68127-3

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No. 68127-3

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

MADERA WEST CONDOMINIUM OWNERS ASSOCIATION, et al.

Appellant,

v.

MARX/OKUBO,

Respondent.

APPEAL FROM KING COUNTY SUPERIOR COURT
Honorable Mary Yu, Judge

BRIEF OF APPELLANT

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This appeal is about the negligence of an Architect/Engineering firm for not meeting the professional standard of care required in preparing a property assessment and reserve study for a non-profit Washington Homeowners Association and its members, which were necessary to safeguard them against future risks associated with the construction, repair, and maintenance of their condominium community.

The Washington legislature made it a priority in 2008 (SB 6215) and recently again (RCW 64.38.065 et seq.) to have every condominium community in this State commission a reserve study and update it regularly to provide homeowners with a clear understanding of the condition of their community, and the funding necessary to maintain its integrity.

When an Architect/Engineer undertakes to provide services in this regard (i.e. preparing a property assessment for purposes of Washington Condominium Act's mandatory disclosures and/or a reserve study to budget for necessary repairs), it must meet the standard of care required by the laws of this State.

Here, an Architect/Engineering firm, Marx/Okubo ("Okubo"), undertook to provide the aforementioned services for the Madera West Condominiums. Appellants allege Okubo did not meet the applicable standard of care in preparing its reports.

ASSIGNMENTS OF ERROR

1. The trial court erred by dismissing Okubo for failure to provide pre-litigation notice as described in RCW 64.50.
2. The trial court erred by not finding a duty between Okubo and Appellants as such duty exists by statute and under common law, and was foreseeable.
3. The trial court erred in finding the Association lacked standing to bring its own negligence claim and/or a negligence claim on behalf of the individual homeowners at Madera West, where the Association has standing to sue in either capacity under the Washington Condominium Act.
4. The trial court erred when it considered Mr. Randy Hart's declaration over objection of Appellants because Mr. Hart lacked personal knowledge to testify on whether repairs to the project were made after 1996, and further, because his testimony was based on inadmissible hearsay.

This action arises out of the conversion of the Forrest Village Apartments to the Madera West Condominiums. Madera West is a condominium conversion project located in Federal Way that consists of 172 units. It was converted in 2005.

Mark/Okubo ("Okubo") first visited the Madera West Condominiums in 1996, when the project was called the "Forrest Village Apartments." CP 1518. The Forrest Village Apartments were clad in an engineered wood product called "Louisiana Pacific Seal Siding," commonly known as "LP Siding." CP 1520.

In 1996, a class action lawsuit was certified against the manufacturer of LP Siding. CP 1526. LP Siding was known to swell, expand, and absorb an abnormal level of moisture that caused it to fail prematurely. CP 1520. As a consequence of the class action, LP siding was and is widely known as a defective product. CP 1526.

The former owner of Forrest Village, Mr. Richard Senn, hired Okubo in 1996 to evaluate the siding at Madera to see if he should opt into the LP Siding class action. CP 1520, 1525. The report Okubo prepared for Mr. Senn explained that 56,855 sq ft of the 160,910 sq ft, or about 35% of LP Siding at Forrest Village, was "damaged." CP 1541. Okubo defined the term "damaged" in its Report as follows:

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> To designate siding that is in noticeably poor condition. To be considered damaged, a board was approaching greater than .54" in thickness, and had a moisture content of > 28% or exhibited 'checking' as defined by the American Plywood Association [reference omitted]. In addition, failure could also be determined if siding was buckling or had become soft due to rot [reference omitted]. ***If such conditions exist in any portion of a 16' board, the entire board is considered defective and must be replaced.***

CP 1528. (Italics and bold added, underline in original). According to Okubo, in 1996, over one-third of the LP Siding at Forrest Village was "damaged" and had to be "replaced".

The 1996 Report further pointed out several areas of the siding and other building components were not integrated together in a waterproof manner. CP 1531-33. For example, the 1996 report said, "the siding considered damaged should be removed and a new moisture barrier (building paper or other building wrap) installed..." CP 1521. The report confirmed defects in the siding where it transitioned to other components, and also presumed damage to the structural components behind the siding. (Id. at Pg: 12-14).

