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THE COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON
NO. 68127-3-1

MADERA WEST CONDOMINIUM OWNERS ASSOCIATION, et al.,

Appellants,

v.

MARX/OKUBO, LTD., a Washington corporation,

Respondent

BRIEF OF RESPONDENT MARX/OKUBO, LTD.

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COURT OF APPEALS
STATE OF WASHINGTON
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1. The Right-to-Cure Act requires claimants to give construction professionals pre-litigation notice. Claimants concede Marx/Okubo is a construction professional to whom they did not give pre-litigation notice. Did the trial court properly enter a dismissal without prejudice where claimants were alerted to the requirements of the Act in the Public Offering Statement?

2. By agreeing to perform an expressly limited condition assessment and reserve study for a real estate development professional under contract terms that precisely limited the use of Marx/Okubo's reports, did Marx/Okubo also undertake as a matter of law to report to strangers who illicitly received the reports?

3. The Association and individual unit owners asserted identical claims against Marx/Okubo to recover the cost of repairing damage to the building envelope and other building surfaces and components. Does the Association have standing independent of unit owners to assert claims for damage to common elements in which the Association has no protectable interest?

4. Did the trial court abuse its discretion by admitting the expert affidavit of Randy Hart submitted in opposition to claimants' summary judgment where the affidavit identified the bases for his opinions pursuant to the rules of evidence?

II. INTRODUCTION

This appeal involves the unauthorized distribution and use of a property condition assessment and a capital improvement reserve study. The primary issue before the Court is whether Marx/Okubo owed a duty to strangers who received its reports without its consent.

The litigation arises out of the conversion of the Forest Village Apartments into the Madera West Condominiums. The owners' association and 56 unit owners sought damages from the project declarant and its real estate agent alleging they failed to disclose pre-existing construction deficiencies and misrepresented the amount of funds deposited in a reserve account. Those claims were resolved by settlement. Plaintiffs also claimed Marx/Okubo owed a duty to them. They contend Marx/Okubo acted negligently in performing a pre-purchase inspection for a real estate developer contemplating purchase of the apartment complex, and in preparing a capital improvement reserve analysis for the developer. The trial court dismissed the claims against Marx/Okubo on summary judgment.

Marx/Okubo owed no common law or statutory duty to plaintiffs. Marx/Okubo and plaintiffs were strangers. Without Marx/Okubo's knowledge or consent Marx/Okubo's reports were distributed to prospective condominium purchasers, despite the fact Marx/Okubo's contract prohibited distribution of the reports to third persons. On the

facts presented, the common law rule that no duty is owed to strangers must prevail. Because plaintiffs failed to demonstrate a basis for imposing a duty on Marx/Okubo running to plaintiffs, dismissal of plaintiffs' claims against Marx/Okubo was proper.

III. STATEMENT OF THE CASE

A. Procedural History

Plaintiffs are the Madera West Condominium Association ("Association") and 56 unit owners ("unit owners") who purchased condominiums from defendant Madera West LLC ("Madera West"). (CP 703, 710) Plaintiffs (hereafter "claimants") asserted claims premised upon construction defects in the project. (CP 715) They alleged Madera West breached implied warranties, misrepresented the condition of the Madera West complex and misrepresented the amount of funds it had deposited into a reserve account established to address future capital improvements. (CP 710-3) Claimants also asserted Marx/Okubo made negligent misrepresentations in reports it prepared for a potential developer, and acted negligently in preparing the reports. (CP 714-5)

On November 10, 2011, claimants and Marx/Okubo filed cross-motions for summary judgment. Claimants' motion sought findings that (1) the Association had standing to pursue its own negligence claims; (2) the Association had standing to pursue negligence claims on

behalf of individual unit owners; and (3) Marx/Okubo breached a duty of care to individual unit owners and the Association "by failing to provide accurate reports." (CP 1086) Claimants' motion was denied. (CP 1646) On December 21, 2011, claimants appealed the denial of their summary judgment.[1]

Marx/Okubo's motion sought dismissal of claimants' claims on three grounds, including that claimants failed to establish Marx/Okubo owed an independent tort duty to them. (CP 728-9) The trial court granted Marx/Okubo's motion by order entered December 9, 2011.[2] (CP 447-9; see also CP 450-2) On March 7, 2012 the trial court entered final judgment in favor of Marx/Okubo pursuant to CR 54(b).

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[1] Ordinarily, the denial of a summary judgment motion is not an appealable order. Sea-Pac Co., Inc. v. United Food and Commercial Workers Local Union 44, 103 Wn.2d 800, 801-802, 699 P.2d 217 (1985), citing, Roth v. Bell, 24 Wn. App. 92, 104, 600 P.2d 602 (1979).

[2] Because claimants have not sought review of the dismissal of their misrepresentation claims Marx/Okubo will not address the trial court's dismissal of claimants' misrepresentation claims. Claimants' complaint asserted two causes of action against Marx/Okubo: misrepresentation and negligence. Both causes of action were premised upon the same factual allegation: that Marx/Okubo failed to properly investigate and disclose to claimants deficiencies in the Forest Village apartment complex. Marx/Okubo sought summary judgment dismissal of claimants' misrepresentation claims. (CP 736-45) The trial court granted Marx/Okubo's motion and dismissed claimants' misrepresentation claims along with their negligence claims. (CP 447-9) Claimants have not referenced the dismissal of the misrepresentation claim in their assignments of errors, issues pertaining to assignments of error, or argument. Therefore, the appropriateness of the trial court's dismissal of claimants' negligent misrepresentation claims is not before this Court. RAP 10.3(g) ("The appellate court will only review a claimed error which is included in an assignment of error or clearly disclosed in the associated issue pertaining thereto."); Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 808-9, 828 P.2d 549 (1992) ("An issue raised and argued for the first time in a reply brief is too late to warrant consideration."); Greater Harbor 2000 v. City of Seattle, 132 Wn.2d 267, 279, 937 P.2d 1082 (1997).

A notice of settlement between claimants and Madera West was filed on March 26, 2012. (CP 2230) To date claimants' claims against defendants Madera West and Steadfast have not been dismissed.

B. Background Facts

1. Evans Development retained Marx/Okubo to prepare a Property Condition Assessment for use in evaluating and negotiating the purchase of the Forest Village Apartments.

In January of 2005 Marx/Okubo submitted to Evans Development a proposal to perform a pre-purchase Property Condition Assessment with respect to the Forest Village Apartments. (CP 753-4) The primary purpose of the assessment was to provide Evans Development with information to assist it in negotiating the purchase of the apartment complex. (CP 753-4, 840-2, 1688) Evans Development accepted Marx/Okubo's proposal by authorizing Marx/Okubo to proceed, and Marx/Okubo's proposal became the contract between the parties. (CP 754, 763)

a. Marx/Okubo's contract prohibited distribution of its reports and limited the scope of Marx/Okubo's services and its potential liability.

Marx/Okubo's contract defined its scope of work as follows:

> Marx/Okubo's analysis will consist of one non-invasive site observation which will include accessible areas of the site, building exterior walls, roofs, common areas and 20% of the apartment units and representative attics and crawlspaces, if access is made available.

(CP 756) Marx/Okubo's proposal stated its assessment could be

utilized by Evans Development to prepare its own statement of conditions for use in complying with statutory condominium conversion disclosure requirements. (CP 759)

Marx/Okubo's proposal incorporated Marx/Okubo's Standard Terms and Conditions. (CP 763) The Standard Terms and Conditions prohibited use of Marx/Okubo's reports by third parties and prohibited Evans Development from distributing the reports to others. The Terms and Conditions provided as follows:

> All . . . reports . . . prepared or created by Marx/Okubo during the course of providing its services are and shall remain the property of Marx/Okubo . . . .
>
> These documents . . . may not be reproduced in advertisements, brochures, or sales materials, or used by the Client for any purpose other than the purpose for which they were prepared, nor may they be used for any purpose by third parties, without the written permission of Marx/Okubo.

