

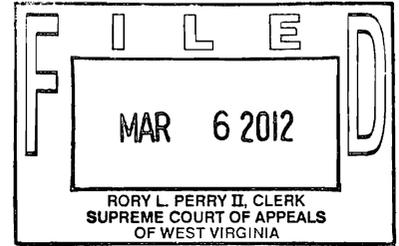
**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**UNIVERSITY COMMONS RIVERSIDE  
HOME OWNERS ASSOCIATION, INC.,**

**Petitioner,**

**v.**

**Case No. 11-1577**



**UNIVERSITY COMMONS  
MORGANTOWN, LLC; KOEHLER  
DEVELOPMENT, LLC; COLLEGIATE  
HOMES, INC.; RICHARD KOEHLER;  
FRANK KOEHLER; ADAM SHARP;  
RICHARD DUNLAP; O.C. CLUSS  
PROFESSIONAL SERVICES, LLC; R.E.  
CRAWFORD CONSTRUCTION, INC.;  
POZZUTO AND SONS, INC.;  
BUILDING CODE ENFORCEMENT  
OFFICIAL OF STAR CITY; HERRON  
ENGINEERING; EAGLE INTERIORS,  
INC.; BUH CONSTRUCTION; TRIAD  
ENGINEERING, INC.; and UNIVERSAL  
FOREST PRODUCTS,**

**Respondents.**

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**Petitioner's Reply Brief**

On Certified Questions from the Circuit Court  
of Monongalia County  
Honorable Susan B. Tucker  
Civil Action No. 09-C-85

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## Certified Questions Presented, with Proposed Answers

The Circuit Court of Monongalia County certified six questions to this Court:

1. **Pursuant to West Virginia Code § 36B-3-102(a)(4), what constitutes a “matter affecting the common interest community” and what constitutes “unit specific” damages?**

**Plaintiff’s Answer:** Under the plain language of the Uniform Common Interest Ownership Act (“the Act”), the “common interest community” for which a condominium owners’ association may pursue claims on behalf of two or more of its members encompasses the entire condominium complex, including the common elements of the complex, the limited common elements, and individual units. *See* W. Va. Code § 36B-1-103(4), (7), (19), (33); *id.* § 36B-3-102(a)(4). There are no “unit specific” damages for which the association may not pursue claims.

2. **Is a Unit Owners’ Association an adequate representative when a lawsuit is instituted by a Unit Owners’ Association on behalf of two or more unit owners pursuant to West Virginia Code § 36B-3-102(a)(4) when the damages sought include “unit specific” damages affecting only individual units?**

**Plaintiff’s Answer:** Yes. In light of the Act’s broad definition of “common interest community,” a Unit Owners’ Association such as Plaintiff can pursue claims for damages to individual units and is an adequate representative of unit owners’ interests. *See* W. Va. Code § 36B-1-103(4), (7), (33); *id.* § 36B-3-102(a)(4).

3. **If the Court answers “yes” to question number 2, is a unit owner nonetheless a necessary and indispensable party pursuant to Rule 19 of the West Virginia Rules of Civil Procedure?**

**Plaintiff’s Answer:** No. Because Plaintiff is empowered by the Act to pursue all claims concerning matters affecting the common interest community on behalf of two or more of its members, and because the unit owners will be bound to any resolution or settlement of this case under the doctrine of *res judicata*, the individual unit owners need not be joined as parties to this litigation under Rule 19 of the West Virginia Rules of Civil Procedure.

4. **If the individual unit owners are not joined pursuant to Rule 19 does the Association have the authority under West Virginia Code § 36B-3-102(a)(4) to settle and release any and all claims of the unit owners where said individual unit owners have been provided reasonable notice of and have made no objection to said settlement and release?**

**Plaintiff's Answer:** Yes. Because Plaintiff represents the interests of its members, and because its members will be bound by any resolution reached in this case under the doctrine of *res judicata*, Plaintiff necessarily may settle and release any and all claims against Defendants. Moreover, the Court is not required to give the unit owners notice and an opportunity to object to any settlement and release agreed to by the parties because this case is not a class action.

5. **Whether matters pertaining to a unit owner's claim for lost rent or inability to rent are matters that affect the common interest community for which the Unit Owners' Association may institute litigation pursuant to West Virginia Code § 36B-3-102(a)(4)?**

**Plaintiff's Answer:** Yes. Plaintiff may pursue claims for lost rent or inability to rent or sell condominium units on behalf of the owners of affected units because those claims arise from damage to the common interest community and are shared by two or more unit owners.

6. **Is a representative example of unit owners sufficient to offer deposition and trial testimony in this matter to establish defects and damages that are matters affecting the common interest community?**

**Plaintiff's Answer:** Yes. Testimony from a representative sample of unit owners will allow Plaintiff an opportunity to present its case efficiently and with proof sufficient to support its allegations, and at the same time will afford Defendants a fair opportunity to defend against Plaintiff's claims.

## Summary of Argument

Plaintiff filed this action in 2009 seeking recompense for severe and systemic damage to the University Commons Riverside Condominium Complex caused by Defendants' alleged defective design, negligent construction, and misleading marketing of the Complex. Plaintiff is a homeowners' association that brought suit on its own behalf and on behalf of its members, the owners of condominiums at the Complex, under the West Virginia Uniform Common Interest Ownership Act. Those members pay dues to the association so that it can represent them in matters like this, among other purposes.

Over the past three years, Plaintiff has expended thousands of hours vigorously pursuing its members' interests, including facilitating six days of on-site inspections, conducting depositions of forty-four individuals, including fifteen people who own nineteen units, and producing tens of thousands of pages of documents. All of the owners have accepted, acquiesced to, and relied upon Plaintiff's representation; ***not a single owner has filed his or her own suit.***

Defendants now have abruptly brought this litigation to a screeching halt. Defendants are no longer content to allow Plaintiff to serve as the statutorily appointed representative of its members. Instead, they argue that ***each owner of all eighty-four condominiums*** at the Complex must be joined as parties under Rule 19 of the West Virginia Rules of Civil Procedure. Defendants profess to be concerned about the owners' best interests, but their "concern" rings hollow; joining almost 200 persons to this case would inure to Defendants' exclusive advantage.

Forcing each owner to retain counsel to litigate his or her own claims would transform this case into an expensive, virtually unmanageable behemoth. Many of those

individuals lack the necessary resources to pursue their claims, and joinder would effectively deny them their day in court. Defendants recognize that homeowners' associations are more likely to sue for damage to common interest communities than are their members. *See* Resp. Br. at 8. And that is good for Defendants, but not for the homeowners, who in this case bought condominium units in a complex that is a structural, environmental, and financial disaster.

Fortunately, when the Legislature adopted the Uniform Common Interest Ownership Act, it gave those owners the option to have Plaintiff act as their legal representative. *See* W. Va. Code § 36B-3-102(a)(4). The Act permits the owners to pool their resources through an association that they established, fund, comprise and control, and to efficiently pursue litigation through that association regarding matters that affect the common interest community. The owners in this case have chosen to do just that, and Plaintiff has litigated this case to their apparent satisfaction for over three years. They are bound by (and Defendants are protected under) the doctrine of *res judicata*, so Defendants have no basis to claim that they will be subject to subsequent suits after this litigation is resolved. In fact, a resolution of these claims is best served by Plaintiff acting in a representative capacity: this case is far more likely to settle with one plaintiff involved rather than hundreds.

Simply put, there is no reason to force almost 200 people to join this case. Doing so would defeat the purpose of the statute, add weeks of trial time and hundreds of depositions, and cause litigation costs to skyrocket, with no added benefit for the litigants or the Court. Plaintiff urges the Court to answer the certified questions as proposed in its Opening Brief.

## Argument

### I. **The Act plainly allows the homeowners' association to bring claims on behalf of its members for all matters affecting the common interest community, including damage to common elements, limited common elements, and individual units.**

The Court's analysis of whether Plaintiff has standing to represent its members should begin and end with the plain language of the Act. "Where the language of a statute is clear and without ambiguity the plain meaning is to be accepted without resorting to the rules of interpretation." Syl. Pt. 1, *State v. Williams*, 474 S.E.2d 569 (W. Va. 1996) (internal quotation marks omitted). The West Virginia Uniform Common Interest Ownership Act authorizes a homeowners' association to "institute . . . litigation . . . in its own name on behalf of itself **or two or more unit owners on matters affecting the common interest community.**" W. Va. Code § 36B-3-102(a)(4) (emphasis added). This case fits perfectly within that representative provision.

