IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

THOMAS and RUTH LOWRY; DONALD CROSS; LES and NANCY HALL; CARL E. and RASA KNUDSON; DAVID and CAREY NYMAN; WALLY and WAVA POTUCEK; R. STUART SCHWARTZ; ROBERT and BEVERLY WILLIAMS; FRED and HOLLY MINNITI; EDWARD and LENORE NABBEFELD; CHARLES and D. JOYCE GALBRAITH; KEN and SALLY JO BOSE; RONALD and LYNN SCOTT; SHIRLEY ANDERSON and MARY COX, by Power of Attorney, individuals,, Plaintiffs, v. ALLENMORE RIDGE CONDOMINIUM ASSOCIATION, a Washington nonprofit corporation, Respondent, BERT L. THOMPSON; DON STODOLA; LEO TRETTIN; and NAN PEELE, individuals, Defendants, RAY E. PEDERSEN and DENESE S. PEDERSEN, husband and wife, Appellants.	No. 41571-2-II UNPUBLISHED OPINION

Penoyar, J. — The Allenmore Ridge Condominium Association (ARCA) entered into a contract with Porter Construction, Inc., worth approximately $4.2 million, to repair water damage and to prevent future water invasion to the Allenmore Ridge condominium buildings. After commencing the project, Porter discovered unanticipated and extensive water damage to the

buildings; ultimately, the project cost approximately $1.2 million more than the original estimate. To pay for the project, the ARCA Board of Directors levied assessments on each condominium unit. Several lawsuits ensued.

In this case, Ray Pedersen, a unit owner who did not pay the initial assessment in full, appeals the trial court's order granting summary judgment to ARCA and dismissing his counterclaims with prejudice. Pedersen contends that the trial court erred when it concluded that (1) he did not have standing to challenge ARCA's imposition of assessments because he had not paid the assessment in full, (2) ARCA did not need to obtain 75 percent member approval for both the contract and the subsequent overage costs, and (3) ARCA and its former directors and/or officers were not negligent. Because (1) the trial court considered Pedersen's claims on the merits, despite its conclusion that he did not have standing to challenge ARCA's motion for summary judgment; (2) the project was for repairs, not capital improvements, and thus did not require voter approval; and (3) the trial court properly considered Pedersen's counterclaims when he raised them as defenses for his failure to pay the assessments, we affirm.

FACTS

I. Background

Ray Pedersen owns a unit at Allenmore Ridge, a condominium community with five separate buildings in Tacoma. Allenmore Ridge is governed by ARCA through its board of directors and is subject to ARCA "Bylaws" and the "Amended and Restated Declaration and Covenants, Conditions, Restrictions and Reservations for Allenmore Ridge Condominium" (Declaration). Clerk's Papers (CP) at 256, 295.

Under Section 10.2(e), (f), and (g) of the Declaration, the Board

> shall have all powers and authority permitted to the Board under the Act and the Declaration, and shall acquire and shall pay for out of the common expense fund hereinafter provided for, all goods and services requisite for the proper functioning of the condominium, including but not limited to the following:
>
> . . . .
>
> Painting, maintenance, repair and all landscaping and gardening work for the common area, and such furnishing and equipment for the common area as the Board shall determine are necessary and proper, and the Board shall have the exclusive right and duty to acquire the same for the common area; provided, however, that the interior surfaces of each condominium unit shall be painted, maintained and repaired by the owners thereof, all such maintenance to be at the sole cost and expense of the particular owner as more particularly provided in Section 11.5.
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> . . . .
>
> *Any other materials, supplies, labor, services, maintenance, repairs, structural alterations, insurance, taxes or assessments which the Board is required to secure by law, or which in its opinion shall be necessary or proper for the operation of the common area* or for the enforcement of this Declaration.
>
> . . . .
>
> *Maintenance and repair of any condominium unit, its appurtenances and appliances, if such maintenance or repair is reasonably necessary in the discretion of the Board to protect the common area or preserve the appearance and value of the condominium development*, and the owner or owners of said units have failed or refused to perform said maintenance or repair within a reasonable time after written notice of the necessity of said maintenance or repair has been delivered by the Board to the owner or owners; provided that the Board shall levy a special charge against the condominium unit of such owner or owners for the cost of such maintenance or repair.

