S208173

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

OPENING BRIEF ON THE MERITS

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OPENING BRIEF ON THE MERITS

ISSUES PRESENTED

1. Did the Right to Repair Act, Senate Bill No. 800 (2001-2002 Reg. Sess.), 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?

2. 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 care to persons with whom the design professional is not in contractual privity? In *Weseloh Family Ltd. Partnership v.*

K.L. Wessel 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.

INTRODUCTION

Developers of condominiums and other residential housing units typically contract with architects and other design professionals to prepare building plans. A general contractor and numerous subcontractors implement the plans. The plans may be modified during the building process, as unforeseen conditions and unexpected challenges arise. During this process, the design professional may have little to no input on those modifications since his contractual obligation was to draw the plans for the developer.

After the completion of construction, homeowners sometimes allege defects in their units. It has become commonplace for associations of homeowners to file construction defect actions against the developer and the contractors when this occurs. This appeal presents a less-common twist on the usual construction defect litigation scenario: the homeowners have sued the design professionals who drew the plans (along with the developer and numerous contractors).

Here, the Court of Appeal relied on the Right to Repair Act, Senate Bill No. 800 (2001-2002 Reg. Sess.), Civil Code section 895 et

seq. which establishes construction standards for residential housing. Giving the Repair Act a sweeping interpretation, the Court of Appeal concluded it imposed a duty of care on design professionals in every such case. According to the Court of Appeal, even design professionals not in contractual privity with condominium owners owe a duty of care to the owners in preparing the plans.

The Court of Appeal misread the Repair Act's provisions and misunderstood the Legislature's intentions. The Repair Act is silent as to whether a design professional owes a duty of care. The Repair Act leaves that matter to the common law, the traditional source from which courts discern whether a duty of care is owed. This Court should therefore reverse the Court of Appeal's holding that design professionals owe a duty of care under the Repair Act.

The Court of Appeal suggested—though it did not hold—that design professionals would owe a comparable duty under the balance of common law factors developed by this court in *Biakanja v. Irving* (1958) 49 Cal.2d 647 (*Biakanja*) and *Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370 (*Bily*).[1] The Court of

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[1] "We have employed a checklist of factors to consider in assessing legal duty in the absence of privity of contract between a plaintiff and a defendant . . . '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 (1) the extent to which the transaction was intended to affect the plaintiff, (2) the foreseeability of harm to him, (3) the degree of certainty that the plaintiff suffered injury, (4) the closeness of the connection between the defendant's conduct and the injury suffered, (5) the moral blame attached to the defendant's

(continued...)

Appeal was wrong about this as well, and its decision should not be affirmed on this alternative ground.

The *Biakanja/Bily* factors tilt against imposing a common law duty on the facts of this case. Two architectural firms were hired by the developer of a high-rise apartment building to provide engineering and design services. After the building was completed, the units were rented as apartments for about two years. At that point, plans changed and the units were marketed and sold as condominiums. The condominium association later brought a construction defect action against the architects and 40 other defendants, including the developer. The architects had no control over the construction. They were not in contractual privity with the condominium association. Indeed, their contracts with the developer stated that no condominium association or homeowner could be a third party beneficiary of the architects' obligation to the developer. Moreover, the developer received complaints about the alleged defects from renters, yet later sold the units to the condominium association members without disclosing them. Accordingly, any moral blame properly falls on the developer—another party to this lawsuit—rather than the architects.

On materially similar facts, the Court of Appeal in *Weseloh, supra*, 125 Cal.App.4th at pages 158 and 173 held that a design engineer owed no duty of care to third parties. Any other holding in

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(...continued)
conduct, and [6] the policy of preventing future harm.' " (*Bily, supra*, 3 Cal.4th at pp. 397-398, citing *Biakanja, supra*, 49 Cal.2d at pp. 650-651.)

this case would improperly enlarge the duty owed by design professionals, and would muddle the prior duty limitations established by this court's precedents in *Bily* and *Biakanja*.

At bottom, no statutory or common law duty exists here, so this court should reverse the Court of Appeal's decision.

FACTUAL AND PROCEDURAL BACKGROUND

A. HKS and Skidmore, two architectural firms, are hired by a developer of an apartment complex, the Beacon, to provide design and engineering services.

Petitioners Skidmore, Owings & Merrill LLP (SOM) and HKS, Inc. (collectively HKS/SOM) are architectural firms. They contracted with a sophisticated developer of a large mixed commercial and residential complex in San Francisco (the Beacon) to provide architectural and engineering services. (2 JA 311.) Their contracts with the developer provided that they were "solely responsible to Owner and not to . . . condominium associations or purchasers for performance or 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 Architect's obligations under this Agreement." (1 JA 47.)[2]

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[2] Plaintiff Beacon Residential Community Association (the Association) initially named both HKS and SOM 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-

(continued...)

