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JAN 30 2014

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 319130

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

CLUB ENVY OF SPOKANE, LLC a Washington limited liability company;
DAVID LARGENT, a married man dealing in his separate property;
RIDPATH PENTHOUSE, LLC, a Washington limited liability company; 515
SPOKANE PARTNERS, LLC, a Nevada limited liability company,

Respondents.

v.

RIDPATH REVIVAL, LLC, a Washington limited liability company

Appellant,

and

THE RIDPATH TOWER CONDOMINIUM ASSOCIATION, a Washington
non-profit corporation; FEDERAL DEPOSIT INSURANCE
CORPORATION, as Receiver for Bank of Whitman,

Non-Appealing Defendants.

OPENING BRIEF OF APPELLANT

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I. INTRODUCTION

A. **The trial court erred by denying Appellant's Motion for Summary Judgment and granting Respondents'.**

Summary judgment should be granted for Appellant Ridpath Revival, LLC ("Ridpath Revival"). Respondents' claims should be dismissed as a matter of law because the statute of limitations has run.

Respondents' motion for summary judgment seeking to invalidate the Second Amended and Restated Declaration of Covenants, Conditions, and Restrictions The Ridpath Tower ("Second Amended Declaration") should be denied. The Second Amended Declaration meets statutory requirements for a condominium declaration amendment, and is valid. At a minimum, there are issues of fact regarding whether the Second Amended Declaration was approved or ratified, precluding a finding that it is invalid as a matter of law. Further, the trial court erred by evaluating credibility of witnesses in finding the Second Amended Declaration invalid, creating an independent ground for reversal.

B. **The trial court erred by ruling on issues that were not included in Respondents' motion.**

The trial court's order disposed of the entire case, even though Respondents' motion sought relief on less than all claims. Neither Respondents nor Ridpath Revival briefed, argued or otherwise addressed

all of Respondents' claims.

C. The trial judge should have recused herself.

The trial court made material credibility determinations based on prior knowledge of a key witness. The trial judge should not have heard these motions, and instead should have recused herself due to actual or apparent unfairness and bias.

D. Factual Summary

The Ridpath Tower is a 21 unit condominium complex in downtown Spokane. It is currently uninhabited with no ongoing operations. From its past as a landmark hotel, through its conversion to a condominium complex in 2008, interests in the property have changed hands several times.

Ridpath Revival purchased Units 3, 20 and 21 in the Ridpath Tower Condominium in 2013 with a view toward acquiring more interests in the complex and restoring the hotel to its former glory. CP 465, RP 44.

The Respondents have plans to redevelop the building as micro-apartments, but are blocked from doing so by restrictions in the condominium declaration and by Ridpath Revival's minority interest. CP 12-13. The Respondents want to force Ridpath Revival out. They

sued for declaratory judgment to invalidate the Second Amended Declaration, which created Units 20 and 21, and by extension, terminate Ridpath Revival's real property interests.

The Second Amended Declaration was recorded in 2008 pursuant to the Ridpath Tower Association vote. The vote approving the Second Amended Declaration was certified by the Ridpath Tower Condominium Association president and treasurer and recorded therewith. The Second Amended Declaration was properly created and is valid. The one-year statute of limitations set out in RCW 64.34.264(2) bars Respondents' challenge.

Ridpath Revival respectfully requests this Court to reverse the trial court's August 14, 2013 Order Denying Defendant Ridpath Revival, LLC's Motion for Partial Summary Judgment and Order Granting Club Envy of Spokane, LLC's Motion for Summary Judgment.

II. ASSIGNMENTS OF ERROR

1. The trial court erred by denying Appellant Ridpath Revival's Motion for Partial Summary Judgment and by granting Respondents' Motion for Summary Judgment.

2. The trial court erred by ruling on issues that were not included in Respondents' motion.

3. The trial judge erred by not recusing herself.

III. STATEMENT OF THE CASE

A. Parties

Ridpath Revival was a co-defendant at the trial court level with non-appealing co-defendants Ridpath Tower Condominium Association, and the Federal Deposit Insurance Corporation, as receiver for the Bank of Whitman (“FDIC”). CP 1. Ridpath Revival was formed by Arthur Coffey (“Coffey”) in 2012. Coffey is the managing member of Coffey Development LLC (“Coffey Development”), which is the sole member and manager of Ridpath Revival. CP 507. Ridpath Revival purchased Units 3, 20 and 21 in the Ridpath Tower Condominium in January, 2013. CP 508-509. The FDIC, as receiver for the Bank of Whitman, owns Units 1 and 2. CP 11.

