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IN THE SUPREME COURT OF CALIFORNIA

BEACON RESIDENTIAL COMMUNITY ASSOCIATION,
Plaintiff and Appellant,

v.

SKIDMORE, OWINGS & MERRILL LLP et al.,
Defendants and Respondents.

AFTER A DECISION BY THE COURT OF APPEAL, FIRST APPELLATE DISTRICT, DIVISION FIVE
CASE NO. A134542

PETITION FOR REVIEW

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PETITION FOR REVIEW

ISSUES PRESENTED

1. Does a design professional (e.g., an architect or engineer) that provides design recommendations to the developer of a construction project, but has no involvement in the construction, owe a duty of the care to persons with whom the design professional is not in contractual privity? In *Weseloh Family Ltd. Partnership v. K.L. Wessell Construction Co., Inc.* (2004) 125 Cal.App.4th 152 (*Weseloh*), the Court of Appeal, Fourth Appellate District, Division Three, held a design professional owes no duty in those circumstances. Here, in a published opinion, the Court of Appeal refused to apply *Weseloh* and held that a design professional does owe a duty of care.

2. Did the Right to Repair Act, Senate Bill 800, Civil Code section 895 et seq., which abrogated the holding in *Aas v. Superior Court* (2000) 24 Cal.4th 627 (*Aas*), that homeowners may not recover damages in negligence from the builder of their homes for existing construction defects that had not yet caused property damage or personal injury, also abrogate other common law rules governing the liability of design professionals prior to the adoption of that Act?

INTRODUCTION: WHY REVIEW SHOULD BE GRANTED

ISSUE 1

The Court of Appeal's opinion here constitutes a dramatic expansion of the liability of design professionals that will impact numerous future cases. In *Weseloh*, the Court of Appeal relied on the duty analysis in *Biakanja v. Irving* (1958) 49 Cal.2d 647 (*Biakanja*) and *Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370 (*Bily*) to hold that a design engineer owed no duty of care to third parties. The engineer in that case performed consulting work for a subcontractor on a project to construct an automobile dealership, including the design of two retaining walls. The court held it was not liable to the owners of the property after the retaining walls collapsed because the engineer had no contractual relationship with the owners and had no role in the construction of the walls.

Weseloh is irreconcilable with this case, whose facts are not materially different. Here, the defendants, two architectural firms, contracted with the developer of a large mixed commercial and

residential complex to provide architectural and engineering services. Like the engineer in *Weseloh*, they had no role in the construction itself. Their contracts with the developer provided that no condominium association or purchaser of the residential units in the complex would be a third party beneficiary of the architects' obligations to the developer. After the complex was completed, it was sold to another developer, which marketed and sold the residential units as condominiums. The condominium homeowner's association then brought this action against the architects and 40 other defendants, alleging multiple construction and design defects in the complex. The trial court, relying on *Weseloh*, sustained the architects' demurrers to the complaint without leave to amend and dismissed the action.

The Court of Appeal reversed in a published opinion. (Typed opn., 2.) Despite the clear parallels between this case and *Weseloh*, the Court of Appeal found that case "to provide limited guidance in the duty analysis here, and to be of little application to the facts before us." (Typed opn., 7.) Although it acknowledged that "[l]iability concerns may also limit the willingness of design professionals to undertake large residential construction projects at all" (typed opn., 16), it found nothing in the *Biakanja/Bily* duty analysis[1] that would preclude imposition of liability in this case (typed opn., 13).

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[1] "[T]he extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral (continued...)

This court may and should grant review "[w]hen necessary to secure uniformity of decision or to settle an important question of law." (Cal. Rules of Court, rule 8.500(b)(1).) The conflicting decisions in *Weseloh* and in this case leave no doubt that the issue presented here involves a recurring and important yet unsettled question of law, one that has enormous financial consequences for design professionals such as architects and engineers. Until this court settles the issue, more litigation and conflicting appellate decisions are inevitable. This court should grant review and finally resolve whether a design professional whose role is limited to providing advice to a builder, and who has no contractual relationship with the ultimate purchasers, may be liable to those purchasers for its design decisions.

ISSUE 2

Implicitly acknowledging the lack of material distinctions between this case and *Weseloh*, the Court of Appeal "ultimately" rested its decision not on "our assessment of the *Biakanja/Bily* policy analysis," but instead on the Right to Repair Act, Senate Bill 800, Civil Code section 895 et seq. (Typed opn., 17.) The Right to Repair Act abrogated this court's holding in *Aas* that homeowners may not recover damages in negligence from the builder of their homes for construction defects that have not yet caused either property damage or personal injury.

(...continued)
blame attached to the defendant's conduct and the policy of preventing future harm." (*Biakanja, supra*, 49 Cal.2d at p. 650.)

The Court of Appeal purported to find support for its holding in provisions of the Right to Repair Act that specify that it applies to design professionals as well as builders, general contractors and subcontractors. But the Court of Appeal acknowledged that the Act does not create a duty, and that the Legislature merely assumed a duty existed under the common law. Moreover, the statutes on which the court relied make clear that a design professional is liable only for a negligent act or omission, and retains all common law and contractual defenses, which necessarily means a design professional may argue it owes no duty. (*Ventura County Humane Society v. Holloway* (1974) 40 Cal.App.3d 897, 902 (*Holloway*).)

Because one of the essential elements of a claim for professional negligence is a duty owed by the professional to the plaintiff, the Right to Repair Act refutes rather than supports the Court of Appeal's conclusion that liability may be imposed on a design professional that would not otherwise exist under the *Biakanja/Bily* duty analysis.

This court should grant review and examine the Court of Appeal's unprecedented and potentially far-reaching conclusion that liability may be imposed on a design professional for a violation of the Right to Repair Act even if no liability would exist under the *Biakanja/Bily* duty analysis.

PROCEDURAL AND FACTUAL BACKGROUND

Petitioners Skidmore, Owings & Merrill LLP (Skidmore) and HKS, Inc., are architectural firms. They contracted with the developer of a large mixed commercial and residential complex in San Francisco (The Beacon) to provide architectural and engineering services. (2 JA 311.) They had no role in the construction itself. (See 2 JA 313-314; 3 RT 106, 110, 112-114.) Their contracts with the developer provided that they were "solely responsible to Owner and not to . . . condominium associations or purchasers for performance or [*sic*] Architect's obligations under this Agreement; and . . . no such condominium association or purchaser shall be a third-party beneficiary or third party obligee with respect to the Architect's obligations under this Agreement." (1 JA 47.)[2]

After completion of construction, the 595 residential units in the Beacon were initially rented as apartments. However, the

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[2] The Association initially named both HKS and Skidmore in a cause of action for "third party beneficiary-breach of contracts and subcontracts," but set forth only the contract language relating to HKS. (1 JA 45-57, capitalization and boldface omitted.) After HKS demurred, noting the contract language providing that the Association was not a third party beneficiary (1 JA 109-110), the Association dismissed HKS from that cause of action (1 JA 145-147) and, in subsequent iterations of its complaint, chose not to reassert that cause of action against Skidmore (1 JA 229-239; 2 JA 318-320). Consequently, the Association has implicitly conceded that the contract between Skidmore and the developer included similar language.

Beacon was subsequently sold to another developer, which marketed and sold the apartments as condominiums. (2 JA 287.)

The Beacon Residential Community Association (the Association), the homeowners association that manages the Beacon, filed this lawsuit against Skidmore, HKS, and 40 other defendants alleging multiple defects in the project, including "excessive heat gain," a condition supposedly rendering the condominium units uninhabitable during certain periods due to excessively high temperatures. (2 JA 321.) According to the Association, the solar heat gain was due to Skidmore's and HKS's approval of the substitution of less expensive and ultimately nonfunctional windows, as well as a design lacking adequate ventilation within the residential units. (*Ibid.*) The Association's complaint seeks damages in excess of $50 million. (2 JA 323.)

Skidmore and HKS demurred to the Association's operative third amended complaint. (2 JA 361-397.) Relying on the duty analysis in *Biakanja*, *Bily*, and *Weseloh*, they argued they owed no duty of care to third parties, such as the Association or its members.

The trial court found that *Weseloh*, controlled and Skidmore and HKS could not be liable to the Association for negligent design. Rather, the Association was required to show that petitioners had control of the construction process such that they assumed a role beyond that of providing design recommendations to the developer. (3 RT 106, 110, 112-114.) During oral argument on the demurrer, counsel for the Association conceded that Skidmore and HKS had no control over the construction means and efforts, but asserted that their construction observation gave them a degree of overall

"control" of the project that rendered them liable. (3 RT 112.) The court asked counsel if she had a good faith belief that Skidmore and HKS "went beyond what architects do, which is recommend changes, and actually controlled whether or not the change was implemented." (3 RT 119.) When counsel stated she did have such a belief, the court granted leave to amend. (3 RT 118-119.) However, the Association elected not to amend and the court therefore sustained the demurrers without leave to amend and dismissed the action against Skidmore and HKS. (2 JA 487-490.)

