessments due by a condominium owner to a homeowners' association.**

Granville HOA has asserted both in the proceedings below and in its appellate brief that RCW 64.34.364(12) requires that the Kuehners be held responsible for those assessments. App. Br. at 7; CP 1-5. That part of the Condominium Act, entitled "Lien for Assessments," provides for a claim to foreclose a lien placed by a home owners' association on a condominium owner's unit. Granville HOA has not placed a lien on Unit 500, and did not seek to foreclose such a lien in its action, but rather only made a claim against the Kuehners for money due, and it is undisputed that the Kuehners are not the owners of Unit 500.

Granville HOA argues that RCW 64.34.364(12) may be used to bring suit against the Kuehners because they were "obviously being granted a possessory estate in [U]nit 500." App. Br. at 8. In support of that argument, Granville HOA cites the Washington Real Property Desk Book, § 27.2(4) (Vol. II. 3d ed. 1997) for the proposition that ". . . a lease is a conveyance, the grant of an estate . . ." App. Br. at 7. That section of the Washington Real Property Desk Book, however, states that "a lease is

a conveyance, the grant of an estate, *and normally also a contract because of the covenants it contains.*” § 27.2(4) (emphasis added). That section goes on to state that “[i]n ways that will be mentioned in later subdivisions, we are undergoing a shift away from pure conveyancing principles toward those of contract law.” *Id.*

The Kuehners would note that Granville HOA has a remedy under RCW 64.34.364(10), whereby it could collect rents for the titled owners through a receiver:

From the time of commencement of an action by the association to foreclose a lien for nonpayment of delinquent assessments against a unit that is not occupied by the owner thereof, the association shall be entitled to the appointment of a receiver to collect from the lessee thereof the rent for the unit as and when due. If the rental is not paid, the receiver may obtain possession of the unit, refurbish it for rental up to a reasonable standard for rental units in this type of condominium, rent the unit or permit its rental to others, and apply the rents first to the cost of the receivership and attorneys' fees thereof, then to the cost of refurbishing the unit, then to applicable charges, then to costs, fees, and charges of the foreclosure action, and then to the payment of the delinquent assessments. **Only a receiver may take possession and collect rents under this subsection**, and a receiver shall not be appointed less than ninety days after the delinquency. The exercise by the association of the foregoing rights shall not affect the priority of preexisting liens on the unit.

RCW 64.34.364(10) (emphasis added). In fact, the Washington Real Property Desk Book cited by Granville HOA dedicates an entire section to using liens pursuant to the Condominium Act. *See* Washington Real

Property Desk Book § 22.5(9) (“RCW 64.34.364 provides for a lien on each unit for unpaid assessments levied against such unit.”). No lien having been filed and no receiver having been requested or appointed, Granville HOA has no authority to collect rents from the Kuehners.

Therefore, because the Condominium Act does not provide for an action for money damages against tenants-at-will, but rather for remedies related to recording and foreclosing liens against an owner’s unit, the Superior Court did not err in dismissing Granville HOA’s claim against the Kuehners for assessments owed to them by the Ingels.

**D. Quantum Meruit Does Not Establish An Ongoing Duty to Pay By The Kuehners.**

Quantum Meruit is the method of recovering the reasonable value of services provided under a contract implied in fact. *See, e.g., Eaton v. Engelcke Mfg., Inc.*, 37 Wn.App. 677, 681 P.2d 1312 (1984) (affirming Quantum Meruit award on basis of contract implied in fact); *see also A.F.A.B., Inc. v. Town of Old Orchard Beach*, 639 A.2d 103, 105 n. 3 (Me.1994) (“Quantum Meruit denotes recovery for the value of services or materials provided under an actual, implied-in-fact contract.”).

The elements of a contract implied in fact are: (1) the defendant requests work, (2) the plaintiff expects payment for the work, and (3) the

defendant knows or should know the plaintiff expects payment for the work. *Young v. Young*, 164 Wn.2d 477, 486, 191 P.3d 1258 (2008).

First, the Kuehners did not request the utilities and services provided by the Granville HOA. Rather, it was the original owners, the Ingels, through the Condominium Declaration, who requested those utilities and services in exchange for their paying the assessments due for those services. CP 107-162.

Second, the Kuehners paid the HOA assessments voluntarily and therefore, Granville HOA did not have an expectation that the Kuehners would continue to pay for the HOA assessments for Unit 500. CP 164. Rather, the Condominium Declaration clearly details that it is the condominium owners, the Ingels, who are expected to pay for those services. CP 108, 133-138; VRP Vol. I at 14-16.

