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COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON

LISALI REVOCABLE TRUST, a Washington Trust,

Appellant,

v.

TIARA DE LAGO HOMEOWNER'S ASSOCIATION, a
Washington non-profit Corporation

Respondent.

BRIEF OF RESPONDENT

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ORIGINAL

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I. INTRODUCTION

Lisali Revocable Trust (“Lisali”) is the owner of record of two penthouse units (#501 and #502) (the “Lisali Units”) in the Tiara De Lago Condominium in Kirkland, WA. Lisali filed suit against the Tiara De Lago Homeowners’ Association and its individual board members (collectively “the Association”) alleging that the Association failed to adequately respond to Lisali’s concerns about certain water leaks and Lisali’s requests for installation of a T-3 communication line.

Lisali argued the Association was liable for contribution for Lisali’s costs incurred in connection with the water leak (the “contribution claim”). Lisali also argued the Association was liable for damages incurred as a result of the Association’s conduct below the standard of care owed to Lisali (the “standard of care claims”).¹ The

¹ Lisali’s complaint alleged the Association owed Lisali the duties of a fiduciary. (CP 17–30) On summary judgment, however, Lisali argued the Association’s duties required only ordinary care. (CP868) The trial court ruled that the standard of care owed was simply ordinary care. (CP 1150)

trial court granted the Association summary judgment dismissing Lisali's standard of care claims. The trial court then found against Lisali on all claims after a trial on the merits.

On appeal, Lisali fails to understand the applicable standards of review and how they apply to the issues presented.

With respect to summary judgment dismissal of the standard of care claims, this Court reviews de novo. With its summary judgment motion, the Association offered evidence that it had acted reasonably and asserted there was no evidence to the contrary. The issue, therefore, is whether Lisali presented any actual evidence in response that raised a fact question. Although Lisali presented evidence that it disagreed with the Association's plan for repairs, Lisali failed to set forth any affirmative evidence in response to the Association's motion tending to prove that the Association's plan was unreasonable. The trial court properly granted summary judgment.

Even so, at trial, the trial court heard evidence on the question of the Association's reasonableness and determined on the evidence that, in fact, the Association had acted reasonably. On appeal from the trial court's findings as to both the standard of care and contribution claims, Lisali disregards the standard of review, essentially asserting that the trial court should be reversed because it wrongly decided the case on the facts. Lisali's burden on appeal is to show that the trial court lacked substantial evidence to support its findings. This Lisali fails to do.

Finally, with respect to the trial court's award of attorney fees, Lisali fails to satisfy its burden to prove the trial court abused its discretion. Lisali, in fact, simply reiterates its opposition to the Association's motion in the trial court for fees, as though the standard of review is de novo. The trial court considered these arguments and rejected each in turn. Lisali's attempt to raise them again on appeal does not satisfy the standard to prove an abuse of discretion.

II. ASSIGNMENTS OF ERROR

Lisali assigns error to the trial court's (1) Order Granting, in Part, Omnibus Motion for Summary Judgment, (2) Findings of Fact and Conclusions of Law, and (3) Judgment, Findings of Fact and Conclusions of Law re Attorneys' Fees and Order Entering Judgment.² This brief addresses each of these orders.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Under the Condominium Declaration, unit owners, not the Association, have responsibility for Limited Common Elements. The Association presented evidence that the cause of the leaks in the Lisali Unit was the patio doors and windows, which are Limited Common Elements. Is there substantial evidence to support the trial

² Lisali also purports to assign error to the trial court's (1) Order on Civil Motion Denying Plaintiff's Motion to Reconsider, (2) Order Denying Plaintiff's Motion re Proposed Factual Findings and Conclusions of Law, and (3) Order Denying Plaintiff's Motion for Reconsideration. However, Lisali fails to address any of these orders in its opening brief. Therefore, the Association's response brief does not specifically refer to these orders and the Court should not consider any issue relating to them. *Cowiche Canyon Conservatory v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992). In any event, these orders find support in the arguments raised in this brief.

court's finding that the source of the leaks was Limited Common Elements for which the Association is not responsible?

2. It was undisputed that Lisali did not notify the Association or obtain the Association's approval, as required by the Declaration, before incurring the expenses for which Lisali seeks the Association's contribution. Is there substantial evidence to support the trial court's finding that Lisali did not notify the Association or obtain approval before incurring expenses?

3. In response to the Association's summary judgment motion on the standard of care, Lisali failed to make any showing that the Association had acted unreasonably. Did the trial court correctly grant summary judgment for the Association? In any event, is there substantial evidence to support the trial court's finding at trial that the Association acted reasonably?

4. The Declaration permits an award of attorney fees and costs when those fees and costs are "incurred in connection with the dispute" between the Association and a

unit owner. Did the trial court abuse its discretion when it granted the Association's fees and costs incurred in connection with its dispute with Lisali?

