

No. 62818-6-I

IN THE COURT OF APPEALS
STATE OF WASHINGTON
DIVISION I

LISALI REVOCABLE TRUST,

Appellants/Cross-Respondent,

v.

TIARA DE LAGO HOMEOWNERS' ASSOC.,

Respondent/Cross-Appellant.

OPENING BRIEF OF APPELLANT LISALI REVOCABLE TRUST

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III. INTRODUCTION AND SUMMARY OF ARGUMENT

In 1998, appellant Lisali Revocable Trust (“Lisali”) purchased the two top-floor units of the Tiara de Lago Condominium in Kirkland Washington (the “Lisali Units”), the only units at the condominium with exterior walls exposed to wind driven water coming off Lake Washington, and the only units where the exterior walls join the building’s roof. The Lisali Units suffered water leaks at the exterior walls, windows, and doors, causing mold and fungus to grow on the units’ interior wall surfaces and within its exterior walls.

Lisali paid its monthly common expense assessments, in part, to enable the Tiara de Lago Homeowners Association (“TDL”) to maintain the condominium’s common elements. Both the Washington Condominium Act, and TDL’s Declaration obligate each TDL Unit owner to contribute to common element repairs. The Lisali Units first experienced water problems shortly after appellant took possession in 1999. For the first few years, the developer, MKT Associates LLC (“MKT”), responded with limited, ineffective repairs. When TDL responded to the leaks in 2004, it appointed MKT as its “agent” to investigate and resolve the Lisali leaks. MKT immediately suggested the same repair that had failed on three previous occasions. (The previous repairs evidenced by Exs. 15, 24, 33, 38, 45, 47, 50 and MKT’s suggested

repairs Ex. 54 and RP Raskin at 84-85, RP Schlappi August 27, 2008 at 36-41) Lisali, recognizing that repeating limited, ineffective repairs made no sense, felt compelled to investigate and repair the exterior wall leaks to stop both the leaks and the growth of mold and fungus within the units. Lisali shouldered the expense of determining the leaks' true source and paid the majority of expenses to effectuate permanent repairs. It then brought this action for reimbursement of the costs of repairing this common element.

The superior court concluded Lisali alone must bear the investigation and repair costs to keep water out of the building. The practical impact of the trial court's decision is that a single condominium unit owner can be made to pay for the repair of naturally occurring common element water leaks, and related damage. This court should reverse and remand for entry of judgment for the cost of repair.

IV. ASSIGNMENTS OF ERROR

1. The lower court erred in making the following findings of fact and conclusions of law in its October 31, 2008 Findings of Fact and Conclusions of Law: Findings of Fact: 8, 9, 10, 11, 12, 13, 14, 16, 20, 21, 23, and 24. (CP 1684-1688) Conclusions of Law: Unnumbered general conclusion on contribution liability, 1 (2-3), 2 (1) (3), 3(2), 4(5), 5 (3-4), and 6. (CP 1688-1690)

2. The lower court erred in dismissing Lisali's contribution claim for condominium common element repair expenses when each unit owner's deed at the condominium contains an affirmative obligation to contribute to such common element repairs and a prohibition expressly stating that no unit owner may waive or opt out of such duty to contribute to such expenses. Findings of Fact and Conclusions of Law: Unnumbered general conclusion of law on contribution liability. (CP 1688-1690)

3. The lower court erred in not addressing whether an agency relationship was created between TDL, as the principal, and MKT, as the agent, by written correspondence from both parties to Lisali expressly stating that MKT was TDL's agent for purposes of the leaks when such an agency would have raised questions of knowledge and notice imputed to TDL. (CP 1684-1690)

4. The lower court erred in dismissing Lisali's claims against the individual defendants on TDL's Motion for Summary Judgment when a necessary component of the court's ruling was the factual question regarding the reasonableness of the dismissed defendants' intentions. Its Order on Summary Judgment, dated September 7, 2007 should be reversed. (CP 1149-1151).

5. The lower court erred in denying Lisali's Motion for

Reconsideration of the order dismissing the individual defendants when the court found that reasonable minds could come to but one conclusion as to the defendants' intentions and that TDL's counsel stipulated at oral argument on its summary judgment motion that a prior repair agreement applied to Lisali's Units even though agreement's plain language excluded the units. (CP 1152, 1182) Its Order on Lisali's Motion for Reconsideration, dated September 20, 2007 should be reversed. (CP 1182)

6. The lower court erred in awarding TDL attorney's fees and costs. (CP 2015-2018)

7. The lower court erred in awarding the judgment in TDL's favor. The court's November 24, 2008 Judgment should be reversed. (CP 2043)

8. The lower court erred in denying Lisali's motion to reconsider the final judgment. The court's November 24, 2008 Order Entering Judgment should be reversed. (CP 2043)

V. STATEMENT OF ISSUES

1. **Contribution:** Whether the other TDL unit owners are obligated to contribute to Lisali's common element repair expenses when each unit owner's deed contains the obligation to contribute to common expense repairs and TDL Declaration Paragraph 12.2 specifically provides that no unit owner may opt out of the common expense obligation.

Assignments of Error 1, 2.