Plaintiff's claims involve damage to the Complex's common elements, limited common elements, and individual units, **all of which comprise the common interest community.** See *id.* §§ 36B-1-103(4), (7), (19), (33); *id.* § 36B-3-102(a)(4); *D.R. Horton, Inc. v. Eighth Judicial Dist. Court*, 215 P.3d 697, 699, 702 (Nev. 2009) (concluding that the common interest community for which an association could bring suit included individual units); J.A. 000009 (Complex Declaration). The statute's definitional sections reveal that condominium units and common elements are included in and subsets of the larger common interest community: a "unit" is defined as "a physical **portion** of the common interest community" and "common elements" are "all

**portions** of the common interest community other than the units.”<sup>1</sup> *Id.* § 36B-1-103(4), (33) (emphasis added); *see also id.* § 36B-1-103(7) (defining “common interest community”); *D.R. Horton*, 215 P.3d at 702 (interpreting similar statutory definitions). Logically, if individual units were not part of the common interest community, there would be no need for the Legislature to exclude them in defining “common elements.” *See* W. Va. Code § 36B-1-103(4) (defining common elements as “all portions of the common interest community **other than the units**” (emphasis added)); *see also* Syl. Pt. 6, *State ex rel. Cohen v. Manchin*, 336 S.E.2d 171 (W. Va. 1984) (“[e]ach word of a statute should be given some effect”).

“Matters affecting the common interest community” therefore are those “subjects” that “produce an effect upon” or “influence” the common interest community, including all aspects of the Complex, its eighty-four units and seven buildings. *See* Black’s Law Dictionary (8th ed. 2004); Merriam-Webster, Online Edition; *see also* Syl. Pt. 6, *State ex rel. Cohen v. Manchin*, 336 S.E.2d 171 (W. Va. 1984) (“Undefined words and terms used in a legislative enactment will be given their common, ordinary and accepted meaning.”). Plaintiff’s claims involve damage to the common elements, limited common elements, and condominium units at the Complex, including problems with the foundation, cracks in walkways, water damage in units, siding damage, HVAC problems, mold, and an inability to rent or sell units due to those problems. *See* JA 00068-69 (Compl. ¶ 49). Those claims indisputably are “on behalf of two or more unit owners on matters affecting the common interest community,” regardless of whether

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<sup>1</sup> Additionally, the Complex Declaration in this case identifies so-called limited common elements as part of the common interest community such as fireplaces, doors, and windows. *See* J.A. 000012-13; W. Va. Code § 36B-1-103(19) (defining “limited common elements” as “a portion of the common elements allocated by the declaration . . . for the exclusive use of one or more but fewer than all of the units”).

the alleged damage occurred within an individual condominium unit. In short, the association has standing under the statute to bring all such claims.

Because Defendants cannot prevail under the plain language of the Act, they ignore it. Defendants confuse “common interest community” with “common elements,” treating those separately defined phrases as if they were synonymous. Defendants argue that Plaintiff’s ability to represent its members is limited to claims involving the common elements of the Complex and that courts consequently must determine on a case-by-case basis whether the claims brought by a homeowners’ association involve only the common elements or also affect individual units.<sup>2</sup> From a practical standpoint, Defendants would require trial courts to conduct onerous, fact-intensive inquiries each time that a homeowners’ association brought suit on behalf of its members. But more importantly, Defendants’ interpretation of the Act is completely at odds with its terms. A common interest community is more than just its common elements, although they certainly are one part of the community. *Compare id.* § 36B-1-103(4), *with id.* § 36B-1-103(7). The community also includes limited common elements and the condominium units. *See id.* § 36B-1-103(19), (33). The three combine to make up the entire community: the Complex, its eighty-four units and seven buildings.

Defendants cite to only one case involving a statute similar to West Virginia’s Uniform Act. That case is an unpublished trial court decision from Vermont. *See Resp.*

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<sup>2</sup> Significantly, Defendants do not dispute that Plaintiff’s claims are brought on behalf of two or more unit owners. For example, Defendants admit that the claims involving malfunctioning HVAC units are alleged on behalf of 25% of the condominiums at the Complex, and that the owners of at least twenty-five units have alleged that they are unable to rent or sell their units due to Defendants’ defective design and/or negligent construction. *See Resp. Br.* at 13, 14 n.10; *see also* J.A. 000001 (chart of owner complaints). The only issue at hand, therefore, is whether those claims are on matters affecting the common interest community.

Br. at 13-14 (citing *Piper Ridge Homeowners Ass'n, Inc. v. Piper Ridge Assocs.*, No. 418-11-01, 2006 WL 6047597 (Vt. Super. Apr. 12, 2006), *attached hereto* as Exhibit A). Although Defendants are correct that Vermont, like West Virginia, has adopted the Uniform Act, Defendants wrongly contend that the Vermont trial court held “that an association may bring an action asserting claims of its members **only** as to the common elements.” *Id.* at 13 (emphasis added). In *Piper Ridge*, the trial court noted that “an association may bring an action asserting claims of its members as to the common elements,” *Piper Ridge Homeowners Ass'n, Inc.*, 2006 WL 6047597, but did not hold that the association could do so “**only** as to the common elements” as Defendants claim. *See* Resp. Br. at 13. The fact that the court did not use such limiting language is not surprising; it was not asked to determine whether an association may bring an action in Vermont asserting claims as to both common elements and condominium units. Instead, *Piper Ridge* involved issues that have no bearing on this case, namely, whether the association’s claims involving damage to the common elements were time-barred and supported by insufficient evidence. *See Piper Ridge Homeowners Ass'n, Inc.*, 2006 WL 6047597.

Moreover, the Vermont Supreme Court case upon which the *Piper Ridge* trial court relied, *Meadowbrook Condo. Ass'n v. S. Burlington Realty Corp.*, 565 A.2d 238, 239 (Vt. 1989), stated that “the Association may . . . institute legal actions, on behalf of two or more unit owners, with regard to the common areas,” **not** “only with regard to the common areas.” *See id.* As in *Piper Ridge*, the Vermont Supreme Court was not

asked to determine whether the association could also represent its members as to claims involving the condominium units.<sup>3</sup> *See id.*

Because Defendants' interpretation of the Act is flatly contradicted by its terms, the Defendants' complete lack of supporting authority is not surprising. The Act unequivocally allows Plaintiff to pursue **all** claims affecting the common interest community on behalf of two or more owners, **without restriction**. It is irrelevant whether the alleged defects are common to all owners, whether damages claims may differ among units, or whether the homeowners' association or the owner is generally responsible for upkeep and repair of a particular part of the Complex. Plaintiff has satisfied the test for standing under the Act's representative provision: it has brought claims on behalf of two or more of its members on matters affecting the common interest community. The relevant inquiry ends there.

## **II. Plaintiff also may pursue its claims for unit owners' lost rent or inability to rent or sell their units.**

Plaintiff's ability to represent two or more unit owners on matters affecting the common interest community includes representation of those owners who have claimed that they have lost rent or were unable to rent or sell their units because of the Defendants' systemic damage to the Complex.

Defendants disagree, on the asserted basis that not all unit owners experienced an inability to rent or sell their units. It is true that not all unit owners experienced

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<sup>3</sup> If the Vermont Supreme Court were to be presented with that question, it likely would not decide that issue in Defendants' favor. In adopting the Uniform Act, the Vermont Legislature also adopted Comment 3 to the Uniform Act explaining that, under the representative provision, "the association can sue or defend suits **even though the suit may involve only units as to which the association itself has no ownership interest.**" Vt. Stat. Ann. 27A, § 3-102(a)(4), cmt. 3 (emphasis added); *see also* Uniform Common Ownership Interest Act § 3-102, cmt. 3 at 96. In doing so, the Vermont Legislature acknowledged the broad scope of that provision.

these types of damages. It is also irrelevant. The Act does not require that all claims be shared by all owners. *See* W. Va. Code § 36B-3-102(a)(4). It requires only that the homeowners' association (1) represent two or more unit owners (2) on matters affecting the common interest community. *See id.* Plaintiff has satisfied those requirements. Defendants have admitted that Plaintiff brought claims for inability to rent or sell units on behalf of the owners of at least twenty-five units. *See* Resp. Br. at 14 n.10, 31. Moreover, as established above, any claims involving the units are on matters affecting the common interest community. *See Owens v. Tiber Island Condo. Ass'n*, 373 A.2d 890, 895 (D.C. 1977) (holding that property values are matters affecting the common interest community); *cf. Sandy Creek Condo. Ass'n v. Stold & Enger, Inc.*, 642 N.E.2d 171, 176 (Ill. App. Ct. 1994) (holding that association could pursue misrepresentation claims because “[a]lthough not all unit owners were affected by the allegedly fraudulent statements of the defendants, the Act statutorily grants the Association standing to bring an action if more than one unit is affected”).