IV. STATEMENT OF THE CASE

A. Factual Background

The Condominium was created in 1998 by developer MKT Associates, LLC ("MKT") pursuant to the Declaration. (Ex. 1) Sometime thereafter, Lisali became the record owner of units 501 and 502 in the Condominium.

1. Lisali's Request for a T-3 Line

In the fall of 2001, Lisali sought approval from the Association, through its Board of Directors (the "Board"), for installation of a T-3 communication line into the Lisali Units. (CP 543) The Condominium's Declaration required that Lisali obtain the Association's approval for this installation. (Ex. 1)

Installation of the T-3 line required drilling through concrete portions of a common area stairwell. (CP 543) Drilling through this area had the potential to damage structural elements of the building. (CP 543) Accordingly,

the Association determined that some form of indemnity agreement would need to be reached before it would allow Lisali to commence the work. (CP 543-44)

After discussing the need for an indemnification agreement, the Association's then-acting president, W. Ronald Groshong, a lawyer, drafted an indemnity agreement for discussion. (CP 544) A disagreement ensued regarding the scope of the indemnity agreement, resulting in Lisali, through its attorney, challenging the authority of the Association regarding the T3 issue. (CP 544) In response, the Association consulted an outside attorney for advice. (CP 544)

The Association reached a tentative approval for installation on or about December 18, 2001. (CP 544) However, because the T-3 line would serve only the Lisali Units, the Declaration required that expenses be assessed against Lisali and not the other unit owners.³ (CP 544; Ex. 1) The Association therefore conditioned its approval of

³ Section 12.6 of the Declaration provides that "Any Common Expense or portion thereof benefitting fewer than all of the Units may be assessed exclusively against the Units benefitted."

the installation on Lisali reimbursing it for all expenses including attorney fees it incurred in reviewing the issue. (CP 544) Since the proposed (and final) agreement required proportionate reimbursement to Lisali from any unit owner who in the future used the T-3 conduit, Lisali would be reimbursed for its expenses. Lisali, through its attorney, approved this agreement in December 2001 then backed away from the approval. (CP 545) This led to additional months of discussions.

Eventually, Lisali and the Association reached an agreement, evidenced by a Consent Agreement dated April 22, 2002. (CP 545) The Agreement provided that Lisali would “repair at [its] sole expense any damage caused by the installation” and “indemnify and hold harmless the Association against damages resulting from the installation.” (CP 545) The agreement also required Lisali to reimburse the Association for any “reasonable expense necessarily incurred by the Association in approving the installation other than legal fees.” (CP 545) The Agreement required that legal fees be paid by the

Association—i.e., by the individual unit owners in accordance with their pro rata share of ownership even though they received no benefit from the T3 line. (CP 545) The installation occurred shortly thereafter.

2. Water Intrusion in the Lisali Units

MKT originally provided a four-year warranty on the exterior of the building, which was set to expire on May 4, 2002. (CP 549) In anticipation of the expiration of the warranty, the Association retained Kappes Miller Consulting to conduct a physical inspection of the building. (CP 549) Kappes Miller, in turn, retained Corke Amento, Inc., to inspect the building envelope. (CP 549) Corke Amento prepared a report of its findings, dated March 21, 2002, that identified a number of problems, including condensation in some window frames, water leakage in at least one sliding door, and a number of other issues. (CP 549) The developer also conducted its own inspection through Wetherholt & Associates. (CP 549)

The Association and the developer eventually reached a “tolling agreement” dated April 24, 2002, by which the

parties agreed to toll the statute of limitations for certain warranty claims by one year, and other items by three years, to allow the developer an opportunity to correct the problems. (CP 549) Thereafter, the developer undertook to correct the problems identified in the Corke Amento and Wetherholt reports. (CP 549–50)

In December 2003, leaks developed in the area of a sliding door in the Lisali Units, which resulted in water entering unit 403 below. (CP 547) The Association again asked the developer to investigate. (CP 547) However, Lisali declined to permit access to units 501 and 502, even to make emergency temporary repairs to stop the water intrusion. (CP 547) On February 24, 2004, Dr. Israel, as President of the Association, sent a letter to Lisali’s attorney reiterating the request for access. (CP 547; Ex. 51) Dr. Israel’s letter stated that the developer would “identify and resolve the problem.” (CP 547; Ex. 51)

Dr. Israel’s letter specifically warned, “Your client does not have the authority to resolve leakage problems without Board approval. . . .” (CP 547; Ex. 51)

