68522-8

68522-8

No. 68522-8-1

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

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MARX/OKUBO.

Appellant,

v.

MADERA WEST CONDOMINIUM OWNERS ASSOCIATION, et al.,

Respondent.

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APPEAL FROM KING COUNTY SUPERIOR COURT
Honorable Mary Yu, Judge

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# BRIEF OF RESPONDENT

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## INTRODUCTION

The first part of this appeal hinges on whether a party can move for summary judgment, raise a certain issue therein, and then selectively quote from the non-moving parties' response to manufacture a claim for attorney's fees. Appellant/Marx Okubo's ("Okubo") claim for attorney's fees in this instance is exactly that, and the trial court accordingly denied its motion for fees under RCW 4.84.330. Respondents did not make any breach of contract claims against Okubo. Respondent made only negligence claims against Okubo. The only time Respondents referenced a contract and Okubo in the underlying action was in their response to Okubo's motion for summary judgment, wherein Okubo put its contract with AF Evans at issue.

In the second part of the appeal, Okubo is asking the Court to direct the trial court to sanction Respondents. In doing so, Okubo does not argue that the trial court misapplied the law or any standard to effect sanctions under CR 11 or CR 26, but rather, it requests this Court review again, all of the facts and evidence in support of Respondents' negligent misrepresentation claim and answers to discovery, to affirmatively find Respondents gave false testimony (i.e. engage in a review de novo). As the trial court has already reviewed the record extensively and determined no false testimony was given, its decision should be upheld.

## I. ASSIGMENTS OF ERROR/STATEMENT OF ISSUES

1. The trial court did not err by denying Okubo's motion for an entry of attorney's fees under RCW 4.84.330 because Respondents never made a breach of contract claim against Okubo, nor did they argue Okubo's contract with AF Evans was central to their claims or knowingly exploit it. And notwithstanding the same, the prevailing party clause in Okubo's contract with AF Evans does not award fees in this instance.

2. The trial court did not abuse its discretion by denying Okubo's request for CR 11 sanctions because Respondents' negligent misrepresentation claim had a chance to succeed at the time it was made, and was supported by facts and evidence.

3. The trial court did not abuse its discretion by denying Okubo's request for CR 26 sanctions because Respondents did not give false testimony; the discrepancy in the testimony offered by them, if any, was caused by the discrepancy between Okubo's interrogatories and deposition questions.

## II. STATEMENT OF THE CASE

This lawsuit arises out of the marketing, selling, and construction defects at the Madera West Condominiums, a 160 plus unit condominium conversion located in Federal Way, Washington. The Developer/Declarant of the project was Madera West, LLC. AF Evans ("Evans") was the managing member of Madera West, LLC.

Under the Washington Condominium Act ("WCA"), Madera West, LLC was required to deliver to purchasers a Public Offering Statement ("POS"), and to include therein property assessment and a reserve study as part of the sale of each condominium unit. RCW 64.34.405-415. To assist in developing the necessary reports, in 2005, Madera West, LLC's managing member retained the services of Okubo, who had actually first investigated the project in 1996. CP 750.

Okubo contracted with Evans (referred to also as the "Okubo – Evans contract") to prepare the property report and reserve study required by WCA. CP 796-808. According to Okubo, the purpose of the Reserve Study was to provide a projection of costs for preparing and maintaining a reserve fund for future repairs. CP 6. The problem with the reserve study was that it did not identify a realistic amount of monthly homeowner dues to be put into the reserve account given the operating budget for the project and necessary repairs. CP 6.

To sell units at Madera, Evans/MW LLC hired Coldwell Banker Bain ("CBB") as a listing broker.

Almost every unit sale was carried out as follows: one of CBB's appointed agents would sit down with the purchaser at the Madera clubhouse; the agent would provide them with a copy of the purchase and sale agreement and statutorily required POS, which included a copy of Okubo's property report and reserve study; he/she would walk the purchasers through the purchase and sale agreement and 300 page or so POS, telling them where to sign, and what he/she believed was the relevant information they should know. CP 766-783, 792 at p. 139 lns. 5-12, 832-846. After reviewing and signing the necessary paperwork, the agent would send the purchaser off with the knowledge they had a week or so to review everything and could rescind their purchase and sale agreement if they wanted. CP 766-783, 792 at p. 139 lns. 5-12, 832-846. In a few instances, however, the POS was mailed several weeks later. CP 772-777.