The Respondents (plaintiffs below) are Club Envy of Spokane, LLC (“Club Envy”), David Largent, Ridpath Penthouse, LLC (“Ridpath Penthouse”) and 515 Spokane Partners, LLC (“515 Spokane Partners”) (together the “Partners”). Respondent David Largent is a member of Club Envy. He has been a member since the inception of Club Envy and the manager since July, 2010. CP 222. David Largent and Club Envy own Unit 19 as tenants in common. CP 222. Ridpath Penthouse owns

Units 4 through 16. CP 236. 515 Spokane Partners owns Units 17 and 18. CP 9.

B. The Lawsuit

The Ridpath Tower became an 18 unit condominium complex on February 20, 2008. CP 285. The First Amended and Restated Declaration of Covenants, Conditions, and Restrictions The Ridpath Tower (“First Amended Declaration”) recorded on June 12, 2008 divided unit 18, which spans 12 floors, into units 18 and 19. CP 296-350, 522. The Second Amended Declaration, recorded on August 28, 2008, divided unit 18 into units 18, 20 and 21. CP 351-403. The Second Amended Declaration was executed, certified by the officers of the Ridpath Tower Condominium Association, and recorded. CP 396-398, 403. It was not challenged until the Partners filed this lawsuit in May, 2013. CP 3.

Coffey became interested in restoring the old Ridpath Tower as a landmark hotel in 2012. Prior to Ridpath Revival’s acquisition of interests in the Ridpath Tower, Coffey discussed the ownership interests with representatives of each respondent. CP 222, 508. None of those representatives notified Coffey that there were any issues with the ownership of Units 20 or 21, or the Second Amended Declaration which

created them. *Id.*

During Coffey's discussions to purchase assets of the Ridpath Tower, Tim Deters, an agent for 515 Spokane Partners, sent Coffey a document showing the owners of each unit in the Ridpath Tower Condominium, including the owners of Units 20 and 21. CP 508, 522. David Largent, a tenant in common owner of Unit 19 and Member and Manager of Club Envy also discussed the purchase of units in the Ridpath Tower with Coffey. CP 508. Lawrence Brown, a member of Ridpath Penthouse, gave Coffey a tour of the Ridpath Tower and Units 20 and 21. CP 508, 540. None of these Respondents' representatives notified Coffey that Units 20 or 21 were improperly created, despite subsequent declarations that no vote to approve the Second Amended Declaration ever took place. CP 208-209, 222-223.

In January 2013, Ridpath Revival purchased Units 3, 20 and 21. CP 508-509. The Partners initiated suit in the Superior Court for Spokane County to invalidate the Second Amended Declaration (and by extension, terminate Ridpath Revival's interests in Units 20 and 21) after word got out about Coffey's plans for the Ridpath Tower. The Partners also sought declaratory judgment that the use restriction in the First

Amended Declaration does not prohibit rental of micro-apartments. CP 3-14.

The Partners moved for a summary determination that the Second Amended Declaration was void for lack of proper approval by the requisite percentage of condominium members. CP 230-233. The Partners' claim directly conflicts with the certificate attached to, and recorded with the Second Amended Declaration certifying that 100% of the voting interests had voted in its favor (the "Certificate"). CP 224-238.

Ridpath Revival filed a cross-motion for summary judgment on the ground that the Partners' claims were barred as a matter of law by the one-year statute of limitations set out in RCW 64.34.264(2). CP 461-472.

The trial court denied Ridpath Revival's motion and granted the Partners' motion, and in a footnote, stated that its order disposed of the case in total. CP 606-608. Ridpath Revival timely appealed the order.

IV. ARGUMENT

A. The Standard of Review is De Novo

The standard of review of an order of summary judgment is de novo, and the appellate court performs the same inquiry as the trial court. *Lybbert v. Grant County*, 141 Wn.2d 29, 34, 1 P.3d 1124 (2000). The

court considers the facts and inferences from the facts in a light most favorable to the nonmoving party. *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002). An appellate court substitutes its judgment on legal issues for the judgment of the trial court. *Del Guzzi Constr. Co. v. Global Northwest*, 105 Wn.2d 878, 882, 719 P.2d 120 (1986).

