IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

BELLEVUE PACIFIC CENTER LIMITED PARTNERSHIP, a Washington limited partnership, Respondent, v. BELLEVUE PACIFIC TOWER CONDOMINIUM OWNERS ASSOCIATION, a Washington non-profit corporation, Appellant.	)	No. 67267-3-I DIVISION ONE PUBLISHED IN PART FILED: October 29, 2012

Cox, J. — At issue in this case is the right to control nine parking spaces located in the courtyard at the main entrance of the Bellevue Pacific Tower Condominium. The trial court properly granted partial summary judgment to Bellevue Pacific Center Limited Partnership (LP), dismissing with prejudice the counterclaims of the Bellevue Pacific Tower Condominium Owners Association (Tower COA).[1] And the court properly ruled that Tower COA could not present its affirmative defenses at trial. Finally, the trial court did not abuse its discretion in awarding the amount of attorney fees to LP against Tower COA that it determined at the conclusion of trial. We affirm.

[1] We adopt the naming conventions of the parties.

Bellevue Pacific Tower Condominium is a residential condominium. It is part of a mixed-use condominium known as Bellevue Pacific Center Condominium. The latter condominium is comprised of a Residential Unit (Bellevue Pacific Tower Condominium), a Commercial Unit, and a Garage Unit.

LP is the developer of these properties and the declarant for each of the declarations establishing Bellevue Pacific Center Condominium and Bellevue Pacific Tower Condominium. LP recorded these two declarations in 1995. They bear recording numbers that are very close to each other.

The declaration for Bellevue Pacific Tower (the "Tower Declaration") and the declaration for Bellevue Pacific Center (the "Center Declaration") both contain terms and conditions for parking. It is undisputed that there are a total of 492 parking spaces within Bellevue Pacific Center, 483 of which are enclosed in the parking garage and nine of which are in the exposed courtyard at the main entrance of Bellevue Pacific Tower. Of the above totals, there are 131 parking spaces for Bellevue Pacific Tower, 122 of which are enclosed. The remaining nine are in the courtyard at the main entrance. There are 171 individual residential units within Bellevue Pacific Tower.

In April 2000, Tower COA executed a lease with LP's agent, renting four of the nine courtyard parking spaces for use by the Tower residents.[2] The lease was for a term of one year and was automatically renewable on a month to month basis thereafter.[3] Tower COA paid LP rent on these four stalls from April

[2] Clerk's Papers at 288, 850.
[3] Id.

2000 through November 2007.[4] It failed to pay rent thereafter.

Two individual residential condominium unit owners also rented two more of the nine courtyard stalls from LP's agent from 2000 to 2005.[5] These were also leased on a month to month basis.

In 2001, Tower COA sued LP over disputes arising from conflicting interpretations of the terms and conditions of the Tower Declaration and the Center Declaration. In September 2003, the parties settled that litigation. They executed a Memorandum of Understanding Regarding Settlement dated September 16, 2003, as well as other documents to memorialize their agreement. Among other things, the parties agreed in the memorandum to release each other "from any and all claims which have been or ***could have been asserted in the [litigation]***."[6]

In 2008, Tower COA wrote to LP and claimed that it had the right to control all nine of the courtyard parking spaces at the main entrance of Bellevue Pacific Tower. LP disagreed. Each party then took a series of steps to assert their respective claims to the courtyard parking spaces.

In 2009, LP commenced this action against Tower COA to obtain a declaration of its right to control the nine courtyard parking spaces and to eject Tower COA from them. LP also sought damages and attorney fees both under the terms of the month to month lease and under the Washington Condominium Act. Tower COA asserted affirmative defenses and counterclaims, which we

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[4] Id. at 850.
[5] Id. at 335, 850.
[6] Id. at 348 (emphasis added).

discuss in more detail later in this opinion. LP asserted the release in the 2003 settlement agreement as a bar to Tower COA's affirmative defenses and counterclaims.

The trial court granted LP's partial summary judgment motion and dismissed Tower COA's counterclaims with prejudice. Tower COA moved for reconsideration, and the court denied this motion.

After a bench trial, the trial court awarded LP damages against Tower COA for unpaid rent for the courtyard parking spaces that it rented. The court also awarded attorney fees to LP based on both the lease Tower COA had signed and RCW 64.34.455.

This appeal followed.

SETTLEMENT AGREEMENT

Tower COA argues that the trial court should not have granted partial summary judgment to LP, dismissing with prejudice its counterclaims. We hold that summary judgment was appropriate and dismissal of Tower COA's counterclaims and affirmative defenses was correct.

An order granting summary judgment should be affirmed if no genuine issue of material fact remains and the moving party is entitled to judgment as a matter of law.[7] Summary judgment orders are reviewed de novo, taking evidence and all reasonable inferences from it in the light most favorable to the nonmoving party.[8]

[7] CR 56(c).
[8] Schaaf v. Highfield, 127 Wn.2d 17, 21, 896 P.2d 665 (1995).

RCW 64.34.030

In its partial summary judgment order, the trial court relied on the 2003 release signed by Tower COA and LP as a bar to all of Tower COA's claims. Tower COA argues that the 2003 settlement agreement with LP does not bar the claims that it asserts in this litigation. Specifically, it contends that RCW 64.34.030 of the Washington Condominium Act bars enforcement of the release in the settlement agreement against individual condominium unit owners who comprise Tower COA. We disagree.