The developer planned to rent the building's residential units as apartments. (2 JA 279-280, 283, 308, 321-322.) HKS/SOM prepared the original design for the Beacon, but did not control or oversee its construction. (See 2 JA 313-314; 3 RT 106, 110, 112-114.) They conducted site observations and attended weekly meetings. (2 JA 313-314.) They also made recommendations to the developer regarding non-conforming work that had already been performed and should be rejected. (*Ibid.*) However, HKS/SOM had to obtain approval from the developer before they could communicate with the contractor about nonconforming work. (2 JA 314.)

B. The Beacon is sold to another developer, and the units are transformed into condominiums.

After completion of construction, the 595 residential units in the Beacon were rented as apartments for approximately two years. (2 JA 321.) The developer received written and unwritten complaints from renters that the apartments "became hot and stuffy

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(...continued)
57, capitalization and boldface omitted.) After HKS demurred, noting the contract language providing that 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 SOM (1 JA 229-239; 2 JA 318-320). Consequently, the Association has implicitly conceded that the contract between SOM and the developer included similar language. The Association did not plead contract claims against HKS/SOM.

on a constant basis, making them essentially uninhabitable and causing a health hazard." (2 JA 321-322.)

The Beacon was subsequently sold to another developer,[3] who marketed and sold the apartments as condominiums. (2 JA 287.)

C. Condominium owners sue HKS/SOM, as well as forty other defendants, alleging defects in the building.

The Association, the homeowners association that manages the Beacon, filed this lawsuit against HKS/SOM and 40 other defendants. The operative third amended complaint asserted three causes of action against HKS/SOM for "Civil Code Title 7—Violation of Statutory Building Standards for Original Construction," "Negligence Per Se in Violation of Statute," and "Negligence of Design Professionals and Contractors." (2 JA 288-307, 311-315, boldface omitted.)

The Association alleged multiple defects in the project, including "excessive heat gain," a condition supposedly rendering the condominium units periodically uninhabitable due to high temperatures. (2 JA 314-315, 321.) According to the Association, this condition was due to in part HKS/SOM's approval of the substitution of less expensive and ultimately nonfunctional windows, as well as a design lacking adequate ventilation within

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[3] Although the third amended complaint tends to obscure the relationship between developers, it suggests that the two developers were related entities. (See, e.g., 2 JA 287-288.) We therefore treat the two developers as one.

the residential units. (*Ibid.*) The complaint further alleges that instead of fixing the problem, the developer made it worse by installing a film on the windows, which caused additional damage to the building. (2 JA 321.) The Association's operative third amended complaint seeks damages in excess of $50 million. (2 JA 323.)

D. The trial court sustains HKS/SOM's demurrers, which argued they owed no duty to the condominium owners.

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

The trial court ruled that *Weseloh* controlled and that HKS/SOM could not be liable for negligent design. The trial court also ruled that, to state a viable claim, the Association must show that HKS/SOM controlled the construction process by assuming a role extending beyond providing design recommendations to the developer. (3 RT 106, 110, 112-114.) During oral argument on the demurrer, counsel for the Association conceded that HKS/SOM had no control over the construction means and methods, but asserted that their construction observation gave them a degree of overall "control" of the project. (3 RT 112.) The court asked counsel if she had a good faith belief that HKS/SOM "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.) But the Association ultimately elected *not* to amend, and the court thereafter sustained the demurrers without leave to amend. (2 JA 487-490.)

The trial court's written ruling explained that "[t]he allegations do not show that either of the architects went beyond the typical role of an architect, which is to make recommendations to the owner. Even if the architect initiated the substitutions, changes, or other elements of design that Plaintiff alleges to be the causes of serious defects, so long as the final decision rested with the owner, there was no duty owed by the architect to the future condominium owners, in the Court's view. The owner made the final decisions, according to the Third Amended Complaint. Therefore, in the Court's view, the holding in *Weseloh,* finding no duty of care of the engineer in that case, dictates the result here based on the facts alleged in the Third Amended Complaint." (2 JA 483.)

E. The Court of Appeal holds that HKS/SOM owed a duty and reverses the trial court's rulings.

The Court of Appeal reversed in a published opinion.[4]

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[4] 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.

The court began by analyzing the *Biakanja/Bily* factors to determine whether the architects owed a common law duty to the Association. The court concluded that *Weseloh* provided "limited guidance" and was of "little application to the facts before us." (Typed opn., 7.) The court found nothing in the *Biakanja/Bily* duty analysis that would preclude imposition of liability in this case (typed opn., 13), yet the court stopped short of ruling on the existence of a common law duty.

"[U]ltimately, it is not our assessment of the *Biakanja/Bily* policy analysis that matters." (Typed opn., 17.) Rather, the Court of Appeal held that, under the Repair Act, design professionals owe a statutory duty of care to third parties. Relying on provisions in the Repair 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.)

