S208173

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

BEACON RESIDENTIAL COMMUNITY ASSOCIATION, Plaintiff and Appellant, **vs.** SKIDMORE OWINGS MERRILL LLP; HKS, INC., individually and doing business as HKS ARCHITECTS, INC., Defendants and Respondents.	Case No. S208173 District Court of Appeal Case No. A134542 San Francisco Co. Case No. CGC-08-478453

PLAINTIFF AND APPELLANT'S ANSWER BRIEF ON THE MERITS

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APPELLANT'S POSITION AS TO THE ISSUES FOR REVIEW

The Court granted review as to the following issues as stated in the Petition for Review:[1]

Issue No. 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 care to the 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. (Petition for Review, filed herein Jan. 23, 2013, p. 1.)

Appellant's Response to Issue No. 1:

The issue as stated in the Petition does not accurately reflect the

[1] In violation of California Rules of Court, Rule 8.516(a)(1), Respondents' Opening Brief on the Merits briefs and argues additional issues that were not included in the Petition for Review. In compliance with Rule 8.516(a)(1), Appellant will not brief or argue these issues herein. Appellant requests notice and a separate opportunity to brief and argue these issues, as stated in Rule 8.516(b)(2), if the Court intends to decide any such issues.

issue in this case as presented by the record herein and as addressed by the Court of Appeal in its opinion. Respondents, Skidmore Owings & Merrill LLP ("SOM"), and HKS, Inc., individually and doing business as HKS Architects, Inc. ("HKS"), did far more than "provide design recommendations." They created the plans and specifications, and otherwise performed comprehensive architectural and engineering services for the Beacon Residential Condominiums (herein called "the Beacon Project"), which consists of 595 condominium units and associated common areas located at 250 and 260 King Street, San Francisco, California. (Joint Appendix (hereafter, "JA") 270.) The Beacon Project was constructed from bare ground based entirely upon Respondents' plans and specifications, and with Respondents' continuing detailed involvement at every phase of the construction. (JA 287-88.) Respondents' involvement in the Beacon Project as detailed in Appellant's Third Amended Complaint, filed April 27, 2011 (JA 269) (hereafter, "Appellant's complaint") extended to the entire Project, and included architecture, landscape architecture, civil engineering, mechanical engineering, structural engineering, soils engineering, and electrical engineering, in addition to construction administration and construction contract

management. (JA 288.)

For these reasons, neither the reasoning of *Weseloh*, nor its holding, is apposite herein. *Weseloh* presented a far more attenuated involvement of two engineers, who were hired only on a limited engagement, to provide standard details for a retaining wall, who were not the engineers of record for the project, and who had no role or involvement at all in reviewing site conditions (which the evidence showed to be responsible for the ensuing retaining wall failure) or in observing construction. Additionally, *Weseloh* was decided on the basis of facts fully developed in the record, at the summary judgment stage. The current case is presented on appeal from the trial court's sustaining of a demurrer.

The Court of Appeal was entirely correct in its conclusion that HKS and Skidmore owed a duty of care to the future owners of the 595 units at the Beacon Project, when performing their services on the Beacon Project. Under analysis and principles that have long been recognized by this Court, as well as by numerous Court of Appeal decisions as to which this Court has expressed its approval, design professionals who prepare the plans and specifications, coordinate all information and consultants, and otherwise perform the type of

comprehensive design and construction observations involved here as alleged in Appellant's complaint, essentially create a product, namely homes. They owe a duty of care to the future home owners when performing their contracted services. The design and construction of a housing development has an obvious and direct impact on this limited class of persons who will be the consumers of the product. As the Court of Appeal correctly stated in its opinion, this is not a novel, or controversial, issue. *Weseloh*, which involved much different facts, did not even purport to address any such issue, as the Court of Appeal correctly observed in concluding that *Weseloh* is inapposite.

Issue No. 2:

Did the Right to Repair Act, Senate Bill 800, Civil Code §§ 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?

Appellant's Response to Issue No. 2:

The Right to Repair Act, enacted in 2002 as Senate Bill 800 ("SB 800") represents (in pertinent part) a Legislative delineation of standards of liability based on policy considerations governing a special situation that is involved here, according to Appellant's complaint: Residential homes that are developed and constructed for sale. This Court, in *Aas*, explicitly invited the Legislature to enact legislation to replace common law principles based on policy considerations relative to housing constructed for sale in California. In response to *Aas*, SB 800 was enacted. The primary objective of SB 800 was to permit homeowners of a newly constructed housing development, such as the Beacon Project, to recover the cost to repair enumerated kinds of construction defects, even if such defects did not yet cause "appreciable harm," which this Court in *Aas* held to be normally required in order for a plaintiff to prevail on a negligence theory based on defective construction.

The present case does not involve this issue. Appellant's complaint alleges that the homeowners of the Beacon Project, on whose behalf the action is brought, have suffered serious harm as a result of negligence in the design of the Beacon Project.

SB 800, specifically, the portions as codified at Civil Code §§ 895 and 936, incorporate a Legislative judgment that design professionals for a housing development constructed for sale are liable to the homeowners for construction defects, if they are caused by the design professional's negligence. The plain language of the statute avoids, in the case of any "for sale" housing project, any need for case-by-case analysis of the design professional's duty of care to the future homeowners. The Court of Appeal was entirely correct in its opinion that Appellant's complaint properly stated a claim under SB 800 and thus a demurrer should not have been sustained to Appellant's complaint.

STATEMENT OF THE CASE

The Beacon Residential Community Association ("BRCA"), Appellant herein, is the duly formed association that manages the Beacon residential condominiums[2] pursuant to the Davis-Stirling Act, California Civil Code §§ 1350 et seq.

Respondents SOM and HKS performed comprehensive architectural and engineering services for the Beacon Project. (JA

[2] A second association, known as the Commercial Association, manages the commercial portions of the project. (JA 277-78.) The Commercial Association has assigned its claims against Respondents to Appellant. (*Ibid.*)

287-88.) Their involvement as detailed in Appellant's complaint extended to the entire duration of the Project, including changes and field observations in addition to the original plans and specifications, and included architecture, landscape architecture, civil engineering, mechanical engineering, structural engineering, soils engineering, and electrical engineering. (JA 288.)

Pursuant to Civil Code § 1368.3, Appellant brought this action against a number of defendants, including Respondents, for serious construction defects that exist at the Beacon project. One defect that is causing ongoing harm is a condition Appellant's complaint calls "solar heat gain." Due to a combination of an inadequate original design, Respondents' approval of the substitution of a cheaper window glass that is highly transparent to solar radiation, a lack of adequate ventilation within the residences, and the absence of adequate operable windows, conditions in the residential units are hot and suffocating. The heat buildup is so bad that the residential units are uninhabitable, unhealthy, and unsafe during certain periods. (JA 291.)

In addition, Appellant's complaint alleges that there are numerous other actionable defects in the Beacon project that were

caused by negligent architectural and engineering design, observation, and construction management work performed by Respondents. These defects include a variety of leaks, water infiltration with resulting property damage, inadequate fire separations, structural cracks and other life safety hazards. (JA 293-305.)

Respondents are each alleged to be design professionals who caused the Beacon Project to violate standards of residential construction required by SB 800, Civil Code §§ 896 and 897. (JA 288.) Appellant's complaint alleges that Respondents, specifically, had a duty of care to the future residents of the Beacon Project, as well as Appellant itself and the Commercial Association. Respondents were paid well over $5,000,000 for their services on the Beacon Project. (JA 312.) Respondents did not merely prepare the original plans and specifications. They were involved with the Beacon Project in every phase from its inception through completion of construction, including –

- Conducting site and field inspections during construction (JA 313);

- Drafting and revising project status reports and field observation reports regarding progression of the construction work and compliance with the design plans and specifications (JA 313);

- Participating in weekly, and then bi-weekly, "Owner/Architect/Contractor" meetings regarding every aspect of the project (JA 313);

- Reviewing applicable building codes, and providing detailed analysis, including identifying building construction type, required egress, units, occupancy, wall and building separations, operation of building systems, including fire, life safety, and air temperature controls, duct and piping sizing, and energy conservation calculations (JA 313);

- Issuing Construction Bulletins and other communications that changed, modified and/or altered the construction of the project JA 314);

- Engaging in communications with contractors that changed the construction of the project (JA 314); and

- Recommending design revisions to control the perceived quality and cost of construction. (JA 314-15.)

It is specifically alleged that the acts and omissions of SOM and HKS resulted in violation of the performance and functionality standards set forth in Civil Code §§ 896, 897, and 900. (JA 290-305.) Additionally, Respondents are alleged to be negligent because their design caused the Beacon Project to violate standards for light and ventilation in residential type occupancy that are set forth in Title 24 of the California Code of Regulations and its incorporated standards regarding operative temperatures within dwelling spaces. (JA 306-07.)[3]

The role played by Respondents in causing the "solar heat gain" problem is also alleged in substantial detail. It is alleged that after receiving initial Title 24 approval, Respondents made "value

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[3] Respondents' Opening Brief has a footnote suggesting that Appellant's allegations of negligence per se are improper. (Opening Brief, p. 9, fn. 4.) This is an example of addressing an issue as to which the Court did not grant review. Negligence per se is an accepted basis of negligence liability for design professionals in construction defect cases. (See *Huang v. Garner* (1984) 157 Cal.App.3d 404, 412-15 (disapproved on other grounds in *Aas v. Superior Court* (2000) 24 Cal.4th 627, 649).) Negligence per se is routinely stated in complaints as a cause of action distinct from other underlying theories of recovery, including ordinary negligence. (E.g., *Lockheed Martin Corp.* v. *Superior Court* (2003) 29 Cal.4th 1096, 1106 n.6; *Merrill* v. *Navegar, Inc.* (2001) 26 Cal.4th 465, 475; *Standard Pacific Corp.* v. *Superior Court* (2009) 176 Cal.App.4th 828, 831.) Commentators suggest pleading of the grounds for applying the doctrine is required. (E.g., 4 Witkin, Cal. Procedure 5th (2008) Pleading, § 583.) As the Court did not grant review on this issue, Appellant will not address it further unless requested to do so by this Court.

engineering" decisions that changed the plans and specifications for the Beacon Project from the approved Title 24 submittal, causing the problem to exist. (JA 281, 312-15.) Respondents, in order to help the developer save money, recommended the substitution of a cheaper exterior window glass for the original design that was approved as part of the Title 24 submittal. (JA 281, 314-15.) Additionally, it is alleged that after Title 24 approval, Respondents approved a substantial reduction in the number of "z-ducts" that were to be the only source of fresh air to the interiors of many of the units. (JA 281, 314-15.) Appellant's complaint alleges, in summary, that defective design, inappropriate materials, improper construction and installation of ventilation systems, mechanical systems, and "z-ducts," all of which were Respondents' responsibility in whole or in part, have together caused the solar heat gain problem in the buildings, and lack of sufficient fresh air. (JA 289-93.)