Defendants also argue that any inability to rent or sell one's condominium is a “unit specific damage” for which Plaintiff may not sue in a representative capacity. But, as discussed more thoroughly in Plaintiff's Opening Brief, the phrase “unit specific damage” does not appear anywhere in the Act and finds no support in its terms. *See* Pet'r Br. at 14, 19-21, 28-29. It is a conveniently invented term intended to effectively immunize Defendants from suit.

Additionally, Defendants' argument invites needless waste of judicial resources. It would be inefficient, to say the least, to allow the homeowners' association to pursue claims for widespread and systemic damage to the Complex, but at the same time prohibit the association from recovering damages for owners' lost rent or inability to

rent or sell condominium units, even though both types of claims arise from the same damage to the Complex. Moreover, throughout this case, Defendants repeatedly have ignored the Act's remedial nature. The Act is intended to protect consumers and to promote judicial efficiency, and as such, must be liberally construed to accomplish those goals. *See Barr v. NCB Mgmt. Servs., Inc.*, 711 S.E.2d 577, 583 (W. Va. 2011) ("Where an act is clearly remedial in nature, [the courts] must construe the statute liberally so as to furnish and accomplish all the purposes intended." (internal quotation marks omitted)); *see also Yacht Club II Homeowners Ass'n, Inc. v. A.C. Excavating*, 94 P.3d 1177, 1180 (Colo. App. 2003) (explaining that the Uniform Act was intended to "make clear that the association can sue or defend suits even though the suit may involve only units as to which the association itself has no ownership interest," and to "avoid the necessity of assignment of claims, powers or attorney or class actions in many circumstances, and thereby simplifying and making more practical the prompt action in the association's and owners' common interests"); *Linden Condo. Ass'n, Inc., v. McKenna*, 726 A.2d 502, 507, 511 (Conn. 1999) (holding that the Connecticut Common Interest Ownership Act, "which is largely modeled after the Uniform . . . Act, was created in order to provide unit owners and their associations with consumer protection rights," and thus, it "must be afforded liberal construction in favor of the intended beneficiaries because it is a remedial statute"). Defendants' cramped interpretation of the Act would eviscerate its remedial purposes.

**III. Because Plaintiff is a statutory representative that has brought suit on its members' behalf, and not a class representative, there is no need to evaluate the adequacy of its representation.**

Because the plain language of the Act does not support Defendants' argument, they look to other sources. They argue, first, that Plaintiff is not an adequate

representative of its members. Defendants speculate that at some point in the future some hypothetical conflict potentially could arise between the homeowners' association and its members which would make Plaintiff's representation inadequate. They also cherry-pick quotes from unit owners' depositions and claim that those owners are confused about the extent to which they are represented by Plaintiff. Defendants therefore contend that, even though the homeowners' association has been designated by statute as the owners' legal representative, and despite the fact that this case was not brought under Rule 23 as a class action, the Court nevertheless should conduct a class action-like analysis to determine whether Plaintiff is an adequate representative of its members. Defendants are wrong.

It is enough that Plaintiff is empowered by statute to sue as its members' representative. *See* W. Va. Code § 36B-3-102(a)(4). The representation provision of the Act was intended to "make clear that the association can sue or defend suits even though the suit may involve only units as to which the association itself has no ownership interest," and to "avoid the necessity of assignment of claims, powers or attorney or class actions in many circumstances, and thereby simplifying and making more practical the prompt action in the association's and owners' common interests." *Yacht Club II*, 94 P.3d at 1180. If the Act did not exist, and the owners had instead assigned their claims to the homeowners' association or given it a power of attorney, the Court would not be asked to determine whether Plaintiff was an adequate legal representative of those owners. Similarly, there is no reason to conduct that inquiry

under the Act. Plaintiff is acting in a representative capacity, on its members' behalf, not as a class representative.<sup>4</sup>

The Act authorizes unit owners to choose to allow Plaintiff to represent them or to bring their own claims. And the unit owners have made their choice. This case has been pending for over three years, and in that time, there has been no conflict between Plaintiff and any of its members, and no unit owner has filed his or her own suit. Instead, Plaintiff vigorously has represented the owners' interests, expending thousands of hours and hundreds of thousands of dollars on their behalf.<sup>5</sup>

**IV. The unit owners do not have to be joined as plaintiffs under Rule 19 because their interests are fully represented by Plaintiff and Plaintiff may conclusively settle or otherwise resolve their claims.**

Defendants assert that, unless all unit owners are joined as plaintiffs under West Virginia Rule of Civil Procedure 19, Defendants will be exposed to subsequent suits and risk multiple or inconsistent judgments. Defendants fail to grasp that the owners are not absent parties who must be joined under Rule 19. Rule 19 provides that a person should be joined as a party if in their absence complete relief cannot be afforded, or if that person claims an interest in the action and their absence impairs their ability to

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<sup>4</sup> This case is not a class action and should not be treated as such; the *D.R. Horton* court wrongly imported class action principles into a case that is not a class action. See *D.R. Horton, Inc.*, 215 P.3d at 703-04.

<sup>5</sup> The hypothetical conflicts with which Defendants are concerned would arise only after Plaintiff prevails on its claims. Defendants imagine, for example, that the association and its members could disagree on the distribution or prioritization of recovered funds. Those issues are between Plaintiff and its members. If the owners disagree with Plaintiff's representation or distribution of funds, they may seek recompense under the Nonprofit Corporations Act. See W. Va. Code § 31E-1-101, *et seq.* Furthermore, the unit owners have control over what happens to those funds: Plaintiff's bylaws provide that each owner may vote on the appropriation of funds received from this litigation. See J.A. 000011-12.

protect that interest or leaves the existing parties exposed to the risk of incurring double, multiple or inconsistent obligations. *See* W. Va. R. Civ. P. 19(a).

The Rule serves an important public interest by protecting absent parties and shielding defendants from double, multiple, or inconsistent judgments. But there is no need to force joinder in this case, for the simple reason that the unit owners are not absent. Instead, they are represented by their homeowners' association—Plaintiff— and as such are fully present and represented although they are not themselves named as plaintiffs. Moreover, there can be complete relief among the parties without joinder. Plaintiff represents its members' interests and is pursuing all of their claims on matters affecting the common interest community (including all claims arising from damage to the Complex, its common elements, limited common elements, and individual units). And finally, the fact that the owners are not named parties in this case does not expose Defendants to the risk of double, multiple, or inconsistent judgments. As the owners' legal representative, Plaintiff stands in its members' shoes and unquestionably will bind them to any settlement or other resolution in this case under the doctrine of *res judicata*. *See Owens*, 373 A.2d at 894-95 (holding that a homeowners' association may bring suit and settle claims on behalf of its members); *Gomez-Ortega v. Dorten, Inc.*, 670 So.2d 1107, 1108 (Fla. Dist. Ct. App. 1996) (holding that condominium purchasers were barred by *res judicata* from asserting claims in a subsequent suit because they were in privity with a party from that suit, the condominium association); *Brickyard Homeowners' Ass'n Mgmt. Comm. v. Gibbons Realty Co.*, 668 P.2d 535, 541 (Utah 1983) (holding that *res judicata* would protect defendants from unit owners later raising

issues advanced by the management committee that acted as owners' legal representative).<sup>6</sup>