The Court of Appeal reversed in a published opinion.[3] Although it found nothing in the *Biakanja/Bily* duty analysis that would preclude imposition of liability in this case (typed opn., 13), "ultimately, it is not our assessment of the *Biakanja/Bily* policy analysis that matters." (Typed opn., 17.) Rather, the Court of Appeal held, the Right to Repair Act, Senate Bill 800, Civil Code section 895 et seq., reflected a legislative policy choice that design professionals should owe a duty of care to third parties.

Relying on provisions in the Act subjecting "design professionals" to liability for violation of its construction standards, the Court of Appeal concluded: "To the extent that a *Biakanja/Bily* policy analysis is not otherwise dispositive of the scope of duty owed by a design professionals [*sic*] to a homeowner/buyer, Senate Bill No. 800 is." (Typed opn., 21.)

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[3] The Court of Appeal reversed the judgment in its entirety, even though it acknowledged that the trial court properly sustained the demurrer to the cause of action for negligence per se. (Typed opn., 4, fn. 5.) It denied petitioners' petition for rehearing, which pointed out that inconsistency in its opinion.

LEGAL DISCUSSION

I. THE COURT OF APPEAL'S PUBLISHED OPINION CREATES A CONFLICT IN THE CASE LAW REGARDING WHETHER DESIGN PROFESSIONALS OWE A DUTY OF CARE TO PERSONS WITH WHOM THEY ARE NOT IN CONTRACTUAL PRIVITY.

In *Weseloh,* a design engineer was retained by a subcontractor to design two retaining walls in connection with the construction of an automobile dealership and, following the construction, inspected the walls at the subcontractor's request. The Court of Appeal held that because there was no privity of contract, the engineer was not liable to either the general contractor or the property owner for damages caused when the walls collapsed. The Court of Appeal here stated that *Weseloh* is distinguishable. (Typed opn., 7.) In fact, there are no meaningful distinctions between the facts in *Weseloh* and the facts of this case. The Court of Appeal's refusal to follow *Weseloh* creates a direct, irreconcilable conflict in the case law regarding the duty of architects and engineers to persons with whom they are not in privity.

The court in *Weseloh* relied on the duty analysis articulated by this court in *Biakanja* and *Bily*. In *Biakanja*, a notary public prepared a will for the plaintiff's brother through which the plaintiff was bequeathed all of his brother's property. The will was denied probate due to a lack of sufficient attestation and plaintiff received only a one-eighth intestate share of the brother's estate. The

plaintiff sued the notary public for negligence. This court delineated the following factors which must be balanced to determine whether a defendant will be held liable to a third person with whom it is not in privity: "the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, and the policy of preventing future harm." (*Biakanja, supra*, 49 Cal.2d at p. 650.)

Applying these factors, this court held the notary public was liable to the plaintiff because "the 'end and aim' of the transaction was to provide for the passing of [the brother's] estate to plaintiff. [Citation.] Defendant must have been aware from the terms of the will itself that, if faulty solemnization caused the will to be invalid, plaintiff would suffer the very loss which occurred." (*Biakanja, supra*, 49 Cal.2d at p. 650.) Moreover, "drafting and supervising the execution of a will . . . was an important transaction requiring specialized skill, and defendant was clearly not qualified to undertake it. His conduct was not only negligent but was also highly improper. He engaged in the unauthorized practice of the law [citations], which is a misdemeanor. . . . Such conduct should be discouraged and not protected by immunity from civil liability. . . ." (*Id.* at p. 651.)

In *Bily*, this court, applying the *Biakanja* factors, addressed whether a third party could maintain a negligence cause of action against a provider of professional services, and held that only those

persons with whom the professional had directly contracted, or, possibly, those who were express beneficiaries of the contract, were owed a duty of care. Thus, it held that an auditor did not owe a duty of care to investors with whom it had no contractual relationship in the preparation of an independent audit of a client's financial statements, even though it was foreseeable the investors would rely on the audit. This court identified "three central concerns" that militated against holding an auditor owed a duty of care to a third parties: (1) an auditor exposed to negligence claims from all foreseeable third parties would face potential liability far out of proportion to its fault; (2) "the generally more sophisticated class of plaintiffs in auditor liability cases . . . permits the effective use of contract rather than tort liability to control and adjust the relevant risks through 'private ordering'"; and (3) "the asserted advantages of more accurate auditing and more efficient loss spreading relied upon by those who advocate a pure foreseeability approach are unlikely to occur." (*Bily*, *supra*, 3 Cal.4th at p. 398.)

In *Weseloh*, *supra*, 125 Cal.App.4th, the Court of Appeal held that application of the *Biakanja/Bily* factors precluded imposition of liability on the design engineer in that case.

First, considering the extent to which the design of the walls was intended to affect the owners, the court in *Weseloh* noted that the engineer did not participate in the construction of the walls and there was no evidence of an intended beneficiary clause related to the design that identified the owners as the intended beneficiaries. To the extent the engineer's participation in the project would also

benefit the owners, it was only through the subcontractor. (*Weseloh, supra,* 125 Cal.App.4th at p. 167.)

Second, regarding forseeability, the court in *Weseloh* noted that under *Bily*, " '[f]oreseeability of injury . . . is but one factor to be considered in the imposition of negligence liability. Even when foreseeability was present, we have on several recent occasions declined to allow recovery on a negligence theory when damage awards threaten to impose liability out of proportion to fault or to promote virtually unlimited responsibility for intangible injury.' " (*Weseloh, supra,* 125 Cal.App.4th at p. 167, quoting *Bily, supra,* 3 Cal.4th at p. 398.) Although the owner in *Weseloh* sought property damages in addition to economic damages, and it is generally foreseeable that a design defect could result in the failure of a retaining wall, there was no evidence that the engineer's design was followed without alteration. (*Weseloh,* at pp. 167-168.)

Third, regarding the certainty that the owner sustained injury, and the closeness of the connection between the engineer's conduct and that injury, the Court of Appeal in *Weseloh* noted that there was no evidence the engineer either participated in or supervised any physical work in the construction of the retaining walls. "[R]ather, it appears [the engineer] provided engineering services akin to professional advice and opinion." (*Weseloh, supra,* 125 Cal.App.4th at pp. 168-169.)

Fourth, regarding "moral blame," the *Weseloh* court noted that the case was different from *Biakanja,* "where the injurious conduct at issue involved the unauthorized practice of law, a misdemeanor, by a notary public in preparing a will. This case does

not involve comparable ' "moral blame." ' " (*Weseloh, supra,* 125 Cal.App.4th at p. 169.)

Fifth, regarding the policy of preventing future harm, the *Weseloh* court concluded there is no support for "an argument that greater care in design engineering would result from expanded liability. . . . The [owners] are not without the remedy of pursuing claims for damages against their general contractor, [the general contractor] is not without the remedy of pursuing its claims for damages against its subcontractor. . . . [The design engineer], in turn, would be accountable to [the subcontractor] for any defects in the design that caused damage." (*Weseloh, supra,* 125 Cal.App.4th at p. 170.)

The *Weseloh* court then addressed the "three central concerns" on which this court premised its decision in *Bily*. Regarding the prospect of liability out of proportion to fault, the court in *Weseloh* noted that there was no evidence that the subcontractor even followed the engineer's design. "Yet, the Weseloh plaintiffs' second amended complaint alleged they sustained $6,000,000 in damages as a result of [the engineer's] conduct. This amount does not even include the unspecified damages prayed for [by the subcontractor's] second amended cross-complaint. The state of the record shows, if anything, the imposition of a duty of care on [the engineers] to the Weseloh plaintiffs and [the subcontractor] would expose [the engineer] to liability far out of proportion to fault." (*Weseloh, supra,* 125 Cal.App.4th at p. 171.)

Regarding the prospect of private ordering, the *Weseloh* court noted that because the engineer "had no part in the construction of

the retaining walls, [it], like the auditor in *Bily*, did not have complete control over the creation of the product—the retaining walls. [Moreover], there is no evidence in the record showing [the engineer's] design was used without alteration." (*Weseloh, supra*, 125 Cal.App.4th at pp. 171-172.)

Finally, regarding the effect of professional services liability to third persons, the court in *Weseloh* once again concluded there was no evidence favoring " 'the alleged tortfeasor over the alleged victim as an effective distributor of loss.' " (*Weseloh, supra*, 125 Cal.App.4th at p. 172, quoting *Bily, supra*, 3 Cal.4th at p. 405.)

