

No. 391286

IN THE COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

MICHAEL G GUSA

*Appellant,*

v.

BARNES LAKE PARK OWNERS  
ASSOCIATION,

*Respondents.*

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COURT OF APPEALS  
DIVISION II  
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STATE OF WASHINGTON  
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OPENING BRIEF

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ORIGINAL

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## I PROCEDURAL HISTORY AND STATEMENT OF FACTS

Appellant Gusa owns Unit 11 at Barnes Lake Park condominium (CP 107). Unit 11 is comprised of ten rooms on three floors with approximately 2100 square feet of space plus a garage, and is located in a building comprised of five units (*Id.*). The building is one of approximately a dozen in the condominium complex.

Under § 5.1.2 of the condominium declaration the common areas and facilities include:

The roofs, **foundations**, studding, joists, beams, supports, **main walls** (excluding only nonbearing interior partitions of apartment), pipes, conduits, and wires, wherever they may be located whether in partitions or otherwise, and any awnings, **and all other structural parts of the buildings, to the interior surfaces of the apartments' perimeter walls, floors, ceilings, windows, and doors; that is, to the boundaries of the apartments as the boundaries are defined in the [Horizontal Property Regimes] Act, and any replacements thereto.**

(CP 120 emphasis supplied).

Section XV of the declaration provides that the Association:

**...shall acquire and shall pay for out of the common expense fund hereinafter provided for, all goods and services requisite for the proper functioning of the condominium, including but not limited to the following...**

15.1.5 Painting, **maintenance, repair** and all

landscaping and gardening work **for the common area**, and such furnishings and equipment for the common areas as the Board shall determine are necessary and proper, **and the Board shall have the exclusive right and duty to acquire the same for the common area**; provided, however, that the interior surfaces of each unit shall be painted, maintained and repaired by the owners thereof, all such maintenance to be at the sole cost (sic) and expense of the particular owner.

(CP 127 emphasis supplied).

Section 15.1.6 of the condominium declaration requires the

Association to pay for:

Any other materials, supplies, labor, services, maintenance, repairs, structural alterations, insurance, taxes or assessments which the Board is required to secure by law or which in its opinion shall be necessary or proper for the operation of the common area or for the enforcement of this Declaration; provided that if for any reason such materials, supplies, labor, services, maintenance, repairs, structural alterations, insurance, taxes, or assessments are provided for particular apartments or their owners, the cost thereof shall be specially assessed to the owner of such apartments.

(*Id.*)

For years, the Association has allowed flooding and water intrusion into Unit 11 (CP 108). The first floor has flooded four times in the last thirteen years (CP 108 - 109). The first flood was in approximately 1996 (CP 109). The second and third were in approximately 2005 (*Id.*). The fourth occurred throughout the period

from June 2008 to February 2009 (*Id.*). After the 1996 flood and again after the first 2005 flood, the Association removed and replaced damaged sheetrock and carpet (*Id.*).

The third flood was less extensive and resulted in no visible damage, but was reported to then Association president Tom Oliva (*Id.*). When Appellant Gusa expressed concern that the prospect of future flooding would inhibit sale of the home, Mr. Oliva replied that Mr. Gusa should tell prospective purchasers "If it floods again, we [the Association] will fix it." (*Id.*). The 2008 - 2009 flooding damaged sheetrock and carpet (*Id.*). The Association has not repaired that damage (*Id.*).

Between 2004 and 2008 water intruded into eight of the ten rooms in the unit as well as the garage (CP 109). Only the two bathrooms did not have water intrusion (*Id.*). At times buckets and large bowls were needed to catch the water (*Id.*). One of the rooms with the most water intrusion was the front room on the second floor (*Id.*). Water intrusion caused a beam and wall studs to rot, and extensive damage to sheetrock (*Id.*). The 2004 water intrusion was the third or fourth episode of water intrusion and damage at that location since 1985 (*Id.*).

For years there has been water intrusion in the kitchen near the windows (*Id.*). In 2005 the Association made repairs intended to halt that water intrusion; however, the repairs were unsuccessful (*Id.*). The Association has known since at least 2007, prior to commencement of this litigation, that water intrusion was continuing near the kitchen windows (*Id.*). In 2005 the Association took months to make repairs to the condominium, during which time portions of Unit 11 were unusable (*Id.*).

Prior to October 2008 the Association did nothing to determine the cause of the flooding in the first floor or to bring it to a halt (CP 110). After learning that the repairs done in 2005 did not halt the water intrusion into the kitchen, the Association did nothing to determine the cause of that water intrusion or to bring it to a halt (*Id.*). In 2007, the Association brought suit for unpaid assessments (CP 4-7). In the complaint, the Association sought to foreclose on its lien for unpaid assessments (CP 6). In October 2008, in conjunction with this litigation, the Association consulted Rick Witte who identified substantial repairs needed to prevent flooding in the first floor and water intrusion into the kitchen (Declaration of Witte CP 86-92).

