68127-3

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No. 68127-3

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

MADERA WEST CONDOMINIUM OWNERS ASSOCIATION, et al.

Appellants,

v.

MARX/OKUBO,

Respondent.

APPEAL FROM KING COUNTY SUPERIOR COURT
Honorable Mary Yu, Judge

REPLY BRIEF OF APPELLANTS

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I. INTRODUCTION

The Okubo reserve study was prepared for Appellants, and confirms the same on the first page in the first paragraph. Okubo's incorrect argument that the study was misappropriated or distributed without its knowledge is uprooted by the express language of the study, which says in addition to its long-term cost of repair projections that Appellants can rely on it for "planning" and "budgeting".

Further, and despite Okubo's many assertions to the contrary, Okubo knew Madera was being converted from apartments to condominiums and at minimum that the information in its reports would be provided to Appellants.

Okubo does hundreds of reserve studies each year, which means hundreds of Homeowner Associations rely on it, and potentially thousands of unit owners. It defies common sense, logic, and justice that Okubo may prepare studies for so many of Washington's citizens without any accountability whatsoever.

To the contrary, however, it is common sensical, logical, and just to hold that Okubo does owe a duty to Appellants where it said they could rely on the reserve study to plan and budget for their reserve account over the next 30 years.

II. REPLY

1. There is no such thing as the "Right-to-Cure Act" and Okubo was given pre-litigation notice in the manner requested in the Public Offering Statement ("POS").

RCW 64.50 is titled "Construction Defect Claims" not the "Right-to-Cure Act".

Okubo admits the only notice provided to Appellants was in the POS that was given to them by MW, LLC, who was the declarant for Madera. Since Okubo can only rely on the notice provided in the POS by MW, LLC to argue it should have received pre-litigation notice under RCW 64.50, then it must also accept notice as described in the POS, which only described notice to MW, LLC. The trial court therefore erred when it initially dismissed Appellant's claims against Okubo by finding the notice sent by Appellants according to the POS provisions was insufficient. CP 20-22.

2. The reserve study expressly states it was prepared for Appellant's use.

The only part of Okubo's response that takes head-on the central issue raised by Appellants – that the reserve study was prepared specifically for them – is in a footnote on page 23 of its brief. Therein Okubo argues that Appellants are misrepresenting what the study says and their position is not supported by the evidence. To be certain what

the study says then, Appellants will simply quote it directly. On page one, in the very first paragraph, the reserve study says,

> The **purpose** of this survey is to provide a forward projection of major costs of repairs and replacements that the Forrest Village[1] **Homeowners Association** [Madera West Condominium Owners Association] **should anticipate in planning and budgeting a reserve fund**. It is our understanding that it is the intent of A. F.
> Evans to **convert** the property to condominiums.

CP 1243 (emphasis added). There is nothing ambiguous about Okubo's explanation of the purpose behind the reserve study. The study was prepared by Okubo to be used by the Appellants based on its understanding that project was being converted. See also CP 1243 at ¶ 4 "...decision making on part of the Homeowners Association."

Further, the specific language about the Association and reserve account was clearly added to the reserve study, where basically all of what Okubo relies on in its defense is boiler-plate. It is impossible for Okubo to argue it was unaware the reserve study was going to be delivered to Appellants, or that delivering the study to Appellants was a misappropriation of its work-product. Indeed Mr. Allan Thunder testified on behalf of Okubo that its reports were prepared with the

[1] The project was known as the Forrest Village Apartments prior to conversion.

knowledge that the apartments were being converted to condominiums[2] in addition to the fact that the study included, not only one, but three separate tables for Appellants to follow in planning and budgeting the reserves, and to determine when to make certain repairs. CP 380 p. 65 lns. 1-14. To put it another way, the express language of the study shows that it was not made in a vacuum for Evans to use exclusively in 2005; the study was a road-map to guide Appellant's actions over the course of the next 30 years.

Along the same lines, the purpose of a reserve study is to determine the amount of owner contributions (i.e. homeowner dues) necessary for the maintenance and repair of a condominium project. See e.g. 1243. Even setting aside the express language of the report and testimony of Mr. Thunder, Okubo knew the project was being converted because it would never prepare a reserve study identifying the amount the Association could collect from the homeowners per annum for an apartment project; an apartment owner could not charge monthly dues to renters. CP 1247-1248.

