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

CINDY ALEXANDER; BLOCKER VENTURES, LLC; CHRIS CLARK; R. BRUCE EDGINGTON; KIPP JOHNSON and JENNIFER JOHNSON; GOPIKRISHNA KANURI and HIMABINDU KANURI; CHRIS KASPRZAK and ELIZABETH KASPRZAK; PAUL LARKINS and JOYCE HYOJUNG LARKINS; KRISTINE MAGNUSSEN; SCOTT McKILLOP; CAINE OTT and DANA OTT; MARA PATTON; PETER RICHARDS; DANTE SCHULTZ; WINFRED D. SMITH; ROBERT STODDARD and COLETTE STODDARD; NEIL WEST; LIANG XU and JIA LU DUAN,

Appellants,

v.

GARY SANFORD AND JANE DOE SANFORD; PAUL BURCKHARD and MURIEL BURCKHARD; JAMES SANSBURN and JANE DOE SANSBURN; RICHARD PETER and JANE DOE PETER; SHANA HOLLEY and RICHARD HOLLEY; BRETT BACKUES and JANE DOE BACKHUES; JOSEPH CUSIMANO and JANE DOE CUSIMANO; JASON FARNSWORTH and JANE DOE FARNSWORTH; PATRICIA HOVDA and JOHN DOE HOVDA; ALEXANDER W. PHILIP and NATALIA T. PHILIP; HUCKLEBERRY CIRCLE, LLC; LOZIER HOMES CORPORATION; DOE DECLARANT AFFILIATES 1-20; DIANE GLENN and JOHN DOE GLENN; CONSTRUCTION CONSULTANTS OF WASHINGTON, LLC,

Respondents.

BRIEF OF RESPONDENTS SANFORD, BURCKHARD, SANSBURN AND LOZIER HOMES CORPORATION

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I. INTRODUCTION AND OVERVIEW

On June 29, 2000, the Huckleberry Condominium Owners Association was formed to manage the Huckleberry Circle Condominiums, whose construction was completed shortly thereafter. Over eleven years later, a small group of dissident unit owners brought this suit against former members of the Board of the Association and their respective spouses (i.e., respondents Sanford, Burckhard, Sansburn, Peter, Holley, Backues, Cusimano, Farnsworth, Hovda, Philip), as well as against the developer declarant (Huckleberry Circle, LLC) and a member of that limited liability corporation (Lozier Homes Corporation), and against an inspector hired by the Association (Construction Consultants of Washington, LLC) and its owner (respondent Glenn). This brief is filed on behalf of the respondents Sanford, Burckhard, and Sansburn (who were appointed to the Board by the declarant Huckleberry Circle) and their spouses, as well as on behalf of Lozier Homes Corporation (collectively the "Developer Defendants").

Stripping away the hyperbole, appellants' central claim is that the Developer Defendants failed to fulfill their duties as Board members (directly or indirectly), and as a result the appellants are now facing increased assessments by the Association for repairs. Appellants' claims fail for at least the following reasons:

The Association is a Washington nonprofit corporation. The Washington Nonprofit Corporations Act (RCW Ch. 24.03) does not allow for suits by members against nonprofit board members for damages. *Lundberg v. Coleman*, 115 Wn. App. 172, 177, 60 P.3d 595 (2002).

Further, by arguing the discovery rule applies, appellants admit that their claims against the Developer Defendants are otherwise facially time-barred. The Board acts as the agent of the Association, and appellants admit the Board knew of these claims prior to 2008. RCW 64.34.308(1); *Stuart v. Coldwell Banker Commercial Group, Inc.*, 109 Wn.2d 406, 414, 745 P.2d 1284 (1987). The Board's knowledge of alleged defects is coextensive with that of the Association as a whole, and each of its members (i.e., appellant unit owners). *Stuart*, 109 Wn.2d at 414-415. Appellants argue that such knowledge should not be imputed to them because it was fraudulently concealed by the Developer Defendants. However, respondent Burckhard resigned from the Board on May 15, 2001, respondent Sansburn resigned by May 9, 2002, and respondent Sanford resigned by March 24, 2006. Their ability to conceal anything ended at the time that they resigned from the Board. *E.g.*, *Quinn v. Connelly*, 63 Wn. App. 733, 741, 821 P.2d 1256 (1992) (fiduciary's resignation ends any tolling of the statute of limitations); *Barker v. American Mobile Power Corp.*, 64 F.3d 1397, 1402 (9th Cir. 1995) (fraud or concealment by

successor fiduciaries does not toll statute of limitations against resigned fiduciaries).

With respect to respondent Lozier (who is alleged to have built the Condominiums), appellants' claims are even more frivolous. In Washington, there is no such claim as "negligent construction." *Stuart*, 109 Wn.2d at 417; *accord*, *Atherton Condo. Apartment-Owners Ass'n Bd. of Dirs. v. Blume Dev. Co.*, 115 Wn.2d 506, 526-27, 799 P.2d 250 (1990). Further, any claim arising out of construction must accrue within six years of substantial completion, or it is barred. RCW 4.16.310. Tacitly recognizing the weakness of the claims against Lozier, appellants now argue that their claim is really one of negligent inspection. However, there is no allegation in the complaint that Lozier inspected anything.

Finally, the WCA states that board members owe duties only to the "association," which is made up of "unit owners." RCW 64.34.308(1). None of these appellants were unit owners at the time Messrs. Sansburn or Burckhard served on the Board, and only half of these appellants were unit owners when Mr. Sanford served as a non-voting Board member. As the Board members' spouses are not accused of doing anything, they should not have been sued at all.

Assuming that the Court affirms the dismissal order, the Court must then determine whether appellants' claims were frivolous and

advanced without reasonable cause. RCW 4.84.185. This small subset of dissident owners, who do not represent the majority of the Association, are attempting an end-run around the WCA's carefully calibrated statutory regime, and in doing so are attempting to burden unpaid volunteer board members with potentially ruinous liability. Who in Washington state will ever volunteer to serve on a condominium board if a small litigious group of their neighbors can bypass the democratic process to assert ill-conceived claims against them with impunity? The Developer Defendants should be awarded their fees both below and on appeal. RCW 4.84.185, RAP 18.9.

II. ASSIGNMENTS OF ERROR FOR CROSS-APPEAL

The Developer Defendants assign error only to the trial court's order denying them attorneys fees. CP 855-56. The only issue raised in conjunction with the cross-appeal is whether – in light of the arguments below – the trial court abused its discretion in denying such award.

III. STATEMENT OF THE CASE

The Developer Defendants largely adopt appellants' factual recitation. However, the trial court also had before it certain undisputed public record evidence regarding when each appellant purchased their unit, as well as appellants' evidence in opposition to the motion for fees. Respondents delve into that evidence in more detail.

A. APPELLANTS' OWN COMPLAINT PLEADED THEM OUT OF A CLAIM

Despite appellants' serial allegations of construction defects, appellants admit that any construction defect claims are barred by the applicable statutes of limitation and repose. CP 18, 21. Indeed, appellants claim loss of a chance to bring such claims, and thus hope to recover their pro-rata portion of the Association's $2.5 million special assessment on unit owners to "pay for the cost to correct defective conditions and repair resulting property damage" at the Condominiums. CP 22, 29.

1. Appellants' Complaint was filed on September 7, 2011 over a decade after the Condominiums were built.

The Appellants in this action are a dissident minority of residential condominium unit owners at the Huckleberry Circle Condominiums ("Condominiums" or "Project"). CP 1-2. Huckleberry Circle, LLC (i.e., "Declarant") was the Washington limited liability company that filed the papers to declare the development to be in condominium ownership. CP 5. Appellant Lozier is alleged to be the sole member of Huckleberry Circle, LLC, and is alleged to have built the Condominiums. CP 5. Appellants Sansburn, Sanford and Burckhard are alleged to have been acting as the agents of Lozier and/or Huckleberry Circle, LLC. CP 5.

2. The Developer Defendants' involvement ceased on or before March 24, 2006.

The Huckleberry Circle Condominium Owners Association (the "Association") was created on June 29, 2000, and the initial board consisted of respondents Sansburn, Sanford, and Burckhard. CP 6. The first sale to a bona fide purchaser (i.e., not anyone associated with the Declarant) occurred on November 6, 2000. CP 6.

