NO. 89306-3

THE SUPREME COURT OF THE STATE OF WASHINGTON

MADERA WEST CONDOMINIUM OWNERS ASSOCIATION, et al.,

Petitioners,

v.

MARX/OKUBO, LTD., a Washington corporation,

Respondent

ANSWER TO PETITION FOR REVIEW

Kenneth G. Yalowitz, WSBA 12017
Amber L. Hardwick, WSBA 41828
Natalya P. Maze, WSBA 43099
Attorneys for Respondent
Marx/Okubo, Ltd.

GREEN & YALOWITZ, PLLC
1420 Fifth Avenue, Ste. 2010
Seattle, WA 98101-4087
206-622-1400
206-583-2707 (fax)
kgy@gyseattle.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

I. IDENTITY OF RESPONDENT

Marx/Okubo was one of the defendants in the underlying action. Marx/Okubo asks the Court to deny plaintiffs' Petition for Review. Alternatively, if the Court grants plaintiffs' Petition Marx/Okubo asks the Court to also accept review of the portions of the unpublished Court of Appeals decision terminating review designated in Part II, below.

II. COURT OF APPEALS DECISION

If the Court accepts review as requested by plaintiffs, Marx/Okubo asks the Court to also accept review of two additional portions of the Court of Appeals decision: (a) the ruling affirming the trial court's denial of CR 11 sanctions against certain plaintiffs who reasserted claims through an amended complaint even though their testimony made clear they could not establish an essential element of their claims; and (b) the ruling affirming the trial court's denial of an award of attorneys' fees to Marx/Okubo under RCW 4.84.330 and the doctrine of equitable estoppel.

III. INTRODUCTION

Marx/Okubo and plaintiffs were strangers. Marx/Okubo was retained by a real estate professional to perform a property assessment for the real estate professional's exclusive use in evaluating the purchase and potential conversion of an apartment complex to

condominiums, and to prepare a reserve study for the real estate professional to use in establishing maintenance reserves. Marx/ Okubo's contract prohibited distribution of Marx/Okubo's work product to a third party and prohibited use of the reports by parties other than its client. Marx/Okubo's reports indicated they were prepared for use by Marx/Okubo's client.

Plaintiffs had no relationship with Marx/Okubo; at the time Marx/Okubo's reports were prepared the Madera West Condominium Owners' Association did not exist, and none of the individual plaintiffs held an ownership interest in any aspect of the apartment complex. Plaintiffs and Marx/Okubo were strangers. No basis exists for imposing an independent tort duty to plaintiffs on Marx/Okubo.

The trial court and the Court of Appeals properly evaluated the duty question under existing case authority. Furthermore, the unscrupulous actions of the developer here make it unlikely the issues in this litigation will be duplicated. Therefore, plaintiffs have failed to demonstrate the existence of any of the considerations governing review as required by RAP 13.4.

If the Court grants review it should consider two issues in addition to the duty issue. Marx/Okubo was entitled to both sanctions pursuant to CR 11 and attorneys' fees pursuant to the doctrine of equitable subrogation. The Court of Appeals improperly distinguished

decisions of this Court in affirming the denial of fees and sanctions to Marx/Okubo. Therefore if the Court grants plaintiffs' Petition for Review, it should also review the Court of Appeals analysis on these issues.

IV. STATEMENT OF THE CASE

Marx/Okubo entered an agreement with Evans Development to perform a pre-purchase Property Condition Assessment with respect to the Forest Village Apartments. (CP 753-54) The primary purpose of the assessment was to provide Evans Development with information to assist it in negotiating the purchase of the apartment complex. (CP 753-54, 840-42, 1688)

Marx/Okubo's contract stated its assessment could be used by Evans Development to prepare its own description of the condition of the premises for use in complying with statutory condominium conversion disclosure requirements. (CP 759) However, Marx/Okubo's contract prohibited use of Marx/Okubo's reports by third parties and prohibited Evans Development from distributing the reports to others. The contract provided:

> All . . . reports . . . prepared by or created by Marx/Okubo during the course of providing its services are and shall remain the property of Marx/Okubo . . . .
>
> These documents . . . may not be reproduced in . . . sales materials, or used by the Client for any purpose other than the purpose for which they were prepared, nor may

> they be used for any purpose by third parties, without the written permission of Marx/Okubo.

