Case No. **S208173**

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

BEACON RESIDENTIAL COMMUNITY ASSOCIATION,
Plaintiff and Appellant,

vs.

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

AFTER A DECISION BY THE CALIFORNIA COURT OF APPEAL,
FIRST APPELLATE DISTRICT, DIVISION FIVE, NO. A134542.
SAN FRANCISCO COUNTY SUPERIOR COURT, CGC-08-478453.

AMICUS CURIAE BRIEF OF THE CIVIL JUSTICE ASSOCIATION OF CALIFORNIA IN SUPPORT OF DEFENDANTS AND RESPONDENTS

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INTRODUCTION: INTEREST OF AMICUS AND IMPORTANCE OF ISSUE

The Civil Justice Association of California (CJAC) welcomes the opportunity to address two related issues this case presents[1] — Does the Right to Repair Act (Civ. Code § 895 *et seq.*) abrogate the common law "duty" defense applicable to the liability of "design professionals" toward future third-party owners of a building for whom the designers have no express contractual obligation; and, if not, do those who design a building for developers pursuant to a written contract between them, but have no direct involvement in its construction, owe a duty of care to its ultimate owners under the negligent design tort?

The appellate opinion answered "yes" to both questions, reversing the trial court and creating a new liability rule in conflict with long-standing precedent, common sense and sound public policy. Unless reversed, this opinion will impose untoward costs on design professionals. This, in turn, will increase the price of housing and commercial buildings to the detriment of the public and a struggling

[1] By separate application accompanying the lodging of this brief, CJAC asks the Court to accept it for filing.

economy, particularly with respect to the construction and sales of new housing. The opinion also will have profound liability implications for a broad array of professionals who directly contract their services to others and agree in those contracts to limit the duty they have to third parties who may in the future have an economic relationship with one of the original parties to the contract.

CJAC has a vital interest in the resolution of these issues. From our founding more than 30 years ago, we have sought to educate the public about ways to make our laws for determining who gets how much money, from whom and under what circumstances, more fair, certain, economical and efficient. Toward this end, CJAC regularly petitions the government, including the judiciary, for redress with respect to a variety of issues, including ones integral to this case. For example, CJAC participated as *amicus curiae* in *Aas v. Superior Court* (2000) 24 Cal.4th 627 (*Aas*), which held that homeowners could not recover damages in a negligence action against the developer, contractor or subcontractors who built their homes for existing construction defects that had not yet caused property damage or personal injury. In reaching this conclusion, *Aas* explained that while "tort law provides a remedy for construction defects that cause property damage or personal injury" (*id.* at 635), the "economic loss rule" precludes recovery for damages such as "the difference between price paid and value received, and deviations from standards of quality that have not resulted in property damage or personal injury." *Id.* at 636.

In response to the holding in *Aas,* the Legislature enacted Civil Code section 895 *et seq.*, the Right to Repair Act (Act), which supersedes that holding by nullifying the economic loss rule for the situations specified. Whether by doing so the Act also

abolishes the common law duty defense to negligence actions against design professionals in the circumstances of this case, however, is now before this court.

Another issue pertinent to this case with which CJAC has a long-standing interest is the extent to which liability attaches to, or is defined by, third parties in their relationship to defendants. See, *e.g.*, *Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112; *Sharon P. v. Arman, Ltd.* (1999) 21 Cal.4th 1181. This case presents, if duty is not obliterated as a defense by the Act, an opportunity for the court to provide further needed guidance on this question.

SUMMARY OF SALIENT FACTS AND PROCEDURAL BACKGROUND

This case arises on demurrer, which means the well-pleaded factual allegations of the third amended complaint, the operative one, are deemed true. *Zelig v. County of Los Angeles*, *supra*, 27 Cal.4th 1112, 1126. Amicus sets forth the abbreviated facts from the complaint to provide the context necessary for defining and informing the legal issues.

Defendants, Skidmore, Owings & Merrill LLP and HKS, Inc., are two architectural firms who contracted with the developer of a large mixed commercial and residential complex in San Francisco, The Beacon, to provide architectural and engineering services. Their contracts provided they are "solely responsible to Owner and not to . . . condominium associations or purchasers for performance . . .; and . . . no such condominium association or purchaser shall be a third-party beneficiary or third party obligee with respect to the Architect's obligations under this agreement." Petition for Review, p. 6. Defendants had no role in the construction of the building.

