

NO. 41571-2-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

RAY PEDERSEN,

Appellant,

v.

ALLENMORE RIDGE CONDOMINIUM ASSOCIATION,

Respondent.

RESPONDENT'S BRIEF

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I. INTRODUCTION

Mr. Pedersen appeals because he does not want to pay a validly imposed assessment by the Allenmore Ridge Condominium Association (“ARCA”) to restore and repair five badly deteriorating condominium buildings. The trial court determined that the assessment was valid before dismissing Mr. Pedersen’s counterclaim against ARCA. The trial court gave Mr. Pedersen multiple opportunities to litigate the issues in his counterclaim, and made its rulings only after considering Mr. Pedersen’s filings and submissions in briefing, declarations, and oral argument. Despite this, Mr. Pedersen appeals because he feels that the rules that apply to the other homeowners do not apply to him.

Mr. Pedersen appeals from the trial court’s ruling on ARCA’s Motion for Summary Judgment on Unpaid Assessments (“Assessments MSJ”). On appeal, Mr. Pedersen argues the trial court erred in ruling he had no standing to challenge the validity of the initial assessment because he failed to pay his portion of the assessment. Mr. Pedersen also argues the trial court erred in dismissing his counterclaim *with prejudice*, thereby depriving him of the opportunity to raise the issues in his counterclaim to the trial court. Mr. Pedersen is incorrect for several reasons.

First, Mr. Pedersen asks this Court to ignore established Washington case law, which prevents a dissenting homeowner from withholding payment of an assessment. The rule adopted by Washington Appellate Courts protects associations from homeowners who withhold assessments and financially cripple associations and prevent them from

performing their functions. Second, the trial court found that the initial assessment was valid and then evaluated Mr. Pedersen's claims on the merits, which is what Mr. Pedersen claims that trial court did not do. Mr. Pedersen had multiple opportunities to litigate the issues in his counterclaim before the trial court. Mr. Pedersen filed various papers with the trial court in support of his counterclaim and participated in oral argument on the issues raised therein. Thus, the trial court did not prevent Mr. Pedersen from submitting any evidence or argument in support of his claims. The trial court ruled on the merits of Mr. Pedersen's counterclaim after determining that the assessment was validly imposed.

Mr. Pedersen also argues that ARCA violated the Amended and Restated Declaration and Covenants, Conditions, Restrictions and Reservations for Allenmore Ridge Condominium ("Condo Declaration"), by not obtaining a 75 percent approval vote from the homeowners prior to initiating and completing the restoration project and incurring associated costs. However, the project did not require a homeowner approval vote because it was for "restoration and repair," not "capital additions and improvements." Mr. Pedersen failed to submit any evidence that the restoration project was a "capital addition and improvement" and, therefore, subject to 75 percent homeowner approval under the Condo Declaration.

Mr. Pedersen also argues it was improper for the trial court to rule upon the issue of ARCA's alleged negligence and breach of duty because the Assessments MSJ was limited in scope to Mr. Pedersen's failure to

pay his share of the assessment to fund the restoration project. However, Mr. Pedersen invited a ruling on ARCA's supposed negligence and breach of duty when he argued in his Response to the Assessments MSJ that by proceeding with the restoration project despite failing to garner 75 percent homeowner approval for the initial assessment, ARCA was negligent and breached its duty.

II. STATEMENT OF ISSUES

1. Did the trial court err in ruling that Mr. Pedersen did not have standing to challenge the validity of the initial assessment? Answer: No. The trial court followed Washington law in ruling that Mr. Pedersen lacked standing to challenge the validity of the initial assessment because he failed to pay it. The trial court ruled that the assessment was validly imposed and, after reviewing Mr. Pedersen's counterclaim on the merits, properly dismissed it *with prejudice*.

2. Did the trial court err in ruling that ARCA was not negligent nor breached its duty to the homeowners? Answer: No. The trial court properly ruled that based on the Declaration, Washington law, and other evidence, ARCA was not negligent nor did it breach its duty to the homeowners.

3. Did the trial court err in ruling that a 75 percent homeowner vote was not required to repair the deteriorating buildings? Answer: No. The trial court correctly ruled that: (1) the project was a "restoration and repair," not a "capital addition and improvement," under the Declaration and a 75 percent approval vote was not required; and

(2) ARCA was duty-bound by the Declaration and the Washington Condominium Act to repair the buildings.

4. Did the trial court err by ruling on the issue of ARCA's alleged negligence and breach of duty in ARCA's Assessments MSJ? Answer: No. The trial court ruled on ARCA's alleged negligence and breach of duty in the Assessments MSJ only after Mr. Pedersen raised those issues in his Response to same.

III. STATEMENT OF THE CASE

A. Factual Background

Over a number of years, ARCA planned for, and in 2007-2009 executed, a massive, \$4.2 million restoration project on five existing condominium buildings. The funds to finance the restoration project were obtained through the imposition of a special assessment upon the homeowners ("initial assessment"). Thomas Lowry was the Board President at the time the assessment was imposed, and remained President until March 2008. ARCA hired Trinity|ERD ("ERD"), a building envelope engineering firm, to prepare a scope of work and oversee the day-to-day work of ARCA's general contractor, Porter Construction, Inc. ("Porter").

ARCA's contract with Porter was a combined fixed-sum contract for certain specified items, and was an allowance-amount contract for restoration of water damage and dry rot. The allowance portion of the contract budgeted more than \$400,000 of the \$4.2 million restoration contract to restoration and repair of water damage, as those conditions

were found. All of Porter's invoices charged against the contract allowance were reviewed and approved by ARCA's project engineer, ERD, before they were accepted for payment by ARCA's officers.

As the restoration project commenced, the siding of the five buildings was removed and opened up, revealing damage that was much more extensive than originally anticipated, requiring additional repair work and causing the actual cost of the restoration project to exceed the estimated contract allowance cost. In order to complete the restoration project and leave all 60 homeowners with secure and watertight homes, then Board President Bud Thompson, after consultation with project engineer ERD, authorized Porter to continue the restoration project to its completion rather than stop work in progress. This resulted in Porter exceeding the previously-agreed upon allowance contract costs of \$4.2 million.

As the restoration project neared completion, ARCA was unable to pay Porter in full for its work. This was due in part to homeowners like Mr. Pedersen, who withheld their special assessment payments. This caused Porter to file a blanket contractor's lien against ARCA. Although most of the homeowners paid their share of the lien claim, thereby reducing the amount owed to Porter, Mr. Pedersen, and a group of homeowners headed by former Board President Thomas Lowry ("Lowry plaintiffs"), refused to do so. Instead, the Lowry plaintiffs sued their neighbors, *i.e.*, ARCA, and the volunteer Board Members to force them to pay instead. When ARCA filed a third-party complaint against

Mr. Pedersen for his refusal to pay the validly imposed restoration project assessment, he brought a counterclaim against ARCA, seeking to avoid paying the assessment.

B. Facts Supporting Trial Court's Ruling that the Condo Declaration Does Not Require 75 Percent Approval Vote

1. Homeowners' testimony under oath was that this was a restoration and repair project

Lowry plaintiff, Ruth Lowry, was both secretary and assistant secretary for ARCA from 2004 to 2009. (CP 930 at 27:17-18)

Mrs. Lowry testified that the subject project was a restoration project and that it was a necessary project for the Board to undertake. (CP 934 at 122:8-11) Mrs. Lowry testified that prior to the commencement of the restoration project the decks at the condominium experienced "serious rot." (CP 931 at 56:24-57:7; CP 932 at 61:4-12) Mrs. Lowry quoted Colin Murphy of ERD, who used the term "catastrophic rot" to describe the conditions of the decks and the buildings. (CP 932 at 61:4-12)

Mrs. Lowry testified that the elevator shafts in Buildings 5 and 4 contained dry rot and were "scary" from a structural standpoint. (CP 935 at 131:6-14, 132:6-9) Mrs. Lowry also testified that there was catastrophic damage on the decks and that was "scary" because the decks could have collapsed. (*Id.* at 132:11-14)

Lowry plaintiff, Holly Minniti, testified that the subject project was a restoration project (CP 947 at 91:5-11) Throughout her deposition she referred to the subject project as a "restoration project." (CP 942 at 24:3-5; CP 944 at 64:12-13, 65:8-10; CP 945 at 72:4-5; CP 946 at 81:9-

13) Ms. Minniti testified that there was repair work conducted at the project because failure of the building envelope caused water intrusion. (CP 943 at 56:11-14)

Lowry plaintiff, Carl E. Knudson, was a former Board Member, having served at the time Thomas Lowry was also on the Board. (CP 953 at 23:14-18; CP 954 at 71:19-22) A contractor, Mr. Knudson testified that it was his understanding that the subject project was in fact a restoration project. (CP 953 at 24:20-21, 25:13) Mr. Knudson testified that the restoration project was necessary for the Board to undertake. (CP 954 at 72:5) Mr. Knudson testified that if the Board had not undertaken the restoration project, the “buildings would have fallen down” because they were “in really sad shape.” (*Id.* at 72:7-11) Mr. Knudson testified that the problem with the buildings was water intrusion and resulting dry rot and other damage caused by water intrusion. (*Id.* at 72:12-17)

Lowry plaintiff, D. Joyce Galbraith, testified that the subject project was a “repair and restoration” project and that it was “necessary” because “there was so much rot between the outside wall and the inside wall that there wasn’t any question that it had to be taken care of.” (CP 960 at 22:1-12)

