

706 35-7

70635-7



70635-7-I

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

EASTLAKE LOFTS CONDOMINIUM ASSOCIATION, as
assignee of Defendant/Third-Party Plaintiff Eastlake & Lynn,
LLC,

Appellant,

v.

LORIG ASSOCIATES, LLC, a Washington Limited Liability
Company,

Respondent.

OPENING BRIEF OF APPELLANT EASTLAKE LOFTS
CONDOMINIUM ASSOCIATION

Anthony Rafel, WSBA #13194
Tyler B. Ellrodt, WSBA #10638
RAFEL LAW GROUP PLLC
600 University St., Ste. 2520
Seattle, WA 98101
Main 206.838.2660
Fax 206.838.2661

Attorneys for Appellant

TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	ASSIGNMENTS OF ERROR.....	2
III.	STATEMENT OF THE CASE.....	4
IV.	ARGUMENT.....	6
	A. The Standard of Review is De Novo.....	6
	B. Lorig’s Arguments Concerning Applicable Statutes of Limitation Are Without Merit.....	8
	1. The Contract Between E&L and Lorig Was A Continuous Services Contract.....	8
	2. Statutes of Limitations Begin to Run When a Claimant has the Right to Apply to a Court for Relief.....	9
	3. The Discovery Rule of Accrual Applies to E&L’s Claims.....	12
	C. E&L’s Negligence Claim Against Lorig Is For Negligent Construction Management.....	14
	D. There are Questions of Fact Concerning the Nexus Between Lorig’s Acts and E&L’s Claims.....	16
V.	CONCLUSION.....	18

TABLE OF AUTHORITIES

Statutes

RCW 4.16.010.....	10
RCW 4.16.080(3).....	9

Cases

<i>1000 Virginia Ltd. Partnership v. Vertecs Corp.</i> , 158 Wn.2d 566, 574, 146 P.3d 423 (2006).....	12, 14
<i>Affiliated FM Ins. Co. v. LTK Consulting Servs., Inc.</i> , 170 Wn.2d 442, 455–56, 243 P.3d 521 (2010).....	15
<i>Ah How v. Furth</i> , 13 Wash. 550, 43 P. 639 (1986).....	8
<i>Atherton Condo. Apartment-Owners Ass'n Bd. of Directors v. Blume Dev. Co.</i> , 115 Wn. 2d 506, 516, 799 P.2d 250, 257 (1990).....	7
<i>Budd v. Nixen</i> , 6 Cal.3d 195, 200-02, 98 Cal.Rptr. 849, 491 P.2d 433 (1971).....	10
<i>Cambridge Townhomes, LLC v. Pacific Star Roofing, Inc.</i> , 166 Wn.2d 475, 485, 209 P.3d 863 (2009).....	10
<i>Citizens for Clean Air v. Spokane</i> , 114 Wn.2d 20, 38, 785 P.2d 447 (1990).....	7
<i>Davies v. Krasna</i> , 14 Cal.3d 502, 121 Cal.Rptr. 705, 535 P.2d 1161 (1975).....	10
<i>Deschamps v. Mason County Sheriff's Office</i> , 123 Wn.App. 551, 557-58, 96 P.3d 413 (2004).....	7
<i>Gazija v. Nicholas Jerns Co.</i> , 86 Wash. 2d 215, 219, 543 P.2d 338, 341 (1975).....	10, 11
<i>Hansen v. Friend</i> , 118 Wn.2d 476, 485, 824 P.2d 483 (1992).....	7
<i>Hash by Hash v. Children's Orthopedic Hosp. and Medical Center</i> , 110 Wn.2d 912, 915, 757 P.2d 507 (1988).....	7