After The Beacon was completed, its 595 units were rented by the developer as apartments. Later the building was sold to another developer, who then marketed and sold the apartments as condominiums. Sometime after many condominium units were sold, the homeowners association managing The Beacon brought suit against more than 40 defendants, including the design professionals who are parties to this appeal. The lawsuit claims defects in The Beacon caused by negligent architectural and engineering design. One of the defects alleged is "solar heat gain," which renders the units uninhabitable, unhealthy and unsafe during certain periods due to excessively high temperatures. Defendants are named in three causes of action: [1] Violation of Statutory Building Standards for Original Construction; [2] Negligence Per Se in Violation of Statute; and [3] Negligence of Design Professionals and Contractors.

Defendants demurred, arguing that *Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370 (*Bily*) and *Weseloh Family Ltd Partnership v. K.L. Wessel Construction Co., Inc.* (2004) 125 Cal.App.4th 152 (*Weseloh*) and other authorities make clear they owed no duty of care to plaintiffs. The trial court agreed, stating that liability could not be premised on negligent design alone, that plaintiffs were 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.

At the hearing on the demurrer, the trial court asked counsel for plaintiffs if she had a good faith belief that the defendant design professionals "went beyond what architects do, which is recommend changes, and [instead] actually controlled whether or not the change was implemented." Petition, p. 8. Counsel stated she did have such a belief, and the court granted leave to amend. *Id.* When plaintiffs failed to amend,

however, the court sustained the demurrer and dismissed defendant design professionals from the lawsuit.

On appeal, the court reversed the lower court, finding the Repair Act not only abrogated the economic loss rule, but abolished the common law duty defense by specifying that design professionals owe a duty of care to third parties. "To the extent that a . . . *Bily* policy analysis is not otherwise dispositive of the scope of duty owed by design professionals to a homeowner/buyer, [the Repair Act] is." Opinion, p. 21.

SUMMARY OF ARGUMENT

The Repair Act abrogates the economic loss rule but not the common law duty defense to negligence actions, including actions by third party purchasers of property against design professionals for the tort of negligent design. In fact, the Act expressly recognizes and preserves common law defenses, which includes the most commonly asserted "no duty" defense.

A "balancing" of multiple factors determines whether a defendant owes a duty to a particular plaintiff under specified circumstances. These factors include [1] the extent to which the transaction was intended to affect the plaintiff, [2] the foreseeability of harm to the plaintiff, [3] the degree of certainty the plaintiff suffered injury, [4] the closeness of the connection between the defendant's conduct and the injury suffered, [5] the moral blame attached to the defendant's conduct, and [6] the policy of preventing future harm.

Balancing these factors requires the court to consider three central concerns: [1] design professionals exposed to negligence claims from all foreseeable third parties would face potential liability far out of proportion to their fault; [2] in design

professional liability cases the effective use of contract rather than tort liability can control and adjust the relevant risks through "private ordering"; and [3] the asserted advantages of better designs and more efficient loss spreading relied upon by those who advocate a pure foreseeability approach are unlikely to occur.

When these factors are considered and balanced according to this court's guiding precedent and central concerns, the most reasonable conclusion is that defendants here owe no duty to plaintiffs for negligent design of The Beacon.

LEGAL ANALYSIS

I. THE RIGHT TO REPAIR ACT DOES NOT ABROGATE THE COMMON LAW "DUTY" DEFENSE TO NEGLIGENCE CLAIMS.

Civil Code § 895 *et seq.* establishes building standards for new residential construction, and provides homeowners with a cause of action against, among others, builders and individual product manufacturers for violation of those standards (§§ 896, 936). The Act makes clear that upon violation of an applicable standard, a homeowner may recover economic losses from a builder without having to show that the violation caused property damage or personal injury (§§ 896, 942). In such instances, the Act abrogates the "economic loss rule,"[2] thus legislatively superseding

[2] The economic loss rule provides that "where a purchaser's expectations in a sale are frustrated because the product he bought is not working properly, his remedy is said to be in contract alone, for he has suffered only 'economic losses.' This doctrine hinges on a distinction drawn between transactions involving the sale of goods for commercial purposes where economic expectations are protected by commercial and contract law, and those involving the sale of defective products to individual consumers who are injured in a manner which has traditionally been remedied by resort to the law of torts. [Citation.] The economic loss rule requires a purchaser to recover in contract for purely economic loss due to disappointed expectations, unless he can demonstrate harm above and beyond a broken contractual promise. [Citation.] Quite simply, the economic loss rule 'prevent[s] the law of (continued...)