RCW 64.34.030 provides as follows:

> 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***. A declarant may not act under a power of attorney or use other device to evade the limitations or prohibitions of this chapter or the declaration.[9]

The settlement agreement on which LP and the trial court relied to bar Tower COA's claims states in relevant part:

> This agreement, dated for reference purpose as of September 16, 2003, is between . . . Bellevue Pacific Tower COA [Tower COA], Bellevue Pacific Center Limited Partnership [LP] . . . and is intended as an outline of settlement of litigation currently pending between the parties . . . .
>
> 1. ***Claims excluded***—the parties are not settling and reserve the right to further litigate these issues: (1) Tower's claim that (a) the voting allocation contained in Center's declaration of one vote for each of the three units comprising Center violates the Washington Condominium Act, (b) that a representative on Center's board other than a representative of Tower's board violates the Washington Condominium Act, and (2) Center's claim for judicial reformation of Center's declaration because the square footage of the P-1 portion of the garage is not included in the total square footage of the building and the Residential Unit for purposes of

[9] Clerk's Papers at 348 (emphasis added).

> allocating expenses under Schedule B of Center's declaration. Neither party will assert that the resolution of such issues has any retroactive effect on matters settled herein.
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> 2***. Except as to the claims excluded***, and subject to the other terms of this agreement, each party releases every other party from any and all claims which have been or ***could have been asserted in the lawsuit*** . . . .[1]

We start with the observation that RCW 64.34.304 enumerates certain powers of a condominium owners' association. Specifically, this statute states that an association may:

> (d) ***Institute, defend, or intervene in litigation*** or administrative proceedings in its own name on behalf of itself or two or more unit owners on matters affecting the condominium;
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> (e) ***Make contracts*** and incur liabilities.[11]

The plain words of this statute make clear that Tower COA had the power to settle the prior litigation when it executed the contract containing the release in 2003. Moreover, we have previously recognized that the Washington Condominium Act does not prevent or limit the power of an owners' association from settling disputes. "[N]othing in the language of RCW 64.34.030 and .100 prevents parties from mediating or otherwise settling their disputes in any manner they wish, including nonbinding arbitration. The [Washington Condominium Act] restricts only parties' ability to abrogate enforcement of its terms by judicial proceeding should alternative methods of dispute resolution fail."[12]

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[1] Clerk's Papers at 348 (emphasis added).

[11] (Emphasis added.)

[12] Marina Cove Condo. Owners Ass'n v. Isabella Estates, 109 Wn. App. 230, 237, 34 P.3d 870 (2001), abrogated on other grounds by Satomi Owners

Tower COA does not and cannot attack, on its own behalf, the settlement and release that it signed in 2003. That is because the plain language of the above statute clearly states that it had the authority to sign that document. Rather, it argues that the settlement and release cannot be enforced against the individual condominium unit owners that comprise the association. This argument is plainly wrong.

There are no Washington cases that address releases and settlement agreements in the context of the Washington Condominium Act. But there is no reason to believe that the legal principles that generally apply to settlement agreements are any different in this context.

Generally, a "settlement is a compromise voluntarily agreed to by the parties. Each party generally accepts something less than that to which he believes he is entitled based on a decision that the compromise is more advantageous to him than the sum of the risks and benefits involved in pursuing the claim."[13] "Each party's promise in the new agreement is supported by an entirely new consideration—the return promise of the other. And so the accord is enforceable as a contractual agreement in its own right. It ***cuts off all defenses and arguments based on the underlying contract***."[14]

Chadwick v. Northwest Airlines, Inc.[15] applies these principles to the

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Ass'n v. Satomi, LLC, 167 Wn.2d 781, 799 n.13, 225 P.3d 213 (2009).

[13] Chadwick v. Nw. Airlines, Inc., 33 Wn. App. 297, 301, 654 P.2d 1215 (1982) (quoting Strozier v. General Motors Corp., 635 F.2d 424, 425-26 (5th Cir. 1981)) (quotation marks omitted).

[14] Oregon Mut. Ins. Co. v. Barton, 109 Wn. App. 405, 413-14, 36 P.3d 1065 (2001) (internal citations omitted).

[15] 33 Wn. App. 297, 654 P.2d 1215 (1982).

effect of a release in a settlement agreement on a later employment discrimination claim. There, Chadwick alleged that he was denied the sick leave Northwest Airlines provided other similarly situated employees because of his physical handicap.[16] Northwest Airlines argued that Chadwick's discrimination claim was barred by a previous settlement agreement signed after Chadwick had filed a grievance against the company.[17] In the agreement, Chadwick agreed he could "not . . . file or process any unemployment compensation, Workmen's Compensation, ***discrimination or other claims of any nature against the Company in any form as a result of his resignation or reinstatement hereunder***."[18] In his second lawsuit Chadwick contended that the settlement agreement violated the public policy favoring the elimination of discrimination against the handicapped. The court rejected this claim:

> It is well established settlements are strongly favored and are to be encouraged. We find no authority for adopting a rule that per se voids a settlement simply because it involves a possible discrimination claim. In fact, federal cases interpreting Title VII of the Civil Rights Act of 1964 . . . consistently favor settlement and conciliation of discrimination claims.[19]

Though there is a strong public policy favoring the elimination of discrimination,[2] the Chadwick court held that the long-standing policy favoring settlements outweighed the policy in that case.[21]

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[16] Id. at 298-99.
[17] Id. at 299.
[18] Id. (emphasis in original).
[19] Id. at 300 (internal citations omitted).
[2] See Roberts v. Dudley, 140 Wn.2d 58, 62 n.2, 993 P.2d 901 (2000) (noting that Washington statutory and legal precedent all "evidence a strong and clear public policy against discrimination").
[21] Chadwick, 33 Wn. App. at 300-01.

