

NO. 399288

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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MICHAEL G. GUSA,

Appellant

v.

BARNES LAKE PARK OWNERS ASSOCIATION,

Respondent

APPELLANT'S REPLY BRIEF

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STATE OF WASHINGTON  
BY  DEPUTY

FILED  
COURT OF APPEALS  
DIVISION II

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## **ARGUMENT**

### **I. THE ASSOCIATION WILFULLY AND WANTONLY NEGLECTED ITS DUTIES UNDER THE DECLARATION**

The Association attempts to portray itself as having acted diligently via a showing that it made \$23,841.65 in repairs to unit 11 and the adjacent portion of the building in which it is located. However, the repairs to the first floor were necessary because the Association did nothing to halt water intrusion at that location. Many of the repairs to the second and third floors were necessary because repairs made by the Association to halt water intrusion on those floors were inadequate. Episodes of water intrusion occurred over a period of several years.

### **II. THE ASSOCIATION'S BREACH OF ITS DUTY TO MAINTAIN AND REPAIR IS CENTRAL TO THIS LITIGATION**

The Association begins its argument by asserting that its failure to maintain common areas of the condominium are irrelevant (Association's brief page 7 et seq.). That issue is, in fact, central to this litigation. The Association concedes that it has a duty to repair and maintain the common areas (Association's brief pages 7 - 8). This duty includes an obligation to maintain and repair common elements of the buildings to prevent water intrusion into the buildings. It is undisputed that the Association never made

any repairs whatsoever that were intended to prevent flooding into the first floor of the home, and that the Association did not bring in an expert to determine the causes of that water intrusion until 2008, after this litigation was underway (CP 109 - 110). The Association repeatedly replaced damaged sheetrock and carpet on the first floor, but did nothing to identify the cause of or prevent water intrusion into the first floor of unit 11 (CP 109 - 110).

This constituted a breach of the Association's duty to repair and maintain common elements of the building. Although the Association did repair some areas of the building in an effort to prevent further water intrusion into the second and third floors, many of the repairs were unsuccessful (CP 109). Having made inadequate repairs, the Association is not relieved of its continuing duty to maintain and repair common areas.

The Association next argues that had Appellant Gusa wished to enforce the Association's repair and maintenance obligation, he should have moved for injunctive or declaratory relief (Association's brief page 8). The Association wrongly claims that Appellant Gusa sued only for money damages (Association's brief page 8). In fact, in their answer and counterclaim, the defendants requested both injunctive relief and damages (CP 11). The Association's argument that Appellant Gusa should have

sought injunctive relief is an admission that the Association breached its duty of maintenance and repair, an admission that Appellant Gusa has a cause of action arising from that breach, and an admission that the trial court erred when it granted summary judgment to the Association dismissing the defendants' causes of action.

**III. THAT APPELLANT GUSA DID NOT BRING SUIT AGAINST THE ASSOCIATION PRIOR TO COMMENCEMENT OF THE ASSOCIATION'S SUIT IS IMMATERIAL**

The Association argues that Appellant Gusa "complains that in 14 years no preventative repairs were made to the ground floor. But appellant never bothered to sue the association in those 14 years and then did so only after it first sued him for delinquent assessments (Association's brief page 8 footnote 3). It is undisputed that Appellant Gusa repeatedly requested repairs to halt water intrusion into the first floor (CP 109-110). Instead of fulfilling its duty to repair and maintain the common areas, the Association brought suit. There is no basis to penalize Appellant Gusa for attempting to resolve this matter without resort to litigation.

**IV. BOTH APPELLANT GUSA AND THE ASSOCIATION ARE SUBJECT TO CHAPTER 64.32 RCW AND THE DECLARATION**

Citing *Shorewood West Condominium Assn. v. Sadri*, 140 Wn.2d 47,

52, the Association argues that condominiums are creatures of statute; that the rights and duties of individual owners are not the same as those of real property owners under the common law; and that in exchange for the benefits of associating with other owners, a condominium unit owner gives up a degree of freedom of choice that he or she might otherwise have if the property were separately and privately owned (Association's brief pages 8 - 9). While these principles are true, it is also true that the Association has duties under Chapter 64.32 RCW and the declaration.