On May 15, 2001, respondent Burckhard resigned from the Board, and was replaced by a unit owner (respondent Holley). CP 9. Respondent Burckhard had no involvement with the Condominiums after that time. Burckhard resigned over a decade before appellants filed suit.

By May 9, 2002, control of the Association was turned over to a board elected by unit owners, and all voting board members thereafter were unit owners. CP 9-10. Respondent Sansburn had already resigned and had no further involvement with the Condominiums. Sansburn resigned almost a decade before appellants filed suit.

On May 9, 2002, respondent Sanford also resigned his voting position on the Board, but remained on the Board as a non-voting member to represent the interests of declarant Huckleberry Circle, LLC. CP 9-10.

However, governance of the Board and the Condominiums from that time on was solely in the hands of unit owners.

On March 24, 2006, appellant Sanford resigned his non-voting position on the Board. CP 19. There is no allegation that he (or respondent Lozier) had any involvement with the Condominiums, the Board or these appellants after that time. If the Developer Defendants are liable for anything, it has to be as a result of actions they took prior to March 24, 2006 – over five years before appellants filed their lawsuit.

On November 19, 2010, the Association filed its own breach of contract lawsuit against the declarant Huckleberry Circle, LLC for alleged construction defects. *Huckleberry Circle Condominium Owners Assoc. v. Huckleberry Circle, LLC*, King County Superior Court Case No. 10-2-40706-5 SEA. CP 22, 775-802.

B. MOST OF THE APPELLANTS PURCHASED THEIR UNITS AFTER THE DEVELOPER DEFENDANTS RESIGNED

According to available public records, all of the appellants purchased their units after respondents Sansburn and Burckhard resigned. Further, half of the appellants purchased their unit after defendant Sanford resigned. The table below sets forth each of the appellants' dates of purchase, with **the names bolded of the appellants who purchased *after* Sanford's resignation**:

NAME	UNIT NO.	DATE OF PURCHASE
Winfred D. Smith	1629	7/24/2002
Chris and Elisabeth Kasprzak	1605	9/19/2002
Blocker Ventures, LLC	1371	5/9/2003
Neil West	1456	5/27/2004
Cindy Alexander	1375	7/28/2005
Robert Stoddard	1424	8/12/2005
Scott A. Mckillop	1380	9/1/2005
Chris Clark	1432	11/3/2005
Dante Schultz	1463	12/14/2005
Bruce Edgington	**1459**	**4/19/2006**
Caine and Dana Ott	**1491**	**7/14/2006**
Paul and Joyce Larkins	**1391**	**8/1/2006**
Gopikrishna and Himabindu Kanuri	**1396**	**8/8/2006**
Liang Xu and Jia Lu Duan	**1451**	**2/6/2007**
Mara Patton	**1626**	**8/15/2007**
Kristine Magnussen	**1613**	**1/11/2008**
Kipp and Jennifer Johnson	**1625**	**3/19/2008**
Peter Richards	**1622**	**9/2/2009**

CP 102-72. Only appellants Kasprzak and Smith purchased their units directly from the declarant Huckleberry Circle, LLC; the remaining appellants all purchased from other unit owners. CP 102-72.

C. APPELLANTS' OWN INVESTIGATION UNDERMINES THEIR COMPLAINT.

Following respondents' dismissal, the Developer Defendants moved for recovery of their attorneys fees pursuant to RCW 4.84.185. Appellants' response showed their complaint was groundless.

Contrary to appellants' allegations, the Board's meeting minutes show that it was the Association's property manager (non-party CDC Management Services), not the declarant, that recommended to the Board that it hire Diane Glenn of respondent Construction Consultants to perform inspections. CP 493-94. Further, if there was any conspiracy, it was only to keep respondent Sanford (as a representative of the Declarant) in the dark about the Board's meetings in March 2003 with construction defect lawyers about a possible construction defect lawsuit. *E.g.*, CP 511-28. As explained by respondent Cuisimano in March 2003, the Board was "concerned about the water drainage issues in units with a roof deck and [was] investigating the need to have further inspections done," and discussed how to best exclude respondent Sanford from discussions regarding any potential suit. CP 511-18.

The Board was advised by attorney Ken Harer in April 2003 to sue the declarant developer Huckleberry Circle, LLC, well within the statute

of limitations for such claims. CP 12-13. Respondent Sanford was excluded from those discussions. CP 767-68.

By August, 2003, board member Peters had resigned, respondent Farnsworth replaced him on the Board, and the Board voted to engage in a long-delayed reserve study. CP 546-48. About the same time, the Association's property manager CDC consulted with a building envelope specialist and was advised about "serious problems." CP 549-50. Respondent Cusimano then asked if water intrusion problems represented a design defect. CP 554-55. On October 9, 2003, CDC emailed the company doing the reserve study that homeowners had reported ponding issues on the decks, which might require a structural inspection. CP 556-58.

Notably, respondent Sanford was not copied on any of these communications, which occurred over a year before the statute of limitations on a claim against the developer would run. However, in October 2003, the Board considered the possibility of having an outside structural engineer inspect the apparent problems with the decks, which is noted in the minutes that were available to all unit owners, including these appellants. CP 559-62.

Contrary to plaintiff's allegations, respondent Sanford, as the declarant Huckleberry Circle, LLC's non-voting board representative,

urged the voting members of the Board, and the Association's property manager CDC, to institute a rigorous inspection program in January 2004:

> I felt it was important to follow-up on the comments I made speaking to the issues of inspections and maintenance for Huckleberry Circle. As noted there is an ever increasing need to address the maintenance needs and responsibilities for the property by the Homeowner's Association and the Board of Directors . . . The continued lack of an inspection and maintenance program will serve only to increase the potential for greater and more costly repairs in the future.

CP 568-70. That letter was sent by CDC to all of the Board almost a year before the deadline to sue the developer. CP 571-72. The need for maintenance and repairs was then publicly discussed with all attending Association members at the Homeowners Association meeting later that month, including issues regarding deck repairs and leaking flat decks. CP 575-77. Appellants' own evidence shows that the unit owners (including any of the appellants that owned units at that time) were put on notice that leaks had been discovered almost a year before the deadline for bringing any claims against the developer.

A few days later, the property manager CDC had someone inspect the deck at unit 1375,[1] and found problems:

---

[1] This unit was owned at the time by respondent Alex Philip, who was later elected to the Board in about March 2005. CP 644-646. It is currently owned by lead plaintiff Cindy Alexander, although she purchased it on July 28, 2005, about 18 months after this inspection. For purposes of the statute of limitations, however, Mr. Philip knew of the problems that Ms. Alexander is now complaining need to be fixed.

> The [inspector] told us that the water is not draining because the deck surface is below the deck drains. He recommended that the slope of the deck surface, below the wood boards, be increased so there is no standing water. My question is should all the decks be checked for the slope? It does not matter that they are resealed, etc., if the water is not draining, but standing, there will be leaks. I hope you will mention this at the board meeting on February 4.

CP 578-79. The Board then discussed those deck issues. CP 580-82.[2]

In late March 2004, appellant Blocker Ventures, LLC reported a leak and admitted it "first noticed the leak approximately 6 months ago." CP 585-587. Respondent Sanford again urged more (not less as alleged by appellants) inspections and maintenance:

> The Board and CDC must take on the responsibility for repairs. . . . The inspection notes provide further support to the ever increasing need to address the maintenance requirements and responsibilities for the property by the Homeowner's Association and the Board of Directors. The continued lack of an inspection and maintenance program will serve only to increase the potential for greater and more costly repairs in the future.
>
> As has been discussed, my role as a Board member is limited to providing input and support to the actual voting Homeowner members of the Board of Directors. I have continued to make rather vocal appeals to the Board about implementing even a minimal maintenance program, but admittedly I am frustrated with the realization that my participation on the Board may be of little value nor a good use of my time.

[2] Those minutes also note an issue with the deck at unit 1613, which is currently owned by appellant Magnuson, although she purchased her unit almost four years later.

CP 585-87. *See also* CP 588-90 (showing Board received that letter). Appellant Blocker Ventures knew of its potential claims in March 2004, over seven years before it brought suit.

