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COURT OF APPEALS CAUSE NO. 68127-3-I *consolidated with* No. 68522-8-I

SUPREME COURT OF THE STATE OF WASHINGTON

MADERA WEST CONDOMINIUM OWNERS ASS'N, ET AL.

Petitioners,

v.

MARX/OKUBO,

Respondent.

PETITION FOR REVIEW

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STATE OF WASHINGTON

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IDENTITY OF PETITIONERS

Petitioners are the Madera West Condominium Owners Association and individual homeowners named as plaintiffs in the underlying action (collectively "Association"), and seek review Court of Appeals ("COA") decision No. 68127-3-I (consolidated with) No. 68522-8-I filed July 1, 2013, and motion to reconsider the same. Appendix A-B.

INTRODUCTION

Under the Washington Condominium Act ("WCA"), which is a consumer protection statute, every developer/declarant of a condominium conversion must prepare a Public Offering Statement for future purchasers, and include therein, a reserve study prepared by an independent licensed architect or engineer. The issue before the COA was whether the architect who prepares the reserve study required by the WCA that is to be included in the POS, has a duty of care to an Association that is independent of any duty of care it owes the declarant with whom it contracts with to prepare the study. The Association argued that Marx/Okubo ("Okubo"), the architect hired by the declarant in this instance, did. Although Okubo contracted with the declarant to prepare the study for the POS, it owed the Association a duty of care as a third-party with a legally protected interest in the condominium. The COA disagreed.

ISSUES PRESENTED FOR REVIEW

1. Should the Association's petition be accepted because the COA's decision conflicts with this Court's decision in Affiliated i.e. do architects owe a similar duty of care as engineers to third persons with whom they do not have a contractual relationship?

2. Should the Association's petition be accepted because the COA's decision undermines the consumer protection mechanisms in the WCA, forcing condominium owners associations or its members to bear the all of the responsibility for an unscrupulous architect's work?

STATEMENT OF THE CASE

This action arises out of the conversion of the Forrest Village Apartments to the Madera West Condominiums ("Madera West"), which is a 172 unit condominium conversion located in Federal Way.

In 1996, a class action lawsuit was certified against the manufacturer of LP Siding. CP 1526.[1] Mr. Richard Senn, the former owner of Forrest Village, hired Marx/Okubo in 1996 to evaluate Madera West for purposes of opting into the LP Siding lawsuit. CP 1520, 1525. Okubo prepared a report for Mr. Senn explaining that approximately 35% of LP Siding at Forrest Village, was "damaged" and needed to be

[1] LP Siding was known to swell, expand, and absorb an abnormal level of moisture that caused it to fail prematurely and as a consequence of the action, was widely regarded as a defective product. CP 1526; CP 1520.

"replaced". CP 1541.[2] The report further explained several areas of the siding and other building components were not installed properly.[3] CP 1521.

In January of 2005, Okubo visited the Forrest Village Apartments a second time. This time Okubo was hired by A.F. Evans Development, Inc. AF Evans was one of the members of the declarant for Madera West, Madera West, LLC ("MW, LLC"). Okubo was hired to review the project for purposes of converting it to condominiums, and to assist MW, LLC in fulfilling the requirements of the WCA, which required every POS it delivered to include, "(a) ... a report prepared by an independent, licensed **architect** or engineer, or a statement by the declarant based on such report... (c) a statement by the declarant of the expected useful life of each item reported in subsection (a)..."). RCW 64.34.415 (a) and (c); App. F. According to Okubo, a "Proposal" titled

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[2] Okubo defined the term "damaged" in its Report as follows:

> 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. (Bold added, underline in original).

[3] 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.

"Architectural/Engineering Due Diligence" and a copy of its standard terms and conditions made up its agreement with AF Evans. CP 756-772.

Okubo prepared a Property Condition Assessment for the benefit of AF Evans/MW, LLC and the Association. The findings made therein were hardly consistent with those made in Okubo's 1996 report. Rather than identify that one third of Madera West needed to be repaired, the assessment said the siding was performing, and there was some limited damage in isolated areas. CP 1438. [5] Okubo knew, at a minimum, the information contained in its assessment would serve as a basis for MW, LLC's WCA mandated disclosures in the POS.[6]

After preparing the assessment, Okubo prepared for the POS and benefit of the Association, a reserve study.[7] CP 1499-1516. The purpose

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[5] The assessment also failed to mention the siding was "LP" or a known defective product. Instead it referred to it only as "engineered wood". CP 1438.

[6] 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.

[7] Not only does the reserve study say it was prepared for the benefit of the Association, officers of AF Evans were members of the Madera West Condominium Association, which was incorporated when the reserve study was issued. CP 1496.

of the Reserve Study was to,

> [P]rovide 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 helping the Association establish and adequately fund a reserve account, and despite Okubo's extensive knowledge of the damage at Madera West, the study did not consider the condition of the property in preparing its study. Id.

When the Association later found out about the actual condition of Madera West, it realized it had not collected anywhere near the amount of money it needed to make necessary repairs. CP 1395-97, 1564-66. Using Okubo's projections, monthly homeowner dues were initially set three times lower than they should have been set at.[8] See id. ¶ 6-7.

The Association filed a lawsuit against MW LLC on March 4, 2009. Based on discovery and this Court's opinion in Affiliated, it later amended its complaint to add Okubo as a defendant, asserting against it claims for professional negligence and negligent misrepresentation, and

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[8] The Association understood it was purchasing a conversion condominium that would need to be maintained and repaired on a more aggressive schedule than a brand new condominium.

seeking to recover the economic loss caused by its failure to prepare a reserve study using reasonable care.

The trial court dismissed all claims against Okubo on December 9, 2012. The Association filed a limited motion for reconsideration on the issues of whether Okubo owed it a duty, and whether it had standing to pursue its own negligence claim. The motion was denied. CP 1665-1667.

On appeal, the COA affirmed the trial court, except that it did find the Association had standing to sue Okubo on behalf of two or more unit owners. App. A at 10. The Association moved for reconsideration; that motion was denied on August 8, 2013. App. B.

ARGUMENT

A. Okubo owes a duty of care to the Association.

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 v. Pinch's Deli Market, Inc., 80 Wash.App. 862, 866, 912 P.2d 1044 (1996); citing Petersen v. State, 100 Wash.2d 421, 425-26, 671 P.2d 230 (1983). "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."[9] Keller v.

[9] 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

City of Spokane, 146 Wash.2d 237, 243, 44 P.3d 845 (2002).

The Association's appeal focused on the second Schooley inquiry, or whether the scope of an architect's duty of care extends to third parties with whom they do not have a contract. This inquiry may be decided as a matter of law where the answer is in a statute or case law. Alhadeff v. Meridian on Bainbridge Island, LLC, 167 Wash.2d 601, 220 P.3d 1214 (2009). But if the answer is based on foreseeability, it is ordinarily a question of fact. Christen v. Lee, 113 Wn.2d 479, 492, 780 P.2d 1307 (1989) (The concept of foreseeability determines the scope of the duty owed); Hansen v. Friend, 118 Wash. 2d 476, 483, 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); see also Wells v. City of Vancouver, 77 Wash.2d 800, 802-803, 467 P.2d 292 (1970) (The element of foreseeability plays a large part in determining the scope of defendant's duty).

1. Affiliated expressly mentions architects owe a duty of care to third persons even in the absence of contractual relationship.

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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 308-12-330(1)(a).

The COA did not find Affiliated FM Ins. Co. v. LTK Consulting Services., Inc., 170 Wn.2d 442, 243 P.3d 521 (2010) instructive on the issue of whether a duty exists between the Association and Okubo, but Affiliated confirms Washington recognizes that one does. Affiliated, 170 Wn.2d at 451-454, citing G.W. Construction Corp. v. Professional Service Industries, Inc., 70 Wn. App. 360, 366, 853 P.2d 484 (1993); quoting Feinman, Professional Liability to Third Parties § 11.3.1, at 228 (2000)(("Most courts have extended liability to **architects and engineers** by applying the ordinary law of negligence."); Stuart M. Speiser et al., The American Law of Torts § 15:117, at 852 (1987)("It is well settled, in the modern law, **that architects or engineers** may be subject to **liability for property loss or damage** resulting from defective designs, specifications, plans, drawings, **supervision and administration, and the like**.") (bold added). In holding that an engineer owed a duty of care to a licensee of the Seattle Monorail/a third party that had a property interest in the monorail but did not have contract with the engineer, this Court relied on authority findings the liability of architects and engineers analogous.

The COA, however, did not interpret Affiliated to apply to architects, reasoning it applies only to engineers, which seemingly lacks merit. App. A at 18. Both architects and engineers require special training

and certification by the State, and significantly, RCW 64.34.415 allows a licensed engineer or architect to prepare the critical reports it requires.

The COA also distinguished in particular the G.W. Construction Corp. case cited by this Court in Affiliated to explain the Association only had a possible claim for negligent misrepresentation under these facts. In G.W. Constr. the court held a building inspector/engineer owed a duty of care to a subcontractor because they had a contractual relationship. While there is no contract between the Association and Okubo, G.W. Constr. lends support to the Association in a broader sense - it confirms a design professional performing a building inspection has a duty to use reasonable care, and the failure to do so may expose it to claims for negligence and negligent misrepresentation. See id. at 366; Key Dev. Inv., LLC v. Port of Tacoma, 173 Wn. App. 1, 292 P.3d 833 (2012) (The applicable standard of care may include the duty not to make a negligent misrepresentation, but the claims are still actionable separately). As this Court explained in G.W. Constr., if an attorney is hired to draft a will and fails to do it, he can be sued for breach of contract. If the same attorney drafts a will, but faisl to have it executed in front of a witness, he can be sued for professional negligence. Here, Okubo did not only knowingly misrepresent the condition of the property in its reports, it failed to prepare a meaningful reserve study using the same care that an architect acting reasonably under

similar circumstances would have. No architect using ordinary care would prepare a reserve study that failed to consider the condition of a project, especially knowing as a matter of fact that nine years earlier, one third of its siding and building components needed to be repaired and replaced. App. A, 20; CP 1591 at ¶ 9.

2. Does an architect assume a tort law duty of reasonable care independent of its contractual obligations?

Even if this Court's express mention of architects along with engineers in the Affiliated decision is only dicta, following the reasoning of that case, one can only conclude a duty of care exists between the Association and Okubo. To decide if the law imposes a duty of care (and to determine the duty's measure and scope) the courts weigh "considerations of 'logic, common sense, justice, policy, and precedent[]' " a/k/a the "duty considerations". Id. at 449 quoting Snyder v. Med. Serv. Corp. of E. Wash., 145 Wn.2d 233, 243, 35 P.3d 1158 (2001); Lords v. N. Auto. Corp., 75 Wn. App. 589, 596, 881 P.2d 256 (1994). 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). Here, logic and common sense dictate that the Association would rely on Okubo's reserve study because it expressly said that it was prepared for the benefit of the Association, and the WCA

permits the Association to rely on the POS. CP 1499; RCW 64.34.410-15; see also One Pac. Towers Homeowners' Ass'n v. Hal Real Estate Invs., 148 Wn.2d 319, 61 P.3d 1094 (2002) (seller of a condominium must provide a POS to purchaser, and failure to do so is breach of the WCA).

3. What is the measure of an architect's duty of care?

The Court said that Okubo did not owe a statutory duty of care to the Association because it did not explain how such a duty exists under WAC 308-12-330(1)(a). However, WAC 308-12-330(1)(a) speaks for itself. It mandates that an architect, "... must 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." State v. Jacobs, 154 Wn.2d 596, 600, 115 P.3d 281 (2005) (Where a statute's meaning is plain, we give effect to that plain meaning as the expression of the legislature's intent.) Okubo/Mr. Allan Thunder prepared and indorsed the study as an "AIA" or licensed architect, and Okubo entered into an agreement with AF Evans to provide "architectural' services required by a consumer protection statute i.e. WCA. CP 1501.

To deny Okubo had a statutory duty, the COA compared this to case Burg. v. Shannon & Wilson, Inc., 110 Wn. App. 798, 43 P.3d 526 (2002). But Burg is distinguishable. In discussing whether engineers owed a statutory duty to third parties, the COA looked at RCW 18.43.010,110-

15, and WAC 196-27A-010-020. But none of these statutes contains a provision similar to WAC 308-12-330(1)(a) describing precisely the standard of care an architect must use at all times.[11] App. D-F.

When a design professional is performing architectural services, it must use reasonable care and competence. There is no limiting language in WAC 308-12-330(1)(a) to suggest otherwise.

4. Does the scope of Okubo's duty encompass the Association?

A duty's scope is determined by looking at the class of persons or harm encompassed by a duty of care. It is "necessarily a judgment built on the duty considerations, and so the reasons for recognizing that a class of people or risks of harm is within the scope of a duty are often the same reasons for recognizing a duty of care in the first instance." Affiliated, 170 Wn.2d at 455; see also HAL, 148 Wn.2d at 331, quoting COMMON INTEREST, Official Comment 1 to RCW,

> [t]he best 'consumer protection' that the law can provide to any purchaser is to ensure that such purchaser has an opportunity to acquire an understanding of the nature of the products which it is purchasing.

The reserve study says,

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[11] Burg is also distinguishable because it discussed the duty owed by engineers to third parties, not architects. It is paradoxical for the COA to read Affiliated to apply only to engineers, but extend Burg to architects.

> The purpose of this survey is 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 for a reserve fund. It is our understanding that it is the intent of A.F. Evans to convert the property to condominiums.

CP 1499. The Association is not arguing the duty extends to an indeterminate class of persons. The Association is arguing that a jury could most certainly find that Okubo owed it a duty of care looking at express language of the study and the "duty considerations", and therefore it falls within the scope of persons harmed by the study, particularly where the study was part of the POS prescribed by the legislature to protect it.

While this Court has touched on the duty of an architect to condominium owners before, it has never done so in this context. In Atherton Condominium Apartment-Owners Ass'n Bd. of Dirs. v. Blume Dev. Co., 115 Wn.2d 506, 799 P.2d 250 (1990), the plaintiffs' claim for negligent design was denied because they failed to show the architect "breached any duty of care and that such breach was the proximate cause of the alleged damages." Id. at 534. At the time Atherton was decided, this Court had not recognized a duty between engineers and architects in the context of a claim against third parties for economic loss.[12] This Court has

[12] Atherton, 115 Wn.2d at 534 fn.17. Owners also fail to articulate a recognizable negligence claim. Owners do not demonstrate what, if any, duty Westlin owed to them.

since the Atherton decision in 1990, acknowledged that such duty may exist. Eastwood v. Harbor Horse Found., 170 Wn.2d 380, 393-94, 242 P.3d 825 (2010).

Atherton is further distinguishable from this case because this is not a claim for negligent design, and therefore does not involve any intermediary party - the loss in Atherton was caused by the failure of the contractor to follow the architect's drawings. Id. at 534. Here, Okubo prepared the reserve study directly for the benefit of the Association.

