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Daniel L. Stanco

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THE PROPER EXTENT OF LIABILITY A CONDOMINIUM UNIT OWNER SHOULD HAVE FOR INJURIES CAUSED BY A LIMITED COMMON ELEMENT

DANIEL L. STANCO

I. INTRODUCTION

A difficult question facing condominium law is the proper allocation of damages among condominium unit owners and condominium owners associations when a plaintiff is injured as a result of the condition of a common element.¹ The condominium is a unique, hybrid form of property, providing the individual with exclusive ownership of the condominium unit and a tenancy-in-common with the other condominium owners, each holding an undivided, proportionate share in the common elements.² Because of the relative newness of condominium law,³

¹ See Jerry Orten & John Zacharia, *Allocation of Damages for Tort Liability in Common Interest Communities*, 31 REAL PROP. PROB. & TR. J. 647, 648 (1997) (stating “[o]wnership of common elements in condominiums has given rise to particularly difficult questions and consequences concerning the allocation of damages for tort liability between unit owners and the owners association.”); see also Donald L. Schriefer, *Judicial Action and Condominium Unit Owner Liability: Public Interest Considerations*, 1986 U. ILL. L. REV. 255, 255 (1986) (acknowledging “Because of its hybrid character, and also because the condominium is a relatively recent legal development, certain areas of condominium law remain unsettled.”). See generally Irene S. Mazun, *Condo Associations – New Cop on The Beat: Martinez v. Woodmar IV Condo. Homeowners Ass’n*, 73 ST. JOHN’S L. REV. 325, 326 (1999) (indicating over past few decades courts have been required to determine the liability attributed to a possessor of land for criminal acts of third parties that occur on the possessor’s premises).

² See Orten & Zacharia, *supra* note 1, at 648 (stating “[o]wners acquire a unit and, in a condominium, an undivided proportionate share of the common elements as tenants in common with fellow owners.”); see also James H. Jeffries IV, *North Carolina Adopts the Uniform Condominium Act*, 66 N.C. L. REV. 199, 199 (1987) (indicating condominium ownership involves fee title ownership of an individual unit and undivided co-ownership of the common elements by all tenants); Schriefer, *supra* note 1, at 255 (noting “[t]he owner possesses an individual living unit in fee simple and holds an undivided interest as tenant – in - common with other unit owners in the project’s common elements.”).

³ See *Smith v. King’s Grant Condominium*, 418 Pa. Super. 260, 265 (1992) (declaring “[t]he law of condominium is a relatively new area and is expanding rapidly.

courts are unclear as to what extent they should impose liability on individual unit owners for injuries arising from the negligent maintenance of the common elements,⁴ or other “associational wrongs.”⁵ Although an owners association is typically in control of the common elements and responsible for their maintenance, and also likely to have a master insurance policy,⁶ problems arise when either the extent of the damages exceed the insurance policy limits or when the association is uninsured.⁷ A further issue develops with regard to limited common elements, where the control and maintenance responsibility is potentially divided among the association and the individual unit owners entitled to exclusive possession of the limited common element.⁸

In the case of *Taratuta v. Allyn*,⁹ the New York State Supreme Court denied summary judgment to defendants, condominium owners, when a portion of a limited common element fell from

Unfortunately, the law of tort has yet to catch up with developments in this area.”); see also Patrick Rohan, *Preparing Community Associations for the Twenty-First Century: Anticipating the Legal Problems and Possible Solutions*, 73 ST. JOHN'S L. REV. 3, 10 (1999) (stating “[u]nlike other areas of private-sector law, real property law has never been extensively reviewed or modernized.”).

⁴ See Schriefer, *supra* note 1, at 255 (noting uncertainty exists as to the extent a court can hold a unit owner liable for injuries resulting from the negligent maintenance of a condominium's common elements). See generally Jeffries IV, *supra* note 2, at 216–20 (discussing the potential liability of unit owners for the negligence of a condominium association); Mazun, *supra* note 1, at 341 (commenting that the extent of a unit owner's duty to maintain common areas is under “considerable debate throughout the country.”).