Finally, Okubo's attempt to make the missing first year

[2] For most of his deposition, Mr. Thunder **denied** that Okubo knew prior to issuing its reports that the project was going to be converted. Finally, after a break in the deposition and conference between his counsel and counsel for the declarant, Mr. Thunder changed his testimony and admitted **Okubo knew prior** to issuing its reports that the project was going to be converted. CP CP 380 pp. 64-65 lns. 8-10.

contribution the fault of Appellants is without any merit. Control of the Association was not transferred until late in 2006 or early 2007. As soon as Appellants were apprised of the fact that there was no reserve account[3], which occurred in the beginning of 2007, they opened one and made an $85,000 contribution, which is more than what the "basic" or "moderate" plan calls for in Okubo's study. CP 1247, 1393.

3. Okubo ignored its 1996 observations.

For Okubo to prepare a reserve study based on the assumption there were no deficiencies or damage at Madera was negligent. CP 1590-1592 at ¶ 15-16. Okubo noted that in 1996 over one-third of the project was "damaged" and in need of repair. Nine years later, based on the premise that the siding had no deficiencies, it called for complete replacement eleven years later. So according to Okubo, in a perfect world, the siding had eleven years of useful life. Had Okubo not ignored its previous findings, it is fair to presume Okubo would have called for replacement of the siding in just two years, regardless of how

[3] It is disingenuous for Okubo to even attempt to place blame on Appellants for the failure to initially create and fund a reserve account in 2005, not only because it is aware that unit sales did not even start until after its reports were issued halfway through that year, but part of the underlying lawsuit involved misrepresentation claims directly tied to this very issue or the understanding of Appellants that the declarant was making the initial deposit into the reserve in excess of the fully-funded balance amount identified by Okubo.

aggressively it was maintained.[4] And notwithstanding, LP siding's useful life cannot be meaningfully extended even with aggressive maintenance; "it is and remains a defective product." CP 1591 at ¶¶ 10-11.

4. Okubo has a duty to Plaintiffs according to the WASHINGTON PRACTICE framework.

Under WASHINGTON PRACTICE, Okubo had a duty to Appellants if:

> (1) Okubo **(at least in part)** brought about the risk that caused the injury to Appellant, so long as the risk was reasonably **foreseeable**; or
>
> (2) if Okubo did not bring about the risk, but failed to take steps to prevent the injury to Appellants, and:
>
> (a) it induced **justifiable reliance** by Appellants that it used reasonable care to prevent injury to them;
>
> (b) it had a **"special relationship"** with Appellants imposing a **social duty** to use reasonable care for their safety; or
>
> (c) a **statute** specifically imposed a duty on Okubo to exercise care for Appellant's safety.

16 WASHINGTON PRACTICE, TORT LAW AND PRACTICE § 1.11 (3RD Ed. 2006) (emphasis added).

A. Risk and Foreseeability.

Okubo first visited Madera in 1996. CP 1518. It knew the project

[4] The negligence claim as it pertains to the reserve study is not specifically about "failing to discover and disclose defects." Resp. Brief p.22. Okubo would like the Court to believe this so it appears Plaintiffs are trying to pin declarant liability on Architects and Engineers, but they are not. Plaintiffs are seeking damages for difference in the amount of reserves contributions actually necessary to repair the project and what Okubo identified.

was severely damaged at that time. CP 1541. Okubo's failure to use this knowledge in making its reserve study nine years later contributes to the risk of injury at the project as delaying repairs will lead to continued degradation of its physical condition/safety. CP 549-602.

Moreover, Okubo's projections left Appellants without any meaningful basis to collect any adequate amount of money to make the suggested repairs timely. CP 1566 at ¶ 5-7. Okubo contributed to the damage at the project and to the undercapitalization of the reserves. CP 1590-1592.

The reliance on the study by Appellants was more than foreseeable. Okubo said in the study that Appellants could rely on it to budget the reserve account for the next 30 years. CP 1503.