<i>Hashlund v. City of Seattle</i> , 86 Wn. 2d 607, 621, 547 p. 2d 1221, 1230 (1976).....	11
<i>Jacobsen v. State</i> , 89 Wn.2d 104, 108, 569 P.2d 1152 (1977).....	7
<i>Lewis v. Scott</i> , 54 Wash.2d at 856, 341 P.2d 488.....	10
<i>Lindquist v. Mullen</i> , 45 Wn.2d 675, 677, 277 P.2d 724 (1954).....	10
<i>Lybecker v. United Pacific Ins. Co.</i> , 67 Wn.2d 11, 15, 406 P.2d 945 (1965)	10
<i>McCleod v. Northwest Alloys, Inc.</i> , 90 Wn. App. 30, 969 P.2d 1006, review denied, 136 Wn.2d 1010, 966 P.2d 903 (1198).....	8
<i>Michaels v. CH2M Hill, Inc.</i> , 171 Wn.2d 587, 605, 257 P.3d 532 (2011) 15	
<i>Miller v. Likins</i> , 109 Wn. App. 140, 144, 34 P.3d 835 (2001).....	16
<i>Mountain Park Homeowners Association v. Tydings</i> , 125 Wn.2d 337, 883 P. 2d 1383 (1994).....	6
<i>Olpinski v. Clement</i> , 73 Wn.2d 944, 949-50, 442 P.2d 260 (1968).....	11
<i>Richards v. Pacific Nat'l Bank</i> , 10 Wn. App. 542, 519 P.2d 272 (1974)	8
<i>Schooley v. Pinch's Deli Market, Inc.</i> , 132 Wn.2d 468, 474, 951 P.2d 749 (1998).....	15
<i>State ex rel. McMillan v. Miller</i> , 108 Wash. 390, 400, 184 P. 352 (1919)	10
Other Authorities	
CR 8(c).....	11
<i>David K. DeWolf & Keller W. Allen, Washington Practice: Tort Law and Practice § 15.51, at 504–05 (3d ed. 2006)</i>	15
<i>Prosser, Law of Torts</i> s 30, at 143.....	10
<i>Restatement (Second of Torts</i> ss 281, 7 (1965).....	10

I. INTRODUCTION

In this case a condominium developer, Eastlake & Lynn, LLC (“E&L”), hired a construction project management firm, respondent Lorig Associates, LLC (“Lorig”), to provide management, supervision and coordination services to E&L both during and after E&L’s construction of its condominium project known as the Eastlake Lofts Condominium in Seattle (“the Project” or “the Condominium”). The Condominium was constructed by E&L’s general contractor, Express Construction Company (“Express”), and various subcontractors and suppliers hired by Express. As the Project declarant under the Washington Condominium Act, E&L also formed the Eastlake Lofts Condominium Association (“the Association”), the appellant in this case and the plaintiff in the underlying Superior Court action, and sold the Condominium units to individual buyers in 2007.

After completion of construction and the sale of all of the units the Association discovered that there were substantial construction defects in many components of the Condominium, including the roof, windows, decks and exterior walls. The Association filed an action in King County Superior Court against E&L for recovery of the damages resulting from the defects. E&L then asserted third-party claims against Lorig and several

subcontractors seeking recovery of damages from those third parties to the extent that E&L was held liable to the Association.

Lorig filed a motion for summary judgment (“the Motion”) seeking dismissal of E&L’s third-party claims based on the contention that the applicable statutes of limitations on those claims had expired before E&L asserted them. The trial court granted the Motion despite E&L’s presentation of evidence showing that there were genuine issues of material fact concerning the timing of Project events and the parties’ actions that precluded summary judgment in Lorig’s favor. The Association, as assignee of E&L’s claims against Lorig, appeals the trial court’s order granting the Motion. The Association also appeals the trial court’s denial of E&L’s motion for reconsideration and the portion of the judgment dismissing third party claims that dismissed E&L’s claims against Lorig.

II. ASSIGNMENTS OF ERROR

1. The contract between E&L and Lorig was a continuous services contract that had no fixed date for the completion of services to be provided by Lorig. The statute of limitations on a claim against the party providing services under such a contract does not begin to run until that party stopped performing those services. Here E&L filed its third-party claims against Lorig well within the applicable limitations period

that began to run when Lorig ceased its performance. The trial court erred by granting the Motion in the face of this evidence.

2. Lorig contended that the statute of limitations on E&L's claims began to run in 2008 when E&L learned that there were construction defects in the Condominium. The evidence showed that because E&L had no right to apply to a court for relief at that point the statute would not have begun to run at that time. The trial court erred by granting the Motion in the face of this evidence.