CP at 473-74 (emphasis added).

Section 10.2.1(i) of the Declaration provides:

> The Board's power herein above enumerated shall be limited in that the Board shall have no authority to acquire and pay for out of the maintenance fund capital additions and improvements, including but not limited to real or personal property, (other than for purposes of restoring, repairing or replacing portions of the common areas) having a total cost in excess of Five Thousand Dollars ($5,000.00), without first obtaining the affirmative vote of the owners holding a majority of the voting power present or represented at a meeting called for such purpose, or if no such meeting is held, then the written consent of voting owners having a majority of the voting power; provided that *any expenditure or contract for each capital addition or improvement in excess of Twenty-five Thousand Dollars ($25,000.00)* must be approved by owners having no less than seventy-five percent (75 %) of the voting power.

CP at 474 (emphasis added).

The ARCA Bylaws explain the procedure for conducting a vote by mail:

> In the case of a vote by mail . . . , the Secretary shall give written notice to all owners which notice shall include a proposed written resolution setting forth a description of the proposed action, and shall state that such persons are entitled to vote by mail for or against such proposal and stating a date not less than 20 days after the date such notice shall have been given on or before which all votes must [be] received and stating that they must be sent to the specified address of the principal office of the association. Votes received after that date shall not be effective. Any such proposal shall be adopted if approved by the majority of votes cast on such matter, unless a greater or lesser voting requirement is established by the Declaration or Bylaws for the matter in question.

CP at 406.

Article 14 is entitled "DAMAGE OR DESTRUCTION: RECONSTRUCTION." CP at 487. Section 14.1 of the Declaration reads:

> Any portion of the condominium for which insurance is required under the terms of the Declaration . . . which is damaged or destroyed, shall be repaired or replaced promptly by the Association unless:
>
> (a) the condominium is terminated (Article 22);
>
> (b) repair or replacement would be illegal under any applicable local or state statute, regulation or ordinance;
>
> (c) at least eighty percent (80%) of the Association's votes allocated to the owners, including the vote of every owner of a unit or an assigned limited common

> element which will not be rebuilt, vote not to rebuild.
>
> The cost of repair or replacement in excess of insurance proceeds and reserves is a common expense, which shall be assessed to the surviving units of the condominium.

CP at 487. As used in Article 14, "repair" means "restoring the improvements to substantially the same condition in which they existed prior to the damage or destruction." CP at 489.

The condominium buildings suffered significant water intrusion and water damage. In 2006, the Board decided to undertake a "[r]estoration [p]roject" to repair the building envelope. CP at 1100. The Board retained Trinity• ERD as its project engineer. The project included the installation of a $2 million "rain screen" to replace the deteriorated cladding. CP at 353. On November 16, 2006, ARCA held a special meeting to discuss the project and introduce the homeowners to Trinity• ERD and the general contractor for the project, Porter Construction, Inc.

Before the meeting, the Board issued a "Notice of Members Meeting," which read:

> At the meeting you will be given consent forms to authorize an assessment on your unit for your percentage of the construction loan to do the project. This consent will be the maximum that the Board can assess pursuant to the consent for the project if more than 75 [percent] of the membership authorizes the assessment of their unit. It is expected that the assessment will have to be paid 10 [months] after the project is started. If less than 75 [percent] of the owners consent to the assessment, then the assessment will be whatever the cost will be when the project is undertaken.

CP at 404. The Board ultimately concluded that it was not required to obtain 75 percent owner approval for its assessment of the units but, according to Thomas Lowry, who was the president of the Board during this time, the Board sought to get the consent "if we could" because it "would be the better way to go." CP at 985.

At a Board meeting on December 5, 2006, the Board decided to distribute a consent form related to the restoration project to the owners. The consent form was to have a December 31, 2006 return date. The consent form was distributed and read:

> **THE UNDERSIGNED**, as an owner of a unit in the Allenmore Ridge Condominium does hereby consent to the Allenmore Ridge Condominium Association entering into the necessary contracts in order to perform the work described in the Scope of Work prepared by Exterior Research and Design as it presently exists or may be hereafter amended to do maintenance, repair, as well as prevent water penetration of the walls and windows throughout the condominium property and related matters in the amount of approximately $4,200,000 and, for this purpose, consents to the Board of Directors assessing the unit in the amount shown in the table of assessments below.