B. Statutory duty.

The definitions of the practices of architecture and engineering are far more inclusive than described in Okubo's response. More specifically, RCW 18.43.020 (5), applies to "any person in either public or private capacity practicing or offering to practice engineering". Under RCW 18.43.020 (5)(a), the practice of engineering means,

> any professional service or creative work requiring engineering education, training, and experience and the application of special knowledge of the mathematical, physical, and engineering sciences to such professional services or creative work as

> consultation, investigation, evaluation, planning, design, and supervision of construction for the purpose of assuring compliance with specifications and design, in connection with any public or private utilities, structures, buildings, machines, equipment, processes, works, or projects.

Under RCW 18.43.020 5(b),

> A person shall be construed to practice or offer to practice engineering, within the meaning and intent of this chapter, who practices any branch of the profession of engineering; or who, by verbal claim, sign, advertisement, letterhead, card, **or in any other way represents himself or herself to be a professional engineer**, or through the use of some other title implies that he or she is a professional engineer; or who holds himself or herself out as able to perform, **or who does perform, any engineering service or work or any other professional service designated by the practitioner or recognized by educational authorities as engineering**.

The practice of architecture, contrary to Okubo's selective quotation of RCW 18.08.320 (12), means the,

> rendering of services in connection with the art and science of building design for construction… **or** the design **for construction of alterations or additions to the structures, including but not specifically limited to** predesign services, schematic design, design development, preparation of construction contract documents, and administration of the construction contract.

Okubo admits in its responsive brief, its contract was to provide

"architectural and engineering" services.[5]

In addition, to convince the trial court Appellants claims should be dismissed under RCW 64.50, Okubo argued it was a "construction professional" or a firm comprised of "architects, engineers, and inspectors." RCW 64.50.010 (4); CP 12 at ¶ 2. The reserve study was prepared by Mr. Thunder, a licensed Architect and refers to him in the same capacity. CP 12 at ¶ 4, 1501.

There is no evidence in the record whatsoever that Mr. Thunder prepared the reserve study as anything less than an Architect, and as Okubo admits in its responsive brief, it was retained to provide "architectural and engineering" services.[6] CP 126. If anything, under Gall Landau Young Construction Co. v. Hurlen Construction Co., 39 Wn. App. 420, 429-31, 693 P.2d 207 (1985) what type of service Okubo performed, or what hat it was wearing while carrying-out its services is a question of fact that was not resolved in the underlying matter, making

[5] The limitation on liability in Okubo's contract with AF Evans has nothing to do with its duty to Appellants. Appellants reject any argument that AF Evans's contract with Okubo had anything to do with their claims. Appellants will not address Okubo's position beyond that because it is Okubo's plan to thrust the contract into issue whenever it can to substantiate its motion for attorney fees under RCW 4.84.330.

[6] The limitation on liability in Okubo's contract with AF Evans has nothing to do with its duty to Appellants. Appellants reject any argument that AF Evans's contract with Okubo had anything to do with their claims. Appellants will not address Okubo's position beyond that because it is Okubo's plan to thrust the contract into issue whenever it can to try and substantiate its motion for attorney fees, which was denied in the underlying matter and also on appeal before this Court.

summary judgment improper.

Okubo's finger-pointing at Appellants and reliance on Mr. Mark Jobe does not make the performance issue dispositive one way or the other. Mr. Jobe's declaration explains that Architects regularly carry out reserve studies. CP 1590-1591. Also, the standard for admissibility of expert testimony under ER 702 is different than any standard at issue in the duty inquiry.

Contrary to Okubo's assertions, RCW 64.55 is not part of the Washington Condominium Act, and Appellants did not cite to the WCA or RCW 64.55 to show a statutory duty between Okubo and Appellants. The WCA or section RCW 64.34.410-415 thereof was actually referenced in Okubo's 2005 property report and presented to confirm once again that Okubo knew, without any doubt, that AF Evans was converting Madera from apartments to condominiums when it issued the reserve study, and that on balance there was an issue of fact whether Okubo's reports were misappropriated.[7] But assuming Okubo to be correct for the sake of argument about RCW 64.55, if anything, RCW 64.55 does not create a private cause of action against a third-party for

[7] Assuming Okubo's argument had an application here, RCW 64.55 shields a third-party construction professional from liability for failure to deliver, for example, a property assessment or reserve study, which is required to be part of the Public Offering Statement given to owners by the declarant.

failure to deliver a POS as required by the WCA. It defies common sense and logic, however, to read RCW 64.55 to absolve a third-party architect or engineer completely of any liability for its work simply because it involves a condominium project.

