

COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON  
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**COURT OF APPEALS  
DIVISION II  
OF THE STATE OF WASHINGTON**

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**RAY PEDERSEN,**  
**Appellant,**

vs.

**ALLENMORE RIDGE CONDOMINIUM  
ASSOCIATION,**

**Respondents.**

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**APPELLANT'S REPLY BRIEF**

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**ORIGINAL**

**TABLE OF CONTENTS**

I. SUMMARY OF REPLY.....1

II. STANDARD OF REVIEW.....3

III. REPLY ARGUMENT .....4

    A. The trial court erred by ruling Mr. Pedersen lacked standing to assert claims and defenses because he had not paid the assessment in full.....4

    B. The trial court erred when it ruled that the association did not breach its duties or act negligently.....8

        1. ARCA agrees that Lowry board members violated their duties in the contract procurement, initial management and owner approval process.....8

        2. The motion for summary judgment did not request dismissal of the Pedersen breach of duty and other claims and defenses except on the basis of lack of standing.....9

        3. ARCA “Mootness” and “Law of the case” arguments are meritless.....10

    C. The trial court erred in deciding that the Declaration did not require 75% owner approval under Article 10.2.1.....16

        1. As a capital improvement.....16

        2. As a repair, restoration, capital addition or capital improvement expense.....19

        3. As an Article 14 project.....20

        4. Inadequate record.....20

D.	Even if the Declarations authorize the project without owner approval, the trial court erred in dismissing Pedersen’s claims unrelated to the issue of the need for owner approval.....	22
1.	Improper allocation of assessment.....	23
2.	Breach of duty claims.....	23
3.	Estoppel and other claims and defenses.....	24
IV.	CONCLUSION.....	25
	Appendix 1	
	Appendix 2	

## TABLE OF AUTHORITIES

### Cases

14 Lewis H. Orland & Karl B. Tegland, <i>Washington Practice: Judgments</i> § 380, at 55-56 (4th ed.1986)).....	15
<i>Arabian, Condos, Cats, and CC&amp;Rs: Invasion of the Castle Common</i> , 23 <i>Pepperdine L. Rev.</i> 1, 24 (1995).....	6
<i>Baker v. Monga</i> , 590 N.E.2d 1162, 32 Mass.App.Ct. 450, 453-54 (1992) <i>citing Rivers Edge, supra</i> , at 199.....	24
<i>Baldwin v. Sisters of Providence in Wash., Inc.</i> , 112 Wash.2d 127, 132, 769 P.2d 298 (1989); CR 56(e) .....	3
<i>Bratton v. Welp</i> , 145 Wn.2d 572, 576, 39 P.3d 959 (2002).....	3
<i>Central Puget Sound Reg'l Transit Auth. v. Heirs &amp; Devisees of Eastey</i> , 135 Wn. App. 446, 464-65, 144 P.3d 322 (2006).....	14
<i>Cowiche Canyon Conservancy v. Bosley</i> , 118 Wash.2d 801, 809, 828 P.2d 549 (1992).....	11
<i>Crofton v. Bargreen</i> , 1958, 53 Wash.2d 243, 332 P.2d 1081.....	17
<i>Jack v. Standard Marine Ins. Co.</i> , 1949, 33 Wash.2d 265, 205 P.2d 351, 8 A.L.R.2d 1426.....	17
<i>Kelso Woods Association, Inc. v. Swanson</i> , 692 A.2d 1132 (1997).....	4, 5, 7, 8
<i>Ledcor Indus. (USA), Inc. v. Mut. of Enumclaw Ins. Co.</i> , 150 Wn.App. 1, 14 n.33, 206 P.3d 1255, review denied, 167 Wn.2d 1007 (2009).....	15
<i>MGIC Fin. Corp. v. H.A. Briggs Co.</i> , 24 Wn.App. 1, 8, 600 P.2d 573 (1979)...	14
<i>Nursing Home Bldg. Corp. v. DeHart</i> , 13 Wash.App. 489, 498, 535 P.2d 137, review denied, 86 Wash.2d 1005 (1975)). .....	13
<i>Pamelin Ind., Inc. v. Sheen-U.S.A., Inc.</i> , 95 Wn.2d 398, 402 (1981).....	10

<i>Panther Lake Homeowner's Association v. Juergensen</i> , 76 Wn.App. 586, 887 P.2d 465 (1995).....	4, 7
<i>Rew v. Beneficial Standard Life Ins. Co.</i> , 41 Wash.2d 577, 250 P.2d 956 (1952) .....	17
<i>Riss v. Angel</i> , 131 Wn.2d 612, 632-33, 934 P.2d 669 (Wash. 1997) .....	13
<i>Rivers Edge Rivers Edge Condo. Association v. Rere, Inc.</i> , 390 Pa. Super. 196, 568 A.2d 261, 263-264 (1990) .....	4
<i>Ruff v. County of King</i> , 125 Wn.2d 697, 703, 887 P.2d 886 (1995) .....	3
<i>Seattle-First Nat'l Bank v. Westlake Park Assocs.</i> , 42 Wn.App. 269, 274, 711 P.2d 361 (1985) .....	17
<i>Shinn v. Thrust IV, Inc.</i> , 56 Wash.App. 827, 833-35, 786 P.2d 285, review denied, 114 Wash.2d 1023, 792 P.2d 535 (1990) .....	14
<i>Spokane Concrete Prods., Inc.</i> , 126 Wash.2d 269, 279, 892 P.2d 98 (1995) .....	13
<i>State v Hickman</i> , 135 Wash.2d 97, 101-02, 954 P.2d 900 (1998).....	16
<i>Trustees of Hunters Village Condominium Trust v. Gerke</i> , 2007 Mass.App.Div. 23, 25-26 (2007);.....	8
<i>Young v. Key Pharm., Inc.</i> , 112 Wash.2d 216, 225, 770 P.2d 182 (1989) .....	3, 10

**Statutes**

CR 54..... 14

RCW 64.34.328..... 16

## **I. Summary of Reply**

ARCA conducted a disastrous multimillion-dollar construction project to rebuild deteriorated complex buildings. The disaster was the result of willful and negligent misconduct of ARCA board members involved in the contract procurement and owner approval process. The botched project fractured the ARCA community because of \$1.2 million in cost overruns and ARCA's deception of its owners as to the consequences of the contract.

Board president Thomas Lowry led the board members in charge of the contract procurement and owner approval process. Mr. Lowry conducted a vote to obtain owner approval of the construction project. The vote process was flawed by Mr. Lowry's deceit of owners as to the nature of the contract. The voting process was noncompliant with the Declarations and Bylaws. The vote failed to obtain the approval of 75% of owners within the time specified. The board cannot even demonstrate that majority owner approval was obtained within the required time.<sup>1</sup>

Despite the tainted voting process, the admitted deceit of owners, the inadequate investigation and the open-ended contract, the Lowry board forged ahead with the project.<sup>2</sup> The result was years of delay, \$1.2 million

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<sup>1</sup> Details of the flawed voting process are discussed at pages 9-10 and 39-41 of the Pedersen opening brief. The vote period ended December 31, 2006 and the first vote tally of 62% was not conducted until January 4, 2007.

<sup>2</sup> Facts supporting these claims were provided by ARCA itself in its answer to the Lowry

in cost overruns and multiple lawsuits.