CP at 402. The Board did not receive signed consent forms from over 75 percent of owners by December 31, 2006. Nevertheless, the Board continued to collect votes after the December deadline and eventually received approval from over 90 percent of the owners. "[A]ll but a few homeowners . . . actually paid the repair project assessment." CP at 1070.

The Porter contract was a "base bid, plus allowance contract."[1] CP at 1322. The contract contained the following provision:

> If, in the performance of the Contract, hidden physical conditions are exposed revealing Significantly Different Conditions . . . , the Contractor must report such conditions to the Owner and to the Consultant before the conditions are disturbed. In such notice, the Consultant shall identify to Owner why Contractor believes the condition is a Significantly Different Condition and shall propose such changes in the Contract Documents as he finds necessary to conform to the different conditions. Contractor shall be entitled to no additional compensation for Significantly Different Conditions unless a Change Order or Construction Field Directive identifying the scope adjustment has been issued prior to performance

[1] The $4.2 million project cost included the Porter contract, amounts owed to Trinity• ERD, and money set aside as a contingency fund.

> of such work. "Significantly Different Conditions" means a latent physical condition[ ] materially increasing Contractor's material and/or labor costs only if both of the following are true of the condition: (1) it was not observed, observable or inferable during the investigation phase of the Project; and (2) it is unusual or materially different from conditions ordinarily encountered or inherent in work of this nature.

CP at 1314.

After the project began, Porter discovered extensive and unanticipated water damage to the buildings. Porter submitted change orders, which Trinity• ERD then approved, before performing the additional repairs and replacements. Ultimately, the project cost approximately $1.2 million more than the original $4.2 million and took approximately three years to complete.

In 2008, the Board held a special meeting in which unit owners voted whether to approve a special assessment to fund the additional cost of completing the project. The directors did not obtain 75 percent approval at the meeting. In 2009, unit owners voted a second time; this vote also failed to obtain 75 percent approval. The Bank stipulated that it would not lend the Board the money necessary to finish the project unless 75 percent of the unit owners agreed to the second assessment.

II. Procedural History

This case has a complicated procedural history and involves two separate lawsuits. In June 2009, several Allenmore Ridge unit owners sued ARCA and its directors for (1) breach of duty under the Allenmore Ridge Condominium Declaration, (2) breach of statutory duties to the unit owners in handling the restoration project, and (3) negligence.[2, 3] In September 2009, ARCA

[2] Pedersen was not a plaintiff in the first lawsuit. ARCA refers to the first lawsuit as the "*Lowry* action." Resp't's Br. at 14.

[3] The owners' lawsuit against ARCA included claims that ARCA had breached its duties by failing to conduct a vote on the assessment for the contract and then the overage costs, ARCA had

brought a counterclaim and a crossclaim against the former Board directors and officers.

Meanwhile, in August 2009, Porter brought a separate lawsuit to foreclose on a lien against ARCA and other parties, alleging that ARCA had failed to pay the balance due under its contract with Porter.[4] The following month, ARCA filed a third-party complaint in the Porter lawsuit against several owners, including Pedersen, alleging that Pedersen had failed to pay dues and special assessments. Pedersen then brought counterclaims against ARCA, seeking a declaratory judgment that ARCA did not have a right to collect the special assessment.[5] Pedersen also claimed that ARCA had breached the Declaration and its statutory duties to Pedersen when it entered into a contract with Porter without obtaining owner approval, failed to obtain a fixed price contract, failed to advise owners of the possibility of cost overruns, and failed to properly manage the project; he also alleged that ARCA had destroyed his deck in the course of the construction project.

In November 2009, the owners moved for partial summary judgment on their claim that, by failing to obtain the approving vote of 75 percent of the owners for the additional costs of the repair project, ARCA and its directors breached their duties under the Allenmore Ridge Condominium Declaration and the Washington Condominium Act. The trial court ruled that there was an issue of material fact as to whether the project was a capital addition and improvement and whether ARCA and the Board had breached their duty to the homeowners;

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mismanaged the repair project and the related contracts, and ARCA had failed to properly inform the owners regarding the project and the contracts.