(CP 766) Marx/Okubo gave no permission expanding the permissible uses of its reports. (CP 862-3, 873-4, 755)

Evans Development agreed to limit Marx/Okubo's exposure to damages in a number of ways: Evans Development waived claims for consequential, indirect and special damages, and promised to limit Marx/Okubo's liability on any claim to its fee. The allocation of liability provisions provided in part as follows:

> THE CLIENT AND MARX/OKUBO HAVE DISCUSSED THE RISKS, REWARDS AND BENEFITS OF THE PROJECT AND OF MARX/OKUBO'S SERVICES, AS

> WELL AS MARX/OKUBO'S FEE FOR ITS SERVICES. THE CLIENT ACKNOWLEDGES AND AGREES THAT THE RISKS HAVE BEEN ALLOCATED IN SUCH A WAY THAT, TO THE FULLEST EXTENT PERMITTED BY LAW, MARX/OKUBO'S TOTAL LIABILITY TO THE CLIENT FOR ANY AND ALL INJURIES, CLAIMS, LOSSES, EXPENSES, DAMAGES OR CLAIMS EXPENSES ARISING OUT OF ITS SERVICES FROM ANY CAUSE OR CAUSES INCLUDING, BUT NOT LIMITED TO, PROFESSIONAL NEGLIGENCE, ERRORS, OR OMISSIONS, STRICT LIABILITY, BREACH OF CONTRACT AND BREACH OF WARRANTY SHALL NOT EXCEED THE TOTAL AMOUNT [OF] MARX/OKUBO'S FEE.

(CP 768, emphasis added)

b. Marx/Okubo's Property Condition Assessment explained its limited scope and the limitations on its use.

On April 21, 2005, Marx/Okubo issued its Property Condition Assessment to Evans Development. The report was addressed to Evans Development and it expressly limited use of the report "to the client to whom it is addressed." (CP 777) The report noted the purpose of the assessment was to provide its client with a "general overview of building components." (CP 777)

The Condition Assessment identified the cladding at Forest Village Apartments, as "a combination of engineered wood and vinyl siding, with painted wood trim . . . . Townhouses are sided with painted T1-11 plywood siding." (CP 781) The report described the condition of the siding as follows:

> The siding appears to be performing as expected considering the age and use of the buildings. Isolated

areas of siding damaged from rainwater splash were observed.

(CP 781) Evans Development told Marx/Okubo it planned to aggressively maintain the siding to extend its useful life. (CP 879-80, 895) Therefore, the Property Condition Assessment suggested the siding could be replaced on a deferred maintenance basis. (CP 787)

2. Marx/Okubo's Reserve Study was prepared for the exclusive use of Evans Development.

Marx/Okubo also prepared a Reserve Study for Evans Development based upon the understanding that Evans Development intended to purchase and convert the apartments into condominiums. (CP 798) A Reserve Study is a future projection of large capital expenses an owner might incur to maintain its property. (CP 798) It provides the owner with a program it may follow to accumulate some of the capital improvement costs over time. (CP 798) Reserve Studies are premised upon informed guesses of what future expenses might be. (CP 798, 1361)

Marx/Okubo's Reserve Study indicated its reserve projections were based upon assumptions and "verbal representations made to us, the accuracy of which is unknown." (CP 800) One of the representations Evans Development made to Marx/Okubo was that it would aggressively maintain the siding to prolong its useful life. (CP 879-80, 895) LP-Siding, if properly maintained, can perform for

decades without experiencing significant failures. (CP 1291; see also CP 1360-1)

The Reserve Study set forth a timeline and estimate for performing repairs and accumulating reserves. Marx/Okubo estimated the cost of the siding replacement at $781,600 and the Reserve Study included projections based upon that number. (CP 808-9)

The Reserve Study was addressed to Evans Development and stated it was prepared "to report our findings to the Client to whom this report is addressed." (CP 800) The author of the report testified regarding its purpose as follows:

> The purpose of the Reserve Study was to assist Evans Development in establishing a reserve account for anticipated repairs in the event it decided to convert the apartments to condominiums and to recommend to Evans Development reserve contribution amounts to be deposited into the reserve account. It was not my or Marx/Okubo's intent that the Reserve Study would be distributed to prospective purchasers.

(CP 755)

The Reserve Study's projections assumed that reserves would commence in 2005 (Year 1). (CP 808-9) Claimants did not start the reserve account until June of 2007 (Year 3). (CP 1361) Claimants opened the reserve account with an initial deposit significantly less than the amount Marx/Okubo recommended. (CP 1361) Unit owners are not making the monthly deposits identified by Marx/Okubo in the reserve study. (CP 1361)

3. Claimants were advised LP Siding existed on the complex and that replacement of the siding would be necessary.

The project was clad in Louisiana Pacific Inner-Seal siding (hereinafter, "LP-Siding"). (CP 1289) In early 1996, the complex owner, Richard Senn, retained Marx/Okubo to prepare a report specific to the siding to assist him in making decisions about participating in an LP-Siding class-action lawsuit. (CP 1113)

The LP Siding class-action lawsuit measured the difference between "damaged" and "performing" siding by fractions of inches. (CP 1115-6: "To be considered damaged, a board was approaching greater than .54" in thickness and had a moisture content of >28% or exhibited 'checking' . . . .") Marx/Okubo drafted a report regarding the condition of the LP-Siding. Marx/Okubo noted that a majority of the LP-Siding was still in "good condition." (CP 1110: "Based on the varying amount of deteriorated siding on each wall and the fact that some areas . . . are still in good condition, a partial siding replacement at the project is recommended . . . .") However, the report identified 34% of the siding as "damaged." (CP 1109) Marx/Okubo suggested repairing the damaged siding on an elevation-by-elevation basis.[3] (CP 1110) Marx/Okubo referred Mr. Senn to Cedar-King Lumber Company for siding samples. (CP 1110)

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[3] Claimants' expert testified after observing the siding in 2008 that "stop gap repairs" "might extend the time in which to replace the remainder of the siding by four or five years (2012-2013)." (CP 1400)

In February and March of 1997, Mr. Senn obtained bids from Cedar-King Lumber Company to replace the damaged LP-Siding with various siding products including Vytek vinyl siding or new LP-Siding. (CP 1294, 1297) Subsequent site investigators observed siding types other than LP, including vinyl and T1-11 siding at the project. (CP 1314, 781)

In the summer of 2005, Madera West issued its Public Offering Statement, which disclosed the buildings were sided with LP Siding, that the LP Siding would need to be replaced and that no funds would be available from the class action lawsuit to pay for the replacement. (CP 49) Madera West's Limited Warranty Addendum described the circumstances related to the siding, as follows:

> **c. Exterior Siding.** . . . The Property Condition Assessment shows that the existing siding on most of the buildings is an engineered wood siding known as "Inner Seal" siding. Inner Seal siding was manufactured by Louisiana Pacific company. Other owners have alleged that Inner Seal siding is a defective product that can swell, retain moisture or otherwise fail under certain conditions. There have been class-action and other lawsuits against Louisiana Pacific claiming that the siding is defective. Go to: http://www.lpsidingclaims .com or http://www.neworegontrail.com/siding.htm or http://www.lpcorp.com to learn more about the lawsuits. The prior owner of the project made a claim concerning the siding and received a settlement from Louisiana Pacific. As a condition of the settlement, the prior owner waived its warranty rights (Inner Seal siding came with a 25-year

> warranty). Therefore, Buyer will have no warranty rights against Louisiana Pacific.
>
> . . . The initial budget of the Association includes payments to the reserve account for the purpose of phased replacement all of the siding on the buildings within the next 15 years, which is believed to be the end of the useful life of the siding. The timing included in the budget reflects a compromise between the need to replace the siding before damage occurs and the burden on the owners of paying to replace siding all at once. The Association needs to monitor the siding systems to determine if any portion needs maintenance or replacement earlier than is currently assumed.