Notwithstanding that fact, on February 29, 2004, Lisali's counsel responded that Lisali was undertaking its own investigation, which would take time. (CP 547; Ex. 85) Unbeknownst to the Association, Lisali had, *six months before* this date, hired its own consultant, Chris Norris of Morrison Hershfield, Inc., to investigate the source of the intrusion issues. (CP 547)

Subsequent discussions ensued between Dr. Israel (after consulting with Corke Amento as well as Mike Henry with QED, both of which were water leakage experts) on behalf of the Association, Wetherholt on behalf of the developer, and Morrison Hershfield on behalf of Lisali. (CP 547–48) It became clear that the water intrusion resulted from failure of the Milgard window miter joints and the patio sliding doors. (Wetherholt 24:19–25:17;⁴ Raskin 56:4–57:3; Ex. 123) The Association proceeded with a plan to remove and replace all sliding doors on the fourth and fifth floors (high wind/storm areas) and redesign

⁴ Lisali's verbatim report of proceedings was organized by individual witness. The transcripts are cited accordingly.

the flashing detail to direct water to the exterior, per the experts' drawings and specifications. (CP 548)

In order to complete the work, the Association and developer entered into a Scope of Work Agreement dated July 9, 2004, which included an extension of the warranty on the repair items for an additional two years. (Ex. 89) The developer coordinated the work under its warranty and the tolling agreement. (Ex. 89) The work was performed by WG Clark, the developer's contractor. (CP 549) It was paid for by the developer, not Lisali. (Ex. 89)

Additionally, the Board determined that all Milgard windows would be checked, miter joints repaired and cleaned, and old caulking removed and replaced. (Ex. 89) This work was carried out by Milgard, the window manufacturer, and Lisali did not pay for it. (Ex. 89) Milgard, in addition to its lifetime warranty for original owners, extended an additional 2-year warranty on windows and doors for all other owners. (Ex. 89) All repairs were completed by September 2004.

B. Procedural Background

Lisali filed a lawsuit against the developer, MKT, seeking compensation for damages relating to the leaks. Lisali settled that lawsuit for \$60,000. (Ex. 8)

Lisali then filed this lawsuit against the Association for the same damages. Lisali alleged that, after the repairs to the doors and windows were complete, Lisali found evidence of additional leaks in the exterior wall and roof-wall interface. (CP 1–16, 17–30) Lisali alleged that it incurred expenses to remedy these additional leaks. (*Id.*) Lisali’s complaint sought contribution from the Association for these expenses as well as the expenses Lisali incurred to hire an independent investigator (Morrison Hershfield) while MKT and the Association were investigating the leaks in the doors and windows. (*Id.*) Lisali further alleged that the Association had acted unreasonably by failing to respond adequately to Lisali’s concerns about the leaks and the T-3 line. (*Id.*)

The Association moved for and was granted summary judgment on all of Lisali’s claims except the contribution

claim. (CP 1149–51) The contribution claim proceeded to trial. At trial, the court, despite the order granting the Association summary judgment on the standard of care claims, allowed Lisali to introduce evidence regarding the alleged unreasonableness of the Association’s conduct. The Association submitted evidence in rebuttal and the trial court entered judgment on the evidence in favor of the Association on all claims. (CP 1772) The Association was also granted its fees incurred in connection with this dispute. (*Id.*)

V. ARGUMENT

A. The trial court correctly concluded that Lisali is not entitled to contribution from the Association for Lisali’s alleged damages.

Lisali attempts to characterize the issue on appeal as a factual issue for decision by this Court. That is, Lisali argues that this Court should determine whether Lisali is entitled to contribution from the Association for Lisali’s alleged costs incurred in connection with the leaks. Lisali devotes much of its briefing on this issue to challenging the

trial court's findings of fact as well as reinterpreting the evidence presented at trial.

But, of course, an appellate court is not a trier of fact. "Where the trial court has weighed the evidence [an appellate court's] review is limited to determining whether the findings are supported by substantial evidence and, if so, whether the findings in turn support the trial court's conclusions of law and judgment."⁵ The trial court's findings of fact are supported by "substantial evidence" if there is "evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premise."⁶ Importantly, "[e]ven where the evidence conflicts, a reviewing court must determine only whether the evidence most favorable to the prevailing party supports the challenged findings."⁷

⁵ See, e.g., *State v. Black*, 100 Wn.2d 793, 802, 676 P.2d 963 (1984) (citing *Ridgeview Properties v. Starbuck*, 96 Wn.2d 716, 638 P.2d 1231 (1982)).

⁶ *Holland v. Boeing Co.*, 90 Wn.2d 384, 583 P.2d 621 (1978) (citing *In re Synder*, 85 Wn.2d 182, 532 P.2d 278 (1975)).

⁷ *Black*, 100 Wn.2d at 802 (citing *North Pac. Plywood, Inc. v. Access Road Builders, Inc.*, 29 Wn. App. 228, 232, 628 P.2d 482 (1981)).