The same considerations apply here to preclude the imposition of liability upon Skidmore and HKS:

- Like the engineer in *Weseloh*, Skidmore's and HKS's only role was to provide architectural and engineering services to the project's developer, not participate in the construction. And, as in *Weseloh*, the Association and its members were not intended beneficiaries of the contracts between the developer and Skidmore and HKS. To the contrary, the contracts make clear the absence of any privity of contract with the Association or its members. Although the Court of Appeal held that Skidmore and HKS could not contract away their tort duty of care (typed opn., 11), the absence of an intended beneficiary clause was one of the facts that informed the *Weseloh* court's conclusion that the engineer in that case did not owe a duty of care to the property owner. (*Weseloh, supra*, 125 Cal.App.4th at p. 167.)

- Just as there was no evidence in *Weseloh* that the engineer's design was used without alteration, the Association declined the trial court's invitation to amend its complaint to allege that Skidmore and HKS went beyond recommending changes and actually controlled whether or not the changes were implemented.

- The Court of Appeal held that the Association members could not engage in the same "private ordering" as the plaintiffs in *Bily, supra*, 3 Cal.4th at page 403, through their own investigation or audit. (Typed opn., 14-15, capitalization and emphasis omitted.) The court ignored the fact that the residential units here were marketed and sold as luxury condominiums, and that buyers, particularly those who purchase high-end properties, are represented by sophisticated real estate agents and brokers.

- Skidmore's and HKS's "moral blame" is certainly no greater than that of the engineers in *Weseloh*, whose allegedly defective design caused two retaining walls to collapse, creating the risk of death or serious personal injury.

- Just as in *Weseloh*, the imposition of a duty here is unlikely to result in greater care by architects. And, like the owners in that case, the Association is not without a remedy—it may pursue its claims against the developer of the Beacon who, unlike a design professional, may be held strictly liable in tort for damages caused by construction defects. (*Kriegler v. Eichler Homes, Inc.* (1969) 269 Cal.App.2d 224, 227-229; *Stearman v. Centex Homes* (2000) 78 Cal.App.4th 611, 617-623; *Huang v. Garner* (1984) 157 Cal.App.3d 404, 412, fn. 5 (*Huang*).)

- Because Skidmore and HKS had no role in the actual construction of the project, the liability asserted against them—in excess of $50 million dollars—is clearly out of proportion to their alleged fault.

Notwithstanding the undeniable factual parallels between *Weseloh* and this case, the Court of Appeal found that case "to provide limited guidance in the duty analysis here, and to be of little application to the facts before us." (Typed opn., 7.) According to the Court of Appeal, *Weseloh* was distinguishable because it "was

premised on the evidentiary record before the court and plaintiffs' failure to satisfy their burden in opposing the defendants' motion for summary judgment." (*Ibid.*) However, the primary evidentiary failure by the plaintiffs in *Weseloh* was their failure to demonstrate that the engineer had any involvement in the actual construction of the retaining walls or that the subcontractor followed its design specifications. (*Weseloh, supra,* 125 Cal.App.4th at pp. 171-172.)

This case presents the very same absence of evidence, making it an ideal vehicle for examining the conflicting results in this case and *Weseloh.* The trial court here gave the Association the opportunity to amend its complaint to allege facts demonstrating that Skidmore's and HKS's role went beyond the mere provision of professional advice to the developer and, in addition, involved control of construction. Because the Association declined the opportunity to amend, it must be presumed that its third amended complaint stated as strong a case as possible. (*Reynolds v. Bement* (2005) 36 Cal.4th 1075, 1091.) By declining the opportunity to amend, the Association effectively conceded that petitioners' role was no different than the engineer's role in *Weseloh.*

The Court of Appeal also relied on the *Weseloh* court's comment that its " 'holding should not be interpreted to create a rule that a subcontractor who provides only professional services can never be liable for general negligence to a property owner or general contractor with whom no contractual privity exists. There might be a set of circumstances that would support such a duty, but it is not presented here.' " (Typed opn., 7, quoting *Weseloh, supra,* 125 Cal.App.4th at p. 173.) However, assuming there may be such

circumstances, the circumstances here do not differ in any material respect from those in *Weseloh* and the Court of Appeal's reliance on that statement simply creates confusion and uncertainty regarding the circumstances under which design professionals may be liable to third parties.

In sum, the Court of Appeal's published opinion here creates a direct conflict in the case law regarding the liability of architects, engineers, and other design professionals whose role is limited to providing design recommendations to builders. As the Court of Appeal itself acknowledged, "[l]iability concerns may . . . limit the willingness of design professionals to undertake large residential construction projects at all." (Typed opn., 16.) At a minimum, until that conflict is resolved, the potential for the sort of liability that Skidmore and HKS face here will be reflected in higher insurance for design professionals, a cost that will ultimately be passed on to the public and homeowners in the form of higher housing costs.

II. THE RIGHT TO REPAIR ACT DID NOT ABROGATE COMMON LAW DEFENSES AVAILABLE TO DESIGN PROFESSIONALS, INCLUDING THE ABSENCE OF DUTY.

Implicitly acknowledging the lack of material distinctions between this case and *Weseloh*, the Court of Appeal "ultimately" rested its decision not on "our assessment of the *Biakanja/Bily* policy analysis," but instead on the Right to Repair Act, Senate Bill 800, Civil Code section 895 et seq. (Typed opn., 17.)

The Court of Appeal was mistaken. The Right to Repair Act abrogated this court's holding in *Aas* that homeowners may not recover damages in negligence from the builder of their homes for construction defects that have not yet caused either property damage or personal injury. In addition, the Act modified various statutes of limitation and provided for pre-litigation notice to "builder[s]" and a corresponding right of repair. (*Baeza v. Superior Court* (2011) 201 Cal.App.4th 1214, 1222-1223.)

The Court of Appeal purported to find support for its holding in two provisions of the Act, Civil Code sections 896 and 936. Those sections specify that, in addition to builders, the Act applies to general contractors, subcontractors, material suppliers, individual product manufacturers, and design professionals.

However, "[a]s a general rule '[u]nless expressly provided, statutes should not be interpreted to alter the common law, and should be construed to avoid conflict with common law rules. [Citation.] "A statute will be construed in light of common law decisions, unless it's language ' "clearly and unequivocally discloses an intention to depart from, alter, or abrogate the common-law rule concerning the particular subject matter . . . ." [Citations.]' [Citation.]" ' [Citation.] Accordingly, '[t]here is a presumption that a statute does not, by implication, repeal the common law. [Citation.] Repeal by implication is recognized only where there is no rational basis for harmonizing two potentially conflicting laws.' " (*California Assn. of Health Facilities v. Department of Health Services* (1997) 16 Cal.4th 284, 297.) Nothing in the text or legislative history of the Right to Repair Act indicates that the

Legislature intended to change any common law rule other than the "economic loss" rule established in *Aas, supra,* 24 Cal.4th at page 636. To the contrary, Civil Code section 936 provides in part:

> Each and every provision of the other chapters of this title apply to general contractors, subcontractors, material suppliers, individual product manufacturers, and design professionals to the extent that the general contractors, subcontractors, material suppliers, individual product manufacturers, and design professionals caused, in whole or in part, a violation of a particular standard *as the result of a negligent act or omission or a breach of contract.* In addition to the affirmative defenses set forth in Section 945.5, a general contractor, subcontractor, material supplier, design professional, individual product manufacturer, or other entity *may also offer common law and contractual defenses* as applicable to any claimed violation of a standard . . . . *Nothing in this title modifies the law pertaining to joint and several liability for* builders, general contractors, subcontractors, material suppliers, individual product manufacturer, and *design professionals* that contribute to any specific violation of this title.[4]

(Emphases added.)

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[4] Civil Code section 936 also states that "the *negligence standard* in this section does not apply to any general contractor, subcontractor, material supplier, individual product manufacturer, or design professional with respect to claims for which strict liability would apply." (Emphasis added.) Because design professionals are not subject to strict liability (*Huang, supra,* 157 Cal.App.3d at p. 412, fn. 5), this portion of section 936 has no application to them, other than to confirm that their liability must be measured by a "negligence standard."

By conditioning a design professional's liability on a negligent act or omission, preserving all available common law defenses, and stating that nothing in the Act modifies the law pertaining to a design professional's joint and several liability, this statutory language refutes the Court of Appeal's conclusion that the Right to Repair Act establishes liability that would not otherwise exist under the *Biakanja/Bily* duty analysis. As the Court of Appeal in *Holloway*, *supra*, 40 Cal.App.3d at p. 902, explained:

> The elements of a cause of action for professional negligence are . . . well defined. These ingredients are: (1) the *duty* of the professional to use such skill, prudence and diligence as other members of this profession commonly possess and exercise; (2) *breach of* that *duty*; (3) a *proximate causal connection* between the negligent conduct and the resulting injury; and (4) actual loss or *damage* resulting from the professional negligence. [Citations.] When these elements coexist, they constitute actionable negligence. On the other hand, absence of, or failure to prove, any of them is fatal to recovery. This applies especially to the all important element of duty.