In January of 2005, Okubo once again visited the Forrest Village Apartments. This time Okubo was hired by A.F. Evans Development, Inc., one of the members of Madera West, LLC ("MW, LLC") to evaluate the Project as it was being converted to condominiums. According to Okubo, a "Proposal" titled "Architectural/Engineering

Due Diligence" and a copy of its standard terms and conditions made up the parties' agreement. CP 756-772.

As part of the agreement, in April of 2005, Okubo submitted a Property Condition Assessment to AF Evans/MW, LLC describing the condition of the Project. CP 1425-1452. The Assessment included observations pertaining to the siding. CP 1438. But contrary to its 1996 report, and its claim that over one-third of the siding needed to be replaced, Okubo determined the very same siding[1] was "performing", and that across the Project, there were only "isolated" areas of damage. Id.

The Property Assessment Okubo prepared, in addition, did not identify or mention anywhere the Project was clad in "LP Siding", or a siding product known to be defective. Instead it referred to the siding loosely as "engineered wood" siding. CP 1438.

Still further, the remediation schedule that was made part of the property assessment did not advise making any immediate or short term repairs (anywhere from 1-5 years) to the defective LP siding. CP 1452.

Okubo knew that its Property Assessment would, at minimum, serve as a basis for MW, LLC's Washington Condominium Act

[1] Okubo proposes much of the siding it determined to be "damaged" in 1996 was repaired prior to 2005, thus it did not review the same siding in 2005. As addressed later in this brief, however, there is no evidence to corroborate its position.

disclosure statement, which is required for conversion condominiums. RCW 64.34.410-415. The Property Assessment says,

> It is our understanding that A. F. Evans Development, Inc. plans on converting Forrest Village to condominiums…[t]his report is intended to provide the basis for a statement by A.F. Evans Development, Inc., the 'declarant', as described in RCW 64.34.415.

CP 1429.

In addition to the Property Assessment, Okubo prepared a Reserve Study for AF Evans/MW, LLC, and the Madera West Condominium Owners Association. CP 1499-1516. In Okubo's own words, the purpose of the Reserve Study was to,

> provide a forward projection of major costs of repairs and replacements that the Forest Village Homeowners Association [Madera West Condominium Owners Association] should anticipate in planning and budgeting a reserve fund.

CP 1499. Although the Reserve Study was prepared for the express purpose of budgeting for repairs, it did not take into consideration the age and defects at the Project. Id.

Appellants allege Okubo's Reserve Study was woefully inadequate in the amounts it identified for unit owner contributions to the reserve fund. And even though the Association was making contributions close to what was required under Okubo's proposed funding recommendations (it relied on the Reserve Study to set dues)

the Association was not collecting and contributing enough money to the reserves to cover necessary repairs. CP 1395-97, 1564-66, 1662-64.

The Appellants filed the underlying action on March 4, 2009 against MW, LLC, declarant for the condominium. Prior to filing, it served on MW, LLC a notice of claims pursuant to RCW 64.50 in accordance with the terms set forth in the Condominium's Public Offering Statement ("POS").

Based on discovery and the Washington Supreme Court's adoption of the independent duty doctrine, Appellants later moved to name Okubo as a defendant.

On June 10, 2011, Okubo was dismissed *without* prejudice. Even though Okubo did not provide notice to the purchasers under RCW 64.50, the Court dismissed Okubo based on its finding that Plaintiffs did not provide Okubo with the notice. CP 162-164.

On June 16, 2011, Appellants served a second/amended RCW 64.50 notice letter on Okubo. Okubo responded to the amended notice according to the procedures described in RCW 64.50. The parties were, however, unable to resolve their dispute.

In October 2011, Okubo was added back to the underlying action.

On December 9, 2012 the Court heard cross-motions for summary judgment on Appellants' negligence claims and dismissed Okubo from the

action.

Appellants filed a limited motion for reconsideration on the issues of whether Okubo had a duty to Appellants and whether the Association had its own claim against Okubo for negligence. Appellant's motion was denied. CP 1665-1667.

ARGUMENT

Standard of Review.