Last, the Kuehners were aware that Granville HOA expected payment for the services, but they expected the payment to come from the owners, the Ingels, who are the true obligors on the debt. CP 164.

Therefore, because none of the three elements of a Quantum Meruit claim can be made out by Granville HOA, the Superior Court did not err in dismissing Granville HOA's action against the Kuehners. Again, it is the Ingels against whom Granville HOA must bring these claims.

**II. THE SUPERIOR COURT ERRED IN NOT GRANTING ATTORNEY FEES TO THE KUEHNERS IN THE PROCEEDINGS BELOW PURSUANT TO (A) CR 11 AND RCW 4.84.185 BECAUSE GRANVILLE HOA DID NOT PRESENT ANY FAIRLY DEBATABLE ISSUES AND (B) RCW 64.34.455 BECAUSE GRANVILLE HOA BROUGHT AN ACTION WHICH IS NOT PROVIDED FOR IN THE CONDOMINIUM ACT.**

The trial court erred in not awarding the Kuehners attorney fees and costs under (A) CR 11 and RCW 4.84.185, since it is not fairly debatable that homeowners' associations are in privity with tenants-at-will; and (B) RCW 64.34.455, since Granville HOA brought a suit against condominium tenants, a remedy which is not provided for in the Condominium Act. *See* CP 8 (requesting "Attorney fees and costs provided by law"); CP 173 ("Attorney fees and costs should be awarded pursuant to CR 11 and RCW 4.84.185").

**A. Attorney Fees and Costs Pursuant to CR 11 and RCW 4.84.185 Were Appropriate Because No Statute, Case Law, Contract, or Legal Theory Supported Granville HOA's Contention That The Kuehners Were Responsible for Paying Assessments Due by The Ingels.**

A trial court's decision regarding sanctions for filing frivolous motions and pleadings is reviewed for abuse of discretion. *Do v. Farmer*, 127 Wn.App. 180, 110 P.3d 840 (2005). Courts of appeal apply an objective standard when reviewing whether sanctions for a bad faith filing, pleadings for an improper purpose, or for filing pleadings that are not

grounded in fact, are warranted by law. *Skimming v. Boxer*, 119 Wn.App. 748, 82 P.3d 707, *rev. den'd*, 152 Wn.2d 1016, 101 P.3d 108 (2004). The question is whether a reasonable attorney in a like circumstance could believe his or her actions to be factually and legally justified. *Id.*

The filing of a lawsuit is subject to sanctions if three criteria are met: (1) the action was not well grounded in fact; (2) it was not warranted by existing law; and (3) the attorney signing the pleading has failed to conduct a reasonable inquiry into the factual or legal basis of the action. *Manteufel v. Safeco Inc. Co. of America*, 117 Wn.App. 168, 68 P.3d 1093 *rev. den'd*, 150 Wn.2d 1021, 81 P.3d 119 (2003); *Carillo v. City of Ocean Shores*, 122 Wn.App. 592, 94 P.3d 961 (2004) (constitutionality of “availability charges” for sewer and water as non-permissible regulatory fees presented fairly debatable issues and therefore was not frivolous and award of attorney fees was inappropriate).

Unlike *Carillo*, it is clear that the facts below do not establish a cause of action by Granville HOA against the Kuehners. As stated, neither the Condominium Declaration, CP 107-162, nor the Condominium Act, RCW 64.34, the theory Quantum Meruit, or any other statute or case law establishes that tenants-at-will such as the Kuehners must pay assessments under the Condominium Declaration for assessments due by the condominium owners, like the Ingels. Rather, the Condominium

Declaration, Condominium Act, theory of Quantum Meruit, and other case law and statutes that address the issue make it clear that it is the condominium owners, and not tenant, who must pay those assessments. A review of the Condominium Declaration, CP 107-162, the Condominium Act, RCW 64.34, and the Washington Real Property Desk Book, all make it clear that Granville HOA has an action against the Ingels, the owners of Unit 500, and not the Kuehners, who are merely tenants-at-will.