(CP 766, emphasis added.) Marx/Okubo gave no permission expanding the permissible use of its reports. (CP 862-63, 873-74, 755)

Marx/Okubo's Property Condition Assessment was addressed to Evans Development, and its text expressly limited use of the report "to the client to whom it is addressed." (CP 777) The report described the condition of the apartment complex's siding as "performing as expected considering the age and use of the buildings." (CP 781) Evans Development told Marx/Okubo it planned to aggressively maintain the siding to extend its useful life. (CP 879-80, 895) Based upon that representation, the Property Condition Assessment suggested the siding could be replaced on a deferred maintenance basis. (CP 787)

Marx/Okubo also prepared a Reserve Study for Evans Development based upon the understanding Evans Development intended to purchase and convert the apartments into condominiums. (CP 798) A reserve study is a future projection of large capital expenses (as opposed to maintenance expenses) an owner might incur to maintain its property, with suggested alternative programs the owner may follow to accumulate some of the funds to cover the capital improvement costs over time. (CP 798) Reserve Studies are premised upon informed guesses of what large future capital expenses might be. (CP 798, 1361)

Marx/Okubo's Reserve Study indicated its reserve projections were based upon "verbal representations made to us, the accuracy of which is unknown." (CP 800) One of the representations Evans Development made to Marx/Okubo was that it would aggressively maintain the siding to prolong its useful life. (CP 879-80, 895) Marx/Okubo estimated the cost of siding replacement at $781,000 and the Reserve Study included projections based upon that number. (CP 808-09) LP-Siding, if properly maintained, can perform for decades without experiencing significant failures. (CP 1291; *see also* CP 1360-61)

Like the Property Condition Assessment, the Reserve Study was addressed to Evans Development and stated it was prepared "to report our findings to the Client to whom this report is addressed." (CP 800) "The purpose of the Reserve Study was to assist Evans Development in establishing a reserve account for anticipated repairs in the event it decided to convert the apartments to condominiums." (CP 755) It was not Marx/Okubo's intent that the Reserve Study would be distributed to prospective purchasers. (CP 755)

At the time Marx/Okubo performed services related to the Forest Village Apartments no plaintiff had an identifiable, actual or prospective interest in the project. The Owners' Association did not exist when Marx/Okubo's services were performed. (CP 916-19) Offers to sell units were not made to prospective purchasers until several months

after Marx/Okubo completed its investigation. (CP 2057) According to plaintiffs, neither Marx/Okubo's Property Condition Assessment nor its Reserve Study was included with the initial Public Offering Statement distributed to apartment tenants. (CP 2121, 605, 607) Marx/Okubo received no notice the Association or prospective purchasers were receiving its Property Condition Assessment or Reserve Study. (CP 863, 873-74, 755)

Although the Reserve Study contained one reference to the "Forest Village Owners' Association," neither document contained any reference to the Madera West Condominiums, the Madera West Owners' Association or Madera West, LLC.

Plaintiffs were advised by the condominium declarant the project was sided in LP-Siding, an alleged defective product, and that no funds from the class action lawsuit would be available to replace the siding. Madera West's Public Offering Statement provided, in part, as follows:

> **C. Exterior Siding**. . . . Inner Seal siding was manufactured by Louisiana Pacific Company. Other owners have alleged that Inner Seal siding is a defective product that can swell, retain moisture or otherwise fail under certain conditions. There have been class-action and other lawsuits against Louisiana Pacific claiming that the siding is defective. The prior owner of the project made a claim concerning the siding and received a settlement from Louisiana Pacific. As a condition of the settlement the prior owner waived its warranty rights (Inner Seal siding came with a 25-year warranty). Therefore Buyer will have no warranty rights against Louisiana Pacific.

