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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

DALIA SOSA,

Plaintiff and Appellant,

v.

ROCKPOINTE HOMEOWNERS
ASSOCIATION, INC., et al.,

Defendants and Respondents.

B192055

(Los Angeles County
Super. Ct. No. PC033124)

APPEALS from judgments of the Superior Court of Los Angeles County. John P. Farrell, Judge. Judgments reversed with directions.

Freeman, Freeman & Smiley, Steven E. Young and Jeff D. Neiderman for Plaintiff and Appellant.

The Phillips Firm, Thomas M. Phillips, Timothy E. Kearns, William G. Lieb; Horvitz & Levy, David M. Axelrad and Robert H. Wright for Defendant and Respondent Rockpointe Homeowners Association, Inc.

Gordon & Rees and Charles V. Berwanger for Defendant and Respondent Sky Blue Environmental, Inc.

Plaintiff Dalia Sosa sued her homeowners' association, Rockpointe Homeowners Association, Inc. (RHA), and a mold remediation company, Sky Blue Environmental, Inc. (Sky Blue), for damages for personal injuries allegedly caused by exposure to toxic mold in her condominium unit after her unit had a plumbing leak. On April 17, 2006, a summary judgment was entered in favor of RHA on the grounds (1) that the action was barred by an exculpatory clause in the declaration of covenants, conditions and restrictions (CC&R's) governing the relationship between Sosa and RHA and (2) RHA was entitled to judgment on the claim for breach of warranty because it was not a merchant which sold goods to Sosa. On May 1, 2006, a summary judgment was entered in favor of Sky Blue on the grounds that Sky Blue's conduct was not a cause of Sosa's injuries and the lack of a contractual relationship between Sosa and Sky Blue barred the claim for breach of warranty. Because the exculpatory clause, reasonably interpreted, does not bar liability for negligent remediation and repair, but rather water damage in the first instance, and because triable issues of fact exist as to the negligence claims against both RHA and Sky Blue, we reverse the summary judgments.

BACKGROUND

A. Allegations of Second Amended Complaint (Complaint)¹

Sosa alleged as follows: Since 1995, Sosa has owned a condominium unit in a 950-unit condominium project in Chatsworth. Sosa's building has four units. The condominium project is a common interest development within the meaning of Civil Code section 1351. RHA is a nonprofit corporation duly organized under California law and is comprised of the record owners of each of the condominium units. Under California law and the CC&R's, RHA has the duty to maintain and repair the common areas of the project, which include the walls and plumbing immediately adjacent to and servicing Sosa's unit.

In late August 2002, Sosa noticed a wet spot of carpet next to a first floor wall in her unit. Sosa reported the condition to RHA, which investigated the matter and determined there was a leaking drainage pipe in the upstairs master bathroom. RHA assumed responsibility for the leak and undertook to repair it. In the course of the repair, it was discovered that toxic mold was present in the walls. RHA ordered Sosa to move out of the unit while it repaired the plumbing leaks.

RHA hired Sierra Crest Construction, a sole proprietorship of David Rumph, to repair the pipes and walls. RHA knew that Sierra Crest was an unlicensed contractor but

¹ The complaint contains allegations of asbestos contamination, but at the hearing on Sky Blue's summary adjudication motion in August 2005, Sosa's attorney stated, "We don't contend that [Sosa] is ill because of asbestos contamination. We contend that the condominium has asbestos contamination caused by their conduct and that that requires remediation and costs her money and causes injury to her property. [¶] . . . [¶] [A]nd we sue for injury to property." Sosa also did not dispute that Sky Blue was not retained by anyone to remediate the asbestos in her unit.

In May 2006, Sosa dismissed all property damage claims against Sky Blue. The property damage allegations as to RHA do not alter the analysis of RHA's summary adjudication motion. Accordingly, we do not set out Sosa's property damage allegations and also ignore any allegations or evidence pertaining to personal injuries due to exposure to asbestos.

nevertheless hired it to conduct the repairs of Sosa's unit. RHA hired Sky Blue to remediate the mold in Sosa's unit. RHA also hired Clark Seif Clark, Inc. (CSC), to perform environmental testing on Sosa's unit, and HDP, Inc., to "pack out" Sosa's personal property as part of the repair and remediation process.

In the last half of 2002, RHA instructed Sosa and other unit owners to replace their galvanized plumbing with copper pipe, using a plumber approved by RHA. RHA agreed to pay each owner \$2,500 toward the cost of the re-piping, which was to be completed by December 31, 2004. As Sosa was moving out of her unit for several weeks and the walls were going to be open for the work done by RHA's subcontractors, Sosa hired an RHA-approved plumber to replace her galvanized pipes with copper pipes. The re-piping work was completed in December 2002.