Aas on this point. But does the Act also abolish the common law "duty" defense for design professionals who contract with builders to provide the building plans when the design professionals have no direct, active role in the building's construction? This is an issue of statutory construction, requiring the parsing of the plain language of the Act in the context of all its provisions and judicial opinions informing it.

A. The Plain Language of the Repair Act makes Clear that the Common Law Duty Defense to Negligence Claims is not Abrogated by Actions Brought Pursuant to it.

The starting point for ascertaining whether the Legislature said what it meant and meant what it said with respect to a statute is the "plain language" rule. Under general settled canons of statutory construction, courts "ascertain the Legislature's intent in order to effectuate the law's purpose." *Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1386. To do this requires looking to the statute's words and giving them their "usual and ordinary meaning." *DaFonte v. Up-Right, Inc.* (1992) 2 Cal.4th 593, 601. "The statute's plain meaning controls the court's interpretation unless its words are ambiguous. If the plain language of a statute is unambiguous, no court need, or should, go beyond that pure expression of legislative intent." *Kobzoff v. Los Angeles County Harbor/UCLA Medical Center* (1998) 19 Cal.4th 851, 861.

Of course, to grasp the "plain meaning," of any particular provision of a statute, it must be read in context with other provisions to which it relates. That is because

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[2](...continued)
contract and the law of tort from dissolving one into the other. [Citation.]' " *Robinson Helicopter Co., Inc. v. Dana Corp.* (2004) 34 Cal.4th 979, 988.

when it comes to language, "meaning" necessarily depends on the *context* of language usage. "[L]anguage has meaning *only in context*." *People v. National American Ins. Co.* (1995) 32 Cal.App.4th 1176, 118; emphasis added. "[W]e look first to the words of the statute, giving them their ordinary meaning and *construing them in context*." *Fitch v. Select Products Co.* (2005) 36 Cal.4th 812, 818; emphasis added. This principle is embodied in the *pari materia* ("of the same matter") canon of statutory interpretation. "It is a basic canon of statutory construction that statutes in *pari materia* should be construed together so that all parts of the statutory scheme are given effect." *LEXIN v. Superior Court* (2010) 47 Cal.4th 1050, 1090. Two " '[s]tatutes are considered to be in *pari materia* when they relate to the same person or thing, to the same class of person[s or] things, or have the same purpose or object.' " *Walker v. Superior Court* (1988) 47 Cal.3d 112, 124, fn. 4.

When it comes to the Act and the legislative intent animating it, we are informed by its plain language that "[i]n addition to the affirmative defenses set forth in Section 945.5, a . . . design professional . . . may also offer *common law and contractual defenses as applicable to any claimed violation of a standard.* § 936; emphasis added. This section of the Act must be read in harmony with the remainder of the Act and with other statutes that pertain to the same subject matter and persons. Every "statute should be construed with reference to the whole system of law of which it is a part so that all may be harmonized and have effect." *Stafford v. Los Angeles County Employees' Retirement Bd.* (1954) 42 Cal.2d 795, 799. The only way to harmonize section 936's reference to "common law and contractual defenses" that are reserved for, *inter alia*, "design professionals" in "addition" to those specified in section 945.5 of the Act, is

to look at recognized common law defenses to negligence actions and determine if the absence of "duty" is one.

B. Lack of "Duty" is a Well-Recognized Common Law Defense to Negligence Claims Protected by the Right to Repair Act.

Of all common law defenses to negligence claims, absence of duty is the best known and most frequently asserted. Indeed, "duty" is an essential element in every negligence action, one for which plaintiffs have the burden of demonstrating its existence. The elements of every negligence suit are a defendant's legal duty to the plaintiff as a result of a standard of care, breach of that duty (negligence), and damages proximately caused by the breach. *Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 477.

"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." *Paz v. State of California* (2000) 22 Cal.4th 550, 559. Whether this prerequisite to a negligence cause of action has been satisfied in this case is a question of law to be resolved by the court. As this court has often stated: "To say that someone owes another a duty of care 'is a shorthand statement of a conclusion, rather than an aid to analysis in itself. . .. Duty 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.' " *Id.*; citation. "[L]egal duties are not discoverable facts of nature, but merely conclusory expressions that, in cases of a particular type, liability should be imposed for damage done." *Hoff v. Vacaville Unified School Dist.* (1998) 19 Cal.4th 925, 933.