Here, as in Chadwick, notwithstanding the underlying policy of enforcing protections of the Washington Condominium Act, the principle of finality of settlements outweighs any arguments to the contrary. Our conclusion is buttressed by a Texas case that considered the question now before us. That case is Jistel v. Tiffany Trail Owners' Ass'n, Inc.[22]

The Washington Condominium Act is substantially adopted from the Uniform Condominium Act.[23] Thus, cases outside of Washington construing the same or similar provisions can also be helpful. Jistel is such a case.

In Jistel, the Texas court of appeals held that the waiver provision of the Texas property code did not preclude the effect of a release.[24] There, Jistel sued Tiffany Trail in 2000 over repairs he said it was required to make.[25] Jistel and Tiffany Trail settled this suit.[26] As part of the settlement agreement, Jistel agreed to dismiss the suit, and the 2000 trial court "entered an order dismissing Jistel's claims against Tiffany Trail with prejudice."[27] Jistel again sued Tiffany Trail in 2002 over the same repair issues that had been settled in 2000.[28] But Jistel argued his suit was not barred by the release because the

> provisions of the Uniform Condominium Act, . . . and Tiffany Trail's condominium declaration imposed an ongoing responsibility on the part of Tiffany Trail to make the repairs. Jistel asserted that, pursuant to [the Uniform Condominium Act, as adopted by Texas], Tiffany Trail's ongoing obligation to make the repairs could not be

[22] 215 S.W.3d 474 (Tex. App. 2006).
[23] One Pac. Towers Homeowners' Ass'n v. HAL Real Estate, 148 Wn.2d 319, 328 n.7, 61 P.3d 1094 (2002).
[24] Jistel, 215 S.W.3d at 482.
[25] Id. at 477-78.
[26] Id. at 478.
[27] Id. at 481.
[28] Id. at 477.

limited or waived by agreement.[29]

Jistel relied upon the language of Texas Property Code § 82.004, taken from the Uniform Condominium Act, and argued that he could not waive his rights to repairs given § 82.004. This section mirrors the Uniform Condominium Act non-waiver provision. It states:

> Except as expressly provided by this chapter, provisions of this chapter may not be varied by agreement, and rights conferred by this chapter may not be waived. A person may not act under a power of attorney or use any other device to evade the limitations or prohibitions of this chapter or the declaration.[3]

The Jistel court concluded, however, that the above provision did not obviate the effect of Jistel's prior settlement agreement with Tiffany Trail.[31] "Jistel chose to settle the 2000 suit and to dismiss the suit instead of going to trial. Nothing in the language of Section 82.004 of the Property Code prohibits parties from settling existing, disputed claims in any manner they wish to settle them."[32] The court then noted the important policy rationale supporting the enforcement of settlement agreements.[33]

> Construing Section 82.004 [as Jistel argues] would violate this State's policy of encouraging the peaceable resolution of disputes and the early settlement of pending litigation through voluntary settlement procedures. It would also lead to great uncertainty in the finality of settlement agreements and judgments. Finally, such a construction would lead to unfair results, as is illustrated by this case. Jistel accepted the benefits under the settlement agreement.[34]

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[29] Id. at 478.
[3] Tex. Prop. Code Ann. § 82.004 (2007).
[31] Jistel, 215 S.W.3d at 482.
[32] Id.
[33] Id.
[34] Id. at 482 (internal quotation marks and quotations omitted).

Thus, the Jistel court held that the non-waiver provision of the Texas Property Code did not defeat the enforceability of Jistel and Tiffany Trail's previous settlement agreement.[35]

Here, both LP and Tower COA, each of which was represented by counsel in the prior litigation, signed the Memorandum of Understanding Regarding Settlement that contains the release that is now before us. The plain words of the settlement state that, subject to express exceptions contained in paragraph 1 of the agreement, "each party releases every other party from any and all claims which have been or ***could have been asserted in the [litigation]***."[36] The right to control the nine courtyard parking spaces is not among the items listed as exceptions to the settlement and release. Thus, by its plain terms, the release applied to this claim of right.

Tower COA was aware of the issue regarding the nine courtyard parking spaces at the time of settlement and thus ***could have*** asserted this claim in its previous litigation with LP. As both Jistel and Chadwick demonstrate, the importance of settlement agreements trumps the non-waiver provision included in RCW 64.34.030. Thus, as in Jistel and Chadwick, the trial court properly determined that it should enforce the plain words of the release contained in the 2003 settlement agreement. Doing so, it properly granted partial summary judgment to LP and dismissed the counterclaims of Tower COA.

Further, Tower COA's argument that it was not permitted to waive the

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[35] Id.

[36] Clerk's Papers at 348 (emphasis added).

rights of the condominium owners assumes that they had the right to control the nine parking spaces that are at issue in this case. For the reasons that we explain in more detail in the unpublished portion of this opinion, neither the Tower Declaration nor the Center Declaration can reasonably be read, individually or together, to vest any right to control these nine parking spaces in anyone other than LP. Thus, the underlying premise of this Tower COA argument—that the individual unit owners have a right that has been infringed by the settlement and release—is false.

Additionally, Tower COA argues that, because the Condominium Act is "designed to protect condominium purchasers," it would be contrary to the act and against public policy to apply the release in a case such as this. This is unpersuasive.

First, Tower COA fails to identify any applicable contravening public policy here: the individual unit owners do not have a claim to the nine parking spaces. Second, as both the Chadwick and Jistel courts made clear, even where there ***may*** be other important public policies to consider, the policy of settlement is an important and often weightier one.

Tower COA next argues that the right to control the nine courtyard parking spaces was not contemplated by the Tower COA when it signed the 2003 settlement agreement. Thus, it claims that the plain language of the release that covers "all claims which have been or ***could have been asserted in the [litigation]"*** should not be given effect. We disagree.