2. **Agency:** Whether TDL's and MKT's written correspondence created an express agency making MKT the agent for TDL to identify and resolve the leak problem when correspondence from both TDL and MKT expressly stated that MKT was TDL's "agent" for the leak problems. **Assignments of Error 1, 3.**

3. **Agency:** If MKT was TDL's agent, whether MKT had a duty to inform TDL regarding its knowledge of the condominium's leaks and related repair efforts and regarding all prior communications from Lisali to MKT regarding the same. **Assignments of Error 3.**

4. **Access Repair Obligation:** Whether TDL's Declaration requires TDL to pay Lisali for repairs required to restore the Lisali Units after TDL entered the units to effectuate repairs to the Lisali units' limited common elements. **Assignments of Error 1.**

5. **Amendment of the Tolling Agreement:** Whether the lawyer for a party to an agreement, entered into years earlier, may unilaterally amend the agreement at oral argument by stipulating that the agreement applies to the adverse party when the agreement by its terms specifically excludes the adverse party and when the lawyer has obtained no new meeting of the minds and has provided no new consideration. **Assignment of Error 5.**

6. **Attorneys Fees:** Whether an award of attorneys fees, based on an amendment to an homeowners association declaration, is excessive when a portion of the award is for fees incurred prior to the amendment's adoption and when a portion of the award included fees incurred for motions abandoned or lost prior to trial. **Assignment of Error 6.**

7. **Common Elements:** Whether water leaks and related repairs occurred within a condominium's common elements when the evidence shows that the leaks occur in the condominium building's exterior walls, roof and exterior wall interface, and at failure points in the condominium's weather/water proofing system. **Assignment of Error 1.**

8. **Reasonable Conduct:** Whether a condominium homeowners' association acts reasonably in discharging its obligation to act in the association's best interests when it decides not to inspect the building's roof/exterior wall interface, the entire floor comprised of the building's only exposed vertical walls, and when it appoints the project developer as its agent to investigate, report on, and repair all water leaks prior to the expiration of the project developer's potential for liability for such leaks. **Assignment of Error 1, 4.**

VI. STATEMENT OF THE CASE

A. The Parties and the Initial Background Facts.

Appellant Lisali purchased Units 501 and 502 of Tiara de Lago on July 8, 1998 and May 1, 1998. (Ex. 5) Respondent TDL is a non-profit corporation created by a Declaration of Condominium and by the Washington Condominium Act (the “Act”), at RCW 64.34 *et seq.* (Ex. 1)

MJR Development (“MJR”) formed MKT Associates LLC (“MKT”) that in turn developed Tiara de Lago condominium, comprised of 13 luxury residential suites over ground floor retail space. MKT completed Tiara de Lago in May 1998. Michael Raskin and Jack Loudon are within the control group for MJR and MKT. MJR caused MKT to be TDL’s Declarant. Lisali’s ownership of Units 501 and 502 caused Lisali to become a member of the TDL Homeowner’s Association and obligated Lisali to the obligations set forth in TDL governing documents and in the Act. (Exs. 1, 5)

Declaration Article 10.4 authorizes the Association to act through the Board to enforce the provisions of the Declaration. (EX. 1) The individual Defendants, Israel, Groshong, and Remick, were members of the TDL Board of Directors. (CP 32) Declaration Article 10.3.1 requires TDL’s Board members to act with ordinary and reasonable care. (Ex. 1)

The TDL Declaration defines the condominium’s elements,

common expenses, duties of the respective parties, and allows for amendments. In particular, the Declaration required repairs to the “common elements” of the Condominium to be paid by assessment to all homeowners. (Ex. 1)

“Common Expenses

1.8.10 *“Common Expenses” shall include all* sums lawfully assessed against Owners by the Association and *expenses: of administration, -maintenance, repair or replacement of the Common Elements;* declared to be common expenses by the Act, this Declaration or the Bylaws (as they may be lawfully amended); and agreed upon as common expenses by the Association on. (Emphasis added.)”

B. Tiara de lago Leak History.

TDL experienced a number of leak and moisture related problems at Tiara de Lago. (CP 878, 891; Ex. 15) MKT investigated and attempted repairs during the warranty period, (CP 891, 897; EX 34), commissioning Wetherholt & Associates (“Wetherholt”) to investigate the building’s weatherproof elements in 1999, 2001, and 2002. (EX 16, 17, 18; RP Mike Raskin testimony at p.29-34)

By 2002, TDL board members were frustrated over the developer’s failure to adequately address these water intrusion related problems for the last three years. (CP 338) In 2002, TDL obtained a limited report regarding the building’s weatherproof elements from Corke Amento. (Ex.

19) The Corke Amento inspection involved no destructive testing, and TDL allotted only limited time and a limited budget for the inspection. (Ex. 19) Corke Amento's inspection made no effort to revisit the items listed in the Wetherholt reports but rather looked via visible inspection only for other items that could lead to water infiltration into the building. (Ex. 19)

TDL and MKT agreed to use the last Wetherholt and Corke Amento reports to generate a list of repair items to be addressed by MKT after expiration of the express warranty period. (Exs. 39, 40, 41) TDL and MKT jointly drafted an April 24, 2002, Tolling Agreement ("Tolling Agreement") tolling all statute of limitations and repose time periods applicable to the specific items jointly listed on Exhibit A to the Tolling Agreement. (Ex. 14) By its express terms, the Tolling Agreement limited the scope of its application with the following language, "[t]he scope of this Agreement is limited to the claims described in Exhibit A." (Ex. 14) Exhibit A failed to list any claim related to the Lisali Units. (Ex. 14)

History of the Lisali Unit Leaks

The Lisali Units leaked prior to November 1999. (CP at 878, 891; EX 15, 33) The developer's warranty walk-through sheets for the Lisali Units show leaks at the sliding doors, which MJR/MKT tried to repair. (Ex. 15) By late 2002, however, leaks were again occurring in the Lisali

units. (Ex. 45) (RP Aug. 28, 2008 testimony of Heather Schlappi at p.20-23) This time MKT spearheaded an effort to stop the leaks by repairing or replacing Unit 502 slider doors. (Ex. 45, 47) This repair failed to stem the leaks. By January 2004, leaks believed to be originating from Unit 502 were causing water damage in Unit 403. (Ex. 50) In 2004, MKT once again attempted focusing on the slider doors. (Ex. 54) (RP Raskin at 84-85)

Unfortunately, during the 2004 leak mold and fungus visibly accompanied the leaks. (Exs. 51, 83; CP 720) (RP Chawes). Again, the unit below, Dr. Israel's Unit 403, appeared also to suffer significantly from the leaks. (Ex. 51) Again, MKT led the repair effort. (Exs. 51, 52) And again, MKT sought to focus the investigation and repair effort on the slider doors and related door joints. (RP Schlappi August 27, 2008 at 36-41)

This time, Lisali insisted on a slower, more deliberate approach to the investigation and repair. Lisali slowed the response to the point that both Dr. Israel and Loudon wrote Lisali to request access. (Exs. 51, 52) On February 24, 2004, Dr. Israel wrote a letter with the subject line of "Water leaks from Unit 501/502: Formal request of access for repair" to gain access and stated:

On January [December] 12, 2004, we requested MJR

Development, who is acting as our agent to identify and resolve the problem.