3. Lorig contended that E&L could avoid summary judgment only if it could show that Lorig's acts and omissions in performing its services resulted in the construction defects that formed the basis for the Association's complaint against E&L and E&L's third-party claims against Lorig. E&L presented evidence showing that there were genuine issues of material fact concerning the casual connection between Lorig's acts and the construction defects. The trial court erred by granting the Motion in the face of this evidence.

4. Lorig contended that the "discovery rule" of accrual of a cause of action for statute of limitations purposes is not applicable because E&L did not allege latent defects in its third party complaint. In fact both E&L's third party complaint and the Association's underlying complaint

contained allegations showing that latent defects were at issue. The trial court erred by granting the Motion in the face of this evidence.

5. Lorig contended that E&L's negligence claims should be dismissed because Washington does not recognize a claim for negligent construction. E&L's negligence claim was not a negligent construction claim but was instead a claim for negligent construction management and supervision. The trial court erred by granting the Motion in the face of this evidence.

III. STATEMENT OF THE CASE

This case involves disputes that arose out of the construction of the Eastlake Lofts Condominium in Seattle ("the Project" or "the Condominium"). Those disputes resulted in appellant Eastlake Lofts Condominium Association ("the Association") filing an action against Project developer and declarant Eastlake & Lynn, LLC ("E&L") to recover damages resulting from defective construction of the Project. (CP 1-11). E&L subsequently filed a third party complaint against respondent Lorig Associates, LLC ("Lorig"), a project management firm that E&L had hired to provide management, coordination and supervision services both during construction and after Project completion. (CP 31-47, 294-297, ¶¶ 7-8).

Project construction began in 2006 after E&L entered into a contract for construction of the Project with general contractor Express Construction Company. (CP 80-82, ¶ 6). Val Thomas, Inc. provided initial development management services to E&L until early 2006, when E&L hired Lorig to provide development management services for the Project. (CP 80-82, ¶¶ 2-4). Lorig's services, which it provided through mid-June 2010, included coordination, supervision and management of warranty and related repair work. (CP 294-297, ¶¶ 7-8).

In 2008 Tatley-Grund, Inc., a construction repair specialist, was hired to inspect and report on the condition of certain areas of the Project based on unit owners' complaints about water intrusion. (CP 294-297, ¶ 9). Lorig responded to those reports and worked with the Association to begin repairs. (CP 294-297, ¶ 9). In so doing, Lorig was charged with providing instructions and supervision concerning necessary repair work at the Project. (CP 294-297, ¶ 10). Lorig's efforts in that regard continued into June 2010. (CP 294-297, ¶ 8).

In February 2011, the Association delivered a notice of construction defect claim to E&L. (CP 279-281). This was followed by the Association's filing of its complaint against E&L for recovery of construction defect damages in August 2011. (CP 1-11).

E&L answered the Association's complaint in September 2011 and filed its third party complaint in February 2012 against Lorig and other third party defendants seeking recovery against those defendants in the event that the Association obtained any recovery from E&L. (CP 24-30, 31-47). Lorig then filed its motion for summary judgment seeking dismissal of E&L's third party complaint in July 2012. (CP 64-79). The trial court granted that motion in September 2012, denied E&L's motion for reconsideration in October 2012 and entered judgment dismissing E&L's claims against Lorig in June 2013. (CP 320-323, 360-361, 389-391). The Association then filed this appeal after settling its claims against E&L and obtaining an assignment of E&L's claims against Lorig. (CP 392-403, 369-382, ¶ 4).

IV. ARGUMENT

A. The Standard of Review is De Novo

This is an appeal from an order granting a motion for summary judgment. The Court's review is de novo. *Mountain Park Homeowners Association v. Tydings*, 125 Wn.2d 337, 883 P. 2d 1383 (1994). The Court must thus apply the following fundamental rules governing summary judgment motions.

A trial is "absolutely necessary" if there is a genuine issue as to any material fact. *Jacobsen v. State*, 89 Wn.2d 104, 108, 569 P.2d 1152

(1977). In summary judgment, the moving party bears the burden to demonstrate an absence of material fact. *Hash by Hash v. Children's Orthopedic Hosp. and Medical Center*, 110 Wn.2d 912, 915, 757 P.2d 507 (1988). Only if the moving party has met its initial burden of demonstrating the absence of material fact must the non-moving party come forward with specific facts establishing the existence of an element essential to the non-moving party's case. *Deschamps v. Mason County Sheriff's Office*, 123 Wn. App. 551, 557-58, 96 P.3d 413 (2004). As discussed below, Lorig failed to meet its burden of showing the absence of a genuine issue of fact.

