DISTRICT OF COLUMBIA COURT OF APPEALS

NO. 22-CV-0593

KS CONDO LLC,
Appellant,

v.

FAIRFAX VILLAGE CONDOMINIUM VII,
Appellee

Appeal from the Superior Court
of the District of Columbia
(Hon. Maurice A. Ross, J.)

BRIEF OF APPELLEE, FAIRFAX VILLAGE CONDOMINIUM VII

Thomas C. Mugavero, Esq. (#431512)
Whiteford, Taylor & Preston L.L.P.
3190 Fairview Park Drive
Suite 800
Falls Church, VA 22042
(703) 280-9260
(703) 280-8948 (facsimile)
tmugavero@wtplaw.com
Counsel for Appellee, Fairfax Village Condominium VII

APPELLEE'S CORPORATE DISCLOSURE STATEMENT

Pursuant to D.C. App. R. 28(a)(2), Fairfax Village Condominium VII files its disclosure statement in order to enable the judges of this court to consider possible recusal:

A. Parties and Counsel

1. **Appellant**

KS Condo, LLC

Counsel: Jonathan M. Stern, Victor Rane, PLC, 1200 G Street, N.W., Suite 230 A, Washington, D.C. 20005

2. **Appellee**

Fairfax Village Condominium VII

Trial Counsel: Brian Fellner, 485 Ritchie Highway, #203-D, Severna Park, Maryland 21146

Appellate Counsel: Thomas C. Mugavero, Esq., 3190 Fairview Park Drive, Suite 800, Falls Church, Virginia 22042

B. Parent corporation for Fairfax Village Condominium VII: None

Subsidiaries: None

Publicly held corporation holding more than 10% of stock: None

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Cases

[1] Cases marked with an asterisk (*) are chiefly relied upon.

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STATEMENT OF JURISDICTION

This appeal arises from a Final Order of the Superior Court (Ross, J.), disposing of all the claims in the litigation.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the trial court act within its broad discretion, both as judge and fact-finder, in holding that expert testimony on the relevant standard of care was required, where the evidence showed that the Association knew of the need

to repair the basement wall but also knew of a number of other repair projects that were deemed equally urgent, and where the Association faced significant budget shortfalls and difficulties in collecting unpaid assessments?

STATEMENT OF THE CASE

Plaintiff/Appellant, KS Condo LLC ("KS Condo"), filed its complaint on October 21, 2019; in response to a Motion to Dismiss, KS Condo filed an Amended Complaint on November 22, 2019 (App. 003, 020). Defendant/Appellee, Fairfax Village Condominium VII ("the Association") filed its Answer on December 12, 2019 (App. 003). The Motion to Dismiss was denied as moot on January 2, 2020 (App. 004).

The Amended Complaint alleged that Plaintiff is a unit owner in the Association, and leases out its unit to a third-party tenant (App. 020-21). There had been indications for two years that the wall in the basement of the building at 3810 V Street, S.E. was deteriorating: it had "buckled and [was] visibly deformed", and "was displaced by approximately three inches" (App. 021). Nonetheless, KS Condo claimed that the Association had taken no action to remedy the situation. On July 29, 2017, the wall collapsed, rendering the building uninhabitable until repairs could be made (App. 021). The sole claim in the Amended Complaint for negligence asserted that the Association had breached its

duty to inspect and maintain the basement wall and that KS Condo had been monetarily damaged by the collapse of the wall (App. 022).

The case proceeded through discovery, and a bench trial was held on March 1, 2022 (App. 41). At the beginning of the trial, the Court admitted into evidence all exhibits for both parties (App. 47-49). On March 9, 2022, KS Condo filed its Proposed Findings of Fact and Conclusions of Law; the Association responded on March 30 and KS Condo filed its reply on April 5 (App. 017).

On July 14, 2022, the Court issued its Final Order (App. 027). In that Order, the Court found that for more than two years, the Board had been telling the unit owners that the wall was in imminent danger of collapse and needed immediate repairs (App. 027). The repairs would cost $175,000, an amount later increased to $250,000, which would require either a loan or a special assessment (App. 027-8). The Board retained Property Diagnostics, then the Falcon Group, to assess the problem, ultimately accepting Falcon Group's proposal and issuing a contract for the work (App. 29 – 31). Nonetheless, the Board did not obtain financing for the project until after the wall had collapsed, at which point it obtained a loan for more than $1 million for repairs and upgrades throughout the Association (App. 033).