⁵ See Schriefer, *supra* note 1, at 255 (defining associational wrongs as those which “occur in connection with general maintenance and management of the complex . . . [including] injuries caused by improper maintenance of the common elements of the complex, negligence on the part of maintenance employees, inadequate supervision of recreational areas . . . and managerial wrongs.”).

⁶ See Rohan, *supra* note 3, at 25 (discussing the general statutory obligation of condominium board managers to insure the entire condominium project up to the full replacement cost); see also New York Condominium Act, Real Property Law Article 9-B (2003), N.Y. C.L.S. Real P. § 339-cc(1) (2004) [hereinafter Condominium Act] (stating damage to or destruction of a building must be promptly repaired and reconstructed by the board of managers). See generally *Coakley Bay Condo. Ass'n v. Continental Ins. Co.*, 770 F. Supp 1046, 1048 (D.V.I. 1991) (referring to the association's bylaws which required the condominium board of directors to purchase an insurance policy insuring the building and all improvements made upon the property against loss or damage).

⁷ See Orten & Zacharia, *supra* note 1, at 649 (describing lack of clarity with regard to liability when damages exceed the association's insurance policy limits, when the association is uninsured, or when there is a question of control over the common elements.); see also Rohan, *supra* note 3, at 25 (stating “complex casualty insurance questions are certain to arise.”).

⁸ See Orten & Zacharia, *supra* note 1, at 649 (alluding to control over the common elements as potentially dispositive of liability); see also *King's Grant*, 418 Pa. Super at 264 (declaring “liability is premised on possession and control – not ownership”).

⁹ No. 116732-02, slip op. (N.Y. Sup. Ct. Jan. 8, 2004) (order denying summary judgment).

the roof of the condominium building and struck the plaintiff walking on the street.¹⁰ The court found that an issue of fact existed as to whether the unit owners maintained any control over the common elements either directly or via the condominium board, and whether the unit owners could therefore be liable for the injury sustained by the plaintiff.¹¹ This comment argues in favor of basing liability on the unit owner's pro rata share of the injury causing limited common element. Where a unit owner maintains no control or privilege to use a certain limited common element, he should be absolved from liability. Where a limited number of unit owners share in the use of a limited common element, they should only be held liable for any injury that it causes when it can be shown that they; (1) retained some level of control over the element, (2) preserved some responsibility for its maintenance, and (3) unreasonably relied on the condominium board to fully provide for its maintenance. Furthermore, this comment will look at various theories of liability and argue in favor of limiting an owner's liability by applying the capped apportionment with mandatory insurance theory. It will be shown that this theory not only provides adequate protection for tort claimants, but also best follows the structure and form upon which all of condominium law is based. To alleviate the risk of courts applying various remedies on a case-by-case basis and disproportionately applying liability to unit owners, the state legislature should (1) define the extent of a unit owner's liability, (2) require the owners associations and boards to adhere to mandatory insurance policy limits, and (3) set guidelines for homeowner policies to provide coverage for associational wrongs.

II. THE DUTY TO MAINTAIN LIMITED COMMON ELEMENTS

The condominium is a hybrid form of real property creating two distinct forms of ownership: fee simple ownership in the unit and an undivided interest with other unit owners as tenants-in-

¹⁰ *Id.* at 16-17.

¹¹ *Id.*

common in the common elements.¹² A condominium “unit” refers to the actual apartment or internal structure for which the owner maintains exclusive possession and control.¹³ The “common elements” or “common areas” are usually areas created for use by all unit owners.¹⁴ An area designated for the specific common use of more than one unit owner, but not all unit owners, is called a “limited common element.”¹⁵ Pursuant to the Condominium Act,¹⁶ the maintenance and care for the common elements is typically handled by an elected “board of managers” or “owners association” established under the condominium bylaws,¹⁷ and paid through the common expenses charged to unit owners according to their respective common interest.¹⁸ With the maintenance of common elements normally under the exclusive control of an owners association, each unit owner is usually only

¹² See Orten & Zacharia, *supra* note 1, at 648 (noting “[c]ommon interest communities are a relatively new form of property ownership that is unique in its combination of two distinct ownership estates simultaneously . . . a unit and . . . an undivided proportionate share of the common elements as tenants in common with fellow owners.”); see also Schriefer, *supra* note 1 (stating “[b]ecause of its hybrid character, and also because the condominium is a relatively recent legal development, certain areas of condominium law remain unsettled.”).