This application of the *res judicata* doctrine is widely accepted in other kinds of representative actions. Preclusion principles generally extend "to persons who somehow were represented in the first litigation. . . . Trustees, executors, statutory representatives in death and survival actions, and guardians are familiar examples." Charles Alan Wright *et al.*, 18A Federal Practice & Procedure Jurisprudence § 4448 (2d ed.). For example, the *res judicata* doctrine applies to bind an assignor to the outcome of a suit maintained by an assignee, *see Personnel One, Inc. v. John Sommerer & Co., P.A.*, 564 So.2d 1217, 1218 (Fla. Dist. Ct. App. 1990), and binds a trustee who stands in the shoes of another as her privy, *see Belfor USA Grp., Inc. v. Helms (In re Helms)*, Nos. 10-31612, 10-3259, 2012 WL 481703, at \*7 (Bankr. W.D.N.C. Feb. 14, 2012) (citing cases). There is no material difference between a trustee, an assignee, a privy, or a statutory representative in a death or survival action and a homeowners' association that is statutorily empowered to represent its members in litigation.<sup>7</sup> Plaintiff may settle

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<sup>6</sup> Defendants seek to diminish the persuasive weight of *Brickyard* by pointing out that, unlike West Virginia, Utah has not adopted the Uniform Act. Although Utah indeed has not done so, as Plaintiff acknowledged in its Opening Brief, *see* Pet'r Br. at 18 n.3, Defendants fail to recognize that the Utah statute is substantially similar to the Uniform Act. Compare W. Va. Code § 36B-3-102(a)(4), *with* Utah Code Ann. § 57-8-33. Both allow a homeowners' association to bring suit on matters affecting the common areas *or* more than one unit. Moreover, any difference between the two statutes has no bearing on this Court's *res judicata* analysis.

<sup>7</sup> The Colorado case cited by Defendants that reached the opposite result and held that association members must be joined under Colorado's version of Rule 19, *Clubhouse at Fairway Pines, LLC v. Fairway Pines Estates Owners*, 214 P.3d 451, 453-54, 456-57 (Colo. App. 2008), is contrary to the weight of authority discussed above holding that *res judicata* applies to representative actions, and as such was wrongly decided. Like Defendants and the Circuit Court, the Colorado court in *Fairway Pines* imagined a

or bring to trial all of its members' claims, and the owners will be bound by that resolution.<sup>8</sup>

Because Plaintiff represents the “absent” unit owners, and because Defendants are protected by the doctrine of *res judicata* from the risk of double, multiple, or inconsistent judgments, there is no need to join the owners as plaintiffs under Rule 19.<sup>9</sup> As the Utah Supreme Court stated in *Brickyard*, “[n]othing would be gained by forcing a class action upon the . . . owners nor in requiring that each of them be made parties as the statute offers a less burdensome alternative for legal representation.” 668 P.2d at 542.

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hypothetical conflict between the owners and the association, and allowed its imagination to trump the plain terms of the representative provision of the Uniform Act.

<sup>8</sup> In its Opening Brief, Plaintiff distinguished *Gollub v. Milpo, Inc.*, 522 N.E.2d 954, 957 (Mass. 1988), and *Siller v. Hartz Mountain Assocs.*, 461 A.2d 568, 570-73 (N.J. 1983), which Defendants cite as “[s]ubstantial case law calling into question the authority of the homeowners’ association to settle or resolve the unit specific complaints.” Resp. Br. at 27-30; see Pet’r Br. at 19 n.3, 25-26. To summarize, neither Massachusetts nor New Jersey has adopted the Uniform Act, and their respective statutes do not permit a homeowners’ association to bring claims for anything other than the common elements. Accordingly, those associations naturally could not settle their members’ claims relating to individual units. Further, in *Siller*, the court relied on language in the association’s bylaws that stated that the unit owners have a “primary interest to safeguard [their] interest in the unit [they own[,]” and relied upon that language in determining that the unit owners were not bound by the association’s settlement respecting individually owned property. *Siller*, 461 A.2d at 574. The Complex’s Declaration contains no similar provision. See J.A. 000009-51.

<sup>9</sup> The West Virginia case cited by Defendants for the proposition that all persons who have interests in real property must be joined as parties when that property is in issue, *O’Daniels v. City of Charleston*, 490 S.E.2d 800 (W. Va. 1997), is inapposite because that case was not a representative action. But the intent behind that rule nevertheless is satisfied: because Plaintiff represents its members, all persons who have an interest in the property are represented in this action.

**V. Plaintiff can present its case efficiently and with sufficient proof through the testimony of a representative sample of unit owners, which also will allow Defendants a fair opportunity to defend against all claims.**

Finally, this Court should provide guidance on the discovery- and trial-management questions posed by the parties and the Circuit Court. Defendants seek to depose all past and present unit owners (including co-owners), as well as their past and present tenants (including co-tenants), and later could seek to require those individuals to testify at trial. Although Plaintiff is willing to and indeed has engaged in robust discovery, such extensive testimony would be unreasonably burdensome and expensive, not to mention duplicative and detrimental to judicial efficiency. This Court should instruct the Circuit Court to fashion a protective order limiting that testimony to a representative sample of owners, who already have been deposed.

Defendants have no need to depose over 200 people, many of whom own or live in the same condominium. Although Defendants purport to be largely unaware of the location and extent of physical damage to the Complex, that simply is not the case. Extensive discovery already has been conducted. Defendants and their experts have conducted two rounds of on-site inspections at the Complex, spanning a total of six days. During that time, they have had access to the exteriors and interiors of all seven buildings and entered virtually all of the condominiums. They conducted invasive testing, which included cutting holes in drywall and removing siding. Likewise, Plaintiff's expert witnesses have conducted exhaustive testing of the Complex. Both sides will produce voluminous expert reports based on those inspections, and those reports will form the basis for the experts' testimony regarding the damages and the cost to repair. This case involves damage to property, and Plaintiff has given Defendants

extensive access to that property. Owner depositions cannot add much more to what Defendants themselves have discovered by inspecting the Complex.

Nevertheless, numerous depositions have been taken in this case: forty-four individuals have been deposed, including fifteen unit owners who own a total of nineteen units located in each of the seven buildings at the Complex, and all of the former and current officers of the homeowners' association. Those unit owners constitute a representative sample of owners, and are enough. There is no need to force the added burden and expense of scores of additional depositions.

It is also important to emphasize that Defendants' desire for such burdensome discovery flows from their misreading of the representative provisions of the Uniform Act. Defendants asked the Circuit Court to allow the depositions of all unit owners because they believe that (1) any claims involving damage to the condominium units (or a resulting inability to rent or sell those units) must be brought and proven by the owners themselves, and (2) those owners must be joined as plaintiffs to this suit under Rule 19. Neither of those propositions holds water, leaving Defendants with no justification for deposing 200 people or calling them to testify at trial.

Indeed, all of Plaintiff's claims arise from systemic and widespread damage to the Complex and as such are amenable to common proof. For example, the association's officers have testified about the alleged misrepresentations in the public offering statement, and are in the best position to address issues involving the increased association fees because of damage to the Complex. Fifteen unit owners have testified consistently regarding the materials received from and representations made by the Developer Defendants. *See Brickyard*, 668 P.2d at 543 (holding that proof as to one owner would be proof as to all where the management committee intended to prove its

misrepresentation claim by showing a sales brochure or other advertising material which was presented to each of the unit owners when he expressed an interest in purchasing a unit, or by some other means common to all purchasers).

Additionally, Plaintiff's 30(b)(7) representative has testified and produced documentation responding to all areas of inquiry concerning construction-related issues, including unit owner complaints, incidents, and repairs. Moreover, Plaintiff has alleged damages common to all or most of the units, including but not limited to inadequate HVAC systems, floods, freezing pipes, window leaks, excessive water and electric bills, electrical problems, structural cracks in the drywall, and mold. See J. A. 000001, J.A. 000005, and J.A. 000052. The unit owners who have been deposed thus far have testified to common complaints about those issues, and their testimony has been consistent.<sup>10</sup>

Requiring testimony from all unit owners and tenants, past and present, would contravene the representative-action provision of the Act, utterly destroying its goals of achieving judicial efficiency and reducing litigation costs. The Court should limit such testimony to the representative sample of unit owners who have been deposed to date.