Finally, Burg v. Shannon & Wilson Inc., 110 Wash.App. 798, 43 P.3d 526 (2002) is distinguishable on at least two grounds. First, the report was specifically prepared for reliance on by Appellants,[8] making them akin to a client. Id at 807. And second, RCW 18.43 applies to engineers providing private services.

C. Justifiable Reliance.

Appellants relied on Okubo's reserve study **because it said they should**. CP 1499; Haberman v. WPPS, 109 Wn.2d 107, 162-3, 744 P.2d 1032 (1987) (negligent misrepresentation applies to cases where (1) a defendant has knowledge of a specific party's reliance (2) plaintiff is in a group defendant seeks to influence; or (3) the defendant has reason to know a limited group will rely on the information). Appellants relied on the study to set homeowner dues and as a general estimate of how much

[8] Okubo points out a statement made by counsel for the Appellants at p. 16 of their brief that in Burg, there was "no evidence of *any* relationship whatsoever". Resp. Brief p. 37. Counsel may not have given enough context in making such statement, and certainly did not intend to be misleading in any regard. As Okubo points out, one of the homeowners did contract with the Engineer/Burg, however, the Court did not find that as evidence of any relationship whatsoever that created duty to disclose information outside of the services Burg contracted to provide the homeowner.

their first year reserve contribution should be. CP 1564-1566. There is no doubt that Appellant, as authorized by the study, relied on it and such reliance was justifiable given the express language of the study.

In addition, Okubo argues that Good Samaritan cases are helpful to determine if Appellants justifiably relied on Okubo creating a duty. Under Washington law,

> A person who undertakes, albeit gratuitously, to render aid to or warn a person in danger is required by Washington law to exercise reasonable care in his or her efforts.... If a rescuer fails to exercise such care and consequently increases the risk of harm to those he or she is trying to assist, the rescuer may be liable... A person who voluntarily promises to perform a service for another in need has a duty to exercise reasonable care when the promise induces reliance and causes the promisee to refrain from seeking help elsewhere.

Brown v. MacPherson's, Inc., 86 Wash.2d 293, 299, 545 P.2d 13 (1975); see Chambers-Castanes v. King County, 100 Wash.2d 275, 287, 669 P.2d 451, 39 A.L.R.4th 671 (1983) (911 operator's statement that police were on the way to the scene induced reliance).

Even if Okubo's duty was gratuitous, it still had to exercise reasonable care knowing that its study was going to be disseminated to and relied on by Appellants. Okubo's negligence increased the risk of harm to Appellants and induced reliance by Appellants on its study by saying Appellants could rely on it to plan and budget for reserves.

D. Special Relationship.

The touchstone of to whom a duty is owed is foreseeability, and has been so for over 80 years. Palsgraf v. Long Island R.R. Co., 248 N.Y. 339, 162 N.E. 99, reargument denied, 249 N.Y. 511, 164 N.E. 564 (1928) ("If the harm was not willful, [a plaintiff] must show that the act as to him had possibilities of danger so many and apparent as to entitle him to be protected against the doing of it though the harm was unintended."); Wells v. City of Vancouver, 77 Wash.2d 800, 467 P.2d 292 (1970), citing Palsgraf, 248 N.Y. 339 (concurrence)("Legal scholars have consistently preferred to consider foreseeability in terms of whether conduct creates an unreasonable risk of harm in prescribing or limiting legal duties, whereas the courts have been unclear and often have added confusion by persisting in discussing foreseeability as an element of proximate cause...**questions with respect to foreseeability are more appropriately allocable to the issues of whether the defendant owed the plaintiff a duty** and, if so, whether the defendant's conduct breached that duty); see Affiliated FM Ins. Co. v. LTK Consulting Serv., Inc., 170 Wash.2d 442, 449-50, 461, 243 P.3d 521 (2010) ("To decide if the law imposes a duty...we weigh considerations of 'logic, common sense, justice, policy, and precedent.'"); see also Babcock v. Mason County Fire Dist. No. 6, 14 Wn. 2d 774, 786 30 P.3d