Traditional contract principles apply to the interpretation of a release.[37] The plain language of the release is not ambiguous. It broadly applies to ***all*** claims that could have been asserted, not just those asserted in the litigation.

Tower COA's argument rests on the false premise that the right to control the nine parking spaces was not manifest when Tower COA signed the settlement and release in 2003. The record belies this claim.

In February 2000, the president of Tower COA wrote to all the individual condominium unit owners concerning "the drive court parking situation." He gave his assessment of the situation regarding the nine parking spaces now at issue in this case. He stated:

> [Tower COA] must function within the constraints of the Declaration and the Association Rules and Regulations . . . .
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> According to these documents, there are specific parking spaces on P-1, 1, and in the drive court that belong to [Tower COA] as a Limited Common Element. They are not owned by any particular unit. ***They are allocated by the Declarant for the exclusive use of a specific unit or units.*** Each allocation is then registered on Schedule-B to the specific unit or units. This allows the space to remain allocated to the unit upon resale. Please note, the drive court spaces are treated in exactly the same fashion as the space(s) you may have allocated to your unit(s).
> ***The Declarant hasn't allocated the spaces in the drive court.*** As the [Tower COA] President I have asked the Declarant to provide a cost for allocating any or all of the drive court spaces. ***I have also asked the Declarant to provide a cost for renting any or all spaces.***[38]

There is no dispute that the reference in the above passage to parking spaces "in the drive court" is to the nine parking spaces at issue in this case.

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[37] Bennett v. Shinoda Floral, Inc., 108 Wn.2d 386, 392, 739 P.2d 648 (1987).

[38] Clerk's Papers at 345 (emphasis added).

Likewise, it is undisputed that his reference to the "Declarant" is a reference to LP, the declarant under the Tower declaration. Furthermore, this reference confirms what the Tower declaration plainly states: the Declarant allocates these nine parking spaces for the exclusive use of individual units. Finally, he states his request for a quotation of rental costs for the nine spaces.

In sum, at the time of this written communication, Tower COA had in mind the issue of control of the nine parking spaces at issue here. It acquiesced in the view that LP had the right to control these parking spaces under the terms and conditions of the Tower declaration.

Pursuant to the request stated in the last paragraph of the above quotation, Tower COA entered into a lease in April 2000 with LP's agent for four of the nine parking spaces. The lease was for a term of one year and was automatically renewable on a month to month basis thereafter.[39] Tower COA paid rent on these four stalls from April 2000 through November 2007, and thereafter ceased payment.[4]

Based on the same understanding and acquiescence, two individual residential condominium unit owners leased two more of the nine courtyard spaces from LP for the period 2000 to 2005.[41] These were also leased on a month to month basis.[42]

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[39] Id. at 850.
[4] Id.
[41] Id.
[42] Id.

This record thus evidences that Tower COA as well as two unit owners were aware of the issue of the right to control the nine parking spaces in 2000. Moreover, they acknowledged and acquiesced in LP's exclusive right to control these parking spaces by renting them. Whether their reading of the controlling documents was correct at that time is irrelevant. The relevant fact is that Tower COA was well aware of the issue of the right to control the nine spaces well before the 2003 settlement, which released all claims that could have been made. Likewise, Tower COA acknowledged and acquiesced in the view that LP had the exclusive right to control these nine spaces by renting the spaces over a period of time that began well before the 2003 settlement agreement and release. We also note that no individual owner has asserted in this lawsuit any contrary understanding.

Tower COA argues that it did not consult with an attorney prior to the 2000 memorandum. That makes no difference. It was represented during the 2001 litigation and at the time the parties signed the 2003 settlement agreement and release.[43] The time of settlement is the material time for purposes of this argument, and Tower COA was represented at that time.

Tower COA relies on Nevue v. Close[44] and Richardson v. Pacific Power & Light Co.[45] to argue that because the parties did not contemplate the specific claim of ownership of the courtyard parking stalls in the 2003 release, their arguments are not barred. Both of these cases, dealing with the effect of a

[43] Id. at 396.
[44] 123 Wn.2d 253, 867 P.2d 635 (1994).
[45] 11 Wn.2d 288, 118 P.2d 985 (1941).

release in a personal injury context, are distinguishable.

In Nevue, the plaintiff's injuries were not apparent prior to her signature of the release, and thus not barred by it. Nevue was involved in a car accident, and after the accident, she signed a general release, discharging Safeco Insurance Co. from any other payment other than that outlined in the release.[46] Prior to signing the release, the only injury Nevue complained of was neck strain.[47] Only ***after*** signing the release did Nevue experience back pain.[48] The court noted that:

> Here there was a known minor neck sprain which was no longer bothering plaintiff when the release was signed. [At issue here] is a latent back injury ***which developed after the release was signed that was not known or contemplated by either the plaintiff or the insurance adjuster***."[49]

The court thus held that the release did not automatically apply to bar compensation for Nevue's back pain.[5] "[A]s to an injury ***unknown*** to the plaintiff, and not within the contemplation of the parties to the release, the release should not be binding per se."[51]

Here, as we noted above, Tower COA knew of the issue regarding ownership of the nine parking stalls at the time of the settlement and release. Thus, unlike Nevue, there was "manifestation" of the issue before signing the settlement with the release. Consequently, the court's holding in Nevue is

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[46] Nevue, 123 Wn.2d at 254.
[47] Id.
[48] Id.
[49] Id. at 256 (emphasis added).
[5] Id. at 258.
[51] Id. (emphasis added).

inapposite.