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<sup>10</sup> Defendants also purport to be concerned about Plaintiff's ability to meet its burden of proof using testimony from only a representative sample of unit owners. While Plaintiff appreciates Defendants' solicitude, Plaintiff believes that testimony from a representative sample of owners is more than sufficient to prove its claims, in combination with expert testimony and reports, on-site inspections, and the documents produced by the parties.

## Conclusion

For these reasons, Plaintiff urges the Court to answer the certified questions as proposed.

Respectfully submitted,

**UNIVERSITY COMMONS RIVERSIDE  
HOME OWNERS ASSOCIATION,  
INC.**



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Superior Court of Vermont.  
Bennington County  
PIPER RIDGE HOMEOWNERS ASSOCIATION, INC., Plaintiffs,

v.

PIPER RIDGE ASSOCIATES, Theodore Cetron, Betsy L Cetron, Winhall Real Estate, Inc., Reginald CYR, Tdm Corporation, Lineworks Architects, Lineworks Architects, Inc., Ridge Sports, Inc., R. CYR & Sons, R. CYR & sons, Inc., R.A.B. Construction, R.A.B. Construction, Inc., Defendants.

No. 418-11-01 Bncv.

April 12, 2006.

Opinion & order On Motions For Summary Judgment

John P. Wesley, Presiding Judge.

Piper Ridge Homeowners Association, Inc. v. Piper Ridge Associates, et al., Docket No. 418-11-01 Bncv (Wesley, J., Apr. 12, 2006)

[The text of this Vermont trial court opinion is unofficial. It has been reformatted from the original. The accuracy of the text and the accompanying data included in the Vermont trial court opinion database is not guaranteed.]

Introduction

In this action Plaintiff Piper Ridge Homeowners Association, Inc. seeks to recover damages from Defendants, the various entities and individuals involved in the development of the Piper Ridge condominium complex, for what it alleges were defects in the design and construction of Piper Ridge. Plaintiff alleges that multiple units were built on unstable fill, which has led to substantial settling and consequent damage, and that the siding and flashing on all of the buildings was deficient, which has led to systemic rot through many units. Plaintiff further alleges various other hidden defects including: lack of complete firewalls in some units; failure to provide a four inch slab foundation as promised; failure to use appropriate materials; failure to properly seal chimneys; failure to properly attach decks to buildings; and defects in design and installation of walls and exterior lights. It is undisputed that Plaintiff has already undertaken very costly repairs in connection with the defects it claims, and that additional remedial measures are ongoing.

Plaintiff is the unit owners' association responsible for "maintenance, repair, replacement and modification of the common elements". 27A V.S.A. §3-102(a)(6). Such an association may bring an action asserting claims of its members as to the common elements. §3-102(a)(4); *Meadowbrook Condominium Ass'n v. South Burlington Realty Corp.*, 152 Vt.16 (1989). The role of each Defendant named in Plaintiff's amended complaint can be summarized as follows: 1) Piper Ridge Associates is the limited partnership that developed the project; 2) TDM Corporation is the general partner of Piper Ridge Associates, whose shares were held by Defendants Theodore Cetron, Douglas Velsor and Reginald Cyr; 3) Lineworks Architects was the architectural firm that designed the project, whose principals were Douglas Velsor and Jeffrey Barnes;<sup>[FN1]</sup> 4) R.Cyr & Sons, Inc. or R.Cyr & Sons were contractors for sitework, excavations and foundations; 5) R.A.B. Construction, Inc. or R.A.B. Construction were general contractors for the construction of the condominium units; 6) Reginald Cyr is the principal of



R.Cyr & Sons and R.A.B. Construction, Inc.<sup>[FN2]</sup>; 7) Winhall Realty, Inc. is a real estate agency which had the exclusive listing for the original sales of Piper Ridge condominium units; 8) Ridge Sport, Inc. was the original property management company that managed the development before responsibility was transferred to Plaintiff; 9) Theodore Cetron is a shareholder in Winhall Realty, as well as TDM and Ridge Sport; 10) Betsy Cetron, Theodore's wife, is the other shareholder in Winhall Realty.

FN1. Velsor and Barnes have been dismissed from the action after filing bankruptcy petitions.

FN2. Cyr was personally discharged in bankruptcy prior to the commencement of this action. Any effect of that discharge on the claims here remains adjudicated and is not the subject of the present motions.

Two motions for summary judgment are pending before the Court, after the completion of extensive discovery. Defendant R.A.B. Construction, Inc. moves for summary judgment arguing that Plaintiff's claims are barred by the statute of limitations. Defendants Winhall Real Estate, Inc., Theodore Cetron and Betsy Cetron join R.A.B.'s motion as to the statute of limitations argument, and in a second motion argue that Plaintiff has produced insufficient evidence to support any of the claims particularly against them. Because there is sufficient evidence to create a question of fact as to when Plaintiff had discovered facts reasonably requiring a systemic inspection of the entire Piper Ridge complex, Defendants' motions for summary judgment on statute of limitations grounds are DENIED. Holding that certain of Plaintiff's claims against the Cetrons and Winhall present questions for the jury, while others do not, their remaining motions are GRANTED, in part and DENIED, in part.

#### *Discussion*

I. Statute of Limitations The original complaint in this case was filed on November 26, 2001. The applicable statute of limitations is six years, meaning that Defendants can not prevail on their summary judgment motion on statute of limitations grounds unless they establish that Plaintiff's cause of action accrued prior to November 26, 1995. 12 V.S.A. § 511. The Vermont Supreme Court has explained that,

a cause of action is generally said to accrue upon the discovery of facts constituting the basis of the cause of action or the existence of facts sufficient to put a person of ordinary intelligence and prudence on inquiry which, if pursued, would lead to the discovery. Thus, the statute of limitations] begins to run when the plaintiff has notice of information that would put a reasonable person on inquiry, and the plaintiff is ultimately chargeable with notice of all the facts that could have been obtained by the exercise of reasonable diligence in prosecuting [the] inquiry.

*Galfetti v. Berg, Carmolli & Kent Real Estate Corp.*, 171 Vt. 523, 524 (2000) (citation and internal quotation omitted).

Both parties agree that the discovery rule applies, but they diverge on whether the Court may conclude as a matter of law that prior to November 26, 1995 Plaintiff had discovered facts that would have lead a reasonable person to perform a more probing inspection, such that the extent of the systemic design and construction defects identified in the amended complaint would have then become apparent. Plaintiff vigorously insists that "the question of when the injury [was] or should have been discovered is one of fact to be determined by the jury" *Lillicrap v. Martin*, 156 Vt. 165, 172 (1989). Yet, Defendants maintain that this view of the discovery rule is subject to exceptions, and that circumstances have been recognized in which "summary judgment may be granted to defendant where there is no material fact in dispute and no reasonable fact finder could differ in finding

for defendant.” *Galfetti* at 526 (citation omitted).

In support of their motion for summary judgment, Defendants rely principally upon six pieces of documentary evidence for the claim that reasonable persons in Plaintiff's shoes ought to have made a more detailed inquiry prior to November of 1995. The first three pieces of evidence are letters from individual unit owners detailing specific complaints they have with their properties: 1) In March of 1986 the owner of unit A-12 complained that “every outside corner inside the house is cracking”, citing the belief that this resulted from “poor workmanship” and not as a result of “settling”; 2) In September of 1989 the owner of unit H-5 complained of difficulty in opening the front door and some windows, crossed telephone lines, a leaky shower in the master bathroom, and concerns about the outside deck possibly causing a leak; 3) In October of 1989 another owner expressed concerns about a leak in his roof, and the possibility that this may cause water damage in the attic, as well as the replacement of a clapboard, which was damaged because it was not properly painted in a timely manner. In addition to these complaints, two others were associated with sliding doors: i) in October of 1989 Piper Ridge Sports, Inc. notified Plaintiff that an inspection of the glass doors revealed evidence of wood rot around the doors in nineteen units; ii) in September of 1995 Plaintiffs received invoices from Lindsey & Sons, Inc. who had replaced two sliding glass doors and noted some associated water damage. Defendants further maintain that constructive notice exists in the form of an inspection report prepared by James Hunt for Sterling Asset Management of Parsippany NJ, owner of unit D-1. In October of 1995, Hunt completed an inspection report as to the single unit noting settling of soil, mildew and moisture under cracked exterior siding, and an absence of flashing, gutters and downspouts.