[4] ARCA refers to this lawsuit as the "*Porter* action." Resp't's Br. at 15.

[5] Pedersen argued that ARCA did not validly obtain approval from the owners for the project, that the assessment improperly charged him for repairs to limited common areas that did not benefit him, and the declaration does not have authority over his building.

accordingly, the trial court denied the owners' motion for summary judgment.

In March 2010, Pedersen moved to stay his case, asserting that "the claims of the owners in [the *Lowry* action] are identical in some cases and similar in other cases to those claims between Pedersen and ARCA." CP at 1471. In May 2010, the trial court consolidated the condominium management claims in the two lawsuits. The trial court also severed Pedersen's counterclaims against ARCA from the *Porter* action and consolidated them into the *Lowry* action.

In May 2010, ARCA filed a motion for partial summary judgment on "all claims by plaintiffs arising out of the purported failure to follow the voting requirement." CP at 838. The trial court denied ARCA's motion for summary judgment on the basis that the declaration of Mark Cress—a consultant with a forensic construction defect, water intrusion and property damage investigation, and repair project management company—created a material issue of fact as to whether the project was restorative or a capital improvement.

In his declaration, Cress stated that ARCA's characterization of the project as a restoration project was incorrect. He opined that only 60 percent of the overall project cost was related to the repair of damaged building components. Cress declared that the remainder of the project consisted of the installation of new and improved building materials, such as siding, trim, building paper, flashings, vents, windows, deck membranes, lights, sealants, and paint; "the most obvious and glaring examples of an 'improvement' or 'betterment' is the new and much higher quality, better performing and longer lasting 'rain screen' building enclosure weather resistive barrier/water drainage system Porter had installed at Allenmore Ridge where no such system existed before." CP at 353. Cress also declared that the new components added to the condominium buildings were "betterments," a term for "materials or construction design or work

of better or 'upgraded' quality than that of the previous similar building components." CP at 354. He further declared that "betterment" also means "new materials or construction or design work that is added to a building to improve it where the same or similar materials, design or construction components/systems did not previously exist." CP at 354.

Bert Thompson, former president of the Board, filed a motion for summary judgment on all claims against him, arguing that he had relied on expert and legal advice and was thus immune under the business judgment rule from liability for that reasonable reliance. The trial court granted Thompson's motion.

ARCA filed a renewed motion for partial summary judgment on the alleged voting requirements. ARCA argued that the rain screen was a repair. In the alternative, ARCA argued that the project, which included the installation of the rain screen, had obtained the requisite owner approval and thus it was irrelevant whether the rain screen was a capital improvement. Pedersen filed a declaration opposing the motion, arguing that the Board did not have authority to enter into a contract with Porter or impose the initial assessment.

ARCA also filed a motion for summary judgment on the owners' allegations of negligence and breach of duty. The trial court granted ARCA's motion for partial summary judgment on the owners' allegations of negligence and breach of duty. At the hearing, Pedersen's counsel stated, "[A]s far as the issue of the business judgment rule summary judgment relative to Mr. Pedersen, we don't really have too much of a dog in that fight. That's the fight between the ARCA defendants and the plaintiffs in the *Lowry* suit." Report of Proceedings (RP) (Oct. 15, 2010) at 14. Pedersen's counsel sought to verify that the trial court had not granted the motion regarding the motion for summary judgment as to the voting requirements. Pedersen's counsel signed the

order granting summary judgment on the allegations of negligence and breach of duty and wrote "no objection." CP at 1620.

ARCA then moved for summary judgment against Pedersen for the balance of his unpaid assessment. The trial court realigned Pedersen in the "*Porter* action." In response to ARCA's motion for summary judgment on the balance of Pedersen's unpaid assessment, Pedersen argued that the Board had violated its fiduciary duties to and made misrepresentations to the owners, that the Board had failed to obtain 75 percent approval of the owners, that the assessments were improperly allocated, and that the Board should be estopped from asserting that a vote was not required.