The issue, then, is *not* whether the trial court correctly decided an issue of fact presented to it but whether there is substantial evidence to support the trial court's findings of fact.

- 1. There is substantial evidence to support the trial court's findings that the source of the water intrusion was damage to Limited Common Elements for which the Association is not responsible.**

Lisali argues that it is entitled to contribution for repairs it says it made to Common Elements. Lisali raised this argument at trial and it was rejected by the trial court. (CP 1212)

At trial, Lisali argued that water intrusion came through the Lisali Unit's exterior wall and related roof interface. (CP 1217–1219) The trial court, however, disagreed, finding that the source of the water intrusion was the patio doors and windows. (CP 1774, 1776) The trial court found that, under Washington law, these areas are *Limited Common Elements*, not Common Elements. (CP 1774, 1776) Thus, under the Declaration, the costs

incurred to repair the damage are allocated to the unit owner (Lisali), not the Association. (CP 1774, 1776)

There is substantial evidence to support the trial court's findings. MKT hired Wetherholt to investigate the source of the leaks. (Raskin 58:13–59:5; Wetherholt 23:11–24:22) Wetherholt, in conjunction with MKT, determined that the source of the problem was the Milgard sliding glass doors and windows. (Wetherholt 24:19–25:17; Raskin 56:4–57:3; Ex. 123)

MKT and the Association then entered into a Scope of Work Agreement outlining the cause of the leaks and the necessary action MKT must take to correct the problem. (Ex. 89) The Scope of Work Agreement lists the Milgard glass sliding doors and windows as the cause of the leaks. (Ex. 89)

These exterior doors and windows are Limited Common Elements under Washington law.⁸ RCW 64.34.204 provides, in part:

⁸ RCW 64.34.204. All parties agree that the statutory definition of Limited Common Elements is controlling. (Raskin 7:9–24)

Any shutters, awnings, window boxes, doorsteps, stoops, porches, balconies, patios, and all exterior doors and windows or other fixtures designed to serve a single unit, but which are located outside the unit's boundaries, are limited common elements allocated exclusively to that unit.

Consistent with this definition, the Declaration provides that, although the Association has the duty to repair and maintain the Limited Common Elements (Ex. 1 § 11.7.2), the Unit Owner is responsible for the costs associated with such maintenance. (Ex. 1 § 11.7.4)

Thus, Lisali, and not the Association, was responsible for the costs incurred to repair the leaks in the doors and windows. Notably, Lisali did not incur these costs. The doors and windows were covered under the developer's warranty as well as the manufacturer's warranty. (Ex. 89) MKT and Milgard, therefore, paid for these repairs. (Ex. 89)

At trial, Lisali attempted to argue that, once the windows and doors were repaired, Lisali found evidence of additional leaks in the exterior wall and roof interface. (CP 1217–18) Lisali argued that the Association was

responsible for the cost to repair these Common Elements. (CP 1224–25) It is evident that the trial court considered Lisali’s argument, but did not find it persuasive. Instead, the trial court found that, once the repairs to the doors and windows were complete, “all water intrusion issues were resolved and there has been no evidence of leaking since.” (CP 1775) This finding is supported by MKT’s determination that the leaks stopped once the repairs to the doors and windows were made. (Ex. 123)

The trial court, then, did not find that the water intrusion was caused by any damage to the Common Elements as Lisali contends. The water intrusion was caused by damage to Limited Common Elements, for which Lisali, and not the Association, is responsible. (CP 1774) The trial court’s findings are supported by substantial evidence and cannot be overturned on appeal.

2. There is substantial evidence to support the trial court’s findings that Lisali incurred expenses voluntarily and without the necessary approval of the Association.

As discussed above, the trial court determined that the source of the leaks was the Limited Common Elements

for which Lisali, and not the Association, was responsible. Even if, however, the trial court had concluded that the water intrusion arose from Common Elements, Lisali's claim for contribution would fail as a matter of law. The trial court specifically acknowledged that "[u]nder the express terms of the Condominium Declaration, only the Board has the authority to undertake Common Element and Limited Common Element repair unless written permission is given to the Unit Owners." (CP 1776)

Dr. Israel, President of the Association, testified that prior approval from the Association is necessary to maintain the uniformity of the building and ensure that the work is completed to the Association's standards. (Israel 63:16-64:16) Israel, in fact, notified Lisali that Lisali did not have the authority to resolve the leakage problems without the Association's approval. (Ex. 51)

Nonetheless, Lisali did not notify the Association or obtain permission before incurring expenses for its independent investigation and repair. This fact is undisputed. Heather Schlappi, the property manager for

Lisali, admitted that Lisali did not notify the Association or obtain the Association's approval before incurring expenses:

Q: . . . You didn't forward any Morrison Herschfield report or correspondence to any board member, did you?