When reviewing an order on summary judgment, the Court should engage in the same inquiry as the trial court. Cummins v. Lewis County, 156 Wn.2d 844, 852, 133 P.3d 458 (2006). A decision in favor of the Respondents is only proper if the entire record shows there is no genuine issue of material fact, warranting judgment as a matter of law in its favor. CR 56(c); Cummins, 156 Wn.2d at 852. All facts and reasonable inferences on appeal must be considered in the light most favorable to the Appellants. Babcock v. Mason County Fire Dist. No. 6, 144 Wn.2d 774, 784, 30 P.3d 1261 (2001).

On a motion to strike, however, this Court should review the trial court's ruling for an abuse of discretion. King County Fire Prot. Dist. No. 16 v. Hous. Auth. of King County, 123 Wash.2d 819, 826, 872 P.2d 516 (1994); see also City of Kennewick v. Day, 142 Wash.2d 1, 5, 11 P.3d 304 (2000) (a trial court's decision to admit or exclude evidence

is reviewed for an abuse of discretion).

The trial court's denial of Appellants' motion to reconsider should also be reviewed for an abuse of discretion. See Aluminum Co. of Am. v. Aetna Cas. & Sur. Co., 140 Wn.2d 517, 537, 998 P.2d 856 (2000).

1. Appellants were not required to give Okubo pre-litigation notice.

Appellants attempted service of their original notice of claims to Madera West, LLC c/o A.F. Evans Company, Inc. at 88 Lenora Street Seattle, WA 98121. At the time, however, Madera West LLC did not maintain an office there, so they ended up serving AF Evans at its head office in California. Nevertheless, the only demand for pre-litigation notice made in all of the purchase documents was made by Madera West, LLC, not Okubo. CP 6-7, 44.

Despite knowing the reserve study was going to be delivered to the Association, Okubo made no mention whatsoever of any pre-litigation notice in the study. CP 1499-1516. Appellants did not therefore provide Okubo pre-litigation notice prior to filing their initial claims against it. Appellants relied on RCW 64.50.050 (3), which says, "[t]his chapter shall not preclude or bar any action if notice is not given to the homeowner as required by this section," to forego providing

Okubo with notice. See also Lakemont Ridge Homeowners Ass'n v. Lakemont Ridge Ltd. Partnership, 156 Wash.2d 696, 703-4, 131 P.3d 905 (2006).

After being added to the lawsuit, Okubo argued successfully on summary judgment that it could rely on, and piggy-back off, Madera West, LLC's pre-litigation notice. The trial court erred by accepting Okubo's argument for at least three reasons. First, the notice provided by Madera West, LLC is specific to claims made against the "seller" or "builder." Okubo is neither. Second, even though the term "construction professional" includes architects and design professionals under RCW 64.50.010 (4), a claimant need only provide pre-litigation notice if a construction professional requests it first. RCW 64.50.050 (3). Lastly, RCW 64.50.020 (1) requires notice of claims against a construction professional in an action for "construction defects." The claims made in the underlying action against Okubo were for negligent misrepresentation and professional negligence relating to the issuance of its property assessment and reserve study, not for construction defects.

In this instance, Appellants did not need to provide Okubo with pre-litigation notice and the trial court erred by initially dismissing Okubo without prejudice for want of the same.

2. Okubo owed a duty to Appellants according to statute

and common law, and where such duty was foreseeable.

"An essential element in any negligence action is the existence of a legal duty which the defendant owes to the plaintiff." Schooley v. Pinch's Deli Market, Inc., 80 Wash.App. 862, 912 P.2d 1044 (1996); citing Petersen v. State, 100 Wash.2d 421, 425-26, 671 P.2d 230 (1983). The concept of duty can be divided into three inquiries: (1) By whom is the duty owed? (2) To whom is it owed? (3) What is the nature of the duty or the standard of care? Schooley, 80 Wash.App at 866. "The answer to the second question defines the class protected by the duty and the answer to the third question defines the standard of care." Keller v. City of Spokane, 146 Wash.2d 237, 243, 44 P.3d 845 (2002).

At least two of the Schooley inquiries on duty are undisputed here: who owed the duty? Okubo; and what the standard of care is; Okubo was required to act with "reasonable care and competence, and must apply the technical knowledge and skill which is ordinarily applied by architects of good standing, practicing in the same locality." WAC 308-12-321(1); see also WAC 196-27A-020 and RCW 18.43 as pertaining to the standard of care for engineers.