Respondents filed demurrers in response to Appellant's complaint. (JA 361 (SOM); JA 374 (HKS).) These demurrers objected to the fifth cause of action of Appellant's complaint, which alleged a cause of action based on the negligence of Respondents, and also, objected to the first cause of action, which alleged that

Respondents are liable because their negligence caused the Beacon Project to violate the performance standards of SB 800 on the Beacon Project.[4] (*Ibid.*)

The demurrers were heard on October 28, 2011. (RT 10/28/11, at pp. 88-136.) The trial court announced its intent to sustain Respondents' demurrers without leave to amend. The judge expressed his view that the extensive allegations of Appellant's complaint as to the involvement of Respondents with the Beacon Project were insufficient to establish a duty of care to Appellant. (RT 10/28/11, at pp. 94, 106-15.)

According to the trial court, in order to allege duty, the complaint is required to, and Appellant's complaint does not, state with specificity that Respondents "went beyond what architects do, which is recommend changes, and actually controlled whether or not that change was implemented." (RT 10/28/11, at p. 119; see also RT 10/28/11, at pp. 111, 112.) As discussed at length in its written order, the trial court's ruling was based upon its conclusion that:

> The allegations do not show that either of the architects went beyond the typical role of the architect, which is to

[4] Respondents' prior demurrers did not include any objection to the first cause of action, relating to violations of SB 800. (JA 75-85 (initial SOM demurrer); JA 86-114 (initial HKS demurrer).)

> make recommendations to the owner. Even if the architect initiated the substitutions, changes, and other elements of design that Plaintiff alleges to be the cause of serious defects, so long as the final decision rested with the owner, there is no duty by the architect to the future condominium owners, in the Court's view.

(JA 483.)

The trial court then presented counsel for Appellant with a conditional offer to allow an amendment to the complaint. The court stated that it would change its ruling to allow leave to amend, but only if counsel could, in good faith, "state that the role of SOM, HKS, or both, went beyond the traditional role of the architect." This would need to be "more than a recommendation. When the architect recommends something, the architect does not control it." But if counsel could, "consistent with her ethical duties," amend to state that the architect actually "dictated and controlled" the decision to eliminate z-ducts, "acting in a manner that was contrary to the directions of the owner, or that ignored the owner's directions (rather than merely recommending such a decision to the owner)," (JA 483-84), then leave to so amend would be granted.

Over the protests of counsel for Appellant that she had not had an opportunity to take any discovery on these matters, the trial court ordered that leave to amend would be granted only if counsel could

"in good faith" add to Appellant's complaint an additional averment that Respondents had exercised an extraordinary degree of control over the Beacon Project, acting contrary to, or in disregard of, the instructions of the developer. (RT 10/28/11, at pp. 116-17; see also, JA 483-84.) The trial court threatened counsel for Appellant with sanctions under Code of Civil Procedure section 128.7 if she were to make such an averment, and should it later turn out that Respondents did not, in fact, override, disregard, or act contrary to the developer's instructions. (RT 10/28/11, at pp. 117-18.)

Counsel for Appellant, after reflection, declined to make such an averment. As a result, the demurrers of both Respondents were sustained without leave to amend, under the Court's written order of November 22, 2011. (JA 484 (respondent SOM), 485 (respondent HKS).) Judgment was entered, dismissing the action as to both Respondents, on December 15, 2011. (JA 487, 489.) This appeal followed. (JA 491.)

ARGUMENT

A. This Court Must Uphold the Court of Appeal's Decision Herein if the Facts Alleged in Appellant's Complaint, Reasonably Construed, Amount to a Valid Cause of Action, or Could Reasonably Be Amended to State a Valid Cause of Action

On review of the judgment of the Court of Appeal reversing the superior court's order sustaining defendants' demurrers, this Court must examine Appellant's complaint de novo to determine whether it alleges facts sufficient to state a cause of action under any legal theory, such facts being assumed true for this purpose. (*McCall v. Pacificare* (2001) 25 Cal.4th 412, 415.)

This Court must give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. (*Reynolds v. Bement* (2005) 36 Cal.4th 1075, 1083. It treats the demurrer as admitting all material facts properly pleaded. (*Aubry v. Tri-City Hospital District* (1992) 2 Cal.4th 962, 966-67 (citations omitted).) It is error for a trial court to sustain a demurrer when the plaintiff has stated a cause of action under any possible legal theory. (*Ibid.*) It is an abuse of discretion to sustain a demurrer without leave to amend if the plaintiff shows there is a reasonable possibility any defect identified by the defendant can be cured by amendment. (*Ibid.*)

Statutory interpretation, in this case, the interpretation of SB 800, is a question of law that the appellate court reviews de novo. (*Bruns v. E-Commerce Exchange, Inc.* (2011) 51 Cal.4th 717, 724.) Similarly, the existence of "duty" is a legal question to be reviewed de novo. (*Osornio v. Weingarten* (2004) 124 Cal.App.4th 304, 316.)

B. The Court of Appeal Correctly Concluded That Under the Facts as Alleged in Appellant's Complaint, Respondents, Acting in the Normal Role of the Design Professional, Owed the Future Beacon Project Homeowners a Duty of Care to Perform Their Services in a Reasonably Prudent Manner So As to Avoid Causing Appreciable Harm to the Homeowners and Their Property as a Result of Respondents' Negligence

1. Cases Dating Back to *MacPherson v. Buick Motor Co.* Hold that a Duty of Care Exists Toward Future Homeowners by Significant Participants in the Design and Construction of Homes

As the Court of Appeal correctly states (Court of Appeal Opinion, reproduced as Attachment C (hereafter, "Opinion"), pp. 7-8), the liability of design professionals to third party purchasers of residential construction is not unexplored territory, and does not present this Court with a novel issue. Almost one hundred years ago, in the seminal and still leading case of *MacPherson v. Buick Motor Co.* (1916) 217 N.Y. 382 [111 N.E. 1050], which involved a defective wheel of a car, Justice Cardozo gave extensive attention to a prior

decision, *Burke v. Ireland* (1898) 26 A.D. 487 [50 N.Y.S. 369], which involved defective construction. In *Burke*, the court held that a party is responsible in damages for his negligence in the design or construction of a building, whereby third persons are injured, even though he has no contractual relations with such persons. (*Burke v. Ireland, supra,* 26 A.D. at pp. 491-92.) The nineteenth century *Burke* opinion already recognized that the developer will normally rely on a licensed architect to know the details of designing and constructing a residential building. Thus, the primary "duty" to make such building a safe and habitable place rests with the architect. (*Id.*, at pp. 498-99.) The developer, contractors, and others involved in the construction process generally rely on the architect, whom the law requires to be a qualified, licensed professional (see *Binford v. Boyd* (1918) 178 Cal. 458, 467), to understand the fundamental requirements of habitable living space, and to incorporate them into the design.

MacPherson was the starting point for a long line of cases, including numerous decisions which have issued from this Court, holding that "privity" is not a requisite of liability based on negligence, where the defendant has created a product with knowledge that the product, while normally safe, can be harmful if

poorly designed or made. (*MacPherson v. Buick Motor Co., supra,* 217 N.Y. at pp. 389-90.) The defendant's "duty of care" arises from the nature of the transaction in which the party who contracts to buy the product created by the defendant is known to be a "dealer" who buys only for the purpose of reselling to the public. (*Id.*, at p. 390.)

Justice Cardozo's ground for rejecting the "privity" requirement in *MacPherson* remains equally applicable to the ultimate argument advanced by Respondents herein, namely, the contention that Respondents' duty ran only to the developer (see Opening Brief, pp. 34-37):

> The dealer was indeed the one person of whom it might be said with some approach to certainty that by him the car would not be used. Yet the defendant would have us say that he was the one person whom it was under a legal duty to protect. The law does not lead us to so inconsequent a conclusion.

(*Id.*, at p. 390.) The *MacPherson* opinion explicitly draws support from *Burke*, which as noted dealt with the defective design and construction of a residence. It concludes:

> There is nothing anomalous in a rule which imposes upon A, who has contracted with B, a duty to C and D and others according as he does or does not know that the subject matter of the contract is intended for their use.

(*Id.*, at p. 393.)

This Court long ago fully accepted and adopted the reasoning and rule of *MacPherson*, as it applies to negligence in the design and construction of a residence. This Court is here called upon by Respondents to rewrite the common law, and repudiate an entire line of cases, in order to accept the position advanced by Respondents that the architect owes no duty of care to persons who will be living in the homes that he designs.

MacPherson and its progeny were restated and relied upon by this Court in *Hale v. Depaoli* (1948) 33 Cal.2d 228. The defendant, Depaoli, was involved in the construction of a residence in 1925. In his capacity as a builder, Depaoli had no contractual relationship with subsequent occupants of the residence. The plaintiff was an 18 year old girl, the daughter of a tenant, who fell off the porch due to a defective railing that was not nailed properly, and suffered injuries. This Court cited *MacPherson* to hold that Depaoli, as the builder, owed a duty of care to the future residents to make sure that the home was built properly, and was liable for his negligence in performing that duty. (*Id.*, at pp. 230-31.)

Interestingly, with respect to one of Respondents' efforts to distract attention with an argument about the "original intent" of the

Beacon Project (Opening Brief, pp. 4, 11),[5] the Court in its analysis and holding drew absolutely no distinction between the duty of care that would be owed to a "home owner," as opposed to a "renter." Either way, the duty of care is owed to the people who will be living in the home.

However, Respondents' Opening Brief makes a patently false statement in asserting "[I]t is undisputed that the units in the Beacon were originally built for rental as apartments." Appellant's complaint clearly and unequivocally alleges the exact opposite. It specifically states that Respondents --

> drew the plans and specifications, and/or engaged in periodic site observations and contract administration respecting the design, development, and construction of the Subject Property and the improvements thereon with the knowledge that the said property would be sold to and used by members of the public, including the members of the Plaintiff Association.

(JA 312; see also, JA 270 (Beacon Project was created with CC&R's in place prior to its construction); 277-78 (condominium owners' association was created before the Beacon Project was completed); 287 (intent of the developer was to sell condominiums to the public).)

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[5] This is another example of an issue Respondents argue in their brief, as to which this Court did not grant review.

Appellant's complaint further alleges that in designing and managing the construction of the Beacon Project, Respondents "caused the property and the improvements to be constructed through their own services." Additionally, Appellant's complaint alleges that Respondents were paid well over Five Million Dollars ($5,000,000) for their services on the project, making it fair and equitable for these parties to have a duty of care to Plaintiff and its Members, and the Commercial Association. (JA 312.)

In *Stewart v. Cox* (1961) 55 Cal.2d 857, this Court extended the holdings of *MacPherson* and *Hale* to a situation where a subcontractor had negligently installed gunite for a swimming pool, allowing water to escape which damaged the plaintiffs' home. The Court rejected the argument that the lack of privity between the subcontractor and the home owner was a basis for denying liability. The Court, most cogently, stated:

> [I]t was obvious that the pool for which [subcontractor] Cox provided the gunite work was intended for the plaintiffs and that property damage to them -- and possibly to some of their neighbors -- was foreseeable in the event the work was so negligently done as to permit water to escape. It is clear that the transaction between [contractor] Wahlstrom and [subcontractor] Cox was intended to specially affect plaintiffs. There is no doubt that plaintiffs suffered serious damage, and the court found, supported by ample evidence, that the injury was

> caused by Cox's negligence. Under all the circumstances Cox should not be exempted from liability if negligence on his part was the proximate cause of the damage to plaintiffs.

(*Id.,* at p. 863.)