(Ex. 51) On March 2, 2004, Loudon wrote an email to gain access and stated:

As the Condominium Association's agent MKT Associates LLC formally requests access to your client's property for the purpose of identifying leaks and making repairs as deemed necessary by the Condominium Association.

(Ex. 50) Both Loudon and Dr. Israel testified at trial regarding these communications and acknowledged the relationship and no party recalled any termination of the relationship. (Exs. 50, 51) (RP Raskin at 96-98, RP Loudon at 165-166, RP Schlappi August 27, 2008 at 98-91)

C. Repair History of the Lisali Unit Leaks

During 2004, Lisali worked with TDL and its agents to investigate and repair the Lisali Unit leaks. (Exs. 21, 24-26, 55-56, 58, 60, 64; CP 719-54, 885, 1028; RP Loudon at 134-136) The parties' experts determined that the leaks related to the slider doors and door/wall interface occurred in Tiara de Lago's common elements. (CP 722) Initially, the experts appeared to agree that one source of the leaks was the interface-detail *between* the building's water proofing membrane and the slider door details. (Exs. 25-26; CP 722; *See also* CP 879) Lisali's expert, Morrison Hershfield ("MH"), established the repair protocol adopted and used by

TDL that called for remedial work at least 10” from the door into the common element exterior wall:

Cut back stucco minimum of 10” around perimeter of door . . . Take care not to damage existing weather resistive barrier. If exposed sheathing is wet or damaged cut back stucco until dry undamaged sheathing is exposed. Replace any wet or damaged sheathing with new material.

(CP 733) This report closed by noting that it did not address water intrusion related issues from sources other than the interface detailing *between* the sliding doors and adjacent walls and deck. (CP 734)

The parties effectuated the repairs to the slider doors and surrounding detail utilizing MH’s design detail. (Ex. 110) TDL, however, then decided to test all the slider doors and windows at the condominium, to check for door and window water leaks with the plan that if any slider doors showed problems similar to the sliders on the Lisali Units then they would be repaired using the repair protocol developed by Lisali’s expert. (Ex. 110) MKT performed the building wide test on July 14, 2009 and issued a report to TDL, dated July 15, 2004 (Re: Door and Window Repair Summary.). (Ex. 114) The July 15, 2004 report indicated that MKT performed the repairs on six slider doors in addition to the repairs made in the Lisali Units. (Ex. 114)

The parties repaired the Lisali Unit slider doors during the summer of 2004. (Exs. 5, 54, 58; CP 750) However, during this time Lisali gained

increasing information that parts of Unit 502's exterior wall and related roof interface detail contained additional leaks. (Ex. 12, 31, 32, 66, and 67; CP 1087; RP Daudt at 19, 22-24, RP Empy at 8-16) As the 2004 repair efforts progressed, Lisali suggested testing to determine whether there were other leaks in the exterior wall. (Ex. 26; RP Weatherholt at 8-9) On May 2004, MKT's waterproofing expert wrote that he was personally offended by the notion of destructive testing to look for additional water leaks. (Ex. 26; RP Weatherholt at 8-9) TDL lacked an independent expert and instead relied on the developer's expert to protect the Association's best interests.

In early September 2004, MKT offered to conduct remedial repairs inside Lisali's Unit 502. (Ex. 58) MKT made this offer prior to any party conducting any additional testing on the then-exposed interior side of the exterior walls and roof elements of Unit 502. (CP 747, 753; Ex. 60) At the time of the offer, MH had informed Lisali that it believed there to be additional water leaks beyond the unit's interface wall/door detail. (Exs. 22, 24). For this reason, Lisali rejected MKT's offer. (RP August 27, 2008 Schlappi at 81-85, 107-109) In fact, Lisali turned out to be right in rejecting MKT's offer to close up the walls when AMEC confirmed additional leaks. (Ex. 67)

Lisali declined MKT's offer for immediate interior repairs and continued alone with its investigation for water leaks in TDL's common elements related to Unit 502. Dr. Israel and Loudon were aware of Lisali concern and search efforts with both testifying at trial that by the end of 2004/beginning of 2005 the concern of leaks had shifted to the walls. (Ex. 135; RP Loudon at 175; RP Isreal at 135-137)

D. Lisali's 2005 Investigation of the Exterior Wall and Roof.

During the end of 2004 and into 2005, Lisali investigated for leaks in the common elements related to Unit 502 through AMEC. (CP 640-683; EX 12, 31, 32) The August 24, 2005, AMEC report confirmed the existence of additional areas of water leaks beyond Unit 502's slider doors with leaks in the slider door and window assemblies, the building's fifth floor decorative columns, as well as portions of the roof-wall assemblage. (Exs. 67, CP 670-83) All the leaks identified by AMEC occurred in TDL's common areas and not within Lisali's Unit. (CP 670-83)

MKT monitored AMEC's work and issued a report on August 24 2005 addressing AMEC's work and the results of AMEC's investigation. (Ex. 115) Lisali ultimately repaired the leaks found by the AMEC report, remediated the mold and fungal growths caused by the failed common elements, and repaired the interior common elements of Unit 502 to the interior finish standards that existed prior to the leaks, investigation, and

restorative work. No additional leaks have been reported anywhere in the Tiara de Lago condominium by TDL or Lisali since the completion of the Lisali repairs. (CP 1775 at ¶ 20)