Rather than conspiring to hide defects, appellant Sanford continued to urge more inspections in April 2004:

> We continue to be very concerned about the lack of an on-going inspection, preventative maintenance or basic repair program in place for the project. . . . The continued lack of an inspection and maintenance program will serve only to increase the potential for greater and more costly repairs in the future.
>
> As it has been discussed, my role as a Board member is limited to providing input and support to the actual voting Homeowner members of the Board of Directors. I have and will continue to make my rather vocal appeals to the Board about implementing even a minimal program.

CP 591-93.

Mr. Sanford wrote to CDC again in May 2004 to urge that "immediate action be taken to initiate a comprehensive inspection and maintenance program for the project." CP 602-3. CDC did engage dismissed-defendant The Construction Consultants in about June 2004 to do a ground level inspection, which identified potential problems with appellants Stoddard's and Patton's units.[3] CP 609-12. The Construction

[3] These two appellants purchased their units a year or more after this inspection, but for purposes of any claims against these respondents, their predecessors-in-interest were or should have been aware of potential problems.

Consultants recommended to CDC that another inspection be performed "to cover all areas in detail." CP 615-17.

From at least March of 2005 onwards, the Board minutes reflect that the Board was distributing the minutes to all Association members. *E.g.*, CP 644-49, 654-56, 661-68, 673-75. There are no allegations that any of the Board meetings were closed to unit owners. There are no allegations that the appellants did not have access to those minutes, which discussed numerous times issues of water intrusion, deck inspections or repair and the need for more thorough inspections and maintenance, as well as the continued delay in conducting a reserve study.

In June, 2005, board member Philips emailed CDC regarding some water damage visible at unit 1451, which is now owned by appellants Xu and Duan. CP 657-58. In August, 2005, CDC itself reported some water intrusion problems at unit 1625, which is now owned by appellants Johnson. CP 671-72. In late August of 2005, dismissed defendant The Construction Consultants submitted to CDC a report on its inspections of the deck areas of the Condominiums, which notes various visible issues with the units now owned by appellants Xu and Duan, Edgington, Schultz, Ott, Richards, Patton, West, Clark, Kanuri, McKillop, Larkins, Alexander, Blocker Ventures, Kasprzak, Magnussen, Johnson, and Smith (i.e., every

appellant but Stoddard, whose unit only has a patio, not a deck), and recommended further inspections and maintenance. CP 676-97.

While the Board members worked diligently to maintain and manage the Condominiums, they were met with owner apathy. From September 2005 through May 2006, the Board's minutes distributed to unit owners contained substantially the following plea:

> Board of Directors – one of our members has been on the board for over 4 years and is looking to stand down. The board is looking to replace this member and possibly add another one. If you are interested in serving on the board, please let us know. The time commitment is minimal at 1-2 hours per month and you can see how our neighborhood is operated.

CP 700-2. *See also* CP 703-7, 711-12, 715-17, 724-26, 727-29, 734-36. Indeed, unit owners – including half the appellants here – were so disengaged that they could not even muster a quorum to reelect the existing board at the annual homeowner's association meeting in January 2006:

> ELECTION OF THREE (3) DIRECTORS – There was not a quorum established, therefore there was not an election held. There were no nominations nor volunteers to work on the Board of Directors. The Association still seeks individuals to help with this important aspect of community management. A vote of confidence was established by those in attendance for the current Board of Directors and their collective efforts.

CP 715-17.

However, on January 17, 2006 (just days after the annual homeowners meeting), appellant Kasprazak reported that her wall was "soaking wet with mold, etc." CP 718-21. Appellant Kasprazak clearly discovered her claims more than five years before filing suit.

On February 15, 2006, respondent Sanford attended his last Board meeting. CP 724-26.

IV. ARGUMENT

A. STANDARD OF REVIEW

The Court reviews CR 12(b)(6) dismissal orders de novo, and thus engages in the same inquiry as the trial court. *Gorman v. City of Woodinville*, 175 Wn.2d 68, 71, 283 P.2d 1082 (2012). Under CR 12(b)(6), dismissal should be granted where it appears from the complaint that the plaintiff can prove no set of facts upon which the court can grant relief. *Jeckle v. Crotty*, 120 Wn. App. 374, 380, 120 P.3d 931 (2004). Claims that are facially barred by statutes of limitations should be dismissed. *Atchison v. Great Western Malting Co.*, 161 Wn.2d 372, 382, 166 P.3d 662 (2007). *See also* CR 9(f) (averments of time are material).

Where a plaintiff invokes the discovery rule to counter a statute of limitations defense, the plaintiff bears the burden to show that facts constituting the cause of action were not discovered or could not have been discovered by due diligence earlier. *G.W. Constr. Corp. v. Prof'l*

Serv., Indus., Inc., 70 Wn. App. 360, 367, 853 P.2d 484 (1993). A "'plaintiff is charged with what a reasonable inquiry would have discovered.'" *1000 Virginia Ltd. Partnership v. Vertecs Corp.*, 158 Wn.2d 566, 581, 146 P.3d 423 (2006) (quoting *Green v. A.P.C.*, 136 Wn.2d 87, 95, 960 P.2d 912 (1998)). The court may decide the applicability of the discovery rule as a matter of law where the facts are susceptible to only one reasonable interpretation. *Allen v. State*, 118 Wn.2d 753, 760, 826 P.2d 200 (1992).

Moreover, in ruling on a motion to dismiss, the court "may take judicial notice of public documents if their authenticity cannot be reasonably disputed. . . ." *Rodriguez v. Loudeye*, 144 Wn. App. 709, 725-26, 189 P.3d 168 (2008). Although the Court must construe the complaint in the light most favorable to plaintiffs, dismissal is still proper where the facts pleaded show the claims have a fatal defect. *Atchison*, 161 Wn.2d at 362. The trial court's dismissal order may be affirmed on any ground apparent from the pleadings and evidence, even if the trial court did not consider that argument. RAP 2.5(a); *Adcox v. Children's Orthopedic Hosp. and Med. Ctr.*, 123 Wn.2d 15, 32, 864 P.2d 921 (1993). Standing can be raised for the first time on appeal. *Mitchell v. Doe*, 41 Wn. App. 846, 847-48, 706 P.2d 1100 (1985).

B. APPELLANT UNIT OWNERS LACK STANDING TO SUE.

At its heart, appellants' claim is that the Board members' alleged malfeasance caused these appellants to suffer harm derivatively in the form of increased assessments and related expenses. In corporate law, the test to distinguish between derivative and individual claims is whether the plaintiff can show it suffered some special injury that was not suffered by all shareholders generally. *In re Tri-Star Pictures, Inc., Litigation*, 634 A.2d 319, 330 (Del. 1993). Although a stockholder may maintain an action in his own right against a third party when the injury resulted from the violation of some special duty owed to the stockholder,[4] he may do so "only when that special duty had its origin in circumstances *independent* of the stockholder's status as a stockholder." *Hunter v. Knight, Vail & Gregory*, 18 Wn. App. 640, 646, 571 P.2d 212 (1977), *review denied*, 89 Wn.2d 1021 (1978). Claims of board member malfeasance or breach of duty generally belong to the corporation, and shareholders can only sue derivatively on the corporation's behalf.[5] *Interlake Porsche & Audi, Inc. v. Bucholz*, 45 Wn. App. 502, 509, 728 P.2d 597 (1986).

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[4] "As a general rule, a plaintiff cannot join in the same suit a claim on behalf of the corporation and an individual, personal claim against the defendants." 3A Karl B. Tegland, Washington Practice: Rules Practice CR 23.1 author's cmts., at 518 (5th ed. 2006) (citing *Hames v. Spokane-Benton County Nat. Gas Co.*, 118 Wash. 156, 203 P. 18 (1922)).

[5] Shareholders bringing such claims must file a verified complaint specifically alleging that they owned shares at the time of the malfeasance alleged, that they made demand on

Here, appellants' alleged injury – increased assessments and related expenses – is one that is suffered by all unit owners, not just this dissident minority. However, the Nonprofit Corporations Act (RCW Ch. 24.03) does not permit such suits by members at all, nor does it permit the remedies appellants seek (i.e., damages payable to members). *Lundberg v. Coleman*, 115 Wn. App. 172, 177, 60 P.3d 595 (2002), *rev. denied* 150 Wn.2d 1010, 79 P.3d 446 (2003).