(CP 40) Each unit owner acknowledged receipt of the Limited Warranty Addendum. (See, e.g., CP 36-143)

4. At the time Marx/Okubo performed services related to the Forest Village Apartments no claimant had an identifiable, actual or prospective interest in the project.

Marx/Okubo's Property Condition Assessment is dated April 21, 2005. (CP 773) In May of 2005, A.F. Evans Company (an entity distinct from Evans Development, Inc.) purchased the Forest Village Apartments. (CP 1688)

The Association did not exist when Marx/Okubo's services were performed. (CP 916-9) Offers to sell units were not made to prospective purchasers until June of 2005, several months after Marx/Okubo completed its investigation. (CP 2057) According to claimants, neither Marx/Okubo's Property Condition Assessment nor

its Reserve Study were included with the initial Public Offering Statements distributed to apartment tenants. (CP 2121, 605, 607)

Marx/Okubo received no notice the Association or prospective purchasers were receiving its Property Condition Assessment or Reserve Study. (CP 863, 873-874, 755)

IV. ARGUMENT

A. The Trial Court Properly Granted Marx/Okubo Dismissal Without Prejudice for Claimants' Failure to Provide Pre-litigation Notice as Required by 64.50 RCW.

It is undisputed that in December 2010, claimants brought their action against Marx/Okubo, but failed to serve Marx/Okubo with pre-litigation notice of the claim as required under RCW 64.50.020(1). Marx/Okubo sought dismissal without prejudice pending claimants' compliance with the notice requirements of the Act. On June 10, 2011, the trial court entered an order of dismissal without prejudice. (CP 162-4) Subsequently, claimants delivered Marx/Okubo the pre-litigation notice, and the trial court granted claimants leave to amend their Complaint to rejoin Marx/Okubo as a party. (CP 2221-4) On October 13, 2011, claimants filed a third amended complaint rejoining Marx/Okubo as a party. (CP 700-16)

1. Claimants' appeal of their dismissal without prejudice presents a moot question.

Claimants' appeal of the dismissal without prejudice presents a moot question. Generally, appellate courts will not consider moot

questions or abstract propositions where the court can no longer provide effective relief. Rosling v. Seattle Bldg. & Constr. Trades Council, 62 Wn.2d 905, 907, 385 P.2d 29 (1963), cert. denied, 376 U.S. 971 (1964).

"A case is moot if a court can no longer provide effective relief." State v. Ross, 152 Wn.2d 220, 228, 95 P.3d 1225 (2004); Friendly Finance Corp. v. Koster, 45 Wn.2d 374, 375, 274 P.2d 586 (1954) ("Were we to reverse because no demand was made, respondent could immediately make demand for possession of the car, and, if this was refused, could institute another replevin action, against which appellant admits he has no defense."). "[A] dispute about abstract rights, not a controversy that will make a difference to the litigants" presents moot issues for review. Mauzy v. Gibbs, 44 Wn. App. 625, 629, 723 P.2d 458, 461 (1986) citing, Rosling, 62 Wn.2d at 907–08.

Claimants concede facts which render the issue moot. After dismissing claimants' claims without prejudice the trial court granted their motion for leave to re-join Marx/Okubo as a party. On appeal, claimants argue they were not obligated to serve a pre-litigation notice on Marx/Okubo. Since claimants subsequently served the notice and rejoined Marx/Okubo, the issue presents a purely academic question on appeal. "[N]either party could gain any benefit by . . . either affirming or reversing the judgment of the trial court." Rosling, 62

Wn.2d at 908. Therefore, claimants' first assignment of error presents a moot question.

2. The trial court properly entered dismissal without prejudice for claimants' failure to give pre-litigation notice.

Enacted in 2002, the Right-to-Cure Act requires claimants to give pre-litigation notice prior to filing suit on construction defect claims. The purpose of the Act is to allow construction professionals an opportunity to cure alleged construction defects prior to litigation while preserving adequate rights and remedies for property owners who bring those claims. See, RCW 64.50.005 and RCW 64.50.020. The Act, states: "In every construction defect action brought against a construction professional, the claimant shall, no later than forty-five days before filing an action, serve written notice of the claim on the construction professional." RCW 64.50.020(1).

The court's objective in interpreting the Right-to-Cure Act is to implement the intent of the legislature. Lakemont Ridge Homeowners Ass'n v. Lakemont Ridge Limited Partnership, 156 Wn.2d 696, 698, 131 P.3d 905 (2006) ("Our primary duty in interpreting any statute is to discern and implement the intent of the legislature."). The language of the Right-to-Cure Act is clear; therefore, the Court must enforce the plain meaning of the statute. Id.

Claimants concede Marx/Okubo is a "construction professional" intended to be protected by the Act. However, claimants

contend they were not required to give pre-litigation notice to Marx/Okubo because Marx/Okubo did not alert them to the requirements of the Act.

The Right-to-Cure Act requires construction professionals to alert potential claimants to the Act's requirement, but provides for standard language in the public offering statement to suffice. RCW 64.50.050(1); see also, RCW 64.50.050(3); Lakemont, 156 Wn.2d at 696 (holding the Act did not bar homeowner's claim where homeowner was not provided notice as provided in RCW 64.50.050). RCW 64.50.050(3) states: "[t]his chapter shall not preclude or bar any action if notice is not given to the homeowner as required by this section." Emphasis added. The very same section, RCW 64.50.050, provides:

> (1) . . . In the sale of a condominium unit, the requirement for delivery of such notice shall be deemed satisfied if contained in a public offering statement delivered in accordance with Chapter 64.34 RCW.

It is undisputed claimants received notice of the Act in the Public Offering Statement and in the Seller's Limited Warranty Addendum attached to the Public Offering Statement. The first page of the Public Offering Statement and the last page of the Seller's Limited Warranty Addendum set forth, verbatim, the standard language provided in RCW 64.50.050(2). (See, e.g., CP 44, 53.) Claimants, however, contend the notice must be construed as only notice of the statute's

requirements applicable to the "seller" and builder."[4] This argument is contrary to the clear intent of the legislature in adopting the Right-to-Cure Act.

The legislature defined "construction professional" broadly to include "an architect . . . subcontractor, engineer or inspector . . . ." RCW 64.50.010(4). It is universally recognized that subcontractors, architects, engineers and inspectors do not contract directly with condominium purchasers; yet the legislature expressly extended the benefits of the Right-to-Cure Act to these "construction professionals." By providing that a disclosure of the Act's requirements in a Public Offering Statement will be sufficient to alert potential claimants to the Act's requirements, the legislature ensured that those who do not contract directly with condominium purchasers can receive the Right-to-Cure notice prior to the initiation of suit. Claimants' arguments that third-party construction professionals not contracting with owners must alert owners to the Act separate from the Public Offering Statement would defeat a clear purpose of the legislature. Therefore, claimants' arguments were properly rejected by the trial court.

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[4] The notice provided to claimants in the Public Offering Statement follows the statutory form set forth in RCW 64.50.050(2). The statutory form only requires the Public Offering Statement to identify the "seller" or "builder." Pursuant to RCW 64.50.050(1), the construction professional's duty to alert claimants was satisfied by the Public Offering Statement.

Claimants contend the Right-to-Cure Act does not apply to them because they asserted no construction defect action against Marx/Okubo. The argument is inconsistent with statements made by claimants in previous pleadings. (CP 1086: "This action arises out of construction defects at the Madera West Condominiums.") (See, also CP 710, 714)

RCW 64.50.010(1) identifies the "Action[s]" to which the statute applies. Included among the applicable actions is a "civil lawsuit or action . . . in . . . tort . . . brought against a construction professional to assert a claim, whether by complaint, counterclaim or cross-claim, for damage . . . of real . . . property caused by a defect in the construction of a residence . . . ." Id. See also Lakemont, supra, 156 Wn.2d at 699. The sole damages sought by claimants arise out of the alleged construction defects at Madera West Condominiums. (See, e.g., CP 714-5 at ¶¶ 102, 107: "Such damages include . . . the cost of repairing the damage to the Project caused by defective workmanship and materials and related costs . . . .") Claimants' claims against Marx/Okubo clearly fall within the definition of "Action" contained in RCW 64.50.010(1). Therefore the argument that claimants do not assert claims governed by the Act, lacks merit.