While recognizing that the Association had the duty to act as a reasonable condominium association would act under similar circumstances, the Court held that expert testimony was required to "identify the appropriate standard of care to

which a condominium association must be held for remedial repairs." (App. 036-7). Because KS Condo had not offered any expert opinion evidence, it had failed to prove negligence. Moreover, although KS Condo contended that the Association should have passed and collected a special assessment, it never stated in what amount or by what date such an assessment should have issued – nor did it demonstrate how such an assessment might have been collected, given that many of the unit owners were elderly and on a fixed income, and some had declared bankruptcy (App. 039). Finally, the Court found that there was no evidentiary connection between the prior warnings from the Board and the ultimate collapse, nor any evidence as to whether the proposed engineering work might have prevented or limited the ultimate collapse (App. 039).

Judgment was entered for Defendant, and the case was closed (App. 040). This appeal followed.

STATEMENT OF FACTS RELEVANT TO ISSUES ON REVIEW

The Association consists of eighty units, all contained within a number of buildings (App. 074). The Bylaws provide that the Board manages the association, and has responsibility for setting assessments and maintaining the common elements; the Board also has the authority to levy special assessments, and to sue unit owners for foreclosure (App. 073). The event that precipitated this lawsuit occurred on July 29, 2017: after a heavy rainstorm, the basement wall of the

building located at 3810 V Street, S.E. collapsed (App. 021, 246). All the residents were forced to move out of the building for one year (App. 146).

KS Condo, a subsidiary company of Kaye Stern Properties, owns four condominium units in different associations around town (App. 097-98, 125). KS Condo purchased Unit 101 in 3810 V Street, S.E. in February of 2017 (App. 099); during the course of renovating that unit, they discovered water issues in the basement (App. 100). KS Condo leased out the unit on July 1, 2017 (App. 103); twenty-eight days later, the wall collapsed (App. 104). KS Condo had to provide alternate housing for its tenant until repairs could be made and the building was once again habitable.

In March 2015, the written materials submitted by the Association Board to the unit owners did list a "SERIOUS" issue with that particular basement wall. That, however, was not the only issue facing the Board. There were three separate repair projects that were marked "URGENT": the "2001 Ft. Davis repair costs" (estimated at $80,000); the "3810 V Street basement" (no estimate of costs) and "exterior woodwork painting needed at 2006 38th Street" (estimated at $20,000) (App. 177). Those same materials also listed eighteen separate repair projects that needed to be addressed, for which there were no funds available (App. 179). At the same time as the list of unexpected property repairs was increasing, there were eighteen unit owners who were not making any payments on their assessments,

representing a shortfall of $5,061 per month (App. 177). A special assessment had been imposed, totaling $142,700.00; of that, only $96,207 had been collected (App. 185).

In December, 2015, the Board retained Property Diagnostics, then the Falcon Group, to provide an inspection report. (App. 190, 194). The Falcon Group recommended that the wall issue be addressed, either by a complete rebuild of the wall or through "periodic vertical steel beam foundation reinforcement." (App. 194). At the May, 2016 meeting, the Board discussed the need for a possible special assessment to address a number of repair items, including repair of a floor that had dropped six inches, and the deterioration of a retaining wall between garages (App. 196). Three projects were marked as "URGENT: the floor repair, the foundation repair and the retaining wall repair. Those three items, alone, would require $268,000 to complete (App. 202). At the same time, however, 52% of the unit owners had outstanding balances. Eight unit owners were not paying at all, leaving a monthly shortfall of $2,672 (App. 204).

Sharlene Mobley was on the Board for eight to ten years, serving at different times as secretary and community association representative (App. 153). She first learned in 2015 that the Association needed to do structural work at 3810 V Street, S.E. (App. 154). The Board determined it had $2,000 to install sump pumps for certain buildings, but "kind of managed to incorporate strategically to find the

monies after paying operational items" (App. 154). By 2017, the Association's reserve fund has still not been built up. The problem was that there were too many unit owners who were not paying their assessments, and the available funds had to go towards operations, landscaping, trash pick-up, and other expenses (App. 156). In fact, the Board struggled to pay the Falcon Group (App. 159). She believed that, had they tried to impose a special assessment for the basement, it still would not have given them the money they needed for the repairs (App. 157).