When the contract was completed, ARCA sued the Lowry board by counterclaim. ARCA claimed the Lowry board negligently entered into an open-ended contract, failed to conduct a proper investigation of the building defects and obtain full-price bids, and intentionally deceived owners that the contract price would not exceed \$4.2 million dollars. In a somewhat ironic twist, Mr. Lowry and others commenced the lawsuit by blaming the new ARCA board for the project cost overruns.

ARCA and the Lowry group of owners litigated furiously for most of a year before the Lowry owner claims against ARCA were dismissed. Then ARCA turned to Ray Pedersen's claims and defenses. Apart from unrepresented Jacqueline Foss, Ray Pedersen was the only owner who had claimed the original assessment was invalid.

Despite ARCA's admissions that the Lowry board had violated its duties to all owners, the trial court erroneously dismissed Ray Pedersen's claims and defenses. The trial court relied on ARCA's faulty argument that "decades old" Washington cases impose a harsh prepayment rule that requires owners to prepay an assessment or lose the right to declaratory relief. In its appellate response brief ARCA presents no valid arguments to support its prepayment argument or otherwise validate the trial court's

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complaint, in board member declarations offered by ARCA and in ARCA memorandums. CP, 600-02. Pedersen Opening Brief at 48. See Appendix 1.

dismissal of Mr. Pedersen's claims and defenses.

An association must act consistently with its governing instruments and state law. Mr. Pedersen correctly perceived the Lowry board was acting improperly and outside of its authority when it forged ahead with the doomed project. Mr. Pedersen's claims and defenses are supported by extensive competent evidence and he has the right to have his claims and defenses evaluated on their merits.

## **II. Standard of review**

When reviewing a summary judgment motion, the appeals court takes the position of the trial court.<sup>3</sup> Summary judgment is proper if pleadings, depositions, affidavits, and admissions, viewed in a light most favorable to the nonmoving party, show there is no genuine issue of material fact and demonstrate that the moving party is entitled to judgment as a matter of law.<sup>4</sup>

The initial burden is on the moving party to show there is no issue of material fact.<sup>5</sup> If the moving party meets this initial burden, then "[t]he nonmoving party must set forth specific facts showing a genuine issue and cannot rest on mere allegations."<sup>6</sup>

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<sup>3</sup> *Ruff v. County of King*, 125 Wn.2d 697, 703, 887 P.2d 886 (1995).

<sup>4</sup> *Bratton v. Welp*, 145 Wn.2d 572, 576, 39 P.3d 959 (2002).

<sup>5</sup> *Young v. Key Pharm., Inc.*, 112 Wash.2d 216, 225, 770 P.2d 182 (1989).

<sup>6</sup> *Baldwin v. Sisters of Providence in Wash., Inc.*, 112 Wash.2d 127, 132, 769 P.2d 298 (1989); CR 56(e).

### III. Reply Argument

#### A. The trial court erred by ruling Mr. Pedersen lacked standing to assert claims and defenses because he had not paid the assessment in full.

As discussed in Mr. Pedersen's opening brief, both Washington cases involving challenges to association assessments were decided by rulings on the owner claims on their merits without a prepayment requirement.<sup>7</sup> Washington law therefore does not mandate that an owner prepay an assessment in order to challenge those assessments in court.

ARCA relied on *Panther Lake Homeowner's Association v. Juergensen*<sup>8</sup> as authority for its prepayment requirement. *Panther Lake* cited *Rivers Edge Condo. Association v. Rere, Inc.*, 390 Pa. Super. 196, 568 A.2d 261 (1990) from Pennsylvania for authority related to an owner's request for declaratory relief.<sup>9</sup> In *Kelso Woods Association, Inc. v. Swanson*,<sup>10</sup> a later case from Pennsylvania directly on point, the appeals court reversed a trial court judgment against an owner for an unpaid assessment. *Kelso Woods* remanded the case for determination of the owner's challenges to the assessment on the merits prior to entry of judgment against the owner for the unpaid assessment.<sup>11</sup>

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<sup>7</sup> Pedersen Opening Brief, 14-16.

<sup>8</sup> *Panther Lake Homeowner's Association v. Juergensen*, 76 Wn.App. 586, 887 P.2d 465 (1995)

<sup>9</sup> *Panther Lake* at 590-91.

<sup>10</sup> *Kelso Woods Association, Inc. v. Swanson*, 692 A.2d 1132 (1997)

<sup>11</sup> *Kelso Woods*, at 1134-35.

The *Kelso Woods* court ruled as follows:<sup>12</sup>

We hold that the trial court, when presented with allegations concerning the legality and propriety of a nonprofit association's imposition of assessments, may review that decision to ensure that it is in accordance with not only Pennsylvania law, as in *Quaker City*, but also the by-laws of the association.

...

In conclusion, we hold that the trial court erred as a matter of law in refusing to review the Association's new assessment formula. We, accordingly, vacate the judgment entered against Mr. Swanson and remand the case to the trial court for further proceedings consistent with this opinion.

Courts from Arizona, South Carolina, North Dakota and Georgia also evaluate owner claims against their association on the merits without a prepayment requirement.<sup>13</sup> Only Massachusetts expressly requires prepayment (with exceptions and a caveat that the rule should only apply prospectively because it is unjust and contrary to reasonable owner expectations).

The reasoning to support a prepayment rule is that owners can hold an association hostage by withholding dues. ARCA and Massachusetts courts argue a subordination theory that the individual subordinates his interest to that of the collective in condominium ownership. Thus, they argue, an owner must not withhold payment of assessments to achieve a desired outcome. Instead the owner must pay the assessment in full and then challenge it.

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<sup>12</sup> *Kelso Woods* at 1135.

<sup>13</sup> Pedersen Opening brief at 18-31.

Some subordination is certainly inherent in collective ownership. But the subordination theory flounders when applied to require prepayment.

The collective is bound to follow its charter (in this case its Declarations and Bylaws). The subordination theory loses legitimacy when the collective acts outside its charter. Allowing an association to force owners to pay an invalid assessment before they can challenge it promotes dysfunction in the community, not proper function.

Further, as pointed out in the appellant's opening brief, the balance of power in association affairs favors the association, not the owner.<sup>14</sup> The association has the authority to spread its operating costs among all owners. The association is entitled to judgment for valid assessments, plus attorneys' fees and litigation costs. The association can hold the owner liable for collection costs of a valid assessment and lien and foreclose on the owner's unit. The owner must finance his own legal challenge to wrongful acts of the association and pay his own litigation cost plus pay those of the association if he fails. And the owner faces loss of his home if his challenge is meritless. Thus the balance of power favors the association in the realm of owner-association relations. This

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<sup>14</sup> Pedersen Opening Brief at 20-21 citing Arabian, *Condos, Cats, and CC&Rs: Invasion of the Castle Common*, 23 Pepperdine L. Rev. 1, 24 (1995).

inequality discourages owners from challenging even invalid acts of the association.<sup>15</sup> The inequality is magnified when an owner is forced to pay invalid assessments as a precondition to exercising owner rights.

It is for these reasons that decisions like *Kelso Woods* preclude an association from obtaining a judgment against an owner who challenges the validity of an assessment until the validity of the assessment is established. ARCA provides this court with no explanation of why this court should disregard *Kelso Woods*. In fact, ARCA cites *Kelso Woods* at page 35 of its brief as requiring the court to evaluate the assessment challenge on its merits.