E. Lisali's MKT Litigation.

Lisali filed a lawsuit against MKT (King County Cause No. 04-2-08532-2) for its damages just prior to the operation of the Statute of Repose. (Ex. 93; CP 271-18) The litigation settled, leaving Lisali with substantial uncompensated damages. (CP 28) The settlement agreement provided for the payment of a lump sum without any differentiation or segregation of the settlement amount to any portion of Lisali's claim. (Ex. 71; RP Daudt at 32-35, RP Raskin at 47-51) Likewise, the settlement agreement's release was expressly limited to all claims between Lisali and MKT, and did not include TDL. (Ex. 71)

F. Superior Court Proceedings.

TDL's Motions for Summary Judgment

Lisali sued TDL and its individual board members for its uncompensation damages. The individual board members were dismissed on September 7, 2007. The court dismissed the claims against TDL after trial.

After trial, TDL sought its fees in this matter pursuant to Declaration's Third Amendment, recorded on October 3, 2002. (Ex. 1)

This fee provision provides:

In the event of a dispute which results in a lawsuit *between the Association and a Unit Owner*, the substantially prevailing party in the lawsuit, including any appeal thereof, shall be entitled to recover its attorney's fees and costs incurred in connection with the dispute.

(Ex. 1) (emphasis added) Based on this authority, the court awarded TDL \$179,784.65 for its attorney's fees and costs. The court's award included fees incurred by TDL prior to October 3, 2002, fees incurred by TDL in litigation between a unit owner and individual Board members, and fees incurred in abandoned and lost motions.

Lisali appeals.

VII. ARGUMENT

In determining whether TDL was obligated to contribute to Lisali's repair expenses, the court focused on TDL's conduct and on the question of whether TDL reasonably affected repairs. The court, however, did not address whether Lisali had a right to expect contribution from the other TDL association members based upon TDL's Declaration, imposing on all TDL owners an obligation to contribute to common expenses. TDL's Declaration is a real covenant that binds each TDL deed. Hence, TDL's Declaration and each unit owner's deed serve as a distinct source of contribution liability.

A. The Superior Court Misapplied the Law of Real Covenants.

In the court's findings, it concluded that neither TDL's Declaration nor the Act obligated the other TDL unit owners to contribute to Lisali expenses incurred for stopping common element leaks. But common-interest communities are burdened with servitudes to maintain commonly held property. Restatement of Property (*Third*) of Property, Vol. 2, Sec. 6, Introductory Note. "Servitudes underlie all common-interest communities, regardless of the ownership and organizational forms used. They provide the mechanism by which the obligations to share financial responsibility for common property and services and the obligation to submit to the management and enforcement powers of the community association are imposed on present and future owners of the property in the community."

The Act also burdens each TDL deed for the common good. In adopting the Act, Washington's legislature created for common-interest communities the common obligation that each parcel of the community provides for the maintenance and repair of common property. This obligation to contribute to the maintenance of common property is the distinctive feature of common-interest communities.

This distinctive feature is codified in the Act. RCW 64.34.020(9) provides that a condominium is created from real property with portions of

the property designated for separate ownership but with the remainder designated for common ownership with the unit owners having an undivided interest in the common elements. Once formed, unit owners comprise the association that acts on their behalf. RCW 64.34.300. The Act specifically obligates the association to maintain and repair the condominium's common elements. RCW 64.34.328. The Act also mandates that expenses, incurred as a result of such maintenance and repair, are common expenses to be paid by all association members. RCW 64.34.020(7). Association members are liable, pursuant to RCW 64.34.360(2), for all common expenses, which must be assessed against all the units in accord with each unit's allocated percentage of responsibility for such expenses.

No provision of the Act grants any unit owner the ability to "opt out" of any expense for common property maintenance. Hence, the Act requires the association to maintain the common property with each unit owner being obligated to contribute financially to the expenses of such an obligation. The Act creates both the duty to maintain common elements and the duty to pay for such common element maintenance.

1. TDL's Declaration Entitled Lisali to Contribution for its Common Element Repair Expenses.

TDL's Declaration and other governing documents parallel and

amplify the above listed obligations rather than contradict or limit them. Declaration paragraph 1.8.9 defines a common expense, *inter alia*, as all sums declared to be common expenses by the Act. The Act declares a common expense to be a financial liability of the association. RCW 64.34.020(7). When an association meets its obligation to maintain and repair its common property its related expenses are a common expense. RCW 64.34.328. Thus, like the Act, TDL's Declaration mandates that the financial obligation associated with maintaining and repairing common property is a common expense.

TDL Declaration paragraph 12.2 specifically obligates unit owners to pay for common expenses with the following language:

Each Owner shall be obligated to pay its share of Common Expenses . . . No Owner may exempt himself from liability for payment of Assessments for any reason, including waiver of use or enjoyment of any of the Common Elements or abandonment of the Owner's Unit.

Under the Declaration, no TDL owner, whether alone or collectively, may exempt themselves from liability for payment of expenses arising from maintaining or repairing common elements.

Put simply, TDL's Declaration and the Act require TDL unit owners to contribute to TDL common expenses. Equally, the expense incurred to maintain and repair TDL common elements is a common expense.

If TDL had incurred the expense of repairing the wall and roof/wall interface at issue here, there would be little dispute that the expense would be common expense because TDL's Board is empowered simply to declare such an expense a common expense. But what happens when a TDL unit owner and not the board incurs such an expense? TDL's Declaration does not prohibit one of its unit owners from making such a repair and incurring such a common element expense. To the contrary, TDL Declaration paragraph 16.2 grants individual TDL unit owners' rights against even the Association and Board for failure to comply with the Declaration requirements.