**V. THE COURT CAN LOOK TO THE CONDOMINIUM ACT**

Appellant Gusa previously argued that the legislature made explicit in the 1989 Condominium Act, Chapter 64.34 RCW, that the primary purpose of condominium law is protection of purchasers by devoting all of Article 4 of the Act to it, without providing any equal measure of protection to the condominium association (Appellant's opening Brief pages 16 - 18). The Association responds that the new Act should not be used, even as an interpretive guide, to resolve ambiguities contained in the declaration or bylaws of a pre-1990 condominium regardless of whether that ambiguity is addressed in the Horizontal Property Regimes Act, Chapter 64.32 RCW (Association's brief page 10 footnote 4).

Of course, the court can look to any source of law to resolve an ambiguity or conflict in the provisions of a document or statute, be it the law of Florida, the law of Belgium, Blackstone's commentaries or the code of Hammurabi. Surely, recently enacted statutory law of Washington qualifies as persuasive authority when the controlling older statute is mute on the subject. The Association asks the court to rely upon judicial interpretation of statutes from other states. There is no qualitative difference.

**VI. SECTION XXI OF THE DECLARATION DOES NOT IMMUNIZE THE ASSOCIATION FROM LIABILITY**

The Association argues that § XXI of the declaration immunizes it from liability for damage resulting from water intrusion (Association's Brief page 12 *et seq.*). It does not do so in this circumstance.

The Association cites *Anderson v. Council of Unit Owners of Gables on Tuckerman Condominium*, 404 Md. 560, 948 A.2d 11 (Md. 2008) which involved two consolidated cases. In one, Anderson owned a two-level town home. *Id.* at 565. A water heater on the upper level leaked, and water flowed through the ceiling into the kitchen, causing severe water damage. *Id.* Although the water heater was owned by Ms. Anderson, she claimed that the condominium association was required to pay for the repairs. *Id.* at 566. In the companion case, plaintiffs O'Carroll owned a condominium unit that they

rented out. *Id.* at 568. A grease fire caused the ceiling sprinkler system to engage. *Id.* at 569. Plaintiffs O'Carroll claimed that the Association was required to pay for the repairs. *Id.* The Maryland Supreme Court held that the condominium association had no duty to pay for the repairs. *Anderson* did not involve damage to the interior of a condominium unit caused by an Association's breach of its duties.

*Nido v. Ocean Owners' Council*, 237 Va. 664, 378 S.E. 2d 837 (1989), like the case at bar, involved water intrusion into a condominium unit. Water intrusion occurred due to construction defects. *Id.* at 666. The condominium association engaged a waterproofing company. *Id.* Nonetheless, the Nido condominium unit continued to suffer water intrusion. *Id.* The condominium By-Laws provided that:

The Council shall not be liable for any failure of water supply or other services ... or for injury or damage to person or property caused by the natural elements ... or resulting from electricity, water, snow or ice which may leak or flow from any portion of the Common elements.

The trial court held that this provision barred the suit. The court further held that, even if the duty to repair existed, the condominium association:

did not breach the duty because the repairs undertaken by the Council were not done in a negligent manner. Instead, the trial court determined that the Council undertook the repairs in good faith and with a reasonable expectation of success,

based on the advice of experts.

*Id.*

The Virginia Supreme Court affirmed, but on reasoning that differed substantially from that of the trial court. Under the Virginia Condominium Act, the declaration and by-laws, the condominium association had a duty to repair defects in the common areas. *Id.* at 666 -667. The Supreme Court reasoned that:

We concur with the trial court's reasoning that Section 6.5 of the By-Laws limits the Council's liability for property damages resulting from certain listed events. We do not, however, view this limitation as an abrogation of the Council's contractual duty to Nido to correct the defects in the common elements established by Article 3 ( c ) of the Declaration and Section 6.1 ( c ) of the By-Laws.