Similarly, the facts in Richardson are distinguishable from those here. Richardson was electrocuted on the job by a fallen power line.[52] His widow sued Pacific Power & Light after she signed a "Receipt of Release," acknowledging receipt from the phone company of full payment under its benefit plan and discharging it from all claims.[53] The court held that the release did not waive the widow's later suit.[54] But it based its holding on the fact that the "release" instrument was merely a receipt for money already payable to the widow.[55] That situation is decidedly different from this case. Here, there is no dispute that the release was exactly that, no less.

Tower COA also argues that neither party ever contemplated that the 2003 release would cover a later dispute about parking spaces. First, the broad language of the release does not support this more limited reading. In any event, whether the parties contemplated that the release itself would cover a later dispute about parking is not the issue. The fact is that both parties were ***aware of and contemplated the control of parking issue prior*** to the release. In Nevue, for example, the release did not void plaintiff's later claim for back injuries because it was ***unknown*** to her, ***not*** because she knew of it but thought the release would not apply to those particular problems.[56] Here, that is not the case.

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[52] Richardson, 11 Wn.2d at 295-96.
[53] Id. at 319.
[54] Id. at 320.
[55] Id.
[56] Nevue, 123 Wn.2d at 256.

Tower COA also argues that the plain words of the waiver cannot apply to any dispute about the interpretation of the declarations. But the plain language of the release is clear. It reads: "Each party releases every other party from any and all claims which have been or could have been asserted in the [litigation]."[57] And, the principles upon which Tower COA relies to argue that the release should mean something other than it does, *ejusdem generis* and *noscitur a sociis*, do not apply here. Under these maxims of statutory construction, general words followed by words of a particular meaning, are not to be construed to their widest extent.[58] Instead, they are to be applied only to persons or things of the same general kind as those specifically mentioned.[59] But these principles require that the general and specific terms be connected in some way.[6] The "specific" words that preceded the general release here was a detailed list of the claims ***excluded*** from the release. Thus, the "general" words of the release had no connection to the "specific" words of the claims excluded.

In addition to granting partial summary judgment based on the release's effect, the trial court dismissed Tower COA's counterclaims in its order. Though the court did not specifically reference Tower COA's affirmative defenses in its summary judgment order, it later determined that they had been impliedly dismissed with the earlier dismissal of the counterclaims.

The affirmative defenses Tower COA pleaded in its Answer were:

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[57] Clerk's Papers at 348.

[58] Cockle v. Dep't of Labor & Indus., 142 Wn.2d 801, 808, 16 P.3d 583 (2001).

[59] Id.

[6] Dean v. McFarland, 81 Wn.2d 215, 221, 500 P.2d 1244 (1972).

"unclean hands and inequitable conduct," "misrepresentations and breaches of fiduciary duty," "[f]ailure to state a claim upon which relief can be granted," and the breach of "RCW 64.34.216(i), (j) and RCW 64.34.228."[61] This record shows neither evidence nor argument for the first three affirmative defenses, nor for breach of RCW 64.34.216(1)(i). Therefore, we need not address them further.[62]

The remaining claim is grounded in a challenge over the right to control and allocate the nine spaces at issue in this case. At oral argument of this case, Tower COA properly conceded that its affirmative defenses and counterclaims were essentially the same.[63] Given the trial court's grant of partial summary judgment and dismissal of Tower COA's counterclaims, these remaining affirmative defenses were no longer viable.

The balance of this opinion has no precedential value. Accordingly, pursuant to RCW 2.06.040, it shall not be published.

DECLARATIONS

We may affirm the grant of partial summary judgment on any ground supported by the record.[64] We do so here on the additional basis of the controlling documents, the Tower Declaration and Center Declaration.

The Center Declaration is the most logical starting point to determine who

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[61] Clerk's Papers at 12.

[62] Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

[63] COA summarizes its affirmative defenses in its briefing as follows: "(1) inequitable conduct and unclean hands; (2) misrepresentation and breach of fiduciary duty; and (3) breach of RCW 64.34.216(i), (j) and RCW 64.24.228." Appellant Bellevue Pac. Tower Condo. Owners Ass'n Opening Brief at 16.

[64] King County v. Seawest Inv. Assoc., LLC, 141 Wn. App. 304, 310, 170 P.3d 53 (2007).

controls the nine parking spaces at issue here. Section 6.2 of that declaration expressly provides for the allocation of the nine parking spaces to the Residential Unit (the Tower Condominium):

> Section 6.2: Limited Common Elements Allocated to the Residential Unit. The Common Elements allocated to the Residential Unit as Limited Common Elements include any areas or facilities identified on the Survey Map and Plans by the designation "RLCE," ***plus the following***:
> . . .
> 6.2.5 Main Entrance. The main entrance to the Building for the use of Residential Units, including portions of the exterior driveway, ***parking***, and landscaped areas leading from 107th Avenue N.E., which are shown on the Survey Map and Plans by the designation RCLE.[65]

As Section 6.1 of this declaration provides, these nine parking spaces are "Limited Common Elements" for the Residential Unit, the Tower Condominium: "Limited Common Elements are Common Elements that are reserved for the exclusive use of the Unit or Units to which they are allocated."[66]

We turn next to the Tower Declaration for further specification of the right to control the nine parking spaces. This declaration bears a recording number just two numbers higher than the Center Declaration, indicating near simultaneous recording of these declarations.