LEGAL ARGUMENT

I. THE RIGHT TO REPAIR ACT DOES NOT IMPOSE ON DESIGN PROFESSIONALS A DUTY OF CARE TOWARD THIRD PARTIES.

A. The Repair Act does not even apply to this case.

The Repair Act "applies to original construction intended to be sold as an individual dwelling unit. As to condominium conversions, this title does not apply to or does not supersede any other statutory or common law." (Civ. Code, § 896.)

It is undisputed that the units in the Beacon were originally built for rental as apartments (2 JA 279-280, 283, 308, 321-322), not "sold as [ ] individual dwelling unit[s]" (Civ. Code, § 896). The units were later converted to condominiums, but the developer did not originally intend to construct units for sale. It follows that the Repair Act does not apply to this action. This purely legal issue is embraced by the grant of review and should be considered.

B. The Court of Appeal nonetheless rested its decision on the Repair Act—whose provisions it misunderstood.

The Court of Appeal held that HKS/SOM owed a duty of care to the Association under the Repair Act. (Typed opn., 17.) The court concluded that Senate Bill No. 800 is "dispositive of the scope

of duty owed by a design professional[ ] to a homeowner/buyer." (*Id.* at p. 21.)

The Court of Appeal was mistaken. As we explain below, nothing in the plain language of the Repair Act can be read to automatically impose such a duty of care on design professionals. Nor does the legislative history suggest that was the Legislature's intention. Any doubts on this point should be resolved in favor of HKS/SOM, because the Repair Act does not clearly disclose a legislative intention to abrogate the traditional common law function of assessing when duties of care are owed.

C. The plain language of the Repair Act says nothing about imposing a duty of care on design professionals.

Two provisions of the Repair Act—Civil Code sections 896 and 936—were the centerpiece of the Court of Appeal's analysis. The court believed these provisions established that design professionals always owe homeowners a duty of care. In fact, these provisions show precisely the opposite. We begin by analyzing them.

The first sentence of Civil Code section 936 states that the Repair Act generally applies to design professionals (and others) who act negligently: "Each and every provision of the other chapters of this title apply to . . . design professionals to the extent that the . . . design professionals caused, in whole or in part, a violation of a particular standard as the result of *a negligent act* . . . ." (Emphasis added.) The requirement of proof of a "negligent act" refutes the Court of Appeal's conclusion that a court

may dispense with the *Biakanja/Bily* duty analysis when a design professional is charged with violating the Repair Act's construction standards. That is because "[t]he threshold element of a cause of action for [professional] negligence is the existence of a duty to use due care toward an interest of another that enjoys legal protection against unintentional invasion." (*Bily, supra,* 3 Cal.4th at p. 397.) A plaintiff could not prove a "negligent act" without establishing the existence of a legal duty as a threshold matter.

Moreover, the second sentence of Civil Code section 936 explains that design professionals retain their common-law defenses, as well as statutory affirmative defenses: "In addition to the affirmative defenses set forth in [Civil Code] Section 945.5, a . . . design professional . . . may also offer common law and contractual defenses as applicable to any claimed violation of a standard."

An argument that a defendant owes no duty of care to a plaintiff is one such "common law . . . defense[ ]" (Civ. Code, § 936). "[A] 'defense' is '. . . a reason in law or fact why the plaintiff should not recover or establish what he seeks' "—it is a " '*response to the claims* of the other party, setting forth reasons why the claims should not be granted.' " (*Exxess Electronixx v. Heger Realty Corp.* (1998) 64 Cal.App.4th 698, 712, fn. 15, citing Black's Law Dict. (6th ed. 1990) p. 419, cd. 2.) A defendant's argument that he does not owe a duty is plainly a "defense[ ]" (Civil Code, § 936). (*Ventura County Humane Society v. Holloway* (1974) 40 Cal.App.3d 897, 902 [noting that, in a professional negligence case, a plaintiff must establish each element of the tort: "absence of, or failure to prove, any of them is fatal to recovery"].) By preserving a design

professional's right to raise "common law . . . defenses," Civil Code section 936 enshrines the proposition that a design professional may contest that he owes a homeowner a duty of care. The Court of Appeal therefore erred in interpreting the Repair Act to impose a duty on design professionals in every case.

The other provision of the Repair Act, Civil Code section 896, adds nothing to this analysis. Civil Code section 896 mandates performance standards for new residential constructions and defines the rights and obligations of builders and consumers concerning new housing units. (See typed opn., 18.) "In 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 . . . 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." (Civ. Code, § 896.) This statute serves the purpose of defining (in exhaustive detail) the types of defects for which design professionals and other defendants may be held liable. But it does not state that design professionals automatically owe a duty to homeowners. That is simply not the purpose of this section.

D. The Legislature did not intend to impose an automatic duty of care on design professionals.

The Repair Act expressly states that "[n]othing in this title modifies the law pertaining to joint and several liability for . . . design professionals that contribute to any specific violation of this title." (Civ. Code, § 936.) Since neither the common law nor other statutes automatically impose on design professionals a duty of care toward homeowners in every case, Civil Code section 936 clearly evinces the Legislature's intent *not* to impose a duty of care through the Repair Act.