RHA failed to supervise its subcontractors, Sky Blue, CSC and HDP. The subcontractors failed to fulfill their duties and work, failed to conform to applicable protocols for dealing with mold, and caused further contamination of her unit. In December 2002, CSC performed a post-remediation environmental study and knowingly reported the erroneous conclusion that the mold in the unit was remediated. Following the claimed repairs and partial remediation, Sosa returned to her unit and immediately noticed the recurrence of the severe allergies and respiratory symptoms she had experienced beginning in about August 2002. Sosa notified RHA that the repairs and remediation did not resolve the toxic mold problem. RHA, relying on CSC's reports of its test results, claimed that the remediation efforts were effective. At her own expense, Sosa hired another company to test for mold, and toxic levels of mold were found in several rooms of her unit. RHA initially refused further remediation, but then agreed to remediation of the mold only in the portion of the condominium not subject to Sosa's copper re-piping. RHA took the position that it was the re-piping by Sosa's plumber that was the cause of the then-existing mold in the areas that were re-piped.

Due to financial burdens, Sosa returned to live in her unit in late January 2003, but because portions of her unit were in a dismantled condition and were contaminated by mold which made her ill, she was confined to living in only one bedroom of her unit. In

the spring of 2003, Sosa offered to select and pay her own remediation company to have her unit properly remediated and repaired and then to seek reimbursement from RHA. RHA responded by threatening to obtain an injunction against Sosa and demanded that she cease and desist from any remediation and restoration work because RHA had exclusive authority over the common area. RHA also conditioned its further remediation of Sosa's unit upon Sosa's execution of a release of all claims against RHA, but Sosa refused and brought this lawsuit.

The complaint contained six counts against RHA and two counts against Sky Blue. Count one, against RHA only, labeled breach of contract and statutory duties, alleged that RHA performed inadequate remediation and repair; failed to furnish Sosa evidence of remediation when she demanded it; failed, after the first remediation attempt, to provide required repairs and remediation; falsely claimed that the copper re-piping was the source of further contamination and excused its duties of further repair and remediation; prepared an incomplete repair and remediation plan that did not adequately remediate the mold in her unit; and conditioned further repairs and remediation on Sosa's prior execution of a release.

Count two, labeled negligence, was asserted against both RHA and Sky Blue. Sosa alleged that RHA was negligent in maintaining the plumbing in the common areas and caused a water leak and consequent mold contamination of her unit; RHA also was negligent in performing the repairs of the common areas both before and after August 2002, and in failing to disclose to her the mold contamination in her unit.

Count three, labeled negligence per se, asserted against RHA only, incorporated the prior allegations and alleged that RHA breached its statutory duties of maintenance and repair of the common areas under the Davis-Sterling Common Interest Development Act (Civ. Code, § 1350 et seq.) Count four, against RHA only, captioned mandatory injunction, sought an injunction requiring RHA to remediate the mold in her unit in a "workmanlike, reasonable and quality manner." Count five, against RHA only, for declaratory relief, sought a declaration that RHA breached its duties to Sosa under the CC&R's and applicable statutes.

Count six, labeled breach of warranty, asserted against RHA and Sky Blue, alleged that the CC&R's gave rise to express and implied warranties with respect to the remediation and repair work and that RHA failed to conduct its repairs and services in a skillful, workmanlike manner. As to Sky Blue, Sosa alleged that it breached its warranty to perform its services in a safe manner and in keeping with all applicable abatement protocols, building codes, and regulations.

After answering the complaint, both RHA and Sky Blue moved for summary adjudication of issues.

B. RHA's Motion for Summary Adjudication

RHA moved for summary adjudication as to all counts except the fourth (for mandatory injunction). As to counts one, two, three, five, and six, RHA contended that the counts were barred by the exculpatory clause of the CC&R's. That clause, section 8.5 of the CC&R's, provides: "Neither [RHA] nor its Board of Directors, officers, manager or its employees or agents shall be liable to any Owner, or any other person, for injury, damage or loss to persons or property in the Properties resulting from water, rain, dust, sand, or any other element which may leak or flow from outside of any Unit or from any part of the building, or from any pipes, drains, conduits, appliances or equipment or from any other place or cause, provided neither [RHA], such Board Member or other person has, upon the basis of such information as may be possessed by him/it, acted in good faith, and without willful or intentional misconduct."

As to count six, RHA contended that Sosa could not recover on a breach of warranty theory because RHA is not a merchant which sold goods or services to Sosa. RHA's separate statement was supported by two items of "evidence": (1) the allegations of Sosa's complaint, and (2) various provisions of the CC&R's, including the exculpatory clause in section 8.5.

RHA's exculpatory clause argument was based primarily on *Franklin v. Marie Antionette Condominium Owners Assn.* (1993) 19 Cal.App.4th 824 (*Franklin*), which RHA contended is "100% on point with respect to [its] motion for summary adjudication."

In opposition to the motion, Sosa maintained that *Franklin, supra*, 19 Cal.App.4th 824, is not dispositive because it is distinguishable from the facts and issues presented here. Sosa also argued that the exculpatory clause does not bar RHA's conduct in negligently undertaking and managing the remediation and repair of Sosa's unit. Sosa also argued that the exclusion from liability set out in the exculpatory clause applied if RHA's conduct was in good faith and without willful or intentional misconduct, and that there was a material issue of fact as to whether RHA's conduct met that standard. With respect to the count for breach of warranty, Sosa argued that RHA's conduct in assuming the role of a construction manager created an implied warranty that it would remediate and repair her unit with due care and in a workmanlike manner.