Section 3.1 of the Tower declaration describes the property comprising this condominium:

> Property. The real property comprising the Condominium is described in Schedule A and consists of the Residential Unit as defined in the Mixed Use Condominium Declaration, ***plus certain limited common elements allocated to the Residential Unit under the Mixed Use Condominium Declaration*****,** together with

[65] Clerk's Papers at 197 (emphasis added).
[66] Id.

certain easement rights pertaining thereto.[67]

It is patently obvious that the emphasized portion of this property description specifically refers to the nine parking spaces as well as other limited common elements of the Center Declaration. There is no other reasonable way to read this provision together with the Center Declaration.

Section 3.3 further describes parking spaces as follows:

> Parking Spaces. There are a total of 131 parking spaces in the Condominium, consisting of 122 enclosed parking spaces located on Level P-1, and ***9 exposed parking spaces located in the courtyard area surrounding the main entrance to the Condominium***. In addition, up to 45 parking spaces located on Floor 1 of the Building may be allocated as limited common elements to the Residential Unit under the Mixed Use Condominium Declaration for use by the Owners of the Units in accordance with certain terms and conditions set forth in the Mixed Use Condominium Declaration.[68]

Section 6.5 specifies further how parking spaces are to be allocated by LP, the declarant under the Tower Declaration.

Section 6.5.1 states:

> General. ***Parking spaces*** and storage spaces are or ***shall be allocated to Unit(s) by Declarant*** pursuant to Schedule B or an amendment to Schedule B executed solely by Declarant. Declarant is not required to allocate a parking space or storage area to a Unit. Nothing in this Declaration shall restrict Declarant's right to allocate for value parking spaces or storage areas/spaces for value as Limited Common Area to a Unit.[69]

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[67] Id. at 84 (emphasis added).
[68] Id. (emphasis added).
[69] Id. at 86 (emphasis added).

Section 6.5.3 states:

> Storage and Parking Spaces Allocated Pursuant to Mixed Use Condominium Declaration. References to parking spaces and storage spaces in this Article 6 include storage spaces and parking spaces which may be allocated to the Residential Unit in accordance with the terms of the Articles 6 and 25 of the Mixed Use Condominium Declaration. The use of such spaces is also subject to the terms and conditions set forth in the Mixed Use Condominium Declaration.[7]

Section 6.6.2 states: "Rental of Parking and Storage Spaces by Declarant. The Declarant may rent a parking space or storage area which is unallocated and collect all income from such rental."[71]

Finally, Section 25.2.2 states:

> Storage and Parking Allocations. Declarant reserves the right to make the initial allocation of storage areas and parking spaces as Limited Common Element to particular Unit(s), as described in Section 6.5, with such allocations to be made in Schedule B attached hereto (or by amendment thereto). With respect to each Unit, Declarant shall make such allocations prior to or contemporaneously with the closing of the sale of such Unit by Declarant. At least annually, the Declarant shall record an amendment to Schedule B identifying the allocations made to date. Once the Declarant's right to make such allocations has expired, the balance of any parking spaces and storage areas, if any, not so allocated to specific Units shall continue as part of the Common Elements (not as Limited Common Elements) to be used in accordance with the rules and regulations established from time to time by the Board.[72]

A fair reading of these relevant sections of the Center Declaration and Tower Declaration leads to several conclusions. The Center Declaration, by its terms, allocates the nine parking spaces and certain other elements to the

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[7] Id.
[71] Id.
[72] Id. at 118-19.

Tower condominium. Further, LP reserved to itself the exclusive right to allocate individual parking spaces to individual units within the Tower condominium. Finally, there is absolutely no right of either Tower COA or the individual unit owners in the Tower condominium to control any of these nine parking spaces without LP first allocating them to specific individual units within the Tower condominium.

Despite the plain language of these controlling documents, Tower COA claims that LP does not have the exclusive right to control the nine parking spaces. This argument has no support in the declarations.

Tower COA argues that the condominium declarations permit LP to make only initial allocations of parking spaces. It contends that because LP "reallocated" the courtyard parking spaces to unit 703, it violated the Tower Declaration and RCW 64.34.228, which provides guidelines for reallocation of limited common elements.[73] Additionally, Tower COA argues that the Tower Declaration violates the Washington Condominium Act, RCW 64.34.216(1)(j), as it does not include a time limit for exercising the declarant's rights.[74]

The second argument is barred by the release and settlement agreement that the parties executed in 2003. As we have already explained, the partial summary judgment order properly dismissed all claims that could have been asserted in the prior litigation between these parties. The challenge to the alleged violation of RCW 64.34.216(1)(j) by the Tower Declaration could have

[73] Appellant Bellevue Pac. Tower Condo. Owners Ass'n Opening Brief at 10-11.

[74] Id.

been asserted in the prior litigation. That is because the alleged violation was contained in the Tower Declaration at that time. Because it was either known or should have been known at the time of the settlement and release, we do not further address this claim.

Assuming without deciding that the "reallocation" argument is not barred by the settlement and release, it has no merit. There simply was never any prohibited "reallocation," as Tower COA argues.

In 2008, LP allocated one parking spot to unit 703. Then, in 2009, it allocated all nine of the courtyard spaces to this unit. This allocation was permitted under the Tower Declaration. LP's allocation of all nine of the courtyard parking spaces to unit 703, which it owns, was not a violation of the Tower Declaration.

Section 6.7.3—"Reallocation of Parking Spaces and Storage Spaces"—provides:

> The Declarant shall have the right to change the allocation of parking spaces and storage areas to Units by recording an amendment to Schedule B, ***provided the Declarant has obtained the written consent of the Owners of the Units affected***. In addition, any two or more Unit Owners may, upon approval of the Board, exchange the parking spaces or storage areas allocated to their respective Units by jointly executing and recording an instrument effecting the exchange.[75]

Here, LP, as the declarant under this Tower Declaration, had the right "to change the allocation of parking spaces," provided LP obtained the consent of the affected individual units. Obviously, it was the owner of the affected unit,

[75] Clerk's Papers at 87 (emphasis added).