Section 6.5 only limits the liability of the Council for damages in certain specified instances, a limitation agreed to by all purchasers of Oceans condominiums. This limitation does not leave the owners a right without a remedy. The owners retain the right to sue the Council for damages in instances when the damage arises from circumstances other than those enumerated in Section 6.5.

*Id.* at 667.

Inasmuch as the trial court found that the Council was not negligent in the repairs it undertook, the Supreme Court concluded that the Council met its duty to repair and maintain the common areas, and that Nido had no basis

for suit.

The Supreme Court concluded that because the condominium association undertook repairs, and was not negligent in making the repairs, the Association had met its duty to repair and maintain the common areas, and that Nido had no cause of action. *Id.* at 667. *Nido* does not bar a cause of action if the association fails to repair and maintain the common area, or makes repairs in a negligent manner.

*Franklin v. Marie Antoinette Condominium Owners Assn.*, 23 Cal Rptr. 2d 744, 19 Cal. App. 4<sup>th</sup> 824 (1993) involved water damaged caused by leaking central plumbing. Water damage to the plaintiff's hardwood floors became apparent in mid 1986 beginning with a small area and later spreading to other parts of the floor. 19 Cal. App. 4<sup>th</sup> at 827. The condominium association's manager concluded that the damage was caused by a leak beneath a sink and advised that it was the unit owner's sole responsibility. *Id.* The condominium board also arranged for an insurance investigator to look into the matter. *Id.* The insurance investigator reported "no evidence of [a] central plumbing breakdown." *Id.* On this basis, the Association refused to pay for the damages. During this period, the Association was repairing leaks in the building's plumbing system as they occurred. *Id.*

By mid 1987 the Board realized that the building's rusting steel pipes needed replacement. Eventually, the board repiped the entire plumbing system. *Id.* The trial court concluded that the plumbing had deteriorated to the point of constituting a breach of the contractual duty to maintain and repair the common area, but not to the point of establishing negligence on the part of the Association. *Id.* at 828. The CC & Rs contained an exculpatory clause which provided in part that:

[T]he Association ... shall [not] be liable for ... damage to property in the project ... resulting from ... water ... which may leak or flow from outside of any unit or from any part of the building, or from any pipes, drains, conduits, appliances or equipment or from any other place or cause, unless caused by the gross negligence of ... the Association, its Board, officers, the manager or his staff.

*Id.* at 829.

The California Court of Appeals reasoned that The Board "did their conscientious best to attend to the problems and complaints that came to them," and that the efforts were "not demonstrative of individual or group negligence." Also significant to the court's decision was the fact that the plaintiff could look to her insurer for recovery. *Id.* at 832.

In contrast, for years, Barnes Lake has knowingly and wantonly disregarded its duty to maintain and repair common elements of the structure,

thereby allowing repeated episodes of water intrusion into unit 11. The Association acted in this manner while, at the same time, it addressed water intrusion and damage resulting from water intrusion in units belonging to owners favored by the Association (CP 10 - 11 and 63). Moreover, there is no basis to conclude that Appellant Gusa has recourse to insurance when the Association has knowingly let the situation continue for years.

*Cornell v. Council of Unit Owners Hawaiian Village Condominiums, Inc.*, 983 F. Supp. 640 (D. Md. 1997) involved an alleged slip and fall on ice in a parking lot. The court held that a limitation of liability barred the suit. Nothing in that case suggests that the case involved a knowing years long failure of the association to make repairs.