Paragraph XXI of the declaration states that:

The Board shall not be liable for any failure of any utility or other service to be obtained and paid for by the Board, or for injury or damage to person or property caused by the elements, or resulting from electricity, water, rain, dust or sand which may lead or flow from outside or from any parts of the buildings, or from any of its pipes, drains, conduits, appliances, or equipment, or from any other place. No diminution or abatement of common expense assessments shall be claimed or allowed for inconveniences or discomfort from any action taken to comply with any law, ordinance or orders of a governmental authority. This exemption and limitation of liability extends to the entire Association as well as the Board.

(CP 133).

Since at least 1985, the Association's policy and practice has been to repair common facilities and damage to the units without assessing the cost to the unit owner (CP 110). According to a "Maintenance Update" published by the Association, fifteen repairs were performed on twelve units in the five months between November 13, 2008 and March 23, 2009:

Unit 16 Interior water damage laundry window & entry	3/25/09
Unit 27 Black Mold In Master Bedroom Window	3/23/09
Unit 32 Interior Repairs From Leaking	11/13/08
Unit 51 Interior Repairs From Leaking	11/17/08
Unit 7 Complete Interior Repairs	11/20/08
Unit 20 Leak From Wood Stove, Ceiling Damage	1/9/09
Unit 49 Gutter Leak, Rotted Siding Garage Interior Damage	1/22/09
Unit 10 Wood Rot In Siding, Former Leak Area	1/23/09
Unit 16 Garage threshold/trim fallen off	2/27/09

Unit 56	Interior Drywall Repair	2/24/09
Unit 56	Roof repair	2/24/09
Unit 56	Paint Siding/Trim	2/24/09
Unit 6	Paint Siding/Trim	
Unit 53	Interior Repairs From Leaking	2/24/09
Unit 39	Check Outside Light On Deck; Possible Interior Repair Error By Owner	2/24/09

(CP 163).

The Maintenance Update indicates that each repair benefitted a specific unit (*Id.*). The repairs to units 16, 27, 32, 51, and 53 involved leaking, water damage or black mold (*Id.*). The repairs to units 7 and 56 involved interior drywall repair and interior painting (*Id.*). While the Association was making these repairs to other units, water intrusion was ongoing in Unit 11 (CP 109). However, the Association did nothing about that situation (CP 110).

After the Association's expert witness, Rick Witte, identified the substantial repairs needed to prevent flooding of the first floor and water intrusion into the kitchen, the Association sought and was granted leave to amend the prayer of the complaint, so that it might obtain the relief of a money judgment instead of foreclosure (CP 99-106).

The Association brought a motion for summary judgment, the gravamen of which was that the Association was entitled to judgment

notwithstanding the defendants' counterclaims. The trial court denied that motion (CP 16-18). The Association appealed and the Commissioner of the Court of Appeals affirmed. Nonetheless, the Association sought and the trial court awarded attorney's fees incurred in conjunction with that motion (CP 287-360).

## **II ASSIGNMENTS OF ERROR**

1. The superior court erred by failing to interpret the condominium declaration so as to give full effect to all articles and sections, but instead construed an article on water intrusion as negating a section allocating responsibility for, and giving the duty to, the Association to repair and maintain the exterior of the condominium buildings.
2. The superior court erred by failing to give effect to the clear intent of both the old condominium act (Chapter 64.32 RCW) and the new one (Chapter 64.34 RCW) to make the Association responsible for maintenance and repair of the exterior of the condominium buildings, even though that duty

is also explicitly repeated in the Barnes Lake declaration.

3. The court erred by interpreting Article 21 of the declaration as an exculpatory clause which limits the liability of the Association negligent maintenance and repair of the condominium, which interpretation would violate public policy as a matter of law.
4. The superior court erred by interpreting the declaration in a manner that would be unconscionable as a matter of law.
5. The superior court abused its discretion by awarding attorney fees for an unsuccessful summary judgment motion.

### **III ISSUES ON APPEAL**

1. Does Washington law permit a condominium declaration to limit the liability of the homeowners' association for negligent maintenance and repair of the exterior of the building that is wholly in its control, and if so may it do so by implication rather than explicitly?

2. Is an exculpatory clause that absolves a homeowners' association from negligence in its maintenance and repair of the common elements of the condominium unenforceable as against public policy, when the association by declaration has total control over and responsibility for the common elements?
3. Can a section of a condominium declaration that absolves a homeowners' association from liability for water intrusion be read in harmony with a separate section that provides for liability of the condominium association for maintenance and repair of the common elements so as to give full force to both?
4. Is a declaration provision which absolves a homeowners' association from liability for water intrusion when caused by the association's negligence unconscionable as a matter of law and therefore unenforceable?
5. Is it an abuse of the condominium board's discretion to act to halt water intrusion into selected units, and to repair damage

resulting from water intrusion into those units, while allowing water intrusion to continue unabated into the defendant's unit, and is it error for the court to uphold such policy?

