

NO. A10-2031

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State of Minnesota  
**In Court of Appeals**

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Paul W. Larson and  
Jesse J. Schneider,

*Respondents,*

vs.

Lakeview Lofts, LLC and  
Todd Frostad,

*Appellants.*

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**APPELLANTS' BRIEF, ADDENDUM AND APPENDIX**

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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## STATEMENT OF ISSUES

1. **Is the fiduciary duty imposed upon an officer or director of a homeowners' association for a common interest community by Minn. Stat. § 515B.3-120 applicable to conduct outside the officer's or director's responsibilities?**

Frostad and Lakeview Lofts, LLC raised this issue in the district court by arguing Frostad was acting in his capacity as a developer and property owner, not as an officer or director of the homeowners' association, when he sold the last 17 condominium units of Lakeview Lofts. (T.251, 259-60, 265)<sup>1</sup>

The district court concluded Appellants owed Respondents a fiduciary duty without considering whether Frostad was acting as an officer or director when he sold the last 17 condominium units. (Add.1, ¶1.3)<sup>2</sup>

### **Apposite Authorities:**

Minn. Stat. § 515B.3-120  
*Am. Family Ins. Grp. v. Schroedl*,  
616 N.W.2d 273 (Minn. 2000).

2. **Pursuant to the fiduciary duty delineated in Minn. Stat. § 302A.251, is it reasonable to rely on a lender's underwriting to determine whether a purchaser is capable of making payments and likely to avoid foreclosure?**

Frostad raised this issue in the district court by arguing he relied upon the lenders' underwriters to determine whether a mortgage should be issued to the purchasers of the last 17 condominium units. (T.256-57, 267-68)

The district court concluded Frostad breached his fiduciary duty without considering whether his reliance upon the lenders' underwriters was reasonable. (*See* Add.13, ¶3.0)

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<sup>1</sup> "T." refers to the Trial Transcript dated May 20, 2010.

<sup>2</sup> "Add." refers to Appellants' Addendum; "A." refers to Appellants' Appendix.

**Apposite Authorities:**

Minn. Stat. § 302A.251  
*Am. Family Ins. Grp. v. Schroedl*,  
616 N.W.2d 273 (Minn. 2000).

3. **Did the trial court err when it awarded as damages the claimed diminution in the value of Respondents' condominiums without adequate consideration of the general decline in real estate values during the years in question, without proof that Appellants' alleged conduct caused the claimed diminution, and without proof of a sale of one of the subject properties?**

Appellants raised this issue in the district court by arguing that any claimed diminution in value was due to the general housing market decline, not their alleged conduct. (T.344) Appellants also argued that because Schneider had not sold his condominium unit, he had not suffered compensable damages. (T.389)

Notwithstanding the irrefutable evidence that the market had significantly declined between the date Larson purchased his condominium and the date he sold it, and without considering the fact that Appellants' alleged conduct did not occur until 2006, the district court calculated Larson's losses based on only a 1% claimed general decline in real estate market values between 2004 and 2009. (Add.18, ¶7.3) Although Larson and Schneider purchased their condominium units within one week of each other, the district court calculated Schneider's losses based on a 26% general decline in real estate market values between 2006 and 2010, but did not use that same general market decline in calculating Larson's damages. The district court awarded damages to Schneider despite the fact that he had not sold and had no plans to sell his condominium unit. Moreover, any purported losses suffered by Schneider were not only admittedly temporary, but also purely speculative. Finally, the district court based the damages on the tax-assessed value of Schneider's condominium unit, which is against well-settled Minnesota law.

**Apposite Authorities:**

*Jackson v. Reiling*,  
311 Minn. 562, 249 N.W.2d 896 (1977).  
*Raze v. Mueller*,  
587 N.W.2d 645 (Minn. 1999).

## STATEMENT OF CASE

Appellant Lakeview Lofts, LLC is wholly owned by Appellant Todd Frostad. In 2004, Lakeview Lofts, LLC developed a 40-unit condominium as a first-time venture into real estate. By late 2005 or early 2006, the real estate market in general, and particularly the condominium market, began to soften. In an attempt to sell the last 17 condominium units, Lakeview Lofts, LLC agreed to hire Blackstone Sales, LLC to sell the units in exchange for a management fee based on a percentage of the purchase prices of the units, provided Blackstone found buyers. Blackstone did so, but lenders providing financing for 14 of the properties subsequently foreclosed their mortgages.

Two Lakeview Lofts condominium owners, Respondents Paul Larson and Jesse Schneider, brought suit against Appellants, alleging Appellants knew or should have known the lenders who financed the units sold by Blackstone would foreclose on their mortgages. Appellants further alleged the foreclosures caused a blight on Lakeview Lofts which negatively impacted the value of Respondents' condominium units. After a bench trial, the Honorable Bruce A. Peterson concluded Appellants breached a fiduciary duty imposed under Minn. Stat. § 515B.3-120, and awarded Larson \$101,389.43 in damages and Schneider \$96,225.26 in damages; the court also awarded Larson and Schneider \$41,997.10 in joint attorney fees and expenses. Appellants appeal from the judgment.