In *Kelly v. Astor Investors, Inc.*, 106 Ill. 2d 505, 478 N.E.2d 1346 (Ill. 1985), Astor Investors, Inc., converted an apartment into a condominium and served as the condominium's interim board of managers. *Id.* at 508 - 509. The individual defendants were subsequently appointed to the Westbrook West Condominium Association board of managers. *Id.* at 508. The plaintiffs brought suit against Astor Investors, Inc. and the individual defendants alleging that there were leaking roofs and other structural defects in the common elements of the project. *Id.* at 507. The declaration limited

the liability of the association's board of managers to acts or omissions that constitute wilful misconduct. *Id.* at 508. The Illinois Supreme Court upheld dismissal of the claims. *Astor Investors* is not authority for the Association's claim that Appellant Gusa has no cause of action for acts and omissions. Even if they constitute wilful misconduct.

**VII. THE ASSOCIATION'S ATTEMPT TO DISTINGUISH AUTHORITY CITED BY APPELLANT GUSA IS UNFOUNDED**

In his opening brief, Appellant Gusa cited *Rodruck v. Sand Point Maintenance Comm'n v. Albers*, 48 Wn.2d 565, 295 P.2d 714 (1956, and *Fawn Lake Maintenance Comm'n v. Albers*, 149 Wn. App. 318, 202 P.3d 1019, rev. denied, 166 Wn.2d 1014 (2009) for the proposition that decisions of a homeowners' association must be reasonable, and that homeowners' associations have an obligation to exercise their discretion fairly (Appellants' opening brief page 32 - 33). The Association asserts that this authority is "inapplicable because neither involved a condominium declaration with a limitation on liability such as Section XXI" (Association's Brief page 14 footnote 7). Nothing in statute or the declaration entitle the Association to act unreasonably or exercise its discretion unfairly.

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**VIII. SECTION 15.1.6 OF THE DECLARATION DOES NOT ENTITLE THE ASSOCIATION TO CHARGE APPELLANT GUSA FOR THE COSTS OF HALTING THE WATER INTRUSION OR REPAIRING WATER DAMAGE**

Citing § 15.1.6 of the declaration, the Association argues that it is entitled to impose the cost of repairs upon Appellant Gusa (Association's brief pages 16 - 17). Section 15.1.6 of the declaration states that:

Any other materials, supplies, labor, services, maintenance, repairs, structural alterations, insurance, taxes or assessments which the Board is required to secure by law or which in its opinion shall be necessary or proper for the operation of the common area or for the enforcement of this Declaration; provided that if for any reason such materials, supplies, labor, services, maintenance, repairs, structural alterations, insurance, taxes, or assessments are provided for particular apartments or their owners, the cost thereof shall be specially assessed to the owner of such apartments.

*(Id.)*

Any costs of halting the water intrusion into a building and repairing water damage to common elements of the building are made in fulfillment of the Association's duty to repair and maintain the common elements of the building and are not "provided for particular apartments or their owners". In no event does § 15.1.6 authorize or allow the Association to pass such costs on to a unit owner. Section 15.1.6 should not be read to allocate the cost of repairing an individual unit to the unit owner when the damage resulted

from the Association's longstanding and wilful failure to fulfill its duty to maintain and repair the common area and the common elements of the building.

**IX. CHAPTER 64.34 RCW DOES NOT REQUIRE A DIFFERENT RESULT**

The Association argues that Chapter 64.34 RCW entitles it to pass on the costs of repair to Appellant Gusa (Association's brief pages 16 - 17). RCW 64.34.360(3) states that to the extent required by the declaration, "[a]ny common expense or portion thereof benefitting fewer than all of the units must be assessed exclusively against the units benefitted." The purpose and effect of RCW 64.34.360(3) was discussed extensively in *Keller v. Sixty-01 Assoc.*, 127 Wn. App. 615, 622 - 624 (2005).