The remaining question of to whom Okubo owed a duty may be resolved be either statute or common law, or via the concept of foreseeability. The question of whether a duty is owed may be

predicated either upon a statute or common law. Alhadeff v. Meridian on Bainbridge Island, LLC, 167 Wash.2d 601, 220 P.3d 1214 (2009). The question of whether a duty is owed may also be predicated on the concept of foreseeability. Wells v. City of Vancouver, 77 Wash.2d 800, 802-803, 467 P.2d 292 (1970). Whether or not a duty is owed is guided by "logic, common sense, justice, policy, and precedent" a/k/a the "the duty considerations." Affiliated FM Ins. Co. v. LTK Consulting Serv., Inc., 170 Wash.2d 442, 450, 243 P.3d 521 (2010), citing Snyder v. Med. Serv. Corp. of E. Wash., 145 Wash.2d 233, 243, 35 P.3d 1158 (2001). Generally speaking, courts will find a duty where reasonable persons would recognize it and agree that it exists. Tallariti v. Kildare, 63 Wash.App. 453, 820 P.2d 952 (1991), citing W. Keeton, D. Dobbs, R. Keeton & D. Owen, Prosser and Keeton on Torts § 53, at 359 (5th ed. 1984).

Okubo owed a statutory duty of care to the Appellants. Under WAC 308-12-321(1) and WAC 196-27A-020 and RCW 18.43, Okubo was required to meet the standard of care a professional architect or engineer in like circumstances would have used in preparing its reports, both which acknowledged their impact and purpose on the Appellants directly. Burg. v. Shannon & Wilson, Inc., 110 Wn. App. 798, 43 P.3d 526 (2002) (Professional engineers have a statutory duty to clients,

employers, and members of the public with whom they have a "special relationship.")

Similarly, Okubo owed a common law duty to the Association. Washington Courts have long recognized the obligation of architects and engineers to act with due care, but only recently has that duty been specifically acknowledged. Affiliated, 170 Wash.2d 442, 243 P.3d 521 (2010); G.W. Construction Corp. v. Professional Service Industries, Inc., 70 Wash.App. 360, 366, 853 P.2d 484 (1993).

In Affiliated, the issue was if an electrical engineering firm owed a duty of care to an operating contractor/concessionaire at the Seattle Monorail Station that suffered economic damages as a result of a fire in the station's electronic grounding system. The Washington Supreme Court held that the engineering contractor did indeed owe a professional duty of care to the operating contractor. The court reasoned it has long recognized that engineers have a duty to exercise reasonable skill and judgment in performing engineering services. By undertaking to provide engineering services, the engineering contractor assumed a duty of care to the operating contractor who had a legally protected property interest in the monorail station as a 'concessionaire'. Id. at 458.

The Affiliated opinion and its reasoning apply to the instant case. Okubo agreed to provide professional architectural and

engineering services at Madera/for Appellants. Not only did Okubo understand its property assessment would serve as the basis of Madera West, LLC's mandatory WCA disclosures, it prepared a reserve study that was specifically designed for the Association to rely on in creating, managing, and budgeting its reserve account. CP 1429, 1499.

The Association, moreover, has a legally protected property interest in the common elements and reserve account that is more compelling than the interest the operating contractor had in Affiliated as a "concessionaire". The Association may, for example, "[a]dopt and amend budgets for revenues, expenditures, and reserves, and impose and collect assessments for common expenses from unit owners, [r]egulate the use, maintenance, repair, replacement, and modification of common elements," "make contracts and incur liabilities", cause additional improvements to be made as common elements in the condominium, "acquire, hold, encumber and convey in its own name any right title, or interest" it has in the condominium real property, and even "grant easements, leases, licenses, and concessions" through or over the common elements for a condominium. RCW 64.34.304 (b), (d)-(i).

In a similar vein, Okubo had a duty of care to the individual unit owners at Madera. The individual owners have a protectable interest in the common elements and reserve account – although the reserve account is

owned and operated by the Association, each owner is obligated to pay monthly dues, a portion of which is allocated to reserves. RCW 64.34.304 (j).