## STATEMENT OF FACTS

### A. *Lakeview Lofts*

Lakeview Lofts is a 40-unit condominium style “Common Interest Community” within the meaning of Minn. Stat. § 515B.1-103, subd. 10.<sup>3</sup> It is located in Spring Park, Minnesota. (Add.1, ¶1.2)<sup>4</sup> Lakeview Lofts was developed by Todd Frostad through Lakeview Lofts, LLC, and was Frostad’s first attempt at real estate development. (Add.1, ¶¶1.2, 1.7) Klein Bank financed the development of Lakeview Lofts with a fluctuating prime plus interest rate loan. (Add.4, ¶¶6.1-.2) As part of the financing agreement, Appellants were required to provide and adhere to a “closeout schedule” projecting when the condominium units would be sold. (Add.4, ¶6.3; T.19)

Construction of Lakeview Lofts began in 2004, and the condominium units began selling late that year. (Add.1, ¶1.4) At that time, Lakeview Lofts, LLC had a verbal agreement with Burnett Realty to sell the condominium units in exchange for a real estate commission of 4–6% of the purchase price. (T.35, 63, 84) By late 2005 or early 2006, sales of the condominium units began to slow. (Add.4, ¶¶6.4-.6) As of May 2006, nearly half the residential units remained unsold, putting Lakeview Lofts, LLC behind on the closeout schedule. (Add.5, ¶6.9) Additionally, the interest rate from Klein Bank had increased and there were real estate taxes due and owing on Lakeview Lofts. (Add.5,

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<sup>3</sup> Lakeview Lofts has 39 residential units and 1 commercial unit. (Add.1, ¶ 1.3)

<sup>4</sup> Many of the facts contained in the findings are not disputed, and for sake of brevity, citations are to the court’s findings alone. Where appropriate, other record citations are included to support the factual statements.

¶6.8) Appellants were “feeling pressure to get the project closed,” and accordingly borrowed nearly \$2 million more from Klein Bank to upgrade the remaining units for immediate occupancy.<sup>5</sup> (Add.5, ¶6.7; T.19)

**B. *Blackstone Sales, LLC***

In early 2006, Appellants were approached by Michael Prieskorn, the principal of Blackstone Sales, LLC, regarding the sale of the remaining 17 condominium units. (Add.5, ¶7.1-.3) Around March or April 2006, Appellants and Blackstone verbally agreed Blackstone would either purchase or find purchasers for the 17 unsold units in exchange for a management fee of 10–11% of the purchase price. (Add.5-6, ¶¶7.4, 8.3) Blackstone’s ostensible plan was to either secure direct purchasers for the units or buy the units itself and then resell them. (Add.5, ¶7.3) In an effort to ensure Blackstone sold all 17 remaining units, Appellants structured the deal so Blackstone would get paid only when the last 10 units sold. (Add.6, ¶¶7.9, 8.5) Between June 30, 2006, and September 15, 2006, Blackstone sold the 17 units for the listed sales prices: 6 units to Ryan Simifranca; 5 units to Casey Burns; 3 units to Blackstone Sales, LLC; and 3 units were paid for in cash by Blackstone. (Add.8, ¶¶9.1, 9.3; T.244) The 14 non-cash sales were financed through mortgages issued by a variety of reputable lenders, e.g., Accredited Home Lenders, BNC Mortgage, Sun Trust Mortgage Co., Home Loan Corp., Silver State

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<sup>5</sup> Ultimately, Appellants invested about \$17 million in Lakeview Lofts, and received profits of about \$700,000 to \$800,000, for about a 4% return. (T.83)

Mortgage Co, and Stone Creek Funding Corp. (T.275-76) Pursuant to the agreement, Blackstone was compensated \$914,761.91.<sup>6</sup> (Add.6, ¶8.6)

**C. Paul Larson**

Respondent Paul Larson, a real estate agent for nearly 30 years, purchased a Lakeview Lofts condominium unit on December 27, 2005, for \$375,140.84. (Add.1-2, ¶¶2.2-3) Larson invested approximately \$25,000 in upgrades to his condominium unit after purchase. (Add.2, ¶2.5; T.96) In January 2006, Larson attempted to sell the unit for \$559,000, over \$180,000 more than he had paid less than a month earlier. (Add.2, ¶2.6) At that time, there were at least 17 unsold Lakeview Lofts units offered for significantly less. Reflective of the general downturn in the housing market, Larson's condominium unit did not sell until October 2009 for \$270,000. (Add.2, ¶¶2.6-.7)