Other than legal arguments and evidentiary objections, RHA's reply papers did not offer additional evidence addressed to the issues raised by its motion. In its December 29, 2004 order, the trial court sustained the majority of RHA's evidentiary objections and concluded that the exculpatory clause applied and that "the evidence submitted by plaintiff does not show that defendant [RHA] failed to act in good faith or acted with willful or intentional misconduct." The court also concluded that "there is no evidence that defendant [RHA] sold goods and services subject to an implied warranty." A judgment was entered in favor of RHA on April 17, 2006.² Sosa appealed from the judgment.

² Although the judgment expressly states that judgment is ordered in favor of RHA on the first, second, third, fifth, and sixth causes of action, no mention is made of the fourth count for mandatory injunction. But the judgment also states that it is based both on the previous order granting summary adjudication and on the parties' November 29, 2005 settlement agreement. We infer from the record that the settlement agreement disposed of the fourth count or that the fourth count is no longer in issue so as to preclude the entry of a final appealable judgment. No issue is raised on this appeal relating to the fourth cause of action and no party claims that the judgment is not appealable.

C. Sky Blue's Motion for Summary Adjudication

Sky Blue moved for summary adjudication as to the negligence count for personal injuries on the ground of lack of causation. Sky Blue argued that there was no evidence showing that Sosa's ailments were caused by mold and there was "incontrovertible scientific evidence that [Sosa] is not allergic to the mold found within her unit." Sky Blue also asserted that it did not engage in any conduct causing Sosa's exposure to mold because its work was limited to removing damaged material and cleaning, it completed its work and left the project, and its remediation work passed clearance testing by CSC. After Sky Blue's work was completed, Sosa's plumber cut openings in the walls and ceilings to perform its re-piping work. Sky Blue suggested that Sosa's plumber was the source of the recontamination of Sosa's unit.

As to Sosa's breach of warranty count, Sky Blue maintained that it was without merit because of the lack of privity of contract between it and Sosa, because the primary objective of its contract with RHA was to provide services and not materials or goods, and because the evidence established that Sky Blue made no representations or warranties to Sosa.

The following facts from Sky Blue's separate statement and supporting evidence were undisputed by Sosa: After Sosa complained to RHA in August 2002 about "wet carpet" in her unit, RHA retained CSC to investigate potential mold in portions of her unit. In September 2002, CSC tested Sosa's unit and issued a report setting out its findings and recommendations for areas to be remediated in Sosa's unit. According to CSC's report, CSC's "limited fungal contamination investigation" included a visual survey of, and collection of a limited number of samples from, three areas on the first floor: the bathroom, family room, and garage, and two areas on the second floor: the hall bathroom and master bathroom. CSC concluded that "a broken water pipe located in the [second] floor master bathroom appears to be the cause of the water intrusion and ensuing fungal growths discovered on the east wood paneled wall of the family room, base of the north wooden shear wall of the [first] floor

bathroom, south drywall ceiling of the garage above the washing machine, north corner wooden sub-floor in the [second] floor hall bathroom and south drywall wall of the [second] floor master bathroom. Each of these fungal growths appears to have contributed collectively to the elevated airborne fungal load; however, no evidence of unusually high levels of settled fungi were found on the contents of the subject property.”

CSC’s report recommended work to remediate the fungal contamination in the five rooms addressed in the report. Sky Blue entered into a contract with RHA to perform mold remediation in the areas of Sosa’s unit discussed in CSC’s report. The contract did not require Sky Blue to provide materials, goods, or labor for the reconstruction of Sosa’s unit. Sky Blue set up containment areas and began work on November 4, 2002. Sky Blue tore out and disposed of carpets, flooring, and floor coverings in the living room and second floor hallway. Sky Blue also tore out and disposed of drywall covering walls in the second floor master bathroom, master bedroom, second floor guest bathroom, family room, downstairs bathroom, and garage.

CSC’s first post-remediation inspection of Sosa’s unit in mid-November 2002 failed to pass a “clearance test” to determine whether the remediation was effective, but on November 19, 2002, Sosa’s unit passed CSC’s second inspection and CSC cleared Sosa’s unit for reoccupancy. After Sky Blue was informed that clearance had been obtained from CSC, Sky Blue vacuumed areas that had been remediated with a high efficiency particulate air cleaner, removed the contaminants, and left the project on November 25, 2002.

After Sky Blue left the project, Sosa’s plumber, John’s Plumbing, replaced the galvanized pipe with copper pipe inside the already open areas in the walls where the remediation had been done. According to Sosa, in a limited number of areas where there had been no remediation, John’s Plumbing made small access holes in the walls to route the copper pipes and then patched the holes.

Believing that the remediation had not been successful, Sosa hired Bye Bye Mold, an industrial hygienist, to test her unit for mold. Bye Bye Mold tested the air in the unit on December 10, 2002, and issued a report on December 13, 2002, concluding that, compared to the baseline of the outdoor air, elevated levels of mold spores were in the air in the kitchen, gym room, and master bedroom. The living room had a normal total spore count, but 14 percent of the spores were *Stachybotrys*, which has the ability to produce highly toxic chemicals and is rarely found in the natural outdoor environment but is associated with water-damaged building materials. According to Bye Bye Mold, there is a “zero tolerance” for *Stachybotrys* because of its association with human health symptoms, including dermatitis, coughs, rhinitis, and burning in the nose, throat, and lungs. Sosa’s ailments included nasal discharge, sinus congestion and pressure, respiratory distress, chest tightness, coughing, allergic reactions, blocked ears, headaches, and skin rashes.