Respondents filed this action on March 4, 2009.

Based on evidence gathered in discovery, and because of change in Washington law (i.e. the adoption of the independent duty doctrine and acknowledgment of the common law duty of architects and engineers in Affiliated FM Ins. Co. v. LTK Consulting Serv., Inc., 170 Wash.2d 442,

243 P.3d 521 (2010)), Respondents moved to name Okubo as a defendant in this action in December of 2010.

A few months after being joined as a defendant, Okubo was dismissed from the action without prejudice.[1]

On October 4, 2011, the Association moved to add Okubo back into this action. The order granting leave to amend was entered on October 13, 2011.

Respondents' third amended complaint made specific claims against each Defendant. The complaint did not mention or allege any claims against Okubo relating to its contract with Evans. CP 829-30. Respondents instead made only two claims against Okubo; one for negligent misrepresentation, and one for negligence. CP 829-30. The basis for the negligent misrepresentation claim was Okubo's failure to provide accurate information about homeowner dues. CP 813.

## III. ARGUMENT AND AUTHORITY

### 1. Okubo is not entitled to attorney fees under RCW 4.84.330 because the Evans-Okubo contract was not central to their claims, they did not knowingly exploit the contract, and the contract does not support a fee award under its terms.

[1] Okubo was dismissed for lack of notice under RCW 64.50, which is an assignment of error in Respondents appeal No. 68127-3-1 linked hereto.

### a. The Evans-Okubo contract was not central to Respondents' claims.

The trial court properly held that Okubo is not entitled to fees under RCW 4.84.330. Respondents never made a breach of a contract claim against Okubo, and further, they never tried to step into Evans's shoes and enforce any contractual warranties against Okubo. Indeed, Respondents argued the exact opposite. Respondents argued the contract could not be enforceable or binding against them, and even if the trial court was to accept Okubo's position, the contract by its own terms did not allow Okubo to recover fees under RCW 4.84.330.

With regard to awarding fees, the starting point for the court is not a public policy favoring attorney fees; instead, it starts with the general rule that a prevailing party cannot recover attorney fees absent a contract, a statute, or a recognized ground in equity. Rettkowski v. Dep't of Ecology, 128 Wn.2d 508, 514, 910 P.2d 462 (1996). RCW 4.84.330 in relevant part provides,

> In any action on a contract or lease ... where such contract or lease specifically provides that attorney's fees and costs, which are incurred to enforce the provisions of such contract or lease, shall be awarded to one of the parties, the prevailing party, whether he or she is the party specified in the contract or lease or not, shall be entitled to reasonable attorney's fees in…

Accordingly, for RCW 4.84.330 to apply: (1) the action must be "on a contract or lease," (2) the contract must contain a unilateral attorney fee or

cost provision[2], and (3) there must be a "prevailing party." Wachovia SBA Lending v. Kraft, 138 Wash.App. 854, 859, 158 P.3d 1271 (2007); citing Labriola v. Pollard Group, Inc., 152 Wn.2d 828, 839, 100 P.3d 791 (2004).

Respondents alleged two causes of action in their complaint against Okubo; negligent misrepresentation and negligence. CP 829-830. Respondents never mentioned the Evans - Okubo contract in their complaint, nor did they ever rely on it for any purpose in support of their claims. CP 829-830.

Okubo's citation to Respondents' response to its motion for summary judgment as a basis to argue fees cannot be substantiated. In their response to Okubo's motion for summary judgment, in the paragraph directly preceding the passage relied on by Okubo in support of its fee motion, Respondents explained that Okubo's contract with Evans had absolutely nothing to do with their claims. Respondents' response in relevant part says,

> In its motion, Okubo lists a few of the sections in the standard terms that affect [sic] its legal relationship with Evans, but does not list any – not a single one – that affects [sic] its relationship with Plaintiffs or somehow makes them part of the Okubo and Evan's

[2] "By its plain language, the purpose of RCW 4.84.330 is to make unilateral contract provisions bilateral. The statute ensures that no party will be deterred from bringing an action on a contract or lease for fear of triggering a one-sided fee provision." Wachovia SBA Lending, Inc. v. Kraft, 165 Wn.2d 481, 200 P.3d 683 (2009).