**D. Jesse Schneider**

Respondent Jesse Schneider purchased a Lakeview Lofts condominium unit on January 4, 2006, for \$354,358.47. (Add.2, ¶3.2) As of the date of trial, Schneider had not sold his condominium unit; he testified, "I purchased this property because I needed a place to live; I wasn't expecting to make a profit." (T.221) The 2009 tax-assessed value of his condominium unit was \$182,000 based on an assessment conducted in 2008; the 2010 tax-assessed value of his condominium unit was \$166,000 based on an assessment conducted in 2009. (Add.2, ¶3.3; T.403)

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<sup>6</sup> This amount was 10.76% of the aggregate sales price. (Add.6, ¶8.6) Burnett Realty had been unsuccessful in selling the last 17 units for a 4-6% fee.

**E. Lakeview Lofts Homeowners' Association**

Frostad formed the Lakeview Lofts Homeowners' Association (HOA) in October 2005. (Add.4, ¶5.2) Frostad surrendered control of the HOA to the members at a meeting in May 2006, which was before any sales facilitated by Blackstone had occurred. (Add.4, ¶5.3) Frostad confirmed this surrender in a letter to the HOA dated July 7, 2006. (Add.4, ¶5.4)

**F. Trial**

Larson and Schneider filed suit against Frostad and Lakeview Lofts, LLC, on March 18, 2009, alleging they had “intentionally inflated” the sales price of the 17 units marketed by Blackstone,<sup>7</sup> and knew or should have known the units would “eventually go into foreclosure.”<sup>8</sup> (A.5-6, ¶¶18-20) All 14 of the units marketed by Blackstone that were purchased through mortgage financing were foreclosed upon by the lenders, and according to the district court, “[i]t is unclear what happened to the [3] units purchased with cash.” (Add.9, ¶10.5) Larson and Schneider alleged the foreclosures resulted in a blight on their condominium units, which decreased their value.

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<sup>7</sup> The court apparently found no merit in this allegation as it issued no findings that the prices were inflated.

<sup>8</sup> Respondents also alleged Appellants should have known Blackstone's purchases would result in violations to the Declaration for Lakeview Lofts. Pursuant to the Declaration, “No more than 25 percent of the living units . . . may, at any time, be non-owner occupied living units held for leasing.” (Add.2-3, ¶¶4.1-.2, 4.7) Respondents presented no evidence at trial that any violations of the Declaration caused their alleged damages, and the district court made no finding to that effect.

A bench trial was conducted May 20-21, 2010. During the trial, Respondents presented testimony from an appraiser, Cal Haasken. (T.163) Haasken testified the Blackstone fees were unreasonable, the Blackstone fees were not disclosed to the lenders' appraisers, and the Blackstone fees were not listed on the purchase agreements or HUD statements of the first 7 closings in violation of the Real Estate Settlement Procedures Act.<sup>9</sup> (Add.7-8, ¶¶8.8-.10) However, the Blackstone fees were not listed on the purchase agreements or HUD statements of the first 7 closings because they were not paid out until the last 10 closings. (T.34) Notably, the HUD statements for the last 10 closings reflected the entirety of Blackstone's fees for all 17 units sold. (T.171) Although settlement agents reviewed the HUD statements for these 10 units prior to the closings, Blackstone's management fees were never questioned. (T.256-57) Further, various underwriters for the mortgages on the Blackstone sales, *e.g.*, Accredited Home Lenders, BNC Mortgage, Sun Trust Mortgage Co., Home Loan Corp., Silver State Mortgage Co., and Stone Creek Funding Corp., never questioned the transactions. (T.275-76)

Nevertheless, Haasken testified the structure of the Blackstone fees was "so unusual" it should "have raised a red flag that pointed to potentially fraudulent transactions." (Add.8, ¶8.10) Saliently, Respondents did not present any evidence that actual fraud in the mortgage transactions occurred or that Frostad was aware of any actual

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<sup>9</sup> Regulations promulgated under the Real Estate Settlement Procedures Act make clear it is the responsibility of the settlement agent to complete the HUD form. *See* 24 C.F.R. § 3500.8(b).

fraud.<sup>10</sup> Despite the complete lack of evidence regarding any particulars of the claimed fraud scheme, and despite the fact that no lender asserted a claim of actual fraud, the district court inferred that the foreclosures were the result of fraud perpetrated by Blackstone against the lenders.<sup>11</sup> Haasken concluded that while home values dropped between 2006 to 2010, “the Lakeview Lofts project was harmed more than others,” specifically a 25% further diminution due to the foreclosures of the mortgaged Blackstone units.<sup>12</sup> (Add.10, ¶10.7; T.370)