By February, 2017, many of the needed repairs had been completed, but there were still eight projects that were marked "Very High" in priority, and one – Foundation Repair – Boiler Removal – that was marked "Urgent." (App. 220). At the same time, 36 out of the 85 unit owners were in arrears, with an outstanding balance of $359,582. Seven owners were not making payments at all, for a monthly shortfall of $2,114 (App. 219). Nonetheless, by mid-February 2017, the Board had not only obtained a repair plan from Falcon Group, but had sent the matter out for bids (App. 407-8).

By April, 2017, the Board, through its management company, was seeking a loan for the repair costs (App. 237-8). The Board's counsel, Brian Fellner, worked with the lender to provide necessary documents and to review the loan application (App. 134 – 6). He spent a little over a month on the work, which he did not believe was an inordinate amount of time, considering the type of loan sought and

the documents required (App. 136- 7). There was no evidence presented at trial on how long Mr. Fellner should have spent on this loan application.

Finally, by May 31, 2017, the Board reported that there were seventeen repair projects identified as necessary, at a known cost of $662,306 (App. 413). At the same time, 51% of the unit owners had some outstanding balance, for a shortfall of $342,154; 9 unit owners were making no payments at all, for a monthly shortfall of $3,350 and a total outstanding balance of $92,444. (App. 412). By the time of the wall collapse in July 2017, the Board had two bids for reconstruction of the wall before the collapse (App. 145), but no loan funds to pay for the repairs (*id.*). After the collapse, the Board quickly obtained a loan of over $1 million to cover a number of repairs around the property (App. 92-3, 147).

Herbert Robinson began serving on the Board in 2016 or 2017, and was the President of the Board up through just before trial (App. 072, 081); he remembered more than one management discussions as to the problems in the basement of 3810 V Street (App. 076). He testified, however, that there were a number of problems within the community that they had to deal with – most of which were simply the result of an aging infrastructure (App. 089). The Board had imposed special assessments in the past, although not specifically directed to the problem in that basement wall (App. 078). Nonetheless, there were thousands of dollars in assessments that remained uncollected: the Association simply did not have the

money to go through the foreclosure process (App. 084-5). Often the unit owners would declare bankruptcy, or would be foreclosed by the relevant mortgagee (App. 85). As Mr. Robinson said, "it would be nice if we [could] wave a wand to get the $300,000 from the unit owners who did not pay their assessment fees. It would be nice, but it didn't quite work that way." (App. 86). KS Condo did not present any evidence as to exactly how much money the Association might raise through foreclosures, nor how much it would cost to conduct such collection actions.

The remainder of the evidence at trial involved either events after the basement wall collapse (*i.e.*, repair and renovation) or KS Condo's damages claims. Since neither of these figured into the Court's ultimate findings, they are not relevant to this appeal.

SUMMARY OF ARGUMENT

The trial court has broad discretion to determine whether expert testimony is required in a particular case. A long line of cases from this Court dictates the circumstances where expert testimony is required, even if the plaintiffs have insisted that the particular claim of negligence could be left to the jury's common sense. Here, the evidence showed that although the Association knew for two years that there were problems with the basement wall at 3810 V Street, S.E., there were also a number of other projects that required attention. In 2015 and 2016, there were approximately eighteen separate repair projects outstanding, with three

marked as "URGENT". At the same time, the Association faced a number of unit owners who were delinquent on their assessment payments, creating a budget shortfall of hundreds of thousands of dollars. Given these facts, the trial court acted within its discretion in holding that expert testimony was required to show what a reasonable condominium association would have done under this convergence of circumstances.

Because the decision rests within the discretion of the trial court, it should not be reviewed *de novo* on appeal. Appellant's arguments ignore the long-standing precedent within the District of Columbia, and rely on inapposite cases from other jurisdictions. Moreover, having conceded that the need for expert testimony should be determined on a case-by-case basis, Appellant fails to explain why such determination should not be left to the trial court, especially here, where the court was also the finder of fact.