Atherton was decided 23 years ago and much has changed since then – particularly the economic climate and rise of condominium conversions versus new construction, and Affiliated sets forth an analytical framework that can very well be applied to architects in more current context.

5. The COA and trial court erred when they determined the record did not show Okubo was negligent.

The COA, while recognizing the possibility of a negligent misrepresentation claim on the facts of this case, fails to look at the reserve study independent of the property assessment. Key Dev. Inv., LLC, 173 Wn. App. at 1 (An applicable standard of care may include the duty not to make a negligent misrepresentation, but the claims are still

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[the] Owners appear to seek only economic loss damages which are not recoverable under tort law."

actionable separately). Rather than focus on the threshold duty issue, the COA and trial courts answered the question of whether Okubo had a duty to the Association by looking at whether there was evidence that Okubo violated any standard of care. Not only is the latter a question of fact[13] [14], it puts the cart before the horse. The most obvious example of this is the COA's failure to address the issue of foreseeability entirely. See generally App. A. at 17-22.

Okubo conceded at oral argument that it should have been granted summary judgment if the reserve study had listed the correct name of the Association (i.e. had it said "Madera West Condominium Owners Association" instead of "Forrest Village Homeowners Association"). App. C, 14-15, admitting the Association was the intended recipient of its study, CP 1499; 381. Noting this concession, the COA should have determined that Okubo assumed a duty to the Association.

6. Does an architect's duty of care extend to the Association and persons who have a property interest in the reserve account?

The Association has an interest greater than or equal to the licensee in Affiliated in the reserve account. The Association has the exclusive right to create and administer the reserve account in its own name, and

[13] Eastwood, 170 Wn.2d at 398, 242 P.3d 825 (2010) (causation is an issue of fact).

[14] The Association's expert testified Okubo did not act reasonably. CP 1591 at ¶ 9.

every owner at Madera West grants the Association a license to manage the reserve account by operation of the law/the WCA. RCW 64.34.380 et seq.; App. G.

The COA dismissed the Association's right to pursue a negligence claim on its own behalf for the damage to the reserve account acknowledging the Association has some interest in the reserves, but not a "protectable interest" as described in Satomi Owners Ass'n v. Satomi, LLC, 167 Wn.2d 781, 812, 225 P.3d 213 (2009). But as this Court pointed out in Affiliated, SMS's legally protected interest derived from the "*right and privilege to maintain and exclusively* operate" the Monorail System. Affiliated, 170 Wn.2d at 459 (italics in original, underline added).[15]

B. The decision to deny that a duty exists between Okubo and the Association is a matter of public interest affecting every condominium owner in this State.

1. The COA's ruling strips owners of any recourse against an architect who produces a worthless study.

A declarant must produce a property report and reserve study in the Public Offering Statement ("POS") for a condominium conversion. WCA 64.34.415; App. F. The reports must be prepared by a design

[15] This decision may lead to an absurd circumstance where the Association could not, for example, pursue a claim for embezzlement without owner approval even though the reserve account must be made in its name.

professional, which may be an architect or engineer. The failure to deliver the foregoing is considered a failure to deliver a POS. RCW 64.34.405. The reason a declarant is compelled to produce these reports is to make buyers aware of the condition of the property, to provide them pre-purchase notice of the likely cost of future repairs, and equally important, how much their monthly homeowner dues will be. See HAL, 148 Wn.2d at 331; CP 1566.

In this instance, Madera West LLC did provide the report and reserve study required by law in the POS. Both were prepared by a licensed architect/Okubo. In providing the mandated disclosures, MW LLC assumed that Okubo's reports provided meaningful and accurate information necessary to satisfy the intent of the WCA; unfortunately, that was not the case. CP 1688 at ¶ 4.

The COA's decision provides developers a road map on how to commit perpetual fraud upon the tens of thousands of condominium owners in the State of Washington. "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)). Developers can

retain an architect to produce reports just to satisfy the statute, and without an eye towards their accuracy. If the declarant is sued, he will argue he justifiably relied on the architect to use reasonable care in performing his work.[18] The architect will respond, under the current law, he had no obligation to use such care, and even if he did, he is not liable to a third party for failure to do so unless it can show clear and convincing evidence that he provided false information. ESCA Corp. v. KPMG Peat Marwick, 135 Wn.2d 820, 826, 959 P.2d 651 (1998) (a claim for negligent misrepresentation must be established by clear and convincing evidence).[21]

The above described scenario is exactly what happened here. To deflect liability for the negligently prepared reports, Okubo argues the responsibility for producing accurate information falls on MW LLC, who along with its selling agent duped the COA. Okubo argues it has no responsibility for its failures to comply with the standard of care set out in

[18] CP 366 at 3-7 v. 380-81 at 8-10. Okubo originally testified that it was not aware the project was a conversion when preparing its reports, but admitter later it did.

[21] There is no other design professional in Washington that enjoys this type of immunity - not engineers, not builders, not contractors, not developers, not even real estate appraisers. Affiliated, supra; Jackson v. City of Seattle, 158 Wn. App. 647; 244 P.3d 425 (2010); Davis v. Baugh Indus. Contractors, 159 Wn.2d 413, 150 P.3d 545 (2007); Schaaf v. Highfield, 127 Wn.2d 17; 896 P.2d 665 (1995).

WAC 308-12-330(1)(a) and/or applicable case law because Madera West only commissioned a limited investigation. CP 673 17:18-19, 20-21: 13-1.

But Okubo's imposed limitation excuse is spurious, and it should be held independently liable for its work and failures to meet industry standards, particularly where the WCA singles out architects as one of the only design professionals capable of preparing such mandatory disclosures. CP 1591 at ¶ 9.[22] The legislature put its faith in Okubo to advise the Association that it visited this very same project nine years ago, and that the damage it discovered back then could have only worsened. CP 1541, 1528. That any new study that did not take into consideration the condition of the property did not effectively advise purchasers of the future cost of necessary maintenance and repairs, or their monthly dues. CP 1499. Without Okubo using the discretion given to it under the WCA, the Association, not the declarant, is forced to shoulder the burden of Okubo's careless work.[23]

2. The deleterious effects of the COA's decision go beyond the facts of this case as condominium associations are required by law to get annual reserve studies.

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[22] The COA's expert testified, "[a] reserve study is only as good as the accuracy of the prediction of the useful remaining life and should be based on a thorough site review of a current building."

[23] Affiliated, 170 Wash.2d at 454, "[A]n innocent party who never had the opportunity to negotiate the risk of harm would be forced to bear the costs of a careless engineer's work...Still, we think economic concerns about liability run amok are overstated and can be addressed through conventional concepts of the measure and scope of a duty of care."

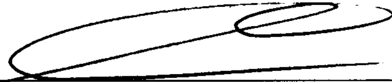
In 2011 the legislature passed RW 64.34.380, which requires an Association to obtain an annual reserve study unless it can show doing so would be an unreasonable hardship. The intent of this added section was to ensure that all associations would be prepared for, and have the ability to fund, major repairs necessary to maintain the integrity of their community. The Board of Directors is tasked with having the study prepared for the Association.

Following the COA's decision, an architect can prepare a reserve entirely meaningless reserve study, and neither the Association nor a third party would be able to maintain a claim against it for professional negligence, but "a negligent act should have some end to its legal consequences." Hunsley v. Giard, 87 Wn.2d 424, 435, 553 P.2d 1096 (1976).

CONCLUSION

In this instance, Okubo's negligence remains without an end. The COA's decision affects thousands of condominium owner/Owner's Association in this State. The question presented is simply whether Okubo had an obligation to use even some degree of care in preparing the WCA mandated reserve study for the Association. According to Affiliated, WAC 308-12-330(1)(a), the duty considerations, concept of foreseeability, WCA, the answer to the question is "yes".

RESPECTFULLY SUBMITTED this 6th day of September.



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APPENDIX

Exhibit A: Court of Appeals Decision filed July 1, 2013

Exhibit B: Order Denying Motion for Reconsideration filed August 8, 2013

Exhibit C: Transcript of Hearing

Exhibit D: RCW 18.43.010

Exhibit E: RCW 18.43.105-110

Exhibit F: WAC 196-27-010-020

Exhibit G: RCW 64.34.380 et seq.

Exhibit H: RCW 64.34.415

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

MADERA WEST CONDOMINIUM ASSOCIATION, a Washington non-profit corporation; THOMAS FASSLER; JOHN BERRY; TAMARA VERA; MICHELLE DONALDSON; JACK RADFORD; JAY INGWALDSON; DOROTHY ROCKEY; ALLAN FULLER; SCOTT PERRY; RYAN FIDLER; DANIELLE TOWNSEND; DIANA CRETTOL; HANNAH ALMARAZ; KEITH BRETT; LEONOR CASTELLAR; GARY EVANS; LATRELLE GIBSON; LINDA GRESETTE; RICHARD HARRISON; CINDY KALLENBERG; BRENNA LARSEN-THIEL; CANDICE McKINNEY; JAYNE MILLER; MICHAEL OCTAVE; HENRI PARREN; PAUL PATTELLE; TONI POSEY; KELLY ROBINSON; MICHAEL SMITH; JEROME SZYMANSKI; STEVEN TOLLEY; ERIN ZAMORA; ROCIO TRUJILLO; GWEN BERVEN; MARY BIZZELL; PAUL BOVA; ALYSON BROWN; ADAM CARTER; ALTHEA CHANG; JENNIFER COPE; JEFF DANNENBERG; LEE ELLIOTT; GARY GESELL; JONATHAN JONES; COURTNEY LINDSAY; MICHAEL OKUDA; GABRIEL ORTIZ; MARCIA PETERSON; ERIK SOCTT; DAN SKINNER; DIANNA STACY; JIMMIE STOKES; BEVERLY STOKES; ADAM STOKES; LINDA UPSHAW; ROSIE WHITE; ERIK WINKLER; and KARL YAUCH, Washington residents,

Appellants/Respondents,

v.

No. 68127-3-I
(Consolidated with
No. 68522-8-I)

DIVISION ONE

UNPUBLISHED

FILED: July 1, 2013

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
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MARX/OKUBO, a Washington corporation,)
)
)
Respondent/Appellant,)
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MADERA WEST, LLC, a Washington corporation; JESSE NELSON, a Washington resident; and COLDWELL BANKER BAIN ASSOCIATES, a Washington corporation,)
)
)
Defendants.)
)

Cox, J. — Madera West Condominium Association and multiple individual condominium unit owners (collectively "COA") appeal the summary dismissal of their action for negligence against the architectural firm of Marx/Okubo & Associates, Ltd. ("Marx/Okubo"). Marx/Okubo appeals the trial court's denial of its motion for attorney fees and sanctions under CR 11 and CR 26(g). We consolidate these linked appeals for decision.

The COA fails to show that Marx/Okubo owed it any statutory or common law duty for a professional negligence claim. Thus, there are no genuine issues of material fact for trial on this claim. Further, the negligent misrepresentation claim has been abandoned on appeal.

Marx/Okubo fails to show that it is either entitled to an award of attorney fees or that the trial court abused its discretion in denying sanctions. We affirm.

In 1996, Marx/Okubo inspected and evaluated the condition of the Forest Village Apartments' ("Apartments") siding for the Apartments' then owner. The siding was evaluated based on criteria established by a class action suit against

the siding's manufacturer. Marx/Okubo concluded that approximately 35 percent of the siding was damaged.

In 2005, A.F. Evans Development, Inc. ("A.F. Evans"), the prospective purchaser of the Apartments, hired Marx/Okubo to inspect the property. The purposes of this inspection included determining the condition of the property in preparation for A.F. Evans to convert the property to condominiums.

Marx/Okubo inspected the Apartments and produced a "Property Condition Assessment" in April and a "Reserve Study" in May. The property assessment summarized Marx/Okubo's "review of the physical conditions; architectural, mechanical, and electrical components . . . and the quality of construction." The reserve study provided "a forward projection of major costs of repairs and replacements that the Forest Village Homeowners Association should anticipate in planning and budgeting for a reserve fund."

Marx/Okubo gave the following summary of the Apartments' siding: "The siding appears to be performing as expected considering the age and use of the buildings. Isolated areas of siding damaged from rainwater splash were observed."

In May 2005, A.F. Evans purchased the property. Thereafter, the property was converted to condominiums. Madera West, LLC ("MW, LLC"), was the developer and declarant of the Madera West Condominiums ("Madera West").

The COA commenced this action against MW, LLC, and others. The COA later joined Marx/Okubo as a defendant. In its Third Amended Complaint, the

COA asserted claims for negligent misrepresentation and professional negligence against Marx/Okubo.[1]

In November 2011, the COA and Marx/Okubo made cross motions for summary judgment. Marx/Okubo argued that the COA failed to establish a negligent misrepresentation claim and that it did not owe the COA a duty for a professional negligence claim. In the COA's motion for partial summary judgment, the COA sought determinations that (1) the COA had standing to pursue its negligence claims on its own behalf and on behalf of individual unit owners, and (2) Marx/Okubo breached a duty of care it owed to the COA. Additionally, the COA moved to strike portions of Randy Hart's declaration that Marx/Okubo submitted in opposition to the COA's motion for partial summary judgment. Hart is an architect and a principal at an engineering firm who reviewed the records produced in discovery for this case.

The trial court granted Marx/Okubo's motion for summary judgment and dismissed, with prejudice, all of the COA's claims against Marx/Okubo. It also denied the COA's motion for partial summary judgment and dismissed its claims based on lack of standing. For purposes of this latter motion only, the court also denied the COA's motion to strike portions of Hart's declaration.

In February 2012, Marx/Okubo moved for an award of attorney fees and sanctions. The trial court denied both requests.

The COA and Marx/Okubo both appeal.

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[1] Clerk's Papers (No. 68127-3) at 700-716.

PRELITIGATION NOTICE

The COA argued in its briefing on appeal that it was not required to give Marx/Okubo prelitigation notice. Marx/Okubo contends that this issue is moot. We agree that this issue is moot, and the COA properly conceded this point at oral argument on appeal.

Generally, this court will not consider a moot issue unless it involves "'matters of continuing and substantial public interest.'"[2] "'A case is technically moot if the court cannot provide the basic relief originally sought . . . or can no longer provide effective relief.'"[3] Mootness is a question of law that this court reviews de novo.[4]

There are exceptions that permit a court to reach a moot issue, but these exceptions do not apply to this case.

Here, the trial court granted the COA's motion for leave to rejoin Marx/Okubo as a party after it complied with the prelitigation notice requirement and statutory procedures. Because this court cannot provide any relief that the trial court has not already provided, this issue is moot. We need not address this issue further.

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[2] In re Cross, 99 Wn.2d 373, 377, 662 P.2d 828 (1983) (quoting Sorenson v. City of Bellingham, 80 Wn.2d 547, 558, 496 P.2d 512 (1972)).

[3] Dioxin/Organochlorine Ctr. v. Pollution Control Hearings Bd., 131 Wn.2d 345, 350-51, 932 P.2d 158 (1997) (citations omitted) (quoting Snohomish County v. State, 69 Wn. App. 655, 660, 850 P.2d 546 (1993)).