(CP 40) Each unit owner acknowledged receipt of the Limited Warranty Addendum. (*See, e.g.*, CP 36-143)

According to plaintiffs, they were told by the condominium declarant that $1 million would be deposited by the declarant into the Association's reserve account to address the siding and other issues. (CP 2093) According to plaintiffs, no such deposit was made. (*Id.*)

V. ARGUMENT WHY REVIEW SHOULD BE DENIED

Plaintiffs assert review should be granted because (1) the decision of the Court of Appeals is in conflict with a decision by this Court; and (2) the petition involves an issue of substantial public interest. Neither argument has merit, therefore the Petition for Review should be denied.

A. The Court of Appeals Properly Applied a Duty Analysis Consistent with This Court's Decision in *Affiliated*

Marx/Okubo and plaintiffs were strangers and no basis exists to impose a duty on Marx/Okubo to plaintiffs. To survive summary judgment plaintiffs were obligated to demonstrate Marx/Okubo owed a duty to them. The uncontroverted facts establish plaintiffs had no relationship with Marx/Okubo. Marx/Okubo was retained by a real estate professional to perform a property assessment for the professional's exclusive use in evaluating the purchase and potential conversion of an apartment complex to condominiums, and to prepare a Reserve Study for the real estate professional to use to establish

maintenance reserves. It is undisputed Marx/Okubo's contract prohibited distribution of Marx/Okubo's work product beyond the real estate professional who retained Marx/Okubo. Marx/Okubo's reports indicated they were prepared for use by Marx/Okubo's client. Neither report mentions the Madera West Condominiums, the Madera West Owners' Association or Madera West LLC. On these undisputed facts the Court of Appeals affirmed the trial court's conclusion Marx/Okubo owed no duty to plaintiffs.

Plaintiffs are wrong when they argue the Court of Appeals decision is in conflict with the lead opinion in Affiliated FM Insurance Co. v. LTK Consulting Services, Inc., 170 Wn.2d 442, 243 P.3d 521 (2010). Plaintiffs assert the Court of Appeals determined Affiliated applies to engineers but not architects. Plaintiffs mis-read the Court of Appeals opinion. The Court of Appeals applied a standard duty analysis and found Marx/Okubo owed no duty to plaintiffs on the facts presented. The Court concluded: "Nor can we find in this record any explanation why the COA [defined by the Court to include all plaintiffs] is within the scope of the duty owed by this professional firm for the professional negligence claim." Unpublished Decision, Court of Appeals No. 68127-3-I, at p. 121.

The Court of Appeals went on to reject plaintiffs' effort to characterizing their claims as "professional negligence" claims to avoid

the heightened evidentiary standard (clear and convincing evidence) applicable to negligent misrepresentation claims. The Court of Appeals noted that, unlike the defendant in Affiliated, Marx/Okubo was not accused of negligently performing professional design services; rather, plaintiffs alleged Marx/Okubo made negligent misrepresentations in a property condition assessment and reserve study that plaintiffs never should have received. The Court reasoned:

> The COA fails to point to anything in this record to explain that these reports are "negligent because they breach a professional duty owed rather than a duty not to negligently misrepresent something . . . ."
>
> These are not mere technicalities. To the extent the COA seeks to rely on Affiliated where the tort claim appears to have been one for professional negligence, not negligent misrepresentation, these failings are critical. Specifically, this case is essentially a case based on negligent misrepresentation, not professional negligence. Thus, there is no basis to rely on the lead opinion in Affiliated, a professional negligence case. That case is distinguishable.

Unpublished Decision, Court of Appeals No. 68127-3-I, at 21 (footnote omitted).