6. Is it an abuse of the court's discretion to award attorney fees for work on an unsuccessful summary judgment motion?

#### **IV STANDARD OF REVIEW**

The reviewing court reviews summary judgment orders de novo and engages in the same inquiry as the trial court. *Sheik v. Choe*, 156 Wn.2d 441, 447, 128 P.3d 574 (2006). Summary judgment can be affirmed only if there are no genuine issues of material fact and the party moving for summary judgment is entitled to judgment as a matter of law. CR 56(c); *Huff v. Budbill*, 141 Wn.2d 1, 7, 1 P.3d 1138 (2000). The reviewing court must construe the facts and all reasonable inferences from those facts in the light most favorable to the nonmoving party. *Hertog ex rel. S.A.H. v. City of Seattle*, 138 Wn.2d 265, 275, 979 P.2d 400 (1999).

## **V ARGUMENT**

### **A) Summary**

There are a number of reasons why the decision of the Superior court cannot stand:

1. The decision essentially renders the Association no longer responsible for, and absolves it of the duty of, the reasonable, non-negligent maintenance of the exterior of the condominium buildings, but leaves in place the prohibition against an individual unit owner maintaining the portion of the exterior of the building in which he or she resides. If allowed to stand, this decision would render the condominium unsustainable and place each individual unit in danger. Any condominium that has a similar limitation on liability will also be in danger.
2. At the very least, when read together, § 15 of the declaration gives the Association the duty to repair and maintain the exterior of building and § 21, limits liability in cases of water intrusion, without reference one section to the other. This is an ambiguity in the declaration. Such ambiguities must be resolved in favor of the consumer/purchaser under black letter contract law, the structure of the Condominium Act and

multiple decisions of Washington appellate courts.

3. If the water intrusion clause in Article 21 is read as a limit on liability for negligent repair and maintenance, it is void because it was not bargained for.
4. The superior court's interpretation of the declaration would render the declaration unconscionable as a matter of law.
5. There exists a completely rational harmonization of §§ 15 and 21 of the declaration which leaves the duty imposed by § 15 intact. It is simply this: The Association initially has no liability for water intrusion, unless caused by negligent maintenance or repair, but after notice of the situation, the Association has a duty of reasonable non-negligent repair and maintenance. It is liable for breach of *that* duty regardless of whether the consequences are water intrusion, mold damage, fixture destruction, or loss of property value.
6. Declarations that are excessively one-sided, provide no remedy for breach by the association, and thereby invite breach by the association are unconscionable as a matter of law.
7. The Association may have some discretion under the

declaration as to the manner and circumstances of repair of condominium buildings, but abused that discretion when it failed to repair the building in which defendant Gusa resides, but repaired other buildings that were in the same circumstance.

8. The Court abuses its discretion when it awards attorney fees to the Association for an unsuccessful summary judgment motion.

**B) The Condominium Form of Ownership Cannot Survive If No Party Has the Duty to Reasonably and Non-negligently Maintain the Building Exterior**

It is beyond controversy that failure to properly maintain and repair the exterior of a structure in the Pacific Northwest will eventually and inevitably lead to water intrusion. Equally beyond controversy is that fact that in condominiums in general, and Barnes Lake in particular, the duty to maintain and repair belongs exclusively to the Association. RCW 64.32.010(7)(b), RCW 64.34.328; Declaration § 15 (CP 127); and that individual unit owners do not have the authority to repair the exterior of their own dwelling. Declaration § 15.1.5 (CP

127).

It is a truism in the law that a legal right – in this case the right to have the exterior of one’s dwelling competently maintained and repaired by the Association – without a remedy is an illusion and the equitable powers of the court must step in and enforce the right.

The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve the high appellation, if the laws furnish no remedy for the violation of a vested right.

*Marbury v. Madison*, 5 U.S. 137, 163, 1 Cranch 137, 2 L. Ed. 60 (1803)

That principle is one of chancery jurisdiction, which, expressed in the form of a precept, is probably the most important of the equitable maxims, namely, that equity will not suffer a wrong (or, as sometimes stated, a right) to be without a remedy.

*Rummens v. Guaranty Trust Co.*, 199 Wash. 337, 346-47, 92 P.2d 228 (1939)

The unavoidable conclusion of these truisms is that, under the Superior Court’s decision, § 15 of the declaration and RCW 64.32.010(7)(b), RCW 64.34.328 which it reflects create only the illusion of a duty to maintain the exterior of the building, no real duty at all, because the right it creates is only an illusion. The Association need only wait until its lapse in responsibility under § 15 leads to water intrusion and it is then off the hook forever.

Under the Superior Court’s ruling, Mr. Gusa not only has no

recourse against the Association, he also has no way of repairing the exterior of the home because its exterior is a common element of the condominium, title to which is in the Association, so he has no right to repair it. (See declaration § 15.1.5 (CP 127)) giving the Association the exclusive right to repair and maintain). He is thus reduced to watching his home slowly disintegrate.

The consequences of this decision are staggering to the other owners at Barnes Lake and to the condominium form of ownership in general. If interpreted like the superior court has done, this exclusionary language, which presumably exists in other condominium declarations in the state, creates a situation where no one has responsibility for maintaining the exterior of the homes. One cannot have a condominium without imposing the basic responsibility that goes with the common ownership of the exterior of buildings, the duty to maintain the structure.