In response to Defendants' claim that significant problems had been noted prior to the commencement of the limitations period, Plaintiff relies on the affidavit of Paul Carroccio, the founding partner of TPW Management, the firm retained by Plaintiff in 1998 to manage their affairs respecting oversight of the common elements. Mr. Carroccio acknowledges that there was evidence pre-dating November 1995 suggesting deterioration in the buildings at Piper Ridge. However, he maintains that these circumstances were not the sort that would raise alarm as to systemic design and construction problems. Furthermore, Mr Carroccio claims that the problems cited by Defendant's motion could reasonably have been interpreted, even by an expert, as evidence of poor maintenance and/or poor materials, and not systemic design and construction flaws.<sup>[FN3]</sup>

FN3. While Defendants challenge the sufficiency of the Carroccio affidavit, claiming that it contains obvious errors in some places and is unsupported by personal knowledge in others, the Court concludes that Plaintiff has established a sufficient basis for Carroccio's opinions to withstand a motion for summary judgment. See V.R.E.702 (testimony of expert may be received in form of opinion); V.R.E.703 (facts or data reasonably relied upon by others in the field need not be admissible in evidence). Matters of credibility as to the reliability of the facts underlying expert opinion are properly reserved for the jury. *Capiello v. Northrup*, 150 Vt. 317(1988).

According to Plaintiff the benefit of all reasonable doubts and inferences as to the motion for summary judgment, the Court cannot find that Defendants are entitled to judgment as a matter of law on the statute of limitations claim. *Messier v Metro. Life Ins. Co.*, 154 Vt. 406, 409 (1990). *Galfetti* is readily distinguishable. The Court concluded in that case that there could be no dispute as to when discovery ought to have occurred because a clear date had been established as to notice of defect - the receipt of a letter notifying the plaintiff of a zoning violation. There was no dispute that the plaintiff had received the letter, or that it constituted notice of the defect alleged. Here, however, the complaints from various dissatisfied individual unit owners reveal little. In accordance with the affidavit of Mr. Carroccio, it seems reasonable that sticky windows, a leaky shower, a leaky roof,

some crossed telephone lines and an ill-painted clipboard would not in aggregate indicate the systemic design and construction problems that were only uncovered after a time-consuming and thorough evaluation resulting in this lawsuit. Furthermore, as Plaintiff argues, the sliding glass door problems were thought at the time to be a product defect issue, and not a design/construction issue - an understanding seemingly confirmed through success in bringing warranty claims against the manufacturer. The Hunt report details problems with a single unit that have some similarities to those identified by prior individual complaints. Yet, the Court cannot conclude as a matter of law that the accumulation of these individual problems, any of which might have been plausibly limited to the unit in question, ought to have triggered a more searching examination by Plaintiff prior to November 26, 1995. Rather, the determination of whether a reasonable and prudent owners' association ought to have undertaken an earlier and more thorough examination must rest with the jury, in light of all the facts. Lillicrap.<sup>[FN4]</sup>

FN4. Defendants insist that any notice to one of its members serves to legally bind Plaintiff, inasmuch as it was functioning as an unincorporated association at all times relevant to this issue, according to 27 V.S.A. § 1327, then in effect. Defendant relies on *Meadowbrook* for this proposition, which Plaintiff disputes, claiming that the Supreme Court's holding in that case is "erroneous".

The briefing of this issue has not proved enlightening to the Court. While it is beyond argument that Plaintiff was not incorporated at all the relevant periods, that legal truism is not dispositive of the notice issue. Contrary to Defendants' argument, *Meadowbrook* did not address any claim that notice to a single member constituted notice to the association for statute of limitation purposes. Rather, that case held only that for individuals who acquired interests after defects became patent, the trial court should have granted apportionment of damages awarded for injury to the common elements to exclude the claims of those unit owners. While it is conceivable that some such adjustment might eventually be required here, (despite Plaintiff's belief that the *Meadowbrook* ruling was "erroneous"), this issue is not presently raised by the motions.

The Court is not persuaded that any of the authorities advanced by either party are useful except by way of analogy, since none deal directly with notice for purposes of triggering the discovery rule. However, in that vein, fairness gathers more around Plaintiff's cases recognizing the practical limitations of imputing, for any purpose, knowledge of any one member to determine the rights of the whole organization. See, *White v. Cox*, 17 Cal. App.3d 824 (1971). On the other hand, Defendant's reliance on V.R.C.P.4(d)(8)(service can be made on "any member" of an unincorporated association) does not give rise to a tautology that knowledge of defects to the common elements associated with one member's unit is automatically imputed to the association.

The Court concludes that the degree to which any member's knowledge contributed to a duty by the association to make further investigation is a question of fact for the jury's determination.

## II. Sufficiency of Each Count as to Cetrons and Winhall Realty

There are nine counts in Plaintiff's amended complaint asserting the following causes of action: breach of warranties, negligence, breach of fiduciary duty, breach of express and implied contract, breach of contract - third party beneficiary, breach of contract<sup>[FN5]</sup>, breach of covenant of good faith and fair dealing, negligent and/or intentional misrepresentation, and consumer fraud. Plaintiff's complaint levels each of the claims against each of the defendants, based on a generalized pleading of facts ostensibly common to all. As urged by the Cetrons and Winhall, the complaint employs scant effort to plead facts indicating how any particular defendant's actions ex-

posed him, her or it to liability under each count, as distinguished from the behavior of other individual or corporate defendants.<sup>[FN6]</sup> This approach to pleading complicated the Court's analysis of the motions for summary judgment, leaving Plaintiff vulnerable to dismissal as to some of its claims based on patent failure to state a cause of action..

FN5. There are two counts numbered "V" in the amended complaint.

FN6. Throughout the amended complaint, Plaintiff lumps together claims against corporate defendants with claims against individual defendants. Judging from the face of its complaint, Plaintiff appears to assume that any act by any person will suffice to levy both individual and corporate liability, without the need for additional facts addressing whether or not the act was undertaken in the course of employment on behalf of a corporate entity. This assumption elides an entire jurisprudence arising from the recognition of the separate accountabilities associated with the corporate form of business organization. See, e.g. 1A V.S.A. §6.22(b) ("a shareholder of a corporation is not personally liable for the acts or debts of the corporation except that he or she may become personally liable by reason of his or her own acts or conduct"); *Agway, Inc. v. Brooks*, 173 Vt. 259, 262 (2001) (discussing the elements necessary to "pierce the corporate veil"); *Gladstone v. Stuart Cinemas, Inc.* 2005 VT 44 (discussing the elements of "de facto merger").

In this section, the Court considers the motions for summary judgment filed by Theodore Cetron and Betsy Cetron in their personal capacities, and by Winhall Real Estate, Inc. who argue that Plaintiff has produced insufficient evidence to maintain any of the claims against them. Plaintiff's approach to these Defendants relies on the argument that Mr. Cetron's extensive involvement in the overall development of Piper Ridge justifies the conclusion that he knew or should have known about the defects at issue; that Mr. Cetron's knowledge can be imputed to Mrs. Cetron either because she is his wife or because she is the principal broker and partner with Mr. Cetron in Winhall Real Estate, Inc.; and that the closely held nature of Winhall exposes it to liability for any act or failure to act by Mr. Cetron, even those plainly separate from his activities as Winhall's agent in marketing the Piper Ridge units. Without further consideration of the nuances between Mr. Cetron's individual and corporate spheres of activity, Plaintiff's case necessarily depends on an ability to establish Mr. Cetron's knowledge of the defects based on evidence in the record. Thus, it is useful to examine that record along three general lines of inquiry in order to identify the extent to which there are material facts in dispute.

#### *Who designed/constructed Piper Ridge?*

Plaintiff alleges that Mr. Cetron personally controlled all aspects of the design and construction of Piper Ridge. As evidentiary support for this conclusion Plaintiff offers: (1) the contract for the Piper Ridge sitework between Piper Ridge Associates and R. Cyr & Son; (2) the contract for the Piper Ridge design and construction between "Piper Ridge Associates as represented by TDM Corporation" and Lineworks Architects;<sup>[FN7]</sup> (3) a check from Piper Ridge Associates payable to R. Cyr & Sons signed by Mr. Cetron for work performed; (4) the invoice from R. Cyr & Son that details the work performed that generated the check; (5) minutes from an April 1983 TDM Corporation meeting that detail the division of "construction management fee" among Mr. Cyr (35%), Mr. Velsor (33%) and Mr. Cetron, (27%)<sup>[FN8]</sup>; (6) an August 1983 letter from TDM Corporation to Mr. Howard Rosen, CPA, detailing the allocation of TDM shares as: Mr. Cetron 51 shares, Mr. Cyr 25 shares, Mr Velsor 18 shares, and Mr. Allen 6 shares. Plaintiff further summarily posits that in carrying out many of these acts Mr. Cetron opened himself to individual liability even when ostensibly exercising his authority as a corporate officer..