Thus, a design professional causes "a violation of a particular standard" in the Right to Repair Act "as a result of negligent act or omission" only if it owes a duty to the plaintiff. If the *Biakanja/Bily* policy analysis establishes that no duty is owed, one of the essential elements of a negligent act or omission is absent and the design professional is not liable under either the common law or the Right to Repair Act.

According to the Court of Appeal, the legislative history of Senate Bill No. 800 showed "that the Legislature assumed that

existing law imposed third party liability upon the design professionals." (Typed opn., 19.) It relied on a statement in the bill analysis prepared for both the Senate and Assembly that existing law "[p]rovides that a construction defect action may be brought against any person who develops real property or performs or furnishes the design, specifications, surveying, planning, testing, or observation of construction or construction of an improvement to real property." (Typed opn., 19-20, quoting Assem. Com. on Judiciary, analysis of Sen. Bill No. 800 (2001-2002 Reg. Sess.) as amended Aug. 26, 2002, p. 2 and Sen. Com. on Judiciary, analysis of Sen. Bill No. 800 (2001-2002 Reg. Sess.) as amended Aug. 28, 2002, pp. 1-2.) However, the fact that a construction defect action could be brought against a design professional under some circumstances before adoption of the Right to Repair Act does not mean that a court could ignore the *Biakanja/Bily* duty analysis. Certainly, there were circumstances where that analysis would not preclude an action against a design professional. For example, a contract between a design professional and a developer could make a homeowner's association an express third-party beneficiary. In addition, homeowners, or a homeowners association, could hire a design professional directly. And, the *Biakanja/Bily* analysis would not preclude an action against a design professional for negligent misrepresentation. Moreover, if, unlike Skidmore, HKS, and the engineer in *Weseloh*, a design professional was actively involved in the construction itself, as opposed to merely making design recommendations to a developer, application of the *Biakanja/Bily* duty analysis might result in liability.

In sum, the Court of Appeal's conclusion that the Right to Repair Act creates a duty on the part of design professionals that would not otherwise exist under the *Biakanja/Bily* policy analysis misreads the text and legislative history of that Act. Its interpretation of the Act threatens serious repercussions for all design professionals. The opinion merits review by this court.

CONCLUSION

For the foregoing reasons review should be granted.

January 22, 2013

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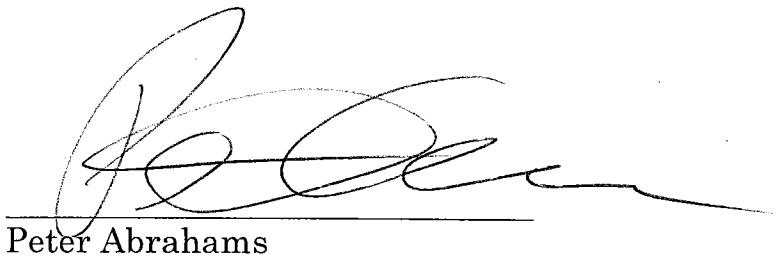
CERTIFICATE OF WORD COUNT
(Cal. Rules of Court, rule 8.504(d)(1).)

The text of this petition consists of 5,390 words as counted by the Microsoft Word version 2007 word processing program used to generate the petition.

Dated: January 22, 2013



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Filed 12/13/12

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

BEACON RESIDENTIAL COMMUNITY ASSOCIATION, Plaintiff and Appellant, v. SKIDMORE, OWINGS & MERRILL LLP et al., Defendants and Respondents.	A134542 (San Francisco City and County Super. Ct. No. CGC-08-478453)

Skidmore, Owings & Merrill LLP (SOM) and HKS, Inc. (individually & doing business as HKS Architects, Inc.; hereafter HKS) are design professionals. SOM and HKS (collectively Respondents) provided architectural and engineering services, as well as construction administration and construction contract management, for the Beacon Residential Condominiums—595 condominium units and associated common areas located at 250 and 260 King Street, San Francisco, California (the Project). Appellant Beacon Residential Community Association (BRCA), the homeowners' association that manages the Project, sued several defendants, including Respondents for alleged construction defects. (Civ. Code, § 1368.3, subd. (a).)[1] BRCA asserted that Respondents had a duty of care to it and to future residents in design of the Project, and that their professional negligence caused the Project to violate residential construction standards established by Senate Bill No. 800 (2001–2002 Reg. Sess.) (§§ 895–945.5; hereafter Senate Bill No. 800).

[1] All further statutory references are to the Civil Code, unless otherwise indicated.

The trial court sustained demurrers, with partial leave to amend,[2] to a third amended complaint as to both SOM and HKS on the ground that they owed no duty to BRCA or its members, under either common law or Senate Bill No. 800. We disagree and reverse.

I. FACTUAL AND PROCEDURAL BACKGROUND[3]

Respondents were the architects for the Project. As detailed in the third amended complaint,[4] their involvement included architecture, landscape architecture, and engineering (civil, mechanical, structural, soils, electrical), in addition to construction administration and construction contract management. BRCA alleged multiple defects in the Project caused by negligent architectural and engineering design, observation, and construction work performed by Respondents, including water infiltration, inadequate fire separations, structural cracks and other life safety hazards. One of the defects alleged is "solar heat gain," whereby the condominium units are rendered uninhabitable, unhealthy, and unsafe during certain periods due to excessively high temperatures. The solar heat gain is purportedly due to Respondents' approval of the substitution of less expensive, and ultimately nonfunctional, windows, as well as a design lacking adequate ventilation within the residential units. Respondents are named in three causes of action:

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[2] BRCA asserts in its briefing that the demurrers were sustained without leave to amend. That is not entirely correct. The court sustained demurrers to the first and second causes of action without leave to amend, and the demurrer to the fifth cause of action with leave to amend. BRCA declined to amend, and judgments of dismissal were entered on December 15, 2011.

[3] Since the matter comes to us from dismissal on demurrer, we take the facts from the operative third amended complaint, "treat[ing] the demurrer as admitting all material facts properly pleaded," but not "assum[ing] the truth of contentions, deductions or conclusions of law." (*Aubry v. Tri–City Hospital Dist.* (1992) 2 Cal.4th 962, 967 (*Aubry*); *Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126.)

[4] BRCA filed a first amended complaint on June 1, 2010. Respondents demurred. The trial court sustained the demurrer with leave to amend. A second amended complaint, filed on March 17, 2011, was superseded with the third amended complaint, filed April 27, 2011. The third amended complaint identifies approximately 40 named defendants, including the original developer, a subsequent developer, developer-related marketing entities, the general contractor, several subcontractors, as well as Respondents.

the first cause of action, for "Civil Code Title 7 – Violation of Statutory Building Standards for Original Construction"; the second cause of action, for "Negligence Per Se in Violation of Statute"; and the fifth cause of action, for "Negligence of Design Professionals and Contractors."

Respondents demurred to the third amended complaint, arguing that, under *Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370 (*Bily*) and *Weseloh Family Ltd. Partnership v. K.L. Wessell Construction Co., Inc.* (2004) 125 Cal.App.4th 152 (*Weseloh*), they owed no duty of care to BRCA or its members, and consequently could not be liable. The trial court agreed. In sustaining the demurrers, the court took the view that liability could not be premised on negligent design, and that BRCA was required to show that the design professionals had "control" in the construction process, assuming a role beyond that of providing design recommendations to the owner. The court found that "[t]he allegations do not show that [Respondents] went beyond the typical role of the architect, which is to make recommendations to the owner. Even if [Respondents] initiated the substitutions, changes, and other elements of design that [BRCA] alleges to be the cause of serious defects, so long as the final decision rested with the owner, there is no duty by [Respondents] to the future condominium owners, in the Court's view." BRCA prepared and submitted an order to the Court on the demurrer, and the judgments issued. A timely notice of appeal was filed on January 20, 2012.

II. DISCUSSION

A. *Standard of Review*

On appeal from an order dismissing an action after the sustaining of a demurrer, we independently review the pleading to determine whether the facts alleged state a cause of action under any possible legal theory. (*McCall v. PacifiCare of Cal., Inc.* (2001) 25 Cal.4th 412, 415; *Aubry, supra,* 2 Cal.4th at p. 967.)