ARCA touts a “decades old” authority in Washington in support of the Massachusetts prepayment rule. Both cases evaluated owner challenges on their merits. The cites by ARCA for its “decades old” authority proposition on page 28 of its brief are *Panther Lake* and *Rivers Edge*. ARCA’s admission that *Panther Lake* relies on *Rivers’ Edge* validates the need to follow progeny of *Rivers Edge* such as *Kelso Woods* which is directly on point as persuasive authority in a ruling that prepayment is not required.

Even if the prepayment rule is adopted by this court, the trial court ruling of lack of standing is still in error. As argued in the opening brief,

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<sup>15</sup> Arabian, *supra* at 23-24.

Massachusetts courts created an exception to the prepayment requirement when an association does not have a reasonable belief the assessed expense was proper.<sup>16</sup> This exception applies to the Lowry board's admitted malfeasance. Further appellant's opening brief established the inequitable result of prepayment rule allowed only prospective application.<sup>17</sup>

Acts of an association, like any corporation, are subject to judicial review to ensure the association acts within state law and its own charter. The proper rule to adopt regarding owner standing is that of *Kelso Woods*. All owner claims must be evaluated on their merits in the principal collection action. In the case of undisputed assessments or assessments determined to be valid, the subordination theory may allow immediate entry of judgment for the association or delay that decision until trial in the trial court's discretion. Remaining owner claims for declaratory or other relief or should then be decided in the pending action. The trial court erred in dismissing Mr. Pedersen's claims for lack of standing.

**B. The trial court erred when it ruled that the association did not breach its duties or act negligently.**

**1. ARCA agrees the Lowry board members violated their duties in the contract procurement, initial management and owner approval process.**

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<sup>16</sup> *Trustees of Hunters Village Condominium Trust v. Gerke*, 2007 Mass.App.Div. 23, 25-26 (2007); Pedersen Opening Brief at 34-35.

<sup>17</sup> Pedersen Opening Brief at 32-34.

The trial court dismissed Ray Pedersen's breach of duty<sup>18</sup> claims with the following ruling:

Any claim for relief by Ray Pedersen and Jacqueline Foss based upon an assertion that the Allenmore Ridge Condominium Association or Its Officers or Directors ARCA were negligent and/or breached their duty in the management of the restoration and repair project, including not requiring 75% approval vote from the homeowners, is dismissed with prejudice.

It is hard to imagine how the court could rule there was no issue of material fact when ARCA admitted the Lowry board violated its' duties and deceived owners.<sup>19</sup> It is actually undisputed that ARCA breached its duties to owners. Without question, evidence from ARCA itself creates an issue of material fact as to breach of duty.

**2. The motion for summary judgment did not request dismissal of the Pedersen breach of duty and other claims and defenses except on the basis of lack of standing.**

On the procedural side, the court's ruling was in error because the motion for summary judgment requested dismissal only on the basis of lack of standing.<sup>20</sup> In general, the moving party on summary judgment bears the initial burden of showing the absence of an issue of material

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<sup>18</sup> For brevity sake, breaches of duty and negligence claims are referred to as breach of duty claims in this Reply.

<sup>19</sup> Ray Pedersen pointed this out in his response to ARCA's motion for summary judgment. CP, 600-02. Pedersen Opening Brief at 48. See Appendix 1.

<sup>20</sup> Pedersen Opening Brief at 47 citing CP 426, Section IV.

fact.<sup>21</sup> The ARCA motion against Pedersen was limited in scope to an assertion that the assessment was valid, that owner approval was not required and that Ray Pedersen lacked standing to challenge the assessment because he had not paid the entire assessment.<sup>22</sup>

Thus, ARCA's motion only shifted the burden of proof to Mr. Pedersen to establish that the assessment was invalid and that he had standing. ARCA did not shift the burden of proof to Ray Pedersen to present facts demonstrating an issue of material fact as to any other claim or defense except whether the assessment was valid under the Declarations.

In order to fully respond to a motion, due process requires that a party receive fair notice of the nature of the motion.<sup>23</sup> Because the ARCA motion related only to the issue of whether the assessment required owner approval under the Declarations and whether Ray Pedersen lacked standing, Ray Pedersen was not given proper notice of a request for dismissal of his claims and defenses for any other reason.

**3. ARCA "Mootness" and "Law of the case" arguments are meritless.**

ARCA's summary judgment reply launched a new argument that there was no genuine issue of material fact as to Mr. Pedersen's claims of

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<sup>21</sup> *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989)

<sup>22</sup> CP 426-32.

<sup>23</sup> *Pamelin Ind., Inc. v. Sheen-U.S.A., Inc.*, 95 Wn.2d 398, 402 (1981); Opening Brief at 47.

breach of duty because prior trial court rulings on motions directed at other parties rendered Mr. Pedersen's claims "moot" or wiped out by the "law of the case" doctrine.<sup>24</sup> ARCA cites no authority for the "mootness" or "law of the case" argument in either its summary judgment pleadings or in this court.<sup>25</sup> Arguments without citation to authority should be disregarded.<sup>26</sup>

Even if evaluated on the merits these arguments fail. Again, the notion that Pedersen possesses no breach of duty claim is conceptually difficult to grasp given that ARCA admits the Lowry board breached their duties and deceived owners. On this motion for summary judgment against Ray Pedersen, ARCA simply cannot erase the evidence it presented outlining the multiple breaches of duty of the Lowry board members in the contract procurement and initial management phases. If ARCA possesses a claim for breach of duty, it follows that association owners possess the same claims.

This alone should overcome any mootness or law of the case argument. Nonetheless, ARCA appears to argue that since the trial court previously dismissed the Lowry plaintiffs' claims against ARCA, this equates to a ruling that no other owner can assert that ARCA violated its

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<sup>24</sup> CP 420-34 (Motion for SJT with no mention of these issues), CP 635-646 (ARCA's SJT Reply raising these issues).

<sup>25</sup> ARCA's Opening Brief at 23-27 (mootness) and 49 (law of the case). CP 639-40 (Section II.B of ARCA SJT Reply)

<sup>26</sup> *Cowiche Canyon Conservancy v. Bosley*, 118 Wash.2d 801, 809, 828 P.2d 549 (1992).

duties.

ARCA touts several prior rulings as leading to “mootness” or “law of the case” arguments. One ruling is an order granting ARCA successor president Bud Thompson’s motion to dismiss Lowry plaintiff claims against Bud Thompson.

The court’s ruling filed August 31, 2010 stated simply:

Defendant Thompson’s Motion for Summary Judgment is Granted.<sup>27</sup>

The ruling contained no findings of fact or conclusions of law to elucidate why the court ruled in this fashion.

The next motion was by ARCA and original board members (excluding Thomas Lowry) for dismissal of the Lowry plaintiff claims against them.<sup>28</sup> A written ruling on this motion was entered only after Ray Pedersen’s Opening Brief had been filed.<sup>29</sup> Again the court provided no findings of fact or conclusions of law in its order and ruled simply:

ARCA Defendants’ Motion for Partial Summary Judgment on Plaintiffs’ Allegations of Negligence and Breach of Duty is GRANTED....<sup>30</sup>

Regardless of how the trial court ruled in favor of ARCA on prior motions, the issue on this appeal is whether ARCA – in its motion for SJT

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<sup>27</sup> CP 1599-1602 (filed October 18, 2011 – note judge’s signature confirms order is back-dated to October 15, 2010, i.e., not signed on October 15, 2010).