> agreement. For example, the parts of the 'LIMITATION OF LIABILITY' section in the standard terms Okubo redlines describes the risk allocation they agreed to with the 'Client,' who in this case is Evans. *Nothing therein can be presumed to bind the Plaintiffs.*

CP 753 at lns. 9-24 (emphasis added). Shockingly, Okubo entirely omitted this paragraph from its initial fees motion, and despite Respondents pointing out the omission in their response to the trial court, Okubo omits it again from its opening brief to this Court. CP 753 at lns. 9-24.

But even assuming this Court was not made aware of the foregoing passage, the one Okubo relies on that comes directly after, in and of itself confirms Respondents were not relying on the Okubo-Evans contract. For RCW 4.84.330 to apply in this instance, Evan's contract with Okubo had to be central to the existence of Respondents' claims (i.e. the claims could not exist independently of it). Seattle–First Nat'l Bank v. Wash. Ins. Guar. Ass'n, 116 Wn.2d 398, 413, 804 P.2d 1263 (1991); c.f. ESCA Corp. v. KPMG Peat Marwick, 135 Wash.2d 820, 959 P.2d 651 (1998); Deep Water Brewing, LLC v. Fairway Resources Limited, 152 Wn. App. 229, 215 P.3d 990 (2009) (Attorney fees awarded for tortious interference "where enforcement of the agreement [was] the essence of the ... tortious interference claim"). Out of an abundance of caution, and only to address any chance the trial court found Okubo's contract argument persuasive, Respondents' said in response to Okubo's motion the following:

> The only relevant part of the standard terms here is Okubo's warranty that '[it would] perform its services for [Evans] within the accepted practices and procedures and [would] exercise that degree of care and skill ordinarily exercised under similar circumstances by members of its profession.' In other words, Okubo warranted that it would not be negligent in carrying out the work in its proposal.

CP ---- (internal citations omitted).[3] From the above passage, it is clear Respondents' were explaining the Evans - Okubo contract, if relevant at all, under its very terms even excluded direct claims made by Evans against Okubo for negligence, again confirming their position that their negligence claims were exclusive of the contract.

The trial court properly recognized that Okubo was not entitled to fees under RCW 4.84.330 where the only support for its claim arose out of a passage in Respondents' response to their motion that was taken out of context.

In addition, to prevail on its motion for summary judgment dismissal, Okubo relied heavily on ESCA, supra. ESCA was an action for negligent misrepresentation arising out of a bank/lender's reliance on preliminary reports generated by an accounting firm for a software company to make a loan. Although Okubo incorrectly argued ESCA as grounds to dismiss Respondents' negligence claim, and Respondents do

[3] Clerk's papers numbers have not yet been assigned to this document. The sub number is 270 in Okubo's Supplemental Designation of Clerk's Papers.

not concede it applies here for that purpose, ESCA is illustrative in so far as the Court reasoned Appellant's negligent misrepresentation claim was actionable on the materials and opinions prepared as a result of a parties' underlying contract/agreement. Therefore even if Respondents relied solely on the reports Okubo prepared pursuant to the contract with Evans, the Evans - Okubo contract would not automatically become central to their claims as Respondents' claim arose out of the independent duty doctrine. Affiliated, 170 Wash.2d at 442.

ESCA is also illustrative whereas it points out that justifiable reliance is not what Okubo purports it to be in its motion – simply that Respondents did not allegedly review the Okubo reports prior to taking over their units. Justifiable reliance in a negligent misrepresentation claim means the "lack of contributory negligence by the plaintiff." Id. at 827, citing Restatement (Second) of Torts § 552A (1977).

The trial court properly denied Okubo's motion for attorney fees under applicable case law, particularly where Okubo had relied heavily on case law that was contrary to their position on attorney fees to dismiss the underlying claims.

In the same vein, the trial court properly denied Okubo's motion for fees in regard to Respondents' professional negligence claim. This Court held in Boguch v. Landover Corp., 153 Wn.App. 595, 618-19, 224

P.3d 795 (2009), that a claim for breach of professional duties is not an action on contract, unless Plaintiff makes a claim for a specific breach of a contractual duty. Respondents' position - as pointed out in its response to Okubo's motion for summary judgment – was that no specific provision of the Evans - Okubo contract applied to them. Therefore as a matter of law, Okubo was not entitled to attorney fees on Respondents' negligence claim.