B. *Design Liability Under Common Law*

BRCA's second and fifth causes of action sought to impose liability on Respondents on negligence theories.[5] "The threshold element of a cause of action for negligence is the existence of a duty to use due care toward an interest of another that enjoys legal protection against unintentional invasion. [Citations.] Whether this essential prerequisite to a negligence cause of action has been satisfied in a particular case is a question of law to be resolved by the court. [Citation.] [¶] A judicial conclusion that a duty is present or absent is merely ' "a shorthand statement . . . rather than an aid to analysis. . . . '[D]uty,' is not sacrosanct in itself, but only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection." ' [Citations.] 'Courts, however, have invoked the concept of duty to limit generally "the otherwise potentially infinite liability which would follow from every negligent act . . . ." ' [Citations.]" (*Bily, supra,* 3 Cal.4th at p. 397.) A duty of care may arise through statute, contract, the general character of the activity, or the relationship between the parties. (*J'Aire Corp. v. Gregory* (1979) 24 Cal.3d 799, 803.) "The determination whether in a specific case the defendant will be held liable to a third person not in privity is a matter of policy and involves the balancing of various factors, among which are the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, and the policy of preventing future harm. [Citations.]" (*Biakanja v. Irving* (1958) 49 Cal.2d 647, 650–651 (*Biakanja*).)

In *Biakanja, supra,* 49 Cal.2d 647, the Court held that a defendant's negligent performance of a contractual obligation resulting in damage to the property or economic

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[5] The second cause of action alleges negligence per se based on a claim that the design caused the Project to violate residential standards for light and ventilation under Title 24 of the California Code of Regulations. The negligence per se doctrine actually relates to the burden of proof. (*Alarid v. Vanier* (1958) 50 Cal.2d 617; Evid. Code, § 669.)

interests of a person not in privity could support recovery if the defendant was under a duty to protect those interests. The court articulated a case-by-case test for identifying such a duty. (See *Aas v. Superior Court* (2000) 24 Cal.4th 627, 643–644 (*Aas*), superseded in other respects by statute.) The court permitted recovery in *Biakanja* by the intended beneficiary under a will prepared for the decedent by the defendant notary public, but who then failed to have it properly attested. In concluding the notary owed a duty to an intended beneficiary not to mishandle the will's drafting and solemnization, the Supreme Court attached particular importance to the fact that the " ' "end and aim" ' of the notary's service to the testator was 'to provide for the passing of [the] estate to [the] plaintiff' [citation], and to the high impropriety of, and need to prevent, the unlicensed practice of law [citation]." (*Aas*, at p. 644; *Biakanja,* at p. 651.)

In *Bily, supra,* 3 Cal.4th 370, the Supreme Court considered whether an accounting professional's duty of care in preparing an independent audit of a client's financial statements extended to persons other than the client, in the context of the client's public stock offering. A jury returned a verdict in favor of the investor plaintiffs on a claim of professional negligence. The jury was instructed that " '[a]n accountant owes a further duty of care to those third parties who reasonably and foreseeably rely on an audited financial statement prepared by the accountant. A failure to fulfill any such duty is negligence.' " (*Bily,* at p. 379.) The court reversed the judgment, employing the "checklist of factors" articulated in *Biakanja* to "assess[] legal duty in the absence of privity of contract between a plaintiff and a defendant." (*Bily,* at p. 397; *id.* at pp. 407, 416.) The *Bily* court again emphasized the important role of policy factors in determining negligence, observing that "mere presence of a foreseeable risk of injury to third persons [is not] sufficient, standing alone, to impose liability for negligent conduct" and that " '[p]olicy considerations may dictate a cause of action should not be sanctioned no matter how foreseeable the risk . . . for the sound reason that the consequences of a negligent act must be limited in order to avoid an intolerable burden on society.' " (*Id.* at p. 399.) Additional considerations the court found pertinent in limiting the auditor's liability in *Bily* were: (1) potential imposition of liability out of proportion to fault,

"rais[ing]the spectre of vast numbers of suits and limitless financial exposure" (*id.* at p. 400, fn. omitted); (2) the ability of third parties in an audit negligence case to " 'privately order' " the risk of inaccurate financial reporting through alternative contractual arrangements (*id.* at p. 403); and (3) the effect on auditors of third party liability, in light of the relative sophistication of third parties who lend and invest based on audit reports—i.e., "whether auditors are the most efficient absorbers of the losses from inaccuracies in financial information" (*id.* at p. 405, fn. omitted). In limiting general negligence liability to the direct clients of the auditor, the Supreme Court observed that "judicial endorsement of third party negligence suits against auditors limited only by the concept of forseeability raises the spectre of multibillion-dollar professional liability that is distinctly out of proportion to: (1) the fault of the auditor (which is necessarily secondary and may be based on complex differences of professional opinion); and (2) the connection between the auditor's conduct and the third party's injury (which will often be attenuated by unrelated business factors that underlie investment and credit decisions). [¶] As other courts and commentators have noted, such disproportionate liability cannot fairly be justified on moral, ethical, or economic grounds. [Citations]." (*Id.* at pp. 401–402.)

The trial court also relied on *Weseloh, supra,* 125 Cal.App.4th 152, in sustaining the demurrers in favor of the design professionals here. In *Weseloh*, the defendant engineers prepared the design for a retaining wall for a commercial property on behalf of a subcontractor. They were sued by the property owner and by the general contractor when the wall failed. The trial court granted motions for summary judgment on the ground the design engineers did not owe a duty of care to the property owner or to the general contractor. (*Id.* at p. 158.) Considering the case to be one of first impression, the Fourth District Court of Appeal applied the *Biakanja* and *Bily* factors and affirmed, finding that the plaintiffs had failed to produce evidence to satisfy their burden to prove the existence of a duty or of a triable issue of material fact relevant to the duty issue. (*Weseloh,* at pp. 167–174.) "With regard to the *Biakanja* factors, while it was foreseeable that design defects could cause a retaining wall to fail, the . . . plaintiffs . . . failed to

produce any evidence showing (1) [defendants'] design was primarily intended to affect the . . . plaintiffs . . . ; (2) the closeness of the . . . plaintiffs' injury to [defendants'] conduct; (3) any moral blame implicated by [defendants'] conduct; or (4) how, by imposing expanded liability on design engineers under similar circumstances, future harm would be prevented. [¶] With regard to the *Bily* factors, the imposition of such a duty would result in liability out of proportion to fault.[6] With regard to private ordering, the . . . plaintiffs could have required subcontractors to name them as intended beneficiaries of their subcontracts. The . . . plaintiffs could also have required subcontractors to name them as additional insureds in their insurance policies." (*Id.* at pp. 172–173.)

It is important to note that the holding in *Weseloh* was premised on the evidentiary record before the court and plaintiffs' failure to satisfy their burden in opposing the defendants' motion for summary judgment. The court limited its holding to the facts before it, stating that "[o]ur holding should not be interpreted to create a rule that a subcontractor who provides only professional services can never be liable for general negligence to a property owner or general contractor with whom no contractual privity exists. There might be a set of circumstances that would support such a duty, but it is not presented here." (*Weseloh, supra,* 125 Cal.App.4th at p. 173.) We therefore find *Weseloh* to provide limited guidance in the duty analysis here, and to be of little application to the facts before us. No California court has yet extended *Weseloh* to categorically eliminate negligence liability of design professionals to foreseeable purchasers of residential construction as Respondents seem to urge, and, as we discuss *post*, we believe different policy considerations are necessarily part of the calculus in this context.

In considering liability of design professionals to third party purchasers of residential construction, we do not chart unexplored territory or view this case as truly a

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[6] The defendant engineers were paid a fee of no more than $2,200, the damages claimed exceeded $6,000,000, and the evidence failed to show that the subcontractor had even followed the design specifications. (*Weseloh, supra,* 125 Cal.App.4th at p. 171.)

matter of first impression. The issue, as we view it, is not whether a design professional owes a duty of care to these purchasers, but the scope of that duty.

" '[A]n architect who plans and supervises construction work, as an independent contractor, is under a duty to exercise ordinary care in the course thereof for the protection of any person who foreseeably and with reasonable certainty may be injured by his failure to do so . . . .' [Citations.]" (*Mallow v. Tucker, Sadler & Bennett, Architects etc., Inc.* (1966) 245 Cal.App.2d 700, 703; see also 6 Witkin, Summary of Cal. Law (10th ed. 2005) Torts, § 996, p. 260 [same]; 11 Miller & Starr, Cal. Real Est. (3d ed. 2011) §§ 29:32 & 29:37, pp. 29-172, 29-191 [scope of architect's or engineer's duty to third parties not in privity of contract determined by balancing several factors]; 6 Cal.Jur.3d (2011) Architects, Etc., § 35, p. 420 ["architect, in his or her capacity as an independent contractor, can be held liable to third persons for negligence in the preparation of plans and specifications" (fn. omitted); damages recoverable when "a third person within the area of foreseeable risk is injured or his or her property damaged as a result of the defective design"].) In *Huber, Hunt & Nichols, Inc. v. Moore* (1977) 67 Cal.App.3d 278, 299, the court considered it "now well settled that . . . the architect may be sued for negligence in the preparations of plans and specifications either by his client or by third persons . . . ."