The trial court properly rejected claimants' argument that the notice mailed to A.F. Evans constituted notice to Marx/Okubo. The

Right-to-Cure Act requires a separate notice for each "construction defect action" instituted by a claimant. RCW 64.50.020(1) ("In every construction defect action brought against a construction professional, the claimant shall . . . ." Emphasis added.). An "action" is defined to include claims brought by complaint, cross-claim or counterclaim. Id. The Act unambiguously requires notice specifically addressed to each construction professional. Id.

Claimants' strained interpretation of the Act requiring only one notice to all construction professionals is inconsistent with the plain language and would defeat a primary purpose of the statute – to allow each construction professional an independent opportunity to investigate and cure alleged defects.

Claimants' failure to provide the Right-to-Cure Notice to Marx/Okubo required dismissal without prejudice of claimants' claims. RCW 64.50.020(6). Therefore, the trial court properly entered a dismissal without prejudice pending claimants' compliance with the pre-litigation notice provisions of the Act.

B. Marx/Okubo and Claimants Were Strangers and Marx/Okubo Owed No Duty to Claimants.

To survive summary judgment, claimants were obligated to demonstrate Marx/Okubo owed a duty to them. Claimants had no relationship with Marx/Okubo. Marx/Okubo was retained by a real estate professional to perform a property assessment for its client to

use in evaluating the purchase and potential conversion of an apartment complex to condominiums and to prepare a Reserve Study for the professional to use to establish maintenance reserves. Marx/Okubo's contract prohibited use of Marx/Okubo's work product by parties other than the real estate professional who retained Marx/Okubo. Marx/Okubo's reports indicated they were prepared for use by Marx/Okubo's client. Claimants and Marx/Okubo were strangers. No basis exists for imposing an independent tort duty to claimants on Marx/Okubo. Therefore summary judgment dismissal of claimants' claims against Marx/Okubo was proper.

An allegation of professional negligence must be supported with proof of a duty, the standard of care and its breach. Wells v. Vancouver, 77 Wn.2d 800, 802-3, 467 P.2d 292 (1970). "It is axiomatic that an action for negligence does not lie unless the defendant owes a duty of care to the plaintiffs." Charter Title Corp. v. Crown Mortgage, 67 Wn. App. 428, 432, 836 P.2d 846 (1992) (emphasis added). See also J & B Development Co. v. King County, 100 Wn.2d 299, 304, 669 P.2d 468 (1983) ("To be actionable, the duty owed must focus on the one 'injured, not on the public at large.'"); and Phillips v. King County, 87 Wn. App. 468, 478, 943 P.2d 306 (1997) ("A negligence claim cannot be sustained unless there is a duty of care running from defendant to plaintiff.").

The determination of the existence of a duty is a question of law. Eastwood v. Horse Harbor Foundation, Inc., 170 Wn.2d 380, 389, 241 P.3d 1456 (2010) ("The court determines whether there is an independent tort duty of care and '[t]he existence of a duty is a question of law and depends on mixed considerations of logic, common sense, justice, policy and precedent.'"). Therefore, review of this issue is de novo.

"'Duty is defined as an obligation to which the law will give recognition and effect, to conform to a particular standard toward another.'" Transamerica Title Insurance Co. v. Johnson, 103 Wn.2d 409, 413, 693 P.2d 697 (1985) quoting W. Prosser, TORTS §53, at 331 (3rd ed. 1964). A plaintiff must do more than establish a defendant owed to someone a duty to exercise care before the plaintiff can recover damages: a plaintiff is required to show the defendant owed a duty directly to plaintiff. The Washington Supreme Court explained a plaintiff's obligation to establish duty as follows:

> [N]o action could be founded upon the breach of a duty owed only to some person other than the plaintiff. He must bring himself within the scope of a definite legal obligation so that it might be regarded as personal to him. "Negligence in the air, so to speak, will not do."

Johnson, supra, 103 Wn.2d at 413, quoting Prosser, supra, at 332.

Claimants rely upon Affiliated FM Ins. Co. v. LTK Consulting Services, Inc., 170 Wn.2d 442, 457, 243 P.3d 521 (2010) and East-

wood, supra, 170 Wn.2d at 389, to support their duty analysis. However, the cases are factually distinguishable: defendants in both cases created the conditions that caused harm to the plaintiffs. Affiliated, 170 Wn.2d at 443 ("[T]he cause of the fire was the train's faulty ground system, the design of which LTK had itself suggested."). Eastwood, 170 Wn.2d at 384 ("'[T]here was a broad, persistent, and systemic failure' to maintain the leasehold, according to the trial court."). Marx/Okubo did not create the alleged construction defects at issue; Marx/Okubo is accused of failing to discover and disclose defects. (CP 714-5) Therefore Affiliated and Eastwood are distinguishable and provide no insight into the duty owed by one who did not create the risk of harm at issue.

Claimants also mis-apply the property interest analysis of Affiliated. The court in Affiliated found that a duty to avoid damaging property extended beyond the property owner to those who had a legally protected right to use the property. 170 Wn.2d at 458. Claimants did not have any interest in the property when Marx/Okubo performed its services. (CP 916-9) In any event, because Marx/Okubo did not harm the property at issue, Affiliated's legally protected property interest analysis is inapplicable here.

The question presented on this appeal is whether Marx/Okubo owed a duty of care to claimants, who at the time Marx/Okubo

performed its services were complete strangers to Marx/Okubo. It is neither logical, consistent with common sense nor just to hold that a consultant who prepares a report for a specific client and prohibits distribution of the report to third-parties owes a duty to a third-party after the report is illicitly distributed in violation of the agreement.[5] Applying the "duty considerations" recited in Eastwood, Marx/Okubo owes no duty to claimants.

The general rule at common law is that a defendant owes no duty to a stranger where the defendant has not brought about the risk that injured the stranger. WASHINGTON PRACTICE describes the applicable common law duty principles as follows:

> In general, the duty to use reasonable care falls into one of two categories: (1) where the defendant has (at least in part) brought about the risk that causes injury to the plaintiff; or (2) where the defendant has not brought about the risk itself, but fails to take steps to prevent the injury to the plaintiff. In the first category of cases the defendant is generally under a duty to use reasonable care, so long as the risk to the plaintiff is reasonably foreseeable. As to the second category of cases, the defendant is generally not under a duty to use reasonable care unless: (a) the defendant has induced justifiable reliance by the plaintiff that the defendant will use reasonable care to prevent injury to the plaintiff; (b) a "special relationship" exists between the defendant and the plaintiff imposing a social duty on the defendant to

[5] Claimants assert Marx/Okubo prepared the Reserve Study for the Association to rely on to create and budget for a reserve account. Brief of Appellant at 15. The argument is not supported by the evidence. The Association did not exist at the time. Marx/Okubo prepared the Reserve Study to report its findings to Evans Development to assist Evans Development in establishing reserve contribution amounts if it converted the apartments into condominiums. (CP 800, CP 755)

> use reasonable care for the plaintiff's safety; or (c) a statute specifically imposes a duty to exercise care for another's safety.