Finally, neither Western Stud Welding, Inc. v. Omak Industries, Inc., 43 Wn. App. 293, 716 P.2d 959 (1986) or Eastwood v. Horse Harbor Foundation, Inc., 170 Wn. 2d 380, 241 P.3d 1256 (2010) confirms Okubo should have been awarded fees. In Western, this Court remanded the issue of attorney fees relying on Herzog Aluminum, Inc. v. General American Window Corp., 39 Wash.App. 188, 692 P.2d 867 (1984) wherein the Court said, "we conclude that the broad language '[i]n any action on a contract' found in RCW 4.84.330 encompasses any action in which it is alleged that a person is liable on a contract." Respondents never alleged Okubo was liable on its contract with Evans.

In Eastwood, fees were awarded because the parties' lease agreement contained an attorney fee provision. Respondents were not a party to the Evans-Okubo contract, and again, they never made any semblance of a breach of contract claim against Okubo.

**b. Respondents did not knowingly exploit the warranty provision(s) in the Evans-Okubo contract for their negligence and negligent misrepresentation claims.**

Again, the only reason the Evans-Okubo contract was discussed at all in the underlying litigation with Okubo is because Okubo brought it up. Respondents never relied on the Okubo-Evans contract in support of their claims. Okubo's argument, that by addressing issues raised in its motion for summary judgment, Respondents are equitably estopped from rejecting the attorney fee provision in its contract with Evans, is not well reasoned. It is, moreover, terribly unfair.

To that end, Townsend v. Quadrant Corp., 173 Wn.2d 451, 268 P.3d 917 (2012) is not "controlling" here. Under Townsend, to be bound by an arbitration agreement between third-parties, there must be "identical causes of action" and causes of action which relate directly to the alleged breach of a contract. Id. at 461. In Townsend there was no separation of claims or parties against whom Plaintiffs were making claims in their complaint. Respondents, to the contrary, made it a point to make separate and distinct claims in their complaint and direct them at specific/different Defendants. For example, Respondents' made negligence claims only against Okubo, whereas their breach of Washington Condominium Act claim was made only against Madera West, LLC. Compare CP 829-830 and 825.

Also, as described above, none of the claims made against any of the Defendants in the underlying action alleged a breach of the Evans – Okubo contract. Respondents did not "knowingly exploit" the Evans – Okubo contract in any sense, which is why Okubo can only selectively quote from the opposition to its motion for summary judgment to have any basis to argue it is entitled to attorney fees. Townsend, 173 Wn.2d at 461.

Lastly, the presumption that Townsend is analogous to this case, even though it deals with an arbitration clause, does not find support under Washington law. Washington as a matter of policy favors arbitration, whereas it does not have a public policy that begins in favor of awarding attorney fees. Compare Heights at Issaquah Ridge Owners Ass'n v. Burton Landscape Grp., Inc., 148 Wn.App. 400, 403–04, 200 P.3d 254 (2009); and Rettkowski, 128 Wn.2d at 514.

**c. The language of the Evans-Okubo contract does not support and an award of fees under RCW 4.84.430.**

Just as RCW 4.84.430 could not apply because Respondents are not parties to the Evans – Okubo contract, and the contract is not central to their claims, etc., the plain language of the prevailing party clause makes the contract inapplicable as well. In construing a written contract courts have consistently applied the following rules: (1) the parties' intent controls; (2) the intent of the parties is ascertained from reading a contract

as a whole; and (3) that ambiguity is not read into a contract that is otherwise clear and unambiguous. Dice v. City of Montesano,131 Wn.App. 675, 683-84, 128 P.3d 1253, review denied, 158 Wn.2d 1017 (2006). The "Dispute Resolution" section of the Evans - Okubo contract pertains specifically to "Marx/Okubo" and the "Client," which is Evans. When the Evans – Okubo contract mentions the term "parties", it is specifically referring to "Okubo" and "Evans". When the Evans- Okubo contract mentions the term "party" it is specifically referring to either "Okubo" or "Evans". CP 796, 806-808. It was never ever Okubo's intent to have this contract apply to anyone else other than Evans, as Okubo alleged repeatedly in defense of Respondents' claims that it had no idea its reports would ever be produced to them; the reports were prepared solely for Evans. CP 118, 806.