Judge Peterson issued Findings of Fact, Conclusions of Law and Order on July 27, 2010, concluding Appellants owed a fiduciary duty to Respondents pursuant to the Minnesota Common Interest Ownership Act, specifically Minn. Stat. § 515B.3-120. (Add.12, ¶1.1) Judge Peterson concluded Appellants breached their fiduciary duty by entering into the agreement with Blackstone to sell the last 17 units. (Add.13-14, ¶3.1-.2)

Judge Peterson held an evidentiary hearing on September 10, 2010. Appellants’ expert witness, Mary Bujold, testified condominium prices dropped an average of 26% in

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<sup>10</sup> The only discussion of the issue at trial was Frostad’s response to a question from Respondents’ counsel as to whether he was aware Blackstone’s principal was in federal prison; Frostad testified he did not know. (T.31)

<sup>11</sup> Specifically, the district court concluded, the transactions “were so unusual so as to have raised multiple red flags and pointed to potentially fraudulent transactions. Defendants knew or should have known about the fraudulent nature of the Blackstone purchases.” (Add.9, ¶9.8)

<sup>12</sup> Judge Peterson apparently disregarded this testimony in determining Larson’s damages, instead relying on an exhibit that he interpreted as showing a 1% general market decline between 2004 and 2009. Despite the fact that Larson purchased his condominium unit within a week of Schneider’s purchase, the district court calculated Schneider’s damages based on a 26% general market decline. *See discussion, infra.*

the metro area between 2004 and September 2010, and provided evidence showing an even greater market decline of 40% in the Lake Minnetonka area during that time. (Add.10-11, ¶10.8; T.429, 436) Bujold provided a statistical analysis of the general market decline in the Lake Minnetonka area for condominiums both excluding Lakeview Lofts and including Lakeview Lofts. (T.436-37) Either way, the 40% general market decline remained the same, indicating that Lakeview Lofts suffered no greater decline than other condominiums in the Lake Minnetonka area. Conversely, Haasken testified “[t]he diminution attributed to the stigma of the foreclosure[s]” was 25% of the prior value of the property, without providing testimony as to the “prior value” was of either Larson’s or Schneider’s property. (T.359) Larson also testified that he conducted a market analysis, which consisted of comparing Lakeview Lofts’ list prices for 2004 and 2005 with Lakeview Lofts’ list prices for 2008 and 2009, to determine his damages.<sup>13</sup> (T.409) Larson opined that the diminution to the value of his property was 50%. (T.412) Larson derived this figure from 8 sales, and did not indicate what portion of that diminution was due to general market decline versus the foreclosures. (T.412)

Judge Peterson issued Amended Findings of Fact, Conclusions of Law and Order on September 17, 2010. Judge Peterson concluded the average market depreciation in the metro area from 2004 to 2009 was 1% based on the exhibit submitted by Bujold, which showed the average drop in price for a condominium in the metro area from 2004 to

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<sup>13</sup> It is not clear what relevance attached to the 2004 and 2005 list prices of Lakeview Lofts condominium units, since purchase price was the only value considered by the district court in setting damages. Moreover, Larson completed his purchase on December 27, 2005, just 5 days before 2006.

2009, excluding Lakeview Lofts, at 1%. (Add.10-11, ¶10.8; Add.18, ¶7.3) Judge Peterson awarded Larson the difference between his purchase price, less 1%, and his selling price, for \$101,389.43 in damages. (Add.18, ¶7.3; T.409)

As to Schneider, based on Bujold's testimony, Judge Peterson found that the average market depreciation in the metro area from 2006 to 2010 was 26%. (Add.10-11, ¶10.8; Add.18, ¶7.4) And without considering that Schneider neither sold nor was attempting to sell his condominium, or the fact that Haasken testified any damages caused by foreclosures are temporary and "curable," he awarded Schneider the difference between his purchase price, less 26%, and the tax-assessed value on his condominium, for \$96,225.26 in damages.<sup>14</sup> Thus, Larson's damages were calculated with a 1% general market decline and Schneider's damages were calculated with a 26% general market decline despite the fact that they purchased their condominium units within about one week of one another. (Add.18, ¶7.4) Finally, Respondents were awarded \$41,997.10 in joint attorney fees and expenses under Minn. Stat. § 515B.3-111(b). (Add.19, ¶3.0)

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<sup>14</sup> Judge Peterson "assumed" the tax-assessed value of Schneider's condominium unit accurately reflected the market value of the unit despite Bujold's testimony that the Lakeview Lofts condominium unit previously owned by Larson was given a tax-assessed value of \$221,000 for 2010, but sold for \$275,000 in July 2010. (T.439)

## ARGUMENT

### *Summary of Argument*

The judgment in this case is premised upon a claimed fiduciary duty Appellants owed Respondents. But Appellants did not owe Respondents a fiduciary duty under either statute or common law that related to Appellants' sale of other condominium units. The court imposed the fiduciary duty in Minn. Stat. § 515B.3-120 upon Appellants despite the fact that the integral prerequisite of the statute was missing: Frostad was not acting as an officer or director of the association when the conduct at issue occurred. There was, as a matter of law, no basis to impose a fiduciary duty upon Appellants under the statute. There was also no common-law basis for imposing a fiduciary duty upon neighboring property owners to avoid foreclosure.

