

No. 67267-3

IN THE COURT OF APPEALS
STATE OF WASHINGTON
DIVISION I

BELLEVUE PACIFIC CENTER LIMITED PARTNERSHIP,
a Washington limited partnership,

Plaintiff/Respondent,

v.

BELLEVUE PACIFIC TOWER CONDOMINIUM OWNERS
ASSOCIATION, a Washington non-profit corporation,

Defendant/Appellant.

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2011 DEC -5 PM 3:58

APPELLANT BELLEVUE PACIFIC TOWER CONDOMINIUM
OWNERS ASSOCIATION OPENING BRIEF

Christopher I. Brain (WSBA #5054)
Mary B. Reiten (WSBA #33623)
TOUSLEY BRAIN STEPHENS PLLC
1700 Seventh Avenue, Suite 2200
Seattle, Washington 98101
206.682.5600

Attorneys for Defendant/Appellant

ORIGINAL

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I. INTRODUCTION

Appellant, the Bellevue Pacific Tower Condominium Owners Association (“Tower COA”) manages the Bellevue Pacific Tower Condominium (“Tower”). The Tower condominium is a unit member of the Bellevue Pacific Center Condominium (“Center”) – that is, the Tower is a condominium within a condominium. The declarant for both condominiums is Bellevue Pacific Center Limited Partnership (“Limited”), the respondent.

The Center is composed of three units: the Commercial Unit, the Garage Unit and the Residential Unit. The Residential Unit is referred to here as the Tower. (CP 196.) The Tower is composed of 171 residential units. (CP 84.) Both the Center and the Tower have their own declarations that govern the apportionment of common area and limited common area within the respective condominium boundaries. This dispute arose because Limited wants to allocate nine courtyard parking spaces that are limited common area of the Center (allocated to the Tower through the Center declaration) to individual unit owners of the Tower. Because Limited did not reserve this right to itself (the declarant) in the Center Declaration (“Center Dec.”) or the Tower Declaration (“Tower

Dec.”), these nine courtyard spaces cannot be re-allocated to individual Tower unit owners as a matter of law.

However, the essence of this dispute never got before the trial court. Relying on a 2003 Memorandum of Understanding (“MOU”) and stipulated judgment between the Tower COA, the Center and Limited, Limited brought a motion for summary judgment claiming that the Tower COA had waived its right to bring these claims regarding allocation of the nine courtyard stalls. Such is not the case as under Washington law, these claims cannot be waived. Further, the MOU does not cover the claims at issue.

On summary judgment, the trial court dismissed the Tower COA’s counterclaims based on this purported waiver. However, it was not asked to, nor did it rule on, the Tower COA’s affirmative defenses. In February 2011, the Tower COA moved the trial court to convert those affirmative defenses into counterclaims. That motion was denied without comment, but kept the affirmative defenses intact. Despite the fact that the court had never been asked, and had never held, that the Tower COA’s affirmative defenses were waived, at trial the Tower COA was not permitted to put on any affirmative defenses. The court pointed to the summary judgment ruling as the basis for so holding. Subsequently, judgment was issued in

Limited's favor and attorneys' fees and costs assessed against the Tower COA. The Tower COA seeks reversal of the summary judgment motion and all actions of the trial court that flowed from that erroneous order.

II. ASSIGNMENTS OF ERROR

1. The trial court's "Order Granting Partial Summary Judgment" to Limited dated May 7, 2010 was in error.
2. The trial court's "Order Denying Defendant's Motion for Reconsideration of Order Granting Partial Summary Judgment" dated May 26, 2010 was in error.
3. The trial court erred in refusing to permit the Tower COA to put on evidence of its affirmative defenses and as a result, its findings, specifically findings of fact 2, 14, and 16-18 and conclusions of law 1-6, were in error as was the subsequent judgment.
4. The trial court erred in awarding attorneys' fees and costs, specifically finding of fact 1 and 3 and conclusion 3, as well as the subsequent judgment entered.

III. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Does the Condo Act prohibit the Tower COA, the Center and/or Limited from releasing claims related to the ownership, possession

and use of limited common areas without amending the declaration pursuant to RCW 64.34.030 and RCW 64.34.228? (Assignment 1, 2.)

2. Does RCW 64.34.216(1)(j) require the declarant of a condominium to reserve development rights in order for those development rights to be valid? (Assignment 3.)

3. Does the release contained in the 2003 MOU contemplate the release of all future claims based on the interpretation of Tower Dec. and Center Dec., when such claims had not arisen at the time the 2003 MOU was signed? (Assignment 3.)

4. Does the release contained in the 2003 MOU contemplate the release of all claims related to the ownership, possession and use of the courtyard parking stalls when the issue of ownership, possession and use had not been in dispute since at least 2000? (Assignment 1, 2.)

5. Does the release contained in the 2003 MOU contemplate the release of any dispute related to the ownership, possession and use of the courtyard stalls when the 2003 MOU contains specific language related to the issues resolved that subordinates the more general language of the release? (Assignment 1, 2.)

6. Does the release contained in the 2003 MOU contemplate the release of any dispute related to the interpretation of the Tower Dec.

and Center Dec. in general when the 2003 MOU does not contain any language that the parties have or will agree with Limited's interpretation of these declarations in the past and in the future (and even if such interpretations are contrary to Washington law)? (Assignment 1, 2, 3.)

7. Did Limited's allocation of all nine courtyard stalls to Unit 703 under the 11th Amendment violate the Tower Dec. in that such allocation was not the initial allocation to Unit 703 and Limited reserved only the right to make the initial allocation? (Assignment 3.)

8. Does the indefinite extension of the development period by Limited (effectuated by its indefinite rental of a unit owned by Limited) violate RCW 64.34.216(1)(j), which requires that the time period for the expiration of development rights be set forth in the declaration? (Assignment 3.)

9. Did the trial court err when it awarded attorneys' fees and costs, when the 2003 MOU does not provide for such an award? (Assignment 4.)

IV. STATEMENT OF THE CASE

Both the Center and Tower condominiums were created under the Condominium Act, RCW 64.34 *et seq.* ("Condo Act"), which governs

condominiums created after July 1, 1990. Each has its own declaration that governs the rights of each unit owner – in the case of the Center, the Commercial, Garage and Tower units, and in the case of the Tower, the 171 residential unit owners. (CP 188-232 (Center Dec.); CP 76-144 (Tower Dec.)) Each declaration designates certain spaces as common elements, limited common elements and defines unit boundaries. These elements (or areas) have specific definitions provided by the Condo Act.