Because it failed to provide expert evidence as to the applicable standard of care, Appellant failed to prove its case, and the claim was properly dismissed. The trial court did not – contrary to the arguments in Appellant's Brief – "require" KS Condo to prove that the Association had the funds necessary, or decide that the applicable standard of care "had been met." Finally, although the duty of a condominium association to maintain the common areas is arguably analogous to that of a landlord, neither landlord nor association is the insurer of the property.

The Association was required to act reasonably in maintaining and repairing the common elements. Since KS Condo failed to define what a reasonable standard of care was, it could not show that the Association had fallen below that standard.

Given the evidence at trial, the court acted well within its discretion in finding that expert testimony was required to define the applicable standard of care for the Association. KS Condo did not offer any expert testimony, and therefore failed to meet its burden of proof. The claims were properly dismissed, and the judgment for the Association should be affirmed.

ARGUMENT

A. Standard of Review

The decision whether to require expert testimony is left to the sound and broad discretion of the trial court. *District of Columbia v. White*, 442 A.2d 159, 165 (D.C.1982); *Varner v. District of Columbia*, 891 A. 2d 260, 266 (D.C. 2006). The court's "action is to be sustained unless manifestly erroneous." *Id.* (*quoting Salem v. United States Lines Co.*, 370 U.S. 31, 35, 82 S.Ct. 1119, 8 L.Ed.2d 313 (1962)).

On appeal from a bench trial, this Court reviews the trial court's legal conclusions *de novo* and its factual findings for clear error. *See*, *e.g.*, *FDS Restaurant, Inc. v. All Plumbing, Inc.*, 241 A.3d 222, 226 (D.C. 2020); *Ballard v. Dornic*, 140 A.3d 1147, 1150 (D.C. 2016). "[T]he judgment may not be set aside

except for errors of law unless it appears that the judgment is plainly wrong or without evidence to support it." D.C. Code § 17-305(a).

B. The Trial Court Acted Within Its Discretion in Requiring Expert Testimony

This Court has long held that expert testimony is necessary when the question of negligence requires specialized knowledge beyond the ken of the average juror. *See Toy v. District of Columbia*, 549 A.2d 1, 6 (D.C. 1988). Thus, in *Katkish v. District of Columbia*, 763 A.2d 703 (D.C. 2000), expert testimony was required to show the "standard of reasonable care and maintenance of a dead and leaning tree by a municipality … in [a] nonemergency situation" (at 706). In *Messina v. District of Columbia*, 663 A.2d 535 (D.C. 1995), expert testimony was required to show the "particular cushioning standard for the ground under … monkey bars to prevent injuries" (at 538). *See also District of Columbia v. Hampton*, 666 A.2d 30, 36 (D.C. 1995) (expert testimony required for the standard of care in "the selection of foster parents and the supervision of the care they provide"); *Beard v. Goodyear Tire & Rubber Co.*, 587 A.2d 195, 200 (D.C. 1991) (expert testimony required as to "the appropriate standard of care to which retail merchants should be held in processing applications for credit cards"); *Butler v. Night and Day Mgt., LLC*, 101 A.3d 1033, 1038 - 9 (D.C. 2014) (expert testimony required as to the standard of care for the number and deployment of security personnel at a nightclub). *See also, gen'lly*, *Briggs v. Wash. Metro. Area Transit*

Auth., 481 F.3d 839, 845 (D.C.Cir.2007) (cataloguing various non-malpractice cases in which expert testimony was required to establish the standard of care).

Expert evidence has also been required in cases where the plaintiffs insisted that negligence could be determined through the application of simple common sense. In *District of Columbia v. Arnold & Porter*, 756 A.2d 427 (D.C. 2000), water was seen running down the curb and "bubbling out of a manhole cover" (at 429). Nonetheless, the investigative crews on both the 4 p.m. to midnight shift and the midnight to 8 a.m. shift deferred any remedial work at that location, choosing instead to handle other jobs of lesser priority. Approximately nine hours after the initial report, the water main break was discovered: the intersection of 21st and M Streets was covered with water, and there was a "geyser of water" (at 429 – 30). Although the plaintiffs argued that an average jury could reach the conclusion that the District had not acted properly in failing to address the water leak, this court nonetheless found that "the operation and maintenance of a municipal water main system and the handling of leaks in that system are not subjects within the common knowledge of jurors" (at 434).