In *Lundberg*, a director of a nonprofit discovered what she believed was substantial malfeasance on the part of other directors and brought suit, seeking an injunction, accounting, disclosures, removal of the directors, declaratory relief, and damages. 115 Wn. App. at 175. The trial court dismissed the complaint under CR 12(b)(6), and the Court of Appeals affirmed, holding that the Nonprofit Corporations Act does not permit such claims to be brought:

> The Washington Business Corporations Act, dealing with for-profit corporations, explicitly grants to shareholders the right to bring derivative actions on behalf of corporations. The same is not true for nonprofit corporations. There is no similar provision in the Nonprofit Corporation Act.

Lundberg, 115 Wn. App. at 174-75. *See also Myer v. Cuevas*, 119 S.W.3d 830, 835-36 (Tex. App. 2003) (unit owners lack standing to sue board

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the corporation itself to pursue such claims, explain the reasons why the corporation declined to pursue such claims or why demand was futile, and show that they can fairly and adequately represent the interests of all similarly-situated shareholders. CR 23.1.

members directly, and board members owe no duties to unit holders, only to condominium association).

As noted by a leading treatise, the majority rule throughout the country is that nonprofit members may not sue board members for breaches of fiduciary duty, malfeasance or similar derivative claims:

> Most states do not permit a member of a not-for-profit to sue derivatively on its behalf. Thus, the member either must persuade the corporation's directors to take action on its behalf – which they are unlikely to do if they are the cause of mismanagement – or must persuade the state's attorney general, typically the state official charged with protecting the interests of non-for-profit corporations and charitable trusts, to pursue the complaint. If neither of these courses is successful, the member's grievance goes unanswered.
>
> * * * *
>
> The general rule, however, is that only the attorney general has standing to sue in the event of a breach of fiduciary duty by a not-for-profit or its officers or directors or [for] claims of corporate mismanagement . . ..

DeMott, SHAREHOLDER DERIV. ACTIONS L. & PRAC. § 2:12 (2012).

The only actions permitted to these appellants are proceedings to enjoin officers or directors from acting *ultra vires*, or to dissolve the nonprofit. RCW 24.03.040(2); .266(1). Other actions must be brought by the nonprofit itself, *e.g.* RCW 24.03.1031, by a member or director against the corporation, RCW 24.03.040(1), or by the attorney general. RCW 24.03.040(3); .250. There are no provisions allowing members to sue board members for damages. The trial court was correct in dismissing all

the claims, as the Nonprofit Corporations Act does not permit them to be brought.

C. THE STATUTE OF LIMITATIONS STARTED RUNNING, AT THE LATEST, ON MARCH 24, 2006 WHEN MR. SANFORD RESIGNED FROM THE BOARD.

Appellants assert six claims against the Developer Defendants: Breach of Board Member Duty of Care, Negligence, Violation of Consumer Protection Act, Negligent Misrepresentation, Fraud by Omission and Misrepresentation, and Civil Conspiracy. Regardless of how couched, there is no allegation that the Developer Defendants did (or failed to do) anything after March 24, 2006, when Mr. Sanford (the alleged agent of Lozier) resigned from the Board.

To understand why appellants have pleaded themselves out of a claim, the Court will have to look at the Washington Condominium Act, the rights and responsibilities contained therein, and the duties of Board members. As explained below, appellants are essentially attempting an end-run around that carefully calibrated Act, which if allowed, will undermine the Condominium Act and massively increase potential liability for condominium association board members. The Developer Defendants explain first why all the claims should be time-barred, and then discuss each individual claim, including unique defenses.

1. Appellants' claims are principally for loss of a chance to recover under the Condominium Act.

With regard to needed repairs at Condominiums, "the association is responsible for maintenance, repair, and replacement of the common elements, including the limited common elements, and each unit owner is responsible for maintenance, repair, and replacement of the owner's unit." RCW 64.34.328. The Association has the legal authority to institute litigation on behalf of itself, or two or more unit owners. RCW 64.34.304(d).

Pursuant to the WCA, developers (i.e., "declarants," *see* RCW 64.34.020(13)) are required to warrant that the condominiums are free from defective materials, constructed in accordance with sound engineering and construction standards, constructed in a workmanlike manner and constructed in compliance with all laws. RCW 64.34.445(2). Generally speaking, the declarant may not disclaim such warranties in any residential construction. RCW 64.34.450(2). The declarant may also (but does not have to) provide other express warranties of quality; however, a "purchaser may not rely on any representation or express warranty unless it is contained in the public offering statement or made in writing signed by the declarant or the declarant's agent identified in the public offering statement." RCW 64.34.443(2).

The WCA has a strict statute of limitation: "A judicial proceeding for breach of any obligations arising under RCW 64.34.443, 64.34.445, and 64.34.450 must be commenced within four years after the cause of action accrues. . . ." RCW 64.34.452. Except for warranties of quality that explicitly extend to future performance or duration,[6] the Legislature abolished use of the discovery rule to extend the time period for bringing such suits: "a cause of action for breach of warranty of quality, ***regardless of the purchaser's lack of knowledge of the breach, accrues***" for individual unit elements as of the date of first purchase of each unit, and for common and limited common elements as of the later of the date the first unit was sold to a bona fide purchaser, the date the common element was completed or the date the common element was added to the condominium. RCW 64.34.452(2). The Legislature also eliminated consequential, special or punitive damages arising out of alleged condominium defects, except as otherwise explicitly allowed by the Act. RCW 64.34.100(1).

Appellants are essentially suing to recover damages for the Association's loss of a chance to sue the Declarant under the Act (which

[6] There is no allegation that any such explicit warranties of future performance or duration are at issue here.

suit they contend would have negated their present proportional liability to pay assessments for needed repairs):

> Such damages include, but are not limited to: plaintiffs' proportional responsibility to pay for the cost to correct defective conditions and repair resulting property damage at the Project (including investigative costs, scope of repair development costs, design costs, inspection costs, contractor costs, project management costs, repair financing costs, and all other costs associated with such repairs); increased costs to correct defective conditions and repair resulting property damage as a consequence of inaction; loss of marketability, use and value of plaintiffs' property; increased reserve expenses; relocation costs; and attorney fees and other costs incurred in prosecuting this action.

CP 29-30. Appellant unit owners cannot claim that the Board was required to sue for damage to the appellants' individual units, as appellants themselves are responsible for such repairs and could pursue such claims directly (RCW 64.34.328), and such individual unit owner claims are barred now regardless of discovery. RCW 64.34.452(2). Similarly, any claims for consequential damages (such as reduced valuation and the like) are also statutorily barred. RCW 64.34.100(1).

It would undermine the WCA to allow these appellants to apply the discovery rule to what are essentially condominium defect claims.

2. <u>The Board knew of the alleged problems well before 2008, so appellants claims here are time-barred.</u>

Appellants' claims (and indeed their arguments for the discovery rule) rest on the central allegation that Messrs. Sanford, Sansburn, and

Burckhard (and the rest of the Board-member respondents) ***knew*** of the alleged construction defects during their tenures on the Board, and should have sued while there was still time. *E.g.*, CP 6 ("During the course of construction and prior to any sales of units at the Project, Declarant, Lozier, Doe Declarant Affiliates, Sanford, Sansburn and Burckhard became aware, or in the exercise of reasonable care, should have become aware, that the Project . . . was, as built, riddled with defective construction"); CP 11 ("In or around early March of 2003, the Board was contacted by construction defect attorney Ken Harer . . . [who] informed the Board that there were signs of potentially serious hidden construction defects, and that the statute of limitations on the Association's warranty claims would soon expire"); CP 12 (confirming that attorney Harer urged the Board to take action regarding potential construction defects); CP 14 ("On August 20, 2003, the Project property manager contacted Mark Jobe, a noted building envelope specialist and repair contractor, regarding bids for deck maintenance, and looking into deck drainage issues at the Project. Mr. Jobe replied: 'Yes, that is a project I am familiar with. There appears to be a serious problem with deck slope. Ponded water is present under the sleeper. Also while I was there I noted the flashing above the brick veneer has been caulked closed. Closed flashing is a serious problem that generally leads to big issues. Also it is often used to mask other problems.