FN7. Both contracts are signed by Mr. Cetron under the heading: "Owner." The signature on the Line-works contract appears to read: "Theodore Cetron pres TDM" and the R.Cyr & Son contract signature appears to read "Theodore Cetron."

FN8. 5% was set aside for Dev Allen as a "performance bonus"

Plaintiff's evidence simply does not justify its desired conclusion: that Mr. Cetron is personally responsible for the design and construction of Piper Ridge. To the contrary, the documentary evidence establishes contractual responsibility for those functions between a variety of corporate entities. Plaintiff has neither plead nor otherwise proven that Mr. Cetron undertook his execution of several of the relevant documents establishing the contracts for the design and construction of Piper Ridge in any capacity other than carrying out corporate authority. That Mr. Cetron was the majority shareholder in TDM Corporation, or that he received a distribution from TDM that was nominally a "construction management" fee, is unhelpful. There is no evidence that Mr. Cetron was contractually bound to perform any of the acts of designing and/or building Piper Ridge *in his personal capacity*. There is no evidence that Mr. Cetron actually did any act with regard to the design and construction of Piper Ridge from which any *personal duty* to Plaintiff could be claimed to have arisen. Plaintiff has failed to establish a genuine issue of fact on this point. Mr. Cetron did not design or construct Piper Ridge.

*Who were the 'sellers' of Piper Ridge?*

Piper Ridge Associates was the corporate developer and fee owner of the project, and it sold the condominium units to the individual owners. Pursuant to an exclusive listing agreement, Winhall Real Estate, Inc. served as the seller's agent in marketing the units to prospective and actual purchasers. To the extent that any of Plaintiff's claims are premised on duties arising from the relationship between the seller and the purchasers of real property, it has established no evidence from which either of the Cetrons or Winhall could be considered a "seller". Rather, based on the evidence, any duties arising between Plaintiff and the Cetrons and Winhall are limited by the broker-buyer relationship, not the seller-buyer relationship (except as discussed below in connection with Mr. Cetron's tenure as a member of Plaintiff's Board of Directors).<sup>[FN9]</sup>

FN9. Furthermore, there is no evidence of record indicating that Betsy Cetron had any personal encounter with Plaintiff, or any of its individual members, in connection with the marketing of Piper Ridge. Similarly, Plaintiff ascribes no other behavior to Mrs. Cetron sufficient to pierce the corporate veil, and make her individually responsible as a shareholder for any vicarious liability that Winhall might suffer as a result of the acts of agents other than Mrs. Cetron. *Agway v. Brooks*. Finally, it is plain that the mere fact of the marriage between Mr. & Mrs. Cetron does not suffice to expose her to liability for his sole acts. See Vt.Stat. Ann., Title 15, Chap. 3. Rights of Married Women.

*Did Theodore Cetron know about any defects in design, construction and/or engineering of Piper Ridge?*

Plaintiff claims that there is evidence that Mr. Cetron knew, or had reason to know, directly and through the knowledge of his fellow shareholders in a closely held corporation, of improper and deficient design work, construction practices and engineering work, and that the units were built on unsuitable fill materials. This claim of culpable knowledge underlies the blunderbuss projection of claims against Mr. Cetron, and upon his wife and real estate agency. To support this allegation Plaintiff cites the testimony of Henri deMarne, the construction expert proffered by Defendant RAB, to establish that the construction and excavation contracts call for the footings of all of the buildings to be built on solid ground. Plaintiff argues that in signing and "managing" those contracts, Mr. Cetron is chargeable with knowledge of this requirement. Plaintiff then offers that (1) Mr. Cetron ini-

tialed a site plan that indicates that buildings were built on fill; (2) that in reviewing the work and signing checks making reference to “stump dumps”, he became charged with the knowledge of the existence of “stump dumps” on the site.

Furthermore, Plaintiff insists that, given his close personal and business relationship with Defendants Reginald Cyr and Douglas Velsor, it is inconceivable that Mr. Cetron remained ignorant of many of the problems which later came to light, knowledge of which the other two defendants have admitted. In response, Defendant Cetron discounts the significance of his signature on documents making ancillary mention of “fill” and “stump dumps”, arguing that the administrative act of signing a check or initialing a document is insufficient to establish culpable knowledge. In response to the claim that Plaintiff has raised a justifiable inference that he acquired the knowledge of others with whom he was closely associated, Defendant submits the depositions of those individuals denying that they ever discussed with him any suggestion of improper fill or inadequate construction practices.

On the present record, Plaintiff certainly has not produced a “smoking gun” to establish Defendant Cetron's guilty knowledge. Yet, its burden at this stage of the proceedings only requires evidence to fairly place in dispute the extent of his knowledge. *Fritzeen v. Trudell Consulting Engineers, Inc.*, 170 Vt. 632 (mem.) (not trial court's function to find facts on a motion for summary judgment even if record appears to lean strongly in one direction). As to the inferences urged by Plaintiff - including whether it is reasonable to believe that his close associates never gave him reason to suspect the quality of the design and construction of Piper Ridge - much is likely to depend on the credibility of the witnesses, a determination entirely within the province of the jury. [FN10] To the extent such knowledge is a predicate for any of Plaintiff's claims, its absence cannot be pro-

claimed as a matter of law.

FN10. The Court rejects Plaintiff's claim that any knowledge by Cyr and Velsor is imputed to Cetron as a matter of law because all three were principal shareholders in a close corporation, TDM, Inc. The only Vermont authority cited for this proposition is *Adams v. B & D Builders & Developers, Inc.* 144 Vt. 353, 357-358 (1984), the holding of which cannot be stretched to encompass the facts here. *Adams* merely held that under the statutory provisions of 9A V.S.A. §9-504(3), requiring “reasonable” notice to the debtor of the sale of collateral, notice to the defendant's husband sufficed where the two were the only shareholders in a close corporation, and each had personally signed a guaranty of the corporation's note. As the opinion notes, except in particular circumstances, “knowledge of a director or officer of a corporation will not be imputed to another director or officer so as to affect him personally”. *Id.* citing 3 Fletcher Cyclopedia of Corporations § 837 (E.Smith 1980). While the fact of the close corporation persuaded the Court that the notice in *Adams* was reasonable, that conclusion does not support the proposition that everyone who had a share in TDM must be charged with the comprehensive knowledge of all the other shareholders. As indicated in the text, certain inferences *of fact* may be justified by the close relationship of the principals, but *Adams* does not require those inferences as a matter of law.

#### *Plaintiff's Claims*

Bearing in mind the foregoing assessment as to critical areas claimed by the parties as either disputed or undisputed, the Court now turns to the particular counts of Plaintiff's amended complaint. The analysis will not proceed in the numerical order established by the pleadings, but rather in accordance with the structure of Plaintiff's response to the motion, a prioritization presumably reflecting its perceptions of the strengths of the various claims.

(i) *Negligent and/or Intentional Misrepresentation(Count VII)*

Plaintiff's complaint alleges that Defendants made intentional and/or negligent misrepresentations concerning the quality of construction at Piper Ridge. Plaintiff emphasizes Mr. Cetron's representations to certain purchasers that the Piper Ridge units were "premium" or the "Cadillac" of complexes. In rejoinder, Defendants argue that Plaintiff has produced no evidence of any misrepresentations made by Mrs. Cetron, and that the statements attributed to Mr. Cetron and Winhall Real Estate, Inc. are matters of opinion, rather than representations of fact, and therefore not actionable. Furthermore, Defendants maintain that any misrepresentations made in the brochures do not give rise to a claim against them because the brochures were prepared by Piper Ridge Associates.