Unless, then, the Act expressly abolishes the common law's "no duty" defense in negligence, it remains a viable barrier to prosecution of same. "A statute will be construed in light of common law decisions, unless its language 'clearly and unequivocally discloses an intention to depart from, alter, or abrogate the common-law rule concerning the particular subject matter. . ..[Citations.]' " *California Assn. of Health Facilities v. Department of Health Services* (1997) 16 Cal.4th 284, 297. While the Act abrogates the "economic loss rule," it expressly recognizes and preserves "common-law defenses" in section 936. Thus the court must determine whether, as a matter of public policy, defendant design professionals owe a common law duty to the ultimate purchasers of the condominiums they claim contain defects resulting from defendants' asserted negligence in designing The Beacon.

II. DEFENDANT DESIGN PROFESSIONALS DO NOT, UNDER THE CIRCUMSTANCES OF THIS CASE, OWE A DUTY OF CARE TO PLAINTIFF HOMEOWNERS.

As the appellate opinion correctly states, "A duty of care may arise through statute, contract, the general character of the activity, or the relationship between the parties." Opinion, p. 4. In all such situational duty scenarios, the job of courts is to figure out whether the defendant should be liable. When it comes to the liability of third parties not in "privity" with others, the determination of whether a duty exists "involves the balancing of various factors, [including] . . . the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, and the policy of preventing future harm." *Biakanja v.*

Irving (1958) 49 Cal.2d 647, 650-651 (*Biakanja*) (adopting balancing test to determine whether nonclient third parties may sue notary public for negligence).

The appellate opinion and plaintiffs both acknowledge (if the Act does not abolish the duty defense) the necessity of "balancing" these multiple factors, but do so in a skewed way that contravenes precedent and its underlying sound public policies.

Bily v. Arthur Young & Co., *supra*, 3 Cal.4th 370 (*Bily*) is the bellwether opinion countenancing against a finding of duty here by design professionals to the third-party purchasers of buildings based on their designs. *Bily* ruled that an accountant's duty of care extends only to his or her client for professional negligence and only to an audit's intended beneficiary for negligent misrepresentation. While *Bily* did not change the common-law rule that any party who foreseeably relies on a *fraudulent* representation may recover, it created several bright-line rules to limit the scope of an auditor's liability to third parties. *Bily* premised its holding on three concerns: (1) Finding that auditors owed a duty to those other than their clients would disproportionately impose liability on auditors; (2) a third party who intends to rely on an audit could seek protection through contractual recitals; and (3) auditors and the public would suffer negative consequences if auditors owed a duty to third parties.

Substitute "design professionals" for "auditors" in *Bily's* above expressed "concerns" for denying a duty to third-parties and you have this case. To begin with, it cannot be gainsaid that the imposition of a duty upon design professionals to third-parties would disproportionately expand their liability. "As one commentator has summarized: 'The most persuasive basis for maintaining the limited duty [of architects

and engineers] is a proportionality argument. . . . It can be argued as a general proposition in these cases that the wrongdoing of a [design professional] is slight compared with that of the party who has deceived him (his client, the developer or a subcontractor) . . .. This rationale for nonliability is similar to the proximate cause grounds on which willful intervening misconduct insulates a 'merely negligent' party from liability." *Bily, supra*, 3 Cal.4th at 402.

Second, while plaintiffs as future buyers were not in the picture when The Beacon was built and thus could not themselves have protected their interests through contracts between the design professionals and the developers, the developers certainly could have included in the contracts a provision making future purchasers of the building third party beneficiaries of the contract. Moreover, plaintiffs could, before buying the housing units, have arranged for thorough inspections of the property by professionals. "Increasingly persons interested in purchasing residential and commercial property make their obligations to close contingent on inspection of the property by a professional inspector." Michael D. Lieder, *Constructing a New Action for Negligent Infliction of Economic Loss: Building on Cardozo and Coase* (1991) 66 *WASH. L. REV.* 937, 976. In other words, contractual arrangements were available to protect plaintiffs' interests.