[4] Hilltop Terrace Homeowner's Ass'n v. Island County, 126 Wn.2d 22, 29, 891 P.2d 29 (1995).

STANDING

The COA next argues that the trial court erred when it summarily dismissed the Condominium Owners Association's ("Association") claims against Marx/Okubo on the basis that the Association lacked standing. We agree in part.

Because we refer to the Association and the individual unit owners collectively as the "COA," we refer to the Association separately when discussing its standing.

A motion for summary judgment may be granted when there is no genuine issue of material fact, and the moving party is entitled to a judgment as a matter of law.[5] This court reviews a summary judgment order de novo, viewing the facts and reasonable inferences in the light most favorable to the nonmoving party.[6]

There are two issues. The first is whether the Association lacked standing to bring the claims on its own behalf. The second is whether the Association lacked standing to bring the claims on behalf of condominium unit owners. We address each issue separately.

The Association's Standing on Behalf of Itself

The COA argues that the Association has standing to bring claims on its own behalf. It contends that the Association has a property interest in Madera West's common elements and the reserve account, which satisfies the standing requirements. We disagree.

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[5] CR 56(c).

[6] Lam v. Global Med. Sys., Inc., 127 Wn. App. 657, 661 n.4, 111 P.3d 1258 (2005).

Under RCW 64.34.304(1)(d) of the Washington Condominium Act, a unit owners' association may "[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."[7] But in order for a unit owners' association to bring a claim on its own behalf, it must prove that it has standing independent from the unit owners.[8]

"The doctrine of standing prohibits a litigant from raising another's legal rights."[9] A party has standing if it demonstrates that it has "'a present, substantial interest'" and that it will accrue a benefit by the relief granted.[10]

In Satomi Owners Association v. Satomi, LLC, the supreme court addressed a condominium owners' association's standing to bring claims on its own behalf against a developer and subcontractors.[11] The court looked to whether the association alleged damage to any property in which it had a "protectable interest" to determine whether it had standing independent from the unit owners.[12]

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[7] (Emphasis added.)

[8] See Satomi Owners Ass'n v. Satomi, LLC, 167 Wn.2d 781, 812, 225 P.3d 213 (2009).

[9] Haberman v. Wash. Pub. Power Supply Sys., 109 Wn.2d 107, 138, 744 P.2d 1032 (1987), opinion amended by 109 Wn.2d 107, 750 P.2d 254 (1988).

[10] Timberlane Homeowners Ass'n, Inc. v. Brame, 79 Wn. App. 303, 307-08, 901 P.2d 1074 (1995) (quoting Primark, Inc. v. Burien Gardens Assocs., 63 Wn. App. 900, 907, 823 P.2d 1116 (1992)).

[11] 167 Wn.2d 781, 811-13, 225 P.3d 213 (2009).

[12] Id. at 812.

The association asserted five claims on its own behalf under RCW 64.34.304(1)(d).[13] It further alleged that the damages included "the cost of repairing the project . . . and resulting monetary and material harm."[14] The "project" involved individual units, common elements, and limited common elements.[15]

The court concluded that the association lacked standing to bring the five claims on its own behalf because it did not have a "protectable interest" in the property that was allegedly damaged.[16] Specifically, it did not own the units or the common elements that were allegedly damaged.[17] "Common elements" are "all portions of a condominium other than the units."[18]

Here, the COA brought two claims against Marx/Okubo: negligent misrepresentation and professional negligence. In its third amended complaint, it alleged that the damage it suffered included "the cost of repairing the damage to the Project caused by defective workmanship and materials and related costs, the cost of correcting defective conditions and related costs, consequential damages, the loss of use, stigma damages, investigation costs and litigation expenses."

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[13] Id. at 811, 812 n.24.

[14] Id. at 811-12 (internal quotation marks omitted).

[15] Id. at 812.

[16] Id.

[17] Id.

[18] RCW 64.34.020(7).

To demonstrate that the Association has independent standing, the COA must show that the Association has a protectable interest in the property that was allegedly damaged. Here, the COA contends that the Association has a protectable interest in Madera West's common elements and in the reserve account. But under Satomi, the Association does not have a protectable interest in this property.[19]

First, like Satomi, the Association does not have a "protectable interest" in Madera West's common elements because they are owned by the unit owners, not the Association.[20]

Second, the Association does not have a "protectable interest" in the reserve account. A unit owners' association may establish a "reserve account" to "fund major maintenance, repair, and replacement of common elements."[21] As Marx/Okubo argues, the Association may "[e]stablish and administer a reserve account" for the benefit of the common elements.[22] But the Association itself does not receive a benefit from administering the reserve account.[23] As with the

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[19] Satomi, 167 Wn.2d at 812.

[20] Id.

[21] RCW 64.34.380(1).

[22] RCW 64.34.304(1)(p); RCW 64.34.380.

[23] See, e.g., RCW 64.34.356 ("Unless otherwise provided in the declaration, any surplus funds of the association remaining after payment of or provision for common expenses and any prepayment of reserves shall, in the discretion of the board of directors, either be paid to the unit owners in proportion to their common expense liabilities or credited to them to reduce their future common expense assessments.").

"common elements" in Satomi, the Association does not have "protectable interest" in the reserve account.[24]

Since the Association did not have a "protectable interest" in the common elements or reserve account, the trial court properly decided that the Association did not have standing independent from the unit owners.

The COA argues that the Association had ***some*** property interest in the common elements and reserve account.[25] But under Satomi, the issue is whether the Association had a "protectable interest" in this property.[26] Whatever interest the Association may have in this property does not rise to the level of a "protectable interest" under Satomi.[27] Further, the COA fails to demonstrate how the Association would benefit from any relief granted.[28] Thus, we reject this argument.

The Association's Standing on Behalf of Unit Owners

The prior discussion does not end our inquiry. The COA also argues that even if the Association does not have standing independent of the unit owners "at the very least it has standing to sue on behalf of the individual owners." We agree.

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[24] Satomi, 167 Wn.2d at 812.

[25] Reply Brief of Appellant at 20-21 (citing Affiliated FM Ins. Co. v. LTK Consulting Services, Inc., 170 Wn.2d 442, 457-58, 243 P.3d 521 (2010)).

[26] Satomi, 167 Wn.2d at 812.

[27] Id.

[28] See Timberlane Homeowners Ass'n, Inc., 79 Wn. App. at 307-08.

As we noted previously, under RCW 64.34.304(1)(d), a unit owners' association may "[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.***"[29]

As discussed above, in Satomi, the supreme court concluded that the condominium association did not have standing to bring five claims on its own behalf.[30] Instead, the court found that the claims were "brought solely in a representative capacity by Blakeley Association on behalf of its members who own the allegedly damaged property."[31]

Similarly, here, the Association has standing to bring claims on behalf of "two or more unit owners" of property that was allegedly damaged. Thus, the trial court erred to the extent it dismissed the Association's claims made on behalf of "unit owners on matters affecting the condominium."

PROFESSIONAL NEGLIGENCE

The COA argues that the trial court erred when it granted Marx/Okubo's motion for summary judgment. The trial court dismissed the COA's negligent misrepresentation as well as its professional negligence claims against Marx/Okubo.[32]

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[29] (Emphasis added.)

[30] Satomi, 167 Wn.2d at 812.

[31] Id.

[32] Clerk's Papers (No. 68127-3) at 1640-41.

Significantly, on appeal, the COA only challenges the dismissal of the professional negligence claim, effectively abandoning the negligent misrepresentation claim made below.[33] For example, in its appellate briefing, the COA argues both a statutory and common law duty "to act with 'reasonable care and competence.'"[34] This is a statement of a duty regarding professional negligence, not negligent misrepresentation. In addition, the COA expressly distinguishes Marx/Okubo's cited case authority on the following basis: "[N]either issue [in that case] was considered under the rubric of a professional negligence claim. The claim at issue was for negligent misrepresentation."[35] This shows the COA's reliance on the professional negligence claim asserted below, not the negligent misrepresentation claim.

Additionally, nowhere in its opening brief is there any discussion of or citation to the Restatement (Second) of Torts § 552, which was the basis for the COA's negligent misrepresentation claim below. This further demonstrates the abandonment of this claim on appeal.

Thus, the sole question now before us is whether the trial court properly dismissed the COA's professional negligence claim on the basis that Marx/Okubo did not owe either a statutory or common law duty to the COA. More specifically, given the discussion regarding standing, the issue is whether Marx/Okubo owed a duty to individual condominium unit owners.

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[33] Brief of Appellant at 11-19.

[34] Id. at 11 (quoting WAC 308-12-321(1)).

[35] Id. at 18.

To prevail on a negligence claim, a plaintiff must prove duty, breach, causation, and injury.[36] "Duty in a negligence action is a threshold question."[37] To determine whether the law imposes a duty and what the measure and scope of that duty are, a court weighs "considerations of 'logic, common sense, justice, policy, and precedent.'"[38] "A duty may be predicated 'on violation of statute or of common law principles of negligence.'"[39]

The existence of a duty is a question of law.[40] The plaintiff has the burden of establishing both the existence and scope of a duty.[41]

Statutory Duty

The COA argues that chapter 18.43 RCW, chapter 18.08 RCW, WAC 196-27A-020, and WAC 308-12-330 establish that Marx/Okubo owed it a duty of care when it was performing engineering and architectural services. We disagree.

"To determine whether a duty of care exists based upon a statutory violation [the supreme court] has adopted the Restatement test, which, among

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[36] Keller v. City of Spokane, 146 Wn.2d 237, 242, 44 P.3d 845 (2002).

[37] Jackson v. City of Seattle, 158 Wn. App. 647, 651, 244 P.3d 425 (2010).

[38] Affiliated FM Ins. Co., 170 Wn.2d at 449 (internal quotation marks omitted) (quoting Snyder v. Med. Serv. Corp. of E. Wash., 145 Wn.2d 233, 243, 35 P.3d 1158 (2001)).

[39] Jackson, 158 Wn. App. at 651-52 (quoting Burg v. Shannon & Wilson, Inc., 110 Wn. App. 798, 804, 43 P.3d 526 (2002)).

[40] Schooley v. Pinch's Deli Market, Inc., 134 Wn.2d 468, 474, 951 P.2d 749 (1998).

[41] Id. at 475.

other things, requires that the injured person be within the class of persons the statute was enacted to protect."[42] To determine whether a plaintiff is a member of a protected class, a court looks to the language of the statute.[43] "Only after the court defines the protected class will the jury then determine whether the injury to the plaintiff was foreseeable."[44]

Under WAC 196-27A-020, registered engineers "are to safeguard life, health, and property and promote the welfare of the public." "To that end, registrants have obligations to the public, their employers and clients, other registrants and the board."[45]

WAC 308-12-330(1)(a)[46] provides that "[w]hen practicing architecture, you must 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."

In Burg v. Shannon & Wilson, Inc., this court considered whether chapter 18.43 RCW and former WAC 196-27 (2001) imposed a duty on S & W, an engineering firm.[47] There, the trial court summarily dismissed the appellant

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[42] Id. at 474-75.

[43] Id. at 475.

[44] Id. at 475 n.3.

[45] WAC 196-27A-020.

[46] As Marx/Okubo notes, the COA cites WAC 308-12-321(1) in its brief, but this particular section is no longer in effect. It appears that the COA meant to cite WAC 308-12-330.

[47] 110 Wn. App. 798, 804-07, 43 P.3d 526 (2002).

homeowners' negligence claim on the basis that S & W did not owe a duty to the homeowners.[48] This court explained that the statutes and regulations "indicate that professional engineers owe duties to the public, to their clients and to their employers."[49]

But this court noted, "The broad pronouncements that engineers owe a general duty to the public welfare alone do not establish that engineers owe a duty to any identifiable group or individual."[50] This court concluded that the "[a]ppellants [had] not met their burden of articulating how these statutes and regulations impose a duty on S & W specific to them individually" and concluded that summary judgment was appropriate.[51]

Here, we reach the same conclusion. The COA has not met its burden in articulating how the broad pronouncements in chapter 18.43 RCW and WAC 196-27A-020, which relates to engineers, impose a duty that Marx/Okubo owed to the unit owners. Like Burg, the unit owners were neither Marx/Okubo's client nor employer at the time it completed its work. A.F. Evans was Marx/Okubo's client. When Marx/Okubo entered into its agreement with A.F. Evans to inspect the property and produce its reports, the Association was neither the client nor the employer of the firm. Moreover, the purchase of the Apartments and the ensuing conversion to condominiums had not occurred. Under these

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[48] Id. at 803.

[49] Id. at 807.

[50] Id.

[51] Id.

circumstances, there is simply no showing of any duty owed under the statutory and regulatory provisions on which the COA relies.

The COA attempts to distinguish Burg from the present case. But its arguments are not persuasive.

First, it contends that Marx/Okubo created a report that was "specifically prepared for reliance on by [the unit owners], making them akin to a client." But as discussed above, at the time Marx/Okubo entered into an agreement with A.F. Evans, no person had purchased a condominium unit and the COA did not exist. Considering these facts, the argument that the unit owners were akin to clients is not persuasive.

Second, the COA contends that chapter 18.43 RCW "applies to engineers providing private services." It provides no further argument. Accordingly, we do not further consider this claim.

Similarly, the COA does not explain why it falls within the protected class under WAC 308-12-330(1)(a). Mere citation to this regulation without any legal argument does not warrant our further consideration of this claim.[52]

In sum, the COA failed to meet its burden in establishing that the unit owners were within the scope of any statutory or regulatory duty imposed on Marx/Okubo.

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

Common Law Duty

The COA next argues that the common law establishes that Marx/Okubo owed the unit owners a professional's duty of care when it performed its services. We hold that the COA has failed in its burden to show the firm owed any common law duty for professional negligence to it.

"'Whether a defendant owes a duty of care to the complaining party is a question of law.'"[53] We review such questions de novo.[54] Further, we may affirm an order granting summary judgment on any basis supported by the record.[55]

In its attempt to show a duty under its professional negligence claim, the COA relies on two cases: Affiliated FM Insurance Co. v. LTK Consulting Services, Inc.[56] and G.W. Construction Corp. v. Professional Service Industries, Inc.[57] Neither case is helpful to establish that Marx/Okubo owed a duty to the COA.

In Affiliated, a fire on the Seattle Monorail caused millions of dollars in losses to Seattle Monorail Services (SMS), a company that had the exclusive concession to operate the Monorail System.[58] The insurer for SMS, as subrogee,

[53] Schaaf v. Highfield, 127 Wn.2d 17, 21-22, 896 P.2d 665 (1995) (quoting Hansen v. Friend, 118 Wn.2d 476, 479, 824 P.2d 483 (1992)).

[54] Sheikh v. Choe, 156 Wn.2d 441, 448, 128 P.3d 574 (2006).

[55] LaMon v. Butler, 112 Wn.2d 193, 200-01, 770 P.2d 1027 (1989).

[56] 170 Wn.2d 442, 243 P.3d 521 (2010).

[57] 70 Wn. App. 360, 853 P.2d 484 (1993).