16 WASHINGTON PRACTICE, TORT LAW AND PRACTICE §1.11 (3rd ed. 2006) emphasis added. See, e.g., Bank of America v. Hubert, 115 Wn. App. 368, 384, 62 P.3d 904 (2003), rev'd. on other grounds, 153 Wn.2d 102 (2004) (law firm did not owe common law negligence duty to non-client); Burg v. Shannon & Wilson, Inc., 110 Wn. App. 798, 811, 43 P.3d 526 (2002) (engineering firm did not owe common law negligence duty to third-party owners of downhill property); Richland School District v. Mabton School District, 111 Wn. App. 377, 392, 45 P.3d 580 (2002) (school district owed no duty to another district to include in former employee's letters of recommendation information regarding charges of child molestation and reprimands); Harrington v. Pailthorp, 67 Wn. App. 901, 910, 841 P.2d 1258 (1992) (attorney representing a parent in child custody dispute owes no duty to child); In re Marriage of J.T., 77 Wn. App. 361, 365, 891 P.2d 729 (1995) (no legal duty to disclose extramarital sexual relations to one's spouse).

It is undisputed the construction defects claimants complain of were not created by Marx/Okubo; claimants contend they were damaged because Marx/Okubo did not discover and warn them of existing conditions. It is also undisputed claimants and Marx/Okubo were

strangers. Therefore, claimants' claims fall within the second category of cases described in WASHINGTON PRACTICE. The general rule in such cases is that no duty is owed to strangers.

To survive summary judgment, the Association and each unit owner was required to demonstrate Marx/Okubo owed a duty to it, him or her. As strangers to Marx/Okubo, claimants were obligated to establish duties personal to them by demonstrating (1) a statute imposed a duty on Marx/Okubo running to claimants; (2) Marx/Okubo induced reliance that it would exercise care to prevent injury to claimants; or (3) a special relationship existed between Marx/Okubo and claimants. As discussed below, claimants failed to meet their burden.

1. Claimants fail to establish that statutes and regulations governing the practice of architecture and engineering created duties running from Marx/Okubo to claimants.

Claimants' argument that statutes and regulations governing the practice of architecture and engineering impose a duty on Marx/Okubo is without merit. The statutes and administrative regulations cited by claimants apply only when architectural or engineering services are being provided. Because the performance of a building inspection and the preparation of a Property Condition Assessment and Reserve Study do not constitute practicing engineering or architecture, the codes and regulations cited by claimants do not

apply and can create no duties running from Marx/Okubo to claimants.

WAC §308-12-330[6] provides standards of practice for professionals "[w]hen practicing architecture." WAC §196-27A-020 applies standards of conduct for "those practicing engineering" (WAC 196-27A-010), and RCW §18.43 applies to "any person . . . practicing or offering to practice engineering . . . " RCW §18.43.010. Washington courts do not apply architectural and engineering standards of care to architects and engineers not performing architectural or engineering services. Gall Landau Young Construction Co. v. Hurlen Construction Co., 39 Wn. App. 420, 429-30, 693 P.2d 207 (1985) (Engineering firm performing only inspection services was held to the standard of ordinary care rather than a heightened engineering standard.). Accord, Affiliated, 170 Wn.2d at 455 ("[T]he measure of care for an engineer undertaking engineering services is the degree of care . . . of a reasonably prudent engineer . . . ." (emphasis added)).

Neither an architectural license nor an engineering license was required to perform the services Marx/Okubo provided to Evans Development.[7] Marx/Okubo performed a non-invasive site observa-

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[6] Claimants cite WAC §308-12-321(1), however, the section was repealed on June 14, 2002 by regulation 02-11-082.

[7] In August of 2005 (after Marx/Okubo's services were completed) the Washington legislature adopted the following qualification requirements for a "qualified building enclosure inspector": "Must be a person with substantial and verifiable experience in building enclosure design and construction." RCW 64.55.040(1)(a); 64.55.010(8)

tion and provided an opinion of the overall condition of the Forest Village Apartments. Marx/Okubo also prepared a reserve funding plan based upon estimates of the costs to complete anticipated major capital improvements. These services do not fall within the statutory definitions of the practice of architecture or the practice of engineering. See RCW §18.08.320(12) ("'Practice of architecture' means the rendering of services in connection with the art and science of building design for construction of any structure . . . ." Emphasis added.); and §18.43.020(5)(a) ("'Practice of engineering' means any professional service or creative work requiring engineering education, training, and experience and the application of specific knowledge of mathematical, physical, and engineering sciences to such professional services . . . ." Emphasis added.).[8]

Claimants' own expert underscores the fact that the services performed by Marx/Okubo were not engineering or architectural services. Claimants' expert, Mark Jobe, is neither an architect nor an engineer. Mr. Jobe testified his company has participated in the investigation of hundreds of multi-family projects and conducted at least 150 reserve studies, yet the only qualification to perform such services identified by Mr. Jobe is "[work] in the construction industry for over thirty-five (35) years . . . ." (CP 1590-1; see also CP 1400 and CP

[8] There is no evidence any Marx/Okubo engineer performed services with respect to the project at issue.

2070) Although Mr. Jobe's Curriculum Vitae indicates he participated in the performance of forensic investigations "on over 2000 multi-family projects" "[w]ith . . . half being current condition assessments and resulting repair planning" (CP 2073), he lists no degrees or licenses related to architecture or engineering. (CP 2073-5)

Claimants suggest the Condominium Act provides a basis for creating duties running from Marx/Okubo to them because Marx/Okubo was aware Evans Development might use information within Marx/Okubo's reports in preparing Evans Development's mandatory disclosures under the Condominium Act. The Condominium Act does not support that assertion. See RCW 64.55.070(1) ("Nothing in this Chapter . . . is intended to, or does: (a) Create a private right of action against any inspector, architect or engineer . . .; or (b) Create any independent basis for liability against an inspector, architect or engineer."). In fact, the statute expressly authorizes limitations of liability such as those contained within Marx/Okubo's contract. RCW 64.55.070(2).

In its contract with Evans Development, Marx/Okubo agreed to perform its services with the "thoroughness and competence of the architectural and engineering professions." (CP 126) However, the same section of the contract stated ". . . Marx/Okubo limits the liability undertaken in their reporting to the fee charged A.F. Evans." No

basis exists for claimants to enforce Marx/Okubo's agreement to perform to a heightened standard of care, because claimants were neither parties to nor third-party beneficiaries of Marx/Okubo's contract with Evans Development. Even if claimants could enforce the contractual standard of care provision, they could not separate the contractual standard of care from the associated limitation on damages.

Furthermore, it is well-settled that statutes and regulations, such as the architectural and engineering licensing statutes and regulations, which establish duties owed to the public in general, do not give rise to private causes of action. Burg, supra, 110 Wn. App. at 807. Burg involved catastrophic damage to homes caused by a landslide. Shannon & Wilson, the engineering firm from which damages were sought, was retained by the City of Seattle to assess the stability of a hillside in the Magnolia neighborhood of Seattle, and to make recommendations to the City regarding stabilizing the hillside. The City did not immediately implement Shannon & Wilson's recommendations, and plaintiffs' homes were damaged by a slide. Burg argued the same statutes and regulations as those cited by claimants imposed a duty on Shannon & Wilson to report to neighboring property owners regarding the instability of the hillside above their properties. This Court rejected the argument, explaining that statutes identifying a duty to the general public do not create private causes of

action:

> To sustain a negligence action against an individual, "the duty must be one owed to the injured plaintiff, and not one owed to the public in general." Taylor v. Stevens County, 111 Wash.2d 159, 163, 759 P.2d 447 (1988). The statute and regulations cited by appellants [RCW 18.34 and WAC 196-27] indicate that professional engineers owe duties to the public, to their clients and to their employers. Except for Burg, appellants were not clients or employers of S & W. claimants offer no other evidence of a special relationship that would invoke a duty under the statute or regulations. The broad pronouncements that engineers owe a general duty to the public welfare alone, do not establish that engineers owe a duty to any identifiable group or individual. claimants have not met their burden of articulating how these statutes and regulations impose a duty on S & W specific to them individually. Summary judgment was appropriate

Burg, supra, 110 Wn. App. at 807 (emphasis added). Accord, Jackson v. City of Seattle, 158 Wn. App. 647, 654, 244 P.3d 425 (2010) (codes enacted for the general welfare do not give rise to tort liability).