Further, no breach of any fiduciary duty occurred. Frostad justifiably relied on lenders' underwriters and settlement agents to properly scrutinize and approve or deny mortgage applications for the condominium units he sold. In reposing his trust in the mortgage experts, Frostad did not breach any fiduciary duty owed to appellants.

Finally, the district court's award of damages was not supported by the evidence and was clearly calculated erroneously. The damages do not appropriately account for the general decline in the housing market during the period in question, or the fact that one Respondent had not even suffered damages because he had not sold his condominium as of the time of trial, nor did he present any evidence that a sale was imminent.

## I. STANDARD OF REVIEW

Fundamentally, this case turns on the scope and meaning of Minn. Stat. § 515B.3-120. Statutory construction is a question of law the court reviews de novo. *In re Kleven*, 736 N.W.2d 707, 709 (Minn. App. 2007). Where a statute is free from ambiguity, the court applies the plain meaning of the statute. *Tuma v. Comm'r of Econ. Sec.*, 386 N.W.2d 702, 706 (Minn. 1986). In doing so, the court strives to “ascertain and effectuate the intention of the legislature,” and assumes the legislature does not intend absurd or unreasonable results. *Am. Family Ins. Grp. v. Schroedl*, 616 N.W.2d 273, 278 (Minn. 2000). To ascertain the intention of the legislature, the court interprets statutes “in light of the surrounding sections to avoid conflicting interpretations.” *Id.* at 277.

The damages awarded are also at issue in this case. Plaintiffs have the burden to prove damages by sufficient evidence. *Canada by Landy v. McCarthy*, 567 N.W.2d 496, 507 (Minn. 1997); *Costello v. Johnson*, 265 Minn. 204, 208, 121 N.W.2d 70, 74 (1963). Damages which rest on speculation and conjecture have not been proven by sufficient evidence and cannot be recovered. *See Jackson v. Reiling*, 311 Minn. 562, 563, 249 N.W.2d 896, 897 (1977). Where plaintiffs fail to present adequate evidence to support their damages claim, the reviewing court must set aside the damages award. *Raze v. Mueller*, 587 N.W.2d 645, 648 (Minn. 1999).

## II. APPELLANTS DID NOT OWE A FIDUCIARY DUTY TO RESPONDENTS

### A. Appellants Were Not Acting As Officers Or Directors Of The Association When The Agreement To Sell The Last 17 Units Was Made With Blackstone; Therefore, Appellants Were Not Subject To The Fiduciary Duty Imposed By Minn. Stat. § 515B.3-120.

The trial court concluded Appellants owed a fiduciary duty to Respondents pursuant to Minn. Stat. § 515B.3-120, which provides:

(a) During any period of declarant control pursuant to section 515B.3-103(c), declarant and any of its representatives *who are acting as officers or directors of the association* shall:

...

(2) be subject to all fiduciary obligations and obligations of good faith applicable to any persons serving a corporation in that capacity.

(Emphasis added.) Thus, Minn. Stat. § 515B.3-120 requires the declarant (Lakeview Lofts, LLC) and any of its representatives who are officers or directors of an association (Frostad) to be in control of the association and acting in that capacity before a fiduciary duty is imposed. Conversely, when they are not acting as officers or directors of the association, the statute does not apply.

The limited scope and application of Minn. Stat. § 515B.3-120 is underscored by Minn. Stat. § 515B.3-103(a), which provides “[i]n the performance of their duties, the officers and directors [of the association] are required to exercise . . . the care required of fiduciaries of the unit owners.” (Emphasis added.) The legislature was careful to limit the fiduciary duty imposed on officers and directors of associations to those actions occurring within “the performance of their duties.” Thus, the legislature clearly intended

the fiduciary duty imposed by Minn. Stat. § 515B.3-120 to also be so limited. *See Schroedl*, 616 N.W.2d at 278 (advising the court interprets statutes “in light of the surrounding sections to avoid conflicting interpretations”).

Plain meaning and common sense also dictate the fiduciary obligation imposed by Minn. Stat. § 515B.3-120 applies only where an association officer or director is acting in that capacity and in the performance of their duties. To interpret the statute otherwise would hold association officers and directors to a fiduciary standard at all times and when acting in any capacity. For example, if an association officer wanted to sell his own condominium unit, as a fiduciary he would have to consider whether selling the unit would send a negative message to the public. But in selling his own property, the association officer is not acting in the performance of his duties, and thus under the statute owes no fiduciary duty to the other condominium owners.