2. Representatives of ARCA’s on-site consulting firm testified that this was a restoration and repair project

The restoration project was a joint undertaking involving three entities: ARCA, Porter, and ERD. ERD was a consulting firm specializing in building envelope issues. ARCA retained ERD to investigate the water

intrusion and deterioration of the five separate buildings of the condominium and oversee the work of Porter. ERD's principal was Colin Murphy. (CP 964 at ¶ 1) ERD had a professional onsite throughout the project. This person was Don Merry, ERD's Project Manager. (CP 969 at ¶¶ 1-3)

Mr. Murphy had knowledge of the scope of repair for the condominium. He testified that the intent of ERD's scope of repair was "to remove and replace components of the building envelope that had suffered extensive damage due to water intrusion." (CP 964 at ¶ 4) Mr. Murphy testified that the "major components of the [scope of repair] were the removal and replacement of all siding, and the removal and replacement of many of the windows." (CP 964-65 at ¶ 6) This removal and replacement was necessitated by the extensive damage suffered by the buildings due to water intrusion. (*Id.*) An example of the extensive damage observed at the buildings was the decking, in particular the deck of homeowner Ray Pedersen, which was rotted through to such an extent that it was "catastrophic." (*Id.*)

The project's scope of repair did not include any alterations or modifications to structural components of the buildings or construction of new buildings or property. (CP 965 at ¶ 7) The scope of repair included allowances for repair of structural damage found during the course of construction. (*Id.*) The allowances were limited to repair and restoration work and did not include capital additions or improvements (*i.e.*, alterations or modifications to structural components of the buildings or

construction of new buildings or property). (*Id.*) Damaged structural components were replaced with “like-kind” products. (*Id.*) Mr. Murphy testified the repairs in ERD’s scope of repair were not capital additions and improvements and were intended to repair, restore, remove, and replace, in like-kind, damaged and worn-out building components. (*Id.* at ¶ 8)

Mr. Merry was onsite weekly, and observed all phases and aspects of the project. (CP 969 at ¶ 3) Mr. Merry attended weekly site meetings between March 2007 and August 2008. (*Id.*) He repeatedly testified that the subject project was a “repair and restoration project.” (CP 969-970, 972 at ¶¶ 2, 3, 9, 15) He agreed that ERD’s scope of repair included removing and replacing components of the building envelope that had suffered extensive damage due to water intrusion. (CP 969 at ¶ 7) Mr. Merry understood that this was also Porter’s scope of work and its intended results. (*Id.*) The purpose of the project was to repair the buildings, by replacement of building envelope materials which had reached the end of their service life. (*Id.*) Damaged structural components were replaced with new ones, of like-kind. (CP 970 at ¶ 12) Any upgrades to components were solely for the purpose of restoring the “weathertight” condition of the building envelope; however, old materials no longer meeting industry standards were replaced with new, current materials. (*Id.*)

Change Orders were issued, after being approved by ERD, as a result of the discovery of additional items that required replacement due to

having reached or exceeded the end of their serviceable life. (CP 970 at ¶ 9) The Change Orders were issued in connection with the repair and restoration of the buildings, and did not encompass capital additions or improvements. (*Id.*) The Change Orders resulted in “like-kind” component replacements. (*Id.*) Mr. Merry testified that there was extensive damage found during the project that was not revealed by prior inspections; these problems were addressed by allowances in the contract, as well as Change Orders. (CP 971 at ¶ 13) Mr. Merry also testified that the allowances were limited to repair and restoration work and did not include capital additions or improvements (*i.e.*, alterations or modifications to structural components of the buildings or construction on new buildings or property) The project’s progress, Change Orders, and allowances were discussed in detail with ARCA Board Members on a weekly basis. (*Id.* at ¶ 14) Mr. Merry observed that the progress of the project was disclosed to the ARCA membership through monthly newsletters. (CP 972 at ¶ 15)

3. The Lowry plaintiffs’ expert admitted that any improvements were inherent in the original, vote-approved, scope of repair

In his deposition, Lowry plaintiffs’ expert Mark Cress testified that the “betterments,” as he defined that term, were part of ERD’s scope of repair that was presented to the homeowners, and that the rain screen was part of these “betterments.” (CP 1063-64 at 96:16-98:2; CP 1065 at 104:15-17) Mr. Cress testified that he would recommend installing a rain screen at the Allenmore condos because it “provides a secondary backup

system and allows your walls to dry out,” and that the walls at Allenmore had been wet for a long time. (CP 1065-66 at 105:21-106:7) Mr. Cress testified that his definition of “betterment” is not based on any particular code provision or industry regulation or specification. (CP 1066 at 107:12-18) Although Mr. Cress focused most of his attention in his declaration on the rain screen, in his deposition he testified to a litany of other supposed “betterments.” But he admitted they were also part of the scope of the restoration project from the beginning because they were in the scope of repair. These included: new building materials (CP 1063 at 96:20-21); new siding (*Id.* at 96:23); new trim (*Id.* at 96:25); new building paper (*Id.* at 97:2); new flashings (*Id.* at 97:4); new windows (*Id.* at 97:6); new lights, vents, deck membranes and related components (*Id.* at 97:8-9); sealants and paint. (*Id.* at 97:11)

4. Documents authored by Mr. Lowry confirmed that this was a restoration and repair project

In a letter dated January 21, 2006 from Mr. Lowry to the homeowners, Mr. Lowry responded to an assertion by Mr. Pedersen who, like Mr. Pedersen in this appeal, cited Condo Declaration Section 10.2.1(i) in arguing that since the proposed repairs exceeded \$25,000, the restoration project must be approved by at least 75 percent of the homeowners. (CP 1340-42) Mr. Lowry disagreed with Mr. Pedersen’s assertion and, after citing Condo Declaration Section 10.2.1(i), stated:

Mr. Pedersen fails to recognize that this section applies to the acquisition of capital additions and improvements and that the words other than for purposes of restoring, repairing or replacing portions on the common area clearly and

unequivocally exclude the important task of repairing and restoring the common area from the requirement of membership approval. The proposal before the Board has nothing to do with acquiring more capital additions and improvements. The Board is facing the critical task of repairing and preserving the eroding common area.

(CP 1342) (underline in original). Mrs. Lowry confirmed that Mr. Lowry, with the assistance of Jack Petrich, a retired Division II appeals court judge and ARCA homeowner, drafted this letter. (*Id.* at 83:9-21) Mrs. Lowry testified that the above opinions of Mr. Lowry and former Justice Petrich as set forth in the letter were correct, *i.e.*, that Condo Declaration Section 10.2.1(i) applies to the acquisition of capital additions and improvements and that the words “other than for purposes of restoring, repairing or replacing portions on the common area” clearly and unequivocally exclude the important task of repairing and restoring the common area from the requirement of membership approval. (CP 934 at 123:25-124:23)

Other credible persons concluded that the project was not a “capital addition and improvement.” ARCA’s former corporate counsel, Bryce Dille, so advised Mr. Lowry in a letter dated January 30, 2006.

(CP 1344-46) On page two of this letter, Mr. Dille stated:

That in the event the cost of the improvement for which funds would be borrowed is in excess of \$25,000, then that must be approved by owners having not less than 75% of the voting power (10.2.1(i)). **This will not apply since funds are for repair and not capital purchase.**

(CP 1345) (underline in original; bold added). In this document, ARCA’s former corporate counsel is advising his client, ARCA, through then-President Thomas Lowry, that Condo Declaration Section 10.2.1(i) does

not apply to repair and restoration work. In fact, Mr. Dille distinguishes capital additions and improvements from repair work. ARCA was told, and Mr. Lowry had knowledge of the fact, that Condo Declaration Section 10.2.1(i) did not apply to the restoration and repair work performed at the project and, therefore, that a 75 percent vote by the homeowners was not required.

Apparently relying upon this unanimous opinion, Mr. Lowry again so stated in a document entitled "Explanation of Procedure." (CP 1348-49):

There are two paths to authorizing the restoration project. One is with the approval of 75% of the voting power of the members pursuant to Article 10.2(i) [*sic*] of the Declarations. This section excludes from its limitation the "restoration," "repair," or "replacing" portions of the common areas. If those are the actions of the restoration, then the limitations of this section of the Declarations do not apply. The other is pursuant to Article 14 of the Declarations unless 80% of the voting power of the membership rejects decision to proceed. The Declarations vest the power to make the initial decision to proceed or not proceed with the Board of Directors. The exterior building envelope that should prevent water penetration of the interior structure is common area and that is what the present proposal by ERD and Porter proposes to restore, repair or replace. . . .

(CP 1348) This document reflects that the voting requirements under Condo Declaration Section 10.2.1(i) were inapplicable if the subject project consisted of "restoration," "repair," or "replacing" portions of the common areas. As noted above, deposition testimony from Lowry plaintiffs Ruth Lowry, Ed Knudson, and Joyce Galbraith, among others, reflected that the subject project was in fact a "restoration" project for the purpose of repairing the common elements because of damage suffered by

the five existing buildings due to water intrusion and resultant rot. This document also reflects that there was an alternate method for securing homeowners' consent to the assessments pursuant to Condo Declaration Section 14, which specifically addresses repair and restoration of the buildings.

When Mr. Lowry turned over the presidency to Bud Thompson, he explained the non-requirement of any vote:

When we were originally trying to figure the requirements of assessing the units we concluded that the restoring, repair or replacement of the common area did not require the 75% approval or was within the \$5,000.00 limitation. However we thought getting the 75% consent if we could, would be the better way to go.

(CP 985). This document reflects that a 75 percent homeowner approval was not required. It also reflects that a vote requiring 75 percent approval was nonetheless held, but there is no mention of it being required under Condo Declaration Sections 10.2.1(i) or (l).