Under this analysis, the critical question becomes whether the problem and remedial work occurred in a common element. If the problem and remedial work occurred in a TDL common element, then each TDL unit owner would be obligated to pay its portion of the remedial expense unless some specific, judicially recognized exception occurred. Here, it is also important to note that neither the Act nor Declaration prohibit the obligation to contribute to common property maintenance and repair expenses from applying to common element repairs made by a TDL unit owner—as opposed to being made by TDL.

3. TDL's Common Property.

The Declaration, at paragraph 1.8.9, defines TDL's "Common

Elements” as all portions of the condominium other than the Units. The Declaration defines Units as the space from the surface of the interior of the exterior walls inward, which is otherwise known as an “Air Space Condo” because the unit is essentially the air within the unit’s walls, floor, and ceiling. The Declaration defines, at paragraph 1.8.21, Limited Common Element as a portion of the Common Elements allocated for the exclusive use of one or more but fewer than all of TDL’s Units. Hence, to the extent Lisali’s work repaired leaks in the condominium’s exterior wall, wall/roof interface detail, or in a building component benefiting the entire association, then its work occurred in a common element.

The evidence at trial established that Lisali did substantial work in the building’s common elements. All of AMEC’s reports indicate that its work occurred in the building’s exterior walls, roof, or exterior decorative columns. Loudon and Dr. Israel testified that the concern about remaining leaks shifted away from the slider doors to the walls after the fall of 2004. MH’s reports indicated that its work focused on the space between the slider doors and the exterior walls. (Ex. 22, 24) MH’s work focused on developing the condominium’s water-proofing elements. Mike Raskin (“Raskin”) of MJR and Ray Wetherholt (“Wetherholt”) of Wetherholt & Associates both testified that MH’s work focused on flashings for the space between the slider doors and the exterior walls. MH’s April 26,

2004 remedial scope of work report required that its remedial work extend at least 10” into the exterior walls. TDL then adopted this repair methodology and applied it to six other slider doors in the building.

Condominium roofs, exterior decorative columns, and exterior walls are the traditional common element portions of building, as opposed to a building’s water-proofing elements that initially may appear less categorical. In reality, water-proofing elements easily fall under the “common element” label because they serve the important function of safe-guarding the entire building.

Water-proofing elements are common elements because they keep moisture out of a condominium for everyone’s benefit. The Uniform Condominium Act of 1980 (the “UCA”) is a model act. Washington’s Condominium Act follows many aspects of the UCA. Comments to the UCA specifically define Condominium “structural components” to include those “portions of a building necessary to keep any part of the building from collapsing, and to maintain the building in weather tight condition.”

No case in Washington addresses specifically whether weather or water-proofing elements are common element. Three cases from other states however, place weather proofing elements of a building well within the categories of common elements. In *Marlyn Condominium Inc. v. McDowell*, 576 A.2d 1346 (D.C. App. 1990), the Court held that a Board

had the authority to change out windows that were part of the unit in order to install new flashings around the windows that were part of the building's common element. In *Swanson v. Parkway Estates Townhouse Ass'n*, 567 N.W.2d 767 (Minn. App. 1997), the Court required the association to reimburse a unit owner for the costs of replacing her slider doors and repairing related damage due to water intrusion from outside the building on the theory that such damages stemmed from a failed common element. Lastly, in *The Shadow Group LLC v. Heather Hills Home Owners Association*, 156 N.C. 197, 579 S.E.2d 285 (2003), the Court held that an owner had a cause of action against its association based on water entering the unit from common areas. Water proofing elements that keep water out of a building are common elements that benefit all unit owners. TDL's building has not leaked since Lisali completed its work.

MKT's on-site water-proofing person provides perhaps the best evidence when on April 10, 2004 Don Davis ("Davis") emailed, "It may not be worth the time to test the seal since I'm convinced these SGD's [sliding glass doors] have to be pulled and a pan installed to make them watertight." Davis is acknowledging in this email that the limited common element slider door seals are irrelevant to the problem of keeping the doors watertight, which will—in his opinion—only occur when he installs the Morrison Hershfield designed flashings, which he refers to as a "pan."

Hence, all the evidentiary roads lead to the conclusion that Lisali's MH and AMEC related work occurred in common elements. As such, the work triggered the contribution obligation embedded in the deeds of all TDL unit owners. Once triggered, the Declaration prohibited any unit owner from opting out of this obligation. In fact, the Declaration, at Article 16.1 grants Lisali the right to maintain an action at law or equity for the failure of the Association or its unit owners to abide by their obligation to comply with their contribution obligation.

4. Lisali Damages by Category

Lisali presented its out of pocket expenses in a number of ways at trial. Lisali's bookkeeper, Ms. Marla Riggs, testified regarding Lisali's summary of its damages presented in two different summaries. (Exs. 79, 138) Lisali even submitted copies of negotiated checks issued to pay for the expenses associated with repairing the common elements. (Ex. 80)

Lisali's interior repair expenses were generated by the following vendors: Veritox, Brent Farnsworth, Bales, Coit, All Service Glass, and Prezant. These checks totaled \$53,392.81.

The Court may award such damages to Lisali under RCW 64.34.328.

This statute provides in relevant part as follows:

Each unit owner shall afford to the association . . . and to their agents . . . access through the owner's unit and limited common elements reasonably necessary for those purposes[of repair]. *If damage is inflicted on . . . any unit through which*

access is taken . . . the association if it is responsible, shall be liable for the repair thereof. (Emphasis Added)

Declaration 10.4.4 amplifies the Act by stating in relevant part:

The Board and its agents . . . may enter any Unit or Limited Common Element when necessary in connection with any maintenance . . . for which the Board is responsible . . . and any damage caused thereby shall be repaired by the Board and paid as a common expense if the entry was . . . for the purpose of maintenance or repairs to Common or Limited Common Elements where the repairs were undertaken by or under the direction or authority of the Board; . . .