When Appellants made an agreement with Blackstone to sell the last 17 units, they were not acting on behalf of the association, they were acting as owners of property. In fact, they had relinquished their control of and position on the HOA prior to any of the Blackstone sales. These actions are simply not subject to a fiduciary duty under Minn. Stat. § 515B.3-120.

**B. Appellants, As Owners Of Condominium Units, Did Not Owe A Common Law Fiduciary Duty To Other Condominium Owners.**

Fiduciary duties arise by statute or where one party places his or her trust and confidence in another and depends on the other to look out for his or her best interests. *Klein v. First Edina Nat'l Bank*, 293 Minn. 418, 422, 196 N.W.2d 619, 623 (1972).

Because the statute does not apply to these facts, the only other basis to find a fiduciary obligation is the common law. But that effort is unavailing as well.

There was no evidence presented at trial, nor was it reasonable for Respondents to expect, that Frostad, as a developer and property owner, was guarding Respondents' best interests at all times regardless of the capacity in which he acted. Concluding that Frostad should have been doing so is akin to concluding that property owners owe a fiduciary duty to their neighbors to manage their property in a way that protects the best interests of their neighbors. That conclusion is untenable under Minnesota law. *See Bradley v. Bradley*, 554 N.W.2d 761, 765 (Minn. App. 1996) (concluding co-tenants of property do not owe one another a fiduciary duty); *see also Swenson v. Bender*, 764 N.W.2d 596, 601 (Minn. App. 2009) (listing per se fiduciary relationships recognized in Minnesota as trustee-beneficiary, attorney-client, business partnerships, director-corporation, officer-corporation, and husband-wife). Frostad, as a developer and property owner, did not owe a common-law fiduciary duty to Respondents.

**C. There Can Be No Liability In The Absence Of A Fiduciary Obligation**

The sole basis for liability found by the district court was a purported breach by Appellants of a fiduciary duty claimed to be owed to Respondents. Because neither the statute relied upon by the district court nor the common law impose such a duty, the judgment of the district court cannot stand. It must be vacated, and the case remanded with directions to enter judgment for the Appellants.

### III. APPELLANTS' CONDUCT DID NOT BREACH ANY FIDUCIARY DUTY

Even assuming, for argument's sake, that Appellants owed Respondents a fiduciary duty under Minn. Stat. § 515B.3-120, Appellants did not breach that duty. As recognized by the trial court, the fiduciary duty imposed by Minn. Stat. § 515B.3-120 is the same as that imposed upon "persons serving a corporation" as officers and directors. Minn. Stat. § 302A.251 delineates the fiduciary standard imposed upon corporate officers and directors.

Subd. 1 A director shall discharge the duties of the position of director in good faith, in a manner the director reasonably believes to be in the best interests of the corporation, and with the care an ordinarily prudent person in a like position would exercise under similar circumstances.

...

Subd. 2 (a) A director is entitled to rely on information, opinions, reports, or statements . . . presented by:

...

(2) counsel, public accountants, or other persons as to matters that the director reasonably believes are within the person's professional or expert competence.

The trial court cited the duty imposed by Minn. Stat. § 302A.251, subd. 1, but neglected the reliance portion of Minn. Stat. § 302A.251, subd. 2(a)(2), which precludes liability where a director justifiably relies on professionals when he or she is exercising the care "an ordinarily prudent person" would exercise. Here, Appellants relied on the mortgage companies to evaluate the ability of the Blackstone purchasers to pay their

mortgages and avoid foreclosure, just as they had with the non-Blackstone sales.<sup>15</sup> Appellants' reliance was justified: the mortgage companies are not only professionals, but are required by law to determine whether a purchaser is legitimate, capable of making payments, and likely to avoid foreclosure. *See, e.g.*, Minn. Stat. § 58.13, subd. 1(24) (providing that no mortgage originator or server shall "arrange for a residential mortgage loan without verifying the borrower's reasonable ability to pay the scheduled payments"). Under the agreement between Appellants and Blackstone, each of the last 10 sales reflected that sale's management fees plus that sale's pro rata share of the first 7 sales' management fees. Not one of the lenders whose underwriters or closers reviewed these documents questioned these fees or were concerned that a "red flag" was raised. There is simply no basis in law to impose a duty on Appellants to perform the underwriting function that was the responsibility of the lenders. That is precisely the situation Minn. Stat. § 302A.251, subd. 2(a)(2) was meant to address.