C. Procedural History

The procedural history of this action is complex and involves multiple parties in two separate actions which were consolidated. It is necessary for ARCA to provide a summary of the procedural history so that this Court has all of the relevant record before it and has a complete understanding of the bases of the trial court's rulings.

On June 23, 2009, the Lowry plaintiffs filed a Complaint in Case No. 09-2-10623-7 ("*Lowry* action"), alleging that ARCA and its Board of Directors breached the Condo Declaration by not obtaining a 75 percent

approval vote from the homeowners before incurring additional costs, *i.e.*, the overage, to complete the restoration project. (CP 1-14). The Complaint also alleged ARCA and the Board were negligent and breached their duty to the homeowners in handling the restoration project. (*Id.*)

On August 7, 2009, Porter filed a Complaint for Sums Owing and Foreclosure of Lien against ARCA, the Lowry plaintiffs, and various subcontractors, in Case No. 09-2-12187-2 (“*Porter* action”). (CP 680-696). Porter alleged that it entered into the restoration contract with ARCA and that ARCA failed to pay Porter the balance due under the contract. Porter alleged that it liened ARCA for the unpaid amount and brought the lawsuit to foreclose on the lien.

On September 14, 2009, ARCA filed, among other things, a third-party complaint in the *Porter* action against three homeowners, including Mr. Pedersen, who failed to pay their share of the initial assessment. (CP 697-717). ARCA alleged that Mr. Pedersen’s failure to pay the validly imposed assessment was the reason that Porter filed the lien against ARCA and brought a lawsuit to foreclose the lien.

On October 13, 2009, Mr. Pedersen filed an Answer, Affirmative Defenses, and counterclaim to ARCA’s third-party complaint. (CP 718-731). The counterclaim raised the following claims: lack of authority to enter into the Porter contract; failure to receive 75 percent approval vote to proceed with the project; allocation of project costs; negligence, breach of duty, breach of contract (*e.g.*, Condo Declaration);

mismanagement of project, resulting in overage and property damage, among other things; and poor quality of repairs.

On November 3, 2009, the Lowry plaintiffs filed a Motion for Partial Summary Judgment on the issue of whether the Condo Declaration required 75 percent homeowner approval for “restoration and repairs” of the condominium buildings. (CP 45-106). ARCA argued in response that because this was a “restoration and repair” project, the Board was obligated to proceed with it irrespective of whether the homeowners approved the project or not. (*See generally*, CP 775-791) The issue boiled down to whether the project was a “restoration and repair” or “capital addition and improvement.” If it was a “capital addition and improvement,” then an approval vote may have been necessary. If it was a “restoration and repair,” then no vote was necessary.

On March 11, 2010, Mr. Pedersen filed a Motion for Reassignment, seeking to stay ARCA’s third-party complaint against him in the *Porter* action and for reassignment to Judge Serko. (CP 1469-1533) Mr. Pedersen stated that in the *Lowry* action, “individual ARCA owners seek to declare that the ARCA Board was not authorized to incur the construction charges and breached various duties to members in its performance of the Porter . . . contract.” (CP 1470) Mr. Pedersen stated that in ARCA’s third-party action, “owners defend against ARCA on similar grounds.” (*Id.*) Mr. Pedersen stated that the issue in ARCA’s third-party claim and his counterclaim was “whether ARCA can collect assessments related to the contract from owners.” (CP 1471)

Mr. Pedersen stated that the “issue of ARCA’s authority to incur construction contract costs and pass those costs on to owners” was the subject of the *Lowry* action. (*Id.*) Mr. Pedersen stated that the claims in the *Lowry* action “are identical...to those claims between Pedersen and ARCA.” (*Id.*) Mr. Pedersen stated that the *Lowry* action “shares many common issues of fact” related to ARCA’s authority to collect assessments from Mr. Pedersen for the Porter contract and that the issues in his counterclaim of authority to enter into the Porter contract and incur the overage are “the precise issue that is the core of the litigation” in the *Lowry* action. (CP 1472)

On March 19, 2010, Mr. Pedersen filed a declaration regarding consolidation and summary judgment in which, similar to the *Lowry* plaintiffs, he argued the Condo Declaration required a 75 percent approval vote from the homeowners prior to initiating the restoration project, that ARCA mismanaged the project, resulting in cost overruns, and that ARCA lacked authority to enter into the contract with Porter because the project failed to receive a 75 percent approval vote. (CP 107-127)

On March 26, 2010, the trial court heard oral argument on the *Lowry* plaintiffs’ Motion for Partial Summary Judgment. At the close of the hearing, the Court ruled that there was an issue of material fact as to whether the project was a “capital addition and improvement” and whether ARCA and the Board breached their duty to the homeowners. (RP, 3-26-10 at 42:17-43:11)

On April 14, 2010, ARCA filed its Response to Mr. Pedersen's Motion for Reassignment. (CP 1534-43) ARCA argued that the trial court should not stay or sever its third-party action against Mr. Pedersen because doing so would prevent ARCA from asserting its claims and defenses against Mr. Pedersen while the remainder of the *Lowry* and *Porter* actions continued. (CP 1536-37) ARCA pointed out that Mr. Pedersen himself admitted the issues in the *Lowry* action and Mr. Pedersen's counterclaim were identical or otherwise very similar. (CP 1538-39)

On May 21, 2010, the trial court entered an Order reviewing Mr. Pedersen's counterclaim from the *Porter* action and consolidating it with the *Lowry* action. (CP 755-764) On May 28, 2010, ARCA filed a Motion for Partial Summary Judgment on Alleged Voting Requirements ("MPSJ"), arguing that the restoration project was for "restoration and repair" and not a "capital addition and improvement." (*See generally*, CP 838-855.) ARCA argued that under the Condo Declaration and Washington law, only "capital additions and improvements" require 75 percent homeowner approval, and that the restoration project was exempt from this requirement. (CP 851-52)

On June 9, 2010, ARCA filed its Stipulation and Order Dismissing ARCA's counterclaims against the *Lowry* plaintiffs. (CP 994-98) On June 14, 2010, Mr. Pedersen filed a Memorandum opposing the MPSJ, again arguing that the Condo Declaration required a 75 percent approval vote from the homeowners prior to initiating the restoration project, that

ARCA mismanaged the project, resulting in cost overruns, and that ARCA lacked authority to enter into the contract with Porter because the project failed to receive a 75 percent approval vote. (CP 765-770)

On June 25, 2010, the trial court heard oral argument on the MPSJ. (*See generally*, RP, 6-25-10) Mr. Pedersen's counsel participated in the oral argument. (*Id.* at 4:6-7; 10:9-12; 18:16-25:18) Mr. Pedersen's counsel argued that: (1) under Section 10.2.1(i) of the Condo Declaration the project required a 75 percent vote by the homeowners regardless of whether it was a "capital addition and improvement" or it was a "restoration and repair"; (2) the project was for "capital addition and improvements" and, therefore, required a 75 percent vote by the homeowners; (3) the allocation of repair costs should have been only to those who benefited from the project; (4) the Board was negligent, breached its duty, and breached the Condo Declaration by failing to get a 75 percent vote by the homeowners for the initial assessment; (5) the Board lacked authority to enter into the Porter contract; and (6) ARCA mismanaged the project. (*Id.*)

The trial court agreed with ARCA that no vote was required for a "restoration or repair project": "[I]t remains my belief that repair and restoration did not require a 75 percent vote." (*Id.* at 34:9-11) But the trial court denied the motion because the Lowry plaintiffs' expert, Mark Cress, provided a declaration (CP 350-359) stating that the restoration project improved upon the quality of construction that had previously existed in the condominiums. (*Id.* at 34:19-35:11) The trial court ruled

that the declaration created an issue of fact as to whether the project was for “repair and restoration” based on the “rain screen” system that was installed in the buildings during the restoration project. (*Id.*) This was the only basis upon which ARCA’s MPSJ was denied. What the Lowry plaintiffs did not tell the Court, and what ARCA wanted to, was that the “betterments” Mr. Cress identified were part of the restoration project all along, and had been approved by a vote of the homeowners. After the hearing, ARCA took Mr. Cress’ deposition, in which he admitted that all of these “betterments” were part of the original scope of repair (see Section B.3., above).

On July 26, 2010, co-defendant Bud Thompson filed a Motion for Summary Judgment based on the Business Judgment Rule (“BJR Motion”). Mr. Thompson argued that he was not negligent nor did he breach his duty in the handling of the restoration project because he relied upon ERD, Porter, and three attorneys in making decisions regarding incurrence of the overage and completion of the restoration project without obtaining 75 percent homeowner approval. Although Mr. Pedersen’s arguments against ARCA in his counterclaim were virtually identical to the issues raised in Mr. Thompson’s BJR Motion, Mr. Pedersen did not file any responsive pleading or declaration in opposition to the BJR Motion.

On August 27, 2010, the trial court heard oral argument on Mr. Thompson’s BJR Motion, and granted same. (CP 1599-1602) The trial court ruled that his actions in handling the restoration project,

incurring the overage, and proceeding to repair the buildings even though the project did not receive a 75 percent approval vote, were immunized by the Business Judgment Rule. (CP 1601) Although Mr. Pedersen's counsel had the opportunity to participate in oral argument on the BJR Motion, he did not.

