FILED
Court of Appeals
Division I
State of Washington
2/25/2019 12:03 PM

No. 77017-9-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

SHAMIM MOHANDESSI; JOSEPH GRACE, individually as residential owners and derivatively on behalf of 2200 RESIDENTIAL ASSOCIATION, a Washington non-profit corporation, and derivatively on behalf of 2200 CONDOMINIUM ASSOCIATION, a Washington non-profit corporation

Appellants/Cross-Respondents,

v.

URBAN VENTURE, LLC, a Washington limited liability company; VULCAN, INC., a Washington corporation; 2200 Condominium Association, a Washington non-profit corporation; GARY ZAK, an individual; BRIAN CROWE, an individual; BRANDON MORGAN, an individual; 2200 RESIDENTIAL ASSOCAITON, a Washington non-profit corporation; and JOHN DOES 1-15, individuals or entities,

Respondents/Cross-Appellants.

BRIEF OF AMICUS CURIAE
COMMUNITY ASSOCIATIONS INSTITUTE

Anthony L. Rafel, WSBA No. 13194
RAFEL LAW GROUP PLLC
4126 E. Madison St., Ste. 202
Seattle, WA 98112
Main 206.838.2660
Fax 206.838.2661

Attorneys for Amicus Curiae Community Associations Institute

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I. INTRODUCTION

Unit owners in a condominium formed under the Washington Condominium Act ("WCA"), RCW chapter 64.34, such as plaintiffs herein, do not have the right to bring derivative actions on behalf of the association.[1] The WCA does not authorize derivative actions and such actions are unnecessary given the robust protections granted to owners therein. Any decision to allow derivative actions by condominium owners should be left to the legislature after full consideration of the potential harm to condominium communities.

II. IDENTITY AND INTEREST OF AMICUS CURIAE

Community Associations Institute ("CAI") is an international organization dedicated to providing information, education, resources and advocacy for community association leaders, members and professionals with the intent of promoting successful communities through effective, responsible governance and management. CAI's more than 39,000 members include homeowners, board members, association managers, community management firms, and other professionals who provide services to community associations. CAI is the largest organization of its kind, serving more than 69 million homeowners who live in more than

[1] The 2200 Condominium and 2200 Residential Condominium were created in 2006 (CP 10045, 10107) and are governed by the WCA. *See* RCW 64.34.010(1).

380,000 community associations in the United States. See www.caionline.org.

There are 63 CAI chapters throughout the United States and abroad. Among them is the Washington State Chapter ("WSCAI"), which was founded in 1973. With more than 2,000 members, WSCAI is CAI's second-largest chapter. See www.wscai.org. CAI and WSCAI have a demonstrated interest in promoting good governance in condominium communities and avoiding unnecessary and expensive litigation.

III. STATEMENT OF THE CASE

CAI adopts Respondent 2200 Residential Association's Restatement of the Case and the Counter-Statement of the Case submitted by Respondents 2200 Condominium Association, Gary Zak, Brian Crowe, and Brandon Morgan.

IV. ARGUMENT

The Court should reject plaintiffs' invitation to find or imply a common law right on the part of condominium unit owners to bring derivative actions on behalf of their condominium associations. First, the legislature has not granted condominium owners a right to bring derivative actions and such actions are unnecessary since owners have the right to sue directly for breach of fiduciary duty by directors. Second, the WCA provides other protections for condominium owners that go well beyond

what members and shareholders of non-condominium nonprofit corporations and for-profit corporations enjoy. Third, condominium communities are ill equipped to handle derivative actions and would be harmed if derivative actions were allowed; any such determination should be left to the legislature.

A. The Condominium Act Does Not Authorize Derivative Actions and Such Actions Are Unnecessary Because Owners Have the Right to Sue Directly for Breach of Fiduciary Duty

"Derivative suits are disfavored and may be brought only in exceptional circumstances." *Haberman v. Washington Pub. Power Supply Sys.*, 109 Wn.2d 107, 147, 744 P.2d 1032, 1060 (1987), *amended,* 109 Wn.2d 107, 750 P.2d 254 (1988). Like the Washington Nonprofit Corporation Act, addressed in respondents' briefs, the Washington Condominium Act, RCW chapter 64.34, does not expressly or impliedly authorize derivative actions.