[58] Affiliated, 170 Wn.2d at 443-44.

commenced a tort action against LTK Consulting Services, Inc., an engineering firm.[59] The insurer alleged that LTK suggested the design of an electrical grounding system that was allegedly at fault for causing the fire.[60] The supreme court stated the issue as "whether SMS, which does not own the Seattle Monorail, can bring a tort action against LTK."[61]

Six justices of a divided court held that the "engineers' common law duty of care has long been acknowledged in this state."[62] In the lead opinion, signed by two justices, the author cited this court's opinion in G.W. Construction Corp. v. Professional Service Industries, Inc.[63] There, this court held that "the defendant engineer performing an inspection under contract had an independent 'duty to exercise reasonable engineering skill and judgment.'"[64]

The lead opinion in Affiliated went on to state that a duty's scope involves a question of law.[65] It further stated that under the circumstances of that case "the scope of an engineer's duty of care extends to the persons who hold a legally protected interest in the damaged property."[66] Then, the lead opinion

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[59] Id. at 443, 446.

[60] Id.

[61] Id. at 444.

[62] Id. at 454, 461, 463.

[63] Id. at 454 (citing G.W. Construction Corp., 70 Wn. App. at 366).

[64] Id. (quoting G.W. Construction Corp., 70 Wn. App. at 366).

[65] Id. at 455.

[66] Id. at 458.

stated that LTK Consulting, an engineering firm, owed a duty to SMS, even though the City of Seattle owned the monorail.[67] SMS, as an operator, had a property interest in the monorail.[68] Thus, SMS was within the scope of LTK's duty of care.[69]

Here, the essence of the professional negligence claim that the COA made below is that Marx/Okubo "fail[ed] to provide owners with all relevant information in its reports, which they knew were prepared as a disclosure of the existing condition of the [condominium] Project."[70] By its plain terms, this claim could serve as grounds for a negligent misrepresentation claim based on the Restatement (Second) of Torts § 552.[71] But, as we have already discussed, the COA has abandoned this claim on appeal.

To establish a negligent misrepresentation claim, the plaintiff must prove that the defendant "'supplie[d] false information for the guidance of others in their

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[67] Id. at 460.

[68] Id.

[69] Id.

[70] Plaintiff's ***Third Amended*** Complaint, Clerk's Papers (No. 68127-3) at 715.

[71] See Restatement (Second) of Torts § 552(1) (2012) ("One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.").

business transactions.'"[72] Failure to disclose information can serve as a basis for negligent misrepresentation where one party in a business transaction has information "'necessary to prevent his partial or ambiguous statement of the facts from being misleading.'"[73] Here, the COA asserts that Marx/Okubo reported that approximately one-third of the LP siding was damaged in 1996. But in 2005, Marx/Okubo reported that there were only "isolated" areas of damage in the same siding. Further, Marx/Okubo failed to disclose that the siding was LP siding and known to be defective. Finally, it alleges that the "monumental disparity" between the 1996 report and 2005 report led to an inaccurate reserve study.

The COA fails to point to anything in the summary judgment record to show the reports were allegedly defective for any reason other than alleged false statements and failure to disclose information. In short, there is nothing here to show any professional negligence, as distinct from a negligent misrepresentation.

As far as we can see, neither the statement of the duties nor the scope of the duties is the same for these two distinct claims. Yet, in discussing these concepts, the COA argued below that it was damaged by reliance on "Okubo's negligent reports."[74] The COA fails to point to anything in this record to explain

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[72] ESCA Corp. v. KPMG Peat Marwick, 135 Wn.2d 820, 826, 959 P.2d 651 (1998) (quoting Restatement (Second) of Torts § 552(1) (1977)).

[73] Colonial Imports, Inc. v. Carlton Nw., Inc., 121 Wn.2d 726, 731, 853 P.2d 913 (1993) (quoting Restatement (Second) of Torts § 551(2)(b) (1977)).

[74] Plaintiff's Motion for Partial Summary Judgment, Clerk's Papers (No. 68127-3) at 1093.

that these reports are "negligent" because they breach a professional duty owed rather than a duty not to negligently misrepresent something. Nor can we find in this record any explanation why the COA is within the scope of the duty owed by this professional firm for the professional negligence claim.

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.[75] That case is distinguishable.

G.W. Construction Corp. is also distinguishable. There, a subcontractor sued a building inspector for failing to detect misplaced rebar during its inspection.[76] The first issue was whether the subcontractor's claim sounded in contract or in tort.[77] This court concluded that the subcontractor's claim sounded only in tort and the tort statute of limitations applied.[78] It explained that the inspector had a "duty to exercise reasonable engineering skill and judgment" in its performance of its contractual obligation.[79] Although this court did not explicitly discuss the scope of this duty, it was clear that the inspector owed a

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[75] Affiliated, 170 Wn.2d at 446.

[76] G.W. Const. Corp., 70 Wn. App. at 363.

[77] Id. at 364.

[78] Id. at 366.

[79] Id.

duty of care to the subcontractor because they were both parties to the contract.[80]

In contrast, Marx/Okubo's contract was with A.F. Evans, not the COA. Thus, G.W. Construction Corp. does not support the assertion that Marx/Okubo owed any duty to the COA. It is not helpful.

In sum, the COA failed to meet its burden in establishing that Marx/Okubo owed any common law duty for professional negligence to it.

EVIDENTIARY RULING

The COA argues that the trial court erred when it denied the COA's motion to strike Hart's declaration. While admitting that this evidence was not submitted in support of Marx/Okubo's motion for summary judgment, the COA makes this argument "to the extent [Marx/Okubo] argues it should be considered in support of [its] opposition" to the COA's motion for summary judgment.

The declaration is not among the listed items the trial court considered in granting summary judgment. Because the declaration plays no part in the decision under review, we decline to address this contention.

SANCTIONS

CR 11

Marx/Okubo contends that the trial court abused its discretion when it denied its request for sanctions under CR 11. Specifically, it asserts that a number of plaintiffs testified that they did not review or reviewed but did not rely on Marx/Okubo's property assessment or reserve study. It argues that these

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[80] Id. at 362, 365.

plaintiffs knew prior to filing their third amended complaint that they could not establish the reliance element of their negligent misrepresentation claims. We disagree.

Under CR 11, a court may impose sanctions if pleadings are filed for an improper purpose or without a basis in law or fact.[81] "The burden is on the movant to justify the request for sanctions."[82]

This court reviews the trial court's CR 11 ruling for abuse of discretion.[83] "A trial court abuses its discretion when its order is manifestly unreasonable or based on untenable grounds."[84] When a trial court denies a party's motion to impose sanctions, it need not enter findings.[85]

Washington courts have recognized that CR 11 sanctions can have a "potential chilling effect."[86] Thus, "the trial court should impose sanctions only when it is patently clear that a claim has absolutely no chance of success."[87]

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[81] Biggs v. Vail, 124 Wn.2d 193, 201, 876 P.2d 448 (1994) (citing CR 11).

[82] Id. at 202.

[83] Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wn.2d 299, 338, 858 P.2d 1054 (1993).

[84] Id. at 339.

[85] Skimming v. Boxer, 119 Wn. App. 748, 755, 82 P.3d 707 (2004).

[86] Bryant v. Joseph Tree, Inc., 119 Wn.2d 210, 219, 829 P.2d 1099 (1992); see also Skimming, 119 Wn. App. at 755.

[87] Skimming, 119 Wn. App. at 755.

"The fact that a complaint does not prevail on its merits is by no means dispositive of the question of CR 11 sanctions."[88]

To establish a negligent misrepresentation claim, a plaintiff must allege the following:

> (1) the defendant supplied information for the guidance of others in their business transactions that was false, (2) the defendant knew or should have known that the information was supplied to guide the plaintiff in his business transactions, (3) the defendant was negligent in obtaining or communicating the false information, ***(4) the plaintiff relied on the false information***, (5) the plaintiff's reliance was reasonable, and (6) the false information proximately caused the plaintiff damages.[89]

Here, Marx/Okubo argues that the COA's negligent misrepresentation claim was without a factual basis. It explains that 14 unit owners admitted in their interrogatory responses that they did not "review or rely" on Marx/Okubo's property assessment and reserve study. It also contends that 10 unit owners admitted the same in their depositions.

But Marx/Okubo's interrogatory and deposition questions focused on whether the unit owners ***read*** these reports. The interrogatory questions asked the unit owners if they had "read the Okubo Report" and if they had "read the Reserve Study." The questions at the unit owners' depositions often related to whether the unit owners remembered when they read the reports and if they could recall specific report provisions.

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[88] Bryant, 119 Wn.2d at 220.

[89] Bloor v. Fritz, 143 Wn. App. 718, 734, 180 P.3d 805 (2008) (emphasis added) (citing Lawyers Title Ins. Corp. v. Baik, 147 Wn.2d 536, 545, 55 P.3d 619 (2002) (citing Restatement (Second) of Torts § 552(1) (1977)).

In the interrogatory questions, Marx/Okubo also asked the unit owners if they "relied upon information supplied by Marx/Okubo that was false." Almost all of the responses included in the record show that the unit owners answered "yes" to this question. Further, the unit owners testified that a Madera West representative reviewed the public offering statement with them and gave them copies before they purchased their condominium units. The public offering statement included Marx/Okubo's reports.

To establish a claim for negligent misrepresentation, a plaintiff must allege that it ***relied*** on false information provided by the defendant.[90] Reliance does not necessarily require that the unit owners ***read*** these reports. Though the COA did not prevail on the merits of its negligent misrepresentation claim, the COA's claim was grounded in ***some*** facts. Thus, the trial court did not abuse its discretion in denying Marx/Okubo's request for CR 11 sanctions.

Marx/Okubo argues that the unit owners' testimony shows that they did not "directly rel[y] upon false statements made by Marx/Okubo" because many of the unit owners testified that they had not read one or both of the reports. It cites Schaaf v. Highfield to support its assertion that its negligent misrepresentation claim did not have a factual basis.[91] But Schaaf does not hold that a plaintiff

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[90] See Bloor, 143 Wn. App. at 734.

[91] Reply Brief of Appellant Marx/Okubo, Ltd. at 11 (citing Schaaf v. Highfield, 127 Wn.2d 17, 30-31, 896 P.2d 665 (1995)).

must directly see or read a report in order to rely on it for the purposes of a negligent misrepresentation claim.[92]

There, John Schaaf brought a negligent misrepresentation claim against Paul Olson, a home appraiser.[93] He asserted that Olson failed to report that the roof on the home Schaaf bought needed to be repaired.[94] The supreme court concluded that summary dismissal of this claim was proper because Schaaf did not rely on the appraisal report "at all."[95] The court explained that Schaaf knew that the roof needed to be repaired before he bought the house and he did not see the appraiser's report until a year after he bought the house.[96]

In contrast, as discussed above, the COA presented some evidence to show that the unit owners relied to some extent on Marx/Okubo's reports even though they did not read them. Thus, this argument is not persuasive.

CR 26(g)

Marx/Okubo next argues that the trial court abused its discretion when it denied its request for discovery sanctions. It contends that the trial court should have imposed sanctions because nine unit owners gave misleading or false responses to interrogatory questions. We disagree.

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[92] See Schaaf, 127 Wn.2d at 30-31.

[93] Id. at 20.

[94] Id.

[95] Id. at 30.

[96] Id. at 30-31.

CR 26(g) is the discovery sanctions rule, and it is "aimed at reducing delaying tactics, procedural harassment and mounting legal costs."[97] This rule authorizes an award of attorney fees and costs if a party fails to comply with discovery rules:

> Rule 26(g) requires an attorney signing a discovery response to certify that the attorney has read the response and that after a reasonable inquiry believes it is (1) consistent with the discovery rules and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law; (2) not interposed for any improper purpose such as to harass or cause unnecessary delay or needless increase in the cost of litigation; and (3) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had, the amount in controversy, and the importance of the issues at stake in the litigation.[98]

If a court determines that CR 26(g) was violated, the rule requires the imposition of sanctions.[99]

This court reviews a trial court's discovery sanctions for abuse of discretion.[100] "'A trial court abuses its discretion when its order is manifestly

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[97] Fisons, 122 Wn.2d at 341.

[98] Id. at 343.

[99] See CR 26(g) ("If a certification is made in violation of the rule, the court, upon motion or upon its own initiative, ***shall*** impose upon the person who made the certification, the party on whose behalf the request, response, or objection is made, or both, an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney fee.") (emphasis added); see also Clipse v. State, 61 Wn. App. 94, 99, 808 P.2d 777 (1991) ("Although the nature of the sanction is a matter of judicial discretion, the rule mandates imposing sanctions if they are appropriate under the rule.").

[100] Magana v. Hyundai Motor Am., 167 Wn.2d 570, 582, 220 P.3d 191 (2009).

unreasonable or based on untenable grounds.'"[101]

> "A discretionary decision rests on 'untenable grounds' or is based on 'untenable reasons' if the trial court relies on unsupported facts or applies the wrong legal standard; the court's decision is 'manifestly unreasonable' if 'the court, despite applying the correct legal standard' to the supported facts, adopts a view 'that no reasonable person would take.'"[102]

In Clipse v. State, this court considered whether the "Designation of Plaintiff's Expert Witnesses" was "inaccurate, misleading, and not reasonable under the circumstances."[103] After comparing the designation with the witnesses' deposition testimony, this court concluded that the designation was misleading.[104] Contrary to the designation, three of the four presumed expert witnesses testified that they were not familiar with the case.[105] This court explained that the misleading disclosures caused "unnecessary expenditures of time and money."[106]

Here, Marx/Okubo argues that nine unit owners gave misleading or false responses to interrogatories when their responses are compared to their deposition testimony. For five of the nine unit owners, Marx/Okubo focuses on the interrogatory response that the unit owners' relied on information provided by

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[101] Id. (quoting Fisons, 122 Wn.2d at 339).

[102] Id. at 583 (quoting Mayer v. Sto Indus., Inc., 156 Wn.2d 677, 684, 132 P.3d 115 (2006)) (quoting State v. Rohrich, 149 Wn.2d 647, 654, 71 P.3d 638 (2003)).

[103] 61 Wn. App. 94, 99, 808 P.2d 777 (1991).

[104] Id. at 102.

[105] Id. at 99-101.

[106] Id. at 102.

Marx/Okubo.[107] For the remaining four unit owners, Marx/Okubo focuses on their interrogatory responses regarding whether they read the reports.[108] Thus, we examine this testimony based on these two interrogatory responses.

Testimony Regarding Reliance

In their interrogatory responses, Allan Fuller, Diana Crettol, Jayne Miller, Jonathan Jones, and Michelle Donaldson testified that they relied on information supplied by Marx/Okubo that was false. At their depositions, Marx/Okubo's questioning focused on when and if they read Marx/Okubo's reports and the specific provisions in the report that they relied on. But, as we noted above, these are different questions than whether the unit owners believed they generally relied on information provided by Marx/Okubo. Thus, these unit owners did not provide misleading or false interrogatory responses. They provided answers to more specific questions during their depositions.