This should be looked into. Would be glad to assist.' Mr. Jobe's email was communicated to the Board."); CP 14 ("On September 22, 2003, Cuisimano emailed the other Board members noting a problem with 'Water leaks in a unit with a deck over the den/office. This is the second deck to have water intrusion. Do we have a design flaw that needs to be addressed?'").

If indeed the claims were undiscoverable during these Board members' tenures, appellants would have no viable claims against these Board members at all, as the Board members could not be expected to act on undiscoverable claims. It is not just indisputable that the claims were known prior to 2008, but indeed central to appellants' theories.

a. The "discovery rule" is inapplicable because the alleged problems were discovered years ago.

As the Board members are the representatives and thus legal agents of the Association, as a matter of law the Association itself would normally be deemed to know the same information. RCW 64.34.308(1); *Deep Water Brewing, LLC v. Fairway Resources Ltd.*, 152 Wn. App. 229, 269-270, 215 P.3d 990 (2009) (board president's knowledge imputed to homeowner's association); *see also Interlake Porsche & Audi, Inc.*, 45 Wn. App. at 517-18 (because corporation is aggrieved party when board member is accused of fraud or malfeasance, board members'

knowledge of transaction is imputed to corporation and starts running the statute of limitations). As the Association itself is comprised solely of unit owners and is the legal agent of the unit owners (e.g., RCW 64.34.300, .304), the owners themselves would normally be deemed to have the same knowledge as the Association, as "an agent's knowledge is imputed to the principal if that knowledge is relevant to the agency relationship." *Kelsey Lane*, 125 Wn. App. 227, 235, 103 P.3d 1256 (2005).[7] *See also Deep Water Brewing*, 152 Wn. App. at 269-79; *Stuart*, 109 Wn.2d at 417 (both suggesting that unit owners' and associations' knowledge is coextensive).

b. Any fraudulent concealment ended as a matter of law when the Board member resigned.

What appellants are really arguing is not that the claims were not discovered or discoverable before 2008, but rather that these respondents fraudulently concealed the information needed to ensure that warranty claims against the developer were timely pursued. However, once a Board member resigned, he or she had no continued ability to hide the "truth." Moreover, each subsequent Board member was required to familiarize themselves with the corporation's affairs, which includes a duty to

[7] Appellants conspicuously omitted from the lawsuit another party that was on notice throughout of every problem – the Association's property manager CDC Management Company. Appellants carefully minimized reference to CDC's role, as CDC's participation and knowledge is a highly inconvenient fact that undercuts plaintiffs' every theory of liability. *E.g.*, *Davis v. Harrison*, 25 Wn.2d 1, 21-22, 167 P.2d 1015 (1946); *Interlake Porsche*, 45 Wn. App. at 517-518 (statute of limitations not tolled when information available from independent source).

actively investigate the rights and liabilities of the corporation. *Senn v. Northwest Underwriters, Inc.*, 74 Wn. App. 408, 416-417, 875 P.2d 637 (1994).

Because it is alleged that Messrs. Sansburn, Burckhard and Sanford were appointed to the Board by the declarant (i.e., Huckleberry Circle, LLC), they were required to exercise "the care required of fiduciaries of the unit owners" in performing their board duties. RCW 64.34.308(1). Such care generally includes a duty to disclose material facts. *Kelsey Lane Homeowners Ass'n v. Kelsey Lane Company, Inc.*, 125 Wn. App. 227, 242-43, 103 P.3d 1256 (2005). However, "[o]n May 9, 2002, Declarant held a meeting at which control of the Association was turned over to a Board elected by unit owners." CP 9-10. *See also* RCW 64.34.312 (describing process for transferring control). From May 9, 2002 onwards, the Board was controlled by unit owners, who were completely independent of the declarant Huckleberry Circle, LLC or the declarant's alleged affiliate Lozier.[8]

As explained above, because the alleged construction defect issues were well known to the Association's agents (i.e., the Board and the

[8] As respondent Sanford was a non-voting Board member from May 9, 2002 onwards, he did not have any real right to control the governance of the Association after that date. Solely for purposes of this appeal, it may be assumed that he still had to carry out his duties such as they were with the care required of a fiduciary to the unit owners.

property manager), there is no question about discovery. The unit owners' knowledge is normally deemed to be coextensive with that of the Association, its Board and its agents. *Stuart*, 109 Wn.2d at 414; *Deepwater Brewing*, 152 Wn. App. at 269-70; *Satomi Owners' Ass'n v. Satomi, LLC*, 139 Wn. App. 175, 180-81, 159 P.3d 460 (2007), *aff'd in relevant part*, 167 Wn.2d 781, 811-12, 159 P.3d 460 (2007).

When a plaintiff claims concealment by a fiduciary, such concealment ends (and the claim accrues) at the time that fiduciary resigns his or her position. *E.g.*, *Gillespie v. Seattle-First Nat'l Bank*, 70 Wn. App. 150, 158-59, 855 P.2d 680 (1993) (action against trustee accrues when fiduciary relationship ends); *Quinn v. Connelly*, 63 Wn. App. 733, 741, 821 P.2d 1256, *rev. denied* 118 Wn.2d 1028, 828 P.2d 563 (1992) (attorney malpractice claim barred by statute of limitations because any alleged concealment deemed to end as a matter of law when attorney-client relationship ends); *Janicki Logging and Constr. Co. v. Schwabe, Williamson & Wyatt, P.C.*, 109 Wn. App. 655, 661, 37 P.3d 309 (2001), *rev. denied* 146 Wn.2d 1019 (2002); *Matson v. Weidenkopf*, 101 Wn. App. 472, 3 P.3d 805 (2000) (both holding that the statute of limitations on malpractice claim against attorney for failure to file within statute of limitations is only tolled until attorney resigns). Other states also follow the same rule that a claim against a fiduciary such

as a board member accrues by no later than the time that the fiduciary resigns. *E.g.*, *Westchester Religious Institute v. Kamerman*, 262 A.D.2d 131, 691 N.Y.S.2d 502, 503 (1st Dep't 1999) (claim against officer of non-profit accrues upon resignation); *A.M. v. Roman Catholic Church*, 669 N.E.2d 1034, 1038 (Ind. App. 1996) (fraudulent concealment terminates at the conclusion of fiduciary relationship at which time the statute of limitations starts to run).

In part, this is because each succeeding Board member had a duty to investigate the affairs of the corporation, and is deemed to know that which is discoverable from reviewing records, interviewing the property manager, and discussing issues with other Board members. *Senn*, 74 Wn. App. at 416-17. Even if plaintiffs are correct that subsequent Board members continued to hide the information, such fraudulent concealment by subsequent Board members only extends the statute of limitations for claims against ***those*** Board members, not against Board members who had already resigned. *E.g.*, *Hyde v. United States*, 225 U.S. 347, 369, 32 S. Ct. 793, 56 L. Ed. 1114 (1912); *United States v. Read*, 658 F.2d 1225, 1233 (7th Cir. 1981) (both holding that alleged conspirator's withdrawal starts the statute of limitations regardless of discovery, and conspirator who withdraws cannot be held liable for acts subsequent to withdrawal). Plaintiffs may not hold Messrs. Sanford,

Burckhard and Sansburn liable for the later actions or inactions of the Board, and may not use those later actions or inactions to extend the statute of limitations against these resigned defendants. *Barker v. American Mobil Power Corp.*, 64 F.3d 1397, 1402 (9th Cir. 1995) (holding that fraud or concealment by successor fiduciaries does not toll statute of limitations for claims against resigned fiduciaries).

With respect to each individual claim against the Developer Defendants, appellants' claims are barred by the applicable statutes of limitation. Other unique bases for dismissal are also discussed below.

3. Analysis of individual claims.

a. Appellants' "Breach of Board Member Duty of Care" claims are barred.

