IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

MICHAEL G. GUSA; and WILLIAM R. HOUGHTALING and MARGARET HOUGHTALING, Appellants, v. BARNES LAKE PARK OWNERS ASSOCIATION, Respondent.	No. 39928-8-II UNPUBLISHED OPINION

Worswick, A.C.J. — Michael Gusa appeals the trial court's decision dismissing his counterclaims against Barnes Lake Park Owners Association (Association) and awarding attorney fees against him. The Association sued Gusa for failure to pay past assessments on his condominium. Gusa filed counterclaims alleging that the Association's failure to repair water intrusion into his unit breached statutory and contractual duties. The trial court granted summary judgment for the Association, finding that article XXI of the condominium declaration disclaimed

the Association's liability for water intrusion and dismissing Gusa's counterclaims. The trial court subsequently entered a judgment against Gusa, ordering him to pay the past due assessments and the Association's attorney fees, and finding that Gusa would be responsible for the cost of repairs that benefitted only his unit. Gusa appeals, arguing that (1) the trial court erred by interpreting article XXI as exculpating the Association's liability for negligence; (2) article XXI, if interpreted as an exculpatory clause, is invalid under the contract law doctrines of illusory promise, public policy, unconscionability, and failure to negotiate; and (3) the trial court's award of attorney fees for a denied motion was improper.[1] We do not address whether article XXI exculpated the Association from negligence because Gusa did not plead negligence below. We further hold that the condominium declaration is not a contract subject to common law contract defenses and that the award of attorney fees was proper. We affirm the trial court's dismissal of Gusa's counterclaims and its award of fees.

FACTS

The Barnes Lake Park condominiums were created in 1975. Gusa owns unit 11. In 2005, Gusa began paying his condominium assessment fees sporadically, and he ceased altogether in 2006. In August 2007, the Association sued Gusa to collect past due assessments by foreclosing on his unit. The Association subsequently amended its complaint to request money damages as well. Gusa filed counterclaims alleging that the Association had breached statutory and

[1] For the first time in his reply brief, Gusa also challenges the trial court's ruling that the cost of future repairs to his unit would be assessed to him. We decline to address this issue. *St. Joseph Gen. Hosp. v. Dep't of Revenue*, 158 Wn. App. 450, 473, 242 P.3d 897 (2010) ("A court may refuse to consider an argument raised for the first time in a reply brief.").

contractual duties by failing to repair the outer structure of his unit and allowing water intrusion. Gusa requested money damages, injunctive relief,[2] and attorney fees.

The Association argued that although it was required under the condominium declaration to repair the outer structure of Gusa's unit, article XXI of the condominium declaration[3] exculpated the Association from liability for water intrusion.[4]

The Association moved for summary judgment, which the trial court denied, ruling that it was first necessary to resolve Gusa's counterclaims.[5] The Association then moved for partial summary judgment on Gusa's counterclaims, which the trial court granted, dismissing Gusa's

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[2] At oral argument before this court, Gusa argued that the trial court erred by failing to grant injunctive relief ordering the Association to repair his unit. We may decline to consider issues not briefed on appeal. *See Satomi Owners Ass'n v. Satomi, LLC*, 167 Wn.2d 781, 808, 225 P.3d 213 (2009). Because Gusa did not brief the issue of injunctive relief, we do not consider it.

[3] A condominium declaration is a recorded real property instrument that creates condominium property and sets forth the basic rules governing the property. *See* RCW 64.32.090; RCW 64.34.200; RCW 64.34.216.

[4] Article XXI provides:

> The Board shall not be liable for any failure of any utility or other service to be obtained and paid for by the Board, or for injury or damage to person or property caused by the elements, or resulting from electricity, water, rain, dust or sand which may lead or flow from outside or from any parts of the buildings, or from any of its pipes, drains, conduits, appliances, or equipment, or from any other place. No diminution or abatement of common expense assessments shall be claimed or allowed for inconveniences or discomfort from any action taken to comply with any law, ordinance, or orders of a governmental authority. This exemption and limitation of liability extends to the entire Association as well as the Board. This section shall not be interpreted to pose any form of liability by any implication upon the Board or the Association.