A: No, I did not.

Q: You didn't forward any Prezant report or correspondence to any board member, did you?

A: No, I did not.

Q: Of any AMEC report you received, you did not forward any AMEC report or correspondence to any board member, did you?

A: No, I did not.

Q: With respect to Bales, you did not forward any Bales report or correspondence to any board member, did you?

A: No, I did not.

Q: With respect to Coit, you did not forward any Coit report or correspondence to any board member, did you?

A: No, I did not.

Q: Having just testified that with respect to Morrison Herschfield, Prezant, AMEC, Bales and Coit, or, frankly any consultant I may have been missing in that group, you then obviously did not obtain express board approval prior to hiring any of those consultants, did you?

A: I went through Jack Loudon [the developer] for everything. I did not get approval through the board.

(Schlappi 112:17–113:19) Loudon testified that he, as the developer, had no authority to act on behalf of the Association to authorize expenses. (Loudon 167:4–19) Loudon also testified that he never told Schlappi he was communicating information to the Association. (Loudon 167:20–168:7)

Dr. Israel confirmed that the Association was never notified and never gave its approval:

Q: With respect to the work described in this letter [Ex. 67], did anybody come to you or the board and seek approval to conduct the work?

A: No.

Q: In the prior letter, the engagement letter, did anybody come to you or the board and seek permission to engage AMEC?

A: No.

Q: Until this litigation, were you aware that work was performed in the summer of 2005 or late 2005 upstairs?

A: Absolutely not.

Q: So nobody came to the board beforehand and asked permission to carry out AMEC

proposals?

A: Nobody came and we weren't informed. We were still under warranty from the developer on the work that we completed eight months before. If we'd have known this, we would have followed up, gone back, had it evaluated, had it done under warranty repair.

. . .

Q: So nobody came to you and said we think we have another problem, we want to hire AMEC?

A: No.

Q: Just like nobody came to you and said we think we have a problem, we want to hire Morrison Herschfield?

A: Correct. My answer is no, they didn't.

(Israel 78:16–79:23; *see also* Israel 22:19–23:1, 24:1–10, 26:4–15, 40:22–25)

Thus, there is substantial evidence to support the trial court's finding that "Lisali never obtained advance permission or even notified the Board before it incurred any of the expenses for which it seeks reimbursement."

(CP 1777) This finding, in turn, supports the trial court's conclusions that the costs incurred by Lisali "were all voluntarily incurred" (CP 1777) and that "the Association

is not liable for any of the costs that Lisali seeks reimbursement for.” (CP 1776)

B. The trial court correctly dismissed Lisali’s claims against the Association for unreasonable conduct.

1. The trial court correctly ruled on summary judgment that Lisali lacked evidence to prove that the Association acted unreasonably.

An order granting summary judgment is reviewed de novo, “with the reviewing court performing the same inquiry as the trial court.”⁹

Lisali argues that the trial court erred by granting the Association summary judgment on the question of whether the Association’s actions were reasonable. Lisali mistakenly contends that the trial court improperly resolved a question of fact by deciding reasonableness on summary judgment.

The trial court did not resolve a question of fact regarding reasonableness; rather, the trial court properly granted summary judgment because the Association set

⁹ *Ski Acres, Inc. v. Kittitas County*, 118 Wn.2d 852, 854, 827 P.2d 1000 (1992) (citing *Herron v. Tribune Pub’g Co.*, 108 Wn.2d 162, 169, 736 P.2d 249 (1987)).

forth evidence to show its conduct was reasonable and Lisali failed to satisfy its burden by submitting affirmative evidence to rebut this fact.

Summary judgment is appropriate wherever “there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.”¹⁰ A moving party may satisfy its initial burden by pointing out to the trial court that “there is an absence of evidence to support the nonmoving party’s case.”¹¹ Once the moving party has satisfied its initial burden, the nonmoving party must make a sufficient showing, by going beyond the pleadings and through the submission of competent admissible evidence, that there are genuine issues for trial.¹² Here, Lisali failed to satisfy its burden as the nonmoving party.

On summary judgment, the Association argued that Lisali had no evidence to support its contention that the

¹⁰ CR 56(c).

¹¹ *Young v. Key Pharmaceuticals*, 112 Wn.2d 216, 255 n.1, 770 P.2d 182 (1989) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)).

¹² *Young*, 112 Wn.2d at 225–26.