Reviewing the dispute resolution section further, it is also clear that it applies only to fees incurred in "arbitration" between Evans and Okubo. CP 808 ("substantially prevailing party in any arbitration, or other final binding dispute on which the parties may agree, shall be entitled to recover from the other party all costs and expenses incurred by that party in the *arbitration*, including reasonable attorney fees.") (emphasis added).

Lastly, assuming for the sake of argument only the Evans – Okubo contract did apply, the request for fees must fail under its choice of law

provision, which required the contract to be governed by the laws of Colorado. The contract says, "any agreement between Marx/Okubo and the Client shall be governed by the laws of the State of Colorado..." CP 808.

**2. Respondents' negligent misrepresentation claims had merit at the time they made and were supported by the facts and evidence. Therefore CR 11 sanctions were not appropriate.**

A denial of sanctions or fees under CR 11 is reviewed for abuse of discretion. Washington State Physicians Ins. Exchange & Ass'n. v. Fisons Corp., 122 Wn.2d 299, 338, 858 P.2d 1054 (1993). The purpose of CR 11 is to deter baseless filings and curb abuses of the judicial system. Skimming v. Boxer, 119 Wn.App. 748, 754, 82 P.3d 707 (2004), citing Biggs v. Vail, 124 Wn.2d 193, 197, 876 P.2d 448 (1994) ("Biggs II"). CR 11 sanctions should only be imposed "when it is patently clear that a claim has absolutely no chance of success." Skimming, 119 Wn.App. at 755, citing In re Cooke, 93 Wn.App. 526, 529, 969 P.2d 127 (1990).

Accordingly, for Okubo to prevail on this appeal, it must show Respondents' negligent misrepresentation claim had no chance of success whatsoever at the time it was made. Skimming, supra; Bryant v. Joseph Tree, Inc., 119 Wn.2d 210, 220, 829 P.2d 1099 (1992) (The court should not consider what was expected using the wisdom of hindsight and should

test the signer's conduct based on what was reasonable at the time the pleading was submitted).

To make a claim for negligent misrepresentation in compliance with CR 11, Respondents had to believe at the time of filing the following: (1) the defendant supplied information for the guidance of others in their business transactions that was false; (2) the defendant knew or should have known that the information was supplied to guide the plaintiff in his business transactions; (3) the defendant was negligent in obtaining or communicating the false information; (4) the plaintiff relied on the false information; (5) the plaintiff's reliance was reasonable; and (6) the false information proximately caused the plaintiff damages. Bloor v. Fritz, 143 Wn.App. 718, 734, 180 P.3d 805 (2008). Justifiable reliance in the framework of the negligent misrepresentation claim means reliance that is reasonable under the surrounding circumstances. Lawyers Title Ins. Corp. v. Soon J. Baik, 147 Wn.2d 536, 551, 55 P.3d 619 (2002). Determining the justifiability of reliance on a misrepresentation is ordinarily a question of fact, and therefore inappropriate for summary judgment. See Havens v. C & D Plastics, Inc., 124 Wn.2d 158, 181, 876 P.2d 435 (1994).

Based on the elements above and as described in the complaint, Respondents' claim was presented as follows: Okubo supplied Respondents with a false expectation of the amount of homeowner dues;

Okubo should have known that the reports it prepared or the information contained therein would be supplied to Respondents; Okubo was negligent in communicating its opinions, at least in part, because it knew in 1996 the Project was in terrible condition and that it was not in any better condition nine years later in 2005; Respondents relied on the information supplied by Okubo as they were told by the selling agent for Madera, generally, what was in Okubo's reports, but more importantly, they understood the amount of dues they were paying would be sufficient to fund future repairs; also, specifically in terms of the Association's claim, it relied on Okubo's reports to set the amount of homeowner dues and tried to meet the reserve numbers therein to fund future repairs and maintenance.

Based on the foregoing, a jury could have concluded that Respondents' reliance was justified, and also, as a consequence of Okubo's mischaracterizations/miscalculations and expert testimony confirming the same, the reserves projections were way off.