[5] The Association sought discretionary review of this denial of summary judgment, which this court denied. Ruling Denying Review, *Barnes Lake Park Owners Ass'n v. Gusa*, No. 37445-5 (Wn. Ct. App. May 15, 2008).

counterclaims for damages.

The trial court later entered judgment for the Association, requiring Gusa to pay past due assessments and the Association's attorney fees. In calculating the attorney fees award, the trial court reviewed detailed itemized records from the Association's attorneys. The trial court included fees relating to the Association's first motion for summary judgment and excluded fees relating to the Association's seeking discretionary review of the order denying that motion. Gusa appeals.

ANALYSIS

I. Standard of Review

We review an order for summary judgment de novo, conducting the same inquiry as the trial court. *See Lake v. Woodcreek Homeowners Ass'n*, 169 Wn.2d 516, 526, 243 P.3d 1283 (2010) (quoting *Berrocal v. Fernandez*, 155 Wn.2d 585, 590, 121 P.3d 82 (2005)). Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c).

A condominium declaration is not a contract, but rather it is a document that unilaterally creates a type of real property. *See Bellevue Pac. Ctr. Condo. Owners Ass'n v. Bellevue Pac. Tower Condo. Ass'n*, 124 Wn. App. 178, 188, 100 P.3d 832 (2004). A condominium declaration is like a deed, and our review is a mixed question of law and fact. *Lake*, 169 Wn.2d at 526. The factual issue is the declarant's intent, which we discern from the face of the declaration. *Lake*, 169 Wn.2d at 526. The legal issue is the declaration's legal consequences, which we review de novo. *Lake*, 169 Wn.2d at 526.

II. Interpretation of Article XXI

Gusa argues that the trial court erred by interpreting article XXI of the condominium declaration as exculpating the Association from liability for water intrusion that was caused by the Association's failure to meet its duty under the declaration to repair the outer structure of his unit. Gusa argues that article XXI is ambiguous, and under the Washington Condominium Act (WCA), chapter 64.34 RCW, ambiguities must be resolved against the Association. And Gusa argues that under the WCA's strong policy protecting condominium owners, article XXI must not be interpreted to disclaim the Association's liability for negligently failing to repair the outer structure of his unit.

To begin, we note that most provisions of the WCA apply only to condominiums created after July 1, 1990. RCW 64.34.010(1). The Barnes Lake condominiums were created in 1975, and thus the prior condominium statute, the Horizontal Property Regimes Act (HPRA), chapter 64.32 RCW, applies. RCW 64.32.020. Our Supreme Court has held that when the HPRA applies, condominium declarations should be interpreted in light of the HPRA's provisions. *See Lake*, 169 Wn.2d at 530. There is no authority for looking to the general policy behind the WCA to interpret declarations governed by the HPRA.

More importantly, Gusa failed to plead negligence below. We may refuse to consider claims raised for the first time on appeal. RAP 2.5(a). We therefore do not consider Gusa's claim on this point. Because the issue is not properly before us, we do not decide whether article XXI immunizes the Association from liability for negligence, nor whether condominium declarations may validly immunize a condominium association from liability for negligence.[6]

III. Contract Claims

Gusa argues that assuming the trial court correctly found article XXI to exculpate the Association from liability, article XXI is invalid. Gusa bases this argument on a series of common law contract doctrines. Gusa first argues that interpreting article XXI as an exculpatory clause made the Association's duty to repair illusory.[7] He also argues that the declaration was invalid under the doctrine that a party may not disclaim negligence by contract when doing so violates public policy.[8] Gusa further argues that the declaration was unconscionable.[9] And Gusa finally argues that article XXI was void under the doctrine that contractual disclaimers of negligence in consumer transactions are void when not explicitly negotiated.[10] Because a condominium declaration is not a contract, we hold that these doctrines do not apply and Gusa's claims fail.