The *MacPherson / Depaoli / Stewart* line of cases was further extended in *Sabella v. Wisler* (1963) 59 Cal.2d 21. In *Sabella*, the "negligence" was the developer's failure to discover that the site of a home was uncompacted fill. Evidence showed that the developer failed to conduct soil tests, and failed to notice the problem from observations during excavation. The plaintiffs' home, which was part of a tract development, did not suffer appreciable damage until four years after it was completed, when sewer pipes became offset due to settlement, causing large volumes of water to escape, thus causing extensive further damage. (*Id.,* at pp. 24-27.)

Sabella is of interest here because it represents this Court's initial foray into the policy considerations giving rise to duties associated with the participants in mass-produced housing, the subject matter of the present case.

Applying the six factor test of *Biakanja v. Irving* (1958) 49 Cal.2d 647, the Court found that a "duty" existed. Significantly with respect to Respondents' main argument here, the Court recognized

that "future homeowners" are a sufficiently definite and limited class to warrant the imposition of a duty of care on the part of those who create a housing development.

> It appears that while this house was not constructed with the intention of ownership passing to these particular plaintiffs, the Sabellas are members of the class of prospective home buyers for which Wisler admittedly built the dwelling. Thus as a matter of legal effect the home may be considered to have been intended for the plaintiffs, and Wisler owed them a duty of care in construction. (See Prosser, Torts (2d ed. 1955) § 36, pp. 166-168.)

(*Sabella v. Wisler, supra,* 59 Cal.2d at p. 28.)

There is no principled basis for a distinction between the duty owed by Respondents to the home owners in this case, and the duty owed to the home owners by the defendants in *Stewart v. Cox* and *Sabella v. Wisler*. Respondents offer no basis to distinguish *Stewart* and *Sabella*. The Court would be required to overrule these venerable cases to accept Respondents' position on a privity requirement here.

The vulnerability of home buyers, particularly, buyers of mass produced homes, was again stressed by this Court in *Connor v. Great Western Savings & Loan Assn.* (1969) 69 Cal.2d 850. The Court factored such vulnerability into the "moral blame" factor of the *Biakanja* analysis. The Court observed that "[A] home is not only a

major investment for the usual buyer but also the only shelter he has." Hence, it is doubly important to protect him against defects beyond his capacity to remedy. The usual buyer of a home is "ill equipped with experience or financial means" to discover serious defects. (*Id.*, at p. 867-68.)

Therefore, relying on *MacPherson* and its progeny, this Court in *Connor* found a duty of care toward future homeowners to exist in the project's financing bank – a party who, while substantially involved in the development that produced plaintiff's home, obviously was not the owner, the contractor, or the architect. (*Id.*, at p. 869.)

Most recently, the "duty outside privity" doctrine of *MacPherson* and its progeny was re-examined by this Court in *Aas v. Superior Court* (2000) 24 Cal.4th 627. This Court, in *Aas*, recapped the entire line of cases from *MacPherson* forward, discussed above. (*Id.*, at pp. 637-42.) The Court did not question in the least the established principle that a duty of care by all project participants, including the design professionals, runs in favor of the future homeowners. However, *Aas* concluded that this duty should be limited, under the doctrine of *Seely v. White Motor Car* (1966) 63 Cal.2d 9, to suits seeking the costs to repair defects in construction

that have caused "appreciable harm" to the homeowners. (*Id.*, at pp. 646, 652.) Violations of fire or earthquake codes, which have not caused any harm, do not give rise to damages recoverable in tort, this Court ruled. In terms of the *Biakanja* factors, the *Aas* holding was primarily addressed to "the degree of certainty that the plaintiff has suffered harm." (*Id.*, at p. 646.)

The Beacon Project homeowners here have suffered serious and appreciable harm as a result of the alleged negligence of Respondents. Appellant's complaint alleges a wide variety of physical and structural damage to the Project caused by Respondents' negligence, as the Court of Appeal correctly pointed out. (Opinion, p. 12; see JA 293-305.) The "solar heat gain" condition, which is a central focus of Appellant's complaint, is of such severity that the units are uninhabitable, unhealthy, and unsafe during certain periods. (JA 291.) The heat has caused physical damage, including window cracking, failure and degradation of window seals. (JA 291-92.) The lack of ventilation has also caused health and safety hazards. (JA 292.) Respondents are morally and legally at fault for the form of shoddy construction that is causing the problem here, specifically, a non air conditioned high rise residential building that absorbs solar heat

because it has too much glass and concrete, and because it does not have anything like sufficient outside air ventilation to disperse the heat buildup and cool off the residences.

The discomfort, annoyance, and adverse health effects of life in the kind of prolonged and uncontrollable heat that exists inside the Beacon Project, where many units are generally 20 degrees or more above outside ambient temperatures, reach into the 90's or even exceed 100 degrees (JA 281), and do not cool off at night, remaining hot for days on end even when the outdoor temperature subsides,[6] are a recognized form of "appreciable, non-speculative, present injury." (*Aas, supra*, 24 Cal.4th at p. 646; see *Kornoff v. Kingsburg Cotton Oil Co.* (1955) 45 Cal.2d 265, 271-72 (damages for discomfort and annoyance associated with adverse living conditions are recoverable in tort, even if no actual physical injury has ensued); *San Francisco*

[6] Appellant's complaint alleges that "solar heat gain" is a very serious problem with the Beacon Project that is causing a lack of habitability, safety and even health problems. To the extent that any additional details regarding the magnitude of the overheating problems at the Beacon Project were required to be, but were not, sufficiently alleged in Appellant's complaint, leave to amend to state them more completely should have been granted. The trial court did not suggest that amendment would be needed, nor did it grant leave to amend to permit a more detailed allegation of the "appreciable harm" suffered by the Beacon Project homeowners. If a complaint does not state a cause of action, but there is a reasonable possibility that the defect can be cured by amendment, leave to amend must be granted. (*Quelimane v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 39 (citing *Blank v. Kirwan* (1985) 39 Cal. 3d 311, 318).)

Unified School District v. W.R. Grace & Co. (1995) 37 Cal.App.4th 1318, 1325-35 ("appreciable harm" occurs when asbestos fibers are released into the air, causing a health hazard, even though no one has actually as yet contracted an asbestos-related disease); see also, *J'Aire Corp. v. Gregory* (1979) 24 Cal.3d 799, 802, 805 (contractor's failure to timely install air conditioning, resulting in uncomfortably warm temperatures that interfered with human comfort inside business premises for a period of a month, caused appreciable harm); *Kriegler v. Eichler Homes, Inc.* (1969) 269 Cal.App.2d 224, 226 (failure of radiant heating system, resulting in inability to provide a proper climate within a home (and no other damage to the home), held to be a form of physical damage to property.) Thus, *Aas* does not support reversal of the Court of Appeal's decision herein.

2. The Duty of Care of Participants in a Construction Project Extends to Design Professionals Who Defectively Prepare the Plans and Specifications, Who Negligently Approve Substitutions of Cheaper Materials, Who Negligently Manage and Observe the Construction, and Who Otherwise Cause Harm to the Future Owners of a Condominium Project

This Court has not been called upon to address directly the duty of care of an architect who prepares the plans and specifications, and otherwise performs comprehensive design services, on a

condominium project. However, such a duty of care has been found to exist in numerous Court of Appeal decisions, and is unanimously recognized by secondary authorities and commentators. There is no sound basis for this Court to hold that architects who performed the extensive scope of services on the Beacon Project that are alleged in Appellant's complaint were not subject to a duty of care to avoid harm to the future homeowners.

Applying the *MacPherson – Depaoli – Stewart* line of authority from this Court, *Montijo v. Swift* (1963) 219 Cal.App.2d 351, 353 early held that an architect owes a duty of care, and thus is liable to a third person not in privity of contract with him for an injury suffered as a result of the architect's negligent design and construction observations.

Mallow v. Tucker, Sadler & Bennett (1966) 245 Cal.App.2d 700, followed *Montijo*. In that case, the architect who prepared the plans and specifications knew about the existence of underground high voltage lines on site, but failed to show them on the plans. The plaintiff was the wife of a worker who was killed when he jack hammered into the concealed power lines. The Court of Appeal had no difficulty concluding that under the *Biakanja* factors, the architect

owed a duty of care to participants in the construction process, despite the lack of any privity. (*Id.*, at p. 703.)

Close in point here is *Cooper v. Jevne* (1976) 56 Cal.App.3d 860. As in the present case, the appellate court was reviewing the sustaining of a demurrer to a negligence cause of action against the architect of a condominium project on grounds of "no duty." In the third cause of action, the project architects were alleged to have prepared and furnished to the "builder-seller" of a condominium project the "architectural plans and specifications." These architects also "acted as supervising architects in the construction of the buildings" within the condominium project. Their professional work was done under written contract with the "builder-seller," i.e., the project developer, for a fee. The complaint alleged that the architects were under a duty of care to avoid foreseeable injury to the purchasers of the condominiums. (*Id.*, at p. 867.) It further alleged that the architects failed to perform their duty of care, resulting in damage to the condominium owners.

The architects in *Cooper* conceded that they had a duty to avoid personal injury to future occupants of the buildings. At argument, they also conceded that this duty would extend to avoiding "property

damage." (*Id.*, at p. 868 n.3.) The Court of Appeal did not question the appropriateness of these concessions, endorsing them in its holding. The court went even farther, in its opinion, and concluded that the architects' duty of care was broad enough to also include negligence that would cause foreseeable harm to the future condominium owners, even if the harm could be characterized as "economic loss alone." (*Id.*, at pp. 867-69.)

This Court in *Aas* expressed concern that *Cooper* should be regarded as dictum insofar as it suggests that the condominium owners could recover "economic loss alone," unaccompanied by property damage or other appreciable harm. (*Aas*, *supra,* 24 Cal.4th at pp. 647-48.) However, in its discussion of *Cooper*, *Aas* did not question that the architect has a duty of care which, if breached, would give rise to liability of the architect to the future homeowners, with respect to appreciable harm to the homeowners that is recoverable in tort under the *Seely* doctrine.[7] (*Ibid.*)

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[7] Another case where the architect was specifically held to owe a duty of care to the future owners was *Huang v. Garner* (1984) 157 Cal.App.3d 404, 418 (cited by Respondents). Although *Huang* was disapproved in *Aas* with respect to its holding regarding the kind of damages that could be recovered (*Aas, supra,* 24 Cal.4th at 648-49), this Court did not question its fundamental conclusion that "building designers and engineers" owe a duty of care to future owners of the building with whom they are not in privity.

Huber, Hunt & Nichols, Inc. v. Moore (1977) 67 Cal.App.3d 278, 299, stated that "it is well settled that the Architect may be sued for negligence in the preparation of plans and specifications either by his client or by third persons." Recent Court of Appeal decisions continue to follow this analysis and conclusion. (E.g., *Standard Fire Ins. Co. v. Spectrum Community Assn.* (2006) 141 Cal.App.4th 1117, 1143-44, citing *Krusi v. S. J. Amoroso Construction, Inc.* (2000) 81 Cal.App.4th 995, 1005-06 (it is "clear that a tort duty runs from an architect, designer, or contractor to not only the original owner for whom real property improvement services are provided, but also to subsequent owners of the same property").)