Our Supreme Court first recognized a remedy in the law of negligence for construction defects causing property damage, as opposed to personal injury, in *Stewart v. Cox* (1961) 55 Cal.2d 857 (liability of subcontractor to owner), relying on the principles enunciated in *Biakanja.* (*Biakanja, supra,* 49 Cal.2d at p. 650; see also *Sabella v. Wisler* (1963) 59 Cal.2d 21 [builder liable for negligent construction in house offered for sale to the public].) In *Cooper v. Jevne* (1976) 56 Cal.App.3d 860 (*Cooper*), the trial court sustained demurrers without leave to amend to negligence claims by purchasers of condominiums in a 100-unit residential project against defendants including the architects for the project. (*Id.* at p. 864.) As here, the plaintiffs alleged that the architects prepared and furnished to the builder-seller, architectural drawings and plans and specifications for the construction and other improvements within the project and acted as supervising

architects in the construction of the buildings within the project. The plaintiffs further alleged that the architects were under a duty to exercise ordinary care as architects to avoid reasonably foreseeable injury to purchasers, that they failed to perform this duty, and that the architects knew or should have foreseen with reasonable certainty that purchasers would suffer the monetary damages alleged if they failed to perform this professional duty. (*Id.* at p. 867.) Albeit without extensive analysis of the individual policy factors enunciated, the Second District Court of Appeal found "nothing in the . . . test enunciated in [*Biakanja*] that would lead us to refrain from imposing liability for economic loss to the purchasers upon the architects for the latter's alleged negligence in the rendition of their professional services." (*Cooper,* at p. 868.) Reversing, the court held that "the architects' duty of reasonable care in the performance of their professional services is logically owed to those who purchased the allegedly defectively designed and built condominiums within the . . . project." (*Id.* at p. 869.)

Eight years after *Bily*, our Supreme Court in *Aas* considered the scope of tort remedies in negligence available for alleged deviations from the applicable building codes or industry standards. (*Aas, supra,* 24 Cal.4th at p. 635.) While announcing a rule precluding damage recovery for purely economic losses, the court reiterated that builders of homes had a duty independent of contractual obligations and arising from principals of tort law supporting negligence for construction defects causing property damage. (*Id.* at p. 643.) While not separately addressing the tort liability of design professionals, the court acknowledged *Cooper* as a case "[f]ocusing on the conduct of persons involved in the construction process" and finding "a remedy in the law of negligence" for construction defects that cause property damage or personal injury. (*Id.* at pp. 635–636 & fn. 4.) Although distinguishing *Cooper*, the Supreme Court did not disapprove it. (*Aas,* at pp. 647–648 [finding that the *Cooper* court's ruling on liability for economic loss was dictum].)[7] *Aas* did not question or repudiate the established rule that "[h]ome buyers

[7] We also note that *Cooper, supra,* 56 Cal.App.3d 860, continues to be viewed as relevant authority in treatises and compendia. (6 Witkin, Summary of Cal. Law (10th ed. 2005) Torts, § 996, p. 260 [duty of architects to exercise due care]; 6 Cal.Jur.3d (2011)

in California already enjoy protection under . . . the law of negligence and strict liability for acts and omissions that cause property damage or personal injury . . . ." (*Aas,* at pp. 652–653.)

As we discuss *post*, the Legislature abrogated the *Aas* economic loss rule in enacting Senate Bill No. 800. The question then is whether the common law policy rationale articulated in *Cooper* for imposing third party tort liability on design professionals remains valid. We believe it does. Since *Cooper* preceded *Bily,* and did not analyze specific application of the *Biakanja* policy factors in assessing the scope of duty owed by design professionals to third parties, we do so now.

1. *Extent to Which the Transaction Was Intended to Affect the Plaintiff*

In *Aas*, the Supreme Court "assume[d] for argument's sake that the conduct of a person engaged in construction is 'intended to affect' all foreseeable purchasers of the property. [Citations.]" (*Aas, supra*, 24 Cal.4th at pp. 646–647.) A design professional providing plans and specifications for residential construction cannot be unaware of the fact that his or her work will have a direct bearing on the integrity, safety and habitability of property intended for residential occupancy.

In this case, Respondents attempted to limit their liability by providing in the HKS contract with the developer that: "Except as set forth in this section 12.1, or as expressly agreed in writing by Architect and Owner, no person other than the parties or their successors and assigns shall be a third-party beneficiary of the obligation contained in the Agreement or have the right to enforce any of its provisions. It is understood that (i) Owner reserves the right to sell portions of the Project to one or more condominium associations or purchasers during or after the conclusion of the Project; (ii) Architect is solely responsible to Owner and not to such condominium associations or purchasers for performance or Architect's obligations under this Agreement; and (iii) no such condominium association or purchaser shall be a third-party beneficiary or third-party

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Architects, Etc., § 35, pp. 420–421 [liability to third persons]; Acret, Architects and Engineers (4th ed. 2012) § 7:3 [third party recovery of economic damages].)

obligee with respect to the Architect's obligations under this Agreement." This intended limitation, however, only serves to emphasize the fact that Respondents were more than well aware that future homeowners would necessarily be affected by the work that they performed. And, in any event, liability to foreseeable residential purchasers is determined by the scope of the duty of professional care, not whether those purchasers are, or are not, third party beneficiaries under contract. While a duty of care arising from contract may perhaps be contractually limited, a duty of care imposed by law cannot simply be disclaimed.

2. *Foreseeability of Harm to the Plaintiff*

Foreseeability as to duty is based on whether an event's nature might generally give rise to a foreseeable injury. (*Laabs v. Southern California Edison Co.* (2009) 175 Cal.App.4th 1260, 1272.) BRCA here alleges that Respondents provided architectural and a variety of engineering services, as well as providing construction administration and construction contract management. Architects and engineers are subject to licensure and registration. (See Bus. & Prof. Code, §§ 5500 et seq., 6700 et seq.) This is because the legislature has determined that it is "injurious to the public interest to allow unskilled and unqualified persons to prepare plans and specifications for the erection of buildings, owing to the dangers which might arise from defects in plans or construction." (*Binford v. Boyd* (1918) 178 Cal. 458, 462.) "The services of experts are sought because of their special skill." (*Gagne v. Bertran* (1954) 43 Cal.2d 481, 489.) Regulated design professionals such as architects and civil engineers are required to sign and affix their stamps to building plans and specifications as evidence of their responsibility for such documents. (See, e.g., Bus. & Prof. Code, §§ 5536.1 [architectural plans], 6735 [civil engineering plans, calculations and specifications].) Professional skill is required to prepare the design documents, and failure to exercise reasonable professional care in the design of residential construction presents readily apparent risks to the health and safety of the ultimate occupants.

3. *Degree of Certainty that the Plaintiff Suffered Injury*

BRCA alleges that, as a consequence of defective work performed by Respondents, there are structural cracks in the project, water infiltration, and life safety hazards. It also contends that design defects render the units uninhabitable, unhealthy, and unsafe during certain periods. For the purposes of analysis here, we necessarily accept those allegations as true.[8] (*Aubry, supra,* 2 Cal.4th at p. 967.)

4. *Closeness of Connection Between Defendant's Conduct and the Injury Suffered*

The pleading allegations assert that the significant defects at issue in the Project resulted directly from the departure by Respondents from the professional standards of care. The fact that others are alleged to have contributed to the injury should not serve to limit the responsibility of those whose training and experience uniquely qualify them to make design decisions, and whose expertise the builder presumptively relies upon in implementing those decisions.[9]

5. *The Moral Blame Attached to Defendant's Conduct*

As the court noted in *Aas*, "the degree of blame would appear to depend upon the nature of the deviation." (*Aas, supra*, 24 Cal.4th at p. 647.) Less moral blame would attach to defects which do not present a risk to health or safety, or to structural integrity. For example, BRCA's third amended complaint alleges defects in specifications for certain Project mechanical components and ventilation issues in nonresidential areas. But

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[8] We do not suggest that every defect alleged by BRCA is necessarily actionable, and as we discuss *post*, Senate Bill No. 800 may serve to limit the scope of claims. (See § 896 ["claimant's claims or causes of action shall be limited to violation of, the following standards, except as specifically set forth in this title"].)