Nothing in the legislative history of the Repair Act supports a different conclusion. As to the liability of design professionals, the legislative history simply reiterates the text of Civil Code section 936, which preserves all applicable common law defenses (and therefore imposes no duty of care, as we have explained above).

The Court of Appeal believed the legislative history 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.)

But this snippet of legislative history cannot bear the weight of the court's interpretation. The fact that (prior to the Repair Act) a construction defect action *could* be brought against design professionals *in some circumstances* hardly means that design professionals owe a common law duty *in every case*. Certainly, there were circumstances in which courts could find that design professionals owed a duty. For example, a contract between a design professional and a developer could acknowledge a homeowners association as a third party beneficiary. Or a homeowners association could hire a design professional directly, or could sue the design professional for negligent misrepresentation. A design professional might also owe a duty of care if he were actively involved in the construction itself, as opposed to merely making design recommendations to a developer. But the fact that design professionals might owe a duty of care to homeowners in some or all of these scenarios does not mean they owe a duty of care in all scenarios.

E. Nothing in the Repair Act clearly abrogates the traditional common law function of ascertaining when a duty of care is owed.

Any doubts about the arguments raised above should be resolved in favor of HKS/SOM. It is typically the role of the common law to assess when duties of care are owed (See *Bily, supra,*

3 Cal.4th at pp. 396-397), and the Repair Act reflects no legislative intent to abrogate that role.

"As 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 its 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 (*California Assn. of Health Facilities*).)

Nothing in the Repair Act purports to eliminate the need to establish the existence of a duty under the common law *Biakanja/Bily* policy analysis in order to state a cause of action against a design professional. The Repair Act abrogated this court's holding in *Aas, supra,* 24 Cal.4th at p. 632, 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 Repair Act established a uniform set of standards that residential building systems and components must meet, modified various statutes of limitation, and provided for prelitigation notice to "builder[s]" and a corresponding right of repair. (*Baeza v. Superior Court* (2011) 201 Cal.App.4th

1214, 1222-1223.) But establishing standards of this type falls well short of " ' " ' "clearly and unequivocally disclos[ing] an intention to depart from, alter, or abrogate the common-law rule," ' " ' " as this court's jurisprudence would require to impose a duty on design professionals in every case. (*California Assn. of Health Facilities, supra*, 16 Cal.4th at p. 297.)

In sum, the Court of Appeal erred in concluding that the Repair Act imposes on design professionals a duty of care toward homeowners that would not otherwise exist under the common law. The plain text of the Repair Act, its legislative history, and the canons of construction traditionally employed by this court establish that the Repair Act imposes no such duty.

II. THE COURT OF APPEAL'S DECISION SHOULD NOT BE AFFIRMED ON THE ALTERNATE GROUND THAT HKS/SOM OWED A COMMON LAW DUTY.

A. Whether a defendant owes a common law duty of care to persons with whom it is not in privity is a question of public policy.

" 'An action in negligence requires a showing that the defendant owed the plaintiff a legal duty, that the defendant breached the duty, and that the breach was a proximate or legal cause of injuries suffered by the plaintiff.' " (*Ratcliff Architects v. Vanir Construction Management, Inc.* (2001) 88 Cal.App.4th 595, 604 (*Ratcliff Architects*).) A duty of care may arise through statute,

contract, the general character of the activities, or the relationship between the parties. (*J'Aire Corp. v. Gregory* (1979) 24 Cal.3d 799, 803.)

"Ultimately, duty is a question of public policy." (*Ratcliff Architects, supra,* 88 Cal.App.4th at p. 605.) "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."'" (*Bily, supra,* 3 Cal.4th at p. 397.)[5]

B. This court's decisions in *Biakanja* and *Bily* frame the standard for ascertaining when a duty is owed. Lower courts have followed these decisions in many contexts.

In *Biakanja, supra,* 49 Cal.2d at page 648, a notary public prepared a will for the plaintiff's brother through which the plaintiff

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[5] The Association argued in the Court of Appeal that duty may not be decided at the demurrer state. Not so. (See, e.g., *Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 36-37, 57-60.)

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 his brother's estate. (*Ibid.*) The plaintiff sued the notary public for negligence. (*Ibid.*) 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." (*Id.* at p. 650.)

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 clearly was 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, supra,* 3 Cal.4th at pp. 396-415, 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. (*Id.* at pp. 406-407.) This court identified "three central concerns" that militated against holding that an auditor owed a duty of care to third parties: (1) an auditor "exposed to negligence claims from all foreseeable third parties faces 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." (*Id.* at p. 398.)