Under the Horizontal Property Regimes Act, Chapter 64.32 RCW, "common expenses shall be charged to, the apartment owners according to the percentage of the undivided interest in the common areas and facilities. *Sixty-01*, 127 Wn. App. at 623 citing RCW 64.32.360(3). RCW 64.34.360(3) allows pre-1990 condominiums to change the manner of assessing common expenses, so that they are based on the units that use the common element. *Id.*

Consistent with RCW 64.32.360(3), the Sixty-01 condominium

declaration required assessments according to the undivided interest of each owner in the common areas and facilities. *Id.* RCW 64.34.360(3) was inconsistent with the declaration “because it required common expenses to be assessed according to units benefitted.” *Id.* at 624. Division I interpreted RCW 64.34.360(3) “to require an amendment to the declaration” if the homeowners wished to impose assessments in accordance with that statute. Like the declaration at issue in *Sixty-01*, the Barnes Lake declaration requires that assessments be imposed based upon the undivided interest of each owner in the common areas and facilities CP 123 declaration § 16.4). Contrary to the Association’s argument, RCW 64.34.360(3) does not require or entitle the Association to pass the costs of repairs on to Appellant Gusa.

**X. THE ASSOCIATION ABANDONED THE RIGHT TO PASS ON THE COSTS AT ISSUE OR LOST THE RIGHT TO DO SO BY SELECTIVE ENFORCEMENT**

The Association asserts that it is entitled to impose upon Appellant Gusa any costs it incurs in conjunction with water intrusion into unit 11 on the basis of paragraph XX of the declaration, which is a nonwaiver provision (Association’s brief page 17 footnote 9). A homeowners association abandons a right by failing to exercise it, or loses a right through selective enforcement. *Mountain Park Homeowners Association, Inc. v. Tydings*, 125

Wn.2d 337, 883 P.2d 1383 (1994).

By choosing not to pass on to unit owners the costs incurred due to water intrusion for at least twenty five years, including costs incurred from 2004 to present while the Association refused to address water intrusion into the first floor of unit 11, the Association abandoned the right to pass these costs on to Appellant Gusa (CP 10 - 11 and 63). The Association's attempt to pass these costs on to one and only one unit owner, Appellant Gusa, in twenty five years constitutes selective enforcement. Section XX of the declaration does not authorize or condone selective enforcement, and does not preserve the Association's right to pass on these costs in this circumstance.

**XI. DECLARATION SECTION 15.1.5 DOES NOT RENDER APPELLANT GUSA RESPONSIBLE FOR THE COSTS OF REPAIRING UNIT 11**

Citing § 15.1.5 of the declaration, the Association argues that Appellant Gusa is responsible for the painting, maintenance, and repair of the interior surfaces of unit 11 (Association's brief page 18). Section 15.1.5 of the declaration states that:

Painting, maintenance, repair and all landscaping and gardening work for the common area, and such furnishings and equipment for the common areas as the Board shall determine are necessary and proper, and the Board shall have

the exclusive right and duty to acquire the same for the common area; provided, however, that the interior surfaces of each unit shall be painted, maintained and repaired by the owners thereof, all such maintenance to be at the sole cost (sic) and expense of the particular owner.

(CP 127).

This provision should not be read to impose a duty of repair upon a unit owner when the damage to the interior surfaces of the unit resulted from the Association's act or omission. To read this provision in the manner advocated by the Association would mean that if an Association vehicle crashed into a unit, the unit owner would be responsible for repairing the interior surfaces. Such a reading is absurd.

**XII. THE ASSOCIATION CONCEDES THAT THE LIMITATION ON LIABILITY DOES NOT ABSOLVE THE ASSOCIATION OF THE DUTY TO MAINTAIN AND REPAIR THE COMMON AREAS AND COMMON ELEMENTS OF THE STRUCTURE**

Citing *Franklin v. Marie Antoinette Condominium Owners Association* and *Nido v. Ocean Owners' Council*, the Association argues that there is a "difference between duty on the one hand and damages liability on the other" (Association's brief pages 20 - 21). The Association's argument acknowledges that the limitation on liability does not absolve the Association from the duty to maintain the common areas and the common elements of the

structure. This duty is unaffected by the limitation on liability. In making this argument, the Association concedes that Appellant Gusa has a cause of action for breach of that duty, and that the trial court erred when it granted summary judgment to the Association.