703, when it changed the allocation among the units it then owned. This was expressly permitted by the plain words of the Tower Declaration. There simply is no reasonable argument to the contrary.

Tower COA points to section 25.2.2 and section 6.5 of the Tower Declaration, as well as section 6.6 of the Center Declaration, to argue that this "reallocation" was not proper. It argues that, together, these sections indicate that LP initially allocated the courtyard parking stalls as limited common elements to the Residential Unit, the Tower. Thus, according to Tower COA, LP cannot "reallocate" the stalls to a specific residential unit.

This mixing of apples and oranges leads, predictably, to confusion. The interpretation of the declarations that we previously discussed is the only reasonable reading of these documents. Accordingly, we reject the alternative readings argued by Tower COA.

AFFIRMATIVE DEFENSES AND COUNTERCLAIMS

Tower COA argues that the motion for partial summary judgment was "silent as to the Tower COA's affirmative defenses." Thus, it claims that the judge should have permitted it to present these defenses at trial. We disagree.

As the United States Supreme Court stated in Reiter v. Cooper, an "[affirmative] defense cannot possibly be adjudicated separately from the plaintiff's claim to which it applies; a counterclaim can be."[76] In C-C Bottlers, Ltd. v. J.M. Leasing, Inc.,[77] Division Three of this court evaluated whether the claims

[76] 507 U.S. 258, 265, 113 S. Ct. 1213, 122 L. Ed. 2d 604 (1993).
[77] 78 Wn. App. 384, 896 P.2d 1309 (1995).

made by J.M. Leasing were counterclaims or affirmative defenses.[78] The court held that the claims were counterclaims as they neither affected, nor were they affected by, the outcome of the plaintiff's underlying claims.[79]

Here, the court's summary judgment order dismissed Tower COA's counterclaims with prejudice. The order is silent on affirmative defenses. Our review of this order is de novo.[8]

When the court entered the partial summary judgment order, it stated: "I find in favor of plaintiff's motion on the release of the claims."[81] It went on,

> THE COURT:
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> [F]or purposes of the appeal, the Court of Appeals may not care on what basis I find, but for your edification that is the reason for the ruling today.
> . . .
>
> It is interesting, the language in the [proposed] order handed forward says that "the Court declares that the nine courtyard parking stalls located in the Bellevue Pacific Tower Condominium were properly allocated."
>
> That is really not my finding. It is ***any claim about the allocation*** was waived in the release, is really what I have found.[82]

At the bench trial that followed before a different judge, Tower COA argued that it should be permitted to present affirmative defenses to LP's claims, notwithstanding the partial summary judgment order. The trial court held that it could not:

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[78] Id. at 387-88.
[79] Id. at 387.
[8] Hartley v. State, 103 Wn.2d 768, 774, 698 P.2d 77 (1985).
[81] Clerk's Papers at 575.
[82] Id. at 576-77 (emphasis added).

THE COURT:

I reviewed the [summary judgment] decision and more importantly, I spoke with [the judge who issued the order on summary judgment] . . . and confirmed that the scope of this [trial is] damages and affirmative defenses to damages, ***not affirmative defenses to the right to damages***.[83]

Tower COA's attorney chose to make a record.

MR. BRAIN: Okay. Let me just raise one issue so that I can make this clear on the record.

Our position with respect to [Section] 25.2.2 is that that issue could not have been raised prior to the initial –

THE COURT: What's 25.2.2?

MR. BRAIN: Your Honor, that's the provision that says that storage and parking allocation—remember, that's the one to make an initial allocation. This was not argued before.

THE COURT: Okay. Now you're back into the other issue. I know where you're going now.

Your position is that [the judge entering the partial summary judgment order] is wrong.

MR. BRAIN: Not so much because he never—this was never placed before him. He . . . was dealing with Center versus Tower allocation, not 25.2.2 allocation. And the reason for that is this issue did not arise—and again, I'm making this for the record. It did not arise until there was the allocation in the 10th amendment which was September of 2008 when every unit had received an allocation.

THE COURT: I recognize that's your position. . . . [The judge entering the partial summary judgment order] ruled that this claim, which he considered to be a claim, was covered by the release.[84]

As the United States Supreme Court stated in Reiter and Division Three

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[83] Report of Proceedings (March 28, 2011) at 5 (emphasis added).
[84] Id. at 6-7.

noted in C-C Bottlers, affirmative defenses are claims that are affected by and which affect a plaintiff's claims.[85] As such, they cannot be adjudicated separately from the merits of these claims.[86]

Here, Tower COA's affirmative defenses depended upon LP's claims and could not be adjudicated separately from them. Thus, when the lower court granted partial summary judgment, it also impliedly dismissed the affirmative defenses that depended on LP's claims.

Moreover, there can be no doubt that dismissal of both Tower COA's affirmative defenses and counterclaims was proper on this record.

Tower COA's affirmative defenses were (1) inequitable conduct and unclean hands; (2) misrepresentation and breach of fiduciary duty; (3) failure to state a claim upon which relief could be granted; and (4) breach of RCW 64.34.216(i), (j) and RCW 64.34.228. There is neither evidence nor argument in this record that has been called to our attention to support the first three categories of claims. As noted above, Tower COA's appellate briefing makes no reference to RCW 64.34.216(i) and any claim as to this subsection is barred.[87] Thus, only the claim based on RCW 64.34.216(j) and 64.34.228 remains before us. But, as we explained above, Tower COA's arguments regarding both of these sections of the Washington Condominium Act are without merit. Tower COA properly conceded at oral argument that its affirmative defenses were substantially the same as its counterclaims, which the court properly dismissed.