On September 9, 2010, ARCA filed its Renewed Motion for Partial Summary Judgment on Alleged Voting Requirements ("Renewed MPSJ"), again arguing that the restoration project was for "restoration and repair" and not a "capital addition and improvement." (*See generally*, CP 1020-1029) As before, ARCA argued that under the Condo Declaration and Washington law, only "capital additions and improvements" require 75 percent homeowner approval, and that the project was exempt from this requirement because it was for "restoration and repair." ARCA pointed out to the trial court that there was no genuine issue of material fact even if the "rain screen" was a "betterment," and, therefore, a "capital improvement" requiring a 75 percent approval vote of the homeowners, because this "betterment" was voted on before it was installed on the condominium buildings, and received more than 90 percent homeowner approval. Therefore, ARCA reasoned, even if a vote was required to approve this "betterment," the approval vote was obtained. ARCA asked the trial court to dismiss all claims stemming from the supposed failure to obtain member approval.

On September 17, 2010, ARCA filed its Motion for Summary Judgment on Negligence and Breach of Duty ("Breach of Duty MSJ"),

arguing, among other things, that it was not negligent nor did it breach its duty in allowing the restoration project to go forward without obtaining a 75 percent approval vote from the homeowners. (*See generally*, CP 1202-1220) ARCA also argued that even if it was negligent or breached its duty, the Business Judgment rule immunized any liability. (CP 1215-17) ARCA's arguments in its Breach of Duty MSJ were virtually identical to the arguments raised by Mr. Thompson in his BJR Motion. Although he had an opportunity to do so, Mr. Pedersen chose not to file an opposition to the Breach of Duty MSJ.

On September 24, 2010, Mr. Pedersen filed a declaration opposing the Renewed MPSJ. (CP 392-412) The declaration was substantially similar to his previous filings. Mr. Pedersen again argued that the Condo Declaration required a 75 percent approval vote from the homeowners prior to initiating the restoration project, that ARCA mismanaged the project, resulting in cost overruns, and that ARCA lacked authority to enter into the contract with Porter because the project failed to receive a 75 percent approval vote.

On September 30, 2010, ARCA filed a Motion to Strike Mr. Pedersen's September 24th declaration, seeking to strike inadmissible portions of the declaration for containing irrelevant, prejudicial, and inflammatory statements, as well as legal conclusions. (CP 413-419) On October 12, 2010, ARCA filed its Assessments MSJ against Mr. Pedersen (CP 420-434), seeking summary judgment for the unpaid balance of the initial assessment he owed ARCA.

On October 13, 2010, Mr. Pedersen filed a Memorandum opposing ARCA's Motion to Strike his September 24th declaration. (CP 539-550) Unsolicited, and not in direct response to ARCA's Motion to Strike, Mr. Pedersen raised the issue of standing and cited to *Panther Lake Homeowner's Ass'n v. Juergensen*, 75 Wn. App. 586. On October 14, 2010, ARCA filed a reply in support of the Motion to Strike. (CP 551-558) Because Mr. Pedersen raised the issue of standing in his Opposition to the Motion to Strike, ARCA addressed that issue in its reply.

On October 15, 2010, the trial court heard oral argument on ARCA's Renewed MPSJ and Breach of Duty MSJ. (*See generally*, RP, 10-15-10) Mr. Pedersen's counsel was present telephonically for the hearing. (*Id.* at 3:14) Upon the trial court's request, ARCA's counsel explained why ARCA filed the Renewed MPSJ and what changed between the time the trial court denied the MPSJ and ARCA filed the Renewed MPSJ. (*Id.* at 4:6-10:7) After hearing ARCA counsel's argument, the trial court asked ARCA's counsel whether any issues would remain if it were to grant ARCA's Breach of Duty MSJ. (*Id.* at 10:15-20) The trial court then asked Mr. Pedersen's counsel for his argument. (*Id.* at 13:24-14:4) Counsel waived argument on the motion by stating that Mr. Pedersen did not have "a dog in that fight." (*Id.* at 14:21-25; 15:4) The trial court proceeded to find that ARCA was not negligent and did not breach its duty to the homeowners, and granted ARCA's Breach of Duty MSJ. (*Id.* at 15:1-3; CP 1615-20) The trial court further ruled that the granting of the Breach of Duty MSJ mooted the issues in the Renewed

MPSJ, and all remaining claims were dismissed. (RP, 10-15-10 at 6:5-16:7) The trial court reasoned that if ARCA did not act negligently or breach its duty to the homeowners, or if it did but its actions were immunized by the Business Judgment Rule, then the issue of whether the restoration project required a 75 percent approval vote under the Condo Declaration was moot. The Order entered by the trial court reflected that Mr. Pedersen's counsel did not have an objection to the granting of the Breach of Duty MSJ. (CP 1620)

Mr. Pedersen's counsel stated that his client's claims were different from the Lowry plaintiffs', and that there was no motion pending against Mr. Pedersen's counterclaim. (RP, 10-15-10 at 14:5-15) Counsel claimed that "nothing" had been resolved "with respect to Pedersen's claims relative to ARCA." (*Id.* at 17:19-24) Due to the complexity of the procedural history of the *Porter* and *Lowry* actions, the trial court asked the parties to submit their versions of the remaining issues. (*Id.* at 21:5-13; 21:17-19; 22:6-9; 22:11-14; 26:5-26:9; 26:18-24) The trial court asked that all issues in any cross- or counterclaims be brought to the court's attention as well. (*Id.* at 23:6-8)

On October 21, 2010, Mr. Pedersen submitted a Memorandum re: Claims at Issue Relative to Ray Pedersen. (CP 1603-04) In his Memorandum, Mr. Pedersen claimed that he was not a party "to any claim or defense in the 'Lowry' lawsuit," and that he was "a third-party

defendant in the Porter action. . . .”¹ (*Id.*) According to Mr. Pedersen, his remaining claims were: (1) declaratory judgment as to the respective rights and obligations of ARCA and Mr. Pedersen relative to the construction project; (2) declaratory judgment as to defects in the property governing documents; and (3) breach of Condo Declaration, breach of duty, breach of contract, negligence, *ultra vires* acts, lack of authority, and damage to personal property (due to restoration project mismanagement). (CP 1604) Also on October 21, 2010, ARCA submitted its Statement regarding Remaining Claims. (CP 1605-11) ARCA’s version was substantially similar to Mr. Pedersen’s version.

On October 22, 2010, the parties presented their respective statements of remaining issues to the trial court. (*See generally*, RP, 10-22-10) ARCA’s counsel pointed out that pursuant to the trial court’s May 21, 2010 Order, Mr. Pedersen’s counterclaim was severed from the *Porter* action and consolidated with the *Lowry* action. (*Id.* at 4:25-5:18) ARCA’s counsel stated that there were no longer any claims pending between the Lowry plaintiffs and ARCA, but that Mr. Pedersen’s counterclaim remained. (*Id.* at 9:17-10:9) However, ARCA’s counsel stated that the issues in the counterclaim, which included whether the project required a 75 percent approval vote, project mismanagement, and breach of duty and negligence, were mooted based on the trial court granting ARCA’s Breach of Duty MSJ. (*Id.* at 10:10-20)

¹ Mr. Pedersen made this statement despite the fact that his Counterclaim was severed from the *Porter* action and consolidated with the *Lowry* action by Court Order of May 21, 2010. (CP 755-764).

Mr. Pedersen's counsel stated that no motion was brought against the counterclaim. (*Id.* at 11:20-12:1) Counsel stated that he was present in court that day to oppose ARCA's Renewed MPSJ. (*Id.* at 12:2-20) However, the trial court responded that its granting of ARCA's Breach of Duty MSJ would moot the issues of whether the initial assessment was proper and whether the Condo Declaration required a 75 percent approval vote. (*Id.* at 12:21-23) ARCA's counsel pointed out that Mr. Pedersen had multiple opportunities, through his submissions and oral argument, to address the issues on breach of Condo Declaration, breach of duty, negligence, 75 percent approval vote, etc., and that the trial court's granting of the Breach of Duty MSJ mooted those issues. (*Id.* at 13:9-14:1) Because the trial court disposed the issues in the *Lowry* action between the Lowry plaintiffs and ARCA, and those issues were similar (if not identical) to the issues raised in Mr. Pedersen's counterclaim, the trial court ordered that Mr. Pedersen's counterclaim be realigned with the *Porter* action so that Mr. Pedersen would have the opportunity to raise any issues that he wanted and have his day in court. (*Id.* at 14:2-18) The trial court disagreed with Mr. Pedersen's counsel that Mr. Pedersen had not had the opportunity to put forth his arguments. (*Id.* at 15:5-10) ARCA's counsel informed the trial court that Mr. Pedersen can raise whatever arguments he had in a response to the pending Assessments MSJ. (*Id.* at 15:14-16:13) The trial court noted: "We'll realign the Porter case so that Mr. Pedersen is properly in that case with all his claims, his counterclaims and so forth, and we'll address those on November 12th because they'll,

by necessity, come up.” (*Id.* at 17:22-18:1) Even though the trial court had ruled that the issues of breach of Condo Declaration, breach of duty, negligence, 75 percent approval vote, etc., were mooted by the granting of the Breach of Duty MSJ, it allowed Mr. Pedersen the opportunity to raise whatever issues he wanted to in briefing and filings in response to the Assessments MSJ. (*Id.* at 18:21-24)

On November 1, 2010, Mr. Pedersen filed his Response to the Assessments MSJ. In his Response, Mr. Pedersen raised the following issues: poor quality of repairs, lack of authority of ARCA to enter into the Porter contract, allocation of cost of the restoration project, negligence, breach of fiduciary duty, breach of the Condo Declaration, whether 75 percent approval vote was required under the Condo Declaration, whether the project was a “restoration and repair” or “capital addition and improvement,” and project mismanagement. (CP 594-612) These arguments were supported by a declaration. (CP 559-593)

On November 8, 2010, ARCA filed its Reply in support of the Assessments MSJ. ARCA addressed the issues raised by Mr. Pedersen for the first time in his Response, including negligence, breach of duty, allocation of project costs, authority to enter into the Porter contract, and project mismanagement. (CP 635-646)

On November 12, 2010, the trial court heard oral argument on the Assessments MSJ. After hearing oral argument, the trial court ruled that the initial assessment was valid. (RP, 11-12-10 at 37:17-20) The trial court also ruled that ARCA was not negligent nor did it breach its duty to

the homeowners in the management of the restoration project, including not requiring a 75 percent approval vote (CP 649), and that the Condo Declaration did not require ARCA to obtain a 75 percent approval vote for the assessment or cost overruns (CP 650) The trial court made these rulings only after considering Mr. Pedersen's submissions, briefing, and oral argument.