Respondents hired two separate experts to review Okubo's reserve study; Mr. Bob Steimer and Mr. Mark Jobe. In both Messrs. Steimer and Jobe's opinions, there is no way an experienced design professional could have arrived at the conclusions Okubo did. To adequately fund the reserves, dues should have been set at two or three times the amount they were. Bryant, 119 Wn.2d at 220 (To impose sanctions, the filing must not

only be baseless, but without a reasonable and competent inquiry into the factual and legal basis). But of course, if that were the case, no Plaintiff would have purchased a unit at Madera. CP 766-768, 775-783, 832-846 .

As much as Okubo wants to confine Respondents' claims to be strictly about its reports, they just were not. The claim was based on monthly homeowner dues, and counsel even told Okubo that. In response to Okubo's threat of moving for CR 11 sanctions, Respondents' counsel explained,

> the analysis on the reserve study is being completed. It is my understanding the analysis goes as follows. Your client did an incomplete, misleading, and/or incorrect condition assessment and as a result under estimated the life expectancy of the building components. As a direct result the reserve study is way off and the monthly dues set are way too low. If the analysis was done correct and the life expectancy of the components were correct and/or accurate the dues would have been much higher (between $400 and $500 per month) and no one would have bought their unit.

CP 813. If Okubo was unclear about Respondents' negligent misrepresentation claims, it certainly was not after receiving counsel's email. But even with this knowledge, Okubo never asked about dues in deposition, and continued to illicit testimony from Respondents targeted only on their understanding of "justifiable reliance" on its reports.

The trial court did not abuse its discretion in denying Okubo's request for CR 11 sanctions where the Respondents had a chance to prevail on their negligent misrepresentation claim, and counsel made

efforts to clarify any misunderstanding Okubo may have had on the basis of the same.

### 3. Okubo was not entitled to CR 26 Sanctions because Respondents did not give false testimony.

A denial of sanctions or fees under CR 26 is reviewed for an abuse of discretion. Fisons, 122 Wn.2d at 338. A trial court abuses its discretion when its decision is "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." Burnet v. Spokane Ambulance, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997). "The sanction rules are designed to confer wide latitude and discretion upon the trial judge to determine what sanctions are proper in a given case." Fisons, 122 Wn.2d at 339.

Accordingly, for Okubo to prevail on the issue of CR 26 sanctions, it must show the trial court's decision not to impose sanctions on Respondents was manifestly unreasonable, or exercised on entirely unsustainable grounds, or for totally indefensible reasons.

To add the proper context to Respondents' argument, certain facts should be reiterated here. Almost six years ago, the Respondents sat down with Madera West's listing agent to sign their purchase and sale agreements. The listing agent handed them a set of documents totaling approximately 300 pages. He walked them through the stack of documents, telling them where to sign on the purchase and sale documents

and then flipped through what he believed were the relevant portions of the POS and its attachments. After signing, many Respondents were handed a copy of the POS to take with them while others received theirs in the mail several days later.

In addition, and to add further context, Okubo's entire argument assumes Respondents' interrogatory answers were false based on answers they gave in deposition to its Interrogatory No. 11/Interrogatory No. 8, which Okubo incorrectly says requests a date that describes when Respondents' "purchased" their unit. Interrogatory No. 11 specifically asked Respondents to "[s]tate the date on which [they] acquired an *ownership interest* in a home in the Madera West Condominiums." CP 574 (emphasis added). The distinction is paramount as an "ownership interest" in a condominium vests when the deed transfers to a "purchaser", which occurs at closing, and not on the execution of a purchase and sale agreement. RCW 64.34.020 (29).

When counsel asked in deposition if Mr. or Mrs. _____ reviewed the report or reserve study "prior to purchase," he/she is asking something very different from discovery (i.e. a transfer of an "ownership interest" could occur weeks or months after the "purchase" at the time closing). Okubo will likely say the distinction is not an issue, but if that was true, they would not have specifically asked in Interrogatory 11/Interrogatory

No. 8[4] when Respondents gained an "ownership interest" in their unit, and initially made it a point at deposition to ask whether the report or reserve study was relied on prior to "close" or "closing" rather than "purchase" or "purchasing." For example, at Okubo's first deposition it asked questions in the following form: "So you don't recall ***specifically anything*** in the Marx/Okubo report that you relied on in ***closing***; is that right?" CP 742 at p. 115 Lns. 17-19 (emphasis added). At subsequent depositions, it changed the verbiage in its questions, "...can you just confirm that you did not see this document prior to ***purchasing*** your unit?" CP 713 at p. 31 lns. 9-12 (emphasis added).