#### **IV. THE DAMAGES AWARDED TO RESPONDENTS ARE UNSUPPORTED BY THE FACTS OR THE LAW**

A breach of fiduciary duty claim requires proof of the same elements as a negligence claim: duty, breach, proximate causation, and damages. *See Padco, Inc. v. Kinney & Lange*, 444 N.W.2d 889, 891 (Minn. App. 1989); *Hudson v. Snyder Body, Inc.*, 326 N.W.2d 149, 157 (Minn. App. 1982) (listing elements of negligence claim, which are

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<sup>15</sup> At trial, Frostad testified to a buyer who paid \$730,000 for his Lakeview Lofts condominium unit when he planned to live there only one week per year. (T.264) Frostad testified he did not know the risks involved with this buyer but trusted the lender to determine whether the sale was appropriate. (T.264)

the same as the elements of a breach of fiduciary duty claim). Assuming, again for the sake of argument, Appellants did owe Respondents a fiduciary duty and Appellants were not justified in relying on the lenders' underwriters, and thus breached that duty, any conclusion that the breach caused Respondents' purported damages is inherently speculative, as is the amount claimed.

**A. The Court's Award Of Damages To Larson Was Not Supported By The Evidence And Was Clearly Erroneous.**

Larson purchased his condominium unit on December 27, 2005, one week before Schneider purchased his condominium unit. Larson purchased his condominium unit for \$375,140.84, and made improvements of approximately \$25,000, for a total of \$400,140.84. (Add.1-2, ¶¶2.2-.3) About one month after purchasing the condominium unit, Larson attempted to sell it for \$559,000. (Add.2, ¶2.6) During that time, there were at least 17 unsold Lakeview Lofts units offered for significantly less than his listed price, and a rival condominium next to Lakeview Lofts selling units. (T.36) Larson's condominium unit ultimately sold in October 2009 for \$270,000. (Add.2, ¶¶2.6-.7)

Respondents failed to present any evidence of the value of Larson or Schneider's condominiums as of the date of the first foreclosure. But the gravamen of Respondents' complaint is that the foreclosures caused a blight which resulted in diminution of value to their condominium units. Thus, the value of the condominium unit at the time the foreclosures began is a vital component of determining damages. Yet Respondents neglected, as was their burden, to establish when the foreclosures began or the value of their condominium units at that time. That fact alone is fatal to their claim. *See Teachout*

v. *Wilson*, 376 N.W.2d 460, 464 (Minn. App. 1985) (reversing an award of damages where there was no evidence of the fair market value of a business at the time of breach). Because the baseline marker of the value of Respondents' property at the time of the alleged causal incident, the first foreclosure, calculating Respondents' alleged damages is simply not possible.

Nevertheless, the trial court determined Larson's damages were \$101,389.43, the difference between Larson's purchase price and Larson's sale price, less 1%—"the average market depreciation . . . between 2004 and 2009." (Add.18, ¶7.3) Yet the district court factored in a 26% general market decline when calculating Schneider's damages, although he bought his condominium only a week after Larson. There was no basis to apply a different general market decline to Larson's damages calculation than was used in calculating Schneider's damages. It is irrelevant how the market performed in 2004 and 2005. Larson purchased his condominium unit in December 2005. Thus, to calculate his damages based on a 2004 value is nothing more than speculation. *See Jackson*, 311 Minn. at 563, 249 N.W.2d at 897 ("Damages which are remote and speculative cannot be recovered."). Rather, the relevant time period is between 2006 and 2009, during which all witnesses agreed there was a significant market decline.

Further, allowing for only a 1% general market decline for Larson is contrary to the evidence. Haasken testified there was an "additional" diminution due to the foreclosures, but did not dispute a general market decline. And there was no dispute that between 2006 and 2010, there was a 26% general market decline. Additionally, it is irreconcilably inconsistent to calculate Larson's damages based on a 1% general market

decline and Schneider's damages based on a 26% general market decline when they purchased their condominium units within about one week of one another.

**B. The Court's Award Of Damages To Schneider Was Not Supported By The Evidence And Was Clearly Erroneous.**

Schneider purchased his condominium unit on January 4, 2006, for \$354,358.47. (Add.2, ¶3.2) Schneider has not sold, nor made a serious attempt to sell, his condominium unit. The tax-assessed value of his condominium unit for assessment year 2010 (based on an estimated market value in 2009) was \$166,000. (Add.2, ¶3.3) The trial court determined Schneider's damages were \$96,225.26, the difference between Schneider's purchase price and the tax-assessed value of the unit for 2010, less 26%—"the average market depreciation . . . between 2006 and 2010".