**B. Attorney Fees and Costs Are Appropriate Under RCW 64.34.455 Because Granville HOA Brought Suit Under the Condominium Act Against Tenants, And Not Condominium Owners, as Provided by The Condominium Act.**

RCW 64.34.455 provides that any person or class of persons adversely affected by a party's failure to comply with the Condominium Act has standing to seek appropriate relief and the court is empowered to award reasonable attorney fees to the prevailing party. Here, Granville HOA has failed to comply with the Condominium Act because it brought suit against the tenants, and not the owners of the condominium, as provided by the remedies in the Condominium Act. *See* RCW 64.34 *et seq.*

The Kuehners would note that RCW 64.34.368 provides that a judgment lien against a homeowners' association is a lien against all units

in the condominium and their appurtenant common element interests, but does not otherwise affect the property of individual unit owners.

The Kuehners would therefore request that this Court reverse the ruling of the Superior Court and remand with instruction to award attorney fees and costs both against Granville HOA and its attorney of record based on CR 11, RCW 4.84.185, and RCW 64.34.455.

**III. THE SUPERIOR COURT DID NOT ERR IN DENYING GRANVILLE HOA'S REQUEST FOR ATTORNEY FEES AND COSTS BECAUSE THEIR ACTION WAS NOT THE TYPE UNDER WHICH ATTORNEY FEES AND COSTS WERE PROVIDED FOR IN THE CONDOMINIUM DECLARATION.**

In its Appellate Brief, Granville HOA states that “[s]ection 16(h) of the [C]ondominium [D]eclaration provides that the Homeowners Association is entitled to attorney fees in any action to recover any unpaid assessments.” App. Br. at 12. The relevant portion of Section 16(h) provides attorney fees for the Granville HOA in actions to foreclose on a lien against the owner of the condominium:

The Declarant or the Board on behalf of the Association may initiate action to foreclose the lien of any Assessment. In any action to foreclose a lien against any Unit for non-payment of delinquent Assessments, any judgment rendered against the Owner or Owners of such Unit in favor of the Association shall include all costs and an amount for reasonable attorney’s fees.

CP 136-37. First, as previously mentioned, the Condominium Declaration is not a contract. *Bellevue Pac. Ctr. Condo. Owners Ass'n*, 124 Wn.App. at 188. Second, the proceedings initiated by Granville HOA were not to foreclose a lien on Unit 500, but for a claim of money damages against the Kuehners. CP 1-5. Granville HOA, therefore, should neither be awarded attorney fees or costs for this appeal nor for the proceedings below.

**IV. THE KUEHNERS ARE ENTITLED TO FEES FOR THESE APPELLATE PROCEEDINGS SINCE GRANVILLE HOA PRESENTS NO DEBATABLE ISSUES ON WHICH REASONABLE MINDS MIGHT DIFFER.**

In determining whether an appeal is frivolous and was, therefore, brought for the purpose of delay, justifying the imposition of terms and compensatory damages, appellate courts consider (1) that a civil appellant has a right to appeal; (2) all doubts as to whether the appeal is frivolous should be resolved in favor of the appellant; (3) the record should be considered as a whole; (4) an appeal that is affirmed simply because the arguments are rejected is not for that reason alone frivolous; and (5) an appeal is frivolous if there are no debatable issues on which reasonable minds might differ, and the appeal is so totally devoid of merit that there was no reasonable possibility of reversal. *Carillo v. City of Ocean Shores*, 122 Wn.App. 592, 94 P.3d 961 (2004).

Because Granville HOA can still cite no statute, case law, or contract which grants them an action against the Kuehners, this Court

should grant the Kuehners the attorney fees and costs incurred in defending this appeal.

### **CONCLUSION**

THEREFORE, because there is no statute, case law, contract or legal theory establishing privity between a homeowners' association and a condominium owner's tenant-at-will, and the Condominium Declaration does not establish such privity, the Superior Court did not err in granting the Kuehners motion to dismiss pursuant to CR 12(b)(6). Because, it is clear that no statute, case law, contract, or legal theory grants Granville HOA a claim against the Kuehners, the Superior Court erred in not granting the Kuehners their attorney fees and costs for defending the action. Because Granville HOA did not bring an action under which the Condominium Declaration provided that it would be awarded attorney fees and costs, the Superior Court did not err in denying Granville HOA's request for attorney fees and costs. Finally, because Granville HOA once again presents no statute, case law, contract, or legal theory under which the Kuehners would be obligated to pay the assessments due by the Ingels.

Respectfully submitted this 27<sup>th</sup> day of July, 2012.

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### Comments:

This brief was originally filed on 7/27/2012 however, the case number was incorrect.

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