The one exception appears to be Crettol. In her interrogatory response, she testified that she did not receive a copy of the property assessment or reserve study, but she did receive a "Replacement Reserve Estimate," which she

[107] Brief of Appellant Marx/Okubo, Ltd. at 22-27; see Clerk's Papers (No. 68522-8) at 580, 589, 621, 650, 678 (One interrogatory stated, "Do you contend you relied upon information supplied by Marx/Okubo that was false?").

[108] Brief of Appellant Marx/Okubo, Ltd. at 27-33; see Clerk's Papers (No. 68522-8) at 694-95, 708-09, 719-20, 732-33 (One interrogatory stated, "Did you read the Okubo Report referred to in your Second Amended Complaint prior to the date identified in your response to Interrogatory No. [8 or 11]?" Another interrogatory stated, "Did you read the Reserve Study referred to in your Second Amended Complaint prior to the date identified in your response to Interrogatory No. [8 or 11]?" Interrogatory No. 8 for some and No. 11 for others provided, "State the date upon which you acquired an ownership interest in a home in the Madera West Condominiums.").

later discovered was prepared by Phillips Real Estate Services, not Marx/Okubo. At her deposition, she testified that she relied on the estimate but not the property assessment or reports. She explained that she must have misunderstood the interrogatory. Considering this misunderstanding and her explanation, her testimony remained consistent.

In sum, the trial court did not abuse its discretion in determining that the interrogatory responses regarding the unit owners' reliance were not misleading or false.

Testimony Regarding the Reports

In their interrogatory responses, Rosie White and Thomas Fassler testified that they read both the property assessment and reserve study before taking an ownership interest in their condominium unit.

At White's deposition, she clarified that she skimmed the reports sometime after her purchase while she was at home, not in the Madera West office. As the COA points out, Marx/Okubo was asking White two different questions. In the interrogatory, Marx/Okubo asked White if she reviewed the documents before taking an ownership interest in her condominium. At the deposition, White testified that she read the reports after the "purchase." It is not clear whether "purchase" meant after she signed the purchase agreement but before she took ownership. Since Marx/Okubo was asking two different questions, White's interrogatory response was not misleading or false.

During Fassler's deposition, he testified that he was not able to remember when he reviewed these reports or details from these reports. But he testified that he remembered that a sales agent had showed him the reserve study. He

also testified that he remembered that the property assessment mentioned siding. While Fassler could not remember many details about the report, his deposition testimony showed that he "read" the reports to some extent.

Ryan Fidler testified in his interrogatory response that he read only the reserve study before taking an ownership interest. During his deposition, he testified that he did not see the Marx/Okubo reserve study before purchasing his unit. When asked why his interrogatory response stated that he had read the reserve study, he explained that he thought the interrogatory was referring to a reserve study conducted by Madera West, which was posted on a community board. Considering this misunderstanding, Fidler's testimony remained consistent.

Finally, Scott Perry testified in his interrogatory response that he only read the property assessment. During his deposition, he testified that he could not recall whether he read the property assessment. When asked why his interrogatory response stated that he read the report, he responded:

> A. I thought I did. Maybe I didn't. There have been so many documents sent out and it's all gobbledegook to be honest with you. It's a—it's a nightmare lawsuit.
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> . . .
>
> A. I can't recall reading that. I'm sorry I misrepresented that.
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> . . .
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> A. I probably went though this too quickly. Just aggravated that I'm in this situation that I'm in right now with people not following through doing what they're supposed to do. I think that's probably why I said yeah I must have read it.[109]

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[109] Clerk's Papers (No. 68522-8) at 726, 729.

Perry's deposition testimony is the only example where his testimony directly contradicts his interrogatory response. But given Perry's confusion regarding the numerous documents, the trial court did not abuse its discretion when it denied Marx/Okubo's request for CR 26(g) sanctions for Perry and the other unit owners' interrogatory responses.

Marx/Okubo argues that the "fact that the certification rule was violated is so clear from the evidence presented that the trial court must have applied an incorrect legal standard."[110] But under Clipse, which Marx/Okubo cited to support its request for sanctions, the "standard" or "issue" was whether the discovery document contained misleading information that led to unnecessary expenditures of time and money.[111] As explained above, the trial court did not abuse its discretion in determining that the interrogatory responses were not misleading when compared with the deposition testimony. Thus, this argument is not persuasive.

Marx/Okubo contends that "counsel nor the judiciary should turn a blind eye" to false discovery responses "even when sought to be justified by stress, emotion, or confusion." But looking at the interrogatory responses and the deposition testimony as a whole, the responses were not misleading or false. In two instances, there was some confusion about the documents that the interrogatory referenced, but their testimony was fairly consistent when their misunderstanding was revealed.

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[110] Brief of Appellant Marx/Okubo, Ltd. at 36.

[111] Clipse, 61 Wn. App. at 102.

In sum, the trial court did not abuse its discretion in denying Marx/Okubo's request for CR 26(g) sanctions.

ATTORNEY FEES

Marx/Okubo argues that it is entitled to an award of attorney fees against the COA. It bases its argument on RCW 4.84.330 and the attorney fees provision in the contract between A.F. Evans and Marx/Okubo. We hold that Marx/Okubo is not entitled to an award of its reasonable fees against the COA based on this contract.

"Under the American rule compensation for attorney fees and costs may be awarded only if authorized by contract, statute, or a recognized ground in equity."[112] Whether an award of fees is authorized is a question of law that this court reviews de novo.[113]

With regard to whether a contract provision authorizes attorney fees and costs, RCW 4.84.330 provides:

> In any action on a contract or lease entered into after September 21, 1977, where such contract or lease specifically provides that attorneys' fees and costs, which are incurred to enforce the provisions of such contract or lease, shall be awarded to one of the parties, the prevailing party, whether he or she is the party specified in the contract or lease or not, shall be entitled to reasonable attorneys' fees in addition to costs and necessary disbursements.

A threshold issue that neither party addresses is whether the COA is liable for fees based on a contract to which it is not a party.

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[112] In re Impoundment of Chevrolet Truck, WA License No. A00125A v. Wash. State Patrol, 148 Wn.2d 145, 160, 60 P.3d 53 (2002).

[113] Boguch v. Landover Corp., 153 Wn. App. 595, 615, 224 P.3d 795 (2009).

Marx/Okubo fails to cite any persuasive authority that this attorney fees provision between it and A.F. Evans applies to the COA. The contractual provision states:

> The substantially prevailing party in any arbitration, or other final binding dispute proceeding upon which the parties may agree, shall be entitled to recover from the other party all costs and expenses incurred by that party in participating in the arbitration, including reasonable attorneys' fees.[114]

Nothing in the above contractual provision's wording evidences an intent by the parties to the contract to confer on any third-party the right to fees. Moreover, Marx/Okubo fails to point to any other contractual provision to support the conclusion that the COA is an intended beneficiary of the contract containing this provision for fees.

We also note a point that neither party addresses. The language of the fee provision refers to "any arbitration, or other final binding dispute proceeding upon which the parties may agree," not litigation in court.[115]

Nevertheless, Marx/Okubo asserts that an attorney fees provision in a contract can be imposed on a person who is not a party to that contract. But most of the cases Marx/Okubo cites illustrate circumstances where the party seeking attorney fees under a contract provision was a party to that contract.[116]

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[114] Clerk's Papers (No. 68522-8) at 131.

[115] Id.

[116] Brief of Marx/Okubo, Ltd, at 10-11 (citing Eastwood v. Horse Harbor Found., Inc., 170 Wn.2d 380, 401-02, 241 P.3d 1256 (2010); Brown v. Johnson, 109 Wn. App. 56, 58, 34 P.3d 1233 (2001); Edmonds v. John L. Scott Real Estate, Inc., 87 Wn. App. 834, 855-56, 942 P.2d 1072 (1997); Western Stud Welding, Inc. v. Omark Indus., Inc., 43 Wn. App. 293, 299, 716 P.2d 959 (1986)).

The only case that discusses the award of fees where the recovering party was not a party to a contract is Deep Water Brewing, LLC v. Fairway Resources, Ltd.[117] But that case does not support Marx/Okubo's broad assertion.

There, Division Three concluded that the trial court properly awarded attorney fees to the Kenagys.[118] The Kenagys bought a restaurant with a lake view from the Ahlquists.[119] The Ahlquists had entered into an easement agreement and a right-of-way agreement with developers to preserve the restaurant's view.[120] These latter agreements contained attorney fees provisions.[121] Division Three explained that the Kenagys were not third party beneficiaries to the agreements "but nonetheless [could] enforce the agreements (with attorney fees provisions) as running covenants protecting the view from their restaurant."[122]

That is not the case here. There are no running covenants involved in this case. Rather, Marx/Okubo relies on a provision in an agreement to which the COA is not a party. There simply is no authority under these circumstances to impose on the COA the burden of a contractual provision for attorney fees where

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[117] Id. (citing Deep Water Brewing, LLC v. Fairway Res., Ltd., 152 Wn. App. 229, 215 P.3d 990 (2009)).

[118] Deep Water Brewing, 152 Wn. App. at 279.

[119] Id. at 241.

[120] Id. at 239-40.

[121] Id. at 245-46.

[122] Id. at 278.

it is neither a party to the contract nor an intended third-party beneficiary of that contract.

Marx/Okubo avoids the threshold issue that we have discussed and analyzes instead whether the contract was central to the COA's claims. This is incorrect. The initial focus should be on whether the attorney fees provision in this agreement between Marx/Okubo and A.F. Evans extends to the COA.[123] Because Marx/Okubo has cited no controlling authority to support its position, we presume it has found none.[124]

Even if Marx/Okubo could assert a fees provision against the COA, the COA's claims in this case were not "on the contract" as required by RCW 4.84.330.

"If an action in tort is based on a contract containing an attorney fee provision, the prevailing party is entitled to attorney fees."[125] An action is "on a contract" if (1) "the action arose out of the contract," and (2) "if the contract is central to the dispute."[126]

In Boguch v. Landover Corp., this court held that "[i]f a party alleges breach of a duty imposed by an external source, such as a statute or the

[123] See id.

[124] State v. Young, 89 Wn.2d 613, 625, 574 P.2d 1171 (1978).

[125] Brown, 109 Wn. App. at 58.

[126] Id.

common law, the party does not bring an action on the contract, even if the duty would not exist in the absence of a contractual relationship."[127]

There, Boguch brought breach of contract and negligence claims against real estate brokerage firms and two realtors.[128] The trial court concluded that the realtors were entitled to summary judgment as a matter of law and awarded them attorney fees and costs.[129] On review, this court concluded that the realtors were not entitled to an award for defending against Boguch's tort claims.[130] This court explained that Boguch's negligence claims were not "on the contract":

> A realtor has a common law and a statutory duty to exercise reasonable care in representing a seller's interest. RCW 18.86.030(1), .040(1), .110. This duty exists regardless of any contractual provision. The determination of whether [the realtors] breached this duty does not require examination of the listing agreement, making the contract ancillary to the dispute. The contractual relationship may have given rise to the Realtors' duties to Boguch, but their duties are defined by the common law and by statute, not by the contract.[131]

Thus, this court determined that the trial court erred in awarding fees for defending the tort claims based on a contractual provision.[132]

Here, the same conclusion is appropriate. The COA's negligent misrepresentation and professional negligence claims were not "on the contract."

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[127] 153 Wn. App. 595, 615, 224 P.3d 795 (2009).

[128] Id. at 601-03.

[129] Id. at 606-07.

[130] Id. at 619.

[131] Id.

[132] Id.

While the contractual relationship between Marx/Okubo and A.F. Evans may have given rise to the claims, these claims were based on common law and statute, not on the contract. Thus, the trial court properly determined that Marx/Okubo was not entitled to an award of fees for defending against the COA's tort claims.

Marx/Okubo argues that Boguch is not consistent with the supreme court's decision in Eastwood v. Horse Harbor Foundation.[133] But Eastwood is distinguishable from Boguch. In Eastwood, the supreme court determined that Horse Harbor Foundation had a contractual obligation under a lease and an independent tort duty to not cause waste.[134] The court granted Eastwood's request for fees because of an attorney fees provision in the lease ***and*** a statute that provided for an award in a waste action.[135] The court's award regarding the tort of waste appears to be based on a statute, not a contract provision.[136] Here, Marx/Okubo does not cite a statute to support its request for attorney fees and costs. Thus, Boguch controls this case.

Marx/Okubo also contends that Boguch is distinguishable because that case contained a narrower attorney fees provision than the provision here. While the provision's language in Boguch may have been narrower, this difference in

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[133] 170 Wn.2d 380, 241 P.3d 1256 (2010)).

[134] Id.

[135] Id. at 401-02.

[136] Id.

language does not negate the overarching rule.[137] A party does not bring an action "on the contract" if the duty is "imposed by an external source, such as a statute or the common law."[138] Thus, this argument is not helpful.

Finally, Marx/Okubo argues that the doctrine of equitable estoppel supports its request for attorney fees and costs under the contract provision. But this argument is not persuasive.

Marx/Okubo cites Townsend v. Quadrant Corp. to support this argument.[139] This case is distinguishable.

There, the supreme court considered whether the children of homeowners were bound by arbitration clauses that were in the purchase and sale agreements that their parents entered into.[140] The court explained that the general rule is that "nonsignatories are not bound by arbitration clauses."[141] One exception to this rule is the principle of equitable estoppel.[142] "Equitable estoppel 'precludes a party from claiming the benefits of a contract while simultaneously

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[137] See Boguch, 153 Wn. App. at 607 (explaining that the provision stated, "[i]n the event either party employs an attorney to enforce any terms of this Agreement and is successful, the other party agrees to pay reasonable attorneys' fees.") (alteration in original) (internal quotation marks omitted).

[138] Id. at 615.

[139] Brief of Appellant Marx/Okubo, Ltd. at 12-13 (citing Townsend v. Quadrant Corp., 173 Wn.2d 451, 268 P.3d 917 (2012)).

[140] Townsend, 173 Wn.2d at 460.

[141] Id.

[142] Id. at 461.

attempting to avoid the burdens that contract imposes.'"[143] The court further explained that "equitable estoppel may require a nonsignatory to arbitrate a claim if that person, despite never having signed the agreement, 'knowingly exploits' the contract in which the arbitration agreement is contained."[144]

The supreme court explained that two of the parents and children's claims "relat[ed] directly" to the purchase and sale agreement, "including an allegation of breach of warranty and a request for rescission."[145] Because the children were arguing that they received a benefit from the agreement, the children could not also avoid the arbitration clause within that agreement.[146]

In contrast, the COA's claims against Marx/Okubo did not directly relate to the contract between Marx/Okubo and A.F. Evans Development. The COA did not assert breach of contract claims against Marx/Okubo; it asserted negligent misrepresentation and professional negligence claims. Thus, the COA was not "knowingly exploiting the terms of the contract" because it was not basing its tort claims on the contract.[147]

Marx/Okubo contends that the COA "relied upon standard of care warranties contained in Marx/Okubo's contract with [A.F. Evans] to support their

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[143] Id. (internal quotation marks omitted) (quoting Mundi v. Union Sec. Life Ins. Co., 555 F.3d 1042, 1045-46 (9th Cir. 2009)).