The architect's duty of care to future homeowners is also recognized by all important commentators and secondary authorities on California law, as the Court of Appeal correctly pointed out. (Opinion, p. 8, citing 6 Witkin, Summary of Cal. Law (10th ed. 2005) Torts, § 996, p. 260; 11 Miller & Starr, Cal. Real Estate (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 sum, it would be truly shocking, and it would also fundamentally change generally recognized law, were this Court to endorse Respondents' sweeping argument that architects who are paid $5 million and who have the type of comprehensive, "A to Z," "cradle to grave" involvement in preparing plans and specifications, approving revisions that substituted cheaper materials, and then reviewing and making recommendations regarding every phase of construction, as did Respondents on the Beacon Project, owe no duty of care whatsoever to avoid negligence that harms the future residents and homeowners of the project.

Respondents' Opening Brief on the Merits is particularly conspicuous for the absence of ***any*** discussion of the above Court of Appeal decisions and secondary authorities.[8] Conversely, absolutely no authority is presented in Respondents' Opening Brief which holds

[8] Only *Mallow* is even mentioned, and that brief mention is made solely in the context of an argument regarding "moral blame." (Opening Brief, p. 30.)

that a design architect who creates the plans and specifications, and otherwise performs comprehensive design and construction observation on a condominium project, does ***not*** owe a duty of care to the future homeowners. If Respondents should present any such purported authority for the first time in their Reply Brief, Appellant requests permission to file an additional brief to address the new discussion.

3. This Court's Decision in *Bily v. Arthur Young & Co.* Involved a Significantly Different Situation, Does Not Question the Above Cases and Authorities Relative to Residential Developments, and Does Not Alter the Liability of Design Professionals Who Defectively Prepare Plans and Specifications, Causing Harm to the Future Owners of a Condominium Project

In terms of any authority from this Court, Respondents' arguments to the effect that an architect owes no duty of care to future homeowners of the project he designs are based primarily on *Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370. *Bily*, however, addresses the liability of an auditor for its failure to detect fraud in the course of an audit of a company's financial statements. This is a very different context for a duty analysis, and one which presents very different policy considerations related to the unfairness of holding the auditor

liable to the general public when the primary tortfeasors are the auditor's "client, its promoters, and its managers." (*Id.*, at p. 400.)

Bily emphasized that in connection with publicly traded companies, a virtually unlimited number of persons making up the general public can become "investors" who may claim that they have been misled by an error in the audit. Thus, after a lengthy discussion, the Court held that public accounting firms have no general duty of care to persons who may become investors, even though harm to such persons may be foreseeable as a result of misinformation in the audit report. (*Bily, supra*, 3 Cal.4th at pp. 379-406.) The Court's reasoning underlying its holding can be capsulized by its quote from Dean Prosser:

> The problem is to find language which will eliminate liability to the very large class of persons whom almost any negligently given information may foreseeably reach and influence, and limit the liability, not to a particular plaintiff defined in advance, but to the comparatively small group whom the defendant expects and intends to influence.

(*Id.*, at pp. 394-95.)

However, the Court immediately qualified its rule by holding that where the accountant performs its work knowing that the work is intended to be relied on by a particular class of investors "to whom"

or "for whom" the representations are made, then consistent with the Restatement Second of Torts, section 552, the accountant ***does*** owe a duty of care to such class members whom the accountant knows are relying on its work, even though the accountant is not in "privity" with them. (*Bily, supra,* 3 Cal.4th at pp. 392-93 & 406-07.) This portion of *Bily* is the more apposite here, since the Beacon Project unquestionably was intended by Respondents to be sold to, and used as housing by, Appellant's members.

Thus, *Bily* deals with a much different type of situation from what is presented here, where an architect has been involved with all aspects of the design and construction of a major residential development from beginning to end. The architect certainly "expects and intends to influence" the residents and future homeowners of that development. *Bily*'s holding limiting the scope of an accountant's duty of care for an audit of a publicly traded company is centered on the concern that an auditor could be liable to an essentially limitless public. Its reasoning instead supports a finding of duty here. From the standpoint of Respondents, when performing their comprehensive design and observation services on the Beacon Project, the future owners of the development were not a "limitless" class, essentially

equivalent to the general public. Rather, they were the specific objects of the design professional's work. *Bily* itself goes on to hold that tort liability based on a duty of care is appropriate "where the defendant knows with substantial certainty that plaintiff, or the particular class of persons to which plaintiff belongs," will rely on the professional's work in the course of the transaction. (*Bily, supra,* 3 Cal. 4th at 414.)

Both *Bily*, and Restatement Second of Torts § 552 upon which it relied extensively, deal with the principles governing a suit against a professional for negligent failure to detect fraud, not the principles governing a suit for negligent design and construction of a residence. The scope of "duty" to foreseeably damaged persons outside the bounds of privity imposed with respect to "defective products" created by a defendant has always been analyzed differently, and substantially more broadly, than is "duty" with respect to persons who may in the future rely on "reports" written by a defendant who is a professional. In terms of analysis of the *Biakanja* factors, the "closeness of the connection" between the defendant's role and the harm to the plaintiff is far more attenuated in the *Bily* situation than it is here, where it is alleged that the defendant created the product

whose defects caused harm to the plaintiff.[9] (See *Bily, supra,* 4 Cal.4th at pp. 400-02.)

Justice Cardozo's *MacPherson* opinion itself emphasized the difference in the duty of one who "makes" something, as opposed to the lesser duty of one who merely "inspects." (*MacPherson, supra,* 217 N.Y. at pp. 392-93.) *MacPherson* distinguished prior "duty" cases on this basis. Justice Cardozo would return to this same distinction in *Ultramares Corp. v. Touche* (1931) 255 N.Y. 170, 180-81 [174 N.E. 441, 445], the leading case on auditor liability, which this Court essentially followed in *Bily*. This Court should adhere to the same distinction here.

This Court in *Bily* expressly rejected the analogy (which was in fact proffered by the appellate advocates) to what this Court itself termed the "demise of privity as a barrier to recovery for negligence in product manufacture." (*Bily, supra,* 3 Cal.4th at p. 764.) The Court's stated reason for rejecting the analogy is highly instructive.

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[9] *Biakanja* itself falls on the "defective products" side of this dichotomy. It involved the defendant's negligent creation of a will. Its holding was subsequently extended by this Court to wills written by licensed attorneys. (*Heyer v. Flaig* (1969) 70 Cal.2d 223, 226; *Lucas v. Hamm* (1961) 56 Cal.2d 583, 588.)

"***Initially, the maker of a consumer product has complete control over the design and manufacture of its product, whereas the auditor merely expresses an opinion about its client's financial statements.***" (*Ibid.* (emphasis added).)

Here, Respondents are far more like product manufacturers than auditors, in that they had an enormous degree of control over the design and specifications, and thus the ultimate construction of the Beacon Project (regardless of whether they were involved in "overruling" the developer, or countermanding the developer's instructions, going outside the "normal role of the architect" as the trial court's ruling stated to be required, or in "hammering nails" as part of the actual construction). Respondents here were by no means mere consultants furnishing information or a report about the project.[10]

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[10] The critical distinction between professionals who are negligent when making a product, as opposed to defendants who merely fail to uncover a problem when undertaking a review or writing a report, largely addresses the cases about "professionals" that Respondents cite at Opening Brief, pp. 22-25. (See *Mission Oaks Ranch, Ltd. v. County of Santa Barbara* (1998) 65 Cal.App.4th 713, 719-20 (County's EIR consultant, whose job was to prepare an information report, owed no duty of care to the project owner); *Lake Almanor Assn., L.P. v. Huffman-Broadway Group, Inc.* (2009) 178 Cal.App.4th 1194, 1204-05 (same); *FSR Brokerage, Inc. v. Superior Court* (1995) 35 Cal.App.4th 69 (real estate agent owed no duty of care to future invitee injured by balcony collapse in building purchased by his client); *BLM v. Sabo & Deitsch* (1997) 55 Cal.App.4th 823, 830-31 (law firm

In *Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 58-59, this Court returned to the importance of this consideration. The Court declined to find that a title insurance company owes a duty of care to write title insurance regarding properties that are sold in tax sales. The Court pointed out that a title insurance policy is essentially an informational type document, dealing with potential problems created by others, for which the title company should not be required to assume liability. It explicitly distinguished *Connor*, *supra*, on this basis, stating:

> In *Connor*, the defendant had the knowledge, control, and ability necessary to prevent construction of defective homes. Its negligent failure to monitor the quality of the homes for which it provided construction financing contributed to acquisition of homes with serious construction defects by less knowledgeable third party purchasers.

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representing City owes no duty of care to developer, a non-client, to accurately evaluate the law regarding prevailing wage requirements for subsidized housing project.)

Huggins v. Longs Drugs Stores (1993) 6 Cal.4th 124, 133 is entirely inapposite. There was no question that a pharmacist has a duty of care to a person who foreseeably will take medicine that he prepares. This Court's decision deals entirely with the issue of whether a person ***other than the patient*** has a claim for "negligent infliction of emotional distress." No such issue is presented here.

(*Quelimane, supra,* 19 Cal.4th at p. 59.) Thus, the Court in essence concluded that the putative duty asserted in *Quelimane* fell on the *Bily* side of the "informational report" / "defective product" dichotomy.

When *Bily* casually mentions in dictum that architects sometimes perform a role as "suppliers of information and evaluations for the use and benefit of others," (*Bily, supra,* 3 Cal.4th at p. 770) it is referring to architects who are performing this far different type of "information supplying" consulting role, not architects who draw the plans and specifications, and then perform the comprehensive construction management services for a residential project that were performed by Respondents here. Thus, *Bily's* offhand reference to architects is not applicable to the analysis of the duty of care owed by the architect Respondents in this case.[11]

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[11] The cases cited by *Bily* in footnote 20 are very different, in terms of the claims and issues, than are the claims and issues involved here. (Compare *M. Miller Co. v. Dames & Moore* (1961) 198 Cal.App.2d 305, 307 (claim against engineering firm that had prepared a soils report, which was eventually made available to prospective purchasers of a property); *Huber, Hunt & Nichols, Inc. v. Moore, supra,* 67 Cal.App.3d at pp. 301-02 (claim for negligent performance of architect's work resulting in a cost overrun to the general contractor).) Moreover, in both of these cases, a duty of care was found to potentially run to the benefit of the third party who was neither in privity nor an "intended beneficiary" of the design professional's contract.

As stated in *Bily*, the general character of the third party plaintiffs involved in *Bily* is different from the third party plaintiff involved here. Appellant's members are, essentially, "consumers" who are "presumptively powerless" (to use *Bily's* term) to commission an in-depth study of the building prior to their purchase. Latent defects in the design of the project, such as those alleged in Appellant's complaint, are not something that the condominium owners can reasonably discover prior to their purchase.[12]

Respondents' suggestion to the effect that any duty of Respondents to Appellant is precluded by a provision in the contract between Respondents and the developer, stating that the future condominium owners are not third party beneficiaries of the Respondents' contracts (Opening Brief, pp. 23-26) is unsound. Appellant either did not exist, or was under the developer's sole control, at the times when Respondents' contract was signed, when

[12] Allegations of the Appellant's eighth cause of action (not at issue on this appeal) with respect to the existence of defects in the Beacon Project, do not provide a basis for affirming the result below (see Opening Brief, p. 30.) Appellant alleges, in that cause of action, that the "solar heat gain" problem with the Beacon Project in fact became known to the developers prior to sale, and was effectively concealed from the people who bought the units. This allegation is not a basis for finding that Respondents owed Appellant no duty of care. (See, e.g., *Cooper v. Jevne, supra,* 56 Cal.App.3d at p. 866 (the existence of a valid cause of action for concealment against the developer does not preclude simultaneous assertion of cause of action against the architect for negligence).)