Similarly, in *Hill v. Metropolitan African Methodist Episcopal Church*, 779 A.2d 906 (D.C. 2001), the plaintiff was leaving an inauguration ceremony at the church, when there was a "rush of people, perhaps from the balcony." In the crowd, she could not see the stairway when she reached it, and fell. (at 907). The

plaintiff argued that expert testimony was not needed, as the "issue of providing ushers for church services" was a matter of common sense. This Court disagreed, and held that "[w]ithout the expert testimony of one familiar with such considerations, the jury would be left to sheer speculation as to various types of crowd control, what level of measures is generally accepted as reasonable in such circumstances, and the relation of such measures to possible mishaps in the exiting process" (at 910). *See also St. Paul Mercury Ins. Co. v. Capitol Sprinkler Inspection, Inc.*, 627 F.Supp.2d 1, 8 (D.D.C. 2009) (NFPA regulations required that a fire protection system must be "readily accessible" for inspection; an average juror, however, would not know what those words meant "in the context of the sprinkler inspection standards," and expert testimony was required); *Owen v. U.S.*, 899 F.Supp.2d 71, 79-80 (D.D.C. 2012) (although plaintiff argued that the negligence lay in the Kennedy Center's failure to properly investigate the source of malfunctions in a wheelchair lift, expert testimony was still required on the "myriad issues surrounding the safety of wheelchair lifts."); *Tripmacher v. Starwood Hotels & Resorts Worldwide, Inc.*, 277 F.Supp.3d 104, 110 (D.D.C. 2017) (expert evidence required on issues of "designing appropriate measures to handle a large number of people, [or] with the placement of accessibility features in spaces that are open to the public").

Appellant presents an overly simplified version of the facts: it argues that the only question is "what a reasonable condominium association … would do after observing a foundation wall bulging and being told by structural engineers to fortify or repair it" (Appellant Brief at 22). The situation at the Association, however, cannot be described in such minimalist terms. In reality, the Association had multiple repair and maintenance issues to grapple with, and a substantial shortfall in its budgeted income. As the exhibits demonstrated, in 2015 there were three major repair projects that were marked "URGENT" (App. 177), with a total of eighteen separate pending projects (App. 179). At the same time, there were eighteen unit owners who were not making any payments on their assessments (App. 177). By May, 2016, not only was the foundation still an issue, but a floor in one unit had dropped by six inches, and a garage retaining wall was deteriorating. Each of these were marked "URGENT", and would require $268,000 to repair (App. 196, 202). Unfortunately, 52% of the unit owners had outstanding balances (App. 204). By February, 2017, while progress had been made on the long list of repair projects, there was a shortfall of $359,582 in assessment payments (App. 219); three months later, the Board reported a budget income shortfall of $342,154 (App. 412), while seventeen repair projects had been identified, at a known cost of $662,306 (App. 413). Even were the Board to somehow miraculously collect all the outstanding assessment payments on that

same day, they still would have lacked $320,152 to do the repairs. Too, as Ms. Mobley testified, the funds that the Association did have available were needed for operations, trash pick-up, and other daily expenses; they did not have ready funds to do immediate repairs (App. 156).

Appellant also ignores the fact that a foolproof method of collecting on unpaid assessments simply does not exist. As Mr. Robinson testified, the Association did not have the money to proceed with foreclosures. The unit owners often declared bankruptcy, or the mortgage holder would foreclose, effectively cutting the Association out of any recovery from the sale of the unit. See App. 084 – 6). Finally, Appellant repeatedly complains that the Board "never" imposed a special assessment (see Appellant Brief at 8, 12, 29). Mr. Robinson testified, however, that they had imposed special assessments in the past (App. 078); indeed, in 2015, there had been a special assessment of $142,700 imposed; only $96,207 had been collected (App. 185). Imposing another special assessment at a time when the previous one remained uncollected may have proved futile.

The real issue, therefore, is this: in the exercise of reasonable care, what steps should a condominium association board take when faced with numerous maintenance and repair issues, severe budget shortfalls, and limited resources for collection of outstanding debts? Put differently, what is the applicable standard of care within the condominium management industry for prioritization of repairs and

pursuit of outside funding sources, where existing resources are limited and demand upon those resources is great? Such considerations require a level of experience in condominium management and financial planning beyond that of the everyday layman. The average jury would have needed some expert opinion as to how a condominium association might reasonably meet the challenges that Fairfax Village faced; otherwise, it would have no basis upon which to reach any conclusion.