Any doubts as to the existence of a genuine issue of material fact must be resolved against the moving party. *Atherton Condo. Apartment-Owners Ass'n Bd. of Directors v. Blume Dev. Co.*, 115 Wn. 2d 506, 516, 799 P.2d 250 (1990). Further, all evidence and inferences therefrom must be considered in the light most favorable to the non-moving party. *Id.*, citing *Citizens for Clean Air v. Spokane*, 114 Wn.2d 20, 38, 785 P.2d 447 (1990). Summary judgment must be denied if reasonable persons can reach more than one conclusion from all of the evidence. *Hansen v. Friend*, 118 Wn.2d 476, 485, 824 P.2d 483 (1992). Finally, when a motion for summary judgment is based on a statute of limitations argument, the motion can be granted only if there are no genuine issues of fact

concerning commencement of the statutory period. *McCleod v. Northwest Alloys, Inc.*, 90 Wn. App. 30, 969 P.2d 1006, review denied, 136 Wn.2d 1010, 966 P.2d 903 (1998). Lorig has not met and cannot meet the summary judgment standard.

B. Lorig's Arguments Concerning Applicable Statutes of Limitation Are Without Merit

1. The Contract Between E&L and Lorig Was A Continuous Services Contract

The statute of limitations inquiry must begin with an analysis of the nature of the contract between E&L and Lorig. The record is devoid of any evidence showing that the contract included a definite time period specifying either when the contract services would end or when payments would be made. Such a contract is treated as a continuous services contract on which the statute of limitations will not begin to run until the services are ended: "Where services are rendered under an agreement which does not fix any certain time for payment, nor when the services shall end, the contract of employment will be treated as continuous, and the statute of limitations will not begin to run until the services are ended." *Richards v. Pacific Nat'l Bank*, 10 Wn. App. 542, 549, 519 P.2d 272 (1974), quoting *Ah How v. Furth*, 13 Wash. 550, 552, 43 P. 639 (1896).

Here it is undisputed that Lorig continued performing services

under the open-ended contract with E&L until mid-June 2010. (CP 294-297, ¶ 8). The statute of limitations on E&L's claims against Lorig thus did not begin to run until mid-June 2010 and did not expire until mid-June 2013, pursuant to RCW 4.16.080(3). It is also undisputed that E&L's third party complaint against Lorig was filed in February 2012. (CP 31-47). These facts and the fundamental rule set forth in *Richards* are dispositive. E&L filed its third party complaint against Lorig sixteen months before expiration of the three year statutory limitations period applicable to the claims asserted in that complaint. The trial court therefore erred in dismissing those claims on summary judgment.

2. Statutes of Limitations Begin to Run When a Claimant has the Right to Apply to a Court for Relief

Even absent the dispositive continuous services contract rule noted above, Lorig's arguments for dismissal of E&L's claims on statute of limitations grounds must be rejected. Lorig's principal contention is that the statute of limitations on E&L's claims began to run in 2008 when E&L learned about the Project conditions addressed in Tatley-Grund's reports. (CP 75-76, ¶ V(E)). That contention is terminally flawed, however, because it ignores the longstanding rule that a claim does not accrue for statute of limitations purposes until the claimant has the right to apply to a court for relief:

“Generally, a statute of limitation runs from the time a claim accrues; a claim accrues when a party has the right to apply to a court for relief, which may be at the time the claim is discovered.” *Cambridge Townhomes, LLC v. Pacific Star Roofing, Inc.*, 166 Wn.2d 475, 485, 209 P.3d 863 (2009). The Supreme Court previously explained the bases for this rule in detail in *Gazija v. Nicholas Jerns Co.*, 86 Wn.2d 215, 543 P.2d 338 (1975):