A “Common Element” is “all portions of a condominium other than the units.” RCW 64.34.020(6). A “Limited Common Element” is “a portion of the common elements allocated by the declaration or by operation of RCW 64.34.204(2) or (4) for the exclusive use of one or more but fewer than all of the units.” RCW 64.34.204 defines unit boundaries, essentially as the air space bounded by the finished surfaces within a unit. Everything without the finished surface is common area, unless it serves exclusively one or more, but less than all units, then it is a limited common element of those units it serves (i.e. chutes, flues, ducts, columns, shutters, window boxes, stoops, porches, etc.). The resolution to this case turns on the distinction between “Units” and “Limited Common Area” in the Center Dec. and the failure of the declarant, Limited, to reserve the

right to re-allocate the nine courtyard parking stalls to Tower residents under either the Center Dec. or the Tower Dec.

A. The Center Dec. Describes Three Types of Parking at the Tower

The Center Dec. describes three types of parking for the Tower. First, the Center Dec. Art. 4.5.1 describes the unit boundaries of the Tower as composed of those floors above the 6th floor of the building (which also houses the Commercial Unit) and a portion of the P-1 parking level. (CP 196.) That is, within the boundaries of the Tower unit are parking stalls. But this parking is within the unit boundaries of the Tower, and belongs to the Tower, not the Center. As a result, the Center Declaration is silent on the number of stalls within the boundaries of the Tower. (See id.) The Center Declaration also fails to define these parking areas within Residential Unit boundaries as common elements, limited common elements or units. (See id.) The Center Dec. does not even describe the 122 spaces on P-1 as parking for the Tower. Rather, it simply provides:

The lower portion of the Residential Unit includes a portion of Level P-1 of the Building as shown on the Survey Map and Plans. Otherwise the boundaries of this portion of the [Tower] are the same as those of the Garage Unit described in Section 4.5.3 below.

(CP 196; see also TE 45.)

Second, Center Dec. Art. 6.6 identifies 45 additional stalls on floor 1 that may be allocated to either the Garage unit or the Tower at a future date. (CP 199.) Once these spaces are allocated, they will become limited common elements of the Garage unit, the Tower unit, or both. (Id.) That is, these 45 parking stalls are not within the unit boundaries of the Tower, but may be allocated to the Tower by the Center Dec. as a limited common element of the Center for the Tower's use.

Third, Center Dec. Art. 6.2.5 allocates nine courtyard parking stalls to the Tower solely for the Tower's use and identifies those spaces as "RLCEs" on the survey map and plans of the Center condominium. (CP 197; see also TE 45.) Again, that means that these nine courtyard stalls are not within the unit boundaries of the Tower, but have been allocated to the Tower by the Center Dec. as a limited common element of the Center for the Tower's use.

B. The Tower Declaration Describes Parking Stalls That May be Allocated to Residential Unit Owners by Limited as Declarant

Tower Dec. Art. 3.1 describes the Tower with reference to the description in the Center Dec. (CP 84.) It goes on to provide that there

are 131 parking spaces in the Tower – 122 located on P-1 and nine in the courtyard and provides that a further 45 stalls on floor 1 may be allocated to the Tower under the Center Dec. at a future date. (CP 84.)

Tower Dec. Art. 6.5 provides for the allocation of parking stalls to individual units by the declarant, Limited. (CP 86.) Unless the right of reallocation of a limited common element assigned by the Center to the Tower is specifically reserved by the declarant, by definition, the stalls that may be allocated to individual residential units must be located within the boundaries of the Tower. Here, Limited reserved the right to reallocate the 45 stalls in floor 1 should they be assigned to the Tower, but it made no such reservation for the nine courtyard stalls:

References to parking spaces ... in this Article 6 include ... parking spaces which may be allocated to the [Tower] in accordance with the terms of the Articles 6 and 25 of the [Center Dec.]. The use of such spaces is also subject to the terms and conditions set forth in the [Center Dec.]

(CP 86.)

The use of the word “may” refers to the second category of parking spaces referenced in the Center Dec. – the 45 spaces on floor 1 that may be assigned to the Tower, the Garage unit or both. It does not refer to the nine courtyard parking stalls, which had already been assigned to the

Tower as Center limited common elements. The fact that Limited made this reservation to reallocate in the Tower Dec. is important, for as described infra in Section V.C., the Condo Act requires a declarant to specifically identify those limited common elements that may be allocated to individual unit owners and the time period in which they will be allocated. Here, the declarant made no reservation in the Center Dec. to further allocate the nine parking stalls to individual residential unit owners of the Tower. Nor does the Tower Dec. reserve the right to re-allocate limited common elements of the Center, assigned to the Tower, to individual residential unit owners – other than the 45 stalls located on floor 1. (Art. 6 at CP 86.)

Because Limited made no reservation of rights, Article 6.7 of the Center Dec. governs. This article provides that unless a limited common area is allocated to more than one unit, and other than as provided in Center Dec. Art. 6.6, only the owner(s) to whom the RLCEs is assigned has the right to use those RLCEs. (CP 200.) Article 6.7 means that the Tower has the right to exclude all others, including the declarant, from the parking in the courtyard.

In other words, the Declarant cannot reallocate the courtyard stalls because: (1) they are limited common elements of the Center assigned to

the Tower; and (2) the Declarant did not reserve the right to reallocate these Center limited common elements to Tower residential unit owners under either the Center Dec. or the Tower Dec.

C. The Tower COA did not Waive the Right to Challenge Incorrect Parking Stall Allocations by Limited

Limited used the nine courtyard spaces through December 31, 1999 as set forth in the Center Dec., Art. 25.1.2 and the Tower Dec., Art. 25.1.2. Both of these articles reserved to the declarant the right to use the courtyard parking for purposes of facilitating sales of condominium units. (CP 118 (Tower Dec.), 218-19 (Center Dec.)) During that time period, Limited permitted Tower guests to use the courtyard stalls “subject to special sales and marketing rights during sales hours of operation.” (CP 395, 402.) After December 31, 1999, the courtyard stalls reverted to the Tower. At that time, Limited asserted its right to use the stalls as unallocated parking of the Tower. (CP 396.)