<sup>28</sup> CP 1202-20.

<sup>29</sup> CP 1615-20.

<sup>30</sup> Id.

against Mr. Pedersen -- presented facts establishing there was no breach of duty sufficient to shift the burden of proof to Mr. Pedersen to establish a genuine issue of material fact. As argued above, ARCA's motion was insufficient in this respect because of its reliance on standing requirement.

Assuming ARCA did present sufficient facts to shift the burden to Mr. Pedersen to present facts establishing a breach of duty by ARCA, then the issue becomes whether Mr. Pedersen established facts sufficient to create a genuine issue of material fact on the record before the trial court on ARCA's motion for summary judgment against Mr. Pedersen. And as argued above, ARCA itself produced compelling evidence of breach of duty by the Lowry board. According to ARCA, the Lowry board failed to properly investigate the scope of work to be done before undertaking the contract, failed to properly procure bids to cover all necessary work and deceived owners as to the nature of the contract. By ACRA's own evidence and argument, the acts of the Lowry board were in bad faith, negligent and unreasonable.<sup>31</sup> Thus Ray Pedersen presented facts in his

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<sup>31</sup> The business judgment rule does not protect ARCA. This issue was addressed *Riss v. Angel*, 131 Wn.2d 612, 632-33, 934 P.2d 669 (Wash. 1997) as follows:

This court has said that a court will not substitute its judgment for that of corporate directors "[u]nless there is evidence of fraud, dishonesty, or incompetence (i.e., failure to exercise proper care, skill, and diligence)[.]" *In re Spokane Concrete Prods., Inc.*, 126 Wash.2d 269, 279, 892 P.2d 98 (1995) (emphasis added). Reasonable care is required. *Id.* (citing *Nursing Home Bldg. Corp. v. DeHart*, 13 Wash.App. 489, 498, 535 P.2d 137, review denied, 86 Wash.2d 1005 (1975)). The Court of Appeals extensively discussed Washington's business judgment rule in *Shinn v. Thrust IV, Inc.*, 56 Wash.App.

response sufficient to establish a material issue of fact as to ARCA's breach of duty.

Regardless of any prior ruling on ARCA's motion against the Lowry plaintiffs, Mr. Pedersen has established in his response to this ARCA motion (the only motion directed at his claims and defenses) that there is a genuine issue as to ARCA's breach of duty.

ARCA provides no authority for its mootness argument and it is not legally sound. Generally, a trial court's pretrial ruling is subject to modification. The trial judge is entitled to reexamine the matter and reconsider the ruling unless it is denominated a final decision.<sup>32</sup> There was no adjudication that the ruling against the Lowry plaintiffs was a final ruling pursuant to CR 54(b).<sup>33</sup> In the absence of such a finding, a ruling

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827, 833-35, 786 P.2d 285, review denied, 114 Wash.2d 1023, 792 P.2d 535 (1990). Among other things, the court concluded that good faith is insufficient because a director must also act with such care as a reasonably prudent person in a like position would use under similar circumstances.

<sup>32</sup> *Central Puget Sound Reg'l Transit Auth. v. Heirs & Devisees of Eastey*, 135 Wn. App. 446, 464-65, 144 P.3d 322 (2006) (Cox, J., concurring); *accord MGIC Fin. Corp. v. H.A. Briggs Co.*, 24 Wn.App. 1, 8, 600 P.2d 573 (1979).

<sup>33</sup> CR 54. JUDGMENTS AND COSTS

(b) Judgment Upon Multiple Claims or Involving Multiple Parties. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross claim, or third party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination in the judgment, supported by written findings, that there is no just reason for delay and upon an express direction for the entry of judgment. The findings may be made at the time of entry of judgment or thereafter on the court's own motion or on motion of any party. In the absence of such findings, determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and

resolving fewer than all claims "is subject to revision at any time." CR 54(b). Where the initial order did not resolve all of the claims against all of the parties and the trial court made no CR 54(b) certification, the trial court "had authority to modify its initial judgment."<sup>34</sup> Because the ruling was not designated a final ruling (it was not even reduced to writing until a year later), the ruling in question was not subject to appeal by Ray Pedersen or even the Lowry plaintiffs for this reason. Thus the court's prior ruling does not represent binding precedent and the trial court erred in dismissing Ray Pedersen's claims for breach of duty based on "mootness."

The law of the case doctrine is no more helpful to ARCA. This doctrine does exist in Washington law, but it is not applicable here. In its most common form, the law of the case doctrine stands for the proposition that once there is an appellate holding enunciating a principle of law, that holding will be followed in subsequent stages of the same litigation.<sup>35</sup> In addition, law of the case also refers to the principle that jury instructions that are not objected to are treated as the properly applicable law for

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the order or other form of decision **is subject to revision at any time** before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

<sup>34</sup> *Ledcor Indus. (USA), Inc. v. Mut. of Enumclaw Ins. Co.*, 150 Wn.App. 1, 14 n.33, 206 P.3d 1255, review denied, 167 Wn.2d 1007 (2009).

<sup>35</sup> 14 Lewis H. Orland & Karl B. Tegland, *Washington Practice: Judgments* § 380, at 55-56 (4th ed.1986)).

purposes of appeal.<sup>36</sup> Neither of these aspects of the rule applies here. The application of the law of the case doctrine is simply inapplicable in this matter.

Thus ARCA's mootness or law of the case argument is meritless.

**C. The trial court erred in deciding that the Declaration did not require 75% owner approval under Article 10.2.1**

**1. As a capital improvement.**

Ray Pedersen argues that Article 10.2.1(i) requires owner approval of this project because the project included capital additions or improvements exceeding \$25,000.<sup>37</sup>

ARCA responds first that ARCA has a duty under Washington law to repair the common areas regardless of the provisions of the ARCA Declarations. This argument is easily foreclosed. The statute relied on by ARCA is RCW 64.34.328. That statute specifically indicates that it is subject to the ARCA Declarations. Thus any action by ARCA pursuant to this statute must still be conducted according to the Declarations.<sup>38</sup>

Next ARCA argues that its Declarations, specifically Article 14, require ARCA to repair damaged buildings and that Article 14 contains no owner approval requirement. Pedersen asserts that Article 14 is

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<sup>36</sup> *State v Hickman*, 135 Wash.2d 97, 101-02, 954 P.2d 900 (1998).

<sup>37</sup> Pedersen Opening Brief at 38-46.

<sup>38</sup> Pedersen Opening Brief at 42.

nonetheless still subject to the limitations on board authority imposed by Article 10.2.1. ARCA asserts that Pedersen provided no authority for its assertion that Article 14 is subject to Article 10.2.1.

One might say the same for ARCA's unsupported assertion that Article 14 is not subject to Article 10.2.1. However, Ray Pedersen did argue on page 43 of his opening brief that language in a contract must be given its ordinary meaning unless a sufficient reason exists to apply another meaning.<sup>39</sup> He also asserted that language will be given the meaning which best gives effect to the intention of the parties.<sup>40</sup>

In further response to ARCA's argument, its reasoning is flawed because ARCA's interpretation of Article 14 would render the provisions of Article 10.2.1 meaningless. Courts should not adopt contract interpretations that render terms meaningless or ineffective.<sup>41</sup> By ARCA's interpretation, any damage to be repaired by ARCA would fall under Article 14, thereby allowing ARCA to escape the strictures of 10.2.1 in every situation. Essentially there would be no situation where 10.2.1 would apply to repairs, restorations, or capital additions and improvements because Article 14 allows ARCA to repair and restore without owner approval in any situation.