This Court must consider all facts and inferences in the light most favorable to the non-moving party, engage in its own inquiry and substitute its judgment for that of the trial court.

B. The Court should grant Ridpath Revival's Motion for Partial Summary Judgment because the Partners' challenge to the Second Amended Declaration is barred.

1. The one-year statute of limitations bars the Partners' claims challenging the Second Amended Declaration.

No action to challenge the validity of an amendment adopted by the association pursuant to this section may be brought more than one year after the amendment is recorded.

RCW 64.34.264(2).

The Second Amended Declaration was adopted by the Association through a member vote. The vote was evidenced by a recorded July 21, 2008 certification that was agreed by the Association to be *conclusive* evidence of that vote pursuant to Section 13.2 of the

First Amended Declaration. CP 283-284, 332, 403. This lawsuit was filed on May 15, 2013, almost five years after the Declaration was adopted and recorded. The lawsuit is time-barred.

2. The Partners' proposed interpretation, that the statute of limitations does not bar a challenge to the validity of a Declaration, would render the statute meaningless.

Reliability of recorded documents and clarity of title is of paramount importance to purchasers of condominiums. A statute of limitations barring challenges to condominium declaration amendments one year after they are recorded supports this principle. A statute must be given a reasonable interpretation so as to give effect to its purpose and avoid absurd results. *Pasco v. Napier*, 109 Wn.2d 769, 773, 755 P.2d 170 (1988). A reading of a statute that will result in an unlikely, absurd or strained consequence should be avoided. *State v. Yakima County Comm'rs*, 123 Wn.2d 451, 462, 869 P.2d 56 (1994) citing *State v. Neher*, 112 Wn.2d 347, 351, 771 P.2d 330 (1989). "The spirit or purpose of an enactment should prevail over the express but inept wording." *Yakima County Comm'rs*, 123 Wn.2d at 462 citing *State v. Day*, 96 Wn.2d 646, 648, 638 P.2d 546 (1981).

The Partners assert that the statute of limitations under RCW 64.34.264(2) does not bar challenges to the validity of a condominium

declaration amendment – *ever* - so long as a party alleges it was never valid in the first place. They contend that “[O]nly when an amendment complies with RCW 64.32.264 [sic] does it get the benefit of the statute’s limitation of actions.” CP 484. This proposed interpretation is illogical. Every challenge to an amendment is a challenge to whether that amendment is valid. The Partners’ construction would necessarily make every challenge to the validity of any condominium declaration amendment exempt from the statute of limitations, rendering the statute inapplicable. This cannot have been the intent or purpose of the statute.

Under the Partners’ proposed interpretation, there would never be finality of title in a condominium unit subject to an amended declaration. Condominium declaration amendments could be challenged years, or even decades, after their creation. Condominium purchasers would never have stability of title or the protection from lawsuits which a statute of limitations is intended to provide. This Court should reject the Partners’ suggested interpretation in favor of the practical and reasonable construction of RCW 64.34.264(2).

3. The Rhode Island case cited by the Partners does not dictate a contrary result.

The Partners rely on a Rhode Island case holding no statute of

limitations applied when a challenge to an amendment to a condominium declaration was based on the argument that the amendment was void ab initio. See *Am. Condo Ass'n v. IDC, Inc.*, 844 A.2d 117 (R.I. 2004); CP 484. This case is flawed and is not controlling in Washington. The dissent in that case accurately identifies why the majority's reasoning was flawed and illogical: a claim alleging an amendment to a condominium declaration is void ab initio is certainly a challenge to the validity of the amendment. *Am. Condo Ass'n*, 844 A.2d at 137 (in dissent).

“If a claim that an amendment is void ab initio is not subject to the one-year period for filing claims challenging the validity of the amendment, then what type of claim challenging the validity of an amendment is subject to the one-year period?”

Id. (in dissent).