Respondents designed the Beacon Project, and when the Beacon Project was constructed under the management and supervision of Respondents. Appellant's members, the unit owners, did not come on the scene until after the Beacon Project was already completed.[13] It blinks reality to suggest that the Beacon Project was not designed and constructed with these future homeowners in mind. Appellant's complaint explicitly so alleges. (JA 312.) To give any credence to Respondents' argument to the effect that Appellant should be required to prove some "third party beneficiary" status with respect to the contract between the developer and the architect would require

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[13] *Ratcliff Architects v. Vanir Construction Management, Inc.* (2001) 88 Cal.App.4th 595, 604-07, involved the question of whether one of the owner's consultants on a construction project (the construction manager) owed a duty of care to a different owner's consultant (the architect) on the same project. These policy considerations were entirely different from the policy considerations that attach here, where the plaintiff is the condominium owners' association. Plaintiff had no control whatever over Respondents' work, and also had no ability to contract with Respondents. As Justice Lambden's opinion in *Ratcliff* states, when a defendant's liability rests partially under the control of another party's conduct and the plaintiff is free to contract with the other party, the defendant's "moral blame" and degree of connection to the plaintiff's alleged injury are too remote to justify imposition of a tort duty. None of these considerations apply here. Moreover, the Court of Appeal's opinion in *Ratcliff* notes that the questions of the scope of a person's duties, and to whom they are owed, are matters of public policy, and are not subject to regulation by contract. Thus, even where the contract between the developer and its construction manager specifically excludes third party beneficiaries from having any rights under the contract, "public policy may dictate the existence of a duty to third parties." (*Id.*, at p. 605, quoting *Quelimane, supra,* 19 Cal. 4th at p. 58 ("public policy may dictate the existence of a duty to third parties".).

overruling *Connor, Sabella,* and *Stewart*, as well as rejecting the fundamental premise of *MacPherson*, which is to impose liability on one who participates in making a product intended for consumer use, independent of contractual privity.

3. The *Weseloh* Case Relied on by Respondents Also Involved a Significantly Different Situation, Did Not Involve a Residence, and Did Not Purport to Differ With the Long Standing Rule of *Cooper v. Jevne* and the Other Above Cited Cases, Commentaries, and Secondary Authorities Holding that Architects and Other Design Professionals Owe a Duty of Care to the Future Owners of a Residential Development

In terms of any case authority dealing with a design professional's role in defective construction, Respondents base their entire argument on the Court of Appeal decision in *Weseloh Family Limited Partnership v. K.L. Wessel Construction Co., Inc.* (2004) 125 Cal.App.4th 152. The argument, however, does not withstand scrutiny, and certainly does not warrant this Court rejecting the entire line of authority reviewed above.

Weseloh involved design engineers who furnished drawings for retaining walls for an automobile dealership project. A portion of the retaining walls failed. The owners sued the design engineers for negligence. The general contractor also sued the design engineers for negligence and equitable indemnity. Applying the burden-shifting

procedures of Code of Civil Procedure section 437c, the court granted summary judgment to the design engineers on the ground that no duty of care was shown by the undisputed material facts as presented to the court. (*Id.*, at p. 158.) The Court of Appeal, Fourth Appellate District, Division Three affirmed this ruling, although it did not fully endorse the trial court's rationale.

Weseloh exemplifies the maxim that "hard cases make bad law." A close study of *Weseloh* shows that it is both factually and procedurally distinguishable here.

The structure of the *Weseloh* project was as follows. K. L. Wessel Co. ("Wessel") was the general contractor, working under contract with the Weseloh Family Limited Partnership, Weseloh & Sons, LLC, and Weseloh Corporation ("Weseloh"). Sierra Pacific ("Sierra") was the retaining wall subcontractor. Defendant Randle "supervised the design work of the design engineers." Randle was paid "$1,500 or $2,200" for his design of two Keystone walls. (*Id.*, at p. 159.) Randle "testified in his deposition that he 'used an accepted standard of the industry which is the ICBO approved manual for Keystone wall construction.'" (*Id.*, at p. 166.) Thus, it appears the walls were designed using published "standard details," which is

typical practice for structural engineers when designing retaining walls. [14]

Randle was "aware" that Weseloh owned the property. Randle was employed by Owen Engineering Co. ("Owen"). Owen apparently had no other involvement with the project, except through Randle and the other designers whom Randle "supervised." (*Id.*, at p. 159.)

It was repeatedly stressed by the *Weseloh* court that neither Randle nor Owen had any involvement in review of the construction, grading, or installation at the property, nor did they have any involvement in the construction of the retaining walls. (*Id.*, at pp. 159-60.) They were asked to inspect the retaining walls only ***after construction***. (*Ibid.* (emphasis added).)

On February 12, 2001, a portion of the retaining walls failed, causing an alleged $6,000,000 in damages. (*Id.*, at p. 160 & p. 171 fn. 5.)

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[14] The *Weseloh* opinion explicitly says that the defendants were "paid $1,500 or $2,200 for the design of two Keystone walls." (*Weseloh, supra,* 125 Cal.App.4th at p. 159.) Elsewhere in the opinion it is noted that the defendant engineer had testified that the use of ICBO-approved "Keystone" wall designs, which were taken from a manual, are the "accepted standard of the industry." (*Id.,* at p. 166.) The Court may take judicial notice (see *Reynolds v. Bement, supra,* 36 Cal.4th at p. 1083) that "Keystone" wall drawings, which are now published online, are intended for use as standard details for retaining walls. The web site is: (http://www.keystonewalls.com/pages/CADDdetails.html.)

Weseloh sued all of the following entities. (1) Wessel, who eventually settled by paying $1.6 million; (2) Sierra, who eventually settled by paying $1.2 million; (3) another design professional, the soils engineer, who eventually settled by paying $800,000; and (4) Randle and Owen. Wessel, although fully settled with Weseloh, still sought to pursue a cross-complaint against Randle and Owen. (*Id.*, at 160-61.)

In April 2003, Randle and Owed filed a motion for summary judgment, in which they asserted that "no evidence supported the claim that Randle or Owen caused the failure of the retaining walls," and also, that "Randle and Owen could not be liable to the Weseloh plaintiffs or Wessel for negligence because they had no contractual relationship with either the Weseloh plaintiffs or Wessel." (*Id.*, at p. 161.) The motion for summary judgment was granted. Weseloh and Wessel then filed a motion to reconsider, which was denied, with the trial court providing a rationale which bears a faint resemblance to the ruling of the trial court herein:

> If the nature and extent of the work performed by the professional was confined to just giving a professional opinion and advice culminating in a written report, there is no duty owed to the Plaintiffs. If the work included supervision of the actual work performed, then a duty is owed to the Plaintiffs. In this case, there are no facts, and

> there is no allegation that either Randle or Owen supervised the actual work done on the retaining wall, or that either of them controlled, or had the right to control, the physical activities of building the retaining wall. Owen and Randle worked only in their professional capacities rendering their opinions to Sierra Pacific, for Sierra Pacific's purposes, and no evidence has been presented to the contrary.

(*Id.*, at p. 162.)

The appellate court, in affirming, did not adopt or endorse the trial court's reasoning.[15] It did stress the undisputed fact that "neither Randle nor Owen had a 'role in the construction' of the retaining walls. (*Id.*, at p. 164.) Neither "control" nor "the right to control" is mentioned in the appellate opinion as the determinative factor. Thus, *Weseloh* does not support the rationale of the trial court here.

A fact the appellate court did choose to emphasize in *Weseloh* was that the drawings submitted to the City of San Juan Capistrano – although signed by Randle – identified Sierra as their "preparer." (*Id.*, at p. 166.) The court felt it important that a different firm – not the defendants before the court – was the engineering firm of record.

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[15] The reasoning of the trial court in *Weseloh* was apparently based on a reading of *Oakes v. McCarthy Co.* (1968) 267 Cal.App.2d 231, 247-49, a case in which the Court of Appeal affirmed a judgment for damages against a design engineer based on a duty of care to the owner of property. *Oakes* holds that regardless of what may be the case where an engineer merely supplies a design, where the engineer is also involved in "supervising" the "actual work" of a project, a duty of care attaches.

Here, by contrast, Respondents were the sole design architects and engineers of record.

The Court of Appeal acknowledged that injury to Weseloh was foreseeable as a result of negligent design work in connection with the retaining walls. However, the court gave "limited weight" to this factor, in light of what it found to be more important: "Weseloh and Wessel failed to produce evidence showing how and the extent to which their damages were caused by the asserted design defects. This is a significant fact in light of the absence of evidence showing Randle and Owen's design was followed without alteration." (*Id.*, at p. 168.) Thus ultimately, in terms of the *Biakanja* factors, the "closeness of the connection between the defendant's conduct and the injury the plaintiff suffered" was the determinative factor. (*Id.*, at pp. 168-69.)

In the present case, by marked contrast, Appellant's complaint alleges that defects in Respondents' design, as well as improper changes to the design that Respondents recommended and authorized during the construction process, were the direct cause of the "solar heat gain" and other serious construction defects at the Beacon Project. (JA 290, 292-307, 314-15.) For purposes of a demurrer,

these allegations must be accepted as true. This alone fully distinguishes *Weseloh* from the present case.

The *Weseloh* opinion notes that Weseloh's own expert had testified that the retaining wall failure was caused by improper compaction during construction, something that could not be charged to Randle or Owen, since neither of them was present when it occurred. (See *id.*, at p. 168.) There was no claim that either Randle or Owen ever participated in or supervised any physical work in the construction of the retaining walls. (*Id.*, at p. 169.)

The involvement in performing observations, and participating in changes and all other decisions during construction – referred to in some of the cases as "supervising the construction" – is another huge distinction between the role of Randle and Owen as disclosed in the *Weseloh* opinion, and the role of Respondents on the Beacon Project, as disclosed in Appellant's complaint.

For the entire duration of the Beacon Project, Respondents were intimately involved with the progress of the actual construction work. They conducted site and field observations during the construction. They drafted and revised project status reports regarding the progression of the construction work and compliance of the general

contractor with the design plans. They participated in weekly, and then bi-weekly, "owner/architect/contractor" meetings. They engaged in detailed analysis of the applicability of building codes. They approved changes to the window glass, and reductions to ventilation ducts, which deviated from the approved Title 24 report for the Beacon Project and are alleged to be the cause of the "solar heat gain" problem. (JA 315-16.) Assuming, arguendo, that *Weseloh* is correct in its conclusion that some form of supervision or monitoring of the "actual construction work" is a predicate for duty of care of a design professional, the allegations of Appellant's complaint amply meet this requirement.