The statutes and regulations cited by claimants do not apply to condition assessments of existing buildings or to the preparation of reserve studies. The architect and engineer licensing statutes do not create a duty running from Marx/Okubo to claimants. Therefore, claimants have failed to establish a statutory basis for imposing on Marx/Okubo a duty running to claimants.

2. Claimants fail to establish that Marx/Okubo induced justifiable reliance that it would exercise reasonable care to protect them.

A defendant may be liable to a stranger where the defendant

induced justifiable reliance that it would use care to protect the stranger. Good Samaritan cases provide examples of this type of liability. Claimants contend Marx/Okubo owed them a duty because Marx/Okubo knew claimants would rely on its reports. Claimants offered no evidence Marx/Okubo induced justifiable reliance that Marx/Okubo would use reasonable care to protect claimants. Both Marx/Okubo's Property Condition Assessment and its Reserve Study were addressed to Evans Development and stated the documents were prepared for use by Evans Development. At the time Marx/ Okubo prepared its reports the Association did not exist; no unit owners were potential purchasers; and, Marx/Okubo prohibited Evans Development from distributing its work product. Claimants produced no evidence Marx/Okubo induced justifiable reliance it would exercise care to protect claimants.

Negligent misrepresentation claims are not before the Court on this motion.[9] However, negligent misrepresentation cases are pertinent by analogy to the extent they involve application of principles relating to inducement of justifiable reliance. The ability to recover on a claim of negligent misrepresentation is limited to a specific class of persons and inducement of justifiable reliance is a factor utilized in defining the class. In Haberman v. WPPSS, 109 Wn.2d 107, 744

[9] See footnote 2, supra.

P.2d 1032 (1987), the court described the factors establishing the class as follows:

> In deference to legitimate fears of indeterminate liability to third persons, the Restatement narrows the scope of an action for negligent misrepresentations. Liability does not extend to every person who ultimately becomes aware of the misstatement. . . . Liability for negligent misrepresentations is thus limited to cases where (1) the defendant has knowledge of the specific injured party's reliance; or (2) the plaintiff is a member of a group that the defendant seeks to influence; or (3) the defendant has special reasons to know that some member of a limited group will rely on the information.

Haberman, supra, 109 Wn.2d at 162-3. See Affiliated, supra, 170 Wn.2d at 457 ("A duty's scope can be limited to designated classes of persons."), citing ESCA Corp. v. KPMG Peat Marwick, 135 Wn.2d 820, 832, 959 P.2d 651 (1998).

Applying the Haberman analysis by analogy, claimants here do not fall within any of the groups entitled to justifiably rely upon statements made in Marx/Okubo's reports. First, there is no evidence Marx/Okubo was aware of these claimants' reliance. Marx/Okubo's contract with, and reports to, Evans Development made clear Marx/Okubo's services were being performed solely for the benefit of Evans Development. (CP 766, 777, 800) There is nothing in Marx/Okubo's reports to suggest to claimants that Marx/Okubo was undertaking a duty to them. (CP 755, 862-3, 873-4) Contrary to claimants' assertion, the Reserve Study, which referenced a homeowners' association,

did not reference Madera West Homeowners Association or the Madera West Condominiums. On the facts presented, claimants do not fall within the first group identified by the Haberman court.

Second, claimants clearly did not fall within a group that Marx/Okubo sought to influence. Marx/Okubo's reports were prepared for use solely by Evans Development. (CP 755, 766)

Finally, there is no evidence Marx/Okubo had any special reason to believe some member of a group other than Evans Development would rely on its reports. Marx/Okubo's contract expressly limited use of its reports to Evans Development and prohibited Evans Development from distributing its reports. There is no evidence Marx/Okubo had notice its reports would be provided to or used by claimants. (CP 873-4: "Q. And once again, when you produced this report to A.F. Evans, you believed it was only for their internal purpose, correct? A. That's correct." See also CP 755.)

The Washington Supreme Court's decisions in Schaaf v. Highfield, 127 Wn.2d 17, 896, P.2d 655 (1995), and ESCA Corp. v. KPMG Peat Marwick, supra, are instructive. Plaintiff in Schaaf asserted a negligence claim against a real estate appraiser. The supreme court treated the claim as one premised upon negligent misrepresentation. The Court stated the liability of a real estate appraiser "extends only to those involved in the transaction that triggered the appraisal report,

including, but not necessarily limited to, the buyer and the seller." Schaaf, 127 Wn.2d at 28.

In ESCA Corp., the supreme court held a lender was not within the class of parties entitled to rely upon a draft audit report prepared by accountants. In determining the accounting firm owed no duty to the lender, the court noted the accounting firm intended the report would be distributed only to limited members of its client and the accounting firm neither provided a copy of the report to the lender nor was aware its client would do so. ESCA Corp., supra, 135 Wn.2d at 832-3.

No reason exists to distinguish professionals hired to perform a pre-purchase appraisal or a financial records audit from one hired to perform a property condition assessment or reserve study for purposes of determining the scope of their duties owed to third parties. Marx/Okubo's Property Condition Assessment and Reserve Study were not created for claimants' benefit and guidance. None of the claimants were participants in the transaction that triggered the preparation of the reports and there is no evidence Marx/Okubo had notice claimants would receive or rely on its reports. Marx/Okubo did not induce justifiable reliance that Marx/Okubo would exercise reasonable care to protect claimants.

3. No special relationship existed between claimants and Marx/Okubo.

Claimants argue a special relationship existed between them and Marx/Okubo because Marx/Okubo knew that, if Evans Development purchased the Forest Village Apartments it might convert the apartments to condominiums and use some of the information provided by Marx/Okubo to prepare its disclosures to prospective purchasers.[10] Claimants contend that, because it was foreseeable that information might reach them, Marx/Okubo owed claimants a duty. Claimants' argument fails because foreseeability does not establish a duty, it simply defines the scope of a duty once the duty is found to exist. Bernethy v. Walt Failor's, Inc., 97 Wn.2d 929, 933, 653 P.2d 250 (1982) ("Common law principles of negligence provide that duty is a question addressed to the court. . . . Once this initial determination of legal duty is made, the jury's function is to decide the foreseeable range of danger thus limiting the scope of that duty."). See Schooley v. Pinch's Deli Market, Inc., 134 Wn.2d 468, 477, 951 P.2d 749 (1998) ("[F]oreseeablity serves to define the scope of the duty owed.").

Both the Reserve Study and Condition Assessment stated they were prepared for use by Evans Development. The Condition Assessment expressly limited use of the report "to the client to whom it is

[10] In fact Evans Development did not purchase the complex, it was purchased by a separate entity, A.F. Evans Company. (CP 1688)

addressed." (CP 777) Although the Reserve Study referenced a homeowners association, it did not reference the Madera West Homeowners Association, nor any unit owner. In fact, the Reserve Study indicated its purpose was to "report our findings to the Client to whom the report is addressed" and cautioned that it was based upon "verbal representations made to us, the accuracy of which is unknown." (CP 800)

Marx/Okubo clearly and unequivocally prohibited its client from distributing either report to third parties. (CP 766) The undisputed facts do not establish a special relationship between Marx/Okubo and claimants.

The facts in Burg v. Shannon & Wilson, supra, are analogous to those presented here. Shannon & Wilson recommended remedial measures to its client to increase the stability of the client's property. After landslides occurred several downhill neighbors sued Shannon & Wilson asserting it owed a duty to warn them of the instability of its client's property. The trial court found no special relationship existed between Shannon & Wilson and the neighbors and therefore no duty was owed by Shannon & Wilson. This Court affirmed. Burg, 110 Wn. App. at 811.