On November 12, the trial court granted ARCA's motion for summary judgment against Pedersen for unpaid assessments. At the hearing on the motion for partial summary judgment, the trial court stated, "I'm prepared to rule for ARCA. Consistent with my prior rulings, I don't think that there are issues of fact. I believe the assessments were appropriate." RP (Nov. 12, 2010) at 37. The trial court ruled that Pedersen did not have standing to oppose ARCA's motion for summary judgment for unpaid assessments because he had not paid for the initial assessment of the restoration and repair project. The trial court also ruled that (1) ARCA was not negligent and did not breach its duty in the management of the restoration and repair project, including not requiring a 75 percent approval vote from the homeowners; and (2) the Declaration did not require ARCA to obtain an approval vote for both the obligations necessary for the project and the overage costs. Accordingly, the trial court dismissed Pedersen's counterclaims with prejudice. Pedersen appeals.

ANALYSIS

I. Withholding of Assessments

First, Pedersen contends that the trial court erred when it concluded that he did not have "standing"[6] to challenge ARCA's assessment because he had not paid the assessment in full. Br. of Appellant at 13. Pedersen argues that (1) instead of dismissing the case for lack of standing, the trial court should have determined whether the assessment was valid and (2) the trial court should have resolved the claims unrelated to the assessment. ARCA responds that even if it was error for the trial court to require Pedersen to pay his assessment in full before challenging it, the trial court evaluated Pedersen's claim that the assessment was invalid on the merits before dismissing his claims. Because the trial court concluded that the assessment was valid and also addressed Pedersen's unrelated counterclaims, we decline to address this issue.

The trial court ruled that Pedersen did not have standing to oppose ARCA's motion for summary judgment on the unpaid assessments because he had not paid for the initial assessment of the restoration and repair project. Nevertheless, the trial court addressed Pedersen's claim that the assessments were invalid, ruling that (1) ARCA was not negligent and did not breach its duty when it did not obtain 75 percent approval vote from the homeowners for the restoration and repair project and (2) the Declaration did not require ARCA to obtain an approval vote for the restoration project or the overage costs. Accordingly, Pedersen's contention that the trial court should have addressed his claims on the merits fails.

[6] The parties refer to this issue as an issue of "standing;" however, the case law the parties cited does not use this term.

II. Summary Judgment

Next, Pedersen argues that the trial court erred by granting ARCA's motion for summary judgment and dismissing his counterclaims when it concluded that (1) the Declaration did not require ARCA to obtain an approval vote for the project and the subsequent cost overruns and (2) ARCA and its officers and/or directors were not negligent and did not breach their duties. With regard to Pedersen's first argument, the Declaration did not require ARCA to obtain an approval vote because the project was a repair and restoration project. Additionally, the trial court properly considered the remainder of Pedersen's claims because Pedersen raised those claims in his reply to ARCA's motion for summary judgment. Accordingly, we disagree with Pedersen.

A. Standard of Review

On appeal of a summary judgment order, we review the decision de novo. *Bostain v. Food Express, Inc.*, 159 Wn.2d 700, 708, 153 P.3d 846 (2007); *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002). Summary judgment is proper if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c). We consider all facts in the light most favorable to the nonmoving party. *Jones*, 146 Wn.2d at 300. Summary judgment is proper only if reasonable persons could reach but one conclusion from the evidence presented. *Bostain*, 159 Wn.2d at 708. The moving party bears the initial burden of showing the absence of an issue of material fact. *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). We may affirm summary judgment on any ground the record supports. *Plese-Graham, LLC v. Loshbaugh*, 164 Wn. App. 530, 541, 269 P.3d 1038 (2011).

B. Owner Approval Vote

Pedersen contends that the trial court erred when it concluded that ARCA did not need to obtain 75 percent owner approval "for the 4.2 million dollar contract and its cost overruns."[7] Br. of Appellant at 38. Pedersen argues that a vote was required because (1) Section 10.2.1(i) of the Declaration requires owners to approve capital improvements with a cost exceeding $25,000 and the project included such improvements and (2) even repair or restoration projects exceeding $25,000 must be approved by 75 percent of owners. He also asserts that the vote for the initial contract did not comply with ARCA's Bylaws and, thus, the original assessment is invalid. Finally, he contends that there was an issue of material fact as to whether the contract was for capital improvements or repairs. Pedersen's claim fails because the contract was for the repair and restoration of the Allenmore Ridge condominiums and, thus, ARCA was not required to obtain owner approval.