This court noted that its ruling extended to other types of professionals besides accountants. "Accountants are not unique in their position as suppliers of information and evaluations for the use and benefit of others. Other professionals, including attorneys, *architects, engineers*, title insurers and abstractors, and others also perform that function. And, like auditors, these professionals may also face suits by third persons claiming reliance on information and

opinions generated in a professional capacity." (*Bily, supra,* 3 Cal.4th at p. 410 (emphasis added).)

Subsequent cases have applied the *Biakanja/Bily* duty analysis to various other types of professionals, including pharmacists (*Huggins v. Longs Drug Stores California, Inc.* (1993) 6 Cal.4th 124, 133 ["Because plaintiffs were not the patients for whom defendant dispensed the prescribed medication, they cannot recover as direct victims of defendant's negligence"]), real estate brokers (*FSR Brokerage, Inc. v. Superior Court* (1995) 35 Cal.App.4th 69, 73 [real estate brokers did not owe a duty to disclose structural defects to partygoers, with whom no broker-customer relationship existed]), attorneys (*B.L.M. v. Sabo & Deitsch* (1997) 55 Cal.App.4th 823, 830-833 (*B.L.M.*)), construction managers (*Ratcliff Architects, supra,* 88 Cal.App.4th at pp. 604-607 [no duty by construction manager to architect in connection with losses on project]), design engineers (*Weseloh, supra,* 125 Cal.App.4th at pp. 158-159, 167-173 [collapse of retaining wall, no duty by engineer to owner with whom it was not in contractual privity]), and environmental consultants (*Lake Almanor Associates L.P. v. Huffman-Broadway Group, Inc.* (2009) 178 Cal.App.4th 1194, 1204-1206 [third party consultant that had produced an environmental impact report owed no duty to project developer]).

In *Weseloh, supra,* 125 Cal.App.4th at pages 167-173, the Court of Appeal applied the *Biakanja/Bily* factors to determine whether a design engineer owed a duty of care to a building owner. The 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. (*Id.* at pp. 159-160.) 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. (*Id.* at p. 167.) In its analysis, the *Weseloh* court focused on the fact that the engineer only provided design services and had no control over the actual construction.

Here, it is undisputed there was no contractual privity between HKS/SOM and the Association. The existence of a duty to the Association therefore depends on application of the *Biakanja/Bily* policy factors. As we now show, these factors establish that HKS/SOM owed no duty of care.

C. Just as no duty to third parties existed in *Bily* and *Weseloh,* no duty exists here.

1. Extent to which HKS/SOM's design was intended to affect plaintiff in this case.

"California courts have consistently required some manifestation on the part of a professional who offers an opinion, information, or advice that he or she is acting to benefit a third party or defined group of third parties in a specific and circumscribed transaction." (*Bily, supra,* 3 Cal.4th at pp. 411-412; see also *Weseloh, supra,* 125 Cal.App.4th at p. 167 [*Biakanja/Bily* factors weighed against the existence of a duty where "[t]here was

no evidence of an intended beneficiary clause in any contract related to the design of the retaining walls, identifying the [plaintiffs] or [the general contractor] as the intended beneficiary of work performed by [the design professional, hired by a subcontractor]"]; *Mission Oaks Ranch, Ltd. v. County of Santa Barbara* (1998) 65 Cal.App.4th 713, 725 (*Mission Oaks*) [no duty of care to a third party where the third party was not a party to the contract]; *B.L.M., supra*, 55 Cal.App.4th at p. 832 ["In order to show a duty was owed to a third party beneficiary of a legal services agreement the third party must show that 'that was the intention of the purchaser of the legal services—the party in privity,' and that 'imposition of the duty carries out the prime purpose of the contract for services' "].)

Here, the contract between HKS/SOM and the developer explicitly states that a homeowners association is not to be deemed a third party obligee, and that HKS/SOM's sole obligation is to the developer:

> Except as set forth in Section 12.1, or as expressly agreed in writing by the Architect and Owner, no person other than the parties or their successors or 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 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 obligee with respect to Architect's obligations under this Agreement.

(1 JA 47.)

When HKS/SOM contracted with the original developer, the units in the building were designed to be rented as *apartments*. By entering into this contract, HKS/SOM sought to ensure that if the units were ever converted into condominium units, HKS/SOM would not be deemed to have a duty to any subsequent homeowners or condominium associations.

The Court of Appeal here dismissed these contractual provisions as irrelevant, holding that liability is determined by the scope of the duty of professional care, not whether the subsequent purchasers were third party beneficiaries under the contract. (Typed opn., 11.) But as *Bily*, *Mission Oaks*, and *Weseloh* establish, the scope of the duty of professional care depends on whether a plaintiff was an intended beneficiary of the transaction, and the contractual language is directly relevant to that question.