If the existence of a duty is predicated on foreseeability, it is ordinarily a question of fact to be decided by a jury. Hansen v. Friend, 118 Wash. 2d 476, 824 P.2d 483 (1992) (whether duty was owed to minor depends upon foreseeability of harm; since foreseeability is ordinarily a question of fact for jury, the Court of Appeals erred in granting summary judgment to defendants).

As mentioned above, there is no question Okubo knew the information contained in the Property Assessment was going to be delivered to Appellants. CP 1429. There is also no question Okubo prepared the Reserve Study for the Association to rely on to create and budget for a reserve account. CP 1499. Okubo's duty to the Appellants was more than just foreseeable; it was clearly acknowledged in the reports. CP 1429, 1499.

The trial court erred when it did not find a duty between Appellants and Okubo because of the alleged limitations in Okubo's contract with AF Evans, finding this case was analogous to Burg, 110 Wn. App. 798, 43 P.3d 526 (2002). While the scope of an engineer's common law duty of care extends at least as far as the duties assumed by him in the

contract with the owner, *it is not true that the scope of the duty is always limited thereby.* Seattle Western Industries, Inc. v. David A. Mowat Co., 110 Wash. 2d 1, 10, 750 P.2d 245 (1988) (emphasis added); see also Affiliated, 170 Wash.2d 442, 243 P.3d 521 (2010); Eastwood v. Horse Harbor Foundation, Inc, 170 Wash.2d 380, 241 P.3d 1256 (2010); Donatelli v. D.R. Strong Consulting Engineers, Inc., 163 Wash. App. 436, 261 P.3d 664 (2011).

In Burg several homeowners brought suit against an Architect hired by the City to evaluate the stability of a hillside property. The Architect opined the property was unstable and did not convey the same to the owners. The Court was faced with three issues: (1) did the Architect owe a duty to owners under a statutory scheme designed to protect the public at large, not a class or group of private citizens; (2) did the Architect owe a duty of care to the owners as third-party beneficiaries of the contract between it and the City of Seattle; (3) was there was a gratuitous duty owed by the Architect to the owners to apprise them of the corrective work recommendations made to the City. This Court affirmed the trial court's summary judgment dismissal of the claims against the Architect on all three issues because there was no evidence of *any* relationship whatsoever between the Architect and damaged owners.

In other words, this Court declined to extend the duty owed by the Architect hired by the City to the entire public at large.

The facts in Burg are easily distinguishable from this case. Both of Okubo's reports mentioned they were prepared for the benefit of Appellants. CP 1429, 1499. Okubo knew for a fact its reports, or at a minimum the information contained therein, would be provided to purchasers at Madera, and certainly relied on by the Association. Id.

Appellants are not, moreover, arguing Okubo owed a duty to everyone in Washington. But it is not far-reaching to expect Okubo would use reasonable care in preparing information it knew would be disseminated to Appellants and/or that it prepared exclusively for their use. Id.; "The concept of duty is a reflection of all those considerations of public policy which lead the law to conclude that a 'plaintiff's interests are entitled to legal protection against the defendant's conduct.' " Taylor v. Stevens County, 111 Wash.2d 159, 168, 759 P.2d 447 (1988) (quoting W. PAGE KEETON, ET AL., PROSSER AND KEETON ON TORTS § 53, at 357 (5th ed.1984))

The trial court erred, in addition, by accepting Okubo's position that it did not have a duty to Appellants because its reports were misappropriated. Okubo argued the boilerplate use restrictions contained in its agreement limited its liability to AF Evans/Madera West LLC. The

agreement cannot though be reconciled with the express language of its reports, which say they were intended for future use by the Appellants. Id.

Along the same lines, Okubo's reliance on ESCA Corp. v. KPMG Peat Marwick, 135 Wash.2d 820, 959 P.2d 651 (1998) to argue it did not owe a duty of care to the Appellants is misplaced. There were two issues in ESCA and neither of them dealt with a profession negligence claim, or more specifically, the issue of to whom a duty is owed. The Court in ESCA was asked to determine, one, if the comparative fault statute applies to negligent misrepresentation claims, and two, if Plaintiff justifiably relied on a draft audit from a third-party to sustain its negligent misrepresentation claim. Clearly, neither issue was considered under the rubric of a professional negligence claim. The claim at issue was for negligent misrepresentation.