The Board President at that time, Doug Myers, did not dispute Limited’s assertion after reading the Tower Dec. (though he did not read the Center Dec.) and wrote a memo to the members of the Tower COA on that issue. (CP 394-99.) He also testified that he had no memory of hiring counsel to investigate the issue. (CP 396.) While it appears that there may

have been an internal dispute among the unit owners of the Tower, no evidence in the records shows that the dispute ever rose to a formal dispute with Limited. Mr. Myers' memo describes his interpretation of the Tower Dec. and provides that:

The Declarant [Limited] hasn't allocated the spaces in the drive court. As the [Tower COA] President I have asked the Declarant to provide a cost for allocating any or all of the drive court spaces. I have also asked the Declarant to provide a cost for renting any or all spaces. The Declarant may decide that these spaces are not for rent or allocation at this time, that's within the Declarant's rights.

(CP 398.)

In contrast, Oscar Del Moro, Limited's representative on the Tower COA board, testified that a dispute did exist between Limited and the Tower COA as to the allocation of courtyard parking to individual Tower residents, and in fact commissioned an independent study by attorneys to advise them on the matter. (CP 341.) Mr. Del Moro testified that ultimately the Board and their attorneys decided that Limited did control the stalls, and the dispute ended. (CP 341-42.) Since that time, the Tower COA rented courtyard stalls from Limited for use by Tower unit owners until this dispute came to a head in 2007. (CP 341-43.)

In 2001, the Tower COA filed suit against Limited on completely different issues related to the validity of assessments, allocation of utility expenses, allocation of insurance expenses, and other matters. (CP 342.) All parties agree that Limited's alleged right to allocate courtyard parking stalls was not raised or even addressed in this litigation. (CP 342, RP 85:23-87:15.)

That litigation settled in 2003 and the parties executed an MOU and stipulated judgment. (CP 348-50 (MOU); CP 275-80 (SJ).) The MOU provides in paragraph two:

Except as to the claims excluded, and subject to the other terms of this agreement, each party releases every other party from any and all claims which have been or could have been asserted in the Lawsuit, as well as all past and present officers, directors, attorneys, insurers and other agents of the parties.

(CP 348.) Limited argues that by signing this agreement with this release provision, the Tower COA released any claim it had to a correct, legal interpretation of its property rights in the courtyard stalls. (See CP 45-49.)

D. The Genesis of the Current Dispute

The current dispute began January 4, 2008, when then Tower COA President, Victoria Morgan, informed Limited that the Tower COA would

no longer pay rent for the privilege of parking in the courtyard, and gave notice that it contested Limited's interpretation of the Center Dec. and the Tower Dec. She explained that the failure to reserve the right to reallocate the nine courtyard stalls in either declaration meant that the Tower controlled them, not Limited. (CP 291-92.) On January 11, 2009, the Tower COA recorded a "Notice of Ownership," which gave notice to the world that the Tower COA asserted control over the courtyard parking spaces. The notice provides in pertinent part:

Please take notice and be advised that the nine (9) exterior (exposed) parking spaces around the circular driveway ("Parking Spaces") which extends (*sic*) from the fourth (4th) floor level of the building that is the subject hereof were allocated on June 28, 1995 exclusively to the Residential Unit

The Parking Spaces are owned solely and exclusively by the Residential Unit and under the sole and exclusive control of the [Tower COA]. The Parking Spaces may not be sold, transferred, reallocated, assigned, leased, rented, or used by anyone other than the Residential unit that is controlled by the [Tower COA].

(CP 294-95, emphasis in original.)

Limited disagreed with the Tower COA's position. In response to the Notice of Ownership, on April 6, 2009, Limited recorded the 11th Amendment to the Tower Dec. The 11th Amendment allocated each of

the courtyard parking stalls to Unit 703 – a small, studio unit owned by Limited. (CP 241-49.) As discussed infra in Section V.F., this allocation to Unit 703 violates a different provision of the Tower Dec. and raised by the Tower COA as an affirmative defense. But because the Tower COA was not permitted to put on any of its affirmative defenses that issue was never tried. (See RP 5:6-7:7.)

On August 15, 2009, the Tower COA adopted the 12th Amendment to the Tower Dec. This amendment purports to delete the 11th Amendment in its entirety. (CP 300-16.)

In August 2009, Limited delivered to the Tower COA a 10-day notice to pay rent or quit the premises. (TE 36.) In response, the Tower COA surrendered the courtyard parking stalls to Limited. (TE 38.) Despite the fact that the premises were surrendered, Limited made no effort to exert control over these spaces by performing such acts as putting up signs, painting “reserved” on the asphalt of the stalls, placing warning notices on unpermitted vehicles, ticketing, or towing vehicles. Further, they made no complaints to the Tower COA regarding unauthorized vehicles or requested that vehicles be towed. (CP 623-24.) Rather, Limited filed this action.

E. The Tower COA's Affirmative Defenses Should Have Been Allowed at Trial

Limited filed a complaint against the Tower COA on August 31, 2009, essentially seeking a declaration that it owned the nine parking stalls located in the courtyard area of the entrance to the residential condominium represented by the Tower and quieting title to them. (CP 1-8.) The Tower COA filed an answer, affirmative defenses and counterclaims. The affirmative defenses asserted were (1) inequitable conduct and unclean hands; (2) misrepresentation and breach of fiduciary duty; and (3) breach of RCW 64.34.216(i), (j) and RCW 64.24.228. (CP 9-21.) Even assuming the trial court's decision on waiver (discussed infra) is correct, the affirmative defenses based on the Condo Act should have been allowed at trial because they did not arise until 2009.

Pursuant to RCW 64.34.216(j), the Tower Dec. reserves to the declarant, Limited, certain rights called "Development Rights" including the right to make the initial allocation of parking spaces assigned to individual units. Tower Dec. Art. 25.2.2 provides:

25.2.2 Storage and Parking Allocations. Declarant reserves the right to make the **initial** allocation of storage areas and parking spaces as Limited Common Element to particular Unit(s), as described in Section 6.5 with such allocations to be made in Schedule B attached hereto (or by

amendments thereto). With respect to each Unit, Declarant shall make such allocations prior to or contemporaneously with the closing of the sale of such Unit by Declarant. At least annually, the Declarant shall record an amendment to Schedule B identifying the allocations made to date. Once the Declarant's right to make such allocations has expired, the balance of any parking spaces and storage areas, if any, not so allocated to specific Units shall continue as part of the Common Elements (not as Limited Common Elements) to be used in accordance with the rules and regulations established from time to time by the Board.

(CP 118, **bold** emphasis added.) Under section 25.2.5 of the Tower Declaration, Development Rights “continue so long a Declarant owns one or more Units in the Condominium.” (Id.)