Gusa urges throughout his briefs that condominium declarations are subject to the

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[6] Gusa also argues that the Association is liable for abusing its discretion by unreasonably failing to repair his unit. Even assuming that "abuse of discretion" is a valid cause of action, Gusa raises this claim for the first time on appeal. Therefore, as with his negligence claim, we do not consider it.

[7] The illusory promise doctrine renders contracts unenforceable when one party is not truly obligated to perform. *Korslund v. DynCorp Tri-Cities Servs.*, *Inc.*, 121 Wn. App. 295, 326, 88 P.3d 966 (2004) (quoting *Stewart v. Chevron Chem. Co.*, 111 Wn.2d 609, 613, 762 P.2d 1143 (1988)).

[8] This doctrine is set forth in *Vodopest v. MacGregor*, which outlines a six-part test to determine whether a contractual disclaimer of negligence contravenes public policy. 128 Wn.2d 840, 854-55, 913 P.2d 779 (1996).

[9] Unconscionability is a generally applicable contract defense which renders a contract void where one party lacked meaningful choice in the terms of the bargain or where the contract terms are unreasonably harsh or one-sided. *Satomi Owners Assn*, 167 Wn.2d at 813-15.

[10] *See Torgerson v. One Lincoln Tower*, *LLC*, 166 Wn.2d 510, 522, 210 P.3d 318 (2009).

common law of contracts. Gusa misleadingly cites *Lake Limerick Country Club v. Hunt Manufactured Homes*, *Inc.*, 120 Wn. App. 246, 255-56, 84 P.3d 295 (2004), for the proposition that "[I]t is well established that condominium declarations are interpreted under contract principles." Br. of Appellant at 19. *Lake Limerick* held that *equitable servitudes* may be *created* by contract as well as by deed. 120 Wn. App. at 255-56. It provides no support whatsoever for Gusa's claim that the common law of contracts applies to condominium declarations. Moreover, the doctrines that Gusa raises are not doctrines of interpretation, they are more accurately characterized as defenses to the enforceability of contracts. As we noted above, a condominium declaration is not a contract; rather it is a document that unilaterally creates a type of real property. *See Bellevue Pac. Ctr. Condo. Owners Ass'n*, 124 Wn. App. at 188. There is no authority suggesting that the contract law doctrines that Gusa raises apply to declarations.

"A contract is a promise or set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty." Restatement (Second) of Contracts §1 (1981); *accord Washington Fed'n of State Employees, AFL-CIO, Council 28, AFSCME v. State*, 101 Wn.2d 536, 549, 682 P.2d 869 (1984). In contrast, declarations are not promises between parties, but are recorded real property instruments. *Bellevue Pac. Ctr. Condo. Owners Ass'n*, 124 Wn. App. at 188. And condominium owners are not bound to declarations under the same rules as parties to a contract. Rather, owners have the power to amend a declaration by vote. *See* RCW 64.32.090(13); RCW 64.34.264(1). Here, in fact, the Barnes Lake Park declaration may be amended with the consent of 75 percent of the owners.

Based on these distinctions, it would not make sense to extend general common law contract doctrines to condominium declarations. The doctrines that Gusa cites relate to the fairness of agreements between parties. We see no reason to extend these doctrines to condominium declarations, which are *not* agreements between parties. We are not impressed by Gusa's dramatic claims that failing to apply these doctrines will render the declaration a "suicide pact" or lead to the destruction of the condominium ownership form. Br. of Appellant at 15. Owners are empowered to correct any unfairness in a declaration. And they have strong incentives to do so, given that they each have an ownership stake in the property. We reject Gusa's argument that article XXI is void under the cited common law contract doctrines and affirm the trial court's grant of summary judgment against Gusa's counterclaims.