"A condominium declaration is like a deed, the review of which is a mixed question of law and fact." *Lake v. Woodcreek Homeowners Ass'n*, 169 Wn.2d 516, 526, 243 P.3d 1283 (2010). The factual issue is the declarant's intent, which we discern from the face of the declaration; the legal consequences of the declaration are questions of law, which we review de novo. *Lake*, 169 Wn.2d at 526.

Section 10.2.1(i) of the Declaration provides:

> The Board's power herein above enumerated shall be limited in that the Board shall have no authority to acquire and pay for out of the maintenance fund capital additions and improvements, including but not limited to real or personal property, (other than for purposes of restoring, repairing or replacing portions of

[7] Apparently, Pedersen contests ARCA's failure to properly conduct a vote for the initial assessment. He does not argue that ARCA erred by failing to obtain voter approval for the cost overruns.

> the common areas) having a total cost in excess of Five Thousand Dollars ($5,000.00), without first obtaining the affirmative vote of the owners holding a majority of the voting power present or represented at a meeting called for such purpose, or if no such meeting is held, then the written consent of voting owners having a majority of the voting power; provided that *any expenditure or contract for each capital addition or improvement* in excess of Twenty-five Thousand Dollars ($25,000.00) must be approved by owners having no less than seventy-five percent (75 %) of the voting power.

CP at 474 (emphasis added). The plain language of Section 10.2.1(i) is clear: Seventy-five percent of owners must vote to approve capital addition or improvement contracts in excess of $25,000. The voting requirement does not extend to restoration or repair contracts.[8]

Thus, the issue is whether the project involved capital improvements or repairs. Pedersen contends that ARCA's unsuccessful attempt to conduct a vote by mail is evidence that the project was a capital improvement project. That the Board attempted to conduct a vote does not mean that the Board was required to do so. There are a number of reasons that ARCA may have sought to conduct a vote, including the desire to avoid later challenges to the validity of the assessment.

Pedersen also argues that ARCA told owners that in order for the project to proceed, 75 percent of the owners had to approve, citing to the "Notice of Members Meeting." Contrary to Pedersen's assertion, the Notice does not indicate that ARCA sought 75 percent owner approval of the project. The Notice indicates that ARCA would assess the owners regardless. Apparently, the consent forms were related to ARCA's attempt to acquire a construction loan. If less than 75

[8] ARCA devotes a portion of its brief to the argument that it was required to repair the buildings under the Declaration and Washington law. ARCA persuasively argues that it was required to repair damaged premises under Sections 10.2.1(g) and 14.1 of the Declaration. This argument does not, however, resolve whether the project involved capital improvements in excess of $25,000.

percent of the owners consented to the assessment, then the assessment would be the cost of the project.

Finally, Pedersen maintains that the trial court admitted there was an issue of material fact as to whether the contract was for a repair or capital improvement. Indeed, on June 25, 2010, the trial court denied ARCA's motion for partial summary judgment on the voting requirement, concluding that whether the rain screen was a restoration or repair or a capital addition or improvement was an issue of material fact. In a subsequent motion for partial summary judgment, ARCA asserted that the rain screen fell within the scope of the original project and the original project received 90 percent owner approval; thus, even if the rain screen was a capital improvement, it had obtained the requisite votes. ARCA, however, did not conduct a vote for the original project in accordance with the Bylaws. Accordingly, ARCA's clarification did not resolve whether the contract was for capital improvements to Allen Ridge.

Nevertheless, we conclude that there was no issue of material fact as to whether the contract was for only repairs or included capital improvements. In support of their motion for summary judgment, ARCA submitted the depositions of several condominium owners, who described the project as a necessary repair project. Ruth Lowry, secretary and assistant secretary for ARCA, stated in her deposition that "[b]eyond a doubt," "the restoration project was a necessary project for the board to undertake." CP at 934. Holly Minniti testified, in her deposition, that the project was for "[r]epairs and improvements of the common elements and other portions of the condominium;" specifically, "there were water intrusion issues that needed to be addressed. The envelope had failed." CP at 943. According to Minniti, the "improvements" were "[u]pgrading siding" and "[f]ailed windows were replaced." CP at 943.