**XIII. THE ASSOCIATION’S CLAIM THAT THE  
LIMITATION ON LIABILITY DOES NOT VIOLATE  
PUBLIC POLICY IS UNFOUNDED**

In his opening brief, Appellant Gusa demonstrated that the limitation on liability violates public policy (Appellant’s opening brief pages 23 - 32). The Association failed to make a sufficient contrary showing. Citing *Danny v. Laidlaw Transit Services, Inc.*, 165 Wn.2d 200, 208, 193 P.3d 128 (2008)(quoting *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 232, 685 P.2d 1081 (1984)), the Association argues that “[C]ourts should proceed cautiously if called upon to declare public policy absent some prior legislative or judicial expression on the subject.” (Association’s brief page 22). Although this is an accurate statement of the law, it is irrelevant. The legislature has declared the public policy governing condominiums in Chapter 64.32 RCW, the Horizontal Property Regimes Act and Chapter 64.34 RCW, the Condominium Act.

The Association next argues that the limitation on liability “is not

inconsistent with any applicable statute” (Association’s brief page 23). It is true that the limitation on liability does not violate any statute. However, a limitation on liability need not contravene a statute to violate public policy.

The first element of the test is that the transaction concerns a business of a type generally thought suitable for public regulation. The term “business” is not used in a conventional sense. For example, *Wagenblast v. Odessa School Dist.*, 110 Wn.2d 845, 856, 758 P.2d 968, 85 A.L.R. 4<sup>th</sup> 331 (1988), the leading case in this area, involved a limitation of liability in a release used by a public school district in conjunction with a school athletic program. The Association does not dispute that the operation of condominiums is regulated by statute and thus is of a type generally thought suitable for public regulation.

The second element of the test is that the party seeking exculpation performs a service of great importance to the public, which is often a matter of practical necessity for some members of the public. The Association does not dispute that housing is a service of great importance to the public. The third element of the test is that the party seeking exculpation holds itself out as willing to perform the service for any member of the public coming within certain established standards. The Association does not dispute that it has

“the exclusive right and duty” to maintain the exterior of the buildings, and that the Association holds itself out as willing to maintain the common elements of the buildings. The fourth element of the test is met. It is undisputed that housing is an essential service. In the economic setting of the transaction, the Association possesses a decisive advantage of bargaining strength against any member of the public who seeks to purchase at Barnes Lake. There is no negotiation.

So, too, is the fifth element of the test is met. In exercising superior bargaining power, the Association confronts the public with a standardized adhesion contract and makes no provision whereby a purchaser may pay additional reasonable fees and obtain protection against wilful and wanton breach of contract. Finally, the sixth element is met. As a result of the transaction, the property of the purchaser is placed under control of the seller, subject to the risk of carelessness as well as wilful and wanton conduct by the Association.

The Association claims that the limitation on liability does not deny unit owners a meaningful remedy (Association’s brief page 28). The situation suffered by Appellant Gusa illustrates the effect of the limitation on liability. The limitation on liability allows the Association to single out a

disfavored unit owner, knowingly and wilfully failing to repair and maintain the common area and common elements of the structure, thereby causing inevitable damage to the disfavored unit owner's home, knowing that at most, the victimized home owner can obtain a court order that requires the Association to do what it was always obligated by law and the declaration to do. In contrast, if the unit owner fails in any way to live up to his or her obligations to the Association, the Association has a full panoply of legal recourse, including the right to seek unlimited damages.

Citing *Nido, Franklin, Cornell and Kelley*, the Association next argues that "every court thus far that has looked at the enforceability of a limitation of liability similar to Section XXI has upheld the provision. (Association's brief page 24). This claim substantially overstates the holding in several of the cited cases. The facts of these cases were discussed *supra* in § XI.