As of 2008 (and currently), all Tower units have sold except for Unit 703, a studio unit, and penthouse units 2401 and 2402, all three of which belong to Limited. (CP 706-10.) In December 2007, Limited sold its interest in the Garage unit and Commercial unit of the Center; hence the three residential units in the Tower represent Limited's only remaining ownership interest. (TE 46.)

Limited regularly exercised its right to make initial parking allocations to Tower units before the sale of those units and at least annually filed amendments to Schedule B of the Tower Dec. identifying

the initial allocation of parking stalls to the Tower units. (CP 709-10.) In 2008, Limited filed the 10th Amendment, allocating parking stalls to the three units it still owned in preparation for selling them. (CP 714-22.) One parking stall identified as Stall No. 70 was allocated to unit 703 by the 10th Amendment. (CP 717.) The two penthouse suites owned by Limited, units 2401 and 2402, were also given initial parking allocations of two or three spaces each. (CP 721.) After these allocations, no other units owned by Limited remained to which an initial parking allocation had not been made. (CP 708.)

Further, RCW 64.34.216(j) requires that the development period ending date be set forth in the declaration. But no development has taken place since 1995. (CP 707:11-15.) Further, by recording the Tenth Amendment in 2008 Limited completed its initial allocations to the units it owns in the Tower, which it is permitted to do “prior to or contemporaneously with the closing of the sale of such Unit by Declarant.” (CP 118.) Limited has no intention of putting Unit 703 on the market at this time because it is rented. (CP 752:22-25.) In contrast, both of the penthouse units are being actively marketed even though only one is listed on the multiple listing service for cost reasons. (CP 749:10-750:10.)

Further, the renter of Unit 703 does not have access to any parking spaces.
(CP 752:5-11.)

Tower COA's affirmative defenses, pursuant to RCW 64.34.216(j), should not have been prohibited as they did not arise until the 10th Amendment was filed in 2008 and could not have been waived in 2003 even assuming such waiver is possible. (CP 714-22.) That is, once Limited made its "initial" allocations of parking stalls to units 703, 2401 and 2402, Limited's right to make further (additional) allocation of parking stalls terminated and all remaining stalls became part of the common elements under the exclusive control of the Tower COA. (CP 612-22.) This action further terminated the Development Period as to initial parking allocations as no further initial parking allocations remained to be made.

F. The Trial Court Dismissed the Tower COA's Counterclaims Based on the 2003 MOU

Limited brought a motion for summary judgment to dismiss the Tower COA's claim both (1) on the merits, and (2) the waiver contained in the 2003 MOU. (See CP 27-51.) On May 7, 2010, the trial court granted Limited's motion for partial summary judgment. (CP 491-92.) However, the trial court struck the following language from the order:

The Court declares that the nine courtyard parking stalls located at the [Tower] were properly allocated by [Limited], as declarant, to Unit 703 via Amendment #11 to the [Tower Dec.]. The “Notice of ownership of Exterior Parking Spaces” recorded under King County Records and Elections File No. 20080114000895 is invalid and of no force or effect. That portion of Amendment #12 to the [Tower Dec.] that purports to rescind and invalidate Amendment #11 is also declared invalid and of no force or effect.

(Id.) The order simply provides that Limited’ motion is granted. (See generally CR 535-77 (Tx of MSJ Hearing).) Indeed, the trial court expressly rejected these findings stating: “[T]he language in the [proposed] order says that ‘the Court declares that the nine courtyard parking stalls located in the [Tower] were properly allocated.’ That is really not my finding. It is any claim about the allocation was waived in the release is really what I have found.” (CP 577.) Limited’s motion asked the trial court to dismiss the Tower COA’s counterclaims, which it did based on the release language of the 2003 MOU. Both Limited motion and the trial court’s order are silent as to the Tower COA’s affirmative defenses.

The Tower COA moved for reconsideration of the trial court’s ruling, raising the antiwaiver provision of the Condo Act, RCW

64.34.030. (CP 493-512.) The trial court denied the motion, again remaining silent on the Tower COA's affirmative defenses. (CP 609-11.)

In February 2011, the Tower COA moved to convert its affirmative defenses to counterclaims. (See CP 612-21.) The trial court denied that motion, but did not make any indication that it considered the affirmative defenses waived by the release language in the MOU. (CP 795-96.) In reliance on the court's order and believing that its affirmative defenses remained viable, the Tower COA commenced preparation for trial.

On the first day of trial, and after opening statements, the trial court (a different judge than had issued the pre trial rulings) held that the Tower COA's affirmative defenses had been waived under the 2003 MOU:

So let's get on the same page now. I reviewed the decision and more importantly, I spoke with Judge Gonzalez who also reviewed the decision and confirmed that the scope of this trial's damages and affirmative defenses to damages, not affirmative defenses to the right to damages, so – and I don't – you know, I don't express any opinion about whether that was right or not. It was the law of the case and it's its posture today, so that's the way we're going to proceed to litigate this.

(RP 5:6-14.)

Tower COA's attorney objected to limiting the scope of trial:

MR. BRAIN: Our position with respect to the 25.2.2 is that that issue could not have been raised prior to the initial –

THE COURT: What's 25.2.2?

MR. BRAIN: You Honor, that's the provision that says that storage and parking allocation – remember, that's the one to make an initial allocation. This was not argued before.

THE COURT: Okay. Now you're back into the other issue. I know where you're going now. Your position is that Judge Gonzalez is wrong.

MR. BRAIN: Not so much because he never – this was never placed before him. He – Judge Gonzalez was dealing with Center versus Tower allocation, not 25.2.2 allocation. And the reason for that is this issue did not arise – and again, I'm making this for the record. It did not arise until there was the allocation in the 10th amendment which was September of 2008 when every unit had received an allocation.

THE COURT: I recognize that's your position. You don't have to reply. Judge Gonzalez ruled that this claim, which he considered to be a claim, was covered by the release.

(RP 6:9-7:7.)

V. ARGUMENT AND AUTHORITY

A. **The Condo Act Prohibits Waiver of Property Rights Belonging to Unit Owners**

The appellate court reviews summary judgment orders *de novo*, engaging in the same inquiry as the trial court. Green v. Normandy Park, 137 Wn. App. 665, 681, 151 P.3d 1038 (2007). The order will only be sustained if, when considering all the evidence in the light most favorable to the non-moving party, no genuine issue of material fact exists. Id. Here, the Condo Act prohibits waiver by the Tower COA of property rights that belong to unit owners and the trial court erred by granting summary judgment and denying reconsideration on these grounds. RCW 64.34.030.