1261 (2001), quoting Chambers-Castanes, 100 Wash.2d at 286, 669 P.2d 451 ("The term privity is used in the broad sense of the word and refers to the relationship between the police department [or fire department] and any 'reasonably foreseeable plaintiff.' ")

As explained above, Okubo could easily foresee reliance on its study because the language therein invited it. Okubo has done hundreds of studies and knew that its reports were commissioned for purposes of making WCA compliant disclosures. With Okubo's extensive experience in this realm it is hard to imagine it was duped in this one instance. See also CP 1590-92.

Okubo's reliance on Babcock, supra is misplaced. Washington law does not only recognize "special relationships" in the public domain. Hutchins v. 1001 Fourth Ave. Associates, 116 Wash.2d 217, 228, 802 P.2d 1360 (1991) (a special relationship giving rise to a duty may involve a defendant and third-party actor); Affiliated, supra.

"In general, courts will find a duty where reasonable persons would recognize it and agree that it exists." Tallariti v. Kildare, 63 Wash.App. 453, 456, 820 P.2d 952 (1991), citing Prosser and Keeton § 53, at 359), review denied, 118 Wash.2d 1012, 824 P.2d 491 (1992). "Changing social conditions lead constantly to the recognition of new duties." Webstad v. Stortini, 83 Wash.App. 857, 924 P.2d 940

(1996), quoting Prosser and Keeton § 53, at 359. "A 'special relationship' duty arises when the relationship has a direct supervisory component, but does not always require the presence of a custodial relationship." See Taggart v. State, 118 Wash.2d 195, 219, 223, 822 P.2d 243 (1992) (special supervisory relationship may arise when parole officers have taken charge of parolees they supervise, even though there is no custodial relationship).

In this instance Okubo was in a position of control and best suited to prevent any future harm to Appellants that could be caused by its work. See Affiliated, 170 Wash.2d at 453. Appellants simply relied on Okubo's study because it said it was made for that very purpose - to guide them in planning for and managing their reserves. By deterring unreasonable conduct such as Okubo's before it occurs, Washington homeowners would remain protected against calamity they did not have an opportunity to negotiate or allocate risk for. See id. at 453-4.

Adequate reserve funding is a big deal in Washington condominium living. Recently passed legislation makes it absolutely necessary (absent some undue hardship) for Associations to commission reserve studies and update them regularly/annually. To allow Okubo to issue reports willy-nilly with no fear of any consequence for its work or responsibility for the same, the entire purpose of the RCW 64.38.065 et

seq. would be defeated. And even assuming there was no special relationship between an expert commissioning a reserve study for an Association prior to Affiliated and Eastwood[9], changing social and economic conditions create new duties. See Webstad, 83 Wash.App. at 872; Affiliated, 170 Wash.2d at 453-4.[10]

In the end, if this Court does not find a relationship between Okubo and Appellants, Appellants are stuck with a damaged building with no meaningful roadmap to fix it at no fault of their own. Id. at 454.

5. The Association has standing to bring a claim in its own name and where a property interest has been harmed.

As explained in Affiliated, rejecting the same argument Okubo makes here and that LTK/respondent made therein, a claimant need not be a property owner to sue in tort. Id. at 457-8 ("...[O]nly a property owner can sue in tort for damage to the property...We reject LTK's argument...duty extends to the persons who hold a legally protected interest in the damaged property.") The Association's property interest in the reserve account is equal to or greater than the actionable

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[9] 170 Wash.2d 380, 241 P.3d 1256 (2010).