[9] Citing the "value engineering" decisions made in selection of the Project windows (purportedly creating the "heat gain" problems), Respondents contend that recognition of liability to third party purchasers would conflict with their duty of loyalty to their client owner, citing *Ratcliff Architects v. Vanir Const. Management* (2001) 88 Cal.App.4th 595, 606. We do not see how the public policy considerations presented in that case, an action between a construction manager and the architect, would apply here, or how requiring a design consistent with architectural and statutory standards is in conflict with the duty already owed by an architect to the client.

the pleadings also identify items such as cracking in concrete structural elements of the Project, water penetration, and ventilation issues affecting the safety and habitability of the residential areas. Unlike the circumstances in *Aas*, where the plaintiffs failed to show that any of the alleged defects actually posed a serious risk of harm to person or property (*id.* at p. 647), BRCA alleges here significant failures in Project components specified in the design, as well as deficiencies in design, resulting in actual property damage and health safety risks.

6. *The Policy of Preventing Future Harm*

The policy of preventing future harm weighs heavily in favor of recognizing liability. As Justice Traynor observed, "the usual buyer of a home is ill-equipped with experience or financial means to discern . . . structural defects. [Citation.] Moreover a home is not only a major investment for the usual buyer but also the only shelter he has. Hence it becomes doubly important to protect him against structural defects that could prove beyond his capacity to remedy." (*Connor v. Great Western Sav. & Loan Assn.* (1968) 69 Cal.2d 850, 867.)

Like our colleagues in *Cooper*, we find nothing in the *Biakanja* factors that would preclude imposition of liability upon the architects to purchasers of residential construction for alleged negligence in the rendition of professional services. (*Cooper*, *supra*, 56 Cal.App.3d at p. 868.) We likewise find nothing in the policy considerations later set forth in *Bily* that would suggest a different result. Those considerations are: (1) potential imposition of liability out of proportion to fault; (2) the possibility of private ordering of the risk; and (3) the effect on the defendants of third party liability. (*Bily, supra*, 3 Cal.4th at pp. 400–405.)

a. *Liability Out of Proportion to Fault*

Construction defect litigation typically involves a multitude of defendants who participated in the development and construction process. For this reason, such litigation is at least provisionally considered to be complex litigation. (Cal. Rules of Court, rule 3.400(c)(2).) Here, in addition to respondents, BRCA's third amended complaint named approximately 40 defendants, including the developers, the general contractor,

and several subcontractors, all of whom were alleged to have been responsible in some manner for the defects and damages alleged. Multiple cross-complaints for contribution and indemnity were filed, including a cross-complaint by the developer entity against Respondents. Even after the demurrers were sustained in this matter, Respondents remained in the case on the cross-complaints. In other words, Respondents' comparative fault for any tort damages that BRCA is able to ultimately prove, and their obligation to indemnify other responsible parties for a portion of the loss—or be indemnified by those parties—are issues that will necessarily be litigated whether or not there is direct liability to the purchasers. (See *Greystone Homes, Inc. v. Midtec, Inc.* (2008) 168 Cal.App.4th 1194, 1208 (*Greystone*) [discussing application of the doctrine of comparative equitable indemnity in a construction defect case to " 'allow[] loss to be apportioned between plaintiff and defendants according to their respective responsibility for the loss' "].) Moreover, unlike the unknowable universe of potential investor plaintiffs the auditors faced in *Bily*, any liability Respondents face is limited to the purchaser/owners of the 595 condominium units, a defined risk potential known when Respondents designed the Project.

There appears little likelihood that the design professionals could be held responsible for a disproportionate share of any loss to which they contributed. And unlike the engineer in *Weseloh*, Respondents here were allegedly paid over $5,000,000 for their work on the Project, not an insignificant sum and presumably reflective of the extent their work product was incorporated into the Project.

b. *Private Ordering*

In *Bily*, the court distinguished the class of third party investors, creditors, and others who read and rely on audit reports and financial statements from ordinary consumers. (*Bily, supra*, 3 Cal.4th at p. 403.) The court noted that, unlike the " 'presumptively powerless consumer' " in product liability cases, generally more sophisticated investor/creditor plaintiffs have the ability to " 'privately order' the risk of inaccurate financial reporting," either through his/her own investigation or audit, or by contractual arrangements with the client. (*Ibid.*) "As a matter of economic and social

policy, third parties should be encouraged to rely on their own prudence, diligence, and contracting power, as well as other informational tools. This kind of self-reliance promotes sound investment and credit practices and discourages the careless use of monetary resources. If, instead, third parties are simply permitted to recover from the auditor for mistakes in the client's financial statements, the auditor becomes, in effect, an insurer of not only the financial statements, but of bad loans and investments in general." (*Ibid.*, fn. omitted.)

A purchaser of residential housing is certainly far more fairly characterized as a "consumer" and residential housing as a "product," and numerous cases have done so.[10] In *Aas*, the Supreme Court cited with approval *Kriegler's* explanation of the relevant policy considerations, "the average home buyer's reliance on the builder's skill and implied representations of fitness, and the public interest in assigning the cost of foreseeable injuries to the developer who created the danger. [Citations.]" (*Aas, supra,* 24 Cal.4th at p. 639.)

While the individuals and entities participating in the development process may have the ability to privately order allocation of liability among themselves by contract or through structuring of insurance coverage,[11] the buyer does not. Thus, in contrast to *Bily*,

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[10] The "product" analogy for residential housing was first applied in *Kriegler v. Eichler Homes, Inc.* (1969) 269 Cal.App.2d 224 (*Kriegler*). The court held that a residential builder could be subject to strict product liability for consequential property damage stating that in "today's society, there are no meaningful distinctions between [the] mass production and sale of homes and the mass production and sale of automobiles and that the pertinent overriding policy considerations are the same." (*Id.* at p. 227; see also *Stearman v. Centex Homes* (2000) 78 Cal.App.4th 611, 617–623 [strict product liability of residential builder for defective foundation causing physical damage to other building components].)

[11] For example, insurance coverage for large construction projects can sometimes be obtained under comprehensive "wrap-up" insurance policies covering not only the homebuilder, but also the contractor, subcontractors, architects, engineers and other consultants on a project, for construction defect liability and other risks. (Ins. Code, § 11751.82.)

it is the alleged tortfeasor(s), and not the home buyers who are capable of being more "effective distributor[s] of loss." (*Bily, supra*, 3 Cal.3d at p. 405.)

c. *Effect of Third Party Liability*

The final factor seeks to establish the policy balance between, on the one hand, efficient loss spreading, and, on the other, the potential for dislocation of resources. (*Bily, supra,* 3 Cal.3d at p. 404.) In *Bily*, the court questioned the assertion that liability would "deter auditor mistakes, promote more careful audits, and result in a more efficient spreading of the risk of inaccurate financial statements." (*Ibid.*) The court opined that the economic result of unlimited negligence liability for auditors "could just as easily be an increase in the cost and decrease in the availability of audits and audit reports with no compensating improvement in overall audit quality. [Citations.]" (*Id.* at pp. 404–405.) Citing a legal economist, the court observed that " '[t]he deterrent effect of liability rules is the difference between the probability of incurring liability when performance meets the required standard and the probability of incurring liability when performance is below the required standard. Thus, the stronger the probability that liability will be incurred when performance is adequate, the weaker is the deterrent effect of liability rules.' " (*Id.* at p. 404, quoting Fischel, *The Regulation of Accounting: Some Economic Issues* (1987) 52 Brooklyn L.Rev. 1051, 1055.) These concerns have little application to the liability of a design professional to an ultimate purchaser. The design professionals will be liable in negligence only if they fail to meet requisite professional standards of care, and will not incur liability "when performance meets the required standard."[12]

We do not ignore the obvious fact that any rule of liability may negatively impact the cost of housing. (See *Aas, supra*, 24 Cal.4th at p. 649.) Liability concerns may also limit the willingness of design professionals to undertake large residential construction projects at all. (See Hannah & Van Atta, Cal. Common Interest Developments: Law & Practice (2012) § 14:36, pp. 897–898.)

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[12] "Infallibility" is not required, only "reasonable care and competence." (*Gagne v. Bertran, supra,* 43 Cal.2d at p. 489.)

But ultimately, it is not our assessment of the *Biakanja/Bily* policy analysis that matters. In *Aas*, the Supreme Court, considering the many social policy implications, concluded that a judicially created rule of tort liability for construction defects "not caus[ing] harm of the sort traditionally compensable in tort" was not justified, and that such determinations were better left to the Legislature. (*Aas, supra*, 24 Cal.4th at p. 652.) The Legislature has since clearly expressed its view of those policy choices in enactment of Senate Bill No. 800.