Plaintiffs' complaint asserts that the Developer Defendants all breached a board member duty of care (despite the fact that respondent Lozier was never on the Board). CP 23. Appellants claim that the Developer Defendants "owed [appellants] a duty of due care in the management and governance of the Association." CP 23. Respondent Burckhard resigned from the Board on May 15, 2001, respondent Sansburn resigned on or before May 9, 2002, and respondent Sanford resigned by March 24, 2006. There is no allegation that they had any involvement with the management or governance of the Association after resignation.

Under the Condominium Act, the Board "shall act in all instances on behalf of the association." RCW 64.34.308(1). "In the performance of their duties, the officers and members of the board of directors are required to exercise: (a) if appointed by the declarant, the care required of fiduciaries of the unit owners; or (b) if elected by the unit owners, ordinary and reasonable care." RCW 64.34.308(1). Hence, with respect to the Developer Defendants, appellants claim that these respondents needed to meet the standard of a fiduciary in managing and governing the Association. *E.g.*, *Kelsey Lane*, 125 Wn. App. at 242 (declarant-appointed board members "have the duty to act with the care required of fiduciaries of the unit owners.")

As explained above, appellants lack standing (or even a viable cause of action) for such alleged breaches by Board members. *Lundberg*, 115 Wn. App. at 177-78. If the Court decides to examine the substance of these claims, it is also clear that they are time-barred.

As explained above, appellants agree that the Board knew of the facts underlying these claims well before 2008. As also explained above, there could be no fraudulent concealment of these alleged fiduciary breaches by the Developer Defendants once they resigned. To the extent that appellants claim that the Developer Defendants adversely dominated that Board so as to cause the Board to not take action, the unit owners took

control on March 9, 2002, and respondent Sanford resigned from the Board by no later than March 24, 2006, ending any alleged domination. *E.g.*, *Resolution Trust Corp. v. Farmer*, 865 F. Supp. 1143, 1151 (E.D. Pa. 1994); *In re Loranger Mfg. Corp.*, 324 B.R. 575, 581 (Bankr. W.D. Pa. 2005) (equitable tolling through adverse domination ends when alleged wrongdoing directors or officers no longer exercise control). Any fraudulent concealment or adverse domination by the Developer Defendants ended by no later than Sanford's resignation on March 26, 2006, if not much earlier.

While the subsequent Board members' continued failure to reveal the alleged defects might extend the statute of limitations with respect to claims against those Board members, it cannot extend the statute of limitations against the resigned Developer Defendants. "Plaintiffs may not generally use the fraudulent concealment by one defendant as a means to toll the statute of limitations against other defendants." *Griffin v. McNiff*, 744 F. Supp. 1237, 1256 n. 20 (S.D.N.Y. 1990), *aff'd,* 996 F.2d 303 (2d Cir. 1993); *accord*, *Barker*, 64 F.3d at 1402 (citing numerous cases).

Assuming a three-year statute of limitation, the last possible date upon which an action could be commenced against any of the Developer Defendants would be March 24, 2009. The complaint in this action was not filed until September 7, 2011.

b. Appellants have no "negligence" claim against Lozier.

Appellants' second cause of action is an alleged negligence claim, which is only asserted against Lozier. That claim asserts that Lozier "owed [appellants] a duty of due care in undertaking the construction, inspection, condition reporting, and repair of the Project." CP 24. Appellants admit that Lozier was not the declarant (but rather was only a member of the declarant). CP 5. Appellants claim (on information and belief) that Lozier constructed the Condominiums. CP 6. Appellants also claim that Lozier later volunteered to inspect the deck areas (CP 15), although there is no allegation that Lozier actually did so. *See also* CP 18 (stating that offered deck inspection was never done). Rather, the complaint states that the Board authorized the declarant Huckleberry Circle, LLC (not Lozier) to "inspect all the flat surface decks at no cost to the Association, and recoat those with coating failures." CP 17. It is also alleged that "[b]y the end of April, 2005, Huckleberry Circle, LLC and Lozier had completed its deck recoating efforts." CP 18. This is the last allegation regarding anything done by Lozier. Appellants do not allege any contract or any other direct contact with Lozier.

i. The only allegations against Lozier arise from its involvement with the Condominium's construction, but there is no such tort as "negligent construction."

"Washington does not recognize a cause of action for negligent construction on behalf of individual homeowners." *Stuart v. Coldwell Banker Commercial Group*, Inc., 109 Wn.2d at 417; *accord Pacific Erectors, Inc. v. Gall Landau Young Construction Co., Inc.*, 62 Wn. App. 158, 169, 813 P.2d 1243 (1991), *rev. denied*, 118 Wn.2d 1015 (1992) (affirming award of CR 11 sanctions against party asserting cross-claim for "negligent construction"). Regardless of the statute of limitations, allegations of negligent construction or repair simply fail to state a claim.

Appellants tacitly admit this, and instead argue that the "claim here is not about construction, but about incompetent and misleading inspections done by Lozier and the LLC, such that warranty rights were lost." Appellants' Brief, at 48. However, there is no actual allegation in the complaint that Lozier inspected anything (rather, the allegation is that Lozier offered to do so, but never actually did).

The Association itself has sued (on behalf of itself and these appellants) the entity that agreed to inspect or repair those decks (i.e., Huckleberry Circle, LLC) for allegedly breaching its contract to do so. *Huckleberry Circle Condominium Owners Association v. Huckleberry*

Circle, LLC, King County Superior Court Case No. 10-2-40706-5 SEA. As alleged there:

> Defendant Huckleberry Circle, LLC, provided a written proposal to perform work at specific units and decks at the property in 2004. The plaintiff Association agreed to the proposal, and Defendant LLC made attempts to perform the agreed work during the summer and fall months of 2004.
>
> The deck areas where the LLC agreed to perform work in 2004 exhibit construction defects, which have also caused resulting damage to property owned by the Association's members. The construction defects at these decks include conditions that either should have been corrected by the LLC during its work in 2004, or conditions that were installed/modified incorrectly by the LLC during its work in 2004. The construction defects at these deck areas include issues with inadequate sloping, in appropriate surface decking materials, seams failing and seams causing ponding, omission of sill pans for deck doors, mislapped flashing, and other related issues for the performance of the building envelope at these deck areas.

CP 775-802. The dissident unit owners cannot pursue those same claims.

ii. Regardless, any claims against Lozier are time-barred.

Appellants' claims against Lozier are further barred by the applicable statutes of limitations. To the extent that appellants claim that Lozier is vicariously liable for Board member actions, those claims are barred for the same reasons as the claims against the Board.

Further, appellants have alleged that Lozier constructed the Condominiums (CP 6), and indeed, Lozier is a licensed Washington state

contractor (License No. LOZIEHC315MM).[9] Appellants' claims against Lozier (whether for inspection, construction or otherwise) all arise from Lozier having allegedly "constructed, altered or repaired" the Condominiums, or "having performed or furnished any design, planning, surveying, architectural or construction services, or supervision or observation of construction, or administration of construction contracts for any construction, alteration or repair" at the Condominiums.[10] RCW 4.16.300. All such "claims or causes of action . . . shall accrue, and the applicable statute of limitations shall begin to run only during the period within six years after substantial completion of construction, or during the period within six years after the termination of the services . . . whichever is later." RCW 4.16.310. Further, "[a]ny cause of action which has not accrued within six years after such substantial completion

[9] To the extent necessary, the Court can take judicial notice of this fact, which is reflected in the public records of the Department of Labor and Industries, and can be easily verified at its website for looking up contractors: https://fortress.wa.gov/lni/bbip/Search.aspx.

[10] Inspection services performed by a licensed contractor constitute "construction services" and the "supervision or observation of construction." RCW 4.16.300. The Legislature made that even clearer when it enacted the Construction Defect Claims Act, which applies to all claims against "construction professionals," and includes all claims covered by the construction statute of repose. RCW 64.50.020; *see also* RCW 4.16.310 (incorporating the mandatory pre-claim notice under the Construction Defect Claims Act), 4.16.325 (tolling all statutes of limitations for 60 days after service of such notice). In the CDCA, the Legislature defined "construction professionals" explicitly to include "inspectors." RCW 64.50.010.

of construction, or within six years after such termination of services, whichever is later, shall be barred." RCW 4.16.310.