D. Joyce Galbraith testified that the restoration "project" was a "necessary repair" because there was "so much rot between the outside wall and the inside wall that there wasn't any question that it had to be taken care of." CP at 960. Carl Knudson, Jr., a former Board member, testified that the project was "absolutely" a "necessary project for the [B]oard to undertake;" otherwise, "[t]he buildings would have fallen down. They were in really sad shape." CP at 954.

ARCA also submitted declarations from members of the company ARCA retained to carry out the project. Colin Murphy, the principal of Trinity• ERD, declared that ARCA retained his company to "carry out design and construction observation services for the repair and restoration project;" Trinity• ERD prepared a Scope of Repair "to remove and replace components of the building envelope that had suffered extensive damage due to water intrusion. In addition, some of the components needed to be removed and replaced due to reaching or exceeding the end of their service life." CP at 964. Murphy declared that the repair project included "the removal and replacement of all siding, and the removal and replacement of many of the windows. This was necessitated by the extensive damage suffered by the buildings due to water intrusion." CP at 964. He described some of the rot on the building as "catastrophic." CP at 965. Murphy declared that the project "did not include any alterations or modifications to structural components of the buildings or construction of new buildings or property" and allowances for repair of structural damage found during construction were limited to "repair and restoration work." CP at 965. He further declared that the work was "intended to repair, restore, remove and replace, in like-kind, those components of the building envelope that had been

damaged or had otherwise reached or exceeded their serviceable life." CP at 965. Don Merry, the project manager, declared that "[d]amaged structural components of the building envelope were removed and replaced with like-kind products. Any upgrades to components were solely for the purpose of restoring the weathertight condition of the building envelope, but all efforts were made to select products that were similar to the original materials." CP at 970.

To support their opposition to ARCA's partial motion for summary judgment, the owners submitted Cress's declaration. Cress declared that ARCA's characterization of the project as a restoration "project" was incorrect. CP at 353. Cress declared that 60 percent of the project cost was related to the repair of damaged building components and "even that repair 'improved' the buildings dramatically from their former state." CP at 353. Cress also declared:

> The remainder of the project consisted of the installation of new and improved building materials and components of a wide variety, including but not limited to, siding and other building enclosure exterior cladding materials, trim, building paper, flashings of various kinds, windows, lights, vents, deck membranes and related components, sealants, paint. One of the most obvious and glaring examples of an "improvement" or "betterment"' is the new and much higher quality, better performing and longer lasting "rain screen" building enclosure weather resistive barrier/water drainage system Porter had installed at Allenmore Ridge where no such system existed before. . . . Second, many if not all of these new components added to the Allenmore Ridge Condominium buildings by Porter and its subcontractors were not just functional improvements to the buildings but they are also considered "betterments[."] "Betterments" is a term widely used in the building enclosure/water damage investigation and repair field/industry for materials or construction design or work of better or "upgraded" quality than that of the previous similar building components. "Betterment" is also commonly used as a term for new materials or construction or design work that is added to a building to improve it where the same or similar materials, design or construction components/systems did not previously exist.

CP at 353-54.

The testimony and declarations ARCA submitted establish that the project was a necessary repair project. We conclude that Cress's declaration did not create a material issue of fact. Cress's declaration merely establishes that the project used higher quality materials. The use of different materials did not render the project a capital improvement project. Further, any repair that adds value to the property is not necessarily a capital improvement.