The Court of Appeal also reasoned that the contractual language "only serves to emphasize that Respondents were more than well aware that future homeowners would necessarily be affected by the work that they performed." (Typed opn., 11.) But awareness of a possible effect on plaintiff is not the relevant factor. What counts is an intent to affect plaintiff. Here, the plain language of the contract states that no other parties were intended to be beneficiaries of the contract between HKS/SOM and the original developer. The court cannot substitute its own views regarding who the parties intended to benefit, when the very language of the contract made clear that there were no intended

third party beneficiaries. (See *Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1264 ["The fundamental goal of contractual interpretation is to give effect to the mutual intention of the parties"]; Civ. Code, §§ 1636, 1638 [if contractual language is clear and explicit, it governs].)

2. Foreseeability of the injury.

In *Bily*, this court noted that "[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 threatened to impose liability out of proportion to fault or to promote virtually unlimited responsibility for intangible injury." (*Bily*, *supra*, 3 Cal.4th at p. 398.) Applying these principles, the *Weseloh* court held the engineer in that case owed no duty to the plaintiff property owner, even though the plaintiff 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, because there was no evidence that the engineer's design was followed without alteration. (*Weseloh*, *supra*, 125 Cal.App.4th at pp. 167-168.)

Similarly, while it is generally foreseeable that a faulty design, such as recommending the wrong type of window, could lead to the excessive heat conditions alleged by the Association, that by itself is insufficient to create a legal duty to third parties. (See *Bily*, *supra*, 3 Cal.4th at p. 399 ["In line with our recent decisions, we will

not treat the mere presence of a foreseeable risk of injury to third persons as sufficient, standing alone, to impose liability for negligent conduct. We must consider other pertinent factors"]; *Nally v. Grace Community Church* (1988) 47 Cal.3d 278, 297 ["Mere foreseeability of the harm or knowledge of the danger, is insufficient to create a legally cognizable special relationship giving rise to a legal duty to prevent harm"]; *Elden v. Sheldon* (1988) 46 Cal.3d 267, 274 ["[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"].)

The Court of Appeal here improperly afforded the foreseeability factor too much weight. (Typed opn., 11.) It reasoned that because architects are subject to license and registration requirements, and "professional skill is required to prepare the design documents," "failure to exercise reasonable care in the design of residential construction presents readily apparent risks to the health and safety of the ultimate occupants." (*Ibid.*) Under the Court of Appeal's analysis, every time an architect or design professional provides professional services to a client, he will be exposed to liability to third parties. That result is directly contrary to this court's duty analysis in *Bily*.

3. Certainty that the plaintiff sustained injury, and the closeness of the connection between the conduct and that injury.

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. (*Weseloh, supra*, 125 Cal.App.4th at p. 169.) "[R]ather, it appears [the engineer] provided engineering services akin to professional advice and opinion." (*Ibid.*)

Here, the Association's third amended complaint alleged that HKS/SOM's role in the actual construction of the building was limited to conducting site inspections, attending weekly meetings, and recommending to the developer any revisions to work performed that did not conform to the contract documents. (2 JA 313-314.) Notably, HKS/SOM had to obtain approval from the developer before they could communicate with the contractor regarding any nonconforming work. (2 JA 314.)

Before sustaining HKS/SOM's demurrer without leave to amend, the trial court gave the Association the opportunity to amend its complaint to allege facts demonstrating that SOM's and HKS's role went beyond the mere provision of professional advice to the developer and, in addition, involved control of construction. (3 RT 118-119.) Because the Association declined that opportunity, 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 HKS/SOM's role was no different than the engineer's role in *Weseloh*.

Moreover, the connection between HKS/SOM's conduct and the Association's injury is all the more attenuated because (as we discuss in the next subsection) when the developer sold the units two years after construction, it was aware of, and concealed, the alleged defects.

The Court of Appeal concluded that because the Association alleged that the defects were caused by HKS/SOM, these factors weighed in favor of establishing a duty. (Typed opn., 12.) However, the court failed to focus on the *closeness of the connection* between the conduct and the injury, and ignored the facts that the Association refused to amend its complaint to include an allegation that HKS/SOM was involved in the actual construction of the building, and that the developer was aware of and concealed the alleged defects when it sold the units.

4. Moral blame.

"[W]hen a defendant's liability rests partially under the control of another party's conduct . . . , the defendant's 'moral blame' and connection to the plaintiff's alleged injury is too remote to justify imposition of a tort duty." (*Ratcliff Architects, supra,* 88 Cal.App.4th at pp. 606-607.) As noted above, HKS/SOM did not control the construction of the building, and could not even

communicate with the contractors without the approval of the developer.

HKS/SOM's moral blame bears no comparison to that of the architect in *Mallow v. Tucker, Sadler & Bennett, Architects etc., Inc.* (1966) 245 Cal.App.2d 700, 701, where a workman was fatally electrocuted while jackhammering footings at the place called for by the architect's plans, and broke into an underground high-voltage transmission line that the plans failed to disclose. Here, in contrast, the Association alleges that, as a consequence of HKS/SOM's defective design, the residential units in the Beacon complex became hot and stuffy. Indeed, their moral blame is less than that of the engineer in *Weseloh*, whose defective design caused two retaining walls to collapse, which easily could have resulted in death or serious injury. Nonetheless, the Court of Appeal in *Weseloh* found the engineer's moral blame was not comparable to that of the notary public in *Biakanja*, whose "injurious conduct . . . involved the unauthorized practice of law, a misdemeanor . . . ." (*Weseloh, supra*, 125 Cal.App.4th at p. 169.)