IV. ARGUMENT

A. The Trial Court Did Not Err in Dismissing Mr. Pedersen's Counterclaim

1. The trial court followed Washington law in ruling that Mr. Pedersen did not have standing to challenge the validity of the assessment imposed by ARCA to repair the crumbling buildings

Mr. Pedersen asks this Court to reject the requirement under Washington law that an aggrieved homeowner must first pay the disputed assessment before bringing a declaratory judgment action. Put another way, an aggrieved homeowner cannot withhold an assessment simply because the homeowner disagrees with the assessment, and harm the association's financial condition in the process. *Panther Lake*, 76 Wn. App. 586 (citing *Rodruck v. Sand Point Maintenance Comm'n*, 48 Wn. 2d 565 (1956); *River's Edge Condominium Ass'n v. Rere, Inc.*, 568 A.2d 261 (Pa. 1990)). There is nothing flawed with this requirement, which protects associations from homeowners that refuse to pay their assessments. Mr. Pedersen asks this Court to set aside decades old authority provided by the courts of this state in an effort to avoid having to pay the validly imposed assessment.

Mr. Pedersen cites to certain sections of *Panther Lake* which purportedly support his position. However, a closer reading of the case reveals otherwise. *Panther Lake* noted that a homeowner's remedies were limited to "making their wishes known to the Association, casting their votes, and seeking declaratory relief if the Association acts beyond its authority." *Panther Lake*, 76 Wn. App. at 591. However, the court also stated that "[l]ot Owners are not permitted to compound the Association's problems by unilaterally withholding assessments for capital improvements." (*Id.*) This is exactly what Mr. Pedersen did, which is improper. Thus, although Mr. Pedersen did file for declaratory relief (which was only after the restoration project was complete and in response to ARCA's third-party complaint to collect his unpaid restoration assessments), he was not permitted to withhold payment of the validly imposed assessment. Nothing in *Panther Lake* allows him to do so. *Panther Lake* cited *Rodruck* in holding that *Rodruck* "does not stand for the proposition that Lot Owners may challenge the Association's exercise of its discretion by refusing to pay their assessments." *Id.* at 590 (citing *Rodruck*, 48 Wn. 2d at 577).

The fundamental flaw in Mr. Pedersen's argument is that he erroneously assumes that the initial assessment was improperly levied upon the homeowners because a 75 percent approval vote was required, but not obtained. He uses this assumption as the basis for his argument that it was improper for the trial court to rule that he had no standing to challenge the validity of the assessment because he failed to pay the

assessment. He admits in his Opening Brief that the “subordination” theory is applicable if the assessment being challenged is a valid assessment. He argues, without any evidentiary support, that because ARCA’s assessment was invalid, the “subordination” theory should not apply, and he should not have been required to pay the assessment in full prior to challenging its validity. However, the trial court ruled that the assessment was not invalid. (RP, 11-12-10 at 37:17-20) In addition, the trial court ruled that the Condo Declaration did not require ARCA to obtain a 75 percent approval vote for the assessment or cost overruns (CP 650) and that ARCA was not negligent nor did it breach its duty to the homeowners in the management of the restoration project, including not requiring a 75 percent approval vote. (CP 649) The trial court made these rulings after considering Mr. Pedersen’s submissions, briefing, and oral argument.

Interestingly, Mr. Pedersen agrees with the holding in *Panther Lake* that a homeowner cannot withhold assessments that are validly imposed. As detailed in ARCA’s Reply in Support of its Renewed MPSJ (CP 810-820), the assessment was properly levied because no vote was required for “restoration and repair” projects. Even if one was required, more than 90 percent of the homeowners approved the project or otherwise ratified it by paying their allocated portion of the restoration assessment (*see* Section B.3., below). As ARCA has established through its numerous submissions to the trial court, and as the trial court has recognized, a 75 percent approval vote was not required because the

project was for “restoration and repair.” Mr. Pedersen’s hypertechnical arguments of when the votes were received and what the voting forms stated are not only inaccurate, they are irrelevant, because the Condo Declaration never required a vote for “restoration and repair” work. In addition, ARCA was duty-bound under the Condo Declaration and the Condominium Act, RCW 64.34 *et seq.* (“Act”), to repair the crumbling buildings. Thus, the issue of whether a vote was required and the parameters of such a vote are moot and should be disregarded.

Mr. Pedersen cites to *Trustees of Hunters Village Condominium Trust v. Gerke*, 2007 WL 959539 (Mass. App. Div.) in an attempt to distinguish what he calls the “Massachusetts Prepayment Requirement” set forth in *Blood v. Edgar’s, Inc.*, 632 N.E.2d 419 (Mass. 1994). However, *Hunters Village* does not advance Mr. Pedersen’s argument. In *Hunters Village*, the association brought suit against the defendant for conversion of common funds. *Hunters Village*, 2007 WL 959539 at *1. The defendant was the property manager of the condominium as well as a homeowner. *Id.* The court distinguished *Blood* on the basis that there was no direct relationship between the association and the defendant. *Id.* at *4. The court stated: “In *Blood* there existed a relationship between the unit owner and the trustees’ imposition of the common expense assessment. While the assessment was illegal, there was a direct relationship between it and unit ownership, and a valid basis for the trustee’s belief that the assessed expense was proper.” *Id.*

It is important to note that the *Hunters Village* court found that the disputed assessment in that case was illegal. *Id.* at *3. Only after finding that the assessment was illegal did the court issue its holding that the defendant had the right to oppose the assessment. *Id.* at *4. The court also stated: ““Whatever grievance a unit owner may have against the condominium trustees must not be permitted to affect the collection of lawfully assessed common area expense charges.”” *Id.* at *3 (citing *Trustees of the Prince Condo. Trust v. Prosser*, 592 N.E.2d 1301, 1302 (1992)). Thus, *Hunters Village* does not support Mr. Pedersen’s argument. Mr. Pedersen may have had a legitimate argument if the trial court found that the assessment was illegal, but nonetheless dismissed Mr. Pedersen’s counterclaim. However, the trial court did the opposite: it found the assessment was valid, and then ruled upon the issues raised by Mr. Pedersen in his counterclaim. This is exactly what Mr. Pedersen argues the trial court should have done. This is exactly what the trial court did.

Mr. Pedersen failed to produce any evidence that the assessment was illegal. Essentially, Mr. Pedersen argues that the assessment was illegal simply because he says so. This is an insufficient basis for declaring the assessment illegal. In addition, unlike the parties in *Hunters Village*, there was a direct relationship between ARCA and Mr. Pedersen. The assessment was validly levied upon all the homeowners, which included Mr. Pedersen, for the restoration and repair of all the buildings, which is within ARCA’s power. ARCA’s third-party complaint against

Mr. Pedersen was for collection of payment of a special assessment levied against him in his capacity as a homeowner. ARCA has the right to collect the validly imposed unpaid assessment and Mr. Pedersen has no standing to oppose it. Mr. Pedersen wants to gain all the benefits of a common interest community yet not share in any of the risks. This is improper and hampers ARCA's orderly operation and financial solvency. As it related to Porter's lien, Mr. Pedersen's failure to pay his portion of the assessment imposed a greater risk of liability and loss to all other homeowners as a portion of that lien included unpaid assessments due on the original \$4.2 million restoration contract.

Mr. Pedersen's failure to pay his portion of the assessment is the very reason why the rule in *Panther Lake* was enacted. ARCA was prevented from paying Porter the balance owed on the contract due to Mr. Pedersen and other homeowners failing to pay their share. This caused Porter to file a lien against ARCA and then file a foreclosure lawsuit. If Mr. Pedersen (and the few other homeowners who refused to pay their assessments) had paid his assessment in full, as over 90 percent of the homeowners had, then ARCA would have been able to pay the balance owed to Porter and Porter would not have sued to foreclose on its lien. In addition, Mr. Pedersen waited more than two years to file his counterclaim. He could have done so in January 2007, when the initial assessment was levied upon the homeowners. What Mr. Pedersen should have done was pay the initial assessment, and then immediately file his action for declaratory relief (which may have subjected him to posting a

bond) and have the issues therein resolved. Instead, he waited more than two years to file the counterclaim while withholding his share of the assessment, which hurt ARCA financially. Mr. Pedersen devotes more than 35 pages of his Opening Brief to why he should not have to pay the assessment up front. The facts of this action demonstrate why Washington law demands that he should have.

2. The trial court evaluated Mr. Pedersen's claims on the merits

Assuming for the sake of argument that it was error for the trial court to follow Washington law and require that Mr. Pedersen pay his assessment in full before challenging it, the trial court nonetheless evaluated Mr. Pedersen's claims on the merits before making its rulings. Mr. Pedersen states that the trial court dismissed his counterclaim without giving him an opportunity to challenge the validity of the assessment simply because he did not pay the full amount of the assessment. However, this is incorrect and the record shows otherwise.