These provisions mandate that the Association be responsible for repairing the damage caused by or associated with MKT's work and MH flashings work conducted at MKT's direction. Although MKT may have offered to make some repairs before all the leaks were finally identified and remediated, TDL failed to repair or pay for any the damage caused to the Lisali Units by MKT's repair efforts. TDL's failure is in this instance a direct violation of both the Act and paragraph 10.4.4 of the Declaration.

Lisali's exterior repairs were generated by the following vendors: Amec, Inglewood, and Morrison Hershfield. The negotiated checks for these vendors equal \$52,882.84. This Court may award this amount to Lisali on its claim for contribution less Lisali's pro rata share of such an award.

In total, Lisali seeks an award of no less than \$106,275.65 on appeal to compensate it for its common element repair expenses and repair expenses caused by TDL's repair efforts.

B. The Superior Court Improperly Decided a Question of Material Fact to Award TDL Summary Judgment

Under Washington law, any claim that involves a determination of reasonableness is for a fact finder to resolve, and it is reversible error for a Court to substitute its judgment of reasonableness for that of a fact finder. The reasonableness of a party's acts is a question of fact, and if it is a material issue in resolving litigation, the granting of a summary judgment is improper. *Morris v. McNicol*, 83 Wn.2d 491, 519 P.2d 7 (1974). A finding of reasonableness is always an issue of fact for the fact finder to determine. "Whether a person's conduct has met the reasonably prudent man test is a question of fact for determination by the jury . . ." *Wood v. Seattle*, 57 Wn.2d 469, 471, 358 P.2d 140 (1960).

Not only is reasonableness a determination for a fact finder, knowledge and intent are also for a fact finder to determine. "Since knowledge is generally a question of fact, summary judgment is improper where, even though evidentiary facts are not in dispute, different inferences may be drawn there from as to ultimate facts such as intent or knowledge." *Partridge v. City of Seattle*, 49 Wn.App. 211, 741 P.2d 1039 (1987).

A determination of reasonableness, knowledge, or intent all involve drawing inferences from the facts presented. Under Washington

law, inferences must be construed in favor of the nonmoving party. “In ruling on a motion for summary judgment, the trial court is not permitted to weigh the evidence or resolve any existing factual issues.” *Fleming v. Smith*, 64 Wn.2d 181, 390 P.2d 990 (1964). “A motion for summary judgment must be denied even where the evidentiary facts are undisputed if reasonable minds could draw different conclusions therefrom.” *Fleming v. Stoddard Wendle Motor Co.*, 70 Wn.2d 465, 423 P.2d 926 (1967).

Washington’s Supreme Court found that the *reasonableness* of a party’s acts is a question of fact, and that if it is a material issue in resolving litigation, the granting of a summary judgment is improper. *Morris v. McNicol*, 83 Wn.2d 491, 519 P.2d 7 (1974) (emphasis added). In *Morris*, Appellant Morris sued several adjacent and upstream landowners for damage to his real property stemming from their use of property. The adjacent and upstream landowners had allegedly removed tons of earth that effectively re-graded the property and caused debris, sand, and gravel to flow along the stream and to accumulate at the mouth of a creek on Morris’s property. The trial court granted summary judgment in favor of all the adjacent landowners, dismissing Morris’s action for damage to his real property with prejudice.

The Washington Supreme Court ultimately reversed the trial court’s grant of summary judgment. It stated in pertinent part:

[R]espondents contend they had breached no duty owed to appellant and that the type of injury alleged afforded appellant no cause of action under the doctrine of *damnum absque injuria*...However, as the record discloses, there are questions raised as to what respondents' purpose was in grading their respective properties and in removing soil and vegetation from them...Thus, reasonableness in the instant case is a material fact question which cannot be resolved by summary judgment proceeding.

Id. at 495. Thus, in *Morris*, the adjacent landowners were asserting that they had an unequivocal right to protect their property and modify, excavate, or re-grade it to protect it. However, the Washington Supreme Court held that a material question of fact existed as to the true intent of the landowners—did they re-grade their property to protect it or to build new structures on it? As evidence existed that the landowners excavated the property in order to build upon it, the Court overturned the trial court and reinstated Morris's cause of action.

As in *Morris*, a material fact question, which could not have been resolved by summary judgment proceedings, exists here. The Order Granting Defendants' Motion states that "[t]he Court finds a complete absence of unreasonable conduct" with respect to TDL's conduct on the T-3 issue, amending the Declaration, and the Lisali Leaks. Yet, to do this the court made a factual determination that no evidence of a breach of ordinary care exists. To reach this result, the court necessarily weighed the facts to reach conclusions or decide ultimate facts.

Washington's Supreme Court went on to hold, "Whether a person's conduct has met the reasonably prudent [person] test is a question of fact for determination by the jury, unless reasonable minds could not differ in their conclusions." *Wood v. Seattle*, 57 Wn.2d 469, 471, 358 P.2d 140 (1960). Appellant Wood was injured when he fell out of a bus while attempting to exit while using crutches. Wood sued the City of Seattle for negligence in the upkeep of the bus and negligence on part of the bus driver in failing to help Wood exit the bus. The trial court ruled for summary judgment in favor of the City of Seattle, stating that no question of fact existed that Wood was contributorily negligent by law, in that Wood testified at deposition that he was aware of the worn rubber on the stairs of the bus, thought the stairs might be wet, and did not ask the driver for assistance. The Supreme Court of Washington held that the trial court erred in granting summary judgment and remanded the case.

In light of these standards, the court committed reversible error when it granted TDL's motion for summary judgment, in part, because it is a fact finder's duty to interpret the facts to decide questions of reasonableness, knowledge, intent, and to draw inferences from the evidence presented.