Finally, in Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1, 124 Wash.2d 816, 881 P.2d 986 (1994) the Court held that "the economic loss rule does not allow a general contractor to recover purely economic damages in tort from a design professional." Id. at 823. It reasoned there were overriding concerns of protecting all of the parties' contractual expectancies and giving an incentive to negotiate risk. Id. at 826–27. Affiliated, however, recognized the more important overriding policy of protecting Washington's consumers from risk of future harm and

declined to extend Berschauer beyond its holding; specifically recognizing for the first time an engineer's common law duty of care. After considering the policy reasons in Berschauer, the Court reasoned the person or persons to whom a duty is owed should not "bear the costs of a careless engineer's work." Affiliated, 170 Wash.2d at 454. This is precisely what Okubo will ask this Court to affirm; that Appellants should bear the costs of its careless work, or its failure to acknowledge the determinations it made in 1996 before issuing its 2005 reports. See e.g. CP 562-600.

Appellants were not part of the initial contract negotiations, nor were they able to develop the same contractual expectancies the Berschauer Court did not want to render meaningless in the context of that case. Berschauer, 124 Wash.2d at 827.

In sum, none of the cases cited by Okubo establish that an architect or engineer who undertakes to provide services or a product to the third-party is not obligated to exercise reasonable care in their execution or delivery. Okubo had a duty to Appellants and the trial court erred by not finding one existed.

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3. The Association has standing to bring a claim on its own behalf *or* on behalf of two or more unit owners.

The Association has standing to pursue a negligence claim in its own name and on behalf of itself or on behalf of two or more unit owners. RCW 64.34.304 (1)(d). The trial court thus erred by dismissing the Association's negligence claim against Okubo for lack of standing.

Relying on Satomi Owners Ass'n v. Satomi, LLC, 167 Wn.2d 781, 225 P.3d 213 (2009). and Stuart v. Coldwell Banker Commercial Group, Inc., 109 Wash.2d 406, 745 P.2d 1284 (1987), Okubo argued that an Association *only has standing to bring claims as a surrogate of individual homeowners*. That is not what Satomi held. The Satomi Court held the Owners Association did not plead any claim on behalf of itself. It reasoned all of the claims made by the Owners Association sought recovery for damage to the units and common elements, which are owned by the individual homeowners.

This case is different. The Association's claim here is for damages to the reserve account, which is the property of the Association and independent of damage to the common areas. But even if the trial court determined the real issue herein lies with the damage to the common elements, under Affiliated, to have an actionable negligence claim, ownership of the damaged property can be less than fee simple. Affiliated,

170 Wash.2d at 458. The Association could therefore have standing to sue given Okubo's interference with one of the many property rights the Association has in the common elements under the WCA, or at the very least it has standing to sue on behalf of the individual owners.

The Stuart opinion Okubo relied on in the trial court is likewise unpersuasive here. Under the old Horizontal Property Regimes Act, an Association could not bring a claim on its own behalf. RCW 64.32.420, "the *manager or board of directors*, in either case in the discretion of the board of directors, *on behalf of two or more of the apartment owners, as their respective interests may appear...*" The WCA, unlike the HRPA, allows an Association to "[i]nstitute, 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." RCW 64.34.304 (d)(emphasis added). Given the dissimilarity in the language of the HRPA and the WCA, the Stuart opinion does not compare well to this case.

The trial court erred further when it mixed the questions of whether the Association had standing to bring a negligence claim with the question of whether Okubo had a duty to the Association. The doctrine of standing prohibits a party from asserting another's legal right; it does not define the "scope" or "existence" of such right or obligation. See West v. Thurston County, 144 Wn.App. 573, 578, 183 P.3d 346 (2008). The issue

of whether a duty existed between Okubo and Appellants speaks directly to the latter. "A duty's 'scope' involves a question of law." Affiliated, 170 Wash.2d at 455. "The 'existence' of an independent duty is a question of law." Eastwood, 170 Wash.2d at 402.