This calculation was clearly erroneous for two reasons. First, pursuant to Minn. Stat. § 515B.3-111, damages are awarded when a tort occurs for "all losses not covered by insurance suffered by . . . that unit owner." Schneider has suffered no loss. At best, any future loss or damages are speculative. *See Jackson*, 311 Minn. at 563, 249 N.W.2d at 897 ("Damages which are remote and speculative cannot be recovered."). Schneider has not tried to sell his condominium unit. And Haasken testified any damages caused by foreclosures are temporary and "curable." This is consistent with the testimony at trial that the purchase prices for Lakeview Lofts condominium units were already on the rise as of that date. (T.439) Thus, Schneider may be able to sell his condominium unit for more than he paid when he attempts to sell, in which case he would incur no damages. *See Cardinal Consulting Co. v. Circo Resorts, Inc.*, 297 N.W.2d 260, 267 (Minn. 1980)

("Uncertainty as to the fact of whether any damages were sustained at all is fatal to recovery."); *Lowe v. Armour Packing Co.*, 148 Minn. 464, 467, 182 N.W. 610, 611 (1921) ("Future consequences . . . are too speculative to be considered.") (internal quotation marks omitted) (citation omitted).

Further, there was absolutely no evidence presented that the assessor considered the foreclosure of the other Lakeview Lofts condominiums (or was even aware of that fact) when determining the tax-assessed value. Moreover, relying on the tax-assessed value of Schneider's property contravenes established case law. "The Minnesota Supreme Court has held that real estate tax appraisals are inexact value determinations." *In re Moore*, No. C7-99-963, 1999 WL 1103367, at \*3 (Minn. App. Dec. 7, 1999) (A.28) (citing *Harold Chevrolet, Inc. v. Cnty. of Hennepin*, 526 N.W.2d 54, 59 (Minn. 1995)); *Thompson v. Thompson*, 385 N.W.2d 55, 56-57 (Minn. App. 1986) (observing courts have taken judicial notice that property tax assessments are a percentage of actual value). Thus, without more, Schneider's offer of a tax appraisal value as a determination of fair market value was insufficient to establish damages.

**C. The Damages Awarded To Each Respondent Are Unsupported By The Record And The Law And Must Be Set Aside**

The trial court clearly erred in calculating the damages it awarded to the Respondents. *See State v. Hollins*, 765 N.W.2d 125, 133 (Minn. App. 2010) ("an error is clear . . . if it contravenes case law, a rule, or a standard of conduct") (internal quotation marks omitted) (citation omitted). In Larson's case, at a minimum the damages are overstated because the trial court failed to account for the undisputed decline in the real

estate market from 2006 (the time of the alleged breach of fiduciary duty) and the date of Larson's sale of the condominium. Moreover, Larson failed to present any evidence as to the value of his condominium as of the date of the alleged wrongful acts upon which his claim is based.

As to Schneider's claimed damages, not only was there an insufficient evidentiary basis to calculate the claimed diminution of value, as a matter of law, any damage is speculative, because Schneider has not sold his property and admitted he had no plans to do so, the impact of the foreclosures is indisputably temporary, and there was no evidence that the reduced assessment of the property for tax purposes, even if relevant, was impacted by the foreclosures in any way.

### **CONCLUSION**

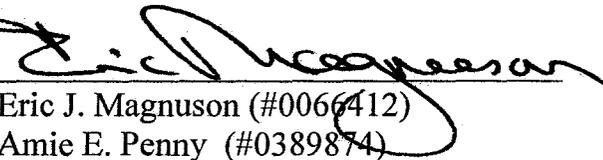
The district court's judgment was fundamentally flawed for three reasons. First, Appellants did not owe a fiduciary duty to Respondents. Appellants were potentially subject to a fiduciary duty only when Frostad was acting as an officer or director of the HOA. The conduct at issue (allegedly fraudulent sales by Blackstone) occurred after Frostad surrendered his position in the HOA, and while Frostad was acting as a developer and property owner, not as an officer or director of the HOA.

Second, Frostad did not breach any fiduciary duty owed to Respondents. By statute, Frostad was permitted to fulfill any fiduciary duty he owed by justifiably relying on experts. Frostad did so: he justifiably relied on the lenders' underwriters and settlement agents to determine whether potential purchasers had the financial wherewithal to avoid foreclosure.

Third, the damages awarded were clearly erroneous. Appellants' conduct did not cause the damage; awarding damages based on a general housing market decline of 1% from 2004 to 2009 is clearly erroneous; Respondents failed to present evidence regarding the value of their property as of the date of the alleged wrongful acts, and awarding damages based on pure speculation and conjecture is contrary to well-settled Minnesota law. The judgment should be reversed in its entirety.

Dated: March 9, 2011

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## CERTIFICATE OF COMPLIANCE

The undersigned counsel for Appellants, certifies that this brief complies with the requirements of Minn. R. App, P. 132.01 in that it is printed in Times New Roman 13-point font, proportionately spaced typeface utilizing Microsoft Word Word 2007 and contains 6,172 words, including headings, footnotes and quotations.

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