Not only do logic and the rule requiring statutes to be interpreted according to their plain meaning require the application of the statute, but basic fairness argues in favor of applying the one year limitations period to bar all claims to the validity of condominium declaration amendments. *Id.*

The Rhode Island dissent presents the better rule. Adopting the Partners' interpretation would eviscerate the statute of limitations and

render it meaningless, which surely was not the intent of the Legislature. Nothing in the statute suggests that only valid condominium declaration amendments are subject to the one-year statute of limitations for challenges to their validity. The statute allows one year to challenge *any* amendment. This Court should find that the statute of limitations applies to the Partners' challenge to the Second Amended Declaration and dismiss the challenge as untimely and barred as a matter of law.

4. The Partners should be equitably estopped from arguing that the statute of limitations should not run against them.

Equitable estoppel is based on the principle that a party should be held to a representation made or position assumed where inequitable consequences would otherwise result to another party who has justifiably and in good faith relied thereon. *Kramarevcky v. Dep't of Social & Health Servs.*, 122 Wn.2d 738, 743, 863 P.2d 535 (1993). The elements of equitable estoppel are:

- (1) an act or omission by the first party, (2) an act by another party in reliance on the first party's act, and (3) an injury that would result to the relying party if the first party were not estopped from repudiating the original act.

Newport Yacht Basin Ass'n of Condo. Owners v. Supreme NW, Inc., 168 Wn. App. 56, 79, 277 P.3d 18 (2012). These elements are established here.

- a. Representatives of each of the Partners either affirmatively represented to Ridpath Revival that Units 20 and 21 existed, or omitted any mention of a purported problem with the Second Amended Declaration.

Representatives of Club Envy, David Largent, and Ridpath Penthouse submitted declarations to the trial court testifying that no vote ever occurred to adopt the Second Amended Declaration and create Units 20 and 21. CP 208-209, 222-223. Despite this knowledge, they never disclosed any issues with the Second Amended Declaration to Coffey when he was looking into acquiring interests in the Ridpath Tower. CP 508-509.

Tim Deters, an agent of 515 Spokane Partners, sent Coffey a document noting the ownership of the various interests in the Ridpath Tower, including Units 20 and 21. CP 513. Coffey also received confirmation of the ownership of the various units from the City of Spokane, which had been in contact with the Partners regarding code violations. CP 509, 522, 543.

Thus, each of the Partners was aware that Ridpath Revival was investigating purchasing Units 20 and 21, and they knew of the alleged deficiency of approval of the Second Amended Declaration, but omitted the information from Coffey knowing he could suffer injury if Ridpath

Revival purchased Units 20 and 21. The first element of equitable estoppel is met.

- b. Ridpath Revival acted in reliance on the Partners' representations and omissions.

Ridpath Revival, having done its due diligence and having discussed the ownership and structure of the Ridpath Tower Condominium with representatives of each of the owners, relied on the information that these representatives provided and purchased Units 3, 20 and 21. CP 508; *see Morris v. Int'l Yogurt Co.*, 107 Wn.2d 314, 328-29, 729 P.2d 33 (1986) (discussing presumptions in proving reliance on omissions). The second element of equitable estoppel is established.

- c. An injury to Ridpath Revival would result if the Partners are not estopped from repudiating their representations and omissions.

Ridpath Revival bought Units 20 and 21 as a bona fide purchaser for value. CP 503-504. If the Partners are not estopped from now claiming that the Second Amended Declaration is invalidated, then Units 20 and 21 cease to exist, and all the time, effort, and monetary commitments Ridpath Revival has put into restoring the Ridpath Tower would be wiped out. Ridpath Revival will suffer financial harm and its real property interests will be stripped away to the benefit of the very

Partners with which Coffey consulted in making his purchase decision. Application of estoppel is equitable under these circumstances.

d. The public record supports a finding of estoppel.

The Partners may argue that estoppel cannot apply since the Second Amended Declaration is of public record. However, the opposite is true – the public record supports estoppel. It is correct that “mere silence or acquiescence will not operate to work an estoppel where the other party has constructive notice of public records which disclose the true facts.” *Newport Yacht Basin Ass'n of Condo. Owners.*, 168 Wn. App. at 79-80 citing *Waldrip v. Olympia Oyster Co.*, 40 Wn.2d 469, 476, 244 P.2d 273 (1952) and “[w]here the parties have equal means of knowledge there can be no estoppel in favor of either.” *Waldrip*, 40 Wn.2d at 476.