The eventual destruction of the entire condominium follows from the interpretation of the declaration by the Superior Court and no declaration should be interpreted as a suicide pact.

There is no refuge for the Association in the facts in this case that might abate the threat to others: The structure of Unit 11 is in

fact disintegrating while we argue (CP107-111).

The water intrusion in the ground floor has a fourteen year history during which the only response by the Association was periodic replacement of the carpet and other interior cosmetic elements (CP 108 - 110). No repair whatsoever was even attempted to prevent water intrusion on the first floor (CP 110). Ever (CP 110). The Association did not hire anyone with expertise to provide direction for implementing repairs that might have been effective. *Id.*

Compare this factual background to *Nido v. Ocean Owners' Council*, 378 S.E.2d 837, 237 Va. 664 (1989) relied on by Association in the superior court, where the association in that case hired experts to design a solution to the water intrusion and the association followed the expert advice – and the court specifically found that the repairs were non-negligently preformed.

**C) The Condominium Act Resolves Ambiguities in the Declarations and the Law in Favor of the Purchaser**

Because the Condominium Act, Chapter 64.34 RCW, is designed to foster the condominium form and its fair and equitable continuance, its provisions and history provide guidance on how the

issues in this case should be resolved.

In order to foster the Condominium form, the Act provides that the primary beneficiary of the Act's provisions is the purchaser of the condominium, not the declarant, not the even the Association. Indeed, the entire Article 4 of the Act comprising 18 sections is titled "Protection of Condominium Purchasers." There is no similar article protecting declarants or associations or builders. Our courts have taken particular notice of this. In *Eagle Point Condominium Owners Association v. Coy*, 102 Wn.App. 697, at 706, 9 P.3d 898 (2000), the court wrote,

The Condominium Act attests to the public interest in quality construction of condominiums, financially responsible transactions involving condominiums, and ***ongoing upkeep of the condominium units and common areas. The Act also has a strong consumer protection component.*** Section 4 is entitled '***Protection of Condominium Purchasers***'. Laws of 1989, ch. 43, sec. 4-1115.

*Id.* (emphasis added)

In *Park Avenue Condominium Owners Association v. Buchan Developments, L.L.C.*, 117 Wn.App. 369, 71 P.3d 692 (2003), the court went back even further in condominium law in affirming its object in protecting consumers:

The Washington Condominium Act (WCA) was enacted in 1989 to address all aspects of condominium construction, sales, and

ownership. The Act substantially adopted the major provisions of the Uniform Common Interest Ownership Act (Uniform Act). *A principal purpose of the WCA was to provide protection to condominium purchasers*, [fn3] in part through creation of implied warranties of quality construction.

117 Wn.App at 374 citing (in fn 3): William B. Stoebuck, 18 *Washington Practice: Real Estate: Transactions* sec. 11.13 at 41 (1995); *One Pacific Towers [Homeowners' Association v. Hal Real Estate Investments, Inc.]*, 148 Wn.2d at 330. [2001] (Some footnotes omitted, *emphasis added*).

The point for purposes of the case at bench is that If there is an irretrievable conflict between §15 of the declaration (and RCW 64.32.010(7)(b), RCW 64.34.328) requiring the Association to repair and maintain the exterior of buildings and §21 of the declaration absolving the Association from liability for water intrusion, that conflict must be resolved in favor of the Owner/purchaser, not the Association. As set forth in § D below, Appellant Gusa does not believe that an irreconcilable conflict exists, but whether there is or is not, the entire emphasis and structure of the Act is aimed at avoiding just the catastrophe that Barnes Lake Homeowners Association has visited on Mr. Gusa.<sup>1</sup>

1

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The fact that this condominium predates the Act and was declared and built under the older Horizontal Property Regimes Act, Chap. 64.32 RCW (HPRA), does not change these principles. This is true for several reasons:

First, the purpose of the old HPRA was not different than stated above; the later Act simply refined with the legislature's more experienced thinking how to best achieve furtherance of the condominium form.

**D) Section 15 and Section 21 Can Be Fully Harmonized in a Way That Protects the Homeowners**

It is well established that condominium declarations are interpreted under contract principles. *Lake Limerick Country Club v. Hunt Mfg. Homes, Inc.*, 120 Wn.App. 246, 255-256 84 P.3d 295 (2004) quoting 1 Restatement (Third) of Prop.: *Servitudes* sec. 2.1 comment. a, at 52.

It is equally well established that,

The primary purpose of judicial interpretation of contracts is to give effect to the parties' intentions and, to the extent possible, where parts of the same writing are inconsistent they should be construed so as to harmonize with one another.

*Turner v. Wexler*, 14 Wn.App. 143, 146, 538 P.2d 877 (1975), citing *Grant County Constructors v. E.V. Lane Corp.*, 77 Wn. 2d 110, 120, 459 P.2d 947 (1969).