If anyone bears moral blame in this case, it is the developer, who, according to the operative complaint, knew about the alleged defects for approximately two years, and concealed them when it sold the units to the members of the Association. (2 JA 321-322.) Specifically, the Association alleged that "at the time that they marketed and sold the Units at the Subject Property, [the original developer] had actual knowledge of serious latent and patent deficiencies at the Subject Property, consisting of improper construction of the windows, ventilation and other related systems

of the Subject Property, to the point that many of the Units became hot and stuffy on a constant basis, making them essentially uninhabitable and causing a health hazard. Numerous of the initial residents of the subject property, to whom Units were rented, complained of the unhealthy, unpleasant, and at times unbearably, hot and stuffy conditions." (2 JA 321.)

The Association further alleged that the developer had full knowledge that the other defendants "had elected to deviate from the approved Title 24 submittal for the Subject Property by installing substandard window glass throughout the Subject Property." (2 JA 321-322.) In an attempt to remediate the severe habitability, safety, and health problems, the developer installed a film on the windows, which did not solve the overheating problem and caused additional damage to the building. (*Ibid.*) The developer is still a party to the case, and the Association has ample opportunity to recover from the developer, as well as from the other defendant contractors and subcontractors.

Citing *Aas, supra*, 24 Cal.4th 627, the Court of Appeal stated that " 'the degree of blame would appear to depend upon the nature of the deviation,' . . . [The Association] alleges here significant failures in Project components specified in the design, as well as deficiencies in the design, resulting in actual property damage and health safety risks." (Typed opn., 12-13.) However, as pleaded in the complaint, because the developer knew of these alleged defects and concealed them during the sale of the units, regardless of the nature of the alleged defects, any moral blame should be assigned to the developer, not HKS/SOM.

5. Liability out of proportion to fault.

In *Bily*, this court explained that imposing liability on an auditor to third parties who relied on an audit report would be out of proportion to fault because the auditor did not have complete control over the information given to it or the dissemination of the report. (*Bily*, *supra*, 3 Cal.4th at p. 399-400; see also *Weseloh*, *supra*, 125 Cal.App.4th at p. 171 [liability of engineer was out of proportion to fault because there was no evidence that the subcontractor even followed the engineer's design].) The same is true here—although HKS/SOM prepared the plans for the project, they had no role in the actual construction. Instead, the developer, contractors, and subcontractors retained primary control over the construction process, as well as final say on how the plans were implemented. (See *Bily,* at p. 400 ["regardless of the efforts of the auditor, the client retains effective primary control of the financial reporting process']).

This court in *Bily* also found that liability was out of proportion to fault because "an audit report is a professional opinion based on numerous complex factors . . . based on the auditor's interpretation and application of hundreds of professional standards, many of which are broadly phrased and readily subject to different constructions." (*Bily*, *supra*, 3 Cal.4th at 400.) Similarly here, the plans for the project were extremely complex, involving many competing factors and interests.

The Court of Appeal attempted to distinguish *Weseloh* on the ground that the design engineers there were paid $2,200 for their

work, and HKS/SOM were paid $5,000,000. (Typed opn., 14.) However, the Court of Appeal ignored the fact that only a tiny portion of HKS/SOM's fee is attributable to their alleged defective design work and that the plaintiffs in *Weseloh* were seeking only $6 million in damages, whereas the Association is seeking "in excess of $50,000,000"—a full order of magnitude greater than the totality of the payments to HKS/SOM. (2 JA 323.)

6. The prospect of private ordering to contractually protect against the risk.

In *Bily*, this court explained that "the generally more sophisticated class of plaintiffs in auditor liability cases (e.g., business lenders and investors) permits the effective use of contract rather than tort liability to control and adjust the relevant risks through 'private ordering.' " (*Bily*, *supra*, 3 Cal.4th at p. 398.) It noted that an audit report is not the equivalent of a consumer product because "the maker of a consumer product has complete control over the design and manufacture of its product; in contrast, the auditor merely expresses an opinion about its client's financial statements," and the third parties in question generally possess "considerable sophistication in analyzing financial information." (*Id.* at pp. 402-403.) "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." (*Id.* at p. 403.)

Here, in three different respects, the parties could privately order their affairs, obviating any need to authorize the Association to sue HKS/SOM directly in tort.

First, HKS/SOM and the developer entered into a contract exempting the architects from third party liability. The developer could have deleted that exemption (and included a provision making homeowners third party beneficiaries) if the developer wished to ensure that HKS/SOM would be independently liable to the Association or successor homeowners.