The dispositive question is whether the Board acted reasonably. At the summary judgment hearing, Lisali presented enough facts to

demonstrate that the Board failed to act reasonably; or at least enough evidence to raise a question of fact as to the Board member's intent. At trial, evidence came into the record that confirmed such animus and hard feelings between TDL's Board members and Lisali. Lisali also introduced evidence that the TDL's Board had acted to exclude the Lisali Units from the Tolling Agreement and had utilized MKT as its agent to investigate and resolve leaks.

To the extent that all of this evidence speaks to the TDL's intent, summary judgment in TDL's favor is only more improper. Questions of intent are always questions of fact. "Since knowledge is generally a question of fact, summary judgment is improper where, even though evidentiary facts are not in dispute, different inferences may be drawn therefrom as to ultimate facts such as intent or knowledge." *Partridge v. City of Seattle*, 49 Wn.App. 211, 741 P.2d 1039 (1987). "In ruling on a motion for summary judgment, the trial court is not permitted to weigh the evidence or resolve any existing factual issues." *Fleming v. Smith*, 64 Wn.2d 181, 390 P.2d 990 (1964). As the issues of intent are included within the reasonableness discussion above, it is enough to state that evidence that the Board's conduct was unreasonable, in bad faith, or with an improper intent to render the court's summary judgment in TDL's favor improper.

C. The Superior Court Misapplied the Law of Contracts to Sustain its Summary Judgment Award to TDL

At the September 7, 2007 summary judgment hearing, the court found that Lisali's units 501 and 502 were covered under the Tolling Agreement between MKT and TDL. A closer look at the Tolling Agreement demonstrates that Lisali's units were, in fact, not covered under the Tolling Agreement. The Tolling Agreement states, "The scope of this Agreement is limited to the Claims described in Exhibit A. This Agreement shall neither apply to nor toll any statutes of limitations for any matter, defect, construction damage and/or problem which may exist at the Project, except the Claims described in Exhibit A."¹ Exhibit A to the Tolling Agreement lists 30 repairs that MKT agreed to make in exchange for TDL's agreement to toll the statute of limitations and repose. Of those listed 30 repairs, only two items deal with leaks (# 2 and 3), and four items deal with caulking, which is intended to prevent leaks (#14, 15, 17, 19). None of the thirty listed repairs concerns Lisali's units, nor does it reference leaks affecting the units below which could have started in Lisali's units. As the scope of the agreement is limited to the items listed in Exhibit A, and none of the items in Exhibit A concern Lisali's units, those units are not covered by the Tolling Agreement.

The court extended the Tolling Agreement to cover the Lisali Units

¹ See Declaration of Jose. F. Vera, EX. 11.

by essentially interpreting the Tolling Agreement to reach the desired result. However, such a reading of the Tolling Agreement is precluded by Washington's context rule of contract interpretation.

Contract are composed of "the subject matter of the contract, the parties, the promise, the terms and conditions, and (in some but not all jurisdictions) the price or consideration." *Family Med. Bldg., Inc. v. Department of Soc. & Health Servs.*, 104 Wn.2d 105, 108, 702 P.2d 459 (1985). Interpretation of contracts may require the use of parol evidence. "[P]arol evidence is admissible...for the purpose of ascertaining the intention of the parties and properly construing the writing." *Berg v. Hudesman*, 115 Wn.2d 657, 669, 801 P.2d 222 (1990) (quoting *J.W. Seavey Hop Corp. v. Pollock*, 20 Wn.2d 337, 348-49, 147 P.2d 310 (1944)). Parol evidence admitted to interpret the meaning of what is actually contained in a contract does not alter the terms contained in the contract. *Id.* Thus, use of parol, or extrinsic, evidence as an aid to interpretation does not convert a written contract into a partly oral, partly written contract. *Id.*

Furthermore, the parol evidence rule precludes use of parol evidence to add to, subtract from, modify, or contradict the terms of a fully integrated written contract—one which is intended as a final expression of the terms of the agreement. *Berg*, 115 Wn.2d at 670; *In re Marriage of*

Schweitzer, 132 Wn.2d 318, 327, 937 P.2d 1062 (1997).

Here, the Tolling Agreement was and is a fully integrated contract. It specifically states that it only covers items directly written in Exhibit A. Exhibit A to the tolling agreement does not make any mention, directly or even by inference, to Lisali's units 501 and 502. Even assuming that the TDL or MKT asserted that they intended the agreement to apply to Lisali's units, such parol evidence cannot alter the terms of the written agreement. Here, it was error for the court to extend agreement to apply to Lisali's units.

The significance of the Tolling Agreement not applying to the Lisali units is that it forces this Court and the court below to consider whether it was reasonable for TDL not to investigate its fifth floor exterior walls and the related wall/roof interface for leaks. Especially, when no evidence indicates that TDL's board made a decision to exclude these common elements from its investigation based on the advice of any professional; or based on any reasonable reason. TDL has offered no evidence to justify its exclusion of the Lisali Units from the Tolling Agreement.

D. The Superior Court Improperly Awarded TDL Its Attorney's Fees and Cost.

An attorney's fee applicant bears the burden of proving his or her requested fee is reasonable. *Scott Fetzer Co. v. Weeks*, 122 Wn.2d 141, 151, 859 P.2d 1210 (1993). The accepted method for calculating the reasonableness of attorney's fees in Washington is the lodestar method. *Absher Constr. Co. v. Kent School Dist. No. 415*, 79 Wn. App. 841, 846-47, 917 P.2d 1086 (1996). Courts first calculate the lodestar by multiplying counsel's hourly rate by the number of hours worked. *Absher Constr.*, 79 Wn. App. at 847. Courts then adjust the lodestar downwards for wasteful or duplicative hours, or any hours spent on unsuccessful theories and claims. *Mahler v. Szucs*, 135 Wn.2d 398, 434, 957 P.2d 632 (1998); *Absher Constr.*, 79 Wn. App. at 847.