Association acted unreasonably. (CP 527–41; ¶ 2070–78)

The Association submitted the declarations of Dr. Israel and Groshong in support of its motion. (CP 542–85) This evidence established that the Association (1) retained experts to examine the exterior of the building before the expiration of the developer’s warranty, (2) negotiated a tolling agreement with the developer to address the outstanding issues, and (3), when additional leaks occurred, hired independent experts and reiterated its demand that the developer respond and resolve the problem. (CP 542–85)

The Association also negotiated extended warranties from the developer and Milgard to cover the repaired components. (CP 542–85)

Once the Association established an absence of unreasonableness, the burden shifted to Lisali to submit affirmative evidence to show a material issue for trial. Lisali failed to do so. Lisali disagreed with the Association’s course of conduct, but this disagreement, in and of itself, does not establish *unreasonableness*. (CP 851–76) Lisali’s reliance on what it believes the

Association should have done is insufficient to defeat summary judgment. It is well-established that “[a]rgumentative assertions, speculative statements, and conclusory allegations do not raise material fact issues.”¹³

For example, Lisali argues that the Association should have hired an independent attorney (instead of Association member, Groshong) to draft the Consent Agreement with respect to the T-3 line. (CP 873–74) Lisali’s bare allegation regarding the necessity of an independent attorney is insufficient to establish unreasonableness. Moreover, the Association *did* hire an independent attorney to address the T-3 issue. (CP 544) As another example, Lisali argues that the Association should have consulted an independent investigator (instead of relying on MKT’s investigator) to determine the source of the water intrusion. (CP 872–73) Again, Lisali’s bare allegation regarding the necessity of a separate investigator is insufficient to establish unreasonableness. And, once

¹³ *Adams v. City of Spokane*, 136 Wn. App. 363, 365, 149 P.3d 420 (2006) (citing *Ruffer v. St. Francis Cabrini Hosp.*, 56 Wn. App. 625, 628, 784 P.2d 1288 (1990)).

again, the Association *did* consult its own independent investigator to address the leaks. (CP 547–48) As yet another example, Lisali argued that the Association attempted to amend the Declaration in order to prejudice Lisali. (CP 873) Yet, Lisali failed to set forth any evidence to show that the Declaration was ever so amended. Moreover, Lisali failed to set forth any evidence to establish that these alleged amendments prejudiced Lisali.

Indeed, Lisali’s opposition to the motion was dedicated entirely to establishing (1) the existence of leaks (which was not a fact in dispute), (2) the developer’s response to the leaks, and (3) Lisali’s independent investigation. (CP 851–76) Nowhere does Lisali raise any evidence to show unreasonableness *on the part of the Association*.

2. **Even if the trial court erred in granting summary judgment, the error was harmless because the issue was fully litigated and resolved at trial.**

Despite the order granting the Association summary judgment, Lisali presented evidence at trial in an attempt to

establish that the Association's conduct was unreasonable.¹⁴

The matter was fully tried on the merits, with the Association presenting evidence in rebuttal. The trial court specifically found:

9. When the intrusion at issue in this case was discovered in December 2003, the Association immediately asked the developer to investigate and resolve the leakage.

. . .

15. To resolve the issue, the Board determined to proceed with a plan of removing and replacing all sliding doors on the fourth and fifth floors and redesign the flashing detail to direct water to the exterior.

16. Chris Norris of Morrison Herschfield recommended exterior random destructive testing. The idea of exterior random testing was rejected as unnecessary since there [were] no visible areas on inspection suggestive of water leakage and the areas . . . around the miter joints could be evaluated by intrusive interior testing without breaking the exterior envelope. The Board explored several recommendations and reasonably adopted

¹⁴ Lisali points to this evidence that was presented at trial in order to support its argument that the order granting summary judgment was improper. To the extent this evidence was not presented in opposition to the motion for summary judgment, however, it should not be considered by this Court when reviewing the motion. RAP 9.12 ("On review of an order granting or denying a motion for summary judgment the appellate court will consider only evidence and issues called to the attention of the trial court.")

and/or rejected them.

17. In order to complete the work, the Association and developer entered into a Scope of Work Agreement dated July 9, 2004, which included an extension of the warranty on the repair items for an additional two years.

(CP 1773–74) The trial court’s findings are supported by substantial evidence:

- Before the expiration of the developer’s original warranty, the Association engaged a building survey by the developer and the Association’s own expert to determine if there were any problems that needed to be addressed. (Israel 6:19–7:6)
The Association also sent surveys to the homeowners seeking their input. (Israel 7:3–6)
Lisali never responded to this survey. (Israel 7:23–24)
- Immediately after the Association became aware of the leaks in the Lisali Units, the Association contacted the developer and insisted upon repairs. (Israel 17:17–18:18)