In April 2003, CSC again tested Sosa’s unit and found mold spores, including *Stachybotrys*, in the second floor master bathroom. Mold was also found in the “Kitchen/family room area,” the living room, and the master bedroom and master bathroom. CSC’s May 2003 report prepared for RHA stated, “The mold growth observed on the sill plates and wall studs on the north and east walls of the master bathroom appeared to be associated with moisture condensation from showering activities throughout time. . . . As reported by Mr. Raymann [a contractor and advisor to RHA], the wall materials on the north and east walls, and a small section of the south wall adjacent to the east wall in the master bathroom were removed for re-piping purposes; these particular sections of the walls in the master bathroom were never part of CSC initial investigation. [¶] . . . [¶] In summary, it would be very difficult at this stage of the evaluation to associate the imbalanced mold spore detected in the kitchen/family room area . . . , living room . . . , upstairs gym room . . . , upstairs hall bathroom . . . , upstairs master bedroom . . . and bathroom . . . with CSC’s initial investigation at the subject property. It is CSC’s opinion that the disturbances on wall and ceiling materials for plumbing re-piping activities that occurred in the subject property appears to have

contributed collectively to the imbalanced airborne mold spores detected in the living room, kitchen/family room area, upstairs gym room, upstairs hall bathroom and upstairs master bedroom/bathroom areas after the completion of the post mold clearance inspection conducted on November 19 of 2002.”

Sky Blue’s causation arguments (that Sosa was not allergic to the types of molds in her unit and that her exposure to mold did not cause or contribute to her injuries) were based primarily on the opinions expressed in the declaration of Dr. Alan Szeftel, who is board certified in allergy, immunology, pulmonary disease, internal medicine, and critical care medicine. Szeftel’s opinions were based on his education, training, and experience, as well as an independent medical examination of Sosa in January 2005; his review of Sosa’s medical records, including the allergy test results from her physician and medical expert, Dr. James Seltzer; Sosa’s deposition and discovery responses; and CSC’s reports of testing of Sosa’s unit.

According to Szeftel, Sosa’s allergy test results showed that she was not allergic to dust mites or to two of the types of mold found in her unit, Aspergillus and Penicillium; Sosa was allergic to Fusarium and Helminthosporium, but neither of these was found in her unit. Sosa, a travel agent with a second career as a scuba diving instructor, also had a long history of left ear “fullness” and difficulty clearing her ears during dives since September 2000, but Szeftel’s examination did not confirm either Eustachian tube dysfunction or asthma. In 1990, Sosa complained of chronic sinus problems and body rash after exposure to sun; in 1991, Sosa was diagnosed with allergic rhinitis and perennial rhinitis.

Szeftel stated that Eustachian tube dysfunction due to mold exposure has not been confirmed and that there was no evidence in the peer-reviewed literature that confirms an association between indoor mold exposure and Sosa’s symptoms of headache, skin rash, nausea, and difficulty concentrating. Szeftel expressed the opinions that Sosa was not allergic to the molds found in her unit, that her nasal, eye, and sinus symptoms were “not related at all” to exposure to the mold in her unit, that her exposure to the mold did not

cause or contribute to her Eustachian tube symptoms, that her cough and other respiratory symptoms were not caused by indoor mold exposure, and that her injuries “were not actually caused by her alleged exposure to indoor mold at her condominium.”

In a reply declaration, Szeftel stated that the levels of airborne spores typically found in homes with water intrusion were “far below what is required to deliver a toxic dose,” and that health effects “due to an irritant mechanism have also not been confirmed in the indoor residential environment. Clinically, associations with dampness and mold and upper respiratory symptoms are weak, subjectively based, and have not shown to be causally related after reviewing the available literature.” Szeftel further stated that allergy testing for *Stachybotrys* is not routinely performed “because clinical allergy to *Stachybotrys* has never been confirmed. As such, an allergic . . . mechanism for her symptoms cannot be claimed. [¶] . . . *Stachybotrys* exposure in her home is not causing her symptoms. A number of National Agencies and Societies have concluded, after thorough review of the available literature, that there is insufficient evidence to confirm an association between *Stachybotrys* and health effects.” Attached to Szeftel’s declaration were copies of three articles published in 2001, 2002, and 2003, which supported Szeftel’s conclusion regarding *Stachybotrys*.

Szeftel further explained that “[m]old may cause lung infections in immunocompromised hosts, or trigger asthma in allergic asthmatics specifically sensitized to the molds they are exposed to. None of these situations apply to Ms. Sosa. Rarely, it is related to Hypersensitivity Pneumonitis or Organic Dust Toxic Syndrome, neither of which Ms. Sosa has any clinical features of. In the absence of these disorders, mold has not been shown to adversely affect respiratory function. Mycotoxin exposure in extremely high doses (millions of spores [per cubic meter] or greater in airborne samples) may possibly affect the lungs. However, this has never been confirmed in the indoor environment and is certainly not applicable to the environment tested within Ms. Sosa’s unit.” Szeftel opined that Sosa does not have

reduced lung function because the tests performed by him and by Dr. Seltzer produced results that were within normal limits.