Section 5.1.2 of the declaration defines the common areas (CP120). Section 15.1.5 grants the Association the exclusive right and imposes a duty to maintain and repair the common areas.

(CP127) Article 21 limits the Association's liability as follows:

The Board shall not be liable for any failure of any utility or other

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Second, Legislative acts that modify without overruling a previous statute are construed as a matter of judicial construction to be an interpretive guide to the previous law. (See, e.g. *Bradley v. Department of Labor & Indus.*, 52 Wn.2d 780, 786-87, 329 P.2d 196 (1958)).

service to be obtained and paid for by the Board, or for injury or damage to person or property caused by the elements, or resulting from electricity, water, rain, dust or sand which may lead or flow from outside or from any parts of the buildings, or from any of its pipes, drains, conduits, appliances, or equipment, or from any other place. No diminution or abatement of common expense assessments shall be claimed or allowed for inconveniences or discomfort from any action taken to comply with any law, ordinance or orders of a governmental authority. This exemption and limitation of liability extends to the entire Association as well as the Board.

Nothing in Article 21 speaks to the duty to repair and maintain the exterior of the buildings under Article 15 nor does Article 21 absolve the Association from liability for breach of that duty. Exclusions from liability for performing a specific duty cannot be implied, they must be explicit. *Scott v. Pacific West Mountain Resort*, 119 Wn.2d 484, 490, 834 P.2d 6 (1992); *Boyce v. West*, 71 Wn. App. 657, 662, 862 P.2d 592 (1993), and see, *McCorkle v. Hall*, 56 Wn. App. 80, 83, 782 P.2d 574 (1989), review denied, 114 Wn.2d 1010 (1990), where an inconspicuous (even though explicit) exculpatory clause was deemed to create a jury question as to effectiveness.

Indeed, our courts, for public policy reasons, refuse to enforce even explicit exemptions from liability for negligence in the maintenance of common areas of multifamily dwellings over which the owner has exclusive control. *McCutcheon v. United Homes Corp.*, 79

Wn.2d 443, 486 P.2d 1093 (1971) (striking down a landlord's lease exculpatory clause relating to common areas in a multifamily dwelling complex); and see, *Thomas v. Housing Auth.*, 71 Wn.2d 69, 426 P.2d 836 (1967) (voiding a lease provision exculpating a public housing authority from liability for negligence when it provided scalding water).

In *McCutcheon*, 79 Wn.2d at 486, the issue was an exculpatory clause that released a landlord from liability for breach of his duty to maintain a common area. Although it arose in the landlord-tenant context the reasoning applied in that case applies in a condominium context as well where the Association is wholly responsible for maintaining common areas, and the unit owner is forbidden to do so.

In *McCutcheon* the landlord relied on the common law concept of freedom to contract to argue that the exculpatory clause was effective. The court responded:

The importance of "freedom of contract" is clear enough. However, the use of such an argument for avoiding the affirmative duty of a landlord to its residential tenant is no longer compelling in light of today's multifamily dwelling complex wherein a tenant merely rents some space with appurtenant rights to make it more usable or livable. Under modern circumstances the tenant is almost wholly dependent upon the landlord to provide reasonably for his safe use of the "common areas" beyond the four walls demised to him. Quinn and Phillips, *The Law of Landlord-Tenant*, 38 Fordham L. Rev. 225, 231 (1969).

*McCutcheon* at 446

The *McCutcheon* court went further, pointing out that impairing responsibility by barring liability ultimately destroys liability and responsibility:

As indicated earlier, a residential tenant who lives in a modern multi-family dwelling complex is almost wholly dependent upon the landlord for the reasonably safe condition of the "common areas". However, a clause which exculpates the lessor from liability to its lessee, for personal injuries caused by lessor's own acts of negligence, not only lowers the standard imposed by the common law, it effectively destroys the landlord's affirmative obligation or duty to keep or maintain the "common areas" in a reasonably safe condition for the tenant's use.

When a lessor is no longer liable for the failure to observe standards of affirmative conduct, or for any conduct amounting to negligence, by virtue of an exculpatory clause in a lease, the standard ceases to exist. In short, such a clause destroys the concept of negligence in the landlord-tenant relationship. Neither the standard nor negligence can exist in abstraction.

*McCutcheon* at 447-48

In this context, there exists no meaningful difference between the landlord-tenant relationship and the association-homeowner relationship, because what the court emphasizes *and then repeats* is the fact that the tenant (or owner, here) is "wholly dependent" on another for the non-negligent maintenance of the common areas which the tenant or unit owner must rely upon.

(See § E below).

Harmonize we must, therefore. We must read both articles of the declaration in a way that gives effect to both.

When read together, articles 15 and 21 of the declaration can and must be interpreted to mean that no liability attaches to water intrusions caused by flood or natural elements *unless* the natural elements got in because of a failure in the duty to repair or maintain.

Furthermore, once such intrusion has taken place and is reported, regardless of the cause, the Association's duty to make timely repairs in a reasonable non-negligent fashion becomes active. When the Association fails for fourteen years to take steps to prevent periodic flooding, the duty is obviously breached and damages are the only adequate remedy.