[144] Id. (internal quotation marks omitted) (quoting Mundi, 555 F.3d at 1046).

[145] Id.

[146] Id. at 462.

[147] See id.

claims against Marx/Okubo." But the COA's reference to the contract's warranty was not a basis for its tort claims. In the COA's opposition to Marx/Okubo's motion for summary judgment, it stated:

> The only relevant part of the standard terms here, is Okubo's warranty that "[it would] perform its services for [Evans] within the accepted practices and procedures and [would] exercise that degree of care and skill ordinarily exercised under similar circumstances by members of its profession." In other words, Okubo warranted that it would not be negligent in carrying out the work in its proposal.[148]

The COA's response merely shows that Marx/Okubo made a warranty to A.F. Evans to use reasonable care. This response does not demonstrate that the COA's claims were grounded in the contract. As discussed above, the COA's tort claims were based on common law and statutes.

In sum, the doctrine of equitable estoppel does not support Marx/Okubo's argument.

Finally, Marx/Okubo argues that it is entitled to attorney fees on appeal because of the attorney fees provision in its contract with A.F. Evans and under RAP 18.1. Because Marx/Okubo is not entitled to fees under the contract provision, it is not entitled to fees on appeal.[149]

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[148] Clerk's Papers (No. 68522-8) at 908 (alteration in original) (citation omitted).

[149] See, e.g., Gray v. Bourgette Const., LLC, 160 Wn. App. 334, 345, 249 P.3d 644 (2011) (granting attorney fees on appeal to a party because the trial court properly awarded attorney fees to that party).

We affirm the summary judgment orders and the denial of sanctions and attorney fees. We also deny fees on appeal.

Cox, J.

WE CONCUR:

Leach, C.J.

Becker, J.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

MADERA WEST CONDOMINIUM ASSOCIATION, a Washington non-profit corporation; THOMAS FASSLER; JOHN BERRY; TAMARA VERA; MICHELLE DONALDSON; JACK RADFORD; JAY INGWALDSON; DOROTHY ROCKEY; ALLAN FULLER; SCOTT PERRY; RYAN FIDLER; DANIELLE TOWNSEND; DIANA CRETTOL; HANNAH ALMARAZ; KEITH BRETT; LEONOR CASTELLAR; GARY EVANS; LATRELLE GIBSON; LINDA GRESETTE; RICHARD HARRISON; CINDY KALLENBERG; BRENNA LARSEN-THIEL; CANDICE McKINNEY; JAYNE MILLER; MICHAEL OCTAVE; HENRI PARREN; PAUL PATTELLE; TONI POSEY; KELLY ROBINSON; MICHAEL SMITH; JEROME SZYMANSKI; STEVEN TOLLEY; ERIN ZAMORA; ROCIO TRUJILLO; GWEN BERVEN; MARY BIZZELL; PAUL BOVA; ALYSON BROWN; ADAM CARTER; ALTHEA CHANG; JENNIFER COPE; JEFF DANNENBERG; LEE ELLIOTT; GARY GESELL; JONATHAN JONES; COURTNEY LINDSAY; MICHAEL OKUDA; GABRIEL ORTIZ; MARCIA PETERSON; ERIK SOCTT; DAN SKINNER; DIANNA STACY; JIMMIE STOKES; BEVERLY STOKES; ADAM STOKES; LINDA UPSHAW; ROSIE WHITE; ERIK WINKLER; and KARL YAUCH, Washington residents,

Appellants/Respondents,

v.

No. 68127-3-I
(Consolidated with No. 68522-8-I)

DIVISION ONE

ORDER DENYING MOTION FOR RECONSIDERATION

MARX/OKUBO, a Washington corporation, Respondent/Appellant, MADERA WEST, LLC, a Washington corporation; JESSE NELSON, a Washington resident; and COLDWELL BANKER BAIN ASSOCIATES, a Washington corporation, Defendants.	)))))))))))))

Appellants, Madera West Condominium Association and multiple individual condominium unit owners, have moved for reconsideration of the opinion filed in this case on July 1, 2013. The panel hearing the case has considered the motion and has determined that the motion for reconsideration should be denied. The court hereby

ORDERS that the motion for reconsideration is denied.

Dated this 8th day of August 2013.

For the Court:

Cox, J.

Judge

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

No. 09-2-11022-1 SEA
COA No. 68127-3

MADERA WEST CONDOMINIUM)
ASSOCIATION, a Washington)
non-profit corporation; THOMAS)
FASSLER, a Washington resident;)
and JOHN BERRY, a Washington)
resident; TAMARA VERA, a)
Washington resident; MICHELLE)
DONALDSON, a Washington)
resident; JACK RADFORD, a)
Washington resident; JAY)
INGWALDSON, a Washington)
resident; DOROTHY ROCKEY, a)
Washington resident; ALLAN)
FULLER, a Washington resident;)
SCOTT PERRY, a Washington)
resident; RYAN FIDLER, a)
Washington resident; DANIELLE)
TOWNSEND, a Washington)
resident; DIANA CRETTOL, a)
Washington resident; HANNAH)
ALMARAZ, a Washington resident;)
KEITH BRETT, a Washington)
resident; LEONOR CASTELLAR, a)
Washington resident; GARY)
EVANS, a Washington resident;)
LATRELLE GIBSON, a Washington)
resident; LINDA GRESETTE, a)
Washington resident; RICHARD)
HARRISON, a Washington)
resident; CINDY KULLENBERT, a)
Washington resident; BRENNA)
LARSEN-THIEL, a Washington)
resident; CANDICE MCKINNEY, a)
Washington resident; JAYNE)
MILLER, a Washington resident;)
MICHAEL OCTAVE, a Washington)
resident; HENRI PARREN, a)
Washington resident; PAUL)
PATTELLE, a Washington)
resident; TONI POSEY, a)
Washington resident; KELLY)
ROBINSON, a Washington)
resident; MICHAEL SMITH, a)
Washington resident; JEROME)
SZYMANSKI, a Washington)

resident; STEVN TOLLEY, a)
Washington resident; ERIN)
ZAMORA, ROCIO TRUJILLO, a)
Washington resident, GWEN)
BERVEN, a Washington resident;)
MARY BIZZELL, a Washington)
resident; PAUL BOVA, a)
Washington resident; ALYSON)
BROWN, a Washington resident;)
ADAM CARTER, a Washington)
resident; ALTHEA CHANG, a)
Washington resident; JENNIFER)
COPE, a Washington resident;)
JEFF DANNENBERG, a Washington)
resident; a Washington)
resident; GARY GESELL, a)
Washington resident; JONATHAN)
JONES, a Washington resident;)
COURTNEY LINDSAY, a Washington)
resident; MICHAEL OKUDA, a)
Washington resident; GABRIEL)
ORTIZ, a Washington resident;)
MARCIA PETERSON, a Washington)
resident; ERIK SCOTT, a)
Washington resident; DAN)
SKINNER, a Washington resident;)
DIANNA STACEY, a Washington)
resident; JIMMIE STOKES, a)
Washington resident; BEVERLY)
STOKES, a Washington resident;)
ADAM STOKES, a Washington)
resident; LINDA UPSHAW, a)
Washington resident; ROSIE)
WHITE, a Washington resident;)
ERIK WINKLER, a Washington)
resident; KARL YAUCH, a)
Washington resident;)
)
Plaintiff,)
)
)
vs.)
)
MADERA WEST, LLC, a Washington)
Corporation; and MARX/OKUBO, a)
Washington corporation,)
)
Defendants.)

MADERA WEST, LLC, A WASHINGTON)
CORPORATION,)
)
Third-Party Plaintiff)
)
)
vs.)
)
EMERALD RENOVATIONS, LLC, a)
Washington corporation; and)
STEADFAST CONSTRUCTION, INC., a)
Washington corporation,)
)
Third-Party Defendants.)

TRANSCRIBED BY: Brigid M. Donovan, RPR
CCR NO: 2070

A P P E A R A N C E S

For the Plaintiff:

ADIL A. SIDDIKI
Casey & Skoglund
1319 Dexter Avenue N., Suite 370
Seattle, Washington 98109

For the Defendant:

KENNETH G. YALOWITZ and
AMBER L. HARDWICK
Green & Yalowitz, PLLC
1420 5th Avenue, Suite 2010
Seattle, Washington 98101-4800

--oOo--

1 SEATTLE, WASHINGTON; TUESDAY, APRIL 23, 2012
2 9:30 a.m.
3 --oOo--
4
5 THE COURT: You may reserve some time for
6 rebuttal.
7 MS. HARDWICK: I would like to reserve
8 three minutes. Thank you, Your Honor. I am Amber
9 Hardwick, counsel for Marx/Okubo. Ken Yalowitz you've
10 already heard from. May it please The Court, this
11 appeal is about whether the trial court erred by denying
12 Marx/Okubo attorney's fees under RCW 4.84.330 or abused
13 its discretion by denying Marx/Okubo's motion for terms
14 under CR 11 and CR 26(g).
15 With our time today I would like to
16 address assignment of error number one, which is whether
17 Marx/Okubo is entitled to attorney's fees where
18 respondent's tort claim placed the contract centrally at
19 issue.
20 THE COURT: I have a threshold question
21 that none of the parties seemed to address. My
22 understanding is that you are seeking to enforce a
23 contractual provision for attorney's fees, right?
24 MS. HARDWICK: That's correct, Your
25 Honor.

1 THE COURT: And you are seeking to
2 enforce these fees against an entity that's not a party
3 to the contract?
4 MS. HARDWICK: That's correct.
5 THE COURT: What authority is there to do
6 that?
7 MS. HARDWICK: Your Honor, in Deep Water
8 Brewing it involved the enforcement of an attorney's
9 fees provision and an easement agreement against a
10 nonsignatory homeowners association. In that case the
11 determining factor -- it was an RCW 4.84.330 case -- and
12 the determining factor was whether -- that the claims
13 were on the contract because The Court could not decide
14 the claims without reference to the easement agreement.
15 THE COURT: Was the entity there a
16 successor in interest to either side of the property
17 involved with the easement?
18 MS. HARDWICK: The claimant was a
19 successor in interest to the dominant easement holder.
20 THE COURT: Other than the easement case,
21 do you have any authority for attempting to enforce a
22 contractual provision for attorney's fees against
23 someone who is not a party to the contract?
24 MS. HARDWICK: Your Honor, we do have
25 equitable basis under --

1 THE COURT: Not equitable. There are
2 three bases for attorney's fees: Contract, recognized
3 ground of equity, and statute. You are relying solely
4 on the contractual provision, right?
5 MS. HARDWICK: We are relying on both the
6 basis and equity for equitable estoppel and the basis on
7 the contract.
8 THE COURT: So explain to me whether or
9 not you have any authority, other than Deep Water, for
10 the proposition that you can enforce a contractual
11 provision for fees against someone not a party to the
12 contract.
13 MS. HARDWICK: Deep Water is the only
14 case that is directly on point to the attorney's fees
15 provision against a nonsignatory. However, in all of
16 the cases cited by Marx/Okubo in our brief, the
17 determining factor was whether the contract had to be
18 referenced to prove the claims, whether they be tort
19 claims or not.
20 In this case respondents have put
21 the contract centrally at issue because they allege that
22 Marx/Okubo failed to properly investigate the conditions
23 at the project and disclose those conditions to them.
24 They concede that Marx/Okubo prepared its investigation
25 and its reports as part of the agreement, but don't want

1 to address any of the limitations in that agreement.
2 Both the scope of the investigation and the obligation
3 to disclose were created under and defined by the
4 agreement. And this Court held that in Edmonds v. John
5 L. Scott that when tort claims for fees are created
6 under and defined by a written contract, it places that
7 contract central to the dispute.
8 And as we discussed, the contract is
9 the only place that identifies that Marx/Okubo offered
10 to prepare an intrusive investigation and that that
11 additional service was declined. The contract also
12 constitutes the circumstances giving rise to
13 Marx/Okubo's services. In Affiliated, the Court
14 recently, Supreme Court recently stated, "A duty of care
15 is necessarily limited to the level of care that is
16 reasonable in the particular circumstances."
17 There is no dispute that
18 Marx/Okubo's contract constitutes the circumstances
19 under which they performed. And respondents have
20 repeatedly referenced the contract in its briefing to
21 support the purpose of Marx/Okubo's preparing their
22 reports.
23 For these reasons we believe that
24 the first basis, the wording on the contract is
25 reasonable under the circumstances because respondent's

1 tort claims cannot be decided without reference to the
2 contract.
3 Your Honor, the second basis is a
4 principle in equity. It's a recognized exception to the
5 general rule that a party is not bound to a contract
6 they did not sign. In Townsend, the Supreme Court
7 recently affirmed this Court's enforcement of an
8 arbitration provision against a nonsignatory on
9 equitable grounds, and there they said, "Equitable
10 estoppel precludes a party from claiming the benefits of
11 a contract while simultaneously attempting to avoid the
12 burdens that contract imposes."
13 Respondents have knowingly exploited
14 the terms of contract both on appeal and at the trial
15 court level. They've referenced the architect and
16 engineering standards of care that are only found in
17 Marx/Okubo's contract with Evans Development -- excuse
18 me, the engineering standard of care are only found in
19 Marx/Okubo's contract with Evans Development. And when
20 pressed at the trial court level, they resorted to the
21 contractual standard of care calling it Marx/Okubo's
22 warranty that they would not be negligent.
23 Respondents now contend that
24 Marx/Okubo is taking this out of context, but the
25 defendant in Townsend said the exact same contention.

1 They said the breach of warranty allegation was
2 misconstrued, nonsignatories had no intention of
3 enforcing contractual warranties, and the Supreme Court
4 was not persuaded. There they held the nonsignatories
5 to knowingly exploiting the terms of the contract and
6 being bound by the burdens of the contract. Respondents
7 resorted to these terms of the contract in their linked
8 appeal and at the trial court level.
9 And for these reasons they should be
10 equitably estopped from avoiding the terms of that
11 contract, the attorney's fees for provision before this
12 Court. Marx/Okubo respectfully requests that this Court
13 reverse the trial court's denial of its attorney's fees
14 and terms, and remand for a determination of the costs.
15 THE COURT: Thank you.
16 MR. SIDDIKI: After the Supreme Court
17 entered its opinions in East Harbin Affiliate (ph) is
18 when we first filed claims against Marx/Okubo, and that
19 was the adoption of the independent duty doctrine or the
20 shift demand to analytical thinking with regard to
21 bringing negligence claim for purely economic loss.
22 We made several claims against
23 several defendants in the underlying case and in our
24 complaint. The claims against Okubo were limited to
25 claims for negligence and negligent misrepresentation.