IV. Attorney Fees on Failed Motion

Gusa finally argues that the trial court erred by awarding the Association its attorney fees for the Association's first summary judgment motion, which the trial court denied. The Association argues that the attorney fees were appropriate because the overall claim was successful. The Association is correct.

While the trial court did not detail the method it used to calculate the attorney fees here, attorney fees in Washington are generally calculated using the lodestar method. *San Juan County v. No New Gas Tax*, 160 Wn.2d 141, 171, 157 P.3d 831 (2007). Under this method, when calculating fees, a trial court should exclude time spent on unsuccessful theories or claims, duplicated or wasted effort, or otherwise unproductive time. *Chuong Van Pham v. Seattle City Light*, 159 Wn.2d 527, 538, 151 P.3d 976 (2007). "In order to reverse an attorney fee award, an

appellate court must find the trial court manifestly abused its discretion." *Chuong Van Pham*, 159 Wn.2d at 538. A trial court abuses its discretion when it adopts a position that no reasonable person would take, when it applies the wrong legal standard, or when it relies on unsupported facts. *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 669, 230 P.3d 583 (2010).

In order to calculate the attorney fees here, the trial court reviewed detailed itemized records. The trial court excluded fees relating to the Association's seeking discretionary review of the denial of its first summary judgment motion, but it did not exclude fees relating to the denied motion itself.

The trial court properly included fees relating to the first summary judgment motion because the motion pertained to an ultimately successful claim. The Association's failed summary judgment motion sought to recover Gusa's unpaid assessments. The trial court denied the motion, but only because the trial court found it necessary to address Gusa's counterclaims first. The Association later prevailed on the merits, obtaining a judgment against Gusa for the unpaid assessments. As such, the time spent on this motion was not spent on an unsuccessful theory or claim. It may be arguable that this time was "wasted effort" or "otherwise unproductive," but we do not reverse an attorney fee award absent a manifest abuse of discretion. Because the matter is arguable, the trial court did not abuse its discretion and we affirm the award of attorney fees.

ATTORNEY FEES ON APPEAL

Both parties request attorney fees on appeal. Gusa requests attorney fees on appeal for the first time in his reply brief. Under RAP 18.1(b), a party must set forth a request for attorney fees on appeal in its opening brief. Failure to do so renders the request for fees untimely. *See King v. Rice*, 146 Wn. App. 662, 673, 191 P.3d 946 (2008). Gusa's request is therefore untimely and we do not consider it.

The Association requests attorney fees on appeal under RCW 64.34.364.[11] RCW 64.34.364(14) provides that an association may recover reasonable costs and attorney fees "incurred in connection with the collection of delinquent assessments" and if the association "prevails on appeal." "Courts decline to award attorney fees under a statute unless there is a clear expression of intent from the legislature authorizing such an award." *In re Marriage of Freeman*, 169 Wn.2d 664, 676, 239 P.3d 557 (2010). This appeal arose from the denial of Gusa's counterclaims. These counterclaims were based on the Association's purported duties to repair the outer structure of Gusa's unit. They were not connected with the Association's attempts to collect Gusa's delinquent assessments. Hence, the Association is not entitled to attorney fees on appeal under RCW 64.34.364(14).

The Association also argues that it is entitled to attorney fees on appeal under RCW 64.34.455.[12] This section provides that the prevailing party may recover attorney fees in a case

[11] This section of the WCA applies retroactively to condominiums created before July 1, 1990. RCW 64.34.010(1).

[12] This section of the WCA also applies retroactively to condominiums created before July 1, 1990. RCW 64.34.010(1).

based on failure to comply with any provision of the WCA "or any provision of the declaration or bylaws." RCW 64.34.455. Gusa's counterclaims were based on the Association's failure to comply with the declaration. The Association has prevailed on these claims, and we award it attorney fees under RCW 64.34.455.

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Worswick, A.C.J.

We concur:

Quinn-Brintnall, J.

Van Deren, J.