RCW 64.34.455 gives individual persons and classes of persons a right of action to redress any failure to comply with the WCA or the condominium's governing documents. It provides as follows:

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

This robust provision gives unit owners adversely affected by the failure of "any person subject to this chapter" to comply with any provision of the WCA or any provision of the declaration or bylaws the right to assert a claim for appropriate relief. It does not, however, grant a right to bring a derivative action on behalf of the association.

Directors and officers of a condominium association are persons "subject to" RCW chapter 64.34. The chapter specifies the powers and duties of directors and officers. RCW 64.34.308, .304. It provides among other things that, in the performance of their duties, directors and officers appointed by the declarant are required to exercise "the care required of fiduciaries of the unit owners," while those elected by the unit owners are required to exercise "ordinary and reasonable care." RCW 64.34.308(1). Moreover, it requires that those duties be performed in good faith: "Every contract or duty governed by this chapter imposes an obligation of good faith in its performance or enforcement." RCW 64.34.090. Accordingly, the failure of a director or officer to discharge his or her duties faithfully and in good faith in accordance with the standard of care prescribed by RCW 64.34.308 is a predicate for an action by an adversely affected owner under RCW 64.34.455 for "appropriate relief." Such action can be brought by a single owner or by a "class of persons" adversely affected by the director's or officer's failure to comply with the statutory standard.

In for-profit corporations, by contrast, shareholders do not have the right of action provided by the WCA; they lack standing to sue for breach of duties owed to the corporation. This justifies resort to the derivative form of action to redress harm. "Ordinarily, a shareholder cannot sue for wrongs done to a corporation, because the corporation is viewed as a separate entity, and the shareholder's interest is too remote to meet the standing requirements. However, because of the possibility of abuse by the officers and directors of a corporation, a narrow exception has been created for shareholders to bring derivative suits on behalf of the corporation." *Gustafson v. Gustafson*, 47 Wn. App. 272, 276, 734 P.2d 949, 953 (1987).

Under the WCA, however, unit owners have standing to sue the association and its directors directly for harm caused by breach of fiduciary duty. *See, e.g., Alexander v. Sanford*, 181 Wn. App. 135, 140-41, 325 P.3d 341 (2014), *rev. granted*, 181 Wn.2d 1022 (2014) (18 owners sued individual board members "for breach of the board member duty of care," among other claims); *Lisali Revocable Trust v. Tiara de Lago Homeowners' Association*, 155 Wn. App. 1043 (Div. I 2010) (unpublished; cited pursuant to GR 14.1) (breach of fiduciary duty asserted against "Board and its members in their individual capacities"); *Nuner v. Mitchell*, 120 Wn. App. 1021 (Div. I 2004) (unpublished; cited

pursuant to GR 14.1); *Rubin v. Juanita Shores Condominium Owner's Association*, 130 Wn. App. 1028 (Div. I 2005) (unpublished; cited pursuant to GR 14.1);.

It is therefore incorrect for plaintiffs to assert that, in the absence of a derivative action, owners lack "standing to sue those who breach their fiduciary duties" (App. Br. 27). It is likewise incorrect to say that "owner members could face significant losses with no possible redress and the tortfeasor could wrongfully profit" (App. Br. 32). The WCA provides a direct right of action to unit owners to redress such harms. Unit owners need not step into the shoes of the association to protect their interests, individually or collectively.

The WCA is a comprehensive statutory scheme that defines the rights and obligations of unit owners and expressly addresses the manner in which persons affected by both statutory and governing document violations may enforce their rights and seek redress. It does not authorize unit owners or other persons to bring suit on behalf of the condominium association derivatively. It does authorize suits by the association itself. RCW 64.34.304(1)(d).