1 Other claims that were made against other parties were
2 not alleged against Okubo. They were kept separate.
3 And claims that were made against Okubo were not made
4 against other parties. For example, there was a breach
5 of contract claim and that was made against Madera West,
6 LLC, the seller of the project.
7 THE COURT: What's the source of the duty
8 that you seek to impose in this case? The other side
9 says you are looking to the contract to establish a
10 standard of care.
11 MR. SIDDIKI: I think that's absolutely
12 wrong. I think that we are looking at the product that
13 was provided to the association, which is the reserve
14 study which said they could rely on it, to show that
15 there is a duty outside of the contract, independent of
16 the contract which would sustain a negligence claim
17 against Okubo.
18 THE COURT: You'd agree but for the
19 contract there'd be no study?
20 MR. SIDDIKI: Yes, that's true. But we
21 didn't rely on that contract in any way whatsoever to
22 make our claims, nor did we knowingly exploit the
23 contract. The only reason that we addressed the
24 contract in the briefing is because they moved for
25 summary judgment on it. We said, but if there is --

1 THE COURT: If you'd found this report
2 just lying on the table in a library and didn't know
3 where it came for except for what it said inside of it,
4 and then you distributed it to folks, do you think
5 you've created a duty by the author to the folks you
6 distributed it to without any context beyond that?
7 MR. SIDDIKI: Not if I was -- not if I
8 didn't fall within a specified group of persons which
9 that report was directed at -- for example, in this case
10 the association. Would anyone in the public who picked
11 up a book be able to say, oh, yeah, this applies to me
12 and you owe me a duty? No. If that book said, this
13 book is prepared for Adil Siddiki and he can rely on it
14 in the future, then yes, I would think so, Your Honor.
15 THE COURT: So all those self-help books
16 that are in the library are creating liability for folks
17 that they maybe aren't aware of?
18 MR. SIDDIKI: I don't believe so. Maybe
19 the ones for Dummies for self-help I can argue, but no,
20 Your Honor, I think what we have here is a specific
21 group of people. And we are not trying to say that
22 Okubo owes a duty to the public, which was talked about,
23 for example, in Burr with those statutes.
24 What we are saying is that you have
25 created a relationship here because you have induced

1 that reliance by saying to the prospective purchaser
2 that the owners association could indeed rely on your
3 report.
4 If you look at our motion, it
5 started out by saying, we don't believe that
6 Marx/Okubo's contract with AF Evans has anything to do
7 with us. But after that, the paragraph that Okubo
8 relies on in saying we exploited their contract simply
9 says this, that if the trial court finds that we are
10 somehow bound to that contract between Evans and Okubo,
11 even if that contract carves out the risk for negligence
12 and does not allocate any liability amongst the parties
13 for a negligence claim, that Okubo would remain liable
14 if it breached its professional duty of care.
15 THE COURT: Let me clarify that. Was
16 Okubo trying to use the contract to show a limitation of
17 liability?
18 MR. SIDDIKI: Yes. That was their --
19 Okubo argued because of its contract with Evans that it
20 had no responsibility to us. I touched -- that's what I
21 was trying to touch on briefly with them not discussing
22 or addressing the adequacy of the reports and simply
23 saying in defense, you have no right against us because
24 our liability is limited only to Evans and we have
25 allocated all the risks therein. And for example, like

1 a Berkshire Phillips case where you have two private
2 parties where the risk has been allocated amongst the
3 parties already and therefore there was no recovery for
4 economic loss in that case.
5 Beyond that, Okubo's discovery
6 answers were really designed to solicit answers --
7 interrogatories and deposition questions were designed
8 to solicit answers they wanted for what they thought the
9 association's claim was. But we were very transparent
10 about what the claim was. It was always about the study
11 and the reliance on the dues. It had nothing to do with
12 a specific page in the report saying one thing or
13 another when it came to homeowners responding to
14 discovery.
15 We couldn't ask them after five
16 years to tell us a specific sentence in over 300 pages
17 that they remember sitting down with with the seller at
18 that time. What we asked them to do was identify
19 whether or not they remember the communications to them
20 about the amount of dues that they'd be paying for the
21 project which is a huge, huge thing for condominium
22 purchaser.
23 I don't know if any of you have ever
24 purchased a condominium, but in addition to your
25 mortgage every month you have to pay that dues amount.

1 You don't ever see it and you don't get it back. And if
2 you get assessed, you won't ever see that money again
3 and you are going to end up paying for it and it causes
4 a lot of foreclosures.
5 And reserve studies in this state
6 have now been adopted and designed to help curtail that
7 problem because it's become such an issue, especially
8 with conversions. But the questions that they asked
9 were confusing in and of itself because, under the
10 Washington Condominium Act, to take over a unit you need
11 to close on it. You have to have an ownership interest
12 in it.
13 At the time of purchase these owners
14 sat down with a real estate agent. He flipped through a
15 300-page public offering statement and said, here, sign
16 here, sign here, sign here. Here's what your dues are
17 going to be, sign here, sign here, sign here. That's at
18 the time of purchase. So that's the first time they
19 even saw the public offering statement or any of the
20 information attached to it.
21 Okubo said, do you remember
22 reviewing anything specific in this document at the time
23 of purchase. That's a totally different question than,
24 do you remember going through this document, ever,
25 before you closed on your house, which could occur two

1 or three weeks down the road depending on financing and
2 so on and so forth.
3 But beyond that, none of owners ever
4 lied to Okubo. They may have been confused about an
5 interrogatory question, they may have misunderstood what
6 they were being asked, but they never knowingly provided
7 any sort of false testimony.
8 We are not trying to skew the
9 fact-finding or truth process here, Your Honor. But the
10 reality is that in every case, if you issue
11 interrogatories and you take those interrogatories in
12 the deposition, you may get more information that you
13 originally got in your answer, and you sometimes may
14 have to change an answer based on the context you
15 provide to the deponent. And that's really what
16 happened here if you look at the record. And the trial
17 court got it right and it didn't abuse its discretion in
18 denying sanctions and fees to Okubo in this instance.
19 Thank you very much.
20 THE COURT: Thank you. You have a few
21 minutes left.
22 MS. HARDWICK: Thank you, Your Honors.
23 Unless you have any questions, I'd like to just focus on
24 the terms that respondents have brought up. Respondents
25 asserted claims against Marx/Okubo as 58 independent

1 individual homeowners and as an HOA. In order to manage
2 this, Marx/Okubo issued targeted discovery requests and
3 got responses and based their depositions on those
4 responses. For example, nine out of the 58 claimants
5 admitted in their discovery responses they did not
6 receive or purchase their units in reliance on any false
7 information --
8 THE COURT: Is there a fact-finding
9 component to the trial court's determination that
10 sanctions should be imposed?
11 MS. HARDWICK: Yes, Your Honor, to the
12 extent that they have to determine that there was false
13 statement.
14 THE COURT: So if there are two ways to
15 look at the answers to the questions asked, one that
16 supports your argument and one that supports the other
17 side's argument, why wouldn't that be within the
18 discretion of the trial court beyond the scope of
19 anything we should meddle in?
20 MS. HARDWICK: I think that if that were
21 the case, that would be reasonable. However, several of
22 the claimants clearly said, well, that was a
23 misstatement, I did not receive this document. The
24 document I was referring to was a different reserve
25 study. And if -- basically respondents say that if

1 Marx/Okubo had asked the right question in deposition,
2 they would have gotten the right answer.
3 And this is an adversarial system,
4 but when Marx/Okubo's counsel asked the claimants if
5 they found -- if there were any false statements that
6 they relied on, they should have gotten the answer that
7 the false statement is the amount of reserves due. And
8 throughout these depositions, the nine claimants that we
9 sought terms for on CR 26(g), not one of them brought
10 that up.
11 THE COURT: Brought what up, excuse me?
12 MS. HARDWICK: Bought up the reserve
13 amounts, their reliance on reserve amounts. So
14 basically the discovery requests identified, did you
15 receive the reports, do you contend there are any false
16 statements. And those people who said yes, we deposed
17 them. And then in the deposition they said no, no false
18 statements, I can't think of any. For these reasons
19 CR 26 is a mandatory sanctions when there is a false
20 statement. And so while there are some of the issues --
21 THE COURT: [INAUDIBLE] statements you
22 later discover is not right and corrected, there is a
23 mandatory obligation on The Court to impose a sanction?
24 MS. HARDWICK: It's not mandatory, but in
25 Clips v. State --

1 THE COURT: Didn't you just say that?
2 MS. HARDWICK: If there is a false
3 statement and they certified to the contrary, and the
4 claimant or, you know, defendant incurred damages, it is
5 mandatory. That's what the certification is there for.
6 Thank you, Your Honors.
7 THE COURT: For today The Court will be
8 in recess.
9 (The proceeding concluded.)
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C E R T I F I C A T E

STATE OF WASHINGTON)
) SS.
COUNTY OF PIERCE)

I, the undersigned Washington Certified Court Reporter, pursuant to RCW 5.28.010, authorized to administer oaths and affirmations in and for the State of Washington, do hereby certify: That the foregoing deposition of the witness named herein was taken stenographically before me and reduced to a typed format under my direction;

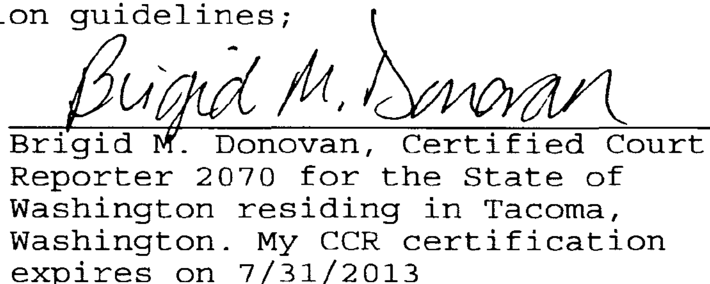
That, according to CR 30(e), the witness was given the opportunity to examine, read and sign the deposition after the same was transcribed, unless indicated in the record that the review was waived;

That all objections made at the time of said examination have been noted by me;

That I am not a relative or employee of any attorney or counsel or participant and that I am not financially or otherwise interested in the action or the outcome herein;

That the witness coming before me was duly sworn or did affirm to tell the truth;

That the deposition, as transcribed, is a full, true and complete transcript of the testimony, including questions and answers and all objections, motions and exceptions of counsel make at the time of the foregoing examination and said transcript was prepared pursuant to the Washington Administrative Code 308-14-135 preparation guidelines;



Brigid M. Donovan, Certified Court Reporter 2070 for the State of Washington residing in Tacoma, Washington. My CCR certification expires on 7/31/2013

RCW 18.43.010
General provisions.

In order to safeguard life, health, and property, and to promote the public welfare, any person in either public or private capacity practicing or offering to practice engineering or land surveying, shall hereafter be required to submit evidence that he or she is qualified so to practice and shall be registered as hereinafter provided; and it shall be unlawful for any person to practice or to offer to practice in this state, engineering or land surveying, as defined in the provisions of this chapter, or to use in connection with his or her name or otherwise assume, use, or advertise any title or description tending to convey the impression that he or she is a professional engineer or a land surveyor, unless such a person has been duly registered under the provisions of this chapter.

[2011 c 336 § 480; 1947 c 283 § 1; Rem. Supp. 1947 § 8306-21. Prior: 1935 c 167 § 2; RRS § 8306-2.]

Notes:

False advertising: Chapter 9.04 RCW.

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18.43.100 << 18.43.105 >> 18.43.110

RCW 18.43.105

Disciplinary action — Prohibited conduct, acts, conditions.

In addition to the unprofessional conduct described in RCW 18.235.130, the board may take disciplinary action for the following conduct, acts, or conditions:

(1) Offering to pay, paying or accepting, either directly or indirectly, any substantial gift, bribe, or other consideration to influence the award of professional work;

(2) Being willfully untruthful or deceptive in any professional report, statement or testimony;

(3) Attempting to injure falsely or maliciously, directly or indirectly, the professional reputation, prospects or business of anyone;

(4) Failure to state separately or to charge separately for professional engineering services or land surveying where other services or work are also being performed in connection with the engineering services;

(5) Violation of any provisions of this chapter;

(6) Conflict of interest -- Having a financial interest in bidding for or performance of a contract to supply labor or materials for or to construct a project for which employed or retained as an engineer except with the consent of the client or employer after disclosure of such facts; or allowing an interest in any business to affect a decision regarding engineering work for which retained, employed, or called upon to perform;

(7) Nondisclosure -- Failure to promptly disclose to a client or employer any interest in a business which may compete with or affect the business of the client or employer;

(8) Unfair competition -- Reducing a fee quoted for prospective employment or retainer as an engineer after being informed of the fee quoted by another engineer for the same employment or retainer;

(9) Improper advertising -- Soliciting retainer or employment by advertisement which is undignified, self-laudatory, false or misleading, or which makes or invites comparison between the advertiser and other engineers;

(10) Committing any other act, or failing to act, which act or failure are

customarily regarded as being contrary to the accepted professional conduct or standard generally expected of those practicing professional engineering or land surveying.

[2002 c 86 § 225; 1961 c 142 § 4; 1959 c 297 § 2.]

Notes:

Effective dates -- 2002 c 86: See note following RCW 18.08.340.

Part headings not law -- Severability -- 2002 c 86: See RCW 18.235.902 and 18.235.903.

RCW 18.43.110

Discipline of registrant — Board's power — Unprofessional conduct — Reissuance of certificate of registration.

The board shall have the exclusive power to discipline the registrant and sanction the certificate of registration of any registrant.

Any person may file a complaint alleging unprofessional conduct, as set out in RCW 18.235.130 and 18.43.105, against any registrant. The complaint shall be in writing and shall be sworn to in writing by the person making the allegation. A registrant against whom a complaint was made must be immediately informed of such complaint by the board.

The board, for reasons it deems sufficient, may reissue a certificate of registration to any person whose certificate has been revoked or suspended, providing a majority of the board vote in favor of such issuance. A new certificate of registration to replace any certificate revoked, lost, destroyed, or mutilated may be issued, subject to the rules of the board, and a charge determined by the director as provided in RCW 43.24.086 shall be made for such issuance.

In addition to the imposition of disciplinary action under RCW 18.235.110, the board may refer violations of this chapter to the appropriate prosecuting attorney for charges under RCW 18.43.120.

[2002 c 86 § 226; 1997 c 247 § 3; 1989 c 175 § 62; 1986 c 102 § 3; 1985 c 7 § 45; 1982 c 37 § 1; 1975 1st ex.s. c 30 § 49; 1947 c 283 § 14; Rem. Supp. 1947 § 8306-31. Prior: 1935 c 167 § 11; RRS § 8306-11.]

Notes:

Effective dates -- 2002 c 86: See note following RCW 18.08.340.

Part headings not law -- Severability -- 2002 c 86: See RCW 18.235.902 and 18.235.903.

Effective date -- 1989 c 175: See note following RCW 34.05.010.

WAC 196-27A-010
Purpose and applicability.