¹³ Condominium Act § 339-e(14) (defining a “unit” as “a part of the property intended for any type of use or uses, and with an exit to . . . a common element. . .”); see also 19A NY JURISPRUDENCE CONDOMINIUMS AND COOPERATIVE APARTMENTS § 111 (2003) (stating that a “unit” means “a part of the property intended for any type of use or uses, and with an exit to a public street or highway or to a common element. . .”).

¹⁴ See Condominium Act § 339-e(3) (defining “common elements” as including “all other parts of the property necessary or convenient to its existence . . . or normally in common use.”).

¹⁵ See *Taratuta*, No. 116732-02, slip op. at 3 (describing the roof in question as a “limited common element” because the declaration specified that its use was for one or more specific units to the exclusion of all other units). See also *Willow Springs Condo. Ass’n v. Seventh BRT Dev. Corp.*, 717 A.2d 77, 92 (Conn. Sup. Ct. 1998) (noting the condominium’s declaration defines a limited common element as a common element allocated “for the exclusive use of one or more but fewer than all of the units”).

¹⁶ See Condominium Act § 339 (outlining terms and rules applicable to the area of condominium law).

¹⁷ See Condominium Act § 339-v(1)(a) (stating the bylaws shall provide for the election of a board of managers, the powers and duties of the board, and whether or not the board may engage the services of a managing agent); Condominium Act § 339-ee(1) (declaring “the board of managers shall be deemed the person in control of the common elements”). See generally *White v. Cox*, 17 Cal. App. 3d 824, 828 (1971) (asserting “[i]ndividual owners maintain their own apartments, and an association of apartment owners maintain the common areas.”).

¹⁸ See Condominium Act § 339-m (mandating “common expenses shall be charged to, the unit owners according to their respective common interest”); *White*, 17 Cal. App. 3d at 828 (explaining that a condominium association charges dues to unit owners which are used to pay for the care and maintenance of common elements).

responsible for the maintenance of their individual unit.¹⁹ Typically, a unit owner's influence on the way the common elements are managed and maintained is limited to the election and removal of members of the board of managers or owners association.²⁰

Before addressing the issue of liability for injuries sustained as a result of the negligent maintenance of common and limited common elements, it is pertinent to compare the unit owner's duty with the association's duty to maintain these areas. Generally landowners owe a duty to exercise reasonable care in the management of their property and can be held negligent for breach of this duty.²¹ A landowner's general duty of care extends not only to persons who enter the property as invitees or licensees, but also to third parties who do not come onto the land, if the breach results in injury.²² Premised on the fact that he is the "possessor" of the land, the landowner's general duty of care arises because he is the party in the best position to maintain its condition and control its dangers.²³ Possession is typically

¹⁹ See *Orten & Zacharia*, *supra* note 1, at 649 n.4 (positing "the owners association typically has exclusive authority and control over the common elements and the maintenance, repair, and replacement obligations for the common elements. Unit owners typically are required to maintain only their individual units."); Rohan, *supra* note 3, at 25 (noting hybrid nature of condominium unit's interests between separate ownership of apartment and percentage ownership of common areas).

²⁰ See *Orten & Zacharia*, *supra* note 1, at 649 n.4 (referring to a typical statutory declaration enabling unit owners to elect new representatives or remove existing ones). See generally Christopher S. Brennan, *The Next Step in the Evolution of the Implied Warranty of Habitability: Applying the Warranty to Condominiums*, 67 *FORDHAM L. REV.* 3041, 3046 (1999) (explaining that condominium directors are elected to the board by the unit owners and are responsible for the daily operations of the condominium).

²¹ See *Davert v. Larson*, 163 Cal. App. 3d 407, 410 (1985) (holding "an owner or occupier of land is required to exercise ordinary care in the management of his property and the breach of such duty constitutes actionable negligence.").