4. Mr. Hart's declaration should have been stricken because it is not based on personal knowledge and is hearsay.[2]

Mr. Hart's testimony was severely flawed for several reasons. First, Mr. Hart testified that all of the siding Okubo confirmed was "damaged" in its 1996 report was repaired by the time Okubo reassessed the Project in 2005. CP 1288-92. The testimony is based partly on two nearly illegible bids – prepared by Cedar King - that only propose certain siding repairs that are discussed in Okubo's 1996 report, and repairs made to Building T in the Madera complex. CP 1293-1307. There is absolutely no evidence that the proposed work in the bids was done. For one, the February 21, 1997 bid was prepared for Perkins Coie, and was marked confidential and privileged. CP 1296-97. The sole inference that could have been drawn from the bid is that it was prepared for the purposes of settling or setting damages in the class action against LP Siding. Second, neither Cedar King bid is signed, showing no indication whatsoever that it

[2] Mr. Hart's declaration was not submitted in support of Marx/Okubo's motion for summary judgment, but rather in support of its opposition to the Appellants' motion. Appellants address it here to the extent Okubo argues it should be considered in support of their opposition or was relied on the trial court in reaching its decision.

was accepted by the Owner, or further that any of the work was performed. Third, Mr. Hart's allegation that the existence of different cladding systems in the project confirms repairs were made has no merit at all. To be more specific, Mr. Hart testified under oath that all of the damaged LP Siding at Madera was repaired because in 1996, Madera was fully clad in LP Siding, and in 2005 there were two other siding systems installed. The fact is Building T, in the townhome portion of Madera, always had a different type of siding on it than the rest of the buildings – a product called T1-11 siding. CP 1438. The only other cladding system installed was vinyl siding that was identified in Okubo's 2005 report. The vinyl siding, however, as Okubo said, was only installed in partially enclosed areas, or the areas of buildings that Okubo said in 1996 did not need to be replaced. CP CP 1438, 1520, 1522. Fourth, the 1996 report from Okubo recommended contacting Cedar King for a "sample" of an alternative siding product and explained the quantities (percentage) of siding failures described in the report were "not for bid purposes." CP 1522, 1539. Cedar King could not even issue a real world bid based on Okubo's 1996 observations, confirming yet again, the bids were solely prepared for litigation purposes. No reasonable expert would rely on a scope of repair or cost estimate prepared for litigation purposes to offer testimony at trial that repairs were actually made at a project. ER 703.

Mr. Hart's testimony did not confirm beyond any issue of fact that siding Okubo said was performing and only damaged in isolated locations in 2005, was not the exact same siding it saw in 2006. But even assuming it was instructive, Mr. Hart, an expert, may not opine on the ultimate facts of the case.

Finally, the proposal/bid attached to Mr. Hart's declaration is hearsay. Okubo argued that it should be admissible as a business record kept in regular course of conduct by the former owner of Madera, Mr. Richard Senn. ER 803 (a)(d). The bid/proposal was, however, obtained for the purposes of litigation. It was not kept in the ordinary course of business. See e.g. State v. Hopkins, 134 Wash. App. 780, 142 P.3d 1104 (2006) (expert testimony held inadmissible because it was prepared for purposes of litigation and not for any business purpose).

CONCLUSION

Appellants respectfully request this court overturn the trial court's decision and hold Okubo had a duty to Appellants, and further remand this case on the remaining issues of whether the duty was breached, whether such breach was a proximate cause of Appellants' damages, and the amount in which they were damaged.

Alternatively, if this Court holds the trial court erred in deciding the duty issue as a matter of foreseeability, and that such inquiry is a

question of fact, then Appellants respectfully request such issue be remanded along with the other issues of breach, causation, and damages.

RESPECTUFLLY SUBMITTED this 5th day of June, 2012.

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COURT OF APPEALS
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MADERA WEST CONDOMINIUM OWNERS ASSOCIATION, et al., Appellants, v. MADERA WEST, LLC, et al., Respondents.	APPELLATE NO. 68127-3-I CERTIFICATE OF SERVICE

TO: CLERK OF THE COURT

I, SARAH NOBLE, certify that I emailed a copy of the foregoing Appellant's Opening Brief to counsel for Respondent, Mr. Ken Yalowitz, on June 5th, 2012.

Sarah R. Noble
Office Manager, Casey & Skoglund PLLC