The trial court properly noted many if not all the responses were due to Okubo's deposition strategy. Okubo's deposition questions were born out of a single intent, and were meant to illicit the exact answers they wanted. Respondents' should not be punished for such tactics. It is unreasonable to believe that someone would remember a "specific" provision in a binder of documents containing over 300 pages. Okubo knew that, and that it is exactly why it did not present its questions differently by saying, for example, "[s]o you don't recall [generally anything] in the Marx/Okubo report that you relied on in closing; is that

[4] Interrogatory 11 became Interrogatory 8 in Okubo's first discovery after it was dismissed and added back to the underlying action.

right?" If the question was presented this way instead, Okubo would have received a much different answer or answers.

Finally, Okubo did not make an effort to distinguish between the property report and the reserve study, and the homeowners' manual or other attachments to the POS when asking questions, leaving many Respondents confused and distressed. See e.g. CP 131-137.

With the foregoing facts and distinctions in mind, the trial court correctly declined to award sanctions to Okubo for receiving allegedly false answers to its discovery. Except for one instance where a Respondent threw in the towel at his deposition, any discrepancy in the discovery answers and deposition testimony is a consequence of the difference between the language in the interrogatories and questions posed in deposition, Okubo taking testimony out of context or asking loaded questions, or a just a simple misunderstanding of what Okubo was asking.

After reviewing a summary of Respondents' testimony (CP 762-764) and comparing that to the hundreds of pages of highly selective testimony proffered by Okubo in its motion for fees, the trial court properly determined Respondents' testimony could not be categorized as "false", and sanctions were not warranted in any instance. CP 878.

Therefore, a review of Respondents' summary shows that in all, there are slight variations at best in the interrogatory answers and

deposition testimony offered by Respondents, and where there is any variation, it was brought on by Okubo.

Setting the discrepancies aside though, the underlying issue Okubo is trying to exploit is really no different than what attorneys face in almost every case when they go over a party's interrogatory answers with them in deposition. The same question presented differently, with a little more information, or a little more clarity or a little more context, can yield a different answer. It happens all the time; it is just that counsel is generally very cautious to seek terms and fees for it.

The trial court properly denied Okubo's motion for CR 26 sanctions, finding the discrepancy between answers to interrogatories and answers in deposition, if any, was hardly grounds to accuse Respondents of giving false testimony.

**4. Okubo is not entitled to fees on appeal.**

As explained more fully in Section 1. above, Okubo is not entitled to fees. Respondents did not make a breach of contract claim against Okubo, the Evans-Okubo contract was not central to their claim, they did not knowingly exploit the Evans-Okubo contract, and they were not parties to it.

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## CONCLUSION

Respondents are already facing tens of thousands of dollars in assessments and costs to try and repair their homes. Whether Okubo agrees or not, it was part of what went wrong at Madera West.

Okubo should not therefore be awarded fees under RCW 4.84.330 by selectively quoting pleadings and consequently putting words in Respondents' mouths. Okubo should not be awarded sanctions under CR 11 when Respondents had a chance of prevailing on their negligent misrepresentation claim. Further, Okubo should not be awarded CR 26 sanctions for its confusing examination of Respondents in deposition.

For all these reasons, and the others identified herein, Respondents respectfully request Okubo's appeal be denied on all grounds.

DATED this 2nd of July, 2012.

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

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| MARX/OKUBO, a Washington corporation,<br><br>Appellant,<br><br>v.<br><br>MADERA WEST CONDOMINIUM OWNERS ASSOCIATION, et al.,<br><br>Respondents. | APPELLATE NO. 68522-8-I<br><br>CERTIFICATE OF SERVICE |

TO: CLERK OF THE COURT

I, ADIL A. SIDDIKI, certify that I emailed a copy of the foregoing Brief of Respondent to counsel for Appellant, Mr. Ken Yalowitz, on July 2, 2012.

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