- The Association worked with the developer to complete temporary repairs and then investigated and negotiated a permanent solution, for which neither the Association nor Lisali had to pay. (Israel 29:6–14, 30:23–25, 51:9–12; Ex. 89)
- Although the developer hired an expert to determine the cause of the leaks, the Association hired its own independent consultants to weigh in on the issue. (Israel 32:24–35:2, 117:9–118:21, 119:18–120:6; Raskin 34:11–23)
- Despite hiring independent experts, the Association remained involved and kept itself apprised of the repair efforts. (Raskin 63:15–20; Loudon 162:23–163:20)
- Once it was determined that the Milgard doors and windows were the source of the leaks, the Association insisted that Milgard repair not only the leaking windows in the Lisali Units, but all the windows in the building. (Israel 52:20–25; Ex. 89) The Association also insisted that Milgard

upgrade all doors on the fourth and fifth floors that were exposed to wind-driven rain and replace all of the miter joints for the glass doors throughout the building. (Israel 54:14–55:1; Ex. 89)

- The Association negotiated with Milgard to obtain extended warranties that were also backed by MKT. (Israel 55:11–57:15; Raskin 71:15–19)
- During the Association’s negotiations with MKT regarding the repairs, Dr. Israel sent an email to counsel for Lisali seeking Lisali’s input on its “expectations as to MKT warranties on repairs.” (Ex. 88; Israel 3:11–25) Dr. Israel also sought information about Lisali’s issues in its lawsuit with MKT so that the Association did not inadvertently “agree to anything that might undermine your position.” (*Id.*)
- The Association permitted counsel for Lisali to address the Board with Lisali’s concerns. The Association considered joining Lisali’s lawsuit

against the developer, but counsel for Lisali never followed up with any information that the Association could consider to determine whether it should join in the suit. (Israel 37:2–40:11)

- In response to Lisali’s demand for destructive testing to determine if there were further leaks, the Association made its construction documentation available to Lisali’s expert to determine whether destructive testing was necessary. (Israel 41:7–42:5) Lisali’s expert never followed up with the Association regarding this documentation. (*Id.*) The developer’s expert, however, advised the Association that destructive testing was unnecessary given that the water intrusion had stopped and there was no evidence of further leaks. (Wetherholt 8:24–10:4)

Based upon this evidence, the trial court concluded:

24. At all times relevant to these proceedings, the Board acted reasonably. Lisali’s claim that the Board abandoned its position as guardian of the common interest is not supported by the evidence and rejected. To the contrary, the Association’s conduct sets the

standard of reasonableness.

(CP 1775) The trial court's conclusion is supported by its findings of fact, which are supported by substantial evidence. These determinations cannot be overturned on appeal simply because Lisali argues a conflict of evidence.

C. **The trial court did not abuse its discretion when it awarded the Association its attorney fees incurred in connection with this matter.**

Lisali's arguments on appeal mirror its arguments to the trial court when it opposed the Association's motion for fees and costs. (CP 1791-98) The Association rebutted each argument in its reply. (CP 2079-86) The Association relied on the broad attorney fee provision in the Declaration that provides:

In the event of a dispute which results in a lawsuit between the Association and Unit Owner, the substantially prevailing party in the lawsuit, including any appeal thereof, shall be entitled to recover its attorneys' fees and costs incurred in connection with the dispute.

(Ex. 1) Based on the language permitting fees "incurred in connection with the dispute" (Ex. 1), the trial court agreed that this provision "is broad and encompasses pre-litigation fees and costs." (CP 2064) To the extent the Association

incurs fees that Lisali does not pay, the unit owners would be forced to pay the cost of litigation brought by Lisali as to which Lisali did not prevail in any respect. A broad reading of the attorney fee provision is consistent with the protection the parties would reasonably have intended.

On appeal, “the trial court’s determination of what constitutes a reasonable award will not be reversed absent an abuse of discretion.”¹⁵ A trial court abuses its discretion when its decision “is manifestly unreasonable or based upon untenable grounds or reasons” and “where no reasonable person would take the position adopted by the trial court.”¹⁶ Here, Lisali does not raise any evidence that the trial court abused its discretion. Instead, Lisali merely reiterates its arguments made to the trial court, essentially requesting a determination de novo by this Court.

Specifically, the trial court considered the following arguments by Lisali and rebuttals by the Association:

¹⁵ *Allard v. First Interstate Bank of Wash.*, 112 Wn.2d 145, 148, 768 P.2d 998 (1989) (citations omitted).

¹⁶ *Id.* at 148–49 (citations omitted).