The place where a broker's sales pitch crosses the line from innocent to actionable remains somewhat blurred in our caselaw, teetering in either direction depending on fairly subtle changes in facts. In *Batchelder v. Birchard Motors, Inc.*, 120 Vt. 429, 435 (1958), the Court concluded that statements made in connection with the sale of an automobile as to its likely performance were "so clearly matters of opinion and judgment, and related to facts to exist in the future" that they would not support a claim for fraudulent misrepresentation. Yet, in *Hughes v. Holt*, 140 Vt. 38, 41 (1981), a claim involving the sale of a termite-infested house, the Court sustained a verdict against both the seller and the realtor, stating "whether statements as to the 'excellent' condition of the house were statements of fact or opinion is for the jury to determine". In *Provost v. Miller*, 144 Vt. 67, 69-70 (1984), the Court found error in the trial court's instruction to the jury "that it must find the brokers negligent if they failed to discover a structural defect in the house that could have been discovered by using reasonable diligence", holding that this overstated the broker's duty to make an independent investigation. On the other hand, in *Cushman v. Kirby*, 148 Vt. 571, 574 (1987), another case involving misrepresentations during the sale of real estate, the Court held that fraud can arise "where one has full information and represents that he has, if he discloses a part of his information only". Similarly, in *Silva v. Stevens*, 156 Vt. 94, 106-107 (1991), the jury's verdict was also sustained against the challenge of insufficient evidence based on a holding that:

...representations that the home was built to "strictest standards" and the garage was "well constructed" could be taken by the jury to be statements of fact rather than opinion. The question of whether a statement is one of fact or opinion is for the jury to determine.

Citing *Hughes v. Holt*, 140 Vt at 41. See, also, *Limoge v. People's Trust Co.*, 168 Vt. 265, 271 (1998)(summary judgment reversed because a jury could find that defendant "did not do enough to determine the truth of the representations it was making as facts of its own knowledge").

As discussed in the previous section of this opinion, Plaintiff has made out a material dispute as to the extent of Mr. Cetron's knowledge of the claimed design and construction flaws. The factfinder's determinations in this regard will undoubtedly further affect its conclusion as to whether Mr. Cetron's representations of the quality of the project to purchasers of Piper Ridge units were merely expressions of opinion, or so contrary to what he knew to be true as to amount to a distortion of fact. Misrepresentations made during the course of marketing, if proved to the jury's satisfaction, will also expose Winhall to vicarious liability. As to these two defendants, the motion for summary judgment must be denied.

On the present record, nonetheless, the Court must grant the motion sought by Mrs. Cetron. There is no evidence that she made any statements to individual purchasers, nor that she was directly involved with her husband in the various business entities responsible for the development and construction of Piper Ridge. Even if she had such knowledge, a matter of complete speculation arising only from the marital relationship, she was never in a posi-

tion where disclosure was a duty. While the agency may be vicariously liable for the misrepresentations of Mr. Cetron as its agent, Plaintiff advances no persuasive authority for the proposition that such liability is imputed to Mrs. Cetron either as spouse, fellow agent, or shareholder.

(ii) *Consumer Fraud (Count VIII)*

As discussed in the previous section, the nature and extent of any knowledge on the part of Mr. Cetron must be judged by the jury in light of all the evidence. Depending on its conclusions, the jury conceivably could find that Mr. Cetron's statements to purchasers were so contradicted by his knowledge as to amount to "unfair or deceptive acts or practices in commerce". 9 V.S.A. §2453(a); see, *Poulin v. Ford Motor Co.*, 147 Vt. 120, 124 (1986) (acts provides "a much broader right than common law fraud"); *Carter v. Gugliuzzi*, 168 Vt. 48, 52-53 (1998) (the sale of real estate through the agency of a real estate broker is covered by the Act). Thus, the motion as to Mr. Cetron and Winhall is denied, although it is granted as to Mrs. Cetron.

(iii) *Breach of Warranty (Count I)*

Mrs. Cetron and Winhall were merely agents of the sellers, Piper Ridge Associates. They were not in privity of contract with Plaintiff, and extended no warranty. Nevertheless, citing *Bolkum v. Staab*, 133 Vt. 467 (1975), Plaintiff argues that Mr. Cetron was so involved in the development of Piper Ridge as to be charged with having extended an implied warranty of fitness to any purchaser. *Bolkum*, however, involved defendants who "owned the lot, caused the house to be built expressly for sale, and sold it to the plaintiffs". *Id.* at 470. As Defendant argues, this is a crucial distinction compared to the record here, which unambiguously establishes that the owner and developer was a corporation, Piper Ridge Associates. Thus, even assuming Plaintiff prevails against Piper Ridge Associates, its claim against Mr. Cetron individually must founder for lack of any pleading or proof sufficient to disregard the corporate form of doing business. *Agway v. Brooks*.

(iv) *Negligent Design, Engineering and Construction (Count II)*

There is no evidence to establish that any of the defendants can be charged with having a duty enforceable in tort law arising from the design, engineering or construction of Piper Ridge. Even if some acts had been proven from which such a duty might arguably have arisen, Defendants are doubtless correct in the assertion that recovery is precluded by the economic loss doctrine, see *Springfield Hydroelectric Co. v. Capp*, 172 Vt. 311, 314 (2001) (claimants cannot seek through tort law to alleviate losses incurred pursuant to a contract); *Gus Catering v. Menusoft Systems*, 171 Vt. 556 (2000) (loss of commercial expectations is not recoverable under negligence law). Nonetheless, the threshold basis for granting summary judgment in favor of all three defendants is the absence of any evidence establishing the predicate elements of a negligence claim - duty and breach.

(v) *Breach of Fiduciary Duty (Count III)*

Plaintiff alleges that Mr. Cetron owed it a fiduciary duty by reason of his position as a member of its Board of Directors at a time when he should be charged with knowledge of defects in design and construction at Piper Ridge. Defendant Cetron does not dispute the claim that certain fiduciary duties accompanied his position on Plaintiff's board; rather, as earlier discussed, he disclaims that there is any evidence that he acquired knowledge which would have triggered a duty to disclose it in his fiduciary capacity. Since the Court has already held that the nature and extent of Mr. Cetron's knowledge must be assessed by the jury, the motion for summary judgment as to Count III is denied as it pertains to claims against him. For the same reasons previously examined, the motion is granted as to Mrs. Cetron and Winhall.

*(vi) Breach of Implied and Expressed Contract (Count IV); Breach of Contract - Third Party Beneficiary (Count V); Breach of Contract (Count V)(sic); Breach of Covenant of Good Faith and Fair Dealing (Count VI)*

Plaintiff failed to oppose Defendants' motions as to these counts; thus, they are considered summarily. An element of each of these claims is a contract between Plaintiff and the defendant sought to be charged. No such contractual obligation has been established as to any of the defendants. Therefore, each motion for summary judgment must be granted.

*ORDER*

In consideration of the preceding discussion, it is hereby ORDERED: 1) As to the motion for summary judgment sought by Defendant R.A.B. Construction, Inc. that the claim that the complaint was brought beyond the statute of limitations, it is DENIED.

2) As to the motion for summary judgment sought by Defendant Theodore Cetron, it is DENIED as to the claim that the complaint was brought beyond the statute of limitations; it is DENIED as to Counts II, VII & VIII; and it is GRANTED as to all remaining counts.

3) As to the motion for summary judgment sought by Defendant Betsy Cetron, it is GRANTED as to all counts, and she is dismissed as a party defendant.

4) As to the motion for summary judgment sought by Winhall Realty, Inc., it is DENIED as to the claim that the complaint was brought beyond the statute of limitations; it is DENIED as to Counts VII & VIII; and it is GRANTED as to all remaining counts.

Dated at Bennington, Vermont

—

John P. Wesley

Presiding Judge

Piper Ridge Homeowners Ass'n, Inc. v. Piper Ridge Associates  
2006 WL 6047597 (Vt.Super. ) (Trial Order )

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## CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of March, 2012, true and accurate copies of the foregoing **Petitioner's Reply Brief** were deposited in the U.S. Mail contained in postage-paid envelope addressed to counsel for all other parties to this appeal as follows:

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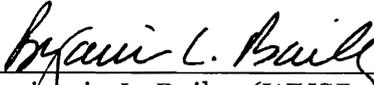
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