**E) Public Policy Bars Enforcement of Clauses Absolving Those Responsible for Residential Common Areas from Their Duty of Maintenance and Repair**

If Article 21 is an exculpatory clause that absolutely bars liability for water intrusion even water intrusion caused by failure of a duty to maintain and repair -- which we believe it is not -- Washington law will not enforce it as such.

A preinjury release for negligence is void if it violates public policy. *Vodopest v. MacGregor*, 128 Wn.2d 840, 849, 913 P.2d 779 (1996)(citing *McCutcheon v. United Homes Corp.*, 79 Wn.2d 443, 486 P.2d 1093 (1971). *Vodopest*, 128 Wn.2d 849(citing *Scott v. Pacific West Mountain Resort*, 119 Wn.2d 484, 492, 834 P.2d 6 (1992) and *Wagenblast v. Odessa School Dist.*, 110 Wn.2d 845, 856, 758 P.2d 968, 85 A.L.R. 4<sup>th</sup> 331 (1988)). In determining whether an exculpatory provision violates public policy the following six factors are considered:

[W]hether (1) the transaction concerns a business of a type generally thought suitable for public regulation; (2) the party seeking exculpation is engaged in performing a service of great importance to the public, which is often a matter of practical necessity for some members of the public; (3) the party holds himself out as willing to perform this service for any member of the public who seeks it, or at least for any member coming within certain established standards; (4) as a result of the essential nature of the service, in the economic setting of the transaction, the party invoking exculpation possesses a decisive advantage of bargaining strength against any member of the public who seeks his services; (5) in exercising a superior bargaining power, the party confronts the public with a standardized adhesion contract of exculpation and makes no provision whereby a purchaser may pay additional reasonable fees and obtain protection against negligence; (6) as a result of the transaction, the person or property of the purchaser is placed under the control of the seller, subject to the risk of carelessness by the seller or his agents.

*Vodopest*, 128 Wn.2d at 854-855 (citing *Wagenblast*, 110 Wn.2d at

851-852).

An exculpatory clause can contravene public policy when it meets “one or more” of these six characteristics. *Vodopest*, 128 Wn.2d at 855. These are not exclusive considerations to which a court may look in the determination of public policy; they give only a “rough outline” of the type of settings in which exculpatory agreements violate public policy. *Id.* The more of these six characteristics present, the more likely the agreement will be declared invalid on public policy grounds. *Wagenblast*, 110 Wn.2d at 852.

1. The Transaction Concerns A Business Of A Type Generally Thought Suitable For Public Regulation

The operation of condominiums is regulated by Chapter 64.32 and Chapter 64.34 RCW, and thus is of a type generally thought suitable for public regulation.

2. The Party Seeking Exculpation Performs A Service Of Great Importance To The Public, Which Is Often A Matter Of Practical Necessity For Some Members Of The Public

In *McCutcheon*, the Supreme Court noted the importance of housing *McCutcheon*, 79 Wn.2d at 449 - 450. In *Vodopest*, the Supreme Court characterized housing as “a necessity of life” *Vodopest*, 128 Wn.2d at 839. When an injured patron of a health club

tried to avoid an exculpatory clause in his contract with the club, the Court of Appeals upheld the clause, pointing out the following:

A common thread runs through those cases in which exculpatory agreements have been found to be void as against public policy. That common thread is they are all essential public services--hospitals, **housing**, public utilities, and public education

Health clubs are a good idea and no doubt contribute to the health of the individual participants and the community at large. But ultimately they are not essential to the welfare of the state or its citizens. And any analogy to schools, hospitals, **housing (public or private)** and public utilities therefore fails. Health clubs do not provide essential services.

Shields v. Sta-Fit Inc., 79 Wn.App. 584, 589, 903 P.2d 525 (1995) (footnotes omitted)(review denied 129 Wn.2d 1002 (1996)) (*emphasis added*)

Housing is an essential service.

3. Barnes Lake Holds Itself Out As Willing To Provide Services To Each And Every Unit Owner

Under § 15.1.5 of the declaration, the Association has “the exclusive right and duty” to maintain the exterior of the buildings (CP 127). The Association holds itself as willing to maintain the exterior of each of the buildings in the condominium complex.

4. As A Result Of The Essential Nature Of The Service, In The Economic Setting Of The Transaction, The Party Invoking Exculpation Possesses A Decisive Advantage Of Bargaining Strength Against Any Member Of The Public Who Seeks The Services

Where one party has no opportunity to negotiate the terms of the agreement there is “no true equality of bargaining power.” *Zuver*, 153 Wn.2d at 305 (quoting *Yakima County Fire Protection District*, 132 Wn.2d at 393 (quoting *Standard Oil*, 347 F.2d at 383 n.5). Because the exculpatory clause is in the condominium declaration, a prospective purchaser of a condominium unit has no bargaining ability whatsoever.