Appellants' claims against Lozier regarding the original construction of the Condominiums, no matter how denominated, had to accrue as a matter of law – at the latest – by 2006, or they are barred. RCW 4.16.310. As explained by the Supreme Court:

> To illustrate the effect of the statute of repose, if, for example, a negligence claim against a contractor arising out of the construction of a building does not accrue until seven years after substantial completion, it is barred by RCW 4.16.310 because it did not accrue within the six-year period of the statute of repose. On the other hand, if the negligence action accrues five years after substantial completion of construction of a building, and therefore the claim is not barred by the statute of repose, the claim then must be brought within the limitations period for a negligence claim – generally within three years of accrual of the cause of action – and the action therefore would have to be brought before the end of eight years after substantial completion.

1000 Virginia Ltd. Partnership, 158 Wn.2d at 575. No matter how creatively appellants may plead their claims against Lozier arising from Lozier's alleged involvement with the original construction of the Condominiums, those claims are barred.[11]

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[11] Appellants also claim that Messrs. Burckhard, Sanford and Sansburn were at all material times "an owner, officer or member of . . . Lozier Homes Corporation." CP 3. Appellants' alleged claims against these individuals all also "arise from" their alleged involvement in the construction of the Condominiums as owners, officers or members of Lozier. *E.g.*, CP 6 ("During the course of construction and prior to any sales of units at the Project, . . . Lozier . . . Sanford, Sansburn and Burckhard became aware, or in the exercise of reasonable care, should have become aware, that the Project was not being

Accepting as true the appellants' unfounded allegation that "[b]y the end of April, 2005, Huckleberry Circle, LLC and Lozier had completed its deck recoating efforts" (CP 18), their claims regarding those specific repairs would still be time-barred, as appellants' own complaint claims that it was immediately apparent that the repairs were ineffective. *E.g.*, CP 18 (in June 2005, Board was notified by owner of unit 1423 that there was water damage inside his den from a leaking deck); CP 19 (property manager informed by owner of Unit 1625, which is now owned by appellant Johnson, that there was water intrusion under her deck); CP 19 ("Between early August, 2005 and January 19, 2006, the Board received multiple complaints from homeowners regarding window, deck, and door leaks."); CP 19-20 ("Between February 15, 2006 and early November, 2006, the Board received more complaints of leaks into the interior of the units"), CP 20 (in early 2007, "a steady stream of leak complaints made its way before the Board").

Putting aside that there is no such tort as "negligent construction," and ignoring the fact that Lozier owed no duty at all to these appellants

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designed or constructed in a manner consistent with minimum requirements of building code with respect to weatherproofing, and was, as built, riddled with defective construction."); *see also* CP 7-9 (containing similar allegations regarding respondents' role and liability for allegedly defective construction). Just as Lozier is protected by the construction statute of repose against any such claims arising out of construction of the Condominiums, so too should these respondents, whose involvement stems from their alleged role as owners, officers or members of a registered contractor.

who did not contract with Lozier to do anything, appellants' own complaint shows that the problems with the repairs allegedly performed by Lozier were almost immediately apparent. Those alleged problems were discovered by January of 2006. Appellants filed their complaint in September of 2011. Assuming that appellants could make out any tort claim whatsoever against Lozier based on its alleged involvement with the deck repairs, the statute of limitation on any such claims expired well prior to appellants filing their complaint.

c. Appellants' Consumer Protection Act claim is barred.

Plaintiffs assert the Developer Defendants' actions violated Washington's Consumer Protection Act ("CPA") – RCW Ch. 19.86. CP 24-25. The statute of limitation is four years. RCW 19.86.120.

Burckhard resigned from the Board on May 15, 2001, Sansburn resigned by no later than May 9, 2002, and Sanford resigned by March 24, 2006. There is no allegation that they engaged in any allegedly deceptive acts or omissions with respect to these appellants after their resignation. As explained above, the statute of limitations for any such claims started running by no later than the dates of their resignation.

Further, even if the claims were not time-barred, in residential construction "the mere failure to comply with industry standards does not

constitute a deceptive act or practice under the CPA." *Nguyen v. Doak Homes, Inc.*, 140 Wn. App. 726, 734, 167 P.3d 1162 (2007); *accord* RCW 64.34.100(1) (special and punitive damages barred). All of appellants' claims are premised on the concealment of allegedly defective construction. Because such claims arise out of construction activities, they are also barred by the construction statute of repose (RCW 4.16.310); but even were they not, defective construction is not a CPA violation as a matter of law. *Nguyen*, 140 Wn. App. at 734.

To the extent that appellants seek to recast these claims as even a knowing failure by Board members to pursue the Association's rights, they again argue themselves out of a claim, as such errors or omissions by nonprofit board members do not constitute the conduct of any trade or commerce within the meaning of the CPA. *Short v. Demopolis*, 103 Wn.2d 52, 61-62, 691 P.2d 163 (1984) (alleged failure to pursue claims in a timely manner is not entrepreneurial activity and is exempt from CPA); *accord Office One, Inc. v. Lopez*, 437 Mass. 113, 125, 769 N.E.2d 749, 759 (Mass. 2002) (condominium board activities are not "trade or commerce" under Massachusetts equivalent of CPA). The CPA claims fail.

d. Appellants' Negligent Misrepresentation claim is barred.

Plaintiffs' claim for negligent misrepresentation is subject to a three-year statute of limitations. RCW 4.16.080(4); *Davidheiser v. Pierce County*, 92 Wn. App. 146, 156 n.5, 960 P.2d 998 (1998). Again, from the complaint, appellants or their agents (e.g., the building manager, other owners and the voting Board members) were well aware of any alleged misrepresentations by no later than when Mr. Sanford resigned from the Board in 2006. As explained above, appellants' negligent misrepresentation claim against the Developer Defendants should also be dismissed as barred by the applicable three-year statute of limitations.

Further, "[a]n omission alone cannot constitute negligent misrepresentation, since the plaintiff must justifiably rely on a misrepresentation." *Ross v. Kirner*, 162 Wn.2d 493, 499, 172 P.3d 701 (2007) (citing *Lawyers Title Ins. Corp. v. Baik*, 147 Wn.2d 536, 545, 55 P.3d 619 (2002)). Appellants' complaint is devoid of any allegation that the Developer Defendants ever communicated anything directly or indirectly to any of these appellants. As the Developer Defendants never represented anything to these appellants, they could not have negligently misrepresented anything. This claim was properly dismissed.

e. Appellants' "Fraud by Omission and Misrepresentation" claim is barred.

Plaintiffs' claims for fraud by omission and misrepresentation are also subject to a three-year statute of limitations. RCW 4.16.080(4); *Davidheiser*, 92 Wn. App. at 156 n.5. To establish a claim for fraud, appellants must allege: (1) representation of an existing fact; (2) its materiality; (3) its falsity; (4) the speaker's knowledge of the truth; (5) the speaker's intent that the recipient will rely upon the fact; (6) ignorance on the part of the recipient; (7) reliance on the part of the recipient; (8) the recipient's right to rely; and (9) recipient's resulting damage as a result of his reliance. *Williams v. Joslin,* 65 Wn.2d 696, 697, 399 P.2d 308 (1965). Further, fraud – unlike other causes of action – must be pleaded with particularity. CR 9(b). Generally, allegations made on "information and belief" are inadequate to meet Rule 9's specificity requirements unless the plaintiff shows the factual basis for that belief. *Neubronner v. Milken*, 6 F.3d 666, 671-73 (9th Cir. 1993). Appellants have still failed to explain exactly what was allegedly fraudulent.

As with all the other claims, any alleged concealment ended by no later than the date each Board member resigned, these claims accrued at that time, and the claims (if any) belong to the Association, not the members. Further, to the extent appellants are claiming that the "fraud"

arose from the Developer Defendants' failure to disclose defects in the original construction, such claims are barred by the construction statute of repose regardless of discovery. RCW 4.16.310.

Finally, appellants have not alleged that the Developer Defendants represented anything directly to them, so there could not have been any fraudulent misrepresentation. Regarding fraud by omission, the Board members' alleged duty to disclose ended as of the date of their resignation. Assuming the appellants even have standing to make such claims, any alleged fraud claims are barred.

f. Sanford could not have "conspired" with his alleged principals, but regardless, any such claim is barred.