However, the public record discloses Units 20 and 21 were properly created and approved. Because the contents of the public record showed Units 20 and 21 as being validly created, the record could not have put anyone on notice of the opposite. The public record supports Ridpath Revival’s position: it confirmed what Ridpath Revival believed, and what the agents of the various Partners represented – that Units 20 and 21 were properly created and that they exist.

5. Laches also precludes the Partners' challenge to the Second Amended Declaration.

Laches is an implied waiver arising from knowledge of existing conditions and acquiescence in them. *Lopp v. Peninsula Sch. Dist.*, 90 Wn.2d 754, 759, 585 P.2d 801 (1978). The elements of laches are:

(1) knowledge or reasonable opportunity to discover on the part of a potential plaintiff that he has a cause of action against a defendant; (2) an unreasonable delay by the plaintiff in commencing that cause of action; (3) damage to defendant resulting from the unreasonable delay.

Pierce v. King County, 62 Wn.2d 324, 382 P.2d 628 (1963); *Edison Oyster Co. v. Pioneer Oyster Co.*, 22 Wn.2d 616, 157 P.2d 302 (1945).

Laches applies. A representative of each Respondent discussed Units 20 and 21 with Ridpath Revival, and so plaintiffs cannot argue that they were unaware of the existence of the Second Amended Declaration creating Units 20 and 21. They knew – or could have discovered by simply looking at the Second Amended Declaration which is a publicly recorded document – that they had a potential claim long before Ridpath Revival bought those units. The Partners all acquired ownership in the Ridpath Tower after the Second Amended Declaration was recorded. CP 9, 528, 537-538.

Their failure to bring a claim until after Ridpath Revival bought

Units 20 and 21, especially when coupled with their representations to Ridpath Revival about the units, constitutes constructive knowledge or a reasonable opportunity to discover, and acquiescence in the conditions as they existed, and is a proper basis for a finding of laches. Simply put, the Partners sat on their rights for too long, to the detriment of Ridpath Revival. This is precisely the situation in which laches should apply. When a party acquiesces in the status quo for four years, and fails to raise his complaint even when specifically questioned, then laches should bar him from raising the issue after another party has relied on that status quo and on the first party's acquiescence in it.

C. The Court should reverse the trial court's order granting the Partners' Motion for Summary Judgment.

1. The facts, when viewed in the light favorable to Ridpath Revival, support the conclusion that the Second Amended Declaration is valid.

The Court of Appeals views all the facts and their reasonable inferences in the light most favorable to the nonmoving party. *All Star Gas, Inc. v. Bechard*, 100 Wn. App. 732, 736, 998 P.2d 36 (2000). Here, even if the statute of limitations issue did not preclude the Partners' challenge, their motion should still be denied because the Second Amendment is valid, or at a minimum, issues of fact regarding its

validity exist.

Grant Person and Gregory Jeffreys certified in writing, contemporaneous with the creation of the Second Amended Declaration in 2008, that “members holding one hundred percent (100%) of the Voting Interests of the Association have voted to amend...the declaration...” CP 403. Their Certificate of Officers was signed, certified and recorded. The Certificate is admissible evidence under RCW 5.44.070:

Copies of all deeds or other instruments of writing, maps, documents and papers which by law are to be filed or recorded in the office of said county auditor, and all transcripts or exemplifications of the records of the proceedings of the board of county commissioners certified by said auditor under official seal, shall be admitted as prima facie evidence in all the courts of this state.

The Partners assert that they have “undisputed evidence that the affected members did not approve the Second Amended Declaration.” CP 230. But this is incorrect. Their evidence is not undisputed. It is contradicted by the Certificate, which states that the members *did* approve the Second Amended Declaration. When the Court considers these two contradictory pieces of evidence, it must view them in the light most favorable to Ridpath Revival. The proper view of the evidence shows that members holding 100% of the Voting Interests approved the

Second Amended Declaration, making that Declaration valid. Thus, the Court cannot grant summary judgment in favor of the Partners.

2. At a minimum, issues of fact as to the validity of the Second Amended Declaration exist.
 - a. Plaintiff's motion should have been denied because Ridpath Revival presented evidence which conflicted with the Partners' declarations.