5. In Exercising A Superior Bargaining Power, The Association Confronts The Public With A Standardized Adhesion Contract Of Exculpation And Makes No Provision Whereby A Purchaser May Pay Additional Reasonable Fees And Obtain Protection Against Negligence

The factors considered in determining whether a contract is an adhesion contract are:

- (1) whether the contract is a standard form printed contract, (2) whether it was ‘prepared by one party and submitted to the other on a “take it or leave it” basis’, and (3) whether there was ‘no true equality of bargaining power’ between the parties.

*Yakima County (W. Valley) Fire Protection Dist. No. 12*, 122 Wn.2d at 371.

The exculpatory provision is in the recorded condominium declaration (CP 133). It is presented to prospective buyers on a “take

it or leave it” basis. There is no opportunity to bargain regarding the provision, much less any “true equality of bargaining power”. Moreover, there is no provision by which the prospective buyer can pay an additional reasonable fee and obtain protection against negligence.

6. As A Result Of The Transaction Appellant Gusa Was Subject To The Risk Of Carelessness By The Association

Appellant Gusa was at risk of the Association’s failure to prevent water intrusion into the home (CP 108 - 110). Each of the six *Wagenblast* characteristics is present.

**F) The Contract Was Procured in a Procedurally Unconscionable Manner**

Unconscionability of contract is a question of law for the court. *Zuver v. Airtouch Communications, Inc.*, 153 Wn.2d 293, 303, 103 P.3d 773 (2004). Procedural unconscionability involves “impropriety during the process of forming a contract.” *Nelson v. McGoldrick*, 127 Wn.2d 124, 131, 896 P2d 1258 (1995) (citing *Schroeder v. Fageol Motors, Inc.*, 86 Wn.2d 256, 260, 544 P.2d 20 (1975)). “All of the circumstances of the transaction should be considered.” *Id.* at 136. An important consideration is whether the agreement was proffered on

a “take it or leave it” basis. Because the exculpatory clause is in the declaration, it is proffered o a “take it or leave it” basis.

**G) The Contract Is Substantively Unconscionable**

Substantive unconscionability exists when a clause or term in a contract is one-sided or overly harsh. *Torgerson v. One Lincoln Tower, LLC*, 166 Wn.2d 510, 519, 210 P.3d 318 (2009)(Setting forth the standard for establishing unconscionability but holding that unconscionability did not exist under the facts of the case). Contract provisions are substantively unconscionable when they excessively favor one party and allow only one party significant legal recourse. *Id.* at 520 (citing *Zuver, supra*, 153 Wn.2d at 318-319). A clause that unilaterally and severely limits the remedies of only one side is substantively unconscionable for denying any meaningful remedy. *Torgerson*, 166 Wn.2d at 520 (citing *Zuver*, 153 Wn 2d at 318). A provision can be substantively unconscionable if it provides incentive to breach. *Id.* at 521.

**1. The Declaration Deprives Unit Owners of Recourse For The Association’s Failure To Maintain The Buildings**

An exclusionary clause restricts the remedies available to one or both parties once a breach occurs. *Schroeder*, 86 Wn.2d at 258.

This limitation on liability deprives unit owners of recourse. The Association can choose, as it has, whether or not to maintain a building. If the Association chooses not to do so, unit owners have no legal right step in and do so.

**2. The Declaration Limits the Association's Liability and Denies Unit Owners a Meaningful Remedy, but Does Not Limit the Liability of Unit Owners**

By limiting the Association's liability for failure to maintain the buildings when such failure results in water intrusion, unit owners are denied a meaningful remedy. In contrast, the declaration places unlimited liability upon the individual unit owner. This circumstance is similar to that in *Zuver*. In that case, *Zuver* waived her right to recover punitive or exemplary damages in connection with any common law claims, including claims arising in tort or contract. *Zuver*, 153 Wn.2d at 315. Under the agreement therein at issue, *Zuver* had a duty to keep information belonging to the employer confidential. The agreement permitted the employer to claim punitive or exemplary damages for breach of that duty, "the only type of suit [the employer] would likely ever bring against *Zuver*". *Id.* at 318. The court held that:

The remedies limitation provision blatantly and excessively

favors the employer in that it allows the employer alone access to a significant legal recourse. Consequently, we conclude that this provision is substantively unconscionable in these circumstances.

*Id.* at 318-319. In the case at bar, as in *Zuver*, the limitation on liability blatantly and excessively favors the Association in that it absolutely denies unit owners recourse in the event of water intrusion, but allows the Association unlimited recourse against the unit owner. Moreover, the limitation on liability invites breach. The Association suffers no legal consequence if it elects not to address water intrusion involving a unit owned by a disfavored owner. The limitation on liability is substantively unconscionable.

**H) The Limitation on Liability Is Void Because it Was Not Specifically Negotiated**

Provisions limiting remedies in a consumer transaction must be explicitly negotiated between buyer and seller and set forth with particularity. *Torgerson*, 166 Wn.2d at 510 (citing *Berg v. Stromme*, 79 Wn.2d 184, 194 - 95, 484 P.2d 380 (1971) and *Baker v. City of Seattle*, 79 Wn.2d 198, 484 P.2d 405 (1971)). Because the alleged exculpatory clause is in the declaration, there was no negotiation regarding this or any other provision. Consequently, the limitation of

liability is void.