B. **RCW 64.34.030 Prohibits Waiver of Rights Under RCW 64.34.228**

The trial court held that the waiver and release language contained in the MOU signed in 2003 waived the Tower COA's right to assert that Limited did not have the legal power under the Condo Act, the Center Dec. or the Tower Dec. to control the courtyard stalls. But RCW 64.34.030 provides that such claims may not be waived unless expressly authorized by the Condo Act:

Except as expressly provided in this chapter, provisions of this chapter may not be varied by agreement, and rights conferred by this chapter may not be waived. A declarant may not act under a power of attorney or use any other device to evade the limitations or prohibitions of this chapter or the declaration.

The drafters of the Uniform Condominium Act (adopted in part by the Washington legislature) indicate in their comments that they included this anti-waiver provision because “of the need to protect purchasers, lenders, and declarants.” Uniform Condominium Act § 1-104 (Amended 1980). The comments go on to provide that:

One of the consumer protections in this Act is the requirement for consent by specified percentages of unit owners to particular actions or changes in the declaration. In order to prevent declarants from evading these requirements by obtaining powers of attorney from all unit owners, or in some other fashion controlling the votes of unit owners, this section forbids the use by a declarant of any device to evade the limitations or prohibitions of the Act or of the declaration.

Id. This commentary reflects applicable Washington law. The Washington Supreme Court has held that the Condominium Act is designed to protect condominium purchasers. One Pac. Towers Homeowners’ Ass’n v. Hal Real Estate Inv., Inc., 148 Wn. 2d 319, 337,

61 P.3d 1094 (2002). Its various provisions “should be construed with this purpose as controlling.” Id.

Hence, although the Tower COA board may have the power to make contracts (RCW 64.34.304(e)), it does not have the power to agree to a reallocation of limited common elements of the Center without further actions being taken as per RCW 64.34.228. RCW 64.34.228(2) provides in pertinent part that:

Except in the case of reallocation being made by a declarant pursuant to a development right reserved in the declaration, a limited common element may only be relocated between units with the approval of the board of directors and by an amendment to the declaration executed by the owners of the units to which the limited common element was and will be allocated.

That is, unless the right to reallocate is specifically reserved as a development right in the declaration, the reallocation of a limited common element from one unit to another cannot be accomplished without an amendment to the declaration.

Here, the Center Dec. allocates the courtyard stalls to the Tower as limited common area. Neither the Center Dec. nor the Tower Dec. contains the right to reallocate those stalls to Tower unit owners (discussed supra in Section IV.B., and infra in Section V.C.). Hence, the

only means of accomplishing legal reallocation of those stalls to individual Tower unit owners would be an amendment of the Center Dec. signed by the Tower COA, the Center COA and the unit owner to whom the stall would be assigned (whether that unit owner be Limited or another party). Such an amendment never took place. And under RCW 64.34.030, neither the Tower COA board nor the Center condominium association board had any power to waive these statutory provisions in settlement of the 2003 litigation.

C. Development Rights Must be Reserved in the Declaration to be Valid

Under RCW 64.34.216(1)(j), development rights reserved to the declarant must be set forth in the declaration:

(1) The declaration for a condominium must contain:

...

(j) A description of any development rights and other special declarant rights under RCW 64.34.020(29) reserved by the declarant, together with a description of the real property to which the development rights apply, and a time limit within which each of those rights must be exercised

Development rights include the right to “reallocate limited common elements with respect to units that have not been conveyed by the declarant.” RCW 64.34.020(16)(e).

The development rights reserved by Limited in the Center Dec. are contained in Article 25. As to the right to reallocate limited common area to other units, the Center Dec. provides that the declarant, Limited, “reserves the right to make the initial allocation of storage areas and parking spaces as Limited Common Elements to particular Unit(s), as described in Sections 6.5 and 6.6...” (CP 219.) As pointed out above, Article 6.6 only addresses the 45 spaces on floor 1 that may be allocated to the Tower, the Garage unit, or both at a later date. (CP 199.)

Under the Tower Dec., development rights are also governed by Article 25. As to the right to reallocate limited common elements to units, Article 25.2.2 provides that Limited, “reserves the right to make the initial allocation of storage areas and parking spaces as Limited Common Element (*sic*) to particular Unit(s), as described in Section 6.5 ...” (CP 118.) Again, as described above, Article 6.5 provides that references to parking include “parking spaces which may be allocated to the [Tower] in accordance with the terms of Articles 6 and 25 of the [Center Dec.]” (CP 86, emphasis added.)

When the Tower Dec. Art. 25.2.2 and 6.5 are read in the context of Center Dec. Art. 25.2.2. and 6.6, it is apparent that the word “may” as used in both declarations refers to parking stalls that may be allocated to

the Tower at a later date – the 45 stalls on floor 1. Logically, then, parking stalls that have already been assigned to the Tower under the Center Dec. are not included in the development rights reservation.

The two declarations are not ambiguous on this point.¹

Declarations are subject to the same rules of construction as contracts.

Hollis v. Garwall, Inc., 137 Wn.2d 683, 695-96, 974 P.2d 836 (1999). An ambiguity will not be read into a contract “where it can reasonably be avoided by reading the contract as a whole.” McGary v. Westlake Investors, 99 Wn.2d 280, 285, 661 P.2d 971 (1983) (citations omitted).

Where contract interpretation does not depend on the credibility of extrinsic evidence or on a choice among reasonable inferences to be drawn from extrinsic evidence, the court may determine the meaning of the contract as a matter of law. Berg v. Hudesman, 115 Wn.2d 657, 667-68, 801 P.2d 222 (1990) (adopting Restatement (Second) of Contracts § 212). However, there does not have to be an apparent ambiguity in a contract term for the court to engage in examination of the meaning of that term. See Berg, 115 Wn.2d at 666 (rejecting plain meaning rule and adopting context rule).

To determine the meaning of an undefined term used in a contract, one looks at the words and phrases surrounding the term for guidance. Wheeler v. Rocky Mountain Fire & Cas. Co., 124 Wn. App. 858, 872, 103 P.3d 240 (2004); see also Restatement (Second) of Contracts §203(c) (1981) (providing that specific terms and exact terms are given greater weight than general language). Here, the word “may” is used in the two declarations in the context of parking stalls that “may” be allocated to the Tower in the future by the Center. Such a reference logically excludes all parking stalls that have already been allocated to the Tower by the Center.