Statutes of limitation do not begin to run until a cause of action has “accrued.” RCW 4.16.010. In most circumstances, a cause of action accrues when its holder has the right to apply to a court for relief. *Lybecker v. United Pacific Ins. Co.*, 67 Wn.2d 11, 15, 406 P.2d 945 (1965); *State ex rel. McMillan v. Miller*, 108 Wash. 390, 400, 184 P. 352 (1919). Actual loss or damage is an essential element in the formulation of the traditional elements necessary for a cause of action in negligence. *Lewis v. Scott*, 54 Wn.2d 581, 856, 341 P.2d 488 (1959); *Lindquist v. Mullen*, 45 Wn.2d 675, 677, 277 P.2d 724 (1954); Cf. Restatement (Second of Torts ss 281, 7 (1965). The difficulty in applying this principle to statutes of limitation problems is created by conceptualization of when the damage has occurred. See *Budd v. Nixen*, 6 Cal.3d 195, 200-02, 98 Cal.Rptr. 849, 491 P.2d 433 (1971). The mere danger of future harm, unaccompanied by present damage, will not support a negligence action. Prosser, Law of Torts s 30, at 143. Until a plaintiff suffers appreciable harm as a consequence of negligence, he cannot establish a cause of action. Thus, although a right to recover nominal damages will not commence the period of limitation, the infliction of actual and appreciable damage will trigger the running of the statute of limitations. *Davies v. Krasna*, 14 Cal.3d 502, 121 Cal.Rptr. 705, 535 P.2d 1161 (1975).

...

While in many instances damage occurs and the action accrues immediately upon the occurrence of the wrongful act, this is not always true. In circumstances where some harm is sustained, but the plaintiff is unaware of it, a literal application of the statute of limitations may result in grave injustice.

Gazija, 86 Wn.2d at 219.

Finally, in *Haslund v. City of Seattle*, 86 Wn. 2d 607, 621, 547 P.2d 1221 (1976), the Court confirmed that determination of the time of plaintiff's suffering of actual and appreciable damages is a question of fact:

The determination of the time at which a plaintiff suffered actual and appreciable damage is a question of fact: since the statute of limitations is an affirmative defense, CR 8(c), the burden was on appellant to prove those facts which established the defense. *See Olpinski v. Clement*, 73 Wn.2d 944, 949-50, 442 P.2d 260 (1968).

Haslund, 86 Wn.2d at 621.

When these rules are applied here it becomes clear that E&L's knowledge of the information contained in the Tatley-Grund reports was not an event that triggered the running of the statute of limitations, because neither that knowledge nor any other circumstances existing at the time gave E&L a right to apply to a court for relief. First, E&L had suffered no damages because of the conditions described in the Tatley-Grund reports. Second, no claim had been asserted against E&L based on those conditions that could have provided grounds for a third party

complaint against Lorig. In short, because E&L had no claims to assert against Lorig and thus no right to apply to a court for relief at that point, there was no basis for any statute of limitations to begin to run.

The circumstances were much different three years later when the Association served its notice of construction defect claims on E&L in February 2011 and then filed its complaint against E&L in August 2011. (CP 279-281, 1-11). As a result of those events E&L not only received notice of specific claims against it but also became a defendant in a lawsuit that sought recovery of damages on those claims. At this point E&L actually had a right to seek third party relief against Lorig and did so by filing its third party complaint in February 2012, well within the three year statutory limitations period. (CP 31-47).

3. The Discovery Rule of Accrual Applies to E&L's Claims

Lorig also argues that the discovery rule of accrual, under which a claim does not accrue until the plaintiff's discovery of the elements of the claim, is inapplicable here because E&L's third party complaint does not allege latent defects. (CP 73-75, ¶ V(D)). As support for this argument Lorig cites the ruling in *1000 Virginia Ltd. Partnership v. Vertecs Corp.*, 158 Wn.2d 566, 574, 146 P.3d 423 (2006). While the Court in *1000 Virginia* held that the discovery rule applies to construction contract

claims when latent defects are alleged, the Court did not hold that the precise term “latent defects” must appear in the plaintiff’s complaint. A reasonable reading of the Court’s holding is that the discovery rule will apply if the complaint includes allegations showing that latent defects are at issue.