[10] Footnote 6 in Webstad the court noted several instances where Washington has found a "special relationship" existed between parties. For example, a school district toward a pupil, McLeod v. Grant C[ounty] Sch. Dist. [No.] 128, 42 Wash.2d 316, 319-22, 255 P.2d 360 (1953); an innkeeper to his or her guests, Miller v. Staton, 58 Wash.2d 879, 883, 365 P.2d 333 (1961) (duty of innkeeper to protect guests from criminal activity of other guests); a common carrier to its passengers Hutchins v. 1001 Fourth Ave. Assocs., 116 Wash.2d 217, 223, 802 P.2d 1360 (1991). See also Prosser [and] Keeton § 56, at 383

concessionaire interest in Affiliated. Id. at 474, citing Scott L. Cummings & Steven A. Boutcher, Mobilizing Local Government Law for Low-Wage Workers, 1 U. CHI. LEGALL F. 187, 199 (200) (Chief Justice Madsen, concurring/dissenting)("A concession agreement is akin to a lease, but distinct that concessionaires do not take proprietary interest in real property, but rather are given the privilege of operating in connection with governmental property under contractual terms...")

Here, assuming Okubo was correct, which it is not because the Association's right to dispose of property under RCW 64.34.304 is only limited to a conveyance as fee simple or as debt collateral (RCW 64.34.348), the Association is "operating" or administering/maintaining the homeowners property according to certain agreed upon terms (i.e. the WCA and Condominium Declaration). The Association at minimum can be deemed to have a comparable property interest to a mere license in the reserve account and common elements. The Association as authorized by the WCA had/has standing to pursue the negligence claim against Okubo "in its own name". RCW 64.34.304 (1)(d).

Furthermore, if Okubo's analysis is correct (i.e. that the Association does not have a recognizable interest in the reserve account and that the only benefit of the reserve account is to the homeowners) then no Association would have the right to collect any unpaid dues and

assess delinquent owners. Any claim to recover such fees would be dismissed for lack of standing. And to take the example to its end, the Association could not even assess owners for the money it will cost to make the necessary repairs.

Appellants opening brief addresses all of the arguments raised by Okubo under Satomi Owners Ass'n v. Satomi, LLC, 167 Wn.2d 781, 225 P.3d 213 (2009) and Stuart v. Coldwell Banker Commercial Group, Inc., 109 Wash.2d 406, 745 P.2d 1284 (1987).

6. To rely on Mr. Hart's declaration and the exhibits attached thereto was an abuse of discretion.

It was an abuse of discretion for the trial court to rely on a litigation estimate and Mr. Hart's testimony to reason repairs were ever made to Madera after Okubo first visited it in 1996.

As explained there was absolutely no evidence that any repairs were made to the project after 1996. CP 1592 at ¶ 14. Okubo's 2005 report explained vinyl siding was only installed in partially enclosed areas, or the very areas of the buildings that Okubo said in 1996 did not need to be replaced. CP 1438, 1520, 1522. And the T-11 siding product was always installed on the Townhome buildings, which were built separately from the condominiums/apartments and seven years prior to them in 1984. CP 1438, 1250; see also CP 1592 ¶ 13. **Indeed Okubo was aware of this**

fact. CP 1250, "The project construction was completed in two phases: 1984 for the townhouses and 1991 for the apartments..."

It is somewhat dubious, moreover, that Okubo would argue "[t]here is no evidence the March 18, 1997 bid addressed to Mr. Senn was prepared for litigation purposes" when a similar bid was produced from Cedar King to Perkins Coie just three weeks earlier. CP 1293-1297; see also CP 1592 at ¶ 14.

Mr. Hart's Declaration certainly went to the truth of the matter asserted where it was submitted to show – albeit allegedly and incorrectly – that all of siding Okubo classified as "damaged" in 1996 was repaired prior to 2005.

CONCLUSION

The initial dismissal of Okubo without prejudice was improper.

The trial court erred by not holding Okubo owed a duty to Appellants, and dismissing the Association's negligence claim for lack of standing.

Finally, it was an abuse of discretion to allow Mr. Hart's wholly unsupportable testimony.

For the foregoing reasons, the trial court should be reversed and the action should be remanded for a determination on the remaining issues.

RESPECTUFLLY SUBMITTED this 20th day of August, 2012.

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TO: CLERK OF THE COURT

I, SARAH NOBLE, certify that I emailed a copy of the foregoing Reply Brief of Appellant to counsel for Respondent, Mr. Ken Yalowitz, on August 20, 2012.

Sarah R. Noble
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