"Under the age old rule expressio unius est exclusio alterius, [w]here a statute specifically designates the things upon which it operates, there is an inference that the Legislature intended all omissions." *State v.*

LG Elecs., Inc., 186 Wn.2d 1, 9, 375 P.3d 636, 640 (2016) (internal quotation marks omitted). The Court "must not add words where the legislature has chosen not to include them." *City of Seattle v. Swanson*, 193 Wn. App. 795, 810, 373 P.3d 342, 350 (2016) (citations omitted). Accordingly, the Court should not read authorization for derivative actions into the WCA, where the legislature has chosen not to include it. *See also America v. Sunspray Condominium Association*, 61 A.3d 1249, 1255 (Me. 2013) ("Given that a derivative suit is 'an extraordinary process,' we will not infer that one is authorized when the Legislature has not so provided by statute.") (internal citation omitted).[2]

Notably, derivative actions are not authorized in the newly-adopted Washington Uniform Common Interest Ownership Act ("WUCIOA"), either. WUCIOA applies to all condominiums and other common interest communities created on or after July 1, 2018. RCW 64.90.075(1). The statutory right of action to enforce obligations imposed by WUCIOA does

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[2] Under the WCA, principles of law and equity including the law of corporations "or other validating or invalidating cause" supplement the WCA, "except to the extent inconsistent" with the chapter. RCW 64.34.070. A derivative action is not a validating or invalidating cause; it is a procedural device. Also, given the inclusion of RCW 64.34.455 granting adversely affected unit owners the right to bring actions individually or as a class against directors an officers for breach of fiduciary or other duties, derivative actions would be inconsistent with the statutory scheme. For both reasons, derivative action procedure does not supplement the provisions of the WCA.

not include the right to proceed by way of a derivative or representative action. See RCW 64.90.685(1).

The legislature is "presumed to know the existing state of the case law in those areas in which it is legislating." *Woodson v State*, 95 Wn.2d 257, 262, 623 P.2d 683 (1980). When it adopted WUCIOA in 2018, the legislature therefore knew that in *Lundberg ex rel. Orient Foundation v. Coleman*, 115 Wn. App. 172, 177, 60 P.3d 595 (2002), *rev. den.*, 150 Wn.2d 1010 (2003), the Court of Appeals had rejected a generalized right on the part of nonprofit corporation members to bring derivative actions, allowing them only in the narrow circumstance specified in RCW 24.03.040(2). "If the legislature does not register its disapproval of a court opinion, at some point that silence itself is evidence of legislative approval." *In re Custody of A.F.J.*, 179 Wn.2d 179, 186, 314 P.3d 373, 376 (2013). The legislature had the opportunity when it adopted WUCIOA to include a right on behalf of community association members to bring a derivative action, if it believed that the decision in *Lundberg* was incorrect or a departure from sound public policy. It did not do so, thus indicating its implied approval of the holding in *Lundberg*.

B. <u>The WCA Provides Condominium Owners with Robust Means to Protect Their Interests</u>

The principal purpose of a derivative action is to protect the corporation from unscrupulous directors and officers. "Devised as a suit in equity, the purpose of the derivative action was to place in the hands of the individual shareholder a means to protect the interests of the corporation from the misfeasance and malfeasance of 'faithless directors and managers.'" *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 95, 111 S. Ct. 1711, 1716, 114 L. Ed. 2d 152 (1991) (citing *Cohen v. Beneficial Loan Corp.*, 337 U.S. 541, 548, 69 S.Ct. 1221, 1226, 93 L.Ed. 1528 (1949)).

The WCA has other, equally effective democratic safety-valves to protect condominium owners from "faithless directors." First, without-cause removal of directors is guaranteed in condominium associations. RCW 64.34.308(8) provides as follows:

> Notwithstanding any provision of the declaration or bylaws to the contrary, the unit owners, by a two-thirds vote of the voting power in the association present and entitled to vote at any meeting of the unit owners at which a quorum is present, may remove any member of the board of directors with or without cause, other than a member appointed by the declarant.