Weseloh next reasons that no moral blame could be placed on either Randle or Owen, who used standard details for retaining walls that were generally accepted in the building community. (*Weseloh, supra,* 125 Cal.App.4th at p. 169.) This is another key distinction from the current case. Respondents are alleged to have deviated, without authorization, from the materials and other design elements that were submitted to the City of San Francisco in order to secure approval of the Beacon Project. This is alleged to be a cause of the "solar heat gain" problem. An element of moral blame attaches to this unlawful

conduct. Furthermore, as noted in *Connor*, *supra,* the element of "moral blame" that attaches to those involved in the defective design and construction of mass produced housing, such as involved here, is substantially greater than in other contexts. (*Connor, supra,* 69 Cal.2d at pp. 870-71.) As cogently stated in *Kriegler v. Eichler Homes, supra*, where a homeowner purchases a home in a condominium development,

> he clearly relies on the skill of the developer and on its implied representation that the house will be erected in reasonably workmanlike fashion and will be reasonably fit for habitation. He has no architect or other professional advisor of his own, his actual examination is in the nature of things largely superficial and his opportunity for obtaining meaningful protective changes in the conveyancing documents prepared by the builder vendor is negligible. If there is improper construction such as a defective heating system or a defective ceiling, stairway, or the like, the well-being of the vendee is endangered and serious injury is foreseeable.

(*Kriegler, supra,* 269 Cal.App.2d at p. 228, quoting from *Schipper v. Levitt & Sons, Inc.* (1965) 44 N.J. 70 [207 A.2d 314].)

The *Weseloh* court discounted the "policy of preventing future harm," mainly because Weseloh had demonstrated the ability to recover substantial sums from the other defendants in the case, including Sierra (for whom Randle and Owen worked) and another design professional. (*Id.*, at p. 170.) The court also felt that Weseloh

and Wessel could have secured contractual agreements stating that they would be third party beneficiaries of the work of Randle and Owen, had they felt the matter to be important. It is utterly unrealistic to apply this rationale to a multi-family residential project such as the Beacon Project. The owners of the building find and purchase their homes after the premises are already completed. Such future owners are uninvolved in any pre-project negotiations. The Association, as noted above, was completely and solely controlled by the developer at the time the Beacon Project was constructed.

Also, the *Weseloh* opinion repeatedly mentions that Sierra, rather than Randle or Owen, was the design professional of record for the Weseloh project. (*Id.*, at p. 170.) The defendants in *Weseloh* were merely two engineers who were employed by the retaining wall subcontractor Sierra (whom everyone presumably agrees ***did*** owe a duty of care to the owner, as it paid the substantial sum of $1.2 million to the plaintiff in settlement). (*Weseloh, supra,* 125 Cal.App.4th at p. 161.) Sierra was the "preparer" of record of the drawings. To highlight the limited nature of the defendants' engagement, the appellate court carefully recites in its opinion that the earth retaining

drawings for the project identified Sierra as their "preparer." (*Id.*, at p. 166.)

As mentioned above, Respondents were the design professionals of record for the Beacon Project and were thoroughly in charge of all aspects of the project's design and construction. Even if "final decisions" may have rested with the developer, the developer relied on the architect to know and implement with competence the technical aspects of designing and construction a building fit for human habitation. (*Burke, supra,* 26 A.D. at pp. 498-99.)

The *Weseloh* court felt that imposing liability of as much as $2,400,000 on Randle or Owen would be totally "out of proportion to fault," given that they were paid only $2,200 for their design. (*Id.*, at p. 171.) This is another enormous difference from the present case. Respondents were paid in excess of $5 million for their comprehensive, start to finish role in the design, observation, and project administration on the Beacon Project. There is nothing unfair about holding them financially responsible for the consequences of their professional negligence.

Curiously, the *Weseloh* court in conclusion stated that the parties all acknowledged that there was no California case on point for

the decision. (*Id.,* at p. 172.) This is the surest possible indication that the *Weseloh* court did not intend to deviate from, or disagree with, the conclusion in *Cooper v. Jevne* that a project architect for a condominium project owes a duty of care to the future owners. *Cooper v. Jevne* is not questioned, cited or discussed in *Weseloh.*

The *Weseloh* court was careful to re-emphasize, again and again in the course of its decision, that its holding is ultimately based on the failure of Weseloh and Wessel to meet their evidentiary burden when called upon to do so by a motion for summary judgment pursuant to Code of Civil Procedure section 437c. (*Id.*, at pp. 159, 162-63, 172-73.)

Not even the Court of Appeal for the Fourth Appellate District, which decided *Weseloh*, views that case as altering established law holding that a project architect of a residential project owes a duty of care to the future residents. In its opinion in *Standard Fire Ins. Co. v. Spectrum Community Assn., supra,* 141 Cal.App.4th at p. 1143, published two years after *Weseloh*, the Fourth District Court of Appeal stated:

> It is, of course, clear that a tort duty runs from an architect, designer, or contractor to not only the original owner for whom real property improvement services are provided, but also to subsequent owners of the same

> property. ... [I]t is a basic rule deriving from the seminal case of *Biakanja v. Irving [(1958)] 49 Cal.2d 647.*

Standard Fire Insurance does not mention *Weseloh.* Thus, it is erroneous to take *Weseloh* totally out of context and view it as a change in the law relative to the duty of care of a residential project architect, a duty clearly recognized in *Cooper v. Jevne* and in the cases reviewed above going back to *MacPherson.*

Weseloh explicitly turns on the procedural posture involved in that case, where the plaintiff failed to meet its burden to produce evidence adequate to show that the defendant engineers, under all the facts and circumstances, owed an independent duty to the project owner. As its holding ran counter to the general trend of California law, the *Weseloh* court took pains to detail the pertinent facts leading to its decision. These were all critical, undisputed facts which led the Weseloh court to conclude (in the context of the developed record in a summary judgment proceeding) that the engineers involved owed no independent duty of care to the project owner, where the engineering subcontractor for whom they were employed already owed such a duty of care, and had already paid $1.2 million in settlement. *Weseloh*

must thus be limited to its procedural context and facts, which are very different from the procedural context and facts here.[16]

4. The Court of Appeal Correctly Concluded that Under the Six Factor Test of *Biakanja*, Respondents Owed Appellant's Members, the Homeowners, a Duty of Care When Performing Their Work on the Beacon Project

The Court of Appeal decision, like every other California decision that involves the duty of care of an architect or developer to future homeowners, concluded that such a duty of care does exist pursuant to the six factor test laid out in *Biakanja*.

The first factor is "the extent to which the transaction was intended to affect the plaintiff." *Aas*, the one case which finds a potential limitation on that duty, "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.*) In the words of the Court of Appeal opinion, "[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

[16] If the Court were to conclude that *Weseloh* cannot be distinguished or limited, then it should be disapproved, due to its lack of accord with established law as discussed above.

habitability of property intended for residential occupancy." (Opinion, pp. 10-11.)

Second is "the foreseeability of harm to plaintiff." The Court of Appeal rightly pointed out that architects, because of their special skill, are relied upon to design homes with competence, to make them safe, habitable places to live. It is highly foreseeable that harm to the future residents and owners will occur if they negligently fail to do so. (Opinion, p. 11.)

The third factor, the "degree of certainty that the plaintiff suffered injury," is what this Court in *Aas* found to be lacking where the suit was purely focused on economic loss, without an allegation of actual harm or damage. However, here by contrast Appellant's complaint alleges that the negligence of Respondents here has caused structural cracks in the project and water infiltration. Additionally, it is alleged that the design defects created by Respondents render the units uninhabitable, unhealthy, and unsafe during certain periods. These allegations, which this Court must accept as true, fully distinguish Appellant's claims from the claims for which no liability in tort was found in *Aas*. *(See* Opinion, p. 12.)

The fourth factor, the "closeness of the connection between the defendant's conduct and the injury suffered," has been discussed at length above in connection with *Bily* and *Weseloh*. Appellant's complaint asserts that the significant defects at issue in the Beacon Project resulted directly from the departure by Respondents from the professional standards of care. As well stated by the Court of Appeal, 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. (Opinion, p. 12.)

The fifth factor, "moral blame," is one that this Court has found to be present as a matter of law in a situation where a mass housing project participant, other than the developer, fails to act with reasonable care to prevent construction defects. (*Connor, supra,* 69 Cal.2d at pp. 870-71.) Additionally, although not required under *Connor, Stewart, Sabella, Cooper* and the other cases discussed above, Appellant's complaint does ascribe to Respondents an additional element of moral blame, in that it alleges with specificity that Respondents modified the project design in a way that evaded

statutory protections of the California Code of Regulations, Title 24. (JA 280-81, 290-305; JA 314-15).

Finally, the sixth *Biakanja* factor, the "policy of preventing future harm," very strongly favors the imposition of a duty of care. If the architect can claim that it owes no duty to future homeowners, then he is free to cut corners, violate codes, sanction deleterious materials and methods of construction, and otherwise assist cost-cutting developers in producing a cheapened, dangerous product. This is the exact opposite of the policy of the law, as developed through *MacPherson*, *Depaoli, Stewart, Sabella, Connor*, and the other cases discussed above. The prospect of liability to an unlimited number of persons, which the Court found unacceptable in *Bily*, is not a determinative consideration where the defendant has specifically designed a housing development. And, unlike the situation of an "information" provider such as an auditor or inspector, there is no real possibility that one who purchases a condominium unit in a 595 unit project can "privately order" the services of the design architect. (See Opinion, pp. 13-17.)

C. The Court of Appeal Also Correctly Concluded That Appellant's Complaint States a Claim for Damages Against Respondents Under SB 800

1. SB 800 Explicitly Grants a Homeowner Association Such as Appellant the Right to Proceed Against the Project Architect and Other Design Professionals, If Their Negligence Causes Violations of the Performance Standards of Civil Code §§ 896 and 897

In the concluding section of *Aas*, this Court explicitly invited the Legislature to enact legislation, if it felt that policy considerations justified the imposition of liability for construction defects that involve only "economic loss" on participants in the process of designing and building residential construction. (*Aas, supra,* 24 Cal.4th at pp. 650-53.) In direct response, the Legislature enacted SB 800, which provides that for purposes of all "for sale" developments, construction and design defects which violate the "performance standards" are actionable regardless of whether or not they have caused "property damage" or "personal injury." (Sen. Rules Com., Off. of Sen. Floor Analyses, Digest dated Aug. 29, 2002 of Sen. Bill No. 800 (2001-02 Reg. Sess.), as amended Aug. 28, 2002 (hereinafter, "Sen. Rules Committee Digest of Aug. 29, 2002"), p. 2 (copy attached as Attachment A to this Brief).[17]

[17] Appellant requests the Court to take judicial notice of the legislative

SB 800 creates a comprehensive remedial scheme to address defects in housing that is constructed for sale in California. (*See generally, Darling v. Superior Court* (2012) 211 Cal.App.4th 69, 75.) It defines building standards to ensure conformance with specified criteria for housing built "for sale" to the public. It also, as a counterbalance, requires claimants to provide notice regarding alleged violations of the building standards. It gives builders an absolute right to repair all alleged defects before a claimant may sue. Finally, it provides the governing association of a common interest development, which Appellant is here, with standing to sue and otherwise pursue remedies, if the repair is either not made, or is inadequate. (Sen. Rules Committee Digest of Aug. 29, 2002, *supra*, at pp. 2-3; Civil Code § 895(f) (defining "claimant" having standing to sue as including the governing association of a common interest development).)