In opposition to the motion, Sosa filed, among other things, a declaration from Dr. James Seltzer, who is board certified in allergy and immunology.³ Seltzer declared that his testing of Sosa in December 2004 (one month before Szeftel's examination of Sosa) directly contradicts Szeftel's statements regarding lung function because his tests revealed symptoms consistent with nocturnal asthma, which evidence "suggests airway reactivity." Seltzer also charged that Szeftel "ignores the recent scientific evidence that exposure to damp or moldy indoor environments has been associated with respiratory tract symptoms, e.g., of the nose and throat, cough, and wheeze." With respect to Sosa's Eustachian tube symptoms, Seltzer stated that "if the dampness or the mold in her indoor environment results in increased upper airway inflammation (swelling), then Eustachian tube obstruction symptoms, e.g., ear plugging, could be asymptomatic until her Eustachian tubes were further challenged when she scuba dived."

Seltzer stated that, based on the CSC reports of September 19, 2002, November 14, 2002, and May 5, 2003, the indoor environment in Sosa's unit was affected by amplification of mold growth and excessive dampness. The November 14, 2002 CSC report documented that on November 8, 2002, Sosa's unit failed the *first* post-remediation clearance inspection because the mold spore counts of the air inside the garage, family room, first floor bathroom, and second floor master bathroom and master bedroom were higher than the counts in the outdoor air. CSC concluded that the foregoing areas of Sosa's unit needed additional remedial work in order to comply with CSC's clearance criteria.

³ Sosa does not challenge the trial court's rulings sustaining Sky Blue's objections to the opinions in the declarations of her expert witnesses Richard Lipsey, a toxicologist, and Stephen Cohen, a property mold specialist, so we ignore those declarations.

Seltzer declared that, to a reasonable medical probability, Sosa “suffers from non-allergic rhinitis (inflammation of the nasal tissues) in reaction to the damp and/or moldy environment in her condominium. Thus, it appears her exposure to her condominium’s environment created by water intrusion and/or mold growth is a substantial factor in causing some of her alleged injuries.”

In opposition to the motion, Sosa also challenged Sky Blue’s assertion that it did not cause her exposure to mold. Sosa argued that triable issues of fact existed as to whether Sky Blue followed the protocols recommended by CSC and made a part of Sky Blue’s contract with RHA. Sosa pointed out that Sky Blue’s contract required it to perform specific work that it did not do, including the removal and disposal of the shower pan in the master bathroom, the removal of the second floor bathtub, and the removal and disposal of the second floor bathroom vanities. Sosa asserted that the evidence offered by Sky Blue — the deposition and declaration of Sky Blue employee Conn Klipp — does not establish that the protocol required by the contract was followed.

After a hearing in August 2005, the trial court granted Sky Blue’s motion for summary adjudication. The order granting the motion stated that there were no triable issues of fact as to Sosa’s claims for negligence and breach of warranty. On May 1, 2006, a judgment was entered in favor of Sky Blue. Sosa appealed from the judgment.

DISCUSSION

A. RHA’s Motion for Summary Adjudication

1. Standard of Review

We review an order granting summary adjudication under the same principles applicable to review of a summary judgment. (*Smith v. Wells Fargo Bank, N.A.* (2005) 135 Cal.App.4th 1463, 1471.) Our review is de novo and we decide independently whether the facts not subject to triable dispute warrant judgment for the moving party as a matter of law. (*Intel Corp. v. Hamidi* (2003) 30 Cal.4th 1342, 1348.) It is solely a judicial function to interpret a written instrument and, where, as

here, there is no extrinsic evidence regarding the exculpatory clause of the CC&R's, we independently construe the exculpatory clause. (See *City of Manhattan Beach v. Superior Court* (1996) 13 Cal.4th 232, 238.)

The language of the instrument must govern its interpretation if it is clear and explicit. [Citation.] Generally, the words of a contract are to be understood in their ordinary and popular sense [citations] unless a contrary intent is shown, such as a specialized meaning due to trade custom and practice or a prior course of dealing [citations].” (*Franklin, supra*, 19 Cal.App.4th at p. 829.) “The same rules that apply to interpretation of contracts apply to the interpretation of CC&R's.” (*Chee v. Amanda Goldt Property Management* (2006) 143 Cal.App.4th 1360, 1377.)

The general rule with respect to releases of liability purporting to exculpate a tortfeasor from damage claims based on its future negligence or misconduct is that the release must “clearly, unambiguously, and explicitly express this specific intent of the subscribing parties.” (*Leon v. Family Fitness Center (#107), Inc.* (1998) 61 Cal.App.4th 1227, 1233.) But pursuant to Civil Code section 1370, “Any deed, declaration, or condominium plan for a common interest development shall be liberally construed to facilitate the operation of the common interest development, and its provisions shall be presumed to be independent and severable.”