Second, purchasers at developments like the Beacon—a new 595-unit building in downtown San Francisco—are typically represented by sophisticated real estate agents and brokers, and can order property inspections before their purchase. (See *Bily*, *supra*, 3 Cal.4th at p. 403.) And no lender would make a purchase money loan without first conducting an appraisal of the residence securing the loan. Thus, the members of the Association and their agents, brokers and lenders were fully capable of conducting their own "private ordering" through investigations and inspections before purchasing their units.

The developer who sold the units was *required* to disclose any known defects to the buyers when they purchased the condominiums, and the Association alleges that the developer *knew* of the alleged problems when the condominiums were sold. (See *Shapiro v. Sutherland* (1998) 64 Cal.App.4th 1534, 1544 [" '[i]t is now settled in California that where the seller knows of facts materially affecting the value or desirability of the property . . . and also knows that such facts are not known to, or within the reach of

the diligent attention and observation of the buyer, the seller is under a duty to disclose them to the buyer' "]; *ibid.* ["A breach of this duty of disclosure will give rise to a cause of action for both rescission and damages"].) Thus, even if condominium owners could not have identified every alleged defect through their inspection, they should have learned of the remaining defects through the developer's disclosures.

Third, the developer has a cause of action against the architects for any alleged defects attributable to the design because the developer owned the building when the problems manifested themselves. In *Krusi v. S.J. Amoroso Construction, Inc.* (2000) 81 Cal.App.4th 995, 1004-1005, the court explained that the owner in possession when problems become manifest may recover against design professionals (absent an express assignment of the owner's right). Here, by the Association's own admission, the owner at that time was the developer, not subsequent purchasers. The *Krusi* rule amounts to private ordering because it specifies the party with a right of redress against a design professional for a defective design. Just as *Bily* observed that parties may control and adjust the relevant risks through private contractual arrangements, the Association's members could have negotiated with the developer (in purchasing their units) for an assignment of its right to sue for any defects that manifested while they owned the units. Indeed, homeowners could still negotiate for an assignment of the developer's rights today. The developer's retention of the right to sue for design defects amounts to a "private ordering" decision.

7. Policy of preventing future harm and effect of professional service providers liability to third persons.

Regarding the policy of preventing future harm, this court in *Bily* 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." (*Bily, supra,* 3 Cal.4th at p. 404.) It 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." (*Id.* at pp. 404-405.)

Applying these principles, the *Weseloh* court found that there was no indication 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, and [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)

Similarly, there is no likelihood that imposition of a duty here will result in greater care by architects, and the Court of Appeal never suggested how it could. To the contrary, the court acknowledged that a rule expanding liability for architects will "negatively impact the cost of housing" and "limit the willingness of

design professionals to undertake large residential construction projects at all." (Typed opn., 16 citing *Aas, supra,* 24 Cal.4th at p. 649 and Hannah & Van Atta, Cal. Common Interest Developments: Law and Practice (2012) § 14:36, pp. 897-898.)

Like the owners in *Weseloh*, 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; see *Stearman v. Centex Homes* (2000) 78 Cal.App.4th 611, 617-623; *Huang v. Garner* (1984) 157 Cal.App.3d 404, 413-414.) The original developer in turn may seek redress from HKS/SOM, with whom it is in contractual privity.

CONCLUSION

For each of the foregoing reasons, the decision of the Court of Appeal should be reversed.

May 29, 2013

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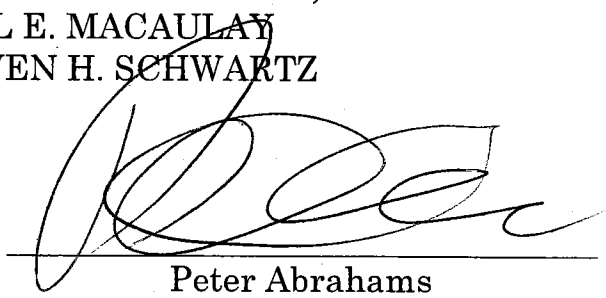
By: 
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CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, rule 8.520(c)(1).)

The text of this brief consists of 8,943 words as counted by the Microsoft Word version 2007 word processing program used to generate the brief.

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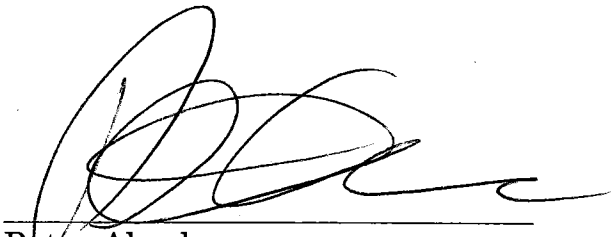

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PROOF OF SERVICE

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 May 29, 2013, I served true copies of the following document(s) described as **OPENING BRIEF ON THE MERITS** on the interested parties in this action as follows:

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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 May 29, 2013, at Encino, California.

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Court of Appeal Case No. A134542
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