In this trial, of course, there was no jury; on the contrary, the trial judge heard all this evidence, and ultimately determined that he, as the trier of fact, lacked the necessary expertise to determine the applicable standard of care, and thus that expert testimony was necessary. This determination certainly lay within the broad discretion of the trial court, and should be affirmed.

C. The Question of Whether Expert Testimony is Required Is Not Reviewed *De Novo*

Appellant concedes that this Court held, in *District of Columbia v. Davis*, 386 A.2d 1195 (D.C. 1978), that the question of whether to require expert testimony lay within the trial court's discretion, and is reviewed accordingly. Appellant contends, however, that such a ruling was a "mistake," which was then "carried forward" in later cases. *See* Appellant Brief at 25. Aside from the fact that KS Condo does not like the result in this case, it offers no reason why the long-standing precedent should be discarded, nor does Appellant cite to any

opinion from this Court to suggest that the question has ever been decided differently.

Appellant does rely on a number of cases from other jurisdictions in support of its proposition. Those cases, however, are inapposite here. *Bittner v. Centurion of Vt. LLC*, 264 A.3d 850 (Vt. 2021) dealt with a statutory requirement that a Certificate of Merit be filed in every medical malpractice case; because plaintiff had failed to do so, the court granted defendant's motion to dismiss. Both the review of a motion to dismiss and interpretation of the relevant statute were *de novo*; the *Bittner* court was not faced with a court's findings after trial on the merits.

Tousignant v. St. Louis Cnty, 615 N.W.2d 53 (Minn. 2000) involved a nursing home resident whose medical chart required that she be restrained and supervised; she was not, and she fell out of her wheelchair. *D.P. v. Wrangell Gen. Hosp.*, 5 P.3d 225 (Alaska 2000) involved a schizophrenic patient who was allowed to wander away from the institution, ultimately engaging in sexual activity with a stranger. In each of these cases, the appellate court held that the particular negligence – failure to supervise, or failure to restrain – were not of a character that required expert testimony. In *Bauer v. White*, 95 Wn. App. 663, 976 P.2d 664 (Wash. 1999) a patient underwent leg surgery, and the surgeon left a pin inside the surgical site. The appellate court balanced the statutory requirements for expert

certification against the long-standing rule that leaving objects in a patient's body was *per se* negligent. *Vandermay v. Clayton*, 328 Ore. 646, 984 P.2d 272 (1999) was a legal malpractice case: the lawyer had not followed the client's express instructions in drafting a contract for sale, and then told his client to sign the contract without disclosing the discrepancy. Here, as well, the appellate court found that, in the particular facts of the case, expert testimony was not required. The fact that expert testimony was not required in those cases, with those unique facts, does not speak to whether it is necessary in the instant case.

Finally, in *FFE Transp. Svces v. Fulgham*, 154 S.W.3d 84 (Tex. 2004), the court addressed, as a matter of first impression, whether deference should be given to a trial court's determination that expert testimony is required. That court found that the matter was for *de novo* review. The ruling, however, is unique to Texas law; again, Appellant offers no argument that this Court should ignore its own precedent and follow the Texas court's opinion.

In addition to the existing precedent in the District of Columbia, more practical concerns mandate rejecting the Texas ruling. As KS Condo concedes, the "determination of whether expert testimony is required must be made on a case-by-case basis," and no blanket rule should be applied (Brief at 22). In ruling whether to require expert evidence, therefore, the trial court must consider the particular facts in evidence and the particular issues in the case. Here, the trial court did

precisely that: the Court's findings noted both the financial difficulties facing the Association and the need for repairs, and specifically noted that "Fairfax was attempting to address the deteriorating wall for years." (App. 038). All of those facts made the question of the appropriate standard of care particularly difficult. Contrary to Appellant's contentions, the trial court did not apply an inflexible rule. Rather, it determined that under the facts in this case, demonstration of the proper standard of care required expert evidence.