The trial court did not refuse to hear Mr. Pedersen's counterclaim. In fact, the issues contained in the counterclaim (lack of authority to enter into Porter contract, poor quality of repairs, negligence, breach of duty, mismanagement of restoration project, breach of Condo Declaration, failure to receive 75 percent approval vote, allocation) were raised by Mr. Pedersen in his opposition papers filed with the trial court,² and were

² In opposition to the Assessments MSJ, Mr. Pedersen raised the following issues: lack of authority to enter into Porter contract, poor quality of repairs, negligence, breach of duty, mismanagement of restoration project, breach of Declaration, failure to receive 75 percent approval vote, whether the project was

also addressed at oral argument on the Assessments MSJ, in which Mr. Pedersen's counsel participated. These issues were direct challenges to the assessment. On October 15, 2010, the trial court gave Mr. Pedersen the opportunity to raise whatever claims he had in a brief statement of remaining issues. Mr. Pedersen did so by filing a Memorandum on October 21, 2010. (CP 1603-04) Mr. Pedersen then raised arguments in his Response to the Assessments MSJ, and presented same at oral argument on November 12, 2010. The court dismissed the counterclaim only after reviewing Mr. Pedersen's papers and hearing oral argument.

Case law cited by Mr. Pedersen is consistent with the trial court's actions. In *Kelso Woods Ass'n, Inc. v. Swanson*, 692 A.2d 1132, 1135 (Pa. 1997), the court held that a trial court, when presented with allegations concerning the legality and propriety of a nonprofit association's imposition of assessments, may review that decision to ensure that it is in accordance with Pennsylvania law as well as the association's bylaws. That is what the trial court did in the instant action, as noted above. Mr. Pedersen cites *Aggasiz West Condominium Ass'n v. Solum*, 527 N.W.2d 244 (N.D. 1995) and *Forest Villas Condominium Ass'n v. Camerio*, 422 S.E.2d 884 (Ga. 1992), for the proposition that claims unrelated to the validity of the assessment must be resolved in the assessment action and that judgment for valid assessments must not be delayed. However, *Aggasiz* and *Forest Villas* support ARCA's position.

a "restoration and repair" or "capital addition and improvement," and allocation (CP 559-593, 594-612).

In *Aggasiz* and *Forest Villas*, the court found that the assessments were valid and then addressed the homeowner's counterclaims. This is what the trial court did in this action. The *Aggasiz* court stated that where an association's declaration and bylaws do not authorize withholding of assessments, a homeowner cannot do so "for any reason." *Aggasiz*, 527 N.W.2d at 247-48. Similarly, the *Forest Villas* court stated that a homeowner involved in a dispute with the association about its services and operations "may not exert leverage in that controversy by withholding payment although he may seek other remedies by way of an independent action." *Forest Villas*, 422 S.E.2d at 886.

Mr. Pedersen argues that his counterclaim contained claims unrelated to the validity of the initial assessment. These include poor quality of repairs, lack of authority of ARCA to enter into the Porter contract, allocation of cost of the restoration project, negligence, breach of fiduciary duty, breach of the Condo Declaration, failure to receive 75 percent approval vote, whether the project was a "restoration and repair" or "capital addition and improvement," and project mismanagement. (CP 724-730) Mr. Pedersen presented these claims to the trial court (CP 107-127; 392-412; 539-550; 594-612; 559-593; 765-770; 1469-1533; 1603-04), which ruled upon them appropriately. (CP 647-52; 1599-1602; 1615-20; *see generally*, RP, 10-15-10 and 11-12-10) Thus, the trial court did what Mr. Pedersen wanted it to do: it ruled on the validity of the initial assessment (finding that it was valid), and found that there was no question of material fact on the remaining claims in the

counterclaim. The finding that the initial assessment was valid necessarily resolved the allegations in the counterclaim of lack of authority to levy the assessment and allocation of project costs.

Mr. Pedersen's argument that he was not allowed by the trial court to challenge the validity of the assessment, or have the issues in the counterclaim addressed, is without merit.

B. An Approval Vote of the Homeowners Was Not Required Because the Restoration Project Was for "Restoration and Repair," Not "Capital Additions and Improvements"

On October 15, 2010, the trial court found that ARCA was not negligent, nor did it breach its duty, by not requiring a 75 percent approval vote from the homeowners. (CP 1615-20) Subsumed in this ruling as moot was the question of whether the project was a "restoration and repair" or "capital addition and improvement," and whether the Condo Declaration required 75 percent homeowner approval for "restoration and repair." Nonetheless, the trial court allowed Mr. Pedersen to raise these issues again in his Response to the Assessments MSJ. On November 12, 2010, the trial court found, *inter alia*, that ARCA was not negligent, nor did it breach its duty, by not requiring a 75 percent approval vote from the homeowners. (CP 652) The trial court also found that neither the Condo Declaration nor the Act required ARCA to obtain a 75 percent approval vote by the homeowners to incur the obligations necessary for the restoration project. (*Id.*) The trial court reached its ruling after reading the briefs submitted by the parties and after hearing oral argument.

Mr. Pedersen’s entire argument rests on the mistaken premise that the restoration project was a “capital addition and improvement,” and, therefore, required a 75 percent vote under Section 10.2.1(i) of the Condo Declaration. The trial court’s ruling reflects that the project was for “restoration and repair,” not “capital additions and improvements.” This was based on ample evidence submitted to the trial court throughout the underlying litigation.

1. The overwhelming evidence before the trial court was that the project was for “restoration and repair,” not “capital additions and improvements”

Here are ordinary dictionary definitions for the terms “repair” and “restoration.”:

Repair: 1. to restore to a good or sound condition after decay or damage; mend: *to repair a motor*. 2. to restore or renew by any process of making good, strengthening, etc.: *to repair one’s health by resting*. . .

Dictionary.com (based on Random House Dictionary) (visited October 31, 2011) <http://dictionary.reference.com/browse/repair> (underline and italics in original).

Restoration: 1. the act of restoring; renewal, revival, or reestablishment. 2. the state or fact of being restored. 3. a return of something to a former, original, normal, or unimpaired condition . . . 5. something that is restored, as by renovating. . . .

Dictionary.com (based on Random House Dictionary) (visited October 31, 2011) <http://dictionary.reference.com/browse/restoration>.

The evidence is undisputed that the project was intended to repair and restore the buildings so that they would return to a sound,

weatherproof condition. The testimony from the homeowners and ARCA's on-site engineering and consulting firm, in addition to the plain meaning of the terms "repair" and "restoration," support ARCA's position. The purpose of the project was to repair extensive damage suffered by the buildings due to water intrusion. The project did not increase the size of the condominiums. To the extent that there were any enhancements to the buildings, they came as a result of two things: repairing damage, and use of more modern building materials.

Mr. Pedersen's argument does not make logical sense. No one would say that enhancement of a condominium building's value simply by repairing it was a "capital improvement." No one would say that buying new siding that meets current standards to replace the old, deteriorated and obsolete siding is a "capital addition." Rather, they would differentiate this work and material replacement from, for example, the capital improvement of installing a swimming pool, or the capital addition of purchasing a quarter acre of land from a neighbor to supplement available onsite parking.

Repairing the existing buildings did not require a vote because ARCA was obligated to protect the asset the homeowners already possess. Adding new financial obligations unrelated to the proper function of the existing asset *does* require a vote. This is consistent with the intent of the Condo Declaration, and makes common sense.

2. ARCA never admitted, and does not admit now, that there was an issue of material fact as to whether the project was for “restoration and repair” or “capital additions and improvements”

According to Mr. Pedersen, ARCA admits that there was an issue of material fact as to whether the Porter contract included capital improvements in excess of \$25,000. (Appellant’s Brief, p. 39) However, Mr. Pedersen fails to tell this Court the full story. In its Renewed MPSJ, ARCA cited to the trial court’s June 25, 2010 denial of the MPSJ, which was solely based on the issue of whether the “rain screen” was a “capital addition and improvement” or “restoration and repair.” (CP 1020-22) ARCA cited to this ruling to provide factual background for the evidentiary developments regarding the “rain screen” system, which supported the Renewed MPSJ. ARCA never admitted that there is an issue of material fact as to the nature of the restoration project.

The Renewed MPSJ identified two arguments by ARCA that it did not have the opportunity to make in the June 25, 2010 hearing on the MPSJ³. The first was that the “rain screen” was always part of the original restoration project scope, and, therefore, a “restoration and repair”; and the second was that even if the “rain screen” was a “capital addition and improvement,” and required 75 percent homeowner approval under the Condo Declaration, denial of summary judgment was inappropriate because more than 90 percent of the homeowners approved it, and paid their assessment. (CP 1026-27) The Renewed MPSJ also informed the

³ At the October 15, 2010 hearing on the Renewed MPSJ, the trial court noted it should not have cut off ARCA’s counsel from making these arguments at the June 25, 2010 hearing on the MPSJ. (*See* RP, 10-15-10 at 8:12).

trial court that since its ruling on June 25, 2010, ARCA deposed the Lowry plaintiffs' expert, Mark Cress, and produced additional evidence that the "rain screen" was a "restoration and repair," not a "capital addition and improvement." (CP 1024-25, 1027)

Mr. Cress admitted that the "rain screen" was part of the scope of the restoration project. Mr. Cress admitted that the "betterments," which included the "rain screen," were part of ERD's scope of repair presented to the homeowners in November 2006. He testified that he would recommend the installation of the "rain screen" at Allenmore because the walls had been wet for a long time. Perhaps most telling was Mr. Cress' admission that his definition of "betterment" was not based on any particular code provision or industry regulation or specification. Thus, Mr. Cress failed to establish that the rain screen was a "betterment," and, therefore, was a "capital addition and improvement" requiring 75 percent homeowner approval to install. Even if the trial court had agreed that the "rain screen" was a "capital addition and improvement," it is undisputed that the "rain screen" was part of the scope of the restoration project, which was approved by more than 90 percent of the homeowners.