The courtyard stalls were allocated to the Tower under Article 6.2.5 of the Center Dec. (CP 197.) Because no provision permits reallocation of these stalls to individual Tower unit owners, they are governed by Article 6.7 of the Center Dec., and may be used by the Tower COA freely and without interference by Limited.

¹ The real issue is wrapping one’s head around the difference between a limited common element of the Center and a limited common element of the Tower and the respective rights that attach to each.

D. Even if the Anti Waiver Provision of the Condo Act Does Not Apply, the Right to Challenge Limited's Control of the Courtyard was not Waived

Contract law governs the interpretation of a release. Nationwide Mut. Fire Ins. Co. v. Watson, 120 Wn.2d 178, 187, 840 P.2d 851 (1992). “Two competing policies are considered” when determining whether a particular claim is covered by a release. Id. “The law favors just compensation of accident victims. However the law also favors private settlement of disputes. Releases are therefore given great weight to support the finality of those settlements.” Id. Yet, when the parties do not contemplate that a specific claim will be covered by a release, the courts will not interpret the release to incorporate that claim. Richardson v. Pac. Power & Light Co., 11 Wn.2d 288, 315-16, 118 Wn.2d 288 (1941).

For example, in Richardson v. Pac. Power & Light Co., supra, the Washington Supreme Court refused to extend a release given by the widow of the decedent for purposes of receiving an employee death benefit to encompass the release of a wrongful death claim by the decedent's estate even though the widow had signed the release in her capacity as administratrix. Id. at 315-16. The court reasoned that:

It is [] clear from the evidence that she did not make the settlement with that company upon any such basis and the she never had

any idea that the execution of such a release could be construed as a discharge of appellants, whom she did hold accountable for her husband's death. To the contrary, her sole idea was that she was executing the release in order to obtain the payment of a benefit in the nature of insurance.

Id. at 319; accord Nevue v. Close, 123 Wn.2d 253, 258, 867 P.2d 635 (1994) (“When the parties conclude a settlement on the assumption or belief that the plaintiff has one kind of injury when in fact her injury is of a materially different nature, courts usually say that the settlement can be avoided and that the plaintiff may proceed with her tort claim.”) (quoting 2 D. Dobbs, Remedies § 11.9, at 774 (1993)); Basin Paving, Inc. v. Moses Lake, 48 Wn. App. 180, 183-85, 737 P.2d 1312 (1987) (refusing to give effect to release because of unilateral mistake on part of respondent who was unaware of overpayment of \$70,000 to appellant at time release was signed); Carlile v Snap-On Tools, 648 N.E.2d 317, 838 (Ill. 1995) (“The intention of the parties controls the scope and effect of a release, and this intent ‘is discerned from the language used and the circumstances of the transaction.’”) (emphasis in original).

1. The Parties Never Raised the Issue of Courtyard Parking During the Litigation Resolved by the 2003 MOU

Here, the parties never contemplated that the 2003 MOU would cover an interpretation of the Tower Dec. and the Center Dec. related to the use of the courtyard parking stalls. Mr. Del Moro and Mr. Jameson both admitted on the record that the litigation settled by the 2003 MOU had nothing to do with courtyard parking. (CP 342; RP at 84:25-87:15 (excluding testimony regarding mediation requirement in MOU as irrelevant because litigation did not deal with courtyard stalls).) It was not even a “dispute” when litigation began in 2001.² The evidence in the record shows that no dispute ever existed other than between unit owners and the Tower COA because the Tower COA agreed with Limited’s (incorrect) legal analysis. Hence, in 2003, nothing existed to release Limited from vis-à-vis the courtyard stalls. See Nevue, supra, 123 Wn.2d at 258 (“[A]s to an injury unknown to the plaintiff, and not within the contemplation of the parties to the release, the release should not be

² Indeed, it is disputed that a dispute between Limited and the Tower COA even existed. Oscar Del Moro knew that unit owners were complaining because of his position as a Tower COA board member. (See CP 340-43). Darlene Scott knew that unit owners were complaining because of her position as Tower manager. (See CP 317-20). However, the evidence is ambiguous as to whether these complaints ever rose to the level of a real dispute between Limited and the Tower COA. In fact, they did not.

binding per se.”); Lefrak SBN Assoc. v. Kennedy Galleries, Inc., 609 N.Y.S.2d 651, 652 (1994) (holding that general release resolving dispute for construction costs did not release claim for operating expenses because such claim was not intended to be disposed of by the release).

Further, because the “dispute,” if any, resolved itself in 2000 and the parties were performing according to their understanding of that resolution, nothing existed in 2003 for Tower COA to release as part of the MOU. See, e.g., Paopao v. DSHS, 145 Wn. App. 40, 48, 185 P.3d 640 (2008) (refusing to vacate a settlement agreement because it violated new federal precedent as the dispute was not pending and the parties were performing in accordance with their settlement agreement at time new precedent issues); cf. Jain v. State Farm Mut. Auto Ins. Co., 130 Wn.2d 688, 691, 926 P.2d 923 (1996) (vacating settlement agreement because it violated newly announced state public policy despite fact that it was not pending at time new public policy issued).

2. Limited’s Interpretation of the 2003 MOU Release is Much too Broad

Limited’s argument that the waiver applies to *any* dispute over the interpretation of the Tower Dec. is much broader than any waiver contemplated by the Tower COA at the time the MOU was signed.

“When a release contains both general and specific language, the general language will be presumed to have been used in subordination to the specific language and will be construed and limited accordingly.” 66 Am. Jur. 2d, Release § 29 (Supp. 2011). The rules of construction of ejusdem generis and noscitur a sociis as adopted in Washington reflect this principle:

In the construction of laws, wills, and other instruments, the ‘ejusdem generis rule’ is, that where general words follow an enumeration of persons or things, by words of a particular and specific meaning, such general words are not to be construed in their widest extent, but are to be held as applying only to persons or things of the same general kind or class as those specifically mentioned.

Cockle v. Dep’t of Labor and Indus., 142 Wn.2d 801, 808, 16 P.3d 583 (2001) (quoting Black's Law Dictionary 517 (6th ed.1990)); see also Kitsap County v. Allstate Ins. Co., 136 Wn.2d 567, 590-91, 964 P.2d 1173 (1998) (applying concept of ejusdem generis to interpretation of insurance policy); In re Weissenborn's Estate, 1 Wn. App. 844, 847-48, 466 P.2d 536 (1970) (applying concept of ejusdem generis to interpretation of will). Similarly the doctrine of noscitur a sociis means that a word is known by the company it keeps. Wright v. Jeckle, 158 Wn.2d 375, 381, 144 P.3d

301 (2006) (citing Gustafson v. Alloyd Co., 513 U.S. 561, 575, 115, S. Ct. 1061, 131 L.Ed.2d 1 (1995)).