**I) In Failing to Act to Address Water Intrusion Into Unit 11, The Association Abused Its Discretion**

The relationship between a homeowner and a homeowner's association was recently described in *Fawn Lake Maintenance Commission v. Albers*, 149 Wn. App. 318, 327, 202 P.3d 1019 (2009):

Members of a homeowners' association are bound by the sound exercise of the governing body's discretion in exchange for the benefits they receive from the association. *Panther Lake Homeowner's Ass'n v. Juergenson*, 76 Wn. App. 586, 580-90, 887 P.2d 465 (1995)(quoting *Rodruck v. Sand Point Maint. Comm'n*, 48 Wn.2d 565, 577, 295 P.2d 714 (1956)). But the association's decisions must be reasonable. *Riss*, 131 Wn.2d 612, 632, 934 P.2d 669 (1997).

*Rodruck v. Sand Point Maintenance Commission*, 48 Wn.2d 565, 295 P.2d 714 (1956) involved the right of the "commission," (a homeowners' association) to impose an assessment for street improvements. The court noted that:

Both the original articles and bylaws and the amended articles and bylaws included, among the corporate purposes and powers, the maintenance and improvement of the streets, alleys, sidewalks, etc. It was for the commission as trustee, through its board of trustees, to determine what work was to be done in maintaining and improving the streets and what charge would be made against the members for such work. **The right to demand payment of the charges levied carried with it an obligation on the part of the commission to exercise the**

**discretion vested in it fairly ...**

*Id. at 577* (emphasis added).

Homeowners' associations have a duty to exercise their discretion in a fair and reasonable manner.

Since at least 1985, the Association's policy and practice has been to repair common facilities as well as damage to the units without assessing the cost to the unit owner (CP 110). For example, in the five months between November 13, 2008 and March 23, 2009, a period in which Unit 11 experienced flooding, fifteen repairs were performed on twelve of the units (CP 163). Each repair benefitted a specific unit (*Id.*). The repairs to several units involved leaking, water damage or black mold (*Id.*). The repairs to units 7 and 56 involved interior drywall repair and interior painting (*Id.*). However, the Association did nothing regarding ongoing water intrusion into Unit 11 that was occurring at the same time (CP 109). This is an abuse of discretion.

**J) the Superior Court Abused its Discretion by Awarding Attorney Fees to the Association for a Failed Summary Judgment Motion**

When "attorney fees are recoverable for only some of a party's claims the award must properly reflect a segregation of the time spent

on issues for which fees are authorized from time spent on other issues. *Loeffelholz v. C.L.E.A.N.*, 119 Wn. App. 665, 690, 82 P.3d 1199 (2004)(citing *Mayer v. City of Seattle*, 102 Wn. App. 66, 79 - 80, 10 P. 3d 408 (2000) and *Smith v. Behr Process Corp.*, 113 Wn. App. 306, 344, 54 P.3d 665 (2002). The court must exclude any hours pertaining to unsuccessful theories or claims. *Mahler v. Szucs*, 135 Wn.2d 398, 434, 957 P.2d 632 (1998). Fees charged for unsuccessful motions must be excluded. *Yousoufian v. Office of Ron Sims*, 114 Wn. App. 836, 856. 60 P.3d 667 (2003), reversed in part, 152 Wn.2d 421, 98 P.3d 463 (2004).

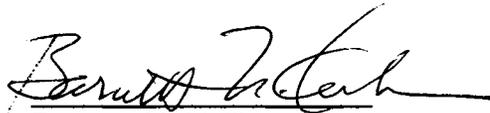
The Association brought a motion for summary judgment the gravamen of which was that the Association was entitled to judgment notwithstanding the defendants' counterclaims. The trial court denied that motion (CP 16-18). The Association appealed and the Commissioner of the Court of Appeals affirmed. Nonetheless, the Association sought and was awarded fees for the work involved in that motion (CP 287-360).

## **VI CONCLUSION**

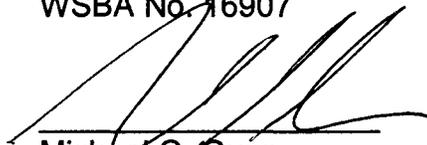
The decision by the Superior Court in this case must not stand.

Allowing it to become the law provides condominium associations an escape clause from the essential requirement that someone, usually a Homeowners' Association, have a duty to repair and maintain the exterior of the condominium buildings. Without such duty, the form cannot survive. Appellant Gusa respectfully requests that both the summary judgment granted to the Association and the award of attorney fees be reversed.

Respectfully submitted,



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COA #84128-4  
Gusa v. Barnes Lake

CERTIFICATE OF SERVICE

Barnett N. Kalikow hereby declares under penalty of perjury according to the laws of the State of Washington that he is of legal age and competence and that on March 3, 2010 he deposited in the U.S. Mail, and sent by electronic mail first class postage prepaid the following items:

Appellant's Opening Brief

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