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<sup>39</sup> *Rew v. Beneficial Standard Life Ins. Co.*, 41 Wash.2d 577, 250 P.2d 956 (1952); *Jack v. Standard Marine Ins. Co.*, 1949, 33 Wash.2d 265, 205 P.2d 351, 8 A.L.R.2d 1426.

<sup>40</sup> *Crofton v. Bargreen*, 1958, 53 Wash.2d 243, 332 P.2d 1081.

<sup>41</sup> *Seattle-First Nat'l Bank v. Westlake Park Assocs.*, 42 Wn.App. 269, 274, 711 P.2d 361 (1985).

Further the reason Article 10.2.1(i) governs Article 14 derives from the preamble language of Article 10.2.1.<sup>42</sup> Article 10.1.2 gives the Board the authority to enforce its Declarations and carry out the powers granted by the Declarations. Thus the Article 10.2.1 preamble authorizes the Board to carry out all its powers, including Article 14. However, Article 10.2.1(i) specifically indicates that the Board's authority hereinabove enumerated (i.e., including the authority to enforce the Declarations authorized by 10.2.1) is limited as set forth in 10.2.1(i). This means that in enforcing any provision of the Declarations, including Article 14, the Board cannot violate 10.2.1(i).

Under this reasoning, Article 10.2.1(i) governs Article 14, this project and the special assessment.

The next issue then becomes whether the project involved capital additions or improvements. If so, then there is no question that owner approval was required.

ARCA argues that it did not admit that the project involved capital improvements and this is somewhat true. What ARCA admits – and what cannot be denied since this is a verbatim quote from its pleading – is that

On June 25, 2010, the Court denied the ARCA Defendants' [Motion for Partial Summary Judgment on Alleged Voting

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<sup>42</sup> The full text of Article 10.1.2 is attached as Appendix 2. Note that excerpts from 10.1.2 contained in Appendix 1 of Pedersen's Opening Brief omitted clauses of Article 10.2.1 (i) and (l) by transcription error. Those are indicated in bold in Appendix 2 to this Reply Brief.

Requirement]. The sole basis for the Court’s denial was because it found a question of material fact as to whether the “rain screen” building envelope system was a “restoration or repair” or “capital addition or improvement.”

CP, 811, lines 12-22. See also CP 353-54, paras 4 & 5.<sup>43</sup>

The trial court has decided there is an issue of material fact on this issue. Since Article 10.2.1 applies to the project and the assessment, and since there is a material issue of fact as to whether the project involves capital improvements, the trial court erred when it ruled that no vote was required.

**2. As a repair, restoration, capital addition or capital improvement expense.**

Regardless of the presence of capital improvements, Article 10.2.1 still requires owner approval of the construction contract and assessment. As argued in Section IV.B of Ray Pedersen’s Opening Brief, Article 10.2.1(i) requires any restoration, repair, capital addition or capital improvement expense over \$25,000 to be approved by an owner vote of 75% or more. That argument is outlined in the opening brief at page 45. Similarly, Article 10.2.1(l) requires 75% owner approval of contracts involving real or personal property with costs in excess of \$25,000 outlined at page 45 of the opening brief.<sup>44</sup> This requires owner approval

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<sup>43</sup> In ARCA Defendants’ Reply in Support of its Renewed Motion for Partial Summary Judgment on Alleged Voting Requirements, filed October 4, 2010. CP, 810-820.

<sup>44</sup> Please note, however, that the typed version of Article 10.2.1(i) and (l) in the Appendix to Pedersen’s Opening Brief contained typographical errors. Those errors are corrected

whether or not the contract and assessment involved capital additions or improvements exceeding \$25,000. ARCA did not address these issues in its response brief or on summary judgment.

**3. As an Article 14 project**

If this court decides the trial court properly decided that Article 14 authorizes the contract and assessment and is not limited by Article 10.2.1, then summary judgment is still inappropriate.

In his opening brief, Ray Pedersen argued further that even if ARCA's Article 14 authority was not limited by Article 10.2.1(i) that ARCA did not produce evidence that it followed the complicated procedures of Article 14. Its vote ballot (CP 402), Notice of Members Meeting (CP 404), and Board minutes authorizing the vote (CP 408) showed no proof of compliance with the procedures of Article 14. Thus ARCA did not meet its burden to show that it followed the procedures of Article 14. Thus even if a vote was not required by Article 10.2.1, an issue of material fact remains as to whether ARCA complied with Article 14.

**4. Inadequate record.**

Despite fairly detailed arguments by Ray Pedersen about what clause of the Declarations governed the board's authority, the order

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in Appendix 2 hereto with corrections indicated in bold.

presented by ARCA provides this court with no guidance as to what provision of the Declarations supports a conclusion that the declaration does not require owner approval. The order provides a rather broad statement that Washington law and the Declarations grant ARCA authority to enter into the construction contract, but provide no guidance as to what provision of the declaration so authorizes the board.<sup>45</sup> ARCA's proposed order does not provide this court with elucidation as to what declaration provision supports that conclusion.

It is established above that the trial court erred in determining that Washington law required ARCA to undertake the contract and assessment because RCW 64.34.328 specifically indicates that it is subject to the association Declarations.

On the issue of what provision of the Declarations authorized ARCA to proceed without a vote, the ARCA motion for summary judgment is no more helpful on this issue. ARCA argued that the Declarations defined assessments and required owners to pay all assessments, but did not address what provision allowed ARCA to enter into assess a \$4.2 million dollar construction contract with attendant special assessments exceeding \$80,000 per unit.<sup>46</sup> On remand the trial

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<sup>45</sup> CP, 647-52.

<sup>46</sup> CP, 641-43 (Section VII. B of ARCA's Motion for SJT against Pedersen).

court should provide a basis for its ruling as to the application of the Declarations to this project.<sup>47</sup>

**D. Even if the Declarations authorize the project without owner approval, the trial court erred in dismissing Pedersen's claims unrelated to the issue of the need for owner approval.**

Based on its conclusion that the Declarations authorized the board to proceed with the contract and the initial assessment without owner approval, the trial court ordered that the Pedersen breach of duty and declaratory judgment claims must be dismissed. Even if we assume for the moment that the decision that ARCA did not require owner approval is correct, it still does not follow that the Pedersen declaratory judgment and breach of duty claims must be dismissed. ARCA admits breach and even if there is no breach for not obtaining 75% approval, there is still a breach of duty. Apparently the court relied on the disfavored Massachusetts Prepayment Rule or the erroneous mootness and law of the case arguments in dismissing Mr. Pedersen's remaining claims. As outlined above, such a ruling is improper. Even if we assume for the moment that the Declarations authorize ARCA to approve the construction project and

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<sup>47</sup> On remand the trial court should determine:

- (1) what provisions of the declarations authorize the board to enter into the initial construction contract and assess owners,
- (2) whether the declarations require owner approval and
- (3) if owner approval is required, whether owner approval was properly acquired.

its assessment without owner approval, this does not support dismissal of Pedersen's other claims.