Within the overall structure of SB 800, the Legislature provided that a design professional is liable to the extent that its negligence causes construction defects actionable under the statute. Thus, it

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history of SB 800 pursuant to Evidence Code § 452(c) and 459. Copies of the portions of the legislative history which Appellant believes to be most pertinent and informative are attached as Attachments A and B to this Brief.

removed the need for any particularized analysis of the design professional's "degree of control" or "duty" in the context of "for sale" housing developments such as the Beacon Project. The Legislature provided that where a "for sale" housing project fails to meet the minimum required performance standards established by Civil Code §§ 896 and 897, the "design professionals" on the project are liable if it is proved that their negligence caused the violation, "in whole or in part." Thus, the trial court's ruling dismissing Appellant's cause of action under SB 800 based on a failure to allege that the architect "controlled" the project, by overruling or countermanding the developer's instructions, was error requiring reversal.

Civil Code section 936, an integral provision of SB 800, states:

> 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.

Section 936 is the basis of Appellant's first cause of action against Respondents in Appellant's complaint, as to which the trial court sustained a demurrer.

Respondents' position on Civil Code § 936 would negate the right of any homeowners association to obtain relief from any design professional under the SB 800 remedial scheme. The proffered interpretation makes section 936's clear mandate that the design professional is liable for negligence meaningless surplusage, since it would require a plaintiff such as Appellant to plead and prove that Respondents were "not really acting in the role of design professionals" in order to proceed with a claim ***against*** design professionals. This Court must avoid an interpretation that would render any part of the statute surplusage. (*Elsner v. Uveges* (2004) 34

Cal.4th 915, 931, citing *Arnett v. Del Cielo* (1966) 14 Cal.4th 4, 22, and *Brown v. Superior Court* (1984) 37 Cal.3d 477, 484.)

The Legislature also expressly provided for liability for violations of the performance standards caused by the design professional, whether "in whole or in part." This, too, is directly contrary to the trial court's requirement that Appellant plead and prove Respondents were the sole procuring cause of the defects at the Beacon Project, to the exclusion of all other participants in the development. Thus, the trial court's ruling was directly contrary to the plain wording of Civil Code section 936, and the Court of Appeal was entirely correct in reversing that ruling.

2. SB 800 Is Intended to Authorize Claims by a Condominium Owners' Association Against a Design Professional for Building Defects That Are Caused by the Design Professional's Negligence

A fallacy advanced by Respondents (Opening Brief, pp. 17-18) is that "existing law" as of the enactment of SB 800 would need to be "abrogated" in order to provide for an architect's liability to future homeowners based on negligence. The history of the law in this area, reviewed thoroughly above, was known to the drafters of SB 800. The Legislature, when enacting SB 800, believed existing law imposes a duty of care on design professionals when they are

designing, observing, and otherwise working in conjunction with a developer to manage the construction of for-sale housing. Thus, the Assembly Judiciary Committee analysis states:

> EXISTING LAW:
> 1) Provides that a construction defect action 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. (citations omitted).

(Assem. Com. on Judiciary Rep. of Aug. 26, 2002 on Senate Bill 800 (2001-02 Reg. Sess.), as amended Aug. 25, 2002 (hereinafter, "Assem. Jud. Com. Report of Aug. 26, 2002"), pp. 1-2 (copy attached as Attachment B to this Brief).)

The Assembly Report leaves absolutely no doubt that the Legislature intended that design professionals would be liable to future homeowners for negligence under SB 800:

> This 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. 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

this bill.

(Assem. Jud. Com. Report of Aug. 25, 2002, *supra*, p. 3.)

In addition to the above quoted reports, as well as the text of Civil Code section 936 itself, there are several other indications of the Legislature's intent to allow actions by condominium owners and associations against design professionals.

As part of SB 800, the Legislature also enacted a provision exempting certain design professionals who perform an "independent quality review" of a project from liability under the statute. This provision is codified as Civil Code section 43.99. The exemption would be meaningless unless the design professionals who actually design a project, and who actually participate in the construction phase of the project, are subject to liability if their work falls below standards of professional care, and causes violation of the performance standards of sections 896 and 897.

Additionally, in 2003, the Legislature returned to "clean up" some provisions of SB 800. One of the provisions so amended was Civil Code section 936. (Civil Code, § 936, as amended by Stats. 2003, ch. 762, § 5 (AB 903).) This cleanup added an explicit reference to "the negligence standard" of section 936, to make it even more

manifest that the Legislature intends for design professionals to be liable based on their negligence, in the context of the development of for-sale housing developments.

3. An Absence of Duty Is Not a "Defense"

Respondents' argument that the Legislature intended that architects should be able to assert "no duty" as an "affirmative defense to liability" is unsupported and untenable. It is settled that "defendant's legal duty of care to plaintiff" is an essential element of the plaintiff's case, which must be alleged by the plaintiff in the complaint. (*Becker v. IRM Corp.* (1985) 38 Cal.3d 454, 471, overruled on other grounds in *Peterson v. Superior Court* (1995) 10 Cal.4th 1185, 1189; *Rosales v. Stewart* (1980) 113 Cal.App.3d 130, 133; 4 Witkin, Cal. Procedure 5th (2008) Pleading, § 576.) It is not an "affirmative defense" to be pleaded and proved by the defendant as part of the answer. The case cited by Respondents, *Ventura County Humane Society v. Holloway* (1974) 40 Cal.App.3d 897, 902, restates the above rule, and in fact, upholds the dismissal of the plaintiff's case on the ground that duty was not adequately pleaded in the complaint.

The Court of Appeal considered and rejected a somewhat similar argument in *Greystone Homes v. Midtec* (2008) 168

Cal.App.4th 1194, 1215. It held that the "economic loss doctrine" is not an "affirmative defense" that the Legislature intended to preserve for product suppliers when enacting SB 800. *Greystone* contrasted the "economic loss doctrine," which is an aspect of "duty," with typical common law defenses, such as comparative negligence and primary assumption of risk, which it concluded the Legislature had in mind when preserving "affirmative defenses to liability"

4. In the Event of a Conflict Between the Common Law Evaluation of Duty and the Statutory Grounds for Liability, the Statute Regarding Housing Constructed For Sale Is Controlling as to Claims Within Its Ambit

Even if this Court were to reach the conclusion that Appellant may not maintain its action against Respondents under general negligence principles, the decision of the Court of Appeal should still be affirmed, because the Legislature's specific enactment of SB 800 governs, where applicable, rather than any contrary common law principles.

The Nevada Supreme Court addressed the issue of a conflict between a statutory enactment and common law in *Olson v. Richard* (2004) 120 Nev. 240, 89 P.3d 31. Under Nevada common law, there is no negligence action permitted against a contractor where the homeowner's damages are characterized as strictly "economic loss."

(*Callaway v. City of Reno* (Nev. 2000) 116 Nev. 250, 993 P.2d 1159.) However, the Nevada Legislature enacted a statutory scheme that allowed negligence claims for construction defects, regardless of the economic loss doctrine. (*Olson, supra,* 89 P.3d at p. 33.) This statutory scheme was held to prevail over any contrary common law doctrine. (*Ibid.*)

5. Appellant's Complaint Alleged All Elements of a Cause of Action Against Respondents Under SB 800

Appellant's complaint contains ample allegations of fact to state a cause of action against Respondents under SB 800. Respondents are identified as design professionals who performed architecture, landscape architecture, a variety of types of engineering including mechanical engineering, construction administration and construction contract management for the Beacon Project (JA 287-88). Their involvement is set out at length. (JA 313-15.) It is alleged that Respondents caused, "in whole or in part," violations of the performance standards of Civil Code §§ 896 and 897, which are enumerated at length. (JA 288, 290-305.) With respect to Respondents, Appellant complied with the prelitigation procedures required under SB 800. (JA 289; see also JA 342-44.) Respondents failed to remedy the defects as prescribed by the statute. (JA 290.)

These allegations are more than adequate as notice pleading. The Court of Appeal correctly reversed the trial court ruling, sustaining Respondents' demurrers to Appellant's complaint.

CONCLUSION

The decision of the Court of Appeal in this case filed December 13, 2012 should be affirmed.

Dated: July 29, 2013.

LAW OFFICES OF ANN RANKIN
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By: Robert R. Riggs

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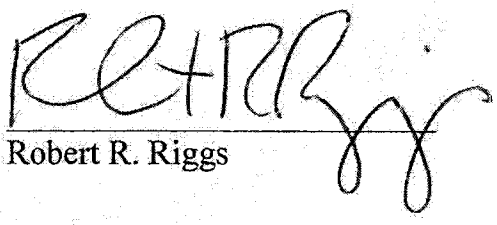
RESIDENTIAL COMMUNITY
ASSOCIATION

CERTIFICATE OF WORD COUNT

The undersigned appellate counsel for Appellant hereby certifies that according to the word processing program used to produce this brief, the word count is approximately 15,040 words, not including the front cover, the table of contents and the table of authorities.



Robert R. Riggs

ATTACHMENT A

Senate Rules Committee, Office of Senate Floor Analyses, Digest dated Aug. 29, 2002 of Senate Bill No. 800 (2001-02 Reg. Sess.), as amended Aug. 28, 2002

SENATE RULES COMMITTEE SB 800
Office of Senate Floor Analyses
1020 N Street, Suite 524
(916) 445-6614 Fax: (916) 327-4478

UNFINISHED BUSINESS

Bill No: SB 800
Author: Burton (D) and Wesson (D) et al
Amended: 8/28/02
Vote: 21

SENATE VOTES NOT RELEVANT

ASSEMBLY FLOOR: Not available

SUBJECT: Liability: construction defects

SOURCE: Author

DIGEST: Assembly Amendments delete the Senate version of this bill relating to collector motor vehicles.

The bill now specifies 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.

This bill also provides that there is no personal monetary liability on the part of, and no cause of action for damages shall arise against, any person, in any of the specified categories, who is under contract with an applicant for a residential building permit to provide independent quality review of the plans and specifications provided with the application in order to determine compliance with all applicable requirements imposed pursuant to the State Housing Law or any rules or regulations adopted pursuant to that law, or to inspect a work of improvement to determine compliance with these plans and specifications, except as specified.

CONTINUED

Senate Floor Amendments of 5/21/01 remove the provision which would have excluded collector motor vehicles from the provision that limits the vehicle license fee to $2.00 annually.

ANALYSIS: Existing law:

1. Provides that a construction defect action 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.

2. Provides that an action based on latent defects (defects not apparent from a reasonable inspection) in construction must be brought within four years of discovery of the defect (if the action is based on breach of contract or warranty), but in no event may such an action be brought more than ten years after the date of substantial completion of the development or improvement.

3. Provides that builders may not be held liable in negligence for construction defects unless those defects have caused death, bodily injury, or property damage. (Aas v. Superior Court, (2000) 24 Cal. 4th 627.)

This bill reforms construction defect law in order to promote safe and affordable residential housing for California. Specifically, this bill:

1. Defines construction defects to ensure performance with specified standards.

2. Requires claimants to provide notice to builders regarding alleged violations.

3. Gives builders an absolute right to repair alleged defects before a claimant may sue.

4. Preserves the right of homeowners to pursue remedies if the repair is not made or is inadequate.

CONTINUED

Comments

According to the authors, this consensus bill represents groundbreaking reform for construction defect litigation. The problem of construction defects and associated litigation have vexed the Legislature for a number of years, with substantial consequences for the development of safe and affordable housing. This bill reflects extensive and serious negotiations between builder groups, insurers and the Consumer Attorneys of California, with the substantial assistance of Assemblymember Darrell Steinberg and key legislative leaders and committee staff over the past year, leading to an unusually broad and powerful consensus on ways to resolve these issues.