In *Nido*, the Virginia Supreme Court noted that under the Virginia Condominium Act, the declaration and by-laws, the condominium association had a duty to repair defects in the common areas. *Nido*, 237 Va. at 666 -667. The Supreme Court reasoned that:

We concur with the trial court's reasoning that Section 6.5 of the By-Laws limits the Council's liability for property

damages resulting from certain listed events. We do not, however, view this limitation as an abrogation of the Council's contractual duty to Nido to correct the defects in the common elements established by Article 3 ( c ) of the Declaration and Section 6.1 ( c ) of the By-Laws.

Section 6.5 only limits the liability of the Council for damages in certain specified instances, a limitation agreed to by all purchasers of Oceans condominiums. This limitation does not leave the owners a right without a remedy. The owners retain the right to sue the Council for damages in instances when the damage arises from circumstances other than those enumerated in Section 6.5.

*Id.* at 667.

The Virginia Supreme Court concluded that because the condominium association undertook repairs, and was not negligent in the repairs it undertook, the Association had met its duty to repair and maintain the common areas, and that Nido had no cause of action. *Id.* at 667. *Nido* does not preclude a cause of action when the association fails to make repairs to the common area or common elements of a structure, or makes those repairs in a negligent manner.

*Franklin* involved water damaged caused by leaking central plumbing. Water damaged the plaintiff's hardwood floors. 19 Cal. App. 4<sup>th</sup> at 827. The California Court of Appeals reasoned that The Board "did their conscientious best to attend to the problems and complaints that came to

them,” and that the efforts were “not demonstrative of individual or group negligence.”

*Cornell*, 983 F. Supp. 640 involved an alleged slip and fall on ice in a parking lot. The court held that a limitation of liability barred the suit. Nothing in that case suggests a knowing years long failure of the association to make repairs. In *Kelley*, 478 N.E. 2d 1346, the limitation on liability did not extend to acts or omissions that constitute wilful misconduct. None of the alleged acts or omissions constituted wilful misconduct. The Illinois Supreme Court upheld dismissal of the claims. None of the cases cited by the Association involve damages that resulted from a knowing, wilful and wanton failure of a condominium association to maintain and repair common areas or common elements of a structure.

The Association next argues that the situation of a condominium unit owner differs from that of a tenant in a landlord-tenant relationship. (Association’s Brief page 24). First, the Association argues that unlike a tenant, a condominium unit owner has an equity interest in the common areas and actually has a say in how the condominium is run (Association Brief page 24). The prospective owner of a condominium unit has no equity interest in the common areas and no say in how the condominium is run, until the

moment of purchase, at which time he or she is already bound by the declaration. After purchase, as shown by the Association's treatment of Appellant Gusa, if a condominium association chooses to single out a disfavored owner for wanton mistreatment, there is nothing the unit owner can do, other than seek injunctive relief.

Citing *Bellevue Pacific Center Condominium Owners Ass'n v. Bellevue Pacific Tower Condominium Ass'n.*, 124 Wn. App. 178, 188, 100 P.3d 832 (2004), rev. denied 155 Wn.2d 1007 (2005), the Association argues that the declaration is not a contract and that the doctrine of unconscionability does not apply (Association's Brief page 27). Even if the declaration is not a contract, the court may set aside a provision that is against public policy. *Riste v. Eastern Washington Bible Camp, Inc.*, 25 Wn. App. 299, 301, 605 P.2d 1294 (1980) (court invalidated restriction on sale in a deed).

The Association then argues that unlike a landlord in a residential landlord-tenant relationship, the Association is not a commercial business for profit (Association's brief page 28). Washington courts have invalidated exculpatory clauses that involved private corporations *McCutcheon v United Homes Corp.*, 79 Wn.2d 443, 486, P.2d 1093 (1971), a public housing authority *Thomas v. Housing Auth.*, 71 Wn.2d 69, 426 P.2d 836 (1967) and

758 P.2d 968, 85 A.L.R. 4<sup>th</sup> 331 (1988). That the Association is not a commercial business for profit is immaterial. The limitation on liability should be set aside because it is against public policy.