**1. Improper allocation of assessment**

In the first place, regardless of the court's decision on the need for owner approval of the assessment, the issue of whether the assessment improperly allocated among owners is still a valid claim. Just because the assessment didn't require owner approval does not mean it was improperly allocated among owners. Ray Pedersen claims that the assessment included repairs to limited common areas which must be assessed among individual owners per Declarations Article 11.4.3(b) and (d). A finding that the assessment did not require 75% owner approval does not support a conclusion that the assessment was properly allocated among owners. The trial court decision makes no finding or conclusion on this issue. It appears the trial court again lumped this claim into the class of claims that fell under the erroneous mootness, law of the case or prepayment rule reasoning and dismissed it in error on this basis.

**2. Breach of duty claims**

Secondly a conclusion that the board had no duty to obtain owner approval does not support a ruling that the Lowry board members did not violate their duties in other respects.

Even if correct, the trial court's ruling that ARCA did not require

owner approval of the contract and assessment supports only a ruling dismissing breach of duty claims based on the need for owner approval. This ruling does not support a blanket dismissal of all breach of duty claims directed at ARCA. ARCA has admitted and affirmatively argued that it misrepresented the contract to owners and breached its fiduciary duty to owners in entering into the contract and this issue is not in legitimate dispute.

Further, not only do the claims of Ray Pedersen for negligence and breach of duty give rise to a claim for damages, they also give rise to a challenge to the validity of the assessment, whether or not the assessment was authorized by the Declarations without 75% owner approval.<sup>48</sup>

Thus even if this court rules that the Declarations do not require owner approval, the trial court erred in dismissing Ray Pedersen's claims that the assessment was invalid due to breach of duty by ARCA.

### **3. Estoppel and other claims and defenses**

Ray Pedersen argues that the Board is estopped from claiming that no vote was required because it deceived owners that the contract was a fixed price contract to obtain owner approval and actually conducted a vote to obtain owner approval. He also asserted a claim for damage to his

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<sup>48</sup> *Baker v. Monga*, 590 N.E.2d 1162, 32 Mass.App.Ct. 450, 453-54 (1992) *citing Rivers Edge, supra*, at 199.

personal property by the board. These claims and defenses were dismissed without any analysis of the claims on the merits. No finding or conclusion is provided by ARCA or the trial court in its order to support a conclusion that these claims or defenses should be dismissed. Indeed the evidence from ARCA that Mr. Lowry knew of the contract's deficiencies and deceived owners to obtain owner approval of the contract alone creates a material issue of fact as to the validity of the estoppel defense.

In reality, the trial court addressed Mr. Pedersen's claims of breach of duty and improper assessment allocation without any indication of evaluation of those claims on their merits. Here again, it appears the trial court dismissed these claims in error on the basis that Mr. Pedersen lacked standing to assert any claim due to nonpayment of the assessment.

#### **IV. Conclusion**

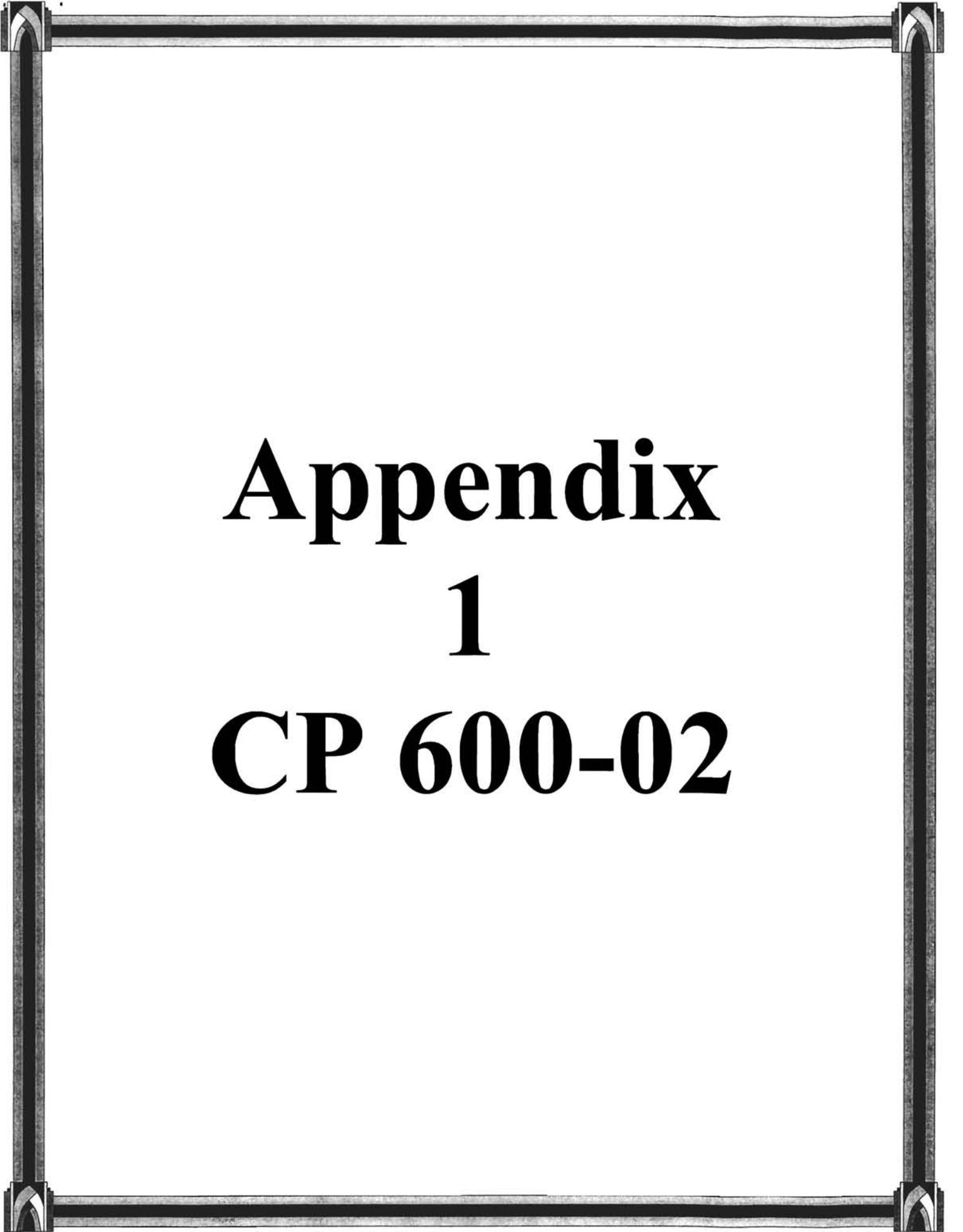
In all respects the trial court's ruling cannot stand. This court should reverse the trial court's ruling, vacate the judgment against Ray Pedersen and reinstate Mr. Pedersen's claims and defenses.