Here E&L alleged in paragraphs 24 and 25 of its third party complaint that Lorig warranted, among other things, that “all work would be performed in a skillful and workmanlike manner” and that E&L “relied upon said warranties and believed that the...work performed by Third-Party Defendants would be performed in a skillful and workmanlike manner...” (CP 31-47, ¶¶ 24-25). E&L’s third party complaint also provides:

Eastlake and Lynn has answered Plaintiff’s Complaint and denied its allegations. Without admitting the allegations therein, if, as alleged in Plaintiff’s Complaint, Plaintiff did sustain any damage, such damage was caused entirely, or in part, on a comparative-fault basis, by the breach, negligence, fault, carelessness, defective product(s), and tortuous [sic] or intentional acts or omissions of Third-Party Defendants (and their agents or employees), and each of them, thereby, proximately causing Plaintiff’s damages as alleged.

(CP 31-47, ¶ 9).

E&L’s third party complaint therefore incorporated all of the defects alleged in the Association’s underlying complaint. That complaint included a fraudulent concealment claim that alleged, among other things,

that (a) “There are concealed defects in the Eastlake Lofts buildings, common elements and units...” and (b) “The concealed defects substantially and adversely affect the value of Eastlake Lofts property...” (CP 1-11, ¶¶ 29, 33). These allegations are more than sufficient to satisfy the latent defect component of the discovery rule set forth in *1000 Virginia*.

Since the entire thrust of E&L’s third party complaint against Lorig was that Lorig should be liable to E&L if E&L was held liable to the Association, E&L’s third party complaint necessarily incorporated the first party complaint’s allegations of latent defects.

C. E&L’s Negligence Claim Against Lorig Is For Negligent Construction Management

Lorig’s related contention that E&L’s negligence claim fails because Washington does not recognize a cause of action for negligent construction (CP 77-78, ¶ V(G)) must also be rejected. As Lorig itself acknowledges, it did not physically perform the warranty work at issue. (CP 298-302, ¶ D, line 18). Instead it performed a variety of construction management, supervision and coordination services. (CP 294-297, ¶¶ 7-12). The record is thus clear that E&L is not asserting a negligent construction claim against Lorig. E&L is claiming instead that Lorig was negligent in its performance of various construction management and

supervision services. The Association has found no authority, and Lorig has cited none, stating that Washington does not recognize a cause of action for negligent construction management.

E&L made a claim against Lorig for negligent construction management, a form of a general negligence claim, which only requires E&L to “establish the existence of a duty, a breach thereof, a resulting injury, and proximate causation between the breach and the resulting injury.” *Michaels v. CH2M Hill, Inc.*, 171 Wn.2d 587, 605, 257 P.3d 532 (2011) (quoting *Schooley v. Pinch’s Deli Market, Inc.*, 132 Wn.2d 468, 474, 951 P.2d 749 (1998)). Indeed, the Supreme Court has held that professionals owe a duty to “exercise the degree of skill, care, and learning possessed by members of their profession in the community.” *Michaels*, 171 Wn.2d at 606 (quoting David K. DeWolf & Keller W. Allen, *Washington Practice: Tort Law and Practice* § 15.51, at 504–05 (3d ed. 2006)); *see also Affiliated FM Ins. Co. v. LTK Consulting Servs., Inc.*, 170 Wn.2d 442, 455–56, 243 P.3d 521 (2010). In *Affiliated FM*, the Supreme Court held that an engineer had a common law duty of care to a property owner to protect the property from injury or loss. *Id.* at 451-461. Similarly, Lorig, as the manager and supervisor of work at the Project, owed a duty of care to E&L that was breached and that breach caused

injury to the property and E&L. Dismissal of E&L's negligence claim, therefore, was improper.

D. There are Questions of Fact Concerning the Nexus Between Lorig's Acts and E&L's Claims

Finally, Lorig asserts that E&L failed to show that there was a nexus between Lorig's acts and omissions and the defective construction conditions alleged in the Association's complaint upon which E&L's claims against Lorig are based. (CP 76-77, ¶ V(F)). Lorig's assertion is wholly unsupported by the record. The record contains substantial evidence establishing issues of fact concerning the causal connection between Lorig's performance of its management and supervision services and the widespread defective construction conditions identified in the Association's complaint. The trial court's granting of summary judgment given this record was error because "[i]ssues of negligence and causation are questions of fact" which are "not usually susceptible to summary judgment." *Miller v. Likins*, 109 Wn. App. 140, 144, 34 P.3d 835 (2001).