Here, the 2003 MOU release relates to litigation begun in 2001 over a myriad of claims related to budgeting issues between the Tower, the Center and Limited. The 2003 MOU details specifically the resolution of those claims, in addition to containing a general release. The subject matter of the 2003 MOU limits the generality of the release contained in it.

Further, Limited's argument that it wanted to resolve all disputes over the interpretation of the Tower Dec. and Center Dec. that arose at any time cannot stand in light of the detailed settlement contained in the 2003 MOU. Nothing in the 2003 MOU indicates that any dispute over the declarations of any nature unrelated to the budgetary matters at issue in that specific litigation were waived for all time. And the doctrines of ejusdem generis and noscitur a sociis protect litigants from such overbroad interpretations of the documents they sign. Accord Shore v. Shore, Case No. C09-848Z, 2011 WL 863490, *2 (W.D. Wash. March 10, 2011) (holding that limitation in release to all claims against specific litigant also limited broad waiver of claims and hence did not foreclose claim against FDIC); Fuku-Bonsai, Inv. v. E.I. DuPont de Menours & Co., 187 F.3d 1031 (9th Cir. 1999) (applying Delaware law that 'words of general

application used in the release which generally follow a specific recital of the subject matter concerned are not to be given their broadest significance but will be restricted to the particular matters referred to in the recital.’) (quoting Adams v. Jankouscas, 452 A.2d 148, 156 (Del. 1982)); Lucent Tech., Inc. v. Gateway, Inc., 470 F. Supp. 2d 1195, 1201-02 (S.D. Cal. 2007) (refusing to extend general release executed in settlement of overpayment claims to release of patent claims even though negotiations for resolution of patent infringement claims were ongoing at time release signed as patent claims had no relationship to matters settled by the release).

E. Res Judicata Does not bar Tower COA’s Claim as to the Courtyard Stalls

Limited argued incorrectly in its summary judgment motion that res judicata effect should be given to the release. While it may be argued that the trial court’s ruling did not address res judicata issues, in the interest of completeness, Tower COA addresses the subject briefly.

Res Judicata applies to “every question which was properly a part of the matter in controversy, but it does not bar litigation of claims which were not in fact adjudicated.” Seattle-First Nat’l Bank v. Kawachi, 91 Wn.2d 223, 226, 588 P.2d 725 (1978). For example, the Washington

Supreme Court refused to apply res judicata principles to prohibit a suit on two notes executed in 1961 and 1962 even though such notes were used as evidence in a trial over a note executed in 1967. The court found that even though the notes could have been litigated with the trial on the 1967 note, the rule of joinder is permissive for independent claims. Id. Similarly here, the budgetary claims litigated between the Tower COA, Limited and the Center stand independently from claims related to the use of the courtyard parking stalls.

Further, although res judicata applies to settlements, it does not apply when the subject matter of the settlements is not identical. Hisle v. Todd Pac. Shipyards Corp., 151 Wn.2d 853, 859 & 865-66, 93 P.3d 108 (2004). For example, in Hisle, the Washington Supreme Court held that “the same subject matter is not necessarily implicated in cases involving the same facts.” Id. at 866. It then found that although both the previously settled litigation and the current litigation involved wage issues, the subject matters were different. Id. That is, the first action addressed the validity of a collective bargaining agreement, and the second presumed the validity of the agreement and sought to apply statutory requirements to it. Id.

Here, the subject matter of the 2001 litigation is not, as Limited describes it, the interpretation of the Tower Dec. and Center Dec. in general. Rather, the 2001 litigation (resolved with the 2003 MOU) addressed the interpretation of the Tower Dec. and Center Dec. with respect to budgetary and other spending issues. In no way did that litigation address the use of the courtyard parking stalls. The subject matter of this appeal does not affect any budgetary matter settled by the 2003 MOU. Rather it addresses the use of the courtyard parking stalls.³ Hence, principles of res judicata do not apply to bar the Tower COA's claim of use of the courtyard stalls.

F. Tower COA's Affirmative Defenses Should Have Been Allowed to be Presented at Trial

1. The Declaration Permits only "Initial" Allocations

Even assuming that Limited reserved the right to reallocate the courtyard stalls under the Center Dec. and Tower Dec. to individual Tower unit owners, RCW 64.34.216(j) still prohibits Limited from allocating these stalls to a unit it owns. This issue arose in 2009, when

³ Because the subject matter of the two actions is not identical, the other three elements of res judicata do not have to be addressed. The four elements are (1) sameness of subject matter; (2) sameness of cause of action; (3) sameness of people and parties; and (4) the quality of the persons for or against whom the claim is made. Hisle, 151 Wn.2d at 865-66.

Limited recorded the 11th Amendment to the Tower Dec., purporting to allocate the nine courtyard stalls to Unit 703, a unit it owns and a unit that already had a parking stall allocated to it.

The Tower Declaration reserves to Limited the development right to make an “initial” allocation of parking spaces. (CP 118-19.) Under the 10th Amendment recorded in 2008, Limited made the initial allocation of a parking space to the last three units it owned: Unit 703, as well as other parking allocations to the two penthouse units owned by Limited. (CP 714-22.) Limited’s later allocation of the nine courtyard parking stalls to Unit 703 falls outside the authority granted in the Declaration as an additional allocation – not an initial allocation. Even were the Development Period to be indefinitely extended, the Declaration does not allow Limited’s secondary allocation of additional parking stalls to Unit 703. Because this issue did not arise until 2009, this affirmative defense should have been permitted at trial.

2. The Declaration Fails to Specify a Time for the End of Development Rights

Further, RCW 64.34.216(1)(j) affirmatively requires that the Declaration specify a time for the end of the development period. Here, Limited failed to do so; it seeks to indefinitely extend the development

period through its continued ownership (and renting out) of Unit 703. Barring Limited's sale of the unit or voluntary termination of the development period, the Tower COA will be forever under some authority of Limited. This indefinite extension of the development period violates the word and spirit of the statute; the development period is meant to end at a designated time. See RCW 64.34.216(1)(j).