**HAY & SWANN PLLC**



Andrew Hay, WSBA# 19164  
Attorney for Appellant

Dated December 5, 2011



**Appendix**  
**1**  
**CP 600-02**

1 ARCA admits violation of its fiduciary duties and misrepresentation to the owners. In its  
2 Counterclaim filed September 25, 2009, ARCA acknowledges the Board and its directors have  
3 fiduciary duties to the members under the declarations,<sup>2</sup> under RCW 64.34.308,<sup>3</sup> under RCW  
4 64.38.025 and RCW 24.03.127,<sup>4</sup> and under the common law.<sup>5</sup>

5 As further alleged by ARCA in its counterclaim,<sup>6</sup> the board and its directors violated  
6 these duties by:

- 7 a. failed to enter into a signed contract with Trinity/ERD;
- 8 b. failed to keep successor Board members and Members/Owners informed  
9 about the status of the project;
- 10 c. negligently and carelessly entered into an open-ended or allowance  
11 contract with Porter Construction when the Former Directors/Officers  
12 knew or should have known that such a contract would expose the ARCA  
13 and the Members/Owners to unnecessary costs and expenses;
- 14 d. failed to conduct a proper investigation of the existing conditions at the  
15 condominium, resulting in the underfunding of the restoration project by  
16 at least one million two hundred thousand dollars (\$1,200,00.00);
- 17 e. negligently and carelessly allowed the restoration project to be put out for  
18 bid without obtaining enough information for the bidders to provide an  
19 accurate bid;
- 20 f. failed to require Trinity/ERD to document existing conditions at the  
21 condominium, which conditions could have otherwise been included in the  
22 scope of the project;
- 23 g. failed to have all five condominium buildings adequately inspected prior  
24 to entering into contracts to have them repaired and restored;
- 25 h. failed to properly communicate with Members/Owners as to the terms and  
conditions of the ARCA's contracts with progress of the restoration  
project;

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23 <sup>2</sup> Counterclaim, Section IV.A. Breaches of Duty under the Declaration

24 <sup>3</sup> Counterclaim, Section IV.B Breaches of Duty under RCW 64.34.308

25 <sup>4</sup> Counterclaim, Section IV.C Breaches of Duty under RCW 64.38.024 and RCW 24.03.127

<sup>5</sup> Counterclaim, Section IV.D Negligence

<sup>6</sup> Counterclaim, Section IV.C

- 1
- 2 i. failed to properly communicate with successor director/Officers as to the progress of the project;
- 3 j. failed to assist and cooperate with successor Directors/Officers in the administration, management, oversight, execution, and completion of the project;
- 4
- 5 k. allowed those Members/Owners, including Plaintiff R. Stuart Schwartz, who did not pay their special assessments to not be assessed and/or liened until ninety (90) days after completion of the restoration project, which the Former Directors/Officers knew or should have known would severely underfund the project;
- 6
- 7
- 8 l. were otherwise careless and/or negligent.
- 9

10 In addition, as described below, the board and its directors failed to properly conduct the vote required to obtain 75% owner approval of the project according to the association bylaws.

11

12 Facts to support each of these claims are provided in various director declarations as follows:

13

14 Kay Tainter Declaration November 2, 2009 and Holly Minniti Declaration October 7, 2009.

15

16 **Para. 3.** Prior to and at the Special Meeting owners/members were repeatedly told by the Board that the Porter repair contract price was a fixed amount and would not be increased/exceeded.

17

18 Nan Peele Declaration, November 29, 2009.

19 **Para. 6.** Neither Mr. Lowry nor representatives of ERD or Porter disclosed to the Unit Owners at the November 16, 2006 meeting that the ARCA-Porter contract was not a fixed price contract for a sum certain.

20

21 **Para. 10.** The Board Defendants determined that those conditions were met when the previously undetermined damage to Buildings 1 and 2 were significantly greater than estimated by either of the engineering firms hired by ARCA. This was a surprise finding, since no intrusive inspections were conducted on either Building 1 or 2. The Board Defendants felt that if complete inspections had been conducted prior to the start of the project, the original bid would have included these additional costs making the original bid higher and eliminating the eventual overage.

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Further ARCA argued in its own prior brief filed November 23, 2009<sup>7</sup> that:

The conduct of ... Thomas Lowry, raises questions of material fact as to whether ARCA's actions were in violation of the Declaration and RCW 64.34.308. The only conclusion that can be drawn from these facts is that Mr. Lowry knew that the repair project could exceed \$4.2 million if "Significantly Different Conditions" were met. Any suggestion by plaintiffs that the ARCA-Porter contract was a fixed-price contract that could never have exceed[ed] \$4.2 million is without merit and patently false." "neither Mr. Lowry nor representatives of ERD or Porter disclosed to the Unit Owners that if Porter found "Significantly Different Conditions," the price of the ARCA-Porter contract could exceed \$4.2 million.

Despite having knowledge that the ARCA-Porter contract could exceed \$4.2 million, Mr. Lowry never disclosed to the Unit Owners at the November 16, 2006 meeting that if Porter found "Significantly Different Conditions," that the contract could go over budget and ARCA would have to pay any overages. ... Under this pretense, Mr. Lowry was able to secure sufficient votes from the Unit Owners to approve the ARCA-Porter contract. As such, the Unit Owners did not know that the contract they voted for could exceed its value and that they would have to pay for any overages."

Based on the foregoing, it is clear that Mr. Lowry's conduct raises genuine issues of material fact as to whether ARCA was in breach of "ordinary and reasonable care" under RCW 64.34.308.

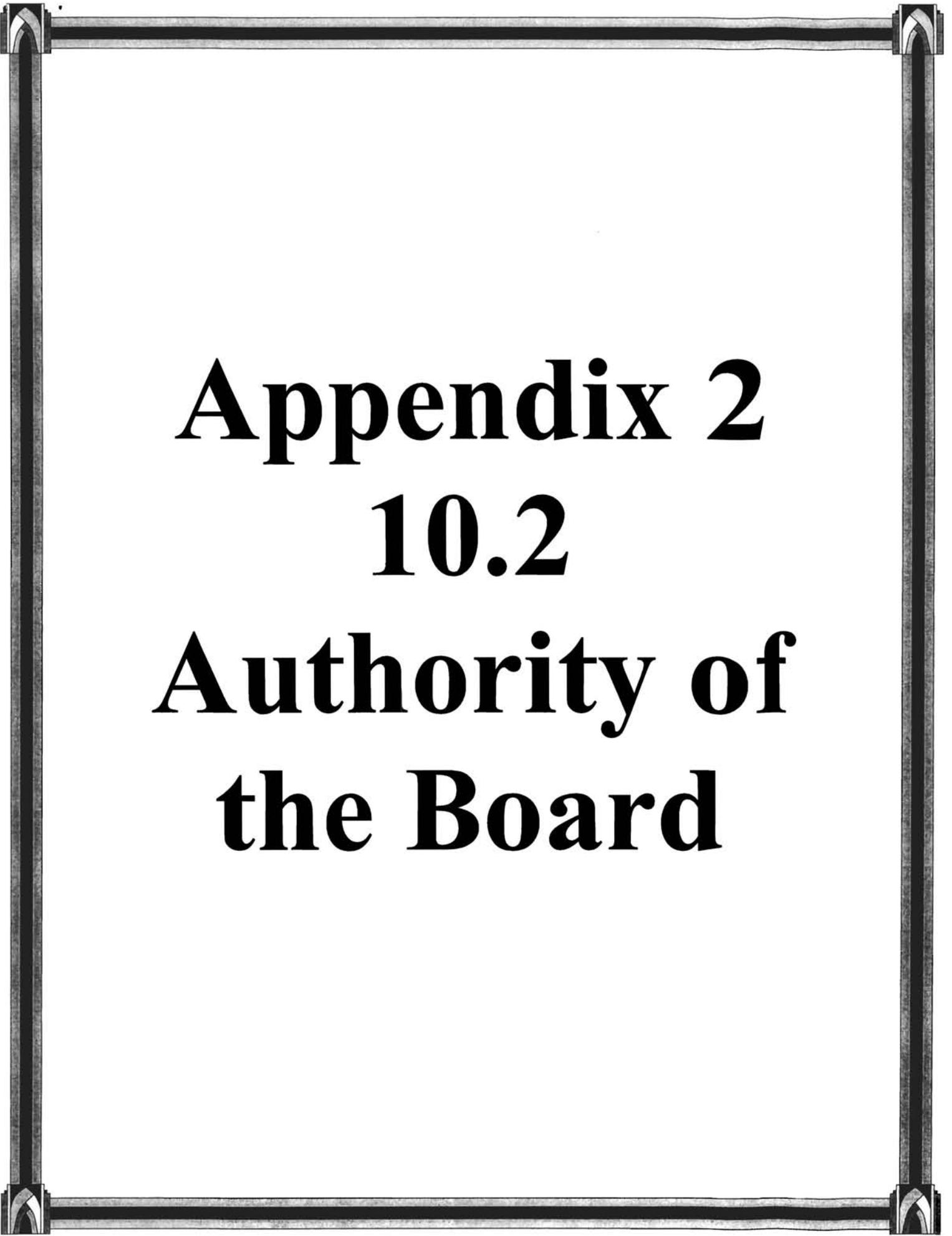
The current board president, Bert Thompson, states in his December 17, 2009 declaration para. 7 that