On March 26, 2010, the trial court denied the Lowry plaintiffs' Motion for Partial Summary Judgment because it found questions of material fact as to whether the project was a "capital addition and improvement," and, therefore, required 75 percent homeowner approval under the Condo Declaration. Mr. Pedersen has not offered any evidence, besides his own opinion, which supports his position and overcomes the

trial court's denial of summary judgment on this issue. In contrast, ARCA has.

3. ARCA never told the homeowners that the restoration project would not go forward without a 75 percent approval vote

ARCA was required under the Condo Declaration and the Act to repair the buildings. Mr. Pedersen ignores this critical fact. Instead, Mr. Pedersen argues that the Board did not follow its own resolution that 75 percent approval be obtained by December 31, 2006. In doing so, Mr. Pedersen relies upon the Notice of Members Meeting (CP 404), among other things, in support of his argument. However, his argument is flawed for several reasons.

First, Mr. Pedersen incorrectly reads the Notice of Members Meeting. In the third paragraph, the Notice states: "If less than 75% of the owners consent to the assessment, then the assessment will be whatever the cost will be when the project is undertaken."⁴ (CP 404) Thus, the Notice does not state that if ARCA fails to receive 75 percent of the vote by December 31, 2006, the restoration and repair project will not commence or that the voting process will restart. Rather, it states that the project will proceed regardless of what the outcome of the vote is, and if fewer than 75 percent vote for the project, the assessment will be whatever the cost of the project is when undertaken. Mr. Pedersen's argument that

⁴ Viking Bank, which provided financing for the restoration project, offered favorable financing terms, which ARCA would have had to forego if the project did not receive 75 percent approval. This did not mean that the restoration project could not go forward if it did not receive 75 percent approval, as Mr. Pedersen wrongly contends.

failure to garner 75 percent of the vote means that the “process will have to restart” is flat out wrong.

Second, even if it is true that fewer than 75 percent of the homeowners returned their mail-in ballots by December 31, 2006, that in and of itself does not mean that the restoration project was not approved and should not have gone forward. Rather, the evidence shows that the homeowners ratified the project. It is undisputed that eventually over 90 percent of the homeowners voted for the project. Votes were being received after the “deadline” and into January 2007. Those whose votes were not received by December 31, 2006, or who otherwise opposed the project, waived any right to object to the project not receiving the requisite votes by December 31, 2006 by subsequently mailing in their votes in favor of the project. Except for Mr. Pedersen and a few others, an overwhelming majority of the homeowners approved and paid their share of the special assessment for the restoration project; and, those who did never challenged the Board’s authority to hire Porter and commence with the project or brought a lawsuit on that basis. Mr. Pedersen himself waited more than two years after the project commenced to bring a declaratory judgment action against ARCA, challenging the validity of the assessment. Mr. Pedersen’s objections notwithstanding, the project was actually ratified by over 90 percent of the homeowners. Mr. Pedersen’s argument is without merit.

Mr. Pedersen argues that ARCA is estopped from asserting that a 75 percent approval vote was required. This argument is flawed for

several reasons. First, as established above, ARCA never told the homeowners that if it failed to receive a 75 percent approval vote the restoration project would not commence. (CP 404) ARCA contemplated that fewer than 75 percent of the homeowners could vote for the project, and informed the homeowners of such a possibility. Second, ARCA was bound by the Condo Declaration and the Act to repair the buildings regardless of the outcome of the vote. By arguing that ARCA is estopped from asserting that a 75 percent approval vote was not required, Mr. Pedersen is in essence arguing that ARCA was bound to a course of action that is contrary to the Condo Declaration and the Act. This would produce an untenable result. As the trial court correctly ruled, ARCA was not negligent in adhering to the Condo Declaration and Washington law in repairing the buildings which, in turn, mooted the issue of whether a vote was required under the Condo Declaration.

The purpose of the vote was twofold: (1) satisfy Viking Bank's requirement that a vote be held to approve the project so that it could place a blanket deed of trust securing a loan; and (2) prevent Mr. Pedersen from complaining that the project did not receive 75 percent approval, even though ARCA and its counsel knew that a 75 percent approval vote was not required for "restoration and repair" under the Condo Declaration. (*See* CP 1340-42; CP 1345) The January 21, 2006 letter specifically addressed Mr. Pedersen and his faulty position that "restoration and repairs" require a 75 percent approval vote. The vote was held simply to prevent Mr. Pedersen from continuing to incorrectly assert that the

restoration project required 75 percent approval. It was not otherwise required under the Condo Declaration or the Act.

4. The Condo Declaration and Washington law mandated that ARCA repair the deteriorating buildings

Whether 75 percent of the homeowners voted for the restoration project by December 31, 2006 is immaterial because ARCA was mandated by the Condo Declaration and the Act to repair the buildings. If Mr. Pedersen's argument that the restoration project could not proceed because it failed to receive 75 percent approval by December 31, 2006 is taken to be true, it would lead to the untenable result that ARCA must not proceed with the repairing the badly deteriorated buildings simply because fewer than 75 percent of the homeowners voted to approve it. This is in direct contravention of ARCA's obligations under the Condo Declaration and the Act. Nothing in the Condo Declaration or the Act support Mr. Pedersen's argument.

The Board was required under Section 10.2.1(g) of the Condo Declaration to maintain and repair "any condominium unit, its appurtenances and appliances, if such maintenance or repair is reasonably necessary in the discretion of the Board" and if the unit owner refused to perform any repairs to his unit. As noted in ARCA's Reply to Mr. Pedersen's Opposition to the MPSJ, Mr. Pedersen's deck was so thoroughly rotted and in danger of collapsing that Colin Murphy, the principal of building engineer ERD, described it as "catastrophic." (CP 932 at 61:4-12) However, Mr. Pedersen did not repair the deck, and

took the position that it was not in need of repair despite overwhelming physical evidence to the contrary. The Board, after being told by ERD that the repairs to Mr. Pedersen's deck were necessary, exercised its discretion under Section 10.2.1(g) and proceeded to repair the deck because it was required to do so. In addition to the limited common area that is Mr. Pedersen's deck, the Board was required by Section 14.8 of the Condo Declaration to repair damaged portions of the buildings unless 80 percent of the homeowners voted not to. This is exactly what the Board did when it discovered that the buildings were in serious danger of collapse.

Similarly, Section 14.1 of the Condo Declaration requires that ARCA "shall" repair or replace damaged premises unless the condominium is terminated or 80 percent of the homeowners vote not to rebuild. This is exactly what ARCA did when it discovered that the buildings were in serious danger of collapse. In addition, RCW 64.34.328 states that a condominium association is required to maintain, repair, and replace the common and limited common elements. This is exactly what ARCA did when faced with having to approve the overages and pressing forward with the restoration project. ARCA did not violate the Condo Declaration or its own resolution by repairing the buildings. Rather, ARCA discharged its obligations under the Condo Declaration and the Act in repairing the buildings. Mr. Pedersen has failed to show otherwise.

Mr. Pedersen argues that Section 14.1 of the Condo Declaration is subject to Section 10.2.1(i) and, therefore, Section 14's mandate that the

Board “shall promptly repair and restore” damage or destruction is superseded. Mr. Pedersen also argues that RCW 64.34.328 is subject to the Condo Declaration, specifically, Section 10.2.1(i). First, as has already been established by ARCA in papers submitted to the trial court and in this Brief, Mr. Pedersen’s interpretation of Section 10.2.1(i) is incorrect. “Restoration and repairs” are specifically exempted from the 75 percent approval requirements of Section 10.2.1(i), which limits the Board’s power to acquire and pay for “capital additions and improvements” from the maintenance fund. Thus, money used to pay for “restoration and repair” are specifically exempted (“other than for purposes of restoring, repairing or replacing portions of the common areas”). When reading the Condo Declaration as a whole, and not in tortured piecemeal as Mr. Pedersen does, Section 10.2.1(i)’s exemption for “restoration and repairs” is consistent with other Sections of the Condo Declaration. Second, Mr. Pedersen does not explain or provide any evidence of how or why Section 10.2 supersedes Section 14.1, or how or why Section 14.1 and RCW 64.34.328 is subject to Section 10.2.1(i). If anything, Section 10.2.1(i) limits the Board’s power and is subject to the broader powers of Section 14, which mandates that the Board “shall promptly repair and restore” damaged or destroyed buildings.

Mr. Pedersen states that it is “absurd” that an association would not require owner approval of a \$4.2 million project with high individual assessments. However, what is “absurd,” and in fact, dangerous and illegal, is for ARCA to disregard the health and safety of its homeowners

and fail to repair the deteriorating buildings simply because a certain percentage of homeowners opposed repairing them.