(1) RCW 18.43.110 provides the board of registration for professional engineers and land surveyors (board) with the exclusive power to fine and reprimand registrants and suspend or revoke the certificate of registration of any registrant for violation of any provisions of chapter 18.43 or 18.235 RCW. This includes, as stated in RCW 18.43.105(11), "Committing any other act, or failing to act, which act or failure are customarily regarded as being contrary to the accepted professional conduct or standard generally expected of those practicing engineering or land surveying." The purpose of chapter 196-27A WAC is to provide further guidance to registrants with respect to the accepted professional conduct and practice generally expected of those practicing engineering or land surveying.

(2) These rules of professional conduct and practice are applicable to all registrants and engineering/land surveying firms. A registrant is any person holding a certificate or license issued in accordance with chapter 18.43 RCW and an engineering/land surveying firm is one that has been issued a certificate of authorization to practice by the board.

(3) All persons, corporations, joint stock associations and limited liability companies registered under the provisions of chapter 18.43 RCW are charged with having knowledge of, and practicing in accordance with, the provisions of this chapter.

[Statutory Authority: RCW 18.43.035. WSR 02-23-027, § 196-27A-010, filed 11/12/02, effective 12/13/02.]

WAC 196-27A-020
Fundamental canons and guidelines for professional conduct and practice.

Registrants are to safeguard life, health, and property and promote the welfare of the public. To that end, registrants have obligations to the public, their employers and clients, other registrants and the board.

(1) **Registrant's obligation to the public.**

(a) Registrants are obligated to be honest, fair and timely in their dealings with the public, their clients and other licensed professionals.

(b) Registrants must be able to demonstrate that their final documents and work products conform to accepted standards.

(c) Registrants must inform their clients or employers of the harm that may come to the life, health, property and welfare of the public at such time as their professional judgment is overruled or disregarded. If the harm rises to the level of an imminent threat, the registrant is also obligated to inform the appropriate regulatory agency.

(d) Registrants shall maintain their competency by continuing their professional development throughout their careers and shall provide opportunities for the professional development of those individuals under their supervision.

(e) Registrants shall be objective and truthful in professional documents, reports, public and private statements and testimony; all material facts, and sufficient information to support conclusions or opinions expressed, must be included in said documents, reports, statements and testimony. Registrants shall not knowingly falsify, misrepresent or conceal a material fact in offering or providing services to a client or employer.

(f) Registrants shall offer their services in a truthful, objective, professional manner that effects integrity and fosters public trust in the engineering and land surveying professions.

(g) Registrants should endeavor to extend the public knowledge of engineering and land surveying.

(h) Registrants shall accurately represent their academic credentials, professional qualifications and experience.

(i) Registrants may advertise professional services only in ways that are representative of their qualifications, experience and capabilities.

(j) Registrants shall forbid the use of their name or firm name by any person or firm that is engaging in fraudulent or dishonest business or professional practices.

(2) **Registrant's obligation to employer and clients.**

(a) Registrants are expected to strive with the skill, diligence and judgment exercised by the prudent practitioner, to achieve the goals and objectives agreed upon with their client or employer. They are also expected to promptly inform the client or employer of progress and changes in conditions that may affect the appropriateness or achievability of some or all of the goals and objectives of the client or employer.

(b) Registrants and their clients should have a clear and documented understanding and acceptance of the work to be performed by the registrant for the client. The registrant should maintain good records throughout the duration of the project to document progress, problems, changes in expectations, design modifications, agreements reached, dates and subject of conversations, dates of transmittals and other pertinent records consistent with prudent professional practice.

(c) Registrants shall seal only documents prepared by them or under their direct supervision as required by RCW 18.43.070.

(d) Registrants shall be competent in the technology and knowledgeable of the codes and regulations applicable to the services they perform.

(e) Registrants must be qualified by education or experience in the technical field of engineering or land surveying applicable to services performed.

(f) Registrants may accept primary contractual responsibility requiring education or experience outside of their own fields of competence, provided, their services are restricted to those parts and aspects of the project in which they are qualified. Other qualified registrants shall perform and stamp the work for other parts and aspects of the project.

(g) Registrants shall act as faithful agents or trustees in professional matters for each employer or client.

(h) Registrants shall advise their employers or clients in a timely manner when, as a result of their studies and their professional judgment, they believe a project will not be successful.

(i) Registrants shall avoid conflicts of interest, or the appearance of a conflict of interest, with their employers or clients. Registrants must promptly inform their employers or clients of any business association, interest, or circumstances that could influence their judgment or the quality of their services or would give the appearance that an existing business association, interest, or circumstances could result in influencing their judgment or the quality of their services.

(j) Registrants shall accept compensation from only one party for services rendered on a specific project, unless the circumstances are fully disclosed and agreed to by the parties of interest.

(3) **Registrant's obligation to other registrants.**

(a) If registrants issue statements, critiques, evaluations or arguments on engineering or land surveying matters, they shall clearly indicate on whose behalf the statements are made.

(b) Registrants shall negotiate contracts for professional services fairly and on the basis of demonstrated competence and qualifications for the type of services required.

(c) Registrants shall respond to inquiries from other registrants regarding their work in a timely, fair and honest manner as would be expected from a prudent practitioner.

(4) **Registrant's obligation to the board.**

(a) Registrants shall cooperate with the board by providing, in a timely manner, all records and information requested in writing by the board, or their designee.

(b) Registrants shall respond to, or appear before the board at the time, date and location so stated in a legally served board order.

(c) Registrants shall notify the board of suspected violations of chapter 18.43 or 18.235 RCW or of these rules by providing factual information in writing to convey the knowledge or reason(s) to believe another person or firm may be in violation.

[Statutory Authority: RCW 18.43.035. WSR 02-23-027, § 196-27A-020, filed 11/12/02, effective 12/13/02.]

RCW 64.34.380
Reserve account — Reserve study — Annual update.

(1) An association is encouraged to establish a reserve account with a financial institution to fund major maintenance, repair, and replacement of common elements, including limited common elements that will require major maintenance, repair, or replacement within thirty years. If the association establishes a reserve account, the account must be in the name of the association. The board of directors is responsible for administering the reserve account.

(2) Unless doing so would impose an unreasonable hardship, an association with significant assets shall prepare and update a reserve study, in accordance with the association's governing documents and RCW 64.34.224(1). The initial reserve study must be based upon a visual site inspection conducted by a reserve study professional.

(3) Unless doing so would impose an unreasonable hardship, the association shall update the reserve study annually. At least every three years, an updated reserve study must be prepared and based upon a visual site inspection conducted by a reserve study professional.

(4) This section and RCW 64.34.382 through 64.34.392 apply to condominiums governed by chapter 64.32 RCW or this chapter and intended in whole or in part for residential purposes. These sections do not apply to condominiums consisting solely of units that are restricted in the declaration to nonresidential use. An association's governing documents may contain stricter requirements.

[2011 c 189 § 3; 2008 c 115 § 1.]

Notes:

Effective date -- 2011 c 189: See note following RCW 64.38.065.

RCW 64.34.382
Reserve study — Contents.

(1) A reserve study as described in RCW 64.34.380 is supplemental to the association's operating and maintenance budget. In preparing a reserve study, the association shall estimate the anticipated major maintenance, repair, and replacement costs, whose infrequent and significant nature make them impractical to be included in an annual budget.

(2) A reserve study must include:

(a) A reserve component list, including roofing, painting, paving, decks, siding, plumbing, windows, and any other reserve component that would cost more than one percent of the annual budget for major maintenance, repair, or replacement. If one of these reserve components is not included in the reserve study, the study should provide commentary explaining the basis for its exclusion. The study must also include quantities and estimates for the useful life of each reserve component, remaining useful life of each reserve component, and current repair and replacement cost for each component;

(b) The date of the study and a statement that the study meets the requirements of this section;

(c) The following level of reserve study performed:

(i) Level I: Full reserve study funding analysis and plan;

(ii) Level II: Update with visual site inspection; or

(iii) Level III: Update with no visual site inspection;

(d) The association's reserve account balance;

(e) The percentage of the fully funded balance that the reserve account is funded;

(f) Special assessments already implemented or planned;

(g) Interest and inflation assumptions;

(h) Current reserve account contribution rate;

(i) A recommended reserve account contribution rate, a contribution rate for a full funding plan to achieve one hundred percent fully funded reserves by the end of the thirty-year study period, a baseline funding plan to maintain the reserve balance above zero throughout the thirty-year study period without special assessments, and a contribution rate recommended by a reserve study professional;

(j) A projected reserve account balance for thirty years and a funding plan to pay for projected costs from those reserves without reliance on future unplanned special assessments; and

(k) A statement on whether the reserve study was prepared with the assistance of a reserve study professional.

(3) A reserve study shall include the following disclosure:

"This reserve study should be reviewed carefully. It may not include all common and limited common element components that will require major maintenance, repair, or replacement in future years, and may not include regular contributions to a reserve account for the cost of such maintenance, repair, or replacement. The failure to include a component in a reserve study, or to provide contributions to a reserve account for a component, may, under some circumstances, require you to pay on demand as a special assessment your share of common expenses for the cost of major maintenance, repair, or replacement of a reserve component."

[2011 c 189 § 4; 2008 c 115 § 2.]

Notes:

Effective date -- 2011 c 189: See note following RCW 64.38.065.

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64.34.382 << 64.34.384 >> 64.34.386

RCW 64.34.384
Reserve account — Withdrawals.

An association may withdraw funds from its reserve account to pay for unforeseen or unbudgeted costs that are unrelated to maintenance, repair, or replacement of the reserve components. The board of directors shall record any such withdrawal in the minute books of the association, cause notice of any such withdrawal to be hand delivered or sent prepaid by first-class United States mail to the mailing address of each unit or to any other mailing address designated in writing by the unit owner, and adopt a repayment schedule not to exceed twenty-four months unless it determines that repayment within twenty-four months would impose an unreasonable burden on the unit owners. Payment for major maintenance, repair, or replacement of the reserve components out of cycle with the reserve study projections or not included in the reserve study may be made from the reserve account without meeting the notification or repayment requirements under this section.

[2011 c 189 § 5; 2008 c 115 § 3.]

Notes:

Effective date -- 2011 c 189: See note following RCW 64.38.065.

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64.34.384 << 64.34.386 >> 64.34.388

RCW 64.34.386

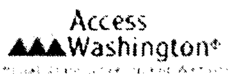
Reserve study — Demand by owners — Study not timely prepared.

(1) Where more than three years have passed since the date of the last reserve study prepared by a reserve study professional, the owners of the units to which at least twenty percent of the votes are allocated may demand, in writing, to the association that the cost of a reserve study be included in the next budget and that the study be obtained by the end of that budget year. The written demand must refer to this section. The board of directors shall, upon receipt of the written demand, provide unit owners making the demand reasonable assurance that the board of directors will include a reserve study in the next budget and, if the budget is not rejected by the owners, will arrange for the completion of a reserve study.

(2) In the event a written demand is made and a reserve study is not timely prepared, a court may order specific performance and award reasonable attorneys' fees to the prevailing party in any legal action brought to enforce this section. An association may assert unreasonable hardship as an affirmative defense in any action brought against it under this section. Without limiting this affirmative defense, an unreasonable hardship exists where the cost of preparing a reserve study would exceed ten percent of the association's annual budget.

(3) A unit owner's duty to pay for common expenses shall not be excused because of the association's failure to comply with this section or RCW 64.34.382 through 64.34.390. A budget ratified by the unit owners under RCW 64.34.308(3) may not be invalidated because of the association's failure to comply with this section or RCW 64.34.382 through 64.34.390.

[2008 c 115 § 4.]



64.34.386 << 64.34.388 >> 64.34.390

RCW 64.34.388
Reserve study — Decision making.

Subject to RCW 64.34.386, the decisions relating to the preparation and updating of a reserve study must be made by the board of directors of the association in the exercise of the reasonable discretion of the board. Such decisions must include whether a reserve study will be prepared or updated, and whether the assistance of a reserve study professional will be utilized.

[2008 c 115 § 5.]

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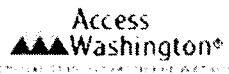

64.34.388 << 64.34.390 >> 64.34.392

RCW 64.34.390

Reserve study — Reserve account — Immunity from liability.

Monetary damages or any other liability may not be awarded against or imposed upon the association, the officers or board of directors of the association, or those persons who may have provided advice or assistance to the association or its officers or directors, for failure to: Establish a reserve account; have a current reserve study prepared or updated in accordance with RCW 64.34.380 through 64.34.388; or make the reserve disclosures in accordance with RCW 64.34.382 and 64.34.410(1)(oo) and 64.34.425(1)(s).

[2008 c 115 § 6.]

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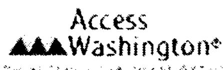

64.34.390 << 64.34.392 >> 64.34.400

RCW 64.34.392

Reserve account and study — Exemption — Disclosure.

(1) A condominium association with ten or fewer unit owners is not required to follow the requirements under RCW 64.34.380 through 64.34.390 if two-thirds of the owners agree to exempt the association from the requirements.

(2) The unit owners must agree to maintain an exemption under subsection (1) of this section by a two-thirds vote every three years.

(3) Notwithstanding subsections (1) and (2) of this section, a disclosure that the condominium association does not have a reserve study must be included in a unit's public offering statement as required under RCW 64.34.410 or resale certificate as required under RCW 64.34.425.

[2009 c 307 § 1.]

RCW 64.34.415
Public offering statement — Conversion condominiums.

(1) The public offering statement of a conversion condominium shall contain, in addition to the information required by RCW 64.34.410:

(a) Either a copy of a report prepared by an independent, licensed architect or engineer, or a statement by the declarant based on such report, which report or statement describes, to the extent reasonably ascertainable, the present condition of all structural components and mechanical and electrical installations material to the use and enjoyment of the condominium;

(b) A copy of the inspection and repair report prepared by an independent, licensed architect, engineer, or qualified building inspector in accordance with the requirements of RCW 64.55.090;

(c) A statement by the declarant of the expected useful life of each item reported on in (a) of this subsection or a statement that no representations are made in that regard; and

(d) A list of any outstanding notices of uncured violations of building code or other municipal regulations, together with the estimated cost of curing those violations. Unless the purchaser waives in writing the curing of specific violations, the extent to which the declarant will cure such violations prior to the closing of the sale of a unit in the condominium shall be included.

(2) This section applies only to condominiums containing units that may be occupied for residential use.

[2005 c 456 § 18; 1992 c 220 § 22; 1990 c 166 § 10; 1989 c 43 § 4-104.]

Notes:

Captions not law -- Effective date--2005 c 456: See RCW 64.55.900 and 64.55.901.

Effective date -- 1990 c 166: See note following RCW 64.34.020.

SUPREME COURT FOR
OF THE STATE OF WASHINGTON

MADERA WEST CONDOMINIUM OWNERS ASSOCIATION, et al., Petitioners, v. **MADERA WEST, LLC**, et al., Respondent.	CAUSE NO. 68127-3-I *consolidated with* NO. 68522-8-I **CERTIFICATE OF SERVICE**

TO: CLERK OF THE COURT

I, Adil A. Siddiki, certify that I emailed a copy of the Petition for Review to counsel for Respondent, Mr. Ken Yalowitz, on September 6, 2013.

Adil A. Siddiki, WSBA No. 37492