- Lisali argued that the Association is not entitled to fees incurred to defend the individual Board members. (CP 1796) The Association pointed out that Lisali pled the same standard of care claims against the Association that it pled against the individual Board members. (CP 2079–86) The time spent defending the individual Board members as well as the Association cannot be segregated. (*Id.*) The trial court agreed. (CP 2061–64)
- Lisali argued that fees incurred before the adoption of the attorney fees provision are not compensable. (CP 1795) Lisali cited no authority for this proposition. The Association pointed out that the attorney fee provision “is extremely broad and encompasses any fees or costs incurred that in any way relate to the dispute.” (CP 2079–86) The trial court agreed. (CP 2061–64)
- Lisali argued that fees related to the Association’s efforts to obtain insurance coverage are not

compensable. (CP 1795) The Association once again pointed to the breadth of the fee provision. (CP 2079–86) The breadth of this provision supports an award of fees the Association incurred to obtain insurance coverage against the claims pled by Lisali. (CP 2079–86) The trial court agreed. (CP 2061–64)

- Lisali argued that expenses related to Dr. Israel’s transportation to the mediation are not compensable. (CP 1797) Lisali did not provide any support for this argument. The Association, nonetheless, pointed out on that the Association attended the mediation in a good faith attempt to settle the dispute. (CP 2079–86) To that end, it was necessary for Dr. Israel (the President of the Association) to attend. The trial court agreed. (CP 2061–64)
- Lisali argued that time spent on “unsuccessful” motions is not compensable. (CP 1796) The Association pointed out that the motions were not

unsuccessful. (CP 2079–86) The Association’s first motion for summary judgment was withdrawn *at Lisali’s request*. The Association’s second motion for summary judgment was, in fact, granted on all claims except Lisali’s claim for contribution. The trial court considered Lisali’s argument and specifically concluded that the fees are “reasonable to compensate the Association given Lisali’s mode and manner of litigating this case. Given the intensive approach, it was reasonable for the Association to seek summary judgment.” (CP 2062)

- Lisali argued that fees incurred to “shadow” Lisali’s lawsuit with the developer are not compensable. (CP 1796–97) Lisali’s claims against the Association, however, were replicas of the claims asserted in the developer litigation.

The trial court did not abuse its discretion, and Lisali offers no reasonable argument it did, in awarding the Association its fees under the broad fee provision

permitting an award of fees and costs “incurred in connection with the dispute.” (Ex. 1)

D. The Association is entitled to an award of attorney fees on appeal.

As discussed above, the Declaration provides that “the substantially prevailing party in the lawsuit, including any appeal thereof, shall be entitled to recover its attorneys’ fees and costs incurred in connection with the dispute.” (Ex. 1) In accordance with the Declaration and RAP 18.1, the Association hereby requests that it be awarded its attorney fees and costs as prevailing party on appeal.

VI. CONCLUSION

For the reasons set forth above, the Association respectfully requests that the trial court’s dismissal of Lisali’s claims against the Association at trial and on summary judgment be AFFIRMED.

DATED: October 8, 2009

BULLIVANT HOUSER BAILEY PC

By 

Jerret E. Sale, WSBA #14101
Deborah L. Carstens, WSBA #17494
Janis C. Puracal, WSBA #39234

Attorney for Respondent

11963126.1

CERTIFICATE OF SERVICE

I hereby certify that on October 8, 2009, a true and correct copy of the foregoing document was served on the following:

Jose F. Vera Vera & Associates PLLC 2110 N Pacific St., Ste. 100 Seattle, WA 98103	<input checked="" type="checkbox"/> Hand Delivery on 10/9/09
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Dated October 8, 2009 at Seattle, Washington.



Kimberly A. Fergin

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October 13, 2009

Richard D. Johnson
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One Union Square
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Seattle, WA 98101

FILED
COURT OF APPEALS DIVISION I
STATE OF WASHINGTON
2009 OCT 14 PM 2:47

Re: *Lisali Revocable Trust v. Tiara De Lago Homeowners' Assoc.*
Court of Appeals No. 62818-6

Dear Mr. Johnson:

On January 2, 2009, Respondent Tiara de Lago Homeowners' Association (the "Association") filed a notice of cross-appeal in this case. On October 8, the Association filed its opposition to Lisali's appeal. The Association withdraws its request for cross-review and will rely on its opposition.

Very truly yours,



Jerret E. Sale
Janis C. Puracal

JCP
Enclosure
cc: Jose F. Vera

12059855.1

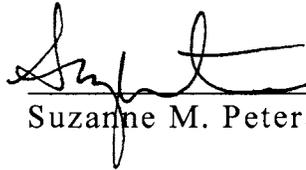
CERTIFICATE OF SERVICE

The undersigned certifies that on this 13th day of October, 2009, I caused to be served the foregoing document to:

Jose F. Vera
Vera & Associates PLLC
2110 N Pacific St., Ste. 100
Seattle WA 98103

- via hand delivery.
- via first class mail.
- via facsimile.

I declare under penalty of perjury under the laws of the state of Washington this 13th day of October, 2009, at Seattle, Washington.



Suzanne M. Petersen