2. Exculpatory Clause of CC&R's Does Not Bar Sosa's Complaint

Even liberally construed, section 8.5, the exculpatory clause in the RHA CC&R's, does not bar Sosa's complaint because the section cannot reasonably be interpreted to release RHA from liability for injury resulting from negligent conduct in *remediating and repairing* Sosa's unit. The gravamen of Sosa's complaint is that RHA negligently remediated and repaired the common areas of her unit *after* it had been damaged by a water leak. Under the CC&R's, RHA was responsible for

repairing that water leak as well as maintaining the common facilities and common areas of Sosa's unit.⁴

Section 8.5, which is one sentence, is comprised of two parts: a main or independent clause ("Neither [RHA] nor its Board . . . shall be liable . . . for injury, damage or loss . . . resulting from water . . . or any other element which may leak or flow . . . from any part of the building, or from any pipes, drains . . .") and a dependent clause ("provided neither [RHA] . . . or other person has . . . acted in good faith, and without willful or intentional misconduct").

The word "neither" in the dependent clause appears to condition immunity from liability upon RHA's *not* acting in good faith and without willful or intentional misconduct. Because this interpretation appears to be the opposite of what was likely intended and would be an unreasonable reading of the sentence, we read the dependent clause as if it did not contain the word "neither."

The dependent clause qualifies or limits the independent clause; the dependent clause does not expand the circumstances under which RHA is released from liability. In other words, as long as RHA acts in good faith and without willful or intentional misconduct, section 8.5 releases RHA from liability for injury resulting from water and other elements "which may leak or flow from outside of any Unit or from any part of the building, or from any pipes, drains, conduits, appliances or equipment or from any other place or cause" Thus, if acting in good faith and without willful or intentional misconduct, RHA would be released from liability for injury resulting from the *initial* water leak in Sosa's unit.

But section 8.5 reasonably cannot be interpreted to release RHA from liability for injury resulting from negligent conduct in *remediating or repairing* the water

⁴ Section 8.1 of the CC&R's provides: "Except as provided otherwise in this Declaration, [RHA] shall be solely responsible for all maintenance, repair, upkeep and replacement of the Common Area and Common Facilities."

damage. First, no language in section 8.5 addresses the issue of remediation or repair. The main clause provides immunity from liability for injury resulting from certain enumerated *elements* (“water, rain, dust, sand, or any other element which may leak or flow . . .”), not from the conduct of any person or entity. Reading the “in good faith and without willful or intentional misconduct” language so as to shield RHA from liability for negligent remediation or repair of water damage as long as RHA acts in good faith and without willful or intentional misconduct would add language to the main or independent clause which is absent. ““We do not have the power to create for the parties a contract that they did not make and cannot insert language that one party now wishes were there.”” (*People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.* (2004) 116 Cal.App.4th 1253, 1265, fn. 9.)

Second, interpreting section 8.5 to release RHA from liability for negligent conduct in remediating or repairing water damage to common areas would nullify or severely limit its responsibility under section 8.1. Interpretation of the CC&R’s must be fair and reasonable, not leading to absurd conclusions. (See *ASP Properties Group, L.P. v. Fard, Inc.* (2005) 133 Cal.App.4th 1257, 1269.) An owner such as Sosa reasonably reading the language of section 8.5 would not expect her neighbors, through the medium of the homeowners’ association, to pay for her injuries or property damage caused by water leaks. The owner must bear that expense on her own. But if the association were to negligently remediate or repair the damage caused by water, the owner would not reasonably expect the association to be free of responsibility. Accordingly, when the language of section 8.5 is considered in the context of other related provisions of the CC&R’s, section 8.5 reasonably cannot be construed to shield RHA from liability for injury resulting from negligent conduct in remediating and repairing Sosa’s unit.

None of the cases cited by RHA support its assertion that section 8.5 releases RHA from liability for alleged negligent conduct in remediating or repairing water damage. *Franklin, supra*, 19 Cal.App.4th 824, is inapposite because the opinion

addressed only a breach of contract claim by a condominium owner who sustained property damage caused by a leak in the central plumbing system. The narrow issue before the court was “whether the nonnegligent Association may contractually shift the risk of loss to the condominium owner, who may look only to the insurance proceeds for her recovery against the Association.” (*Id.* at p. 833.) In reversing a judgment in favor of the plaintiff and directing that a judgment be entered in favor of the association, the court in *Franklin* expressly declined to address the issue of whether the exculpatory clause, similar to the clause in the instant case, provided immunity from negligence liability, because “that is now a moot issue due to the trial court’s finding of no negligence.” (*Id.* at pp. 832–833.) *Franklin* thus did not address the issue, presented here, of whether the exculpatory clause shields an association from liability for personal injuries resulting from the negligent remediation or repair of water damage.