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[85] Reiter, 507 U.S. at 265; C-C Bottlers, 78 Wn. App. at 387-88.
[86] Id.
[87] Cowiche Canyon, 118 Wn.2d at 809.

Thus, we conclude that both sets of claims were without merit and properly dismissed by the trial court.

Tower COA argues that because "[n]othing in [LP's] motion, the trial court's order or the transcript of the hearing addresses any of Tower COA's affirmative defenses," it should have been permitted to raise its affirmative defenses.[88] For the reasons we have explained, this argument is unpersuasive.

BENCH TRIAL

Tower COA assigned error to the trial court's findings of fact and conclusions of law. But it does not support those assignments of error with argument or citation to authorities. Accordingly, we do not consider them.[89]

Whether the trial court derived the correct legal conclusions from those facts is a question of law we review de novo.[9] For the reasons we previously explained, these conclusions were proper.

We interpret a condominium declaration like a deed.[91] Thus, as with a

[88] Appellant Bellevue Pac. Tower Condo. Owners Ass'n Reply Brief at 14.

[89] See RAP 10.3(a)(5); Cowiche Canyon, 118 Wn.2d at 809; State v. Farmer, 116 Wn.2d 414, 433, 805 P.2d 200 (1991).

[9] State v. Solomon, 114 Wn. App. 781, 789, 60 P.3d 1215 (2002).

[91] Lake v. Woodcreek Homeowners Ass'n, 169 Wn.2d 516, 526, 243 P.3d 1283 (2010).

deed, we must give meaning to every word in the declaration if possible.[92] "It has long been the rule of our state that, where the plain language of a deed is unambiguous, extrinsic evidence will not be considered."[93]

Here, the trial record shows that LP controlled the courtyard parking spaces and that Tower COA's actions had consequently made it a holdover tenant of the stalls it had originally rented from LP and a tenant by sufferance of other stalls. The court concluded that Tower COA owed LP $78,500 in damages. These findings were supported by substantial evidence in the record and supported the court's conclusions.

ATTORNEY FEES

Tower COA contends that the trial court erred when it failed to segregate or reduce the attorney fees awarded to LP for time spent pursuing its claims based on the release. Both sides request fees on appeal. The trial court did not abuse its discretion in awarding the amount of fees it did in favor of LP. We award LP fees on appeal, subject to its compliance with RAP 18.1(d).

Trial Fees

RCW 64.34.455 provides that a trial court, "in an appropriate case, may award reasonable attorney's fees to the prevailing party." As this court noted in Eagle Point Condominium Owners Ass'n v. Coy,[94] "an award of fees under the Condominium Act . . . may, in the court's discretion, be reduced on account of

[92] Newport Yacht Basin Ass'n of Condo. Owners v. Supreme Nw., Inc., 168 Wn. App. 56, 64, 277 P.3d 18 (2012).
[93] Id.
[94] 102 Wn. App. 697, 9 P.3d 898 (2000).

the prevailing party's limited success. It may also be discounted by the amount of fees attributable to counsel's work on unsuccessful claims . . . ."[95] Further, the lease under which LP sued included a clause providing for an award of attorney fees and legal costs to the prevailing party in litigation.

Generally, an appellate court will not disturb the amount of a trial court's award of attorney fees unless the trial court abused its discretion.[96] The party challenging the trial court's decision bears the burden of demonstrating that the award was clearly untenable or manifestly unreasonable.[97] "Whether attorneys' fees are reasonable is a factual inquiry depending on the circumstances of a given case and the trial court is accorded broad discretion in fixing the amount of attorneys' fees."[98] When "an attorney fees recovery is authorized for only some of the claims, the attorney fees award must properly reflect a segregation of the time spent on issues for which attorney fees are authorized from time spent on other issues."[99]

Here, the trial court reduced the original attorney fee award by $13,666. It did so "to reflect that ½ of the disputed charges of $27,332 is attributed to the release issue which does not include recovery of attorney fees, but since the

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[95] Id. at 714.

[96] Id. at 715 (citing In re Marriage of Crosetto, 82 Wn. App. 545, 563, 918 P.2d 954 (1996); Schmerer v. Darcy, 80 Wn. App. 499, 509, 910 P.2d 498 (1996)).

[97] Crosetto, 82 Wn. App. at 563 (quoting In re Marriage of Knight, 75 Wn. App. 721, 729, 880 P.2d 71 (1994)).

[98] Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wn.2d 299, 335, 858 P.2d 1054 (1993) (citing Schmidt v. Cornerstone Invs., Inc., 115 Wn.2d 148, 169, 795 P.2d 1143 (1990)).

[99] Hume v. Am. Disposal Co., 124 Wn.2d 656, 672-73, 880 P.2d 988 (1994) (citations omitted).

same issues and work was also required to litigate the lease, 50% recovery is a fair allocation."[1] Given that the court's summary judgment order was based on the release argument, its discounting of 50 percent of the defendant's claimed segregation was not an abuse of discretion.

Fees on Appeal

Tower COA and LP both request attorney fees on appeal, as provided for under RCW 64.34.455, RAP 18.1(b), and the lease under which LP sued. Because Tower COA is not the prevailing party on appeal, its request is denied. LP, as the prevailing party, is entitled to such an award.

We affirm the partial summary judgment, final judgment, and fee award. We also award LP attorney fees on appeal, subject to its compliance with RAP 18.1.

Cox, J.

WE CONCUR:

[1] Clerk's Papers at 997.