The Association's complaint contains extensive, detailed descriptions of the substance and scope of the construction defects found in the Condominium. The complaint groups those defects into the following major construction components where defects were found: roof, walls, decks and windows. (CP 1-11, ¶ 6A-Q). The same types of defects

were described in Tatley-Grund's July 15, 2008 report: roof and roof membrane, exterior cladding, decks and deck interfaces, and windows and doors. (CP 169-171). This comparison is significant because it shows that the same defects addressed by Tatley-Grund in 2008, with coordination and management assistance from Lorig (CP 294-297, ¶ 9), were still present in 2011 when the Association filed its complaint. This is direct evidence that Lorig's performance of its coordination and management services was a contributing cause of the defects on which the Association's complaint and E&L's third party complaint are based.

Lorig's invoices to E&L for the work Lorig performed in 2009 and 2010 provide additional evidence of the causal connection between Lorig's acts and the construction defects at issue. (CP 231-254). Those invoices contain numerous references to warranty work that was performed at Unit 204 of the Condominium during the period from May 2009 to June 2010. (CP 231, 233, 247-249, 252-253). The Association's August 5, 2011 complaint also refers specifically to defective conditions in the roof ("A leak was reported in Unit 204 fireplace.") and walls ("The interior south wall of unit #204 needs to be restored.") that affected Unit 204. (CP 1-11, ¶ 6A, 6H). It is particularly instructive here that after Lorig's thirteen month involvement in the Unit 204 warranty work that resulted in charges from Lorig to E&L of more than \$2,850 (CP 231, 233,

247-249, 252-253), defects affecting Unit 204 were still at issue when the Association filed its complaint fourteen months later. At a minimum this evidence establishes a genuine issue of material fact concerning the cause and effect relationship between Lorig's performance and the construction defects alleged in the Association's complaint.

Finally, Lorig's billings to E&L for its work during the thirteen month period totaled \$28,115. (CP 231-254). This shows that Lorig was significantly involved in the effort to correct defective work, much of which remained uncorrected and was identified as such in the Association's August 5, 2011 complaint. (CP 1-11, ¶ 6A-Q). This is yet more evidence raising a genuine issue of material fact about the extent to which Lorig's performance was a cause of the construction defects that are the basis for E&L's third party complaint against Lorig.

V. CONCLUSION

The trial court erroneously entered orders granting Lorig's Motion for Summary Judgment and denying E&L's Motion for Reconsideration and a Judgment on Third-Party Claims dismissing E&L's claims against Lorig. Those orders and the judgment should be reversed and the case remanded for trial.

DATED: November 4, 2013.

RAFEL LAW GROUP PLLC

By: 
Anthony L. Rafel, WSBA #13194
Tyler B. Ellrodt, WSBA #10638

Attorneys for Appellant Eastlake Lofts
Condominium Association



70635-7-I

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

EASTLAKE LOFTS CONDOMINIUM ASSOCIATION, as assignee of
Defendant/Third-Party Plaintiff Eastlake & Lynn, LLC,

Appellant,

v.

LORIG ASSOCIATES, LLC, a Washington Limited Liability Company,

Respondent.

CERTIFICATE OF SERVICE

Anthony Rafel, WSBA #13194
Tyler B. Ellrodt, WSBA #10638
RAFEL LAW GROUP, PLLC
600 University St., Ste. 2520
Seattle, WA 98101
Main 206.838.2660
Fax 206.838.2661

Attorneys for Appellant

The undersigned hereby certifies as follows:

1. I am over 18 years of age and a U.S. citizen. I am employed as a legal assistant by the law firm of Rafel Law Group PLLC.

2. I certify that on Monday November 4, 2013, I caused a copy of the following documents to be served via the method(s) listed below on the following parties:

DOCUMENTS

1. Opening Brief of Appellant Eastlake Lofts Condominium Association; and

2. Certificate of Service.

Party	SERVICE VIA
David S. Cottnair Merrick, Hofstedt & Lindsey P.S. 3101 Western Ave., Ste. 200 Seattle, WA 98121 dcottnair@mhlseattle.com; jballard@mhlseattle.com <i>Counsel for Respondent Lorig Associates, LLC</i>	<input type="checkbox"/> Email <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> Messenger <input type="checkbox"/> Fax

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct and that this certificate was executed on November 4, 2013, at Seattle, Washington.



Leah Katzer, Legal Assistant