Mr. Lowry falsely told the ARCA membership that the Porter contract would not exceed the 4.2 million bid amount.

ARCA has admitted and affirmatively argued that it misrepresented the contract to owners and breached its fiduciary duty to owners in entering into the contract and this issue is not in legitimate dispute.

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<sup>7</sup> Opposition to Plaintiffs' motion for Partial Summary Judgment (hereafter Opposition).

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**Appendix 2**  
**10.2**  
**Authority of**  
**the Board**

## **10.2 Authority of the Board**

10.2.1 The Board for the benefit of the condominium and the owners, shall enforce the provisions of this Declaration and of the Bylaws, shall have all powers and authority permitted to the Board under the Act and the Declaration, and 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:

(a) Water, sewer, garbage collection, electrical, telephone, gas and any other necessary utility service as required for the common area. If one or more condominium units or the common areas are not separately metered, the utility service may be paid as a common expense, and the Board may by reasonable formula allocate a portion of such expense to each such condominium unit involved as a portion of its common expense.

(b) Policies of insurance or bonds providing coverage for fire and other hazard, liability for personal injury and property damage, and for fidelity of Association officers and other employees, as the same are more fully required hereafter and in the Bylaws.

(c) The services of persons or firms as required to properly manage the affairs of the condominium to the extent deemed advisable by the Board as well as such other personnel as the Board shall determine are necessary or proper for the operation of the common area, whether such personnel are employed directly by the Board or are furnished by the manager or management firm or agent.

(d) Legal and accounting services necessary or proper in the operation of the Association affairs, administration of the common area, or the enforcement of this Declaration.

(e) Painting, maintenance, repair and all landscaping and gardening work for the common area, and such furnishings and equipment for the common area 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 condominium unit shall be painted, maintained and repaired by the owners thereof; all such maintenance to be at the sole cost and expense of the particular owner as more particularly provided in Section 11.5.

(f) 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 condominium units or their owners, the cost thereof shall be specially charged to the owner of such condominium units.

(g) Maintenance and repair of any condominium unit, its appurtenances and appliances, if such maintenance or repair is reasonably necessary in the discretion of the Board to protect the common area or preserve the appearance and value of the condominium development, and the owner or owners of said units have failed or refused to perform said maintenance or repair within a reasonable time after written notice of the necessity of said maintenance or repair has been delivered by the Board to the owner or owners; provided that the Board shall levy a special charge against the condominium unit of such owner or owners for the cost of such maintenance or repair.

(h) The Board may also pay any amount necessary to discharge any lien or encumbrances levied against the entire property or any part thereof which is claimed to or may, in the opinion of the Board, constitute a lien against the property or against the common areas, rather than merely against the interest therein of particular owners. Where one or more owners are responsible for the existence of such lien, they shall be jointly and severally liable for the cost of discharging it, and any costs and expenses (including court costs and attorney fees) incurred by the Board by reason of such lien or liens shall be specially charged against the owners and the condominium unit responsible to the extent of their responsibility.

(i) The Board's power herein above enumerated shall be limited in that the Board shall have no authority to acquire and pay for out of the maintenance fund capital additions and improvements, including but not limited to real or personal property, (other than for purposes of restoring, repairing or replacing portions of the common areas) having a total cost in excess of Five Thousand Dollars (\$5,000.00), without first obtaining the affirmative vote of the owners holding a majority of the voting power present or represented at a meeting called for such purpose, or if no such meeting is held, then the written consent of voting owners having a majority of the voting power; provided that any expenditure or contract for each capital addition or improvement in excess of Twenty-five Thousand Dollars (\$25,000.00) must be approved by owners having no less than seventy-five percent (75%) of the voting power.

(j) Nothing herein contained shall be construed to give the Board

authority to conduct an active business for profit on behalf of all of the owners or any of them.

(k) The Board shall have the exclusive right to **contract** for all goods and services, payment of which is to be made from the maintenance fund. The Board may delegate such powers subject to the terms thereof

(l) The Board may, from common funds of the Association, acquire and hold in the name of the Association, for the benefit of the owners, tangible and intangible personal property and real property and interests therein, and may dispose of the same by sale or otherwise; and the beneficial interest in such property shall be owned by the owners in the same proportion as their respective interests in the common area, and **such** property shall thereafter be held, sold, leased, rented, mortgaged or otherwise dealt with for the benefit of the common fund of the Association as the Board may direct. The Board shall not, however, in any case acquire by lease or purchase real **or personal** property valued in excess of Five Thousand Dollars (\$5,000.00) except upon a majority vote of the condominium unit owners, or valued in excess of Twenty-five Thousand Dollars (\$25,000.00) except upon a seventy-five percent (75%) affirmative vote of the condominium **unit** owners, in the manner specified in Subsection 10.2 (i).

COURT OF APPEALS  
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STATE OF WASHINGTON  
BY \_\_\_\_\_  
DEPUTY

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

RAY PEDERSEN,

Appellant,

vs.

ALLENMORE RIDGE CONDOMINIUM  
ASSOCIATION, et al.,

Respondents.

Case No.: 41571-2-II

CERTIFICATE OF SERVICE

On the 5th day of December, 2011 I emailed and mailed copies of the following documents: Appellants Reply Brief and this Declaration to all parties listed below. I emailed the documents to the email addresses listed and placed copies of the same in sealed envelopes, with proper first class postage affixed, addressed to the following persons, entities and/or corporations in a receptacle maintained by the United States Post Office in Tacoma, Washington.

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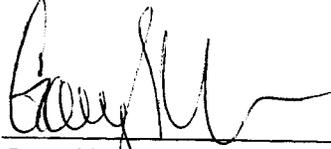
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1 DATED this 5th day of December, 2011.

2 **HAY & SWANN PLLC**

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5 Gary Shaleen, Paralegal

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