The Court of Appeals properly applied duty considerations identified by this Court to find Marx/Okubo owed no duty to plaintiffs. It correctly distinguished Affiliated, which involved alleged negligent engineering designs from the alleged negligent misrepresentations made in a condition assessment and reserve study at issue here.

Therefore, the Court of Appeals decision is consistent with the plurality decision in Affiliated, not in conflict with it as plaintiffs contend.

B. Plaintiffs' Petition Does Not Involve an Issue of Substantial Public Interest.

Plaintiffs argue the Court of Appeals decision will have a broad deleterious impact on condominium owners throughout the state. The argument has no merit. The Court of Appeals decision is unpublished. The decision was not published because the facts presented are unique with little likelihood of repetition.

First, it is undisputed Marx/Okubo and Evans Development agreed Marx/Okubo's reports would not be distributed to comply with RCW 64.34.410. The condominium statute requires developers to include in Public Offering Statements either a description of the condition of the property prepared by the developer or an assessment report prepared by an architect or engineer. Evans Development was only authorized to use the report to prepare its own RCW 64.34.410 disclosure.[1]

Second, Marx/Okubo's reports made clear they were prepared for use by Marx/Okubo's client, and neither report contained any reference to the Madera West Condominiums, the project in which

[1] The distinction is critical because Evans Development limited the scope of services to be provided by Marx/Okubo (CP 756) and made representations to Marx/Okubo specifically related to the siding at issue that formed the basis of Marx/Okubo's recommendations. (CP 879-80, 895).

plaintiffs now have some interest. Rather, plaintiffs contend they relied upon reports that contained no reference to (a) the names of the declarant selling condominium units to them; (b) the name of condominium project they were purchasing units in; or (c) the name of their condominium owners' association.

Third, the improper conduct of Marx/Okubo's client was compounded by the improper actions of the declarant from which plaintiffs purchased. Representatives of the condominium declarant allegedly misled purchasers into believing the declarant had deposited $1 million in the Association's reserve account. (CP 2093)

These are unique circumstances not likely to be repeated. Plaintiffs have failed to demonstrate their petition involves an issue of substantial public interest.

VI. ARGUMENT WHY, IF THE COURT GRANTS PLAINTIFFS' PETITION, IT SHOULD ALSO REVIEW THE COURT OF APPEALS DECISIONS REGARDING SANCTIONS AND ATTORNEYS' FEES

If the Court accepts plaintiffs' petition, it should also review two additional issues decided by the Court of Appeals: (1) whether Marx/Okubo is entitled to CR 11 sanctions against plaintiffs who reasserted claims after their testimony established the claims were meritless, and (2) whether Marx/Okubo is entitled to prevailing party attorneys' fees

under the doctrine of equitable estoppel. The Court of Appeals' ruling on each issue conflicts with decisions of this Court.

A. Marx/Okubo Was Entitled to CR 11 Sanctions Against Plaintiffs Who Reasserted Negligent Misrepresentation Claims After Testifying They Did Not Read and/or Rely on Marx/Okubo's Reports.

Marx/Okubo sought sanctions against certain individual plaintiffs who reasserted negligent misrepresentation claims in their third amended complaint after they testified they either did not review or reviewed but did not rely on Marx/Okubo's reports. This Court ruled in Schaaf v. Highfield, 127 Wn.2d 17, 30-31, 896 P.2d 665 (1995), that reliance on false information is an essential element of a negligent misrepresentation claim. The Court of Appeals declined to follow Schaaf after concluding neither reading nor relying directly on Marx/Okubo's reports was an essential element of plaintiffs' negligent misrepresentation claims. Unpublished Decision, Court of Appeals No. 68127-3-I, at pp. 25-26 ("But Schaaf does not hold that a plaintiff must directly see or read a report in order to rely on it for purposes of a negligent misrepresentation claim.").