C. The Trial Court Allowed Mr. Pedersen to Address the Issues of Negligence and Breach of Duty in Response to ARCA's Assessments MSJ

Mr. Pedersen states that it was improper for the trial court to rule on the issues of negligence and breach of duty because these issues were outside the scope of the Assessments MSJ. (Appellant's Brief, p. 46) Again, Mr. Pedersen chooses to tell this Court only part of the story. ARCA's Assessments MSJ was limited to the issues of Mr. Pedersen's failure to pay the initial assessment and whether a 75 percent approval vote was required under the Condo Declaration for the restoration project to go forward. However, the very first argument advanced by Mr. Pedersen in his Response to the Assessments MSJ was that the "Board violated its fiduciary duties to owners and made material misrepresentations about the contract."⁵ (CP 599-602) Thus, Mr. Pedersen opened the door to the issue of ARCA's negligence and breach of duty. The trial court's Order granting the Assessments MSJ included the issues of ARCA's negligence and breach of duty because

⁵ In his Response, Mr. Pedersen cites to allegations in ARCA's counterclaim against the Lowry plaintiffs as support for his position. However, ARCA voluntarily dismissed the counterclaim on June 9, 2010. (CP 994-98). In addition, Mr. Pedersen cites to declarations of various individuals in arguing that ARCA admitted it breached its duty to the homeowners. However, these declarations preceded receipt by ARCA's counsel of documents which reflected that: (1) 75 percent approval vote was not required (CP 985; 1340-42; 1344-46; 1348-49); and (2) ARCA relied upon ERD and three separate attorneys in the management of the restoration project, including incurring the overage without obtaining 75 percent homeowner approval, among other things.

Mr. Pedersen raised them in his Response. Mr. Pedersen inexplicably criticizes the trial court for addressing his argument on negligence and breach of duty when he himself opened the door to that argument. ARCA had already obtained a successful ruling on the issue of whether it was negligent or breached its duty to the homeowners. Therefore, the trial court's ruling was the law of the case and any similar arguments by Mr. Pedersen were mooted.

Mr. Pedersen argues that ARCA was negligent by entering into an open-ended time-and-materials contract with Porter. However, this red-herring argument ignores the fact that the type of contract ARCA entered into with Porter is irrelevant because ARCA was duty-bound by the Condo Declaration and the Act to repair the buildings. If ARCA had entered into a fixed-price contract, as Mr. Pedersen claims to have suggested, but the buildings needed additional repairs beyond the contract price, ARCA would have been legally obligated to expend additional money to repair the buildings. Instead, Mr. Pedersen argues that ARCA should have ceased repairing the buildings once the contract price was met. This logic is faulty and violates ARCA's duties under the Condo Declaration and Washington law.

Mr. Pedersen claims that the trial court did not address his claim for allocation of project costs. (Appellant's Brief, p. 46, n.19) This is inaccurate. Not only did Mr. Pedersen brief this issue in his Response (*see* CP 599, 606-608), there was extensive oral argument on this issue (*see* RP, 11-12-10 at 18:15-20:6; 28:1-32:17).

D. Attorney's Fees

ARCA respectfully requests that this Court award its fees and expenses pursuant to RAP 18.1.

V. CONCLUSION

For the foregoing reasons, this Court should hold that the trial court did not err on any of its rulings and affirm each of the trial court's rulings in ARCA's favor.

RESPECTFULLY SUBMITTED this 31st day of October, 2011.

BETTS, PATTERSON & MINES, P.S.

By: 

Vasudev N. Addanki, WSBA #41055
Joseph D. Hampton, WSBA #15297
Attorneys for Allenmore Ridge
Condominium Association

CERTIFICATE OF SERVICE

I, Valerie D. Marsh, declare as follows:

1) I am a citizen of the United States and a resident of the State of Washington. I am over the age of 18 years and not a party to the within entitled cause. I am employed by the law firm of Betts, Patterson & Mines, P.S., whose address is Betts Patterson & Mines, One Convention Place, Suite 1400, 701 Pike Street, Seattle, Washington 98101-3927.

2) By the end of the business day on October 31, 2011, I caused to be served upon counsel of record at the addresses and in the manner described below, the following documents:

- **Respondent’s Brief; and**
- **Certificate of Service.**

<i>Counsel for Appellant Pederson:</i>	<input checked="" type="checkbox"/>	U.S. Mail
Andrew R. Hay	<input type="checkbox"/>	Hand Delivery
Hay Law Firm PS	<input type="checkbox"/>	Telefax
201 South 34th Street	<input type="checkbox"/>	UPS
Tacoma, WA 98418-6802	<input checked="" type="checkbox"/>	Email

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 31st day of October, 2011.

Valerie D. Marsh
Valerie D. Marsh

APPENDIX A

Relevant Portions of Condo Declaration

Section 10.2.1 of the Condo Declaration describes the Board's authority in regard to certain goods and services:

The Board for the benefit of the condominium and the owners, shall enforce the provisions of this Declaration and of the Bylaws, shall have all powers and authority permitted to the Board under the Act and the Declaration, and shall acquire and shall pay for out of the common expense fund hereinafter provided for, all goods and services requisite for the proper functioning of the condominium, including but not limited to the following:

* * *

(g) Maintenance and repair of any condominium unit, its appurtenances and appliances, if such maintenance or repair is reasonably necessary in the discretion of the Board to protect the common area or preserve the appearance and value of the condominium development, and the owner or owners of said units have failed or refused to perform said maintenance or repair within a reasonable time after written notice of the necessity of said maintenance or repair has been delivered by the Board to the owner or owners; provided that the Board shall levy a special charge against the condominium unit of such owner or owners for the cost of such maintenance or repair.

* * *

(i) The Board's power . . . shall be limited in that the Board shall have no authority to acquire and pay for out of the maintenance fund capital additions and improvements . . . (other than for purposes of restoring, repairing or replacing portions of the common areas) having a total cost in excess of Five Thousand Dollars (\$5,000.00), without first obtaining the affirmative vote of the owners holding a majority of the voting power present or represented at a meeting called for such purpose, or if no such meeting is held, then the written consent of voting owners having a majority of the voting power; provided that any expenditure or contract for each capital addition or improvement in excess of Twenty-five Thousand Dollars (\$25,000.00) must be approved by owners having no less than seventy-five percent (75%) of the voting power.

* * *

The Board may, from common funds of the Association, acquire and hold in the name of the Association, for the benefit of the owners, tangible and

intangible personal and real property and interests therein, and may dispose of the same by sale or otherwise. . . . The Board shall not, however, in any case acquire by lease or purchase real or personal property . . . valued in excess of Twenty-five Thousand Dollars (\$25,000.00) except upon a seventy-five percent (75%) affirmative vote of the condominium unit owners, in the manner specified in Subsection 10.2(i).

Section 14.1 of the Condo Declaration describes the Board's duties as to repair or replacement of damaged premises:

Any portion of the condominium for which insurance is required under the terms of the Declaration (Article 13), which is damaged or destroyed, shall be repaired or replaced promptly by the Association unless:

* * *

(c) at least eighty percent (80%) of the Association's votes allocated to the owners, including the vote of every owner of a unit or an assigned limited common element which will not be rebuilt, vote not to rebuild. The cost of repair or replacement in excess of insurance proceeds and reserves is a common expense, which shall be assessed to the surviving units of the condominium.

* * *

Section 14.7 of the Condo Declaration defines "repair," "reconstruct," "rebuild" or "restore" as "restoring the improvements to substantially the same condition in which they existed prior to the damage or destruction, with each unit and the common elements having substantially the same vertical and horizontal boundaries as before. . . ."

Section 14.8 is entitled "Restoration by the Board of Directors" and is similar to the above Sections. It states:

14.8 Restoration by the Board of Directors

14.8.1 Board of Directors Shall Restore

Unless prior to the commencement of repair and restoration (other than emergency work referred to in this Article) none of the events specified under Section 14.1 have occurred, the Board of Directors shall promptly repair and restore the damage or destruction. The Board of Directors shall use the available insurance proceeds therefore, and shall pay for "the actual costs of repair and restoration in excess of insurance

proceeds as a common expense, which shall be specially assessed against all units in proportion to their percentage of interest in the common elements.

14.8.2 Authority to Contract

The Board of Directors shall have the authority to employ architects and attorneys, advertise for bids, let contracts to contractors and others, and to take such other action as is reasonably necessary to effectuate the repair and restoration. Contracts for such repair and restoration shall be awarded when the Board of Directors, by means of insurance proceeds and sufficient assessments, has made provision for the cost thereof. The Board of Directors may further authorize the insurance carrier to proceed with repair and restoration upon satisfaction of the Board of Directors that such work will be appropriately carried out.

Section 14.9 states:

14.9 Vote Required Not to Rebuild

In the event that a special meeting is called as set forth under Section 14.4 above, the damage and destruction shall be repaired and restored unless at least eighty percent (80%) of all unit owners vote not to repair and restore together with a unanimous decision of all the unit owners with units or assigned limited common elements which will not be repaired or rebuilt; provided, however, that the failure to obtain such affirmative vote shall be deemed a decision to rebuild and restore the damage and destruction; provided, further, that the failure of the Board of Directors or the owners to convene a special meeting pursuant to Section 14.4 shall be deemed a decision to undertake such repair and restoration work.

Relevant Section of Washington Condominium Act

RCW 64.34.328 states:

64.34.328. Upkeep of condominium

(1) Except to the extent provided by the declaration, subsection (2) of this section, or RCW 64.34.352(7), the association is responsible for maintenance, repair, and replacement of the common elements, including the limited common elements, and each unit owner is responsible for maintenance, repair, and replacement of the owner's unit. Each unit owner shall afford to the association and the other unit owners, and to their agents or employees, access through the owner's unit and limited common elements reasonably necessary for those purposes. If damage is inflicted on the common elements, or on any unit through which access is taken, the unit owner responsible for the damage, or the association if it is responsible, shall be liable for the repair thereof.