A motion for summary judgment should not be granted on the basis of the movant's self-serving declaration if the nonmoving party's evidence contradicts the movant's version of the facts. *Landis & Landis Constr., LLC v. Nation*, 171 Wn. App. 157, 167-68, 286 P.3d 979 (2012). In *Landis*, a tenant claimed to have observed evidence of rodent infestation when moving in to a rental house, and immediately left and then sought return of its pre-paid rent. The landlord moved for summary judgment and submitted a declaration stating that she had never observed rat infestation in the rental home. The tenant submitted a contradictory declaration, describing the evidence of rodent infestation. *Landis & Landis*, 171 Wn. App. at 167. The trial court granted the landlord's motion for summary judgment, but the appellate court reversed because the nonmovant's evidence contradicted the moving party's declaration. *Landis & Landis*, 171 Wn. App. at 168.

Similarly, conflicting evidence exists here. The Partners have submitted recent declarations, created for the purpose of this litigation, stating the vote to approve the Second Amended Declaration was improper. Revival has submitted the Certificate – made contemporaneously with the Second Amended Declaration in 2008 – that members holding 100% of the voting interests voted to amend the Declaration. The Certificate directly contradicts the Partners’ self-serving declarations, requiring a trial to assess the credibility of the declarants and determine the contradicting evidence and material facts.

- b. The trial judge impermissibly weighed the evidence and the credibility of the witnesses in granting Respondents’ motion.

“It is axiomatic that on a motion for summary judgment the trial court has no authority to weigh evidence or testimonial credibility[.]” *No Ka Oi Corp. v. Nat’l 60 Minute Tune, Inc.*, 71 Wn. App. 844, 854 n.11, 863 P.2d 79 (1993). The trial judge must have weighed the evidence and considered the credibility of witnesses. Because the Partners’ and Ridpath Revival’s evidence conflicted, with the Certificate saying that the members voted, and declarations saying they did not, it was not possible for the judge to decide which to believe without weighing the evidence. She had to have given credence to the declarations submitted

for the purpose of summary judgment and discounted the certificate. An assessment of credibility is the only way in which someone could have decided whether to accept the declarations versus the certificate. Such an assessment cannot be made on summary judgment.

3. The Second Amended Declaration meets the requirements of the First Amended Declaration.

The First Amended Declaration, Section 13.2, set forth the method by which it could be amended. It provides:

“Except where a greater amount is otherwise required by the Act or Article 12, an amendment may be adopted at a duly called meeting of the Association by the vote, in person or by proxy, of Owners holding at least ninety-one percent (91%) of all the Voting Interests. **A certificate, signed and sworn to by two (2) officers of the Association,** that the record Owners of the required number of Units (and the required number of first mortgagees, where applicable).”

CP 332. (emphasis added). The Second Amended Declaration contains a certification signed by the Association’s President, Greg Jeffreys, and Treasurer, Grant Person, stating:

The undersigned officers of The Ridpath Tower Condominium Association (“Association”), a Washington non-profit corporation, do hereby certify as follows:

Members holding one hundred percent (100%) of the Voting Interests of the Association have voted to amend and restate the declaration in its entirety as set forth in the above Second Amended and Restated Declaration of Covenants, Conditions, and Restrictions of The Ridpath Tower Condominium and the Second Amendment to the Survey/Plans... **This certificate is made pursuant to Section 13.2 of the Declaration.**

CP 403. (Emphasis added).

The Partners argue the term “sworn” in Section 13.2 of the First Amended Declaration, which stated that the Certificate must be “signed and sworn” should be read to mean “sworn under penalty of perjury.” This argument fails. There is no requirement of an oath under the penalty of perjury. The First Amended declaration doesn’t say that, and there is no reason to read such a requirement in.

The certification states that the officers “certify” the Certificate. Certify means “to authenticate or verify in writing.” Black’s Law Dictionary 258 (9th ed. 2009). It would indeed be an elevation of form over substance and an interpretation of the intent of the contract to read an additional requirement of an oath under penalty of perjury into the First Amended Declaration. Moreover, the same individual – Gregory Jeffreys, President of the Ridpath Tower Condominium Association – executed the First Amended Declaration and also the Certificate. It is

only logical to presume that Mr. Jeffreys knew what he meant by his own terms and requirements in the First Amended Declaration, and met those requirements when creating the Certificate for the Second Amended Declaration. Furthermore, as discussed above, a challenge to the Second Amended Declaration is untimely and is barred by the Statute of Limitations, estoppel and laches.