The Court of Appeals erred. In Schaaf this Court rejected a negligent misrepresentation claim against an appraiser, where plaintiff did not read the appraisal report before he purchased:

> Even more compelling evidence that Schaaf did not rely on the appraiser's report is his admission in a letter that he did not even see the appraisal report until . . . more than a year after he bought the house. . . . Thus he could not possibly have directly relied on the report at the time of purchase.

Schaaf, supra, 127 Wn.2d at 31-32 (emphasis by Court). Because the Court of Appeals misread this Court's decision in Schaaf, its ruling on Marx/Okubo's request for CR 11 sanctions is error. Therefore, this Court should review the CR 11 issue if it accepts plaintiffs' petition.

B. Marx/Okubo Is Entitled to An Award of Attorneys' Fees Under RCW 4.84.330 and the Doctrine of Equitable Estoppel Where Plaintiffs Unsuccessfully Sought to Enforce Contractual Obligations Under an Agreement Containing an Attorneys' Fees Provision.

In Townsend v. Quadrant Corp., 173 Wn.2d 451, 268 P.3d 917 (2012), this Court held parties who sought to enforce rights under an agreement they were not parties to were equitably estopped from denying that a contractual arbitration provision in the agreement applied to them. Townsend, 173 Wn.2d at 460 ("'Equitable estoppel precludes a party from claiming the benefits of a contract while simultaneously attempting to avoid the burdens that contract imposes.'"). Here, plaintiffs sought to enforce obligations and standard of care warranties that Marx/Okubo had assumed through its contract with Evans Development. *See, e.g.*, CP (No. 68522-8) 908. These facts are directly analogous to those before this Court in Townsend. The Court of Appeals declined to enforce the attorneys' fees provision in Marx/Okubo's

contract. Therefore the Court of Appeals decision is in conflict with this Court's ruling in Townsend. For that reason, this Court should review the RCW §4.84.330 attorneys' fees issue if it accepts review under plaintiffs' petition.

VII. CONCLUSION

Plaintiffs have failed to demonstrate their petition satisfies a criteria for this Court's review established in RAP 13.4(b). Therefore, the petition should be denied. If this Court disagrees, it should also review the Court of Appeals decisions relating to CR 11 sanctions and RCW §4.84.330 attorneys' fees.

RESPECTFULLY SUBMITTED this 7th day of October, 2013.

Kenneth G. Yalowitz, WSBA 12017
Amber L. Hardwick, WSBA 41828
Natalya P. Maze, WSBA 43099
Attorneys for Respondent
Marx/Okubo, Ltd.

GREEN & YALOWITZ, PLLC
1420 Fifth Avenue, Ste. 2010
Seattle, WA 98101-4087
206-622-1400
206-583-2707 (fax)
kgy@gyseattle.com

OFFICE RECEPTIONIST, CLERK

To: Laura Wilkinson
Cc: Ken Yalowitz
Subject: RE: Madera West Condominium Owners Ass'n v. Marx/Okubo; No. 89306-3; Answer to Petition for Review; Certif of Service

Rec'd 10-7-13

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Laura Wilkinson [mailto:laura@gyseattle.com]
Sent: Monday, October 07, 2013 10:21 AM
To: OFFICE RECEPTIONIST, CLERK
Cc: Ken Yalowitz
Subject: Madera West Condominium Owners Ass'n v. Marx/Okubo; No. 89306-3; Answer to Petition for Review; Certif of Service

Dear Clerk of the Court:

Please accept the two attached documents for filing in the case of *Madera West Condominium Owners Ass'n v. Marx/Okubo*, Supreme Court No. 89306-3:

1. Answer to Petition for Review; and
2. Certificate of Service.

Respectfully submitted,

Laura Wilkinson, Assistant to Kenneth G. Yalowitz, WSBA #12017
GREEN & YALOWITZ, PLLC
1420 Fifth Avenue, Ste. 2010
Seattle, WA 98101-4087
206.622.1400
Laura@gyseattle.com
Kgy@gyseattle.com