Further, the indefinite extension of the development period violates the Condo Act's requirement that all acts be taken in good faith with fair dealing. RCW 64.34.090. By allocating parking stalls to the remaining unsold units owned by Limited under the 10th Amendment, any continuing development rights of Limited related to parking terminated. Under the terms of the Tower Dec. and Center Dec., once the development period ends, all unallocated parking stalls become common area of the Tower. Following the sale of the garage unit and commercial unit, Limited is merely a residential owner, like the other residential owners who make up the Tower owners association. Instead, a single studio unit, already allocated one parking space, is given an additional nine courtyard spaces for the sole purpose of reserving these spaces for Limited to later sell them to Tower residents.

G. The Trial Court Erred in its Award of Attorneys' Fees and Costs

“Where attorney fees are only recoverable on some of a party’s claims, the award must properly reflect a segregation of the time spent on the varying claims.” Dice v. City of Montesano, 131 Wn. App. 675, 690, 128 P.3d 1253 (2006); Sing v. John L. Scott, Inc., 83 Wn. App. 55, 73-74, 920 P.2d 589 (1996), rev’d on other grounds, 134 Wn.2d 24, 948 P.2d 816 (1997) (holding with respect to segregating legal fees that “while there may be an interrelationship as to the basic facts, the legal theories which attach to the facts are different.”) (citation omitted). Here, time spent on obtaining the dismissal of Tower COA’s claims based on the release contained in the 2003 MOU is non-compensable. The 2003 MOU does not contain a prevailing party attorneys’ fee and cost award clause. (See CP 348-50.)

The amount that should have been segregated is \$27,332, representing those attorneys’ fees spent on pursuing the dismissal of Tower’s claims based on the release. Yet the trial court only discounted the award by \$13,666. Should this court deny Tower COA’s appeal and affirm the trial court, Limited’s attorneys’ fee award at trial should be

reduced by \$13,666 to account for the fact that no fees should have been awarded for litigating the scope of the release.

H. Tower COA Should be Awarded Attorneys' Fees and Costs for a Successful Appeal Under RCW 64.34.455

RCW 64.34.455 provides:

If a declarant or any other person subject to this chapter fails to comply with any provision hereof or any provision of the declaration or bylaws, any person or class of persons adversely affected by the failure to comply has a claim for appropriate relief. The court, in an appropriate case, may award reasonable attorney's fees to the prevailing party.

An appropriate case exists here. Limited's asserted control of the courtyard stalls violates not only the language of the Tower Dec. and the Center Dec., but it also violates the Condo Act. Limited has continued in its faulty assertions, has attempted to assign all of the courtyard stalls to a single unit in violation of the declarant rights it reserved to itself in the Tower Dec., and continues to stubbornly claim its interpretation of the declarations governs regardless based on its overbroad reading of the release.

VI. CONCLUSION

Tower COA respectfully requests that the appellate court reverse the summary judgment ruling of the trial court and all subsequent rulings taken in reliance on that order. The Condo Act prohibits the Tower COA, the Center board and Limited from waiving the requirement of a declaration amendment to reallocate the limited common area of the courtyard to Limited's use and control. That is, Limited's failure to reserve the right of reallocation of the courtyard stalls to Tower unit owners in either the Tower Dec. or Center Dec., means that only a declaration amendment will suffice to accomplish what Limited has tried to do through an overbroad and strained reading of the release in the 2003 MOU.

However, the 2003 MOU did not contemplate that a "dispute" over the courtyard stalls would be released for several reasons: (1) no dispute existed as of the date of 2003 MOU over the use of the courtyard stalls; (2) the general release in the 2003 MOU is subordinated to the specific terms of the items contained in it; (3) no party contemplated that the release addressed any interpretation of the Tower Dec. and the Center Dec. for all times – particularly if a dispute over the interpretation violated Washington law or arose after the signing of the 2003 MOU.

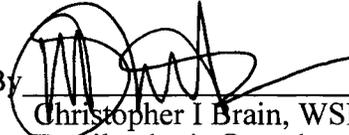
Even if the 2003 MOU somehow waived Tower COA's right to contest the use of the courtyard stalls by Limited during the development period, the MOU did not waive Tower COA's right to contest Limited's additional allocation of the courtyard parking stalls to Unit 703. Nor does it release Limited for its failure to provide for the termination of the development period as required under the Condo Act. These affirmative defenses arose well after the 2003 MOU was signed and should have been allowed at trial.

Further, Tower COA respectfully moves the court to reverse the attorneys' fee award to Limited by \$13,666 should it affirm the trial court's summary judgment. Finally, Tower COA asks the appellate court to award it attorneys' fees and costs for a successful appeal pursuant to RCW 64.34.455.

For these and the all the reasons stated above, Tower COA respectfully move the court to grant its appeal, reverse the trial court, and remand for further proceedings.

DATED this 5th day of December, 2011.

TOUSLEY BRAIN STEPHENS PLLC

By  _____

Christopher I Brain, WSBA #5054

Email: cbrain@tousley.com

Mary B. Reiten, WSBA #33623

Email: mreiten@tousley.com

1700 Seventh Avenue, Suite 2200

Seattle, Washington 98101

206.682.5600

Attorneys for Defendant/Appellant

CERTIFICATE OF SERVICE

I, Betty Lou Taylor, hereby certify that on the 5th day of December, 2011, I caused to be served true and correct copies of the foregoing and the verbatim report of proceeding for the afternoon session, March 28, 2011, to the following person(s) in the manner indicated below:

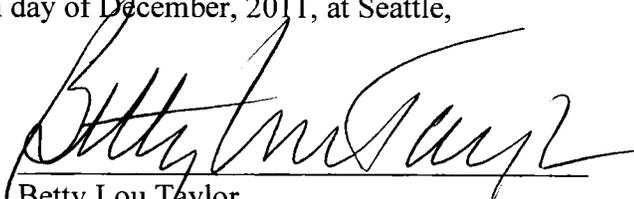
Henry C. Jameson, WSBA #05676
JAMESON BABBITT STITES & LOMBARD, P.L.L.C.
999 Third Avenue, Suite 1900
Seattle, WA 98104-4001

- U.S. Mail, postage prepaid
- Hand Delivery
- Overnight Courier
- Facsimile
- Electronic Mail

Attorneys for Plaintiff/Respondent

I certify under penalty of perjury under the laws of the United States and the state of Washington that the foregoing is true and correct.

EXECUTED this 5th day of December, 2011, at Seattle, Washington.


Betty Lou Taylor