4. If there was a conveyance of common elements pursuant to the Second Amended Declaration, it was not void.

The Partners allege that the Second Amended Declaration's subdivision of Unit 18 into Units 18, 20 and 21 includes the transfer of common elements without an executed agreement pursuant to RCW 64.34.348 and is therefore void. RCW 64.34.348(1) provides that eighty percent of the votes must agree to a conveyance of common elements. The Certificate recorded with the Second Amended Declaration establishes that *all* members agreed to and ratified the Second Amended Declaration, and any conveyance therein. *See Nichols Hills Bank v. McCool*, 104 Wn.2d 78, 85, 701 P.2d 1114 (1985) (implied ratification is a question of fact). When the evidence is viewed in the light most favorable to Ridpath Revival, the Certificate establishes the members agreement to the conveyance of common elements.

The Partners also argued that the Second Amended Declaration should be invalidated because there was no benefit to the Ridpath Tower Association. CP 232. This argument fails for two reasons. First, there is no evidence in the record of a benefit or absence thereof from the formation of Units 20 and 21. Certainly the Ridpath Tower Association may have benefited, monetarily or otherwise, from the creation of Units 20 and 21. No evidence exists for this one way or the other. Second, to the extent that there was not, but should have been, a payment or other benefit, the proper recourse would be for the Ridpath Tower Association to pursue a claim for compensation, not for the Partners to seek to invalidate the existence of Units 20 and 21.

5. The trial court impermissibly ruled on matters that were not part of or briefed in the Partners' Motion for Summary Judgment.

A trial court may not grant summary judgment on issues that were not included in a party's motion, as doing so would unfairly deprive the opposing party of the opportunity to respond with evidence and argument. For example, in *White v. Kent Medical Ctr.*, 61 Wn. App. 163, 169, 810 P.2d 4 (1991), the trial court erred by granting defendants' summary judgment motion on the basis of proximate cause when that issue was first raised in defendants' reply memorandum. "[I]t is

incumbent upon the moving party to determine what issues are susceptible to resolution by summary judgment, and to clearly state in its opening papers those issues upon which summary judgment is sought[.]” *Id.* See also *Erickson v. Chase*, 156 Wn. App. 151, 160, 231 P.3d 1261 (2010) (“The moving party must raise in its summary judgment motion all of the issues on which it believes it is entitled to summary judgment.”)

Similarly, in *R.D. Merrill Co. v. Pollution Control Hearings Bd.*, 137 Wn.2d 118, 139-48, 969 P.2d 458 (1999), the Washington State Supreme Court held that a hearings board improperly granted summary judgment on a particular legal issue where that issue was not raised in the defendant’s summary judgment motion. The Court observed that plaintiffs did not have a fair opportunity to present evidence and that genuine issues of material remained. *Id.* at 139. The fact that the plaintiffs bore the burden of proof was irrelevant; they had no reason to introduce evidence on an issue of which the moving party did not seek review. *Id.* at 148. “It is unfair to grant the extraordinary relief of summary judgment without allowing the nonmoving party the benefit of a clear opportunity to know on what grounds summary judgment is

sought[.]” *Id.*

In this case, the trial court erred in granting complete summary judgment and disposing of the case where the Partners’ motion failed to address a critical factual and legal issue: how to interpret the First Amended Declaration. The Complaint clearly requested a determination on this issue, but Plaintiff’s summary judgment motion never mentioned it. *Compare* CP 14, with CP 224 - 233. Rather, the motion focused solely on whether the Second Amended Declaration was valid. *Id.* Although the title of Partners’ motion requested “summary judgment,” not “partial summary judgment,” Plaintiff’s attorney conceded at oral argument that “we are asking for partial summary judgment.” RP 22:24-23:2. *See also Johnson v. Pacific Bank & Store Fixture Co.*, 59 Wash. 58, 60, 109 P. 205 (1910) (“The character of the pleading will not be measured by the style or title affected by the pleader, but rather by reference to its substance.”)