Third, design professionals and the public will suffer negative consequences if they are held to owe a duty to third parties with whom they have no contractual or direct relationship. Abrogation of the economic loss rule alone will increase the costs of liability insurance for design professionals, an amount certain to compound if they are also deprived of the common law duty defense. "[T]he cost, availability and terms

of professional liability policies will be significantly affected. As a result, one should expect that more architects will forego professional liability insurance and will attempt to shift assets to make themselves judgment proof." Robert A. Prentice, Veronica J. Finkelstein, *ARCHITECTS LOSE THE ECONOMIC-LOSS-RULE SHIELD IN PENNSYLVANIA* (2005) 76 *PA. B.A. Q.* 180, 182.

Apart from the above "concerns" animating *Bily's* holding that accountants do not owe a duty to third parties for negligence in performing their audits – concerns that apply equally to the third party liability of design professionals considered herein – the balancing of other relevant factors[3] considered in *Bily* and *Biankaja* favor a conclusion of "no duty" here.

A. Defendants' Design was Not Intended to Affect Plaintiff.

The scope of duty of professional care is, according to *Bily* and its progeny, influenced by whether plaintiffs are intended beneficiaries of the contract between the parties. A third party may qualify as a beneficiary under a contract where it appears from the contract terms that the contracting parties intended to benefit that third party. *Bancomer, S.A. v. Superior Court* (1996) 44 Cal.App.4th 1450, 1458. In order to recover, the third party must show that the agreement was made expressly for his or her benefit. "The fact that [a third party] is incidentally named in the contract, or that the contract, if carried out according to its terms, would inure to his benefit, is not sufficient to entitle him to demand its fulfillment. It must appear to have been the intention of *the parties* to secure to him personally the benefit of its provisions."

[3] Two of these factors – liability out of proportion to fault and the prospect of private ordering to contractually protect against risk – are discussed *ante* at pp. 11-13.

Kalmanovitz v. Bitting (1996) 43 Cal.App.4th 311, 314; emphasis original. Whether a third party is an intended beneficiary or merely an incidental beneficiary must be gleaned from reading the contract as a whole in light of the circumstances under which it was entered. *Bancomer, S.A. v. Superior Court, supra,* 44 Cal.App.4th at p. 1458. Here the contract between the defendant design professionals and the developer made expressly clear that plaintiffs, as future purchasers of the property, were not intended beneficiaries.

B. Foreseeability of Injury to Plaintiffs is Not Sufficient to Impose a Duty on Defendants.

Before *Bily*, a reasonably foreseeable third party could sue an auditor for negligence. *International Mortgage Co. v. John P. Butler Accountancy Corp.* (1986) 177 Cal.App.3d 806 (holding that reasonably foreseeable third parties could recover against accountant for negligence). Since *Bily*, however, the weight given to *foreseeability* as a factor for determining duty has been considerably weakened. This is partly due to judicial awareness that "foreseeability" is an elusive, open-ended touchstone under which everything is foreseeable and, hence, everyone owes a duty to everyone else. Hence, as a factor for ascertaining duty, "foreseeability" offers no guidance. As *Thing v. LaChusa* (1989) 48 Cal. 3d 644, 668 cautioned when tightening the test for recovery by third parties for their negligently inflicted emotional distress, "[O]n a clear judicial day, courts can foresee forever." This same concern was reiterated in *Bily*: "Policy 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." 3 Cal.4th at 399, quoting *Elden v. Sheldon* (1988) 46 Cal.3d 267, 274.

Another reason for courts to eschew *foreseeability* as a factor to weigh in determining *duty* is that

> [I]t is altogether inadequate for use by the judge as a basis of determining the duty issue and its scope. The duty issue, being one of law, is broad in its implications; the negligence issue is confined to the particular case and has no implications for other cases. There are many factors other than foreseeability that may condition a judge's imposing or not imposing a duty in a particular case, but the only factors for the jury to consider in determining the negligence issue are expressed in the foreseeability formula. If the foreseeability formula were the only basis of determining both duty and it violation, such activities as some types of athletics, medical services, construction enterprises, manufacture and use o chemicals and explosives, serving of intoxicating liquors, operation of automobiles and airplanes, and many others would be greatly restricted. Duties would be so extended that many cases now disposed of on the duty issue would reach a jury on the fact issue of negligence.

Leon Green, *Foreseeability in Negligence Law* (1961) 61 *COLUMB. L. REV.* 1401, 1417-18.