This provision gives unit owners a statutory right to remove directors with or without cause on a two-thirds vote, notwithstanding any provision in the governing documents to the contrary. Nor can the right be withdrawn

by agreement. *See* RCW 64.34.030 ("Except as expressly provided in this chapter, provisions of this chapter may not be varied by agreement, and rights conferred by this chapter may not be waived."). This is an example of the WCA's "strong consumer protection flavor." *One Pacific Towers Homeowners' Association v. HAL Real Estate Investments, Inc.*, 148 Wn.2d 319, 330, 61 P.3d 1094 (2002). Unit owners may call a special meeting to vote on removal of a director on a petition of twenty percent (20%) of the ownership. RCW 64.34.332.

In non-condominium nonprofit corporations, by contrast, the bylaws or articles of incorporation may permit removal of directors only for cause. *See* RCW 24.03.103. The same is true in for-profit corporations, if the articles so provide. *See* RCW 23B.08.080.

Second, the voting power of condominium owners is protected against dilution. The condominium declaration must allocate a portion of the votes in the association to each unit and state the formula used to establish the allocation. RCW 64.34.224(1). A prospective unit purchaser may, by consulting the recorded declaration (which must be included in the public offering statement, RCW 64.34.410(2)), determine exactly what his or her voting percentage will be. An owner's voting percentage can change only if the declarant has reserved in the declaration the right to add

or withdraw units and stated the number of such units and the formula by which any reallocation will occur. RCW 64.34.216(1)(c); 64.34.224(2).

By contrast, in a non-condominium nonprofit corporation, "[t]he right of the members, or any class or classes of members, to vote may be limited, enlarged or denied to the extent specified in the articles of incorporation or the bylaws." RCW 24.03.085(1). Similarly, in for-profit corporations, the articles of incorporation may provide for non-voting shares, RCW 23B.07.210, and voting rights can be diluted simply by the issuance of additional shares within a share class. Also, while the WCA provides that surplus association funds must be distributed or credited to owners unless the declaration provides otherwise, RCW 64.34.356, non-condominium nonprofits cannot make disbursements of income to their members, RCW 24.03.030(2).

Third, as discussed above, the WCA grants a right of action to any person adversely affected by the failure of a person subject to the Act to comply with any provision thereof or any provision in the declaration or bylaws. This statutory right of action and standing markedly distinguishes condominium owners from members in a non-condominium nonprofit corporation or shareholders in a for-profit corporation, who ordinarily lack standing to sue directors and officers for breach of duty to the corporation. *See Sabey v. Howard Johnson & Co.*, 101 Wn. App. 575, 584-85, 5 P.3d

730, 735 (2000) ("Ordinarily, a shareholder cannot sue for wrongs done to a corporation, because the corporation is a separate entity: the shareholder's interest is viewed as too removed to meet the standing requirements. Even a shareholder who owns all or most of the stock, but who suffers damages only indirectly as a shareholder, cannot sue as an individual.") (footnotes omitted).

In a condominium association, a derivative action for breach of fiduciary duty against a director is unnecessary because each owner has a statutory right to seek relief without having to make a showing of injury "separate and distinct from that suffered by other shareholders," as a for-profit shareholder would have to do. *See Sabey*, 101 Wn. App. at 585. As a result, the absence of derivative litigation in condominium associations in no way eliminates director accountability. Indeed, the right to seek "appropriate relief" extends beyond individual owners to any "class of persons adversely affected" by a failure to comply with the WCA or the condominium declaration or bylaws. RCW 64.34.455. A class of claimants consisting of all unit owners other than the allegedly errant directors or officers can thus in a proper case achieve a full recovery for all unit owners, other than the fraction held by the errant directors themselves. A derivative action is unnecessary to prevent "a failure of

justice." Karl B. Tegland, Derivative Actions by Shareholders, 3A Wash. Prac., Rules Practice CR 23.1 (6th ed. 2018).