Also inapposite are the following out-of-state cases cited by RHA: *Cornell v. Council of Unit Owners Hawaiian Village Condominiums, Inc.* (D.Md. 1997) 983 F.Supp. 640, 644 (*Cornell*) [broad language of clause exempting defendant from liability for personal injuries caused by “any other person” evidenced intent to absolve itself from negligence liability]; *Samuels v. Treebrooke Condominium Assn.* (Va.Cir.Ct. 1996) 41 Va.Cir. 109, 110 (*Samuels*) [bylaws provided immunity from liability for property damage from water runoff from the common areas, but owners retained the right to sue defendant for damages when damages arose from circumstances other than those enumerated in the bylaws]; *Nido v. Ocean Owners’ Council* (Va. 1989) 378 S.E.2d 837, 838–839 (*Nido*) [although bylaws provided immunity from liability for property damage from water leakage from common areas, defendant still had contractual duty to correct the defects in the common elements; but trial court properly determined that defendant was not negligent in the repairs it undertook].

The exculpatory clause in *Cornell* is entirely different from the one at issue here, so *Cornell* does not support RHA’s position. Nor are *Samuels* and *Nido* of any assistance

to RHA because *Samuels* did not raise the issue of whether the bylaws precluded a claim for negligent repair or remediation, and in *Nido*, the trial court determined that even if the duty to repair survived the limitation in the bylaws, the defendant was not negligent in the repairs it undertook. Accordingly, nothing in either *Samuels* or *Nido* is inconsistent with our interpretation of the instant exculpatory clause.

RHA asserts that Sosa raised *for the first time on appeal* the issue of whether the exculpatory clause bars her negligence claims. But this issue was raised by RHA's motion below (indeed, the exculpatory clause was the *only* ground for the summary adjudication motion on the negligence claims) and the issue was discussed extensively in Sosa's opposition papers.

RHA also claims the complaint does not allege the theory that it negligently *directed or managed* the remediation and repair of her unit, and RHA maintains that Sosa is barred from raising this theory now. But the complaint alleged that RHA undertook to repair the pipe leaks and the walls, and to have Sky Blue remediate the mold (paragraph 26). The count for breach of contract and statutory duties alleged that RHA was responsible under the CC&R's to remediate and repair the common areas of the development (paragraph 48) and that RHA breached its duties under the CC&R's and pertinent statutes by performing inadequate repairs and remediation of the mold (paragraph 51). Similar allegations appear in the other counts of the complaint, including the counts for negligence (paragraphs 57 through 59), negligence per se (paragraphs 67 through 68), and declaratory relief (paragraphs 78 through 81). Thus, the complaint unambiguously alleged that RHA negligently directed or managed the remediation and repairs. If RHA was genuinely "unclear about what theories [were] tendered by the complaint, there [were] procedural means by which they [could have been] clarified." (See *Pultz v. Holgerson* (1996) 184 Cal.App.3d 1110, 1114.)

We conclude that the trial court erred in granting summary adjudication in favor of RHA on counts one, two, three, and five.

3. Breach of Warranty

The trial court properly granted summary adjudication on count six, for breach of warranty, because it was undisputed that RHA did not provide “consumer goods” within the meaning of Civil Code section 1791 and did not sell goods to Sosa within the meaning of Commercial Code section 2314.⁵ The following authorities cited by Sosa in support of this count are inapposite because they deal primarily with warranties accompanying goods: *Aced v. Hobbs-Sesack Plumbing Co.* (1961) 55 Cal.2d 573, 583 [under former Civil Code sections 1734 to 1736, the former Uniform Sales Act, an implied warranty of suitability for ordinary uses applied, even though article, heating system tubing, was furnished in connection with a construction contract rather than a sale contract]; *Kuitems v. Covell* (1951) 104 Cal.App.2d 482, 485 [implied obligation in all contracts that the work would be fit and proper for its intended use applied to roofing that failed to keep out water]. The foregoing cases do not establish that Sosa has a viable claim for breach of express or implied warranty against RHA because her claims are not based on the furnishing of goods. The trial court properly granted summary adjudication as to this count.

B. Sky Blue’s Motion for Summary Adjudication

1. Standard of Review

The burden of persuasion remains with the party moving for summary judgment. (*Kahn v. East Side Union High School Dist.* (2003) 31 Cal.4th 990, 1002–

⁵ Civil Code section 1791, part of the Song-Beverly Consumer Warranty Act, defines “‘Consumer goods’” as “any new product or part thereof that is used, bought, or leased for use primarily for personal, family, or household purposes, except for clothing and consumables. ‘Consumer goods’ shall include new and used assistive devices sold at retail.”

Commercial Code section 2314 provides in pertinent part: “(1) Unless excluded or modified (Section 2316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind.”

1003.) In determining whether there is a triable issue of fact, we are required to strictly construe the moving party's declarations and to liberally construe those of the opposing party; in other words, the evidence of the opposing party, and the reasonable inferences therefrom, must be accepted as true. (*Grant-Burton v. Covenant Care, Inc.* (2002) 99 Cal.App.4th 1361, 1369.)

The issue of the sufficiency of the expert declarations in the context of summary judgment motions has been addressed by several courts, the decisions of which can be reconciled under the principle that the moving party's evidence is strictly construed and the opposing party's evidence is liberally construed. For example, in *Kelley v. Trunk* (1998) 66 Cal.App.4th 519, 524–525, the court reversed a summary judgment in a medical malpractice case because the moving defendant's expert declaration was unsupported by any reasoned explanation. There, the declaration stated only that “[a]t all times [the defendant doctor] acted appropriately and within the standard of care under the circumstances presented.” (*Id.* at p. 522.)