Given that the necessity for expert testimony depends on the specific facts of the case, and given that factual findings are given large deference in this court's review on appeal, it is illogical to remove the decision to require expert evidence from the discretion of the trial court. Again, the trial court here – both as judge and fact-finder – concluded that expert evidence was needed to establish the standard of care. Such a finding should not be reviewed *de novo*. Rather, both controlling precedent and sound jurisprudence would mandate that the question of expert testimony be left to the trial court's broad discretion. As discussed above, the trial judge here acted well within his discretion, and his ruling should be affirmed.

D. Appellant's Remaining Arguments are Unavailing

The rest of the arguments in Appellant's Brief may be quickly rebutted. Appellant argues that the trial court erred in "requiring" KS Condo to prove that

Fairfax Village had the funds necessary to do the repairs (Brief at 34 – 36). There are two simple responses. First, the trial court placed no such burden on KS Condo. What the court found was that KS Condo's assumption that the Association acted unreasonably in obtaining financing was speculative (App. 038), and that the evidence did not support a finding that the Association could easily have collected enough assessments to fund repairs (App. 039). There was no shifting of the burden of proof – KS Condo simply failed to prove its case.

Second, it is beyond dispute that in a negligence case, the plaintiff must prove three things: "the applicable standard of care, a deviation from that standard by the defendant, and a causal relationship between that deviation and the plaintiff's injury." *Meek v. Shepard*, 484 A.2d 579, 581 (D.C.1984). The trial court found, as a question of fact, that KS Condo had not met the first prong, and therefore failed to create a *prima facie* case of negligence.

Nor is it accurate to argue that "the trial court did not know what the standard of care was but decided that whatever it was it was met" (Brief at 37). KS Condo failed to demonstrate the applicable standard of care, and thus failed to show that the Association deviated therefrom. Whether the Association might theoretically have increased its efforts to foreclose on individual units, or imposed another special assessment, or even moved more speedily towards closing on a loan – there remains no evidence that such acts lay within the applicable standard

of care. Indeed, there was no evidence presented to suggest that any of those options were at all feasible. KS Condo had the burden of showing that a reasonable condominium association, in the same position, would have followed a specific course of action. It failed to do so. The case appropriately ended there.

KS Condo also argues that the Association's duty was "the same as a landlord's duty to a tenant" (Brief at 35). Whether that is true as a universal statement is debatable, but in this case, it is unavailing. "The landlord is not an insurer of appellant's safety in even those portions of the building under its control. It must be shown that the landlord was negligent and that its failure to exercise ordinary care in the maintenance of the premises was the proximate cause of the tenant's injury." *Winthrop v. 1600 16th St. Corp.*, 208 A.2d 624, 626 (D.C. 1965); *see also Gladden v. Walker & Dunlop*, 168 F.2d 321, 322 (D.C. Cir. 1948); *George Washington Univ. v. Weintraub*, 458 A.2d 43, 48 (D.C. 1983). There is no strict liability for a failure to effect repairs; rather, a condominium association must act reasonably in maintaining and repairing the common elements. KS Condo failed to prove that the Association was negligent; again, that brought the case to an end.

Finally, KS Condo argues that "speculation is unnecessary to conclude that a buckling wall that later collapses would not have collapsed had it been braced and repaired" (Brief at 40). Once again, Appellant misreads the trial court's findings. What the court found was that "in July 2017, a wall collapsed … there is no expert

testimony as to why. There is no connection between the prior warnings and the collapse, and no testimony from anyone as to whether the proposed engineering work would have prevented, limited, or even affected the collapse that occurred." (App. 039). This is an accurate summary of the trial evidence, or lack thereof. By all accounts, the wall had been deteriorating for years, but had not collapsed. Ultimately, it collapsed after a heavy rain (App. 246); there was no evidence as to the severity of the rainstorm, nor that, absent such a deluge, the wall would not have remained standing. Similarly, KS Condo never set forth when, in the absence of negligence, repairs should have started, or how far they should have progressed before July 2017. There was, therefore, no proof that the collapse would not have occurred even had repairs been started. The trial court properly concluded that any causative link between the Association's actions and the collapse of the basement wall was speculative.