Claimants seek to distinguish Burg by arguing they had a relationship with Marx/Okubo that did not exist in Burg. The argu-

ment is unsupported by fact. First, claimants presented no evidence of any "relationship" between them and Marx/Okubo. Although Marx/Okubo's Reserve Study referenced a homeowners' association, it did not reference the Madera West Homeowners Association, any unit owner, or even the Madera West Condominiums. Second, claimants incorrectly argue "no evidence of any relationship whatsoever" existed between the damaged owners and the engineer in Burg. Brief of Appellant at 16. In fact, Burg had a direct contractual relationship with defendant Shannon & Wilson, which predated Shannon & Wilson's final report to the City by seven days. Burg, 110 Wn. App. at 810 ("Burg hired S & W on June 21, 1996."). The Burg court found Shannon & Wilson's contract to perform separate services with respect to the stability of Burg's property did not create a special relationship requiring it to disclose advice given to an uphill property owner. Id. ("Therefore, S & W owed no additional duty to the Burgs under their contract to notify them of future instability or recommendations."). See also Taliesen Corp. v. Razore Land Co., 135 Wn. App. 106, 130, 144 P.3d 1185 (2006) (Although a geotechnical engineer subsequently contracted with plaintiff, this Court found no special relationship existed that would rise to a duty to disclose environmental contaminants identified for a prior client.).

Special relationship analysis is generally found in cases applying the public duty doctrine. In such cases a special relationship can arise where there is direct contact between the parties and there are express assurances made that give rise to justifiable reliance on the assurances by plaintiffs. See Babcock v. Mason County Fire Dist. No. 6, 144 Wn.2d 774, 786, 30 P.3d 1261 (2001). No evidence of any direct contact between claimants and Marx/Okubo has been presented. There is no evidence Marx/Okubo made any assurances to claimants.

Both the Marx/Okubo Property Condition Assessment and Reserve Study made clear they were prepared for the exclusive use of Evans Development. There is no evidence Marx/Okubo induced justifiable reliance it would use care to protect claimants. Claimants have failed to offer facts that might establish a special relationship between them and Marx/Okubo.

4. Dismissal of claimants' claims was proper.

Based upon the undisputed facts before the Court, and the cited authority, by performing an existing building assessment and preparing reports to its client, Evans Development, Marx/Okubo did not undertake independent tort duties to strangers. Claimants and Marx/Okubo were strangers at the time Marx/Okubo performed its services. None of the elements necessary to impose a duty of care

toward a stranger have been demonstrated by claimants. Therefore Marx/Okubo owed no duty to claimants and the trial court properly granted Marx/Okubo summary judgment.

C. The Trial Court Properly Denied Claimants' Motion Where the Association Lacked Standing to Bring Independent Negligence Claims Against Marx/ Okubo.

Claimants' Third Assignment of Error addresses the trial court's denial of claimants' motion for summary judgment. When reviewing a denial of summary judgment, appellate courts engage in the same inquiry as the trial courts. Babcock, supra, 114 Wn.2d at 784.

On November 11, 2011, claimants moved for summary judgment, in part, to establish the Association's independent standing to assert negligent misrepresentation and professional negligence claims. (CP 1094) After the trial court denied claimants' motion, the Association moved for reconsideration, stating:

> The Association . . . has standing to bring a claim on its own behalf where it has complete ownership of the reserve account that is underfunded as a consequence of Okubo's gross under-estimation of the amount it would cost to repair Madera.

(CP 1652) The trial court denied the motion for reconsideration. (CP 1667) The Association now appeals. After viewing the facts and inferences in the light most favorable to Marx/Okubo, the trial court's ruling must be affirmed. Babcock, 114 Wn.2d at 784.

The doctrine of standing prevents a party from asserting another person's legal right. Timberlane Homeowners Ass'n, Inc. v. Brame, 79 Wn. App. 303, 307, 901 P.2d 1074 (1995); and see, Stuart v. Coldwell Banker Commercial Group, Inc., 109 Wn.2d 406, 414, 745 P.2d 1284 (1987) ("The rights being asserted, and the claims being made, belong to the individual homeowners.").

The Association contends RCW 64.34.304(1)(d) gives it standing independent of homeowners to sue for defects in the common elements of Madera West. The issue of whether RCW 64.34.304(1)(d) gives an association standing independent of its members was resolved by the Washington Supreme Court in Satomi Owners Ass'n v. Satomi, LLC, 167 Wn.2d 781, 225 P.3d 213 (2009).

In Satomi, the homeowners' association – represented by the same counsel as claimants in this appeal – attempted to bring construction defect claims on behalf of the association and individual unit owners for damage to condominium units, common elements and limited common elements. Id. at 812. The association claimed that it was a separate legal entity with claims independent of unit owners. Id. at fn. 24, citing RCW 64.34.304(1)(d). The court found the property identified in the association's complaint was "owned by the unit owners, not Blakeley Association." Id. The court held the association lacked standing to bring claims on its own behalf because it "has not

alleged damage to any property in which it has a protectable interest." Id. at 812. "Thus, the claims against Blakeley Village are brought solely in a representative capacity by Blakeley Association on behalf of its members who own the allegedly damaged property." Id.

As in Satomi, the property damage at issue is to the "common elements" which are owned by the unit owners, not the Association. Satomi, 167 Wn.2d at 812. The Association and individual unit owners asserted identical claims. (CP 714-5) The only property identified in those claims were common elements including, "water intrusion into and through the building envelope; exterior and interior building surfaces have deteriorated prematurely; interior components have been structurally compromised and the property's useful safe-life is shortened . . . ." (CP 710) These common elements belong to unit owners, therefore the Association lacks standing to bring the claims on its own behalf. Satomi, 167 Wn.2d at 812.

In an effort to avoid the result of Satomi, the Association alleges a property interest in the reserve account. However, the Association's right with respect to the reserve account is limited to administrative functions for the benefit of individual unit owners. RCW 64.34.304(1)(p) ("Establish and administer a reserve account as described in RCW 64.34.380." Emphasis added.); RCW 64.34.380 (an association may "establish a reserve account to fund major main-

tenance, repair, and replacement of common elements . . ." Emphasis added.). The Association receives no benefit from administering the reserve account. RCW 64.34.356 (requiring the Association to return or credit any surplus remaining in the reserve account).

The Association's alleged interest in the reserve account is not sufficient to give the Association independent standing to sue Marx/ Okubo. Timberlane, 79 Wn. App. at 308-309 (The association lacked standing absent "a present, substantial interest, as distinguished from a mere expectancy, or future, contingent interest" and "a benefit will accrue it by the relief granted."). See, Satomi Owners Ass'n v. Satomi, LLC, 139 Wn. App. 175, 180, 159 P.3d 460 (Div. 1, 2007) cited with approval by Satomi, supra, 167 Wn.2d at 812.

The Association cannot establish that its interest in the reserve account is more than a "mere expectancy, or future, contingent interest" and that a benefit will accrue to the Association by relief granted. Timberlane, 79 Wn. App. at 309. The Association's interest in the reserve account, if any, is a future interest, contingent upon unit owner ability and willingness to make deposits. Further, the Association's interest is not substantial where it is limited to administering the reserve account. The Association will receive no benefit from relief granted for damage to the reserve account because all funds in the reserve account must be used for the benefit of the common

elements. RCW 64.34.380. Claims for damage to common elements belong to unit owners. Therefore, any benefit accrues to the unit owners, not the Association.

The Association contends that, notwithstanding Satomi, it has an independent professional negligence claim for damage to the common elements citing the "property interest" analysis in Affiliated, supra, 170 Wn.2d 442. However, Affiliated does not establish standing. In Affiliated, the lead opinion, joined by one Justice, extended the engineers' duty of care to SMS because SMS had an existing "property interest to use and occupy the property," stating:

> In this case, . . . [i]t is plain that the City granted to SMS "the concession right and privilege to maintain and exclusively operate the Monorail System including the facilities, personal property and equipment, together with the right to use and occupy the areas, described in this section." These are property interests in using and possessing the Seattle Monorail, and thus SMS was within the scope of LTK's duty of care.