In *Hanson v. Grode* (1999) 76 Cal.App.4th 601 (*Hanson*), the court also reversed a summary judgment in favor of surgeons who had performed spinal cord surgery on the plaintiff, allegedly causing him nerve damage. There, the declaration of the plaintiff's doctor *in opposition* provided an adequate explanation of the reasons why the defendants' conduct fell below the standard of care and caused the plaintiff's injuries. (*Id.* at pp. 607–608.) Relevant to this case is the *Hanson* court's discussion of the plaintiff's expert's declaration on the issue of causation: “[Hanson's expert] states that Hanson suffered severe damage during the surgery and that the care defendants provided was a cause of his injuries. Although the style of the [expert's] declaration is at times a bit obtuse, Hanson is entitled to all favorable inferences that may reasonably be derived from that declaration. These inferences include a reading of the declaration to state that the nerve damage Hanson suffered during surgery was caused by the conduct of defendants, which conduct fell below the applicable standard of care. Nothing more was needed.” (*Ibid.*)

“Causation is generally a question of fact for the jury, unless reasonable minds could not dispute the absence of causation.” (*Lombardo v. Huysentruyt* (2001) 91 Cal.App.4th 656, 666.) If, under undisputed facts, there is no room for a reasonable difference of opinion, then the issue of causation may be resolved on summary judgment. (*Kurini v. Hanna & Morton* (1997) 55 Cal.App.4th 853, 864.) In negligence cases, causation is established by showing either (1) but for the negligence, the harm would not have occurred or (2) the negligence was a concurrent independent cause of the harm. (*Viner v. Sweet* (2003) 30 Cal.4th 1232, 1240–1241.) Causation need not be proved with absolute certainty, and circumstantial evidence may be used to establish it. (*Id.* at pp. 1242–1243.) To establish causation, the evidence must afford a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a cause in fact of the result. (*Id.* at p. 1243.)

2. Triable Issues Exist as to the Causation Element of the Negligence Count

We agree with Sosa that the declaration of her expert, Dr. Seltzer, was sufficient to create a triable issue of fact on causation and that his declaration does not contain “unfounded speculations,” as argued by Sky Blue. As in *Hanson, supra*, 76 Cal.App.4th 601, Seltzer provided adequate explanations for his opinions. His opinions that Sosa suffered from non-allergic rhinitis and that the damp and/or moldy environment in her unit caused some of her injuries is sufficient to create a triable issue on the point. Seltzer’s examination of Sosa also revealed that she suffered from symptoms consistent with nocturnal asthma, suggesting airway reactivity. He also explained that the dampness and mold in Sosa’s unit could result in swelling of her upper airways which remained asymptomatic until her Eustachian tubes were challenged during scuba diving. From Seltzer’s declaration, a reasonable inference can be drawn that dampness and mold either caused some of her injuries or aggravated or activated some pre-existing conditions, like rhinitis and Eustachian tube obstruction symptoms.

Triable issues also exist as to whether Sky Blue was responsible for the mold and dampness in Sosa's unit that, according to Bye Bye Mold, persisted after Sky Blue's remediation work in November 2002. Sky Blue points to the evidence that CSC cleared Sosa's unit on November 19, 2002, and that Sosa's plumber performed re-piping work in her unit in early December 2002. Sky Blue argues that "any alleged exposure was caused by Sosa's actions and by her [plumbing] subcontractor." But there is no evidence showing that Sosa's plumber engaged in any conduct to cause or contribute to the dampness or the moldy condition of the unit. On the other hand, Sosa points out that Sky Blue failed to perform all the required work under its contract, including removing the master bathroom shower pan and bathtub. According to CSC's May 2003 inspection report, the mold growth in the master bathroom was "associated with moisture condensation from showering activities" The declaration of Sky Blue's employee Klipp does not specifically address the issue of the shower pan, so he does not negate the allegation that it was not removed, as called for by the contract. Thus, triable issues of fact remain as to whether Sky Blue properly performed its remediation work and whether its conduct caused or contributed to the mold growth and dampness found in Sosa's unit after Sky Blue left the project in late November 2002.

For all of the foregoing reasons, we conclude that Sky Blue was not entitled to summary adjudication as to the second count for negligence.

But, for the reasons discussed in part A.3. of the Discussion, we conclude that Sky Blue is entitled to summary adjudication on count six for breach of warranty. As with RHA, Sky Blue performed services and did not furnish goods.

DISPOSITION

The summary judgment in favor of Rockpointe Homeowners Association, Inc., is reversed and on remand the trial court is directed to deny summary adjudication as to counts one, two, three, and five and to grant summary adjudication as to count six. The summary judgment in favor of Sky Blue Environmental, Inc., is reversed and on remand the trial court is directed to deny summary adjudication as to count two and to grant summary adjudication as to count six. The parties are to bear their own costs on appeal.

NOT TO BE PUBLISHED.

MALLANO, Acting P. J.

We concur:

ROTHSCHILD, J.

JACKSON, J.*

* Judge of the Los Angeles Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.