CONCLUSION

The evidence at trial showed that, while the Association knew for two years of an issue with this particular basement wall, it was also facing a number of outstanding repair projects, the cost of which ran to hundreds of thousands of dollars. Throughout the same period of time, there were a number of unit owners who were delinquent on their payments, resulting in a significant budget shortfall for the Association. Contrary to KS Condo's simplistic view of the situation – that

the Association knew of a problem and failed to repair it – the facts clearly showed that the Association was working to address competing maintenance demands with limited funds.

Given this factual evidence, the trial court acted well within its discretion to require expert testimony on the relevant standard of care for a condominium association. Because KS Condo did not offer any such expert evidence, it failed to meet its burden of proof as to negligence, and judgment was properly entered for the Association.

For the reasons argued above, the Appellee, Fairfax Village Condominium VII, respectfully requests that the judgment of the Superior Court be affirmed.

Respectfully submitted,

/s/ Thomas C. Mugavero
Thomas C. Mugavero, Esquire (#431512)
WHITEFORD, TAYLOR & PRESTON LLP
3190 Fairview Park Drive
Suite 800
Falls Church, VA 22042
(703) 280-9273
(703) 280-8948 (facsimile)
tmugavero@wtplaw.com

STATUTES AND RULES RELIED UPON

§ 17–305. Scope of review.

(a) In considering an order or judgment of a lower court (or any of its divisions or branches) brought before it for review, the District of Columbia Court of Appeals shall review the record on appeal. When the issues of fact were tried by jury, the court shall review the case only as to matters of law. When the case was tried without a jury, the court may review both as to the facts and the law, but the judgment may not be set aside except for errors of law unless it appears that the judgment is plainly wrong or without evidence to support it.

(b) The provisions of section 11 of the District of Columbia Administrative Procedure Act (§ 2-510) shall apply with respect to review by the District of Columbia Court of Appeals of an order or decision under that Act.

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of February, 2023, a copy of the Appellees' Brief was served on the following through the Court's electronic filing system:

Jonathan M. Stern, Esq.
Victor Rane, PLC
1200 G Street, N.W.
Suite 230A
Washington, D.C. 20005

/s/ Thomas C. Mugavero
Thomas C. Mugavero

District of Columbia
Court of Appeals

REDACTION CERTIFICATE DISCLOSURE FORM

Pursuant to Administrative Order No. M-274-21 (filed June 17, 2021), this certificate must be filed in conjunction with all briefs submitted in all cases designated with a "CV" docketing number to include Civil I, Collections, Contracts, General Civil, Landlord and Tenant, Liens, Malpractice, Merit Personnel, Other Civil, Property, Real Property, Torts and Vehicle Cases.

I certify that I have reviewed the guidelines outlined in Administrative Order No. M-274-21 and Super. Ct. Civ. R. 5.2, and removed the following information from my brief:

1. All information listed in Super. Ct. Civ. R. 5.2(a); including:

   - An individual's social-security number
   - Taxpayer-identification number
   - Driver's license or non-driver's' license identification card number
   - Birth date
   - The name of an individual known to be a minor
   - Financial account numbers, except that a party or nonparty making the filing may include the following:

     (1) the acronym "SS#" where the individual's social-security number would have been included;
     (2) the acronym "TID#" where the individual's taxpayer-identification number would have been included;
     (3) the acronym "DL#" or "NDL#" where the individual's driver's license or non-driver's license identification card number would have been included;
     (4) the year of the individual's birth;
     (5) the minor's initials; and
     (6) the last four digits of the financial-account number.

2. Any information revealing the identity of an individual receiving mental-health services.

3. Any information revealing the identity of an individual receiving or under evaluation for substance-use-disorder services.

4. Information about protection orders, restraining orders, and injunctions that "would be likely to publicly reveal the identity or location of the protected party," 18 U.S.C. § 2265(d)(3) (prohibiting public disclosure on the internet of such information); *see also* 18 U.S.C. § 2266(5) (defining "protection order" to include, among other things, civil and criminal orders for the purpose of preventing violent or threatening acts, harassment, sexual violence, contact, communication, or proximity) (both provisions attached).

5. Any names of victims of sexual offenses except the brief may use initials when referring to victims of sexual offenses.

6. Any other information required by law to be kept confidential or protected from public disclosure.

Signature

22-CV-0593
Case Number(s)

Thomas C Mugavero
Name

February 21, 2023
Date

tmugavero@wtplaw.com
Email Address