Genuine issues of material fact remain regarding how the First Amended Declaration should be interpreted. *See Lake v. Woodcreek Homeowners Ass’n*, 169 Wn.2d 516, 526, 243 P.3d 1283 (2010) (interpreting a condominium declaration requires making a factual

determination about the declarant's intent). Ridpath Revival had no opportunity to present evidence or legal argument on the property interpretation of the First Amended Declaration, and the matter was not discussed at oral argument. The trial court's use of the extraordinary relief of summary judgment to dispose of an entirely unraised and unbriefed issue was inappropriate and must be reversed.

D. The trial judge should have recused herself due to her personal knowledge of one of the witnesses.

Washington's appearance of fairness doctrine not only requires a judge to be impartial, it also requires that the judge appear to be impartial. *State v. Finch*, 137 Wn.2d 792, 808, 975 P.2d 967 (1999).

Washington cases have long recognized that judges must recuse themselves when the facts suggest that they are actually or potentially biased. *See Diimmel v. Campbell*, 68 Wn.2d 697, 699, 414 P.2d 1022 (1966); *Tatham v. Rogers*, 170 Wn. App. 76, 93, 283 P.3d 583 (2012).

The trial judge impermissibly relied on her knowledge of, and bias against, at least one of the witnesses in reaching her decision. During the course of the summary judgment hearing, it became apparent that the trial judge had personal knowledge of Gregory Jeffreys, the President of The Ridpath Tower Condominium Association and one of

the individuals who signed the Certificate which is at the heart of this dispute and these motions.

The trial judge commented during the hearing that she has “a lot of cases involving this sort of thing with the same gentleman, with Mr. Jeffreys, and they’re not normal or typical.” RP 65. She went on to say that “Mr. Jeffreys . . . has shown a lot of creativity that takes all of these situations outside everything that a lot of us have seen before . . . I haven’t seen things of this magnitude before.” RP 71. She said:

“Because to be probably more blunt that I should be, what if hypothetically, say, Mr. Jeffreys had some other things going on with this whole transaction that wouldn’t pass muster and we kept looking at what went on with this whole deal.”

RP 83. Counsel for Respondents also stated he discussed this “scenario” with the FBI, he mentioned Mr. Jeffreys’ indictment in his oral argument and raised Mr. Jeffreys’ “creativity” with this property, (RP 71-72) implying that Mr. Jeffreys’ dealings, his investigation by the FBI and his indictment make his testimony not credible. The court went on to discuss Mr. Jeffreys’ incarceration (RP 93) and Respondents’ counsel commented that an affidavit signed by Mr. Jeffreys would be “one more perjury on top of that.” RP 94.

From these exchanges, which pepper the transcript from the

summary judgment hearing, it is clear that the trial judge had personal knowledge of Mr. Jeffreys as well as an opinion about his credibility. The credibility of both Mr. Jeffreys and Mr. Person, who certified that members holding 100% of the voting interests had voted to approve the Second Amended Declaration, was critical evidence creating an issue of material fact over whether the Second Amended Declaration was approved. The trial judge's remarks, and her ultimate ruling, show that her personal opinion about Mr. Jeffreys' credibility led her to discount his certification, and influenced her decision to believe Mr. Person's current testimony recanting his earlier certification. The court on summary judgment cannot engage in such credibility determinations. To do so is error. *See Supra*, at 22. She should have recused herself, and her decision should be vacated on this basis alone.

V. CONCLUSION

No challenge to the validity of a condominium declaration amendment may be made more than one year after the amendment is recorded. The Partners' challenge to the validity of the Second Amended Declaration was filed over four years after the Second Amended Declaration was recorded, and it is time-barred as a matter of law. Therefore, summary judgment for Ridpath Revival dismissing the

Partners' claims is proper.

The Partners' Motion for Summary Judgment seeking to invalidate the Second Amended Declaration should be denied, because their challenge is time-barred and also because Second Amended Declaration is valid or at a minimum issues of fact exist regarding its validity.

The trial judge should have recused herself due to apparent or actual bias, and the trial court's decision should be vacated.

DATED this 27th day of January, 2014.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the state of Washington that, on the 27th day of January, 2014, I caused a true and correct copy of this Opening Brief to be served upon the following in the manner indicated below:

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