C. Derivative Actions, if Allowed, Would Harm Condominium Communities; Any Such Decision Should be Left to the Legislature

Derivative actions are disfavored, inconsistent with the Washington Condominium Act, and unnecessary given the unit-owner protections embodied in the WCA. Beyond these considerations, allowing derivative actions by condominium owners would create great mischief and disserve the public interest.

In the first place, whether condominium association members should be permitted to add derivative actions to their existing arsenal of remedies against "faithless directors" is a question for the legislature, not the court. *See State v. Alvarez*, -- Wn. App. --, 430 P.3d 673, 676 (2018). This is particularly so given available evidence of the legislature's intent: In 1967, the legislature departed from the Model Act when it elected not to include derivative actions in Washington's version of the Nonprofit Corporation Act; in 1990, the legislature did not include a right to derivative action in the Condominium Act; and in 2018 it did not include a right to derivative action in the Washington Uniform Common Interest Ownership Act.

Further, allowing derivative actions to be brought by unit owners on behalf of condominium associations would allow owners to sidestep the protections built into the WCA for addressing director malfeasance – removal of directors, special meetings, suits for damages – and encourage expensive, complex adversarial litigation by neighbors against neighbors. Condominium directors and officers are almost always volunteers: unit owners willing to give their time without compensation to help manage their associations for a few years, before rotating off the board when their terms expire. Community volunteers are ill-equipped to handle complex derivative actions.

Condominium associations should not be "hijacked" into asserting third-party claims when the duly elected board of directors determines it is not in the best interests of their associations to do so. Condominium board decisions are ordinarily protected by the business judgment rule. *See Schwartzmann v. Association of Apartment Owners of Bridgehaven*, 33 Wn. App. 397, 401-02, 655 P.2d 1177 (1982). In fact, a condominium board's authority to decline enforcement action in a given case is now expressly recognized in WUCIOA. *See* RCW 64.90.405(8).[3]

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[3] RCW 64.90.405(8) states: "The board does not have a duty to take enforcement action if it determines that, under the facts and circumstances presented: (a) The association's legal position does not justify taking any or further enforcement action; (b) The covenant, restriction, or rule being enforced is, or is likely to be

Nor should condominium associations be forced into coercive settlements to avoid even more significant depletion of operating and reserve funds needed to operate and maintain the condominium building and improvements. *See* Karl Tegland, 3A Wash. Prac., Rules Practice CR 23.1 (6th ed. 2018) ("this type of litigation can also be used to harass corporate officers and directors into settlements favorable to the plaintiffs, at the expense of degrading corporate assets that are the common property of all shareholders") (quoting Baicker-McKee, Janssen, and Corr, Federal Civil Rules Handbook, Rule 23.1 (2006 ed.)). Derivative actions could be financially fatal to condominium associations unwillingly launched into litigation they cannot afford, the potential benefits of which may be dubious or non-existent. Any decision to impose the burden of such litigation on condominium associations should be left to the legislature.

V. CONCLUSION

The Washington Condominium Act provides robust remedies to individual condominium owners and classes of owners to redress harm resulting from director malfeasance. Derivative actions are not authorized

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construed as, inconsistent with law; (c) Although a violation may exist or may have occurred, it is not so material as to be objectionable to a reasonable person or to justify expending the association's resources; or (d) It is not in the association's best interests to pursue an enforcement action."

by the Act and are not necessary to protect owners. Any decision to allow derivative actions should be left to the legislature, after consideration of the harmful consequences to volunteer-led condominium associations.

DATED: February 25, 2019.

RAFEL LAW GROUP PLLC

By: ______________________________
Anthony L. Rafel, WSBA #13194

Attorneys for Amicus Curiae Community Association Institute

RAFEL LAW GROUP

February 25, 2019 - 12:03 PM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	77017-9
Appellate Court Case Title:	Shamim Mohandessi and Joseph Grace, Apps/Cross-Res. v. Urban Venture, LLC, et al., Res/Cross-Apps.
Superior Court Case Number:	15-2-26687-0

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