Indeed, the declaration reflects a broad usage of the word "repair." Section 10.2 outlines the Board's authority. Under Section 10.2.1(g),[9] the Board shall acquire all goods and services requisite for the proper functioning of the condominium, including the "[m]aintenance and repair of any condominium unit, its appurtenances and appliances, if such maintenance or repair is reasonably necessary in the discretion of the Board to protect the common area or preserve the appearance and value of the condominium development."[10] CP at 311-12. Having used this

[9] Section 10.2.1(g) addresses the maintenance and repair of individual condominium units and requires individual unit owners to pay for the cost of such maintenances or repairs:

> Maintenance and repair of any condominium unit, its appurtenances and appliances, if such maintenance or repair is reasonably necessary in the discretion of the Board to protect the common area or preserve the appearance and value of the condominium development, and the owner or owners of said units have failed or refused to perform said maintenance or repair within a reasonable time after written notice of the necessity of said maintenance or repair has been delivered by the Board to the owner or owners; provided that the Board shall levy a special charge against the condominium unit of such owner or owners for the cost of such maintenance or repair.

CP at 473.

[10] We note that this definition of repair is much broader than the definition set forth in Article 14, which is entitled "Damage or Destruction: Reconstruction." CP at 325. Article 14 requires the ARCA to promptly repair or replace any portion of the condominium for which insurance is required under the terms of Article 13 of the Declaration. But, in defining "repair," "reconstruct," "rebuild" and "restore," the Declaration clarifies that the definition applies to Article 14. CP at 326.

definition of the word "repair" in the individual unit context, we see no reason to give it a narrower meaning when it is used elsewhere in this section of the declaration. Under this broad language, a repair includes anything "necessary in the discretion of the Board to protect the common area or preserve the appearance and value of the condominium development." CP at 311-12. And under this definition, the new, higher quality rain screen, designed to protect the building from additional water damage, constituted a repair. Because there was no issue of material fact that the project was for the repair and restoration of the Allenmore Ridge condominiums and, thus, the Board was not required to conduct an owner approval vote, we hold that the trial court did not err by granting summary judgment to ARCA.

C. Remainder of Pedersen's Counterclaims

Pedersen contends that the trial court erred when it dismissed the remainder of his counterclaims, including claims that (1) ARCA allocated the assessment improperly among the owners, (2) ARCA breached its duties by misrepresenting the Porter contract to the owners and then entering into the contract, and (3) ARCA is estopped from claiming that no vote was required. Pedersen contends that the trial court's rulings were beyond the scope of ARCA's summary judgment motion. The trial court addressed these claims because Pedersen raised them as defenses to ARCA's motion for summary judgment; accordingly, we disagree with Pedersen.

In response to Pedersen's argument, ARCA contends that (1) it had already obtained a successful ruling on the issue of whether it was negligent or had breached its duty to the homeowners, (2) the type of contract ARCA entered into is irrelevant, and (3) the trial court

addressed his claim for allocation of project costs. Indeed, Pedersen had an opportunity to be heard on all of his dismissed counterclaims. The trial court considered Pedersen's argument that the assessment was improperly allocated among the owners and that ARCA should be estopped from claiming that no vote was required.[11] When Pedersen's counterclaims against ARCA were consolidated with the *Lowry* action, the trial court ruled that ARCA had not acted negligently or breached its duty because it was immunized under the business judgment rule. Pedersen was present for the arguments and rulings and did not object. Pedersen asserts that the trial court "exceeded the scope of the motion for summary judgment by making rulings as to the board's lack of negligence and lack of breach of duty in its order granting the motion for summary judgment;" however, Pedersen's argument fails because he raised these issues in his response to ARCA's motion for summary judgment. Appellant's Br. at 48.

III. Attorney Fees

Both parties request attorney fees under RAP 18.1. Section 10.2.3 of the Declaration provides, in pertinent part, "If a legal action is brought to interpret or enforce compliance with the provisions of this Declaration, the Articles, the Bylaws, or the rules or regulations of the Association, the prevailing party shall be entitled to judgment against the other party for its reasonable expenses, court costs, and the attorney's fees in the amount awarded by the court." CP at 475. Because ARCA is the prevailing party on appeal, it is entitled to reasonable attorney fees and costs under Section 10.2.3 of the Declaration upon its compliance with RAP 18.1.

[11] At the hearing for the summary judgment, Pedersen argued, "The third problem that affects the legality of the assessment is whether it's properly allocated among owners and that's the limited common area argument." RP (Nov. 12, 2010) at 18.

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Penoyar, J.

We concur:

Armstrong, J.

Hunt, J.