C. The "Close Connection" Between Defendants' Conduct and Plaintiffs' Injuries is Lacking.

Most telling on this point is the opportunity afforded plaintiffs by the court before sustaining defendants' demurrer to amend their complaint and allege facts showing that defendants went beyond the mere provision of professional advice to

the developer and somehow controlled construction of the building. See Opening Brief on the Merits (OBM), p. 28. Plaintiffs declined to amend their complaint, which is an admission they believe they have asserted their strongest factual presentation. These factual allegations echo those made in *Weseloh*, *supra*, 125 Cal.App.4th 152 and should be found as wanting here for a determination of duty as they were there, and for the same sound reason:

> There is no dispute [defendant's'] role in the project was limited to the design of the retaining walls, the supervision of the design process, and an inspection of the walls. . . .[T]here is no evidence either [that defendants] ever participated or supervised any physical work in the construction of the retaining walls; rather, it appears [defendants] provided engineering services akin to professional advice and opinion.

Id. at 168.

The appellate opinion found *Weseloh* to be of "limited guidance" here because its "holding [was restricted] to the facts before it" and accompanied by the qualification that it 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." Opinion, p. 7. But the facts before it were substantially similar to the facts alleged here and deemed true for the purpose of ruling on a demurrer; and the qualification accompanying *Weseloh's* holding typical of qualifications that apply to all appellate holdings, whether express or implied.

D. There is Little "Moral Blame" to Attach to Defendants' Conduct.

It is undisputed from the complaint and the contract between defendants and the developer that defendants did not control the construction of the building. They could not, in fact, even communicate with the contractors without approval from the developer. The developer, however, according to the complaint, knew about the supposed defects in the building's construction for sometime and concealed them from plaintiffs when it sold them condominium units in the building. OBM, p. 31.

When, as here, "a defendant's liability rests partially under the control of another party's conduct . . ., the defendant's 'moral blame' and connection to the plaintiff's alleged injury is too remote to justify imposition of a tort duty." *Ratcliff Architects v. Vanir Construction Management, Inc.* (2001) 878 Cal.App.4th 595, 606-607. As *Weseloh* points out, "This case is different from *Biakanja, supra,* 49 Cal.2d 647, where the injurious conduct at issue involved the unauthorized practice of law, a misdemeanor, by a notary public in preparing a will. This case does not involve comparable " 'moral blame' " 125 Cal.App.4th at 169, citing and quoting from *Bily, supra,* 3 Cal.4th at 397. If "moral blame" is to be placed on any defendant here, it is the developer, not defendant design professionals.

E. Affirming the Opinion will not Prevent Harm to Third Party Buyers.

Neither plaintiffs in their briefs or their complaint, nor the appellate opinion, provide any factual support for the argument that greater care by design professionals would result from expanded liability. Indeed, the opinion concedes that "any rule of liability may negatively impact the cost of housing." Opinion, p. 16. It also recognizes

that "[l]iability concerns may . . . limit the willingness of design professionals to undertake large residential projects . . .." *Id.* Nonetheless, the opinion concluded that defendant design professionals owe a duty to plaintiff third-party purchasers of the condominium units because the Repair Act provides for that liability, a judgment amicus has shown to be in error. See *ante* at pp. 7-10.

CONCLUSION

For all the aforementioned reasons, CJAC believes the decision of the Court of Appeal should be reversed.

Dated: September 26, 2013

Respectfully submitted,

/s/

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CERTIFICATE OF WORD COUNT

I certify that the WordPerfect® software program used to compose and print this document contains, exclusive of the caption, tables, certificate and proof of service, less than 5,100 words.

Date: September 26, 2013

/s/
Fred J. Hiestand

PROOF OF SERVICE

I, David Cooper, am employed in the city and county of Sacramento, State of California. I am over the age of 18 years and not a party to the within action. My business address is 3418 Third Avenue, Suite 1, Sacramento, CA 95817.

On September 26, 2013, I served the foregoing document(s) described as: *Amicus Curiae* Brief of the Civil Justice Association of California in *Beacon Residential Community Association v. Skidmore, Owings & Merrill LLP, et al.*, S208173 on all interested parties in this action by placing a true copy thereof in a sealed envelope(s) addressed as follows:

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

Executed this 26th day of September 2013 at Sacramento, California.

/s/
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