Id. at 458-459. Emphasis in original; citation omitted.

Unlike the existing property interest at issue in Affiliated, supra, the Association did not hold any property interest at the time Marx/Okubo performed services. Marx/Okubo prepared its reports on April 21, 2005 and May 13, 2005. The Association was not formed by Madera West, LLC until July 15, 2005. (CP 916-9) Marx/Okubo could not damage an entity that did not exist.

Further, the only interest the Association possesses is the right to maintain the Project's common elements and to "establish and administer a reserve account." RCW 64.34.304(1)(f); RCW 64.34.304(1)(p). Emphasis added. (CP 1093) The Association's alleged right to "acquire, hold, encumber and convey in its own name" or "grant easements" is misleading because the Association's right is expressly subject to the approval of all affected unit owners. See, RCW 64.34.348, referenced in RCW 64.34.304(1)(h). The Association's interest falls short of Affiliated's concessionaire's interest to "use and occupy" the property. Therefore, the Association lacks independent standing to assert claims for damage against Marx/Okubo and the trial court's ruling must be upheld.

D. The Trial Court Properly Denied Claimants' Motion to Strike the Expert Testimony of Randy Hart.

A trial court's decision to admit or exclude expert testimony is reviewed for abuse of discretion. Stevens v. Gordon, 118 Wn. App. 43, 51, 74 P.3d 653 (2003). The decision to admit expert testimony will not be disturbed on appeal "except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." Lancaster v. Perry, 127 Wn. App. 826, 830, 113 P.3d 1 (2005) (internal citations and quotations omitted).

On November 10, 2011, claimants filed a motion for partial summary judgment against Marx/Okubo. Claimants' motion argued, without support, that Marx/Okubo committed professional negligence. (CP 1090) In opposition to that contention, Marx/Okubo submitted, among other things, the Declaration of Randy Hart in Support of Marx/Okubo's Opposition. (CP 1288) Mr. Hart is an architect who specializes in building enclosure design and forensic architecture. Id. at ¶2. He reviewed the prior property owner's business records and compared the siding descriptions contained in the 1996 and 2005 Marx/Okubo reports and concluded it was likely that the siding identified as "damaged" in the 1996 report had been repaired prior to Marx/Okubo's 2005 site visit. (CP 1289 at ¶7)

Claimants moved to strike the following underlined portions of paragraphs 6 and 7 from Mr. Hart's declaration:

> 6. Marx/Okubo recommended the property owner, Richard H. Senn, replace the damaged siding using other siding products. Marx/Okubo specifically recommended that property owners contact Cedar-King Lumber Company for siding samples.
>
> 7. My review of the Complex's records from the 1990's suggests that the property owner at the time replaced the damaged LP-Siding. In the Spring of 1997, Mr. Senn obtained bids from Cedar-King Lumber Company to replace LP-Siding with various siding products including Vytek vinyl siding or new LP-Siding. Attached, as **Exhibit A**, is a copy of Cedar-King Lumber Company's bids to replace the siding at the Apartments, dated February 21, 1997 and March 18, 1997.

(CP 1571-2) The trial court denied claimants' motion to strike. (CP 1643-4)

Claimants contend the testimony in paragraphs 6 and 7 was inadmissible under the Evidence Rules. However, Mr. Hart's testimony falls within exceptions to Evidence Rules, therefore the trial court properly denied claimants' motion to strike.

Claimants asked the trial court to exclude Mr. Hart's testimony under ER 701. Evidence Rule 701 is inapplicable. By its terms, ER 701 only applies to lay witnesses. ER 701 ("If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited. . . ."). Randy Hart testified as an expert. (CP 1288 at ¶¶ 2, 3 and 17) Evidence Rule 701 does not preclude Mr. Hart's expert testimony.

Claimants argued the trial court must exclude the testimony under ER 602. Evidence Rule 602, requiring personal knowledge, is explicitly "subject to the provisions of rule 703, relating to opinion testimony by expert witnesses." ER 602. Evidence Rule 703 allows an expert to base opinions on evidence made known to the expert at or before the hearing without regard for the admissibility of the evidence. Mr. Hart testified that he based his opinions on Marx/Okubo's 1996 Report and other records produced in discovery. (CP 1289 at ¶3; CP 1604 at ¶¶ 5 and 7) Mr. Hart identified the pertinent

facts he relied upon from the 1996 Report and from the business records of Mr. Senn. These facts support Mr. Hart's opinion set forth in paragraph 17. (CP 1292) Claimants' unsupported contention that no reasonable expert would rely on these records is without merit. Under ER 602 and 703, paragraphs 6 and 7 are admissible as the bases of Mr. Hart's opinion testimony.

Claimants argue that paragraphs 6 and 7 contain inadmissible hearsay. In Washington, "[e]xpert opinion may rely on hearsay." Sunbreaker Condominium Ass'n v. Travelers Ins. Co., 79 Wn. App. 368, 374, 901 P.2d 1079 (1995). Mr. Hart's testimony was not offered to prove the truth of the matters asserted and therefore is not hearsay. ER 801(c). Paragraphs 6 and 7 were offered to explain the bases of Mr. Hart's opinions. The evidence is admissible under ER 703 and ER 705. Further, the documents relied on by Mr. Hart's testimony fall within the hearsay exceptions. Claimants argue, for the first time on appeal, the siding bid attached to Mr. Hart's declaration should have been excluded as hearsay. Under ER 803(6), business records maintained in the regular course of business constitute an exception to the hearsay rule. RCW 5.45.020. In paragraph 6, Mr. Hart refers to a 1996 Report which was produced from Marx/Okubo's business records and Claimants attached a copy to their motion for partial summary judgment. (CP 1106) In paragraph 7, Mr. Hart refers

to Cedar-King Lumber Company bids produced in the business records of Mr. Senn through his company, Pacific Northwest Properties, LLC. (CP 1603 at ¶¶3-5; CP 1610) There is no evidence that the March 18, 1997 bid addressed to Mr. Senn was prepared for litigation purposes. (CP 1294) Therefore, the records, if hearsay, fell within the business records exception to the rule. ER 803(6). Therefore the trial court did not err by admitting Mr. Hart's testimony.

V. CONCLUSION

Claimants failed to provide Marx/Okubo the pre-claim notice required by RCW 64.50 and the trial court's June 10, 2012 dismissal without prejudice of claimants' claims was proper.

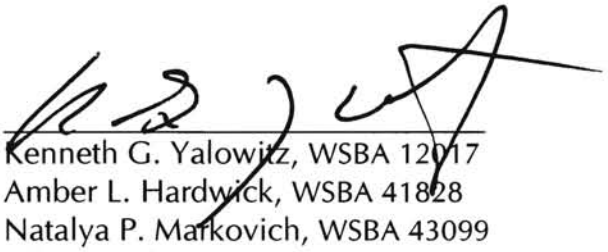
Claimants failed to establish Marx/Okubo owed them a duty, therefore the trial court's December 9, 2012 dismissal of claimants' claims with prejudice was proper.

The Association lacked standing to bring its own negligence claims and/or a negligence claim on behalf of individual unit owners, therefore, the trial court's denial of claimants' summary judgment was proper.

The trial court did not abuse its discretion by admitting the expert testimony of Randy Hart over objection of claimants.

For the foregoing reasons, this Court should affirm the decisions of the trial court.

RESPECTFULLY SUBMITTED this 19th day of July, 2012.



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CERTIFICATE OF SERVICE

The undersigned certifies under the penalty of perjury according to the laws of the United States and the State of Washington that on this date I served in the manner noted below, a true and correct copy of the foregoing document on the following:

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DATED this 19th day of July, 2012, at Seattle, Washington.

Laura Wilkinson