1. Fees Incurred Prior To October 3, 2002 Are Not Compensable.

Here, TDL recorded the declaration amendment granting it a right to request attorney's fees and expenses on October 3, 2002. Because such amendments are restrictive covenants they only become effective upon recordation and do not apply retroactively unless by their express terms. TDL's submission requests fees and expenses incurred prior to October 3, 2002 in the amount of \$6,275.50. The amount is not compensable.

2. Fees Incurred Related To Insurance Coverage Are Not Compensable.

Here, TDL's request for fees and expenses is compensable only to the extent the TDL incurred them in connection with the dispute about Lisali's efforts to remediate water intrusion issues at Tiara De Lago. TDL's fee submission includes \$3,199.50 in attorney's fees incurred in connection with obtaining insurance coverage. Lisali is not responsible for these fees under the Third Amendment to the Declaration because they are not incurred in connection with the underlying dispute.

3. Fees Incurred For Unsuccessful Motions Are Not Compensable.

Here, TDL Association filed three summary judgment motions with the first motion being based on the wrong statute and citing an unpublished appellate decision. The TDL dropped this motion and then noted its next motion for summary judgment which was denied as to TDL. Finally, TDL filed a third motion for summary judgment which was also denied as to the Association. These three motions constitute unsuccessful claims and theories that are not compensable under Washington Law.

TDL incurred \$12,079.50 in fees related to these three failed motions.

4. Fees Incurred Related To Claims Between Lisali And Individual Board Members Are Not Compensable.

Here, the Declaration's Third Amendment does not award fees and costs incurred in connection with disputes between unit owners and individual board members. TDL incurred such fees during its second motion for summary judgment and related motions at the appellate level. In any event, TDL failed to submit any fee request related to the Judgment in favor of the individual board members within 10 days of the Judgment as required by rule.

The Association incurred \$8,657.60 in fees related to claims between Lisali and individual board members.

5. Fees Incurred Related To The Association Shadowing The MKT Litigation Are Not Compensable.

Here, TDL apparently shadowed the progress of Lisali's litigation with the developer, MKT. Frankly, some of the descriptions suggest that TDL participated in the litigation by consultation or at least coordinating their litigation efforts with MKT's litigation efforts.

Based on identifiable work descriptions, TDL incurred \$1,557 in its shadowing efforts, but a large number of time entries may also reflect such an effort but lack a sufficiently clear work description to be identified the as such fees.

6. Costs Incurred Without Sufficient Description Or Related To Transportation Are Not Compensable.

Here, TDL also incurred a large number of costs without indicating any association to any issue or part of the dispute. Pointedly, the entries lack sufficient detail to enable to Trial Court to make a sufficient factual finding tying such costs to authority granting payment of such costs.

TDL also is requesting costs and expenses for Dr. Israel for the parties' mediation without showing any need why it was necessary to incur such costs as opposed to having Dr. Israel participate in the mediation via the telephone. Lisali used the telephone to enable it to participate in the mediation yet TDL failed to take such an obvious cost savings measure. Such travel expenses are not compensable as reasonable expenses because TDL failed to offer any showing as to why such expenses were reasonable or even necessary.

TDL incurred \$1,521 in nondescript fees and costs and \$1,162.32 for unreasonable transportation and meal costs. The total amount of these two items is \$2,683.32.

E. Lisali Entitled to its Fees on Appeal Should it Prevail

Should Lisali prevail in this matter then it is entitled to an award of attorney's fees and costs pursuant to the Third Amendment to the TDL Declaration. (Ex. 1) The Third Amendment provides as follows:

In the event of a dispute which results in a lawsuit *between*

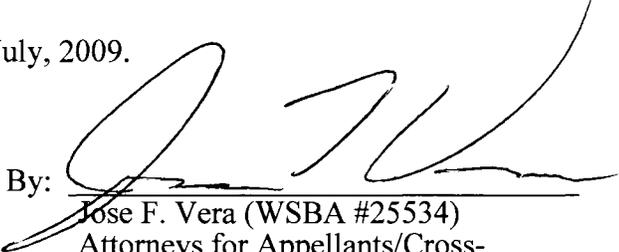
the Association and a Unit Owner, the substantially prevailing party in the lawsuit, including any appeal thereof, shall be entitled to recover its attorney's fees and costs incurred in connection with the dispute.

Hence, if this Court finds that Lisali is entitled to contribution from the other TDL unit owners for its common element repair expenses, then Lisali is also entitled to an award of its fees and costs incurred both at trial and on appeal.

VIII. CONCLUSION

For all these reasons, Lisali respectfully requests that the Court reverse the lower court's judgment and findings, as well as award Lisali its attorney's fees and costs.

Dated this 27 day of July, 2009.

By: 

Jose F. Vera (WSBA #25534)
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Respondent LISALI REVOCABLE
TRUST

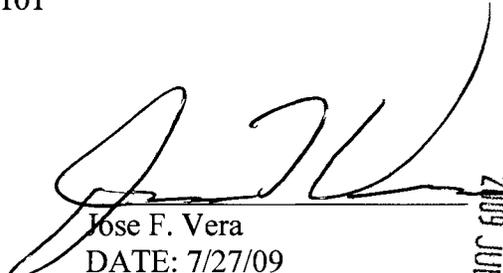
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CERTIFICATE OF SERVICE

I, Jose F. Vera, hereby declare under penalty of perjury of the laws of Washington State, that on July 27, 2009, I caused a true and correct copy of the documents listed below to be delivered to the parties via hand delivery and facsimile.

DOCUMENTS: Opening Brief of Appellant Lisali
 Revocable Trust

PARTIES: Deborah L. Carstens, Attorney for Respondent
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PLACE: Seattle, WA

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