Plaintiffs' final asserted cause of action alleged that Sanford alone conspired with the declarant Huckleberry and Lozier (and the dismissed inspector Glenn and her company CCW) to prevent the Association from asserting its warranty rights. CP 28-29. This is a derivative claim belonging to the Association, so cannot be pursued. *Lundberg*, 115 Wn. App. at 177. Appellants voluntarily dismissed all of their claims against Glenn and her company, so now the only remaining claim is that Sanford conspired with the declarant Huckleberry and Lozier to prevent the Association from asserting those rights. Generally an agent (i.e., Sanford) cannot "conspire" with its principal (i.e., Huckleberry or Lozier),

and relatedly a non-fiduciary (i.e., Glenn, CCW, Huckleberry or Lozier) cannot conspire with a fiduciary (i.e., Sanford) to breach the fiduciary's duty. *Everest Investors 8 v. Whitehall Real Estate Limited Partnership XI*, 100 Cal. App. 4th 1102, 1104, 123 Cal. Rptr. 2d 297 (2002).

Assuming that there could be any conspiracy, and that these owners had standing to assert the claim, any such claim is time-barred against these defendants, as the last actions alleged to have been taken by any of them occurred no later than March 24, 2006, when Mr. Sanford resigned from the Board. Plaintiffs failed to file their complaint until September 7, 2011, so appellants' civil conspiracy claim is time-barred and should be dismissed for the same reasons explained above.

D. THE DEVELOPER DEFENDANTS OWED NO DUTY TO APPELLANTS AND SUCH APPELLANTS CANNOT SHOW RELIANCE.

The Developer Defendants owed no duty to individual unit owners or to non-owners, and appellants cannot claim to have relied on anything the Developer Defendants did or did not do if the particular appellant purchased its condominium unit after a Board member resigned. Only appellants Kasprzak and Smith purchased their units directly from the declarant Huckleberry Circle, LLC; the remaining appellants all purchased from other unit owners. Thus, only appellants Kasprzak and Smith were ever in contractual privity with the original Declarant. Respondents

Sansburn and Burckhard resigned from the Board before any of the appellants purchased their units. Only half of the appellants owned units during Mr. Sanford's tenure.

The existence of a duty is a question of law. *Favors v. Matzke*, 53 Wn. App. 789, 796, 770 P.2d 686 (1989). Appellants engage in a six-page ramble on whether a duty exists. Appellants' Brief, at 40-46. But the Condominium Act itself explains the duty that exists, and to whom it is owed, and there is no need to look further. RCW 64.34.308. As stated there, "the board of directors shall act in all instances on behalf of the association," not any individual unit owners or future purchasers. RCW 64.34.308. Further, the "membership of the association at all times shall consist ***exclusively*** of all the unit owners." RCW 64.34.300 (emphasis added). The definition of "unit owners" is limited to "a declarant or other person who ***owns*** a unit. . . ." RCW 64.34.030(32) (emphasis added). The use of the present tense "owns" was not accidental, as the WCA distinguishes between current "unit owners" and future "purchasers." *Compare* RCW 64.34.100 (31) ("purchasers") *with* RCW 64.34.100 (42) ("unit owners"); *see also* RCW 64.34.425 (unit owner's duties to future purchasers). Under the WCA, board members only owe duties to the association, which is made up of the unit owners who own units during that member's tenure. *See also* CR 23.1 (derivative

plaintiff must be "a shareholder or member at the time of the transaction of which he complains"); RCW 23B.07.400 (same); *Myer*, 119 S.W.3d at 836-37 (condominium board owes no duty to individual unit owners); *Office One*, 769 N.E.2d at 759 (Mass. 2002) (same).

The gravity of ruling otherwise is especially clear in the case of respondent Burckhard, as he has not been on the Board since 2001. In the meantime, actual unit owners elected other unit owners as Board members, which Board members have taken numerous actions over which Burckhard had no control or knowledge. Mr. Burckhard's short stint on the Board more than a decade before this case was filed should not leave him open in perpetuity to lawsuits from future purchasers, and to rule otherwise would not only be contrary to the WCA, but indeed would likely dissuade any unit owner from ever agreeing to serve on a condominium board. Further, if Board members owed some undefined inchoate duty to unknown future purchasers, that duty might conflict with their statutory duties to the Association, as what might be good for the association of current unit owners that elected them might not sit well with future purchasers, as this case aptly demonstrates.

The Board members owe no duty whatsoever to individual unit owners, but only to the Association. Further, none of these plaintiffs were "unit owners" as defined in the WCA during Messrs. Burckhard's or

Sansburn's tenure, and most of them were not "unit owners" during Mr. Sanford's tenure.

E. RESPONDENTS' SPOUSES SHOULD NOT BE PARTIES.

There are no allegations at all against the Board members' spouses, other than that they are or were married to a Board member. Their presence is not needed to create community liability if it exists. *DeElche v. Jacobson*, 95 Wn.2d 237, 246-47, 622 P.2d 835 (1980). Dismissal of these defendants should be affirmed even if any claims against the Board members survive.

V. ARGUMENT ON CROSS-APPEAL

As explained above, appellants' allegations against the Developer Defendants were facially without merit:

> In any civil action, the court having jurisdiction may, upon written findings by the judge that the action ... was frivolous and advanced without reasonable cause, require the nonprevailing party to pay the prevailing party the reasonable expenses, including fees of attorneys, incurred in opposing such action. . . . The judge shall consider all evidence presented at the time of the motion to determine whether the position of the nonprevailing party was frivolous and advanced without reasonable cause.

RCW 4.84.185. The trial court abused its discretion in failing to award reasonable attorneys fees to the Developer Defendants.

"The decision to award frivolous litigation attorney fees is within the discretion of the trial court and will not be disturbed absent a clear showing of abuse." *Reid v. Dalton*, 124 Wn. App. 113, 125, 100 P.3d 349 (2005). Where claims asserted against certain defendants are frivolous, even though claims against other defendants may not be, those defendants who were frivolously named should be awarded attorneys' fees separately under RCW 4.84.185. *Camer v. Seattle School Dist.*, 52 Wn. App. 531, 539, 762 P.2d 356 (1988). Moreover, "[n]othing in the statute requires a court to find that the action was brought in bad faith or for purposes of delay or harassment." *Highland Sch. Dist. v. Racy*, 149 Wn. App. 307, 311, 202 P.3d 1024 (2009).

Appellants' complaint, though voluminous and filled with hyperbole, was fraught with fatal and obvious defects, as argued further above. Appellants' own pre-filing investigation contradicted the allegations. This dissident minority of unit owners should be made to pay the Developer Defendants' costs and attorneys fees for defending against these frivolous claims.

If the trial court's decision denying fees is reversed, the Developer Defendants further request an award of fees on appeal, as an appeal making the same arguments is equally frivolous. RAP 18.9.

VI. CONCLUSION

For the reasons set forth above, respondents Sanford, Sansburn, Burckhard and Lozier request that the Court affirm the trial court's order of dismissal, reverse the trial court's decision not to award fees, and award these respondents their reasonable attorneys fees and costs below and on appeal to be determined by later application.

DATED this 4th day of June, 2013.

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CERTIFICATE OF SERVICE

The undersigned certifies that on this 4th day of June, 2013, I caused to be served the foregoing document to:

Leonard Flanagan Justin Sudweeks Daniel Houser Stein, Flanagan, Sudweeks & Houser, PLLC 901 5th Ave., Ste. 3000 Seattle, WA 98164 Attorneys for Appellants	☒ via hand delivery ☐ via first class mail ☐ via email
Andrew H. Salter Lybeck Murphy LLP 7900 S.E. 28th St., Floor 5 Mercer Island, WA 98040-6005 Attorneys for Respondents Diane Glenn and Construction Consultants of Washington, LLC	☐ via hand delivery ☒ via first class mail ☐ via email.

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

COURT OF APPEALS DIV I
STATE OF WASHINGTON
2013 JUN -4 PM 4:26

DATED this 4th day of June, 2013, at Seattle, Washington.

Gillian Fadaie

SEADOCS:456641.1