A principal feature of the bill is the codification of construction defects. For the first time, California law would provide a uniform set of standards for the performance of residential building components and systems. Rather than requiring resort to contentions about the significance of technical deviations from building codes, the bill specifies the standards that building systems and components must meet. Significantly, these standards effectively end the debate over the controversial decision in the Aas case to the effect that homeowners may not recover for construction defects unless and until those defects have caused death, bodily injury, or property damage, no matter how imminent those threats may be. Moreover, unlike some existing warranty programs, these standards cover all major systems for a substantial period, and are enforceable by subsequent purchasers, not just the original buyer. The bill sets out these standards in detail, organized under non-substantive headings for the benefit of the reader.

The bill provides a floor, but not a ceiling, for the performance of residential structures. In addition to the foregoing minimum standards, the bill provides that a builder may, but is not required to, offer greater protection or longer time periods in its express contract with the homeowners. If a builder offers an Enhanced Protection Agreement, the builder may choose to be subject to its own express contractual provisions.

The bill specifies one, two- and four-year periods for the filing of claims for alleged violations of certain standards. Unless a shorter period is specified, no action may be brought to recover for alleged violations more than 10 years after substantial completion, as defined in Civil Code of Procedure Section 337.15(g)(2). These time limitations do not apply to any action by a claimant for a contract or express contractual provision.

CONTINUED

In a significant departure from existing law, the bill imposes a procedure that a homeowner must follow before bringing suit against a builder. In summary, the homeowner must send a written notice to the builder setting out the nature of the claim. The builder must acknowledge the claim in writing. The builder may then elect to conduct inspection and testing of the alleged defect within a specified period, and must provide certain documentation to the homeowner on request regarding building plans and specifications. Most importantly, the builder may then offer to repair the alleged violation within a prescribed period. Such an offer to repair must also compensate the homeowner for all applicable damages recoverable. Upon receipt of the offer to repair, the homeowner has a prescribed period in which to authorize the builder to proceed with the repair. The offer to repair must also be accompanied by an offer to mediate the dispute if the homeowner so chooses.

The homeowner is relieved from any further pre-litigation process if the builder fails to acknowledge the claim within the time specified, elects to not go through this statutory process, fails to request an inspection within the time specified, fails to make the offer to repair or otherwise strictly comply with the obligations of the statute within the times specified, or if the contractor performing the repair does not complete the repair in the time or manner specified.

This 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.

FISCAL EFFECT: Appropriation: No Fiscal Com.: No Local: No

SUPPORT: (Verified 8/29/02)

Consumer Attorneys of California
Home Ownership Advancement Foundation

CONTINUED

Personal Insurance Federation of California
California Building Industry Association

RJG:kb 8/29/02 Senate Floor Analyses

SUPPORT/OPPOSITION: SEE ABOVE

**** END ****

ATTACHMENT B

Assembly Committee on Judiciary Report of Aug. 26, 2002 on Senate Bill 800 (2001-02 Regular Session)

Date of Hearing: August 26, 2002

ASSEMBLY COMMITTEE ON JUDICIARY
Ellen M. Corbett, Chair
SB 800 (Burton) – As Amended: August 25, 2002

As Proposed to Be Amended

SENATE VOTE: Not relevant.

SUBJECT: CONSTRUCTION DEFECTS LIABILITY AND PROCEDURE

KEY ISSUE: SHOULD CONSTRUCTION DEFECTS BE DEFINED BY SPECIFIC STANDARDS AND BUILDERS BE GIVEN AN OPPORTUNITY TO REPAIR ALLEGED VIOLATIONS BEFORE A HOMEOWNER MAY FILE A CIVIL ACTION IN ORDER TO PROMOTE SAFE AND AFFORDABLE HOUSING?

SYNOPSIS

This bill, the consensus product resulting from nearly a year of intense negotiations among the interested parties, proposes two significant reforms in the area of construction defect litigation. First, the bill would establish definitions of construction defects for the first time, in order to provide a measure of certainty and protection for homeowners, builders, subcontractors, design professionals and insurers. Secondly, the bill requires that claimants alleging a defect give builders notice of the claim, following which the builder would have an absolute right to repair before the homeowner could sue for violation of these standards. If the builder failed to acknowledge the claim within the time specified, elected not to go through the statutory process, failed to request an inspection within the time specified, or declined to make the offer to repair, or if the repair is inadequate, the homeowner is relieved from any further pre-litigation process.

SUMMARY: reforms construction defect law in order to promote safe and affordable residential housing for California. Specifically, this bill:

1) Defines construction defects to ensure performance with specified standards.

2) Requires claimants to provide notice to builders regarding alleged violations.

3) Gives builders an absolute right to repair alleged defects before a claimant may sue.

4) Preserves the right of homeowners to pursue remedies if the repair is not made or is inadequate.

EXISTING LAW:

1) Provides that a construction defect action 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 Civil Procedure sections 337.1 and 337.15.)

2) Provides that an action based on latent defects (defects not apparent from a reasonable inspection) in construction must be brought within 4 years of discovery of the defect (if the action is based on breach of contract or warranty), but in no event may such an action be brought more than 10 years after the date of substantial completion of the development or improvement. (Code of Civil Procedure sections 337 and 337.15. *See, e.g., FNB Mortgage Corp. v. Pacific General Group* (1999) 76 Cal.App.4th 1116; *Liptak v. Diane Apartments, Inc.* (1980) 109 Cal.App.3d 762.)

3) Provides that builders may not be held liable in negligence for construction defects unless those defects have caused death, bodily injury, or property damage. *Aas v. Superior Court*, (2000) 24 Cal. 4th 627.)

FISCAL EFFECT: As currently in print this bill is keyed non-fiscal.

COMMENTS: According to the author, this bill represents groundbreaking reform for construction defect litigation. As many prior bill analyses on this subject have noted, the problem of construction defects and associated litigation have vexed the Legislature for a number of years, with substantial consequences for the development of safe and affordable housing. This bill reflects extensive and serious negotiations between builder groups, insurers and the Consumer Attorneys of California, with the substantial assistance of key legislative leaders over the past year, leading to consensus on ways to resolve these issues.

Definition of Construction Defect. A principal feature of the bill is the codification of construction defects. For the first time, California law would provide a uniform set of standards for the performance of residential building components and systems. Rather than requiring resort to contentions about the significance of technical deviations from building codes, the bill specifies the standards that building systems and components must meet. Significantly, these standards effectively end the debate over the controversial decision in the *Aas* case to the effect that homeowners may not recover for construction defects unless and until those defects have caused death, bodily injury, or property damage, no mater how imminent those threats may be. Moreover, unlike some existing warranty programs, these standards cover all major systems for a substantial period, and are enforceable by subsequent purchasers, not just the original buyer.

Optional Enhanced Protections. The bill provides a floor, but not a ceiling, for the performance of residential structures. In addition to the foregoing minimum standards, the bill provides that a builder may, but is not required to, offer greater protection or longer time periods in its express contract with the homeowners. If a builder offers an Enhanced Protection Agreement, the builder may choose to be subject to its own express contractual provisions in place of the provisions set forth in this Section.

Time Periods for Filing Actions. The bill specifies one, two and four-year periods for the filing of claims for alleged violations of certain standards. Unless a shorter period is specified, no action may be brought to recover for alleged violations more than 10 years after substantial completion, as defined in CCP Section 337.15(g)(2). These time limitations do not apply to any action by a claimant for a contract or express contractual provision.

Right to Repair. In a significant departure from existing law, the bill imposes a procedure that a homeowner must follow before bringing suit against a builder. In summary, the homeowner must send a written notice to the builder setting out the nature of the claim. The builder must

acknowledge the claim in writing. The builder may then elect to conduct inspection and testing of the alleged defect within a specified period, and must provide certain documentation to the homeowner on request regarding building plans and specifications. Most importantly, the builder may then offer to repair the alleged violation within a prescribed period. Such an offer to repair must also compensate the homeowner for all applicable damages recoverable. Upon receipt of the offer to repair, the homeowner has a prescribed period in which to authorize the builder to proceed with the repair. The offer to repair must also be accompanied by an offer to mediate the dispute if the homeowner so chooses.

The homeowner is relieved from any further pre-litigation process if the builder fails to acknowledge the claim within the time specified, elects to not go through this statutory process, fails to request an inspection within the time specified, fails to make the offer to repair or otherwise strictly comply with the obligations of the statute within the times specified, or if the contractor performing the repair does not complete the repair in the time or manner specified.

Subcontractors and Design Professionals. This 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.

Prior Related Legislation. AB 1700 (Steinberg), Ch. 824, Stats. 2001, substantially reformed the pre-litigation dispute resolution process for construction defect actions involving common interest developments.

REGISTERED SUPPORT / OPPOSITION:

Support

California Building Industry Association
California Nurses Association
Congress of California Seniors
Consumer Attorneys of California
Consumer Federation of California

Opposition

None received

Analysis Prepared by: Kevin G. Baker/ JUD. / (916) 319-2334

ATTACHMENT C

Opinion of the Court of Appeal herein, filed Dec. 13, 2012 (status, removed from publication upon this Court's granting of review)

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

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[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.

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Bruiniers, J.

We concur:

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Jones, P. J.

_____
Needham, J.

Superior Court of the City and County of San Francisco, No. CGC-08-478453, Richard A. Kramer, Judge.

Law Offices of Ann Rankin, Ann Rankin, Terry L. Wilkens; Katzoff & Riggs, Kenneth S. Katzoff, Robert R. Riggs, Sung E. Shim and Stephen G. Preonas for Plaintiff and Appellant.

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Robles, Castles & Meredith and Richard C. Young for Defendant and Respondent Skidmore, Owings & Merrill LLP.

Schwartz & Janzen, Noel E. Macaulay and Steven H. Schwartz for Defendant and Respondent HKS, Inc.

PROOF OF SERVICE

I, the undersigned, declare that I am, and was at the time of service of the papers herein referred to, over the age of eighteen (18) years and not a party to the within action or proceeding. I am employed in the County of Alameda, State of California. My business address is 1500 Park Avenue, Suite 300, Emeryville, CA 94608. I am familiar with the regular mail collection and processing practices of Katzoff & Riggs for correspondence deposited for mailing with the United States Postal Service. On July 29, 2013, I caused to be served the following document(s):

PLAINTIFF AND APPELLANT'S ANSWER BRIEF ON THE MERITS

addressed to each such addressee respectively as follows:

[SEE ATTACHED SERVICE LIST]

I then caused the addressee(s) to be served in the following manner:

[X] **VIA THE UNITED STATES POSTAL SERVICE** by causing a true copy and/or the original thereof to be placed in a sealed envelope with postage thereon fully prepaid in the designated area for outgoing mail.

I declare under penalty of perjury, under the laws of the State of California and the United States of America that the foregoing is true and correct. Executed on July 29, 2013 at Emeryville, California.

Nicole Campbell

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