**XIV. THE ASSOCIATION'S ARGUMENT REGARDING THE LIABILITY OF INDIVIDUAL BOARD MEMBERS IS IRRELEVANT**

Citing *Franklin and Kleinman v. High Point Condominium*, 108 Misc. 2d 581, 438 N.Y.S.2d 47 (1979), the Association argues that the threat of personal liability can discourage active and meaningful participation in condominium management (Association's Brief page 23). The answer and counterclaim do not name any individual board member as a defendant and Appellant Gusa has not attempted to in any way assert a claim of liability on the part of any individual board member.

**XV. THE ASSOCIATION'S CLAIM FOR AWARD OF ATTORNEY FEES FOR THE UNSUCCESSFUL SUMMARY JUDGMENT MOTION IS CONTRARY TO WASHINGTON LAW**

In his opening brief, citing *Yousoufian v. Office of Ron Sims*, 114 Wn. App. 836, 856, 60 P.3d 667 (2003), reversed in part, 152 Wn.2d 421, 98 P.3d 463 (2004), the Appellant argued that fees charged for unsuccessful motions must be excluded (Appellant's opening brief pages 33 - 34). The Association cites no contrary Washington authority (Association's Brief page 33).

cites no contrary Washington authority (Association's Brief page 33). Lacking Washington authority to support its position, the Association cites federal authority for the principle that fees incurred for an unsuccessful motion are recoverable so long as the overall claim is successful. That is not the law of Washington.

#### **XVI. APPELLANT GUSA IS ENTITLED TO AWARD OF ATTORNEY'S FEES**

**RCW 64.34.455 authorizes the recovery of attorney fees. The statute provides that:**

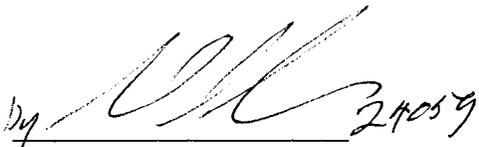
**If a declarant or any other person subject to this chapter fails to comply with any provision hereof or any provision of the declaration or bylaws, any person or class of persons adversely affected by the failure to comply has a claim for appropriate relief. The court, in an appropriate case, may award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

**Should appellant prevail, the court may award reasonable attorney's fees.**

#### **XVII. CONCLUSION**

Appellant Gusa respectfully requests that the Court reverse the grant of summary judgment and remand the case to the trial court for further proceedings.

DATED; September 15, 2010

By  2/10/09

BARNETT N. KALIKOW

Attorney for Appellant

WSBA No. 16907

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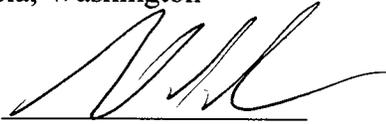
4	BARNES LAKE PARK OWNERS	]	
5	ASSOCIATION,	]	
6		]	
7		]	No. 39928-8-II
	Respondent,	]	
8		]	DECLARATION OF MAILING
	vs.	]	
9	MICHAEL G. GUSA,	]	
		]	
10		]	
	Respondent.	]	

On March 29, 2010, I caused to be deposited in the United States mail, a properly stamped and addressed envelope containing a copy of the Appellant's reply brief, a motion to strike and declaration in support of motion to strike to counsel for the Respondents, John H. Wiegenstein, Heller Wiegenstein PLLC, 144 Railroad Avenue, Suite 210, Edmonds, Washington 98020 and Pamela Pamela A. Okano, Reed McClure, Two Union Square, 601 Union Street, Suite 1500, Seattle, Washington 98101.

I DECLARE UNDER PENALTY OF PERJURY OF THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE AND BELIEF.

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Dated: September 15, 2010 at Olympia, Washington



Michael G. Gusa  
Attorney for Appellant  
WSBA No. 24059