C. *Construction Defect Litigation Under Senate Bill No. 800*[13]

BRCA's first cause of action alleged violation of statutory construction defect standards under Senate Bill No. 800. In 2002, the Legislature enacted Senate Bill No. 800, also known as the Right to Repair Act, "to 'specify the rights and requirements of a homeowner to bring an action for construction defects, including applicable standards for home construction, the statute of limitations, the burden of proof, the damages recoverable, a detailed prelitigation procedure, and the obligations of the homeowner.' (Legis. Counsel's Dig., Sen. Bill No. 800 (2001–2002 Reg. Sess.).)" (*Anders v. Superior Court* (2011) 192 Cal.App.4th 579, 585.) Senate Bill No. 800 was enacted by the legislature, in part, as a response to the holding in *Aas* that homeowners may not recover damages in negligence from the builder of their homes for existing construction defects that had not yet caused either property damage or personal injury. (*Greystone, supra,* 168 Cal.App.4th at p. 1202.) Senate Bill No. 800 abrogates the economic loss rule, legislatively superseding *Aas*, and permits recovery of economic loss for a violation of

[13] This law applies to "new residential units where the purchase agreement with the buyer was signed by the seller on or after January 1, 2003." (§ 938, as amended by Stats. 2003, ch. 762, § 6, p. 5732.) The residential units in the Project were apparently initially rented as apartments. The original developers transferred the Project to other entities who then sold the units as condominiums to the public. There is at least some question, which we need not resolve, whether Senate Bill No. 800 would apply to the Project. For purposes of our discussion, we will presume that it does. We conclude that Senate Bill No. 800 remains, in any event, an legislative expression of the social policy choices relevant to a *Biakanja/Bily* analysis, whether or not the statutory scheme directly governs BRCA's defect claims.

the statutory standards without having to show that the violation caused property damage or personal injury. (*Greystone,* at p. 1202.)

Senate Bill No. 800 provides definitions and mandates performance standards pertinent to new residential construction, and it defines certain expectations, rights, warranties, procedures, and obligations between builders and consumers concerning the sale and function of new housing units. (11 Miller & Starr, Cal. Real Est. (3d ed. 2011) § 29:2, pp. 29-8 to 29-9.) Senate Bill No. 800 established "functionality standards" for new residential housing construction, defining what constitutes a defect in construction for which the builder may be held liable to the homeowner. (§ 896.) Section 896 provides that in relevant part that "[i]n any action seeking recovery of damages arising out of, or related to deficiencies in, the residential construction, design, specifications, surveying, planning, supervision, testing, or observation of construction, a builder, and to the extent set forth in Chapter 4 (commencing with § 910), a general contractor, subcontractor, material supplier, individual product manufacturer, *or design professional,* shall, except as specifically set forth in this title, be liable for, and the claimant's claims or causes of action shall be limited to violation of, the following standards, except as specifically set forth in this title."[14] (Italics added.) Section 897 provides that the standards set forth in section 896 "are intended to address every function or component of a structure. To the extent that a function or component of a structure is not addressed by these standards, it shall be actionable if it causes damage." "The statute lists 45 specific requirements pertaining to most building systems, including the exterior envelope, structural, soil, fire safety, plumbing, electrical, and other systems." (11 Miller & Starr, *supra,* § 29:2 at p. 29-9, fn. omitted.)

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[14] While a "builder" is defined in Senate Bill No. 800 (§ 911), a "design professional" is not. Section 937, however, makes clear that the term "includ[es] architects and architectural firms." Section 937 also confirms that a certificate of merit under Code of Civil Procedure section 411.35 continues to be a requirement to initiate a professional negligence actions in most instances against architects, engineers or surveyors, indicating that the legislature intended to include the latter categories of professionals within the meaning of the term "design professional" as well.

Senate Bill No. 800 has broad application to those involved in the development of residential housing. "Each and every provision of the other chapters of this title apply to general contractors, subcontractors, material suppliers, individual product manufacturers, *and design professionals to the extent that the* general contractors, subcontractors, material suppliers, individual product manufacturers, and *design professionals caused, in whole or in part, a violation of a particular standard as the result of a negligent act or omission or a breach of contract.* In addition to the affirmative defenses set forth in Section 945.5, a general contractor, subcontractor, material supplier, design professional, individual product manufacturer, or other entity may also offer common law and contractual defenses as applicable to any claimed violation of a standard. All actions by a claimant or builder to enforce an express contract, or any provision thereof, against a general contractor, subcontractor, material supplier, individual product manufacturer, or design professional is preserved. Nothing in this title modifies the law pertaining to joint and several liability for builders, general contractors, subcontractors, material suppliers, individual product manufacturer, and design professionals that contribute to any specific violation of this title. However, the negligence standard in this section does not apply to any general contractor, subcontractor, material supplier, individual product manufacturer, or design professional with respect to claims for which strict liability would apply." (§ 936, as amended by Stats. 2003, ch. 762, § 5, p. 5732, italics added.)[15]

As it considered the new statutory scheme under Senate Bill No. 800 for processing and resolving construction defect claims, it is clear in the legislative history that the Legislature assumed that *existing law* imposed third party liability upon the design professionals. The bill analysis prepared for the both the Senate and Assembly on Senate Bill No. 800 stated that existing law "[p]rovides that a construction defect action

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[15] The last sentence of section 936, as originally enacted, read: "However, this section does not apply to any subcontractor, material supplier, individual product manufacturer, or design professional to which strict liability would apply." (Stats. 2002, ch. 722, § 3, p. 4249.) The 2003 clarifying amendments to Senate Bill No. 800 added the explicit reference to the "negligence standard in this section."

may be brought against any person who develops real property or performs or furnishes the design, specifications, surveying, planning, supervision, testing, or observation of construction or construction of an improvement to real property. [(Code of Civ. Proc., §§ 337.1, 337.15.)]"[16] (Assem. Com. on Judiciary, analysis of Sen. Bill No. 800 (2001–2002 Reg. Sess.) as amended Aug. 26, 2002, p. 2; Sen. Com. on Judiciary, analysis of Sen. Bill No. 800 (2001–2002 Reg. Sess.) as amended Aug. 28, 2002, pp. 1–2.) The analysis prepared for the Assembly also stated under a heading entitled, "Subcontractors and Design Professionals," that "[t]his act is intended to apply to subcontractors and design professionals to the extent that the subcontractors, material suppliers, individual product manufacturers and design professionals caused, in whole or in part, a violation of a particular standard as a result of its negligent act or omission or a breach of contract. These persons may assert the affirmative defenses to liability set forth in the bill, as well as common law and contractual defenses as applicable. The bill does not modify current law pertaining to joint and several liability for subcontractors and design professionals that contribute to any specific violation of the construction defect standards set out in the bill." (Assem. Com. on Judiciary, analysis of Sen. Bill No. 800 (2001–2002 Reg. Sess.) as amended Aug. 26, 2002, p. 4.)

The plain language of Senate Bill No. 800 provides that a design professional who "as the result of a negligent act or omission" causes, in whole or in part, a violation of the standards set forth in section 896 for residential housing may be liable to the ultimate purchasers for damages. The legislative history confirms the legislature's intent.[17] In

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[16] Code of Civil Procedure section 337.1 sets forth the four-year statute of limitations for patent construction defects, and Code of Civil Procedure section 337.15 provides a 10-year limitations period for latent defects. Both sections refer to actions brought "to recover damages from any person performing or furnishing the design, specifications, surveying, planning, supervision or observation of construction or construction of an improvement to real property . . . ." (Code Civ. Proc., §§ 337.1, subd. (a), 337.15, subd. (a).)

[17] Although recourse to extrinsic material is unnecessary given the plain language of statute, we may consult it for material that buttresses our construction of the statutory language. (*In re Tobacco II Cases* (2009) 46 Cal.4th 298, 316.)

construing a statute, our general goal must always be to effectuate the legislative intent. (*Wilcox v. Birtwhistle* (1999) 21 Cal.4th 973, 977.) To the extent that a *Biakanja/Bily* policy analysis is not otherwise dispositive of the scope of duty owed by a design professionals to a homeowner/buyer, Senate Bill No. 800 is.

III. DISPOSITION

The order sustaining the demurrers and the judgment of dismissal are reversed. The trial court is directed to enter a new order overruling the demurrers.

_____
Bruiniers, J.

We concur:

_____
Jones, P. J.

_____
Needham, J.

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 15760 Ventura Boulevard, 18th Floor, Encino, California 91436-3000.

On January 22, 2013, I served true copies of the following document(s) described as **PETITION FOR REVIEW** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Horvitz & Levy LLP's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

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

Executed on January 22, 2013, at Encino, California.

Victoria Beebe

Victoria Beebe

SERVICE LIST

Beacon Residential v. Skidmore Owings
Court of Appeal Case No. A134542

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