²² See *Davert*, 163 Cal. App. 3d at 410 (reiterating landowner owes a duty of care to "persons off the property for injuries due to the landowner's lack of due care in the management of his property."); *Moeller v. Fleming*, 136 Cal. App. 3d 241, 245 (1982) (expanding owners duty of care to persons located outside property).

²³ See *RESTATEMENT (SECOND) OF TORTS* § 365 (1965) (stating "[a] possessor of land is subject to liability to others outside the land for physical harm caused by the disrepair of a structure or other artificial condition thereon, if the exercise of reasonable care by the possessor or by any person to whom he entrusts the maintenance and repair thereof (a) would have disclosed the disrepair and the unreasonable risk involved therein, and (b) would have made it reasonably safe by repair or otherwise."). See also *King's Grant*, 418 Pa. Super. 260, 268-69 (1992) (holding "the person in possession of property ordinarily is in the best position to discover and control its dangers, and often is responsible for creating them in the first place" (quoting Page W. Keeton, *Prosser and Keeton on the Law of Torts*, 1984 WEST PUBLISHING CO. 386)).

defined by a legal entitlement to immediate occupation and control, not necessarily ownership.²⁴

Although control may be readily determined when dealing with homeownership or rental property, the condominium form of ownership complicates deciphering which party is in control of the injury causing property, and to what extent that party maintained control.²⁵ Unit owners are in control of their respective units and therefore owe a duty to third parties to exercise reasonable care in its maintenance.²⁶ Ownership of the unit is fee simple absolute,²⁷ and may include appurtenances such as a balcony, terrace, roof deck, and patio.²⁸ In addition, the condominium's declaration shall describe the common elements the unit owner is privileged to use as well as the extent of the interest each unit owner has in the common elements,²⁹ as shall the deeds and leases of units.³⁰

Common areas on the other hand are typically controlled, managed, and maintained by an owners association and thereby

²⁴ See RESTATEMENT (SECOND) OF TORTS § 328E (1965) (stating “[a] possessor of land is (a) a person who is in occupation of the land with intent to control it or (b) a person who has been in occupation of land with intent to control it, if no other person has subsequently occupied it with intent to control it, or (c) a person who is entitled to immediate occupation of the land, if no other person is in possession under Clauses (a) and (b).”). See also *King's Grant*, 418 Pa. Super. at 267 (holding “liability is premised on possession and control – not ownership.”); *Kliwer v. Wall Constr. Co.*, 229 Neb. 867 (Neb. Ct. App. 1988) (denying owners liability for a plaintiff injured because the owner was not in possession of the property).

²⁵ See *White v. Cox*, 17 Cal. App. 3d 824, 828 (1971) (noting unique structure of condominium ownership); Schriever, *supra* note 1, at 255 (commenting on the difficulty of basing liability solely upon control because of the hybrid nature of condominium ownership and the customary delegation of the management and maintenance of common areas to an owners association).

²⁶ See RESTATEMENT (SECOND) OF TORTS § 328E (1965) (giving a definition for a possessor of land); see also *Davert*, 163 Cal. App. 3d at 410 (noting landowner's potential liability due to lack of due care in the management of his property). See generally *King's Grant*, 418 Pa. Super. at 267 (declaring liability is based on possession).

²⁷ See Condominium Act § 339-e(16) (acknowledging “[u]nit owner means the person or persons owning a unit in fee simple absolute”); 19A NY JURISPRUDENCE, SECOND EDITION, CONDOS. AND COOP. APARTMENTS § 74 (stating each unit owner controls their individual unit).

²⁸ See Condominium Act § 339-e(14) (explaining “[u]nit means a part of the property intended for any type of use or uses . . . and may include such appurtenances as garage and other parking space, storage room, balcony, terrace, and patio”).

²⁹ See Condominium Act § 339-n(5) (requiring the declaration contain a “description of the common elements and a statement of the common interest of each unit owner.”); 19A NY JURISPRUDENCE, SECOND EDITION, CONDOS. AND COOP. APARTMENTS § 80 (stating the declaration must contain a description of the land and any improvements).

³⁰ See Condominium Act § 339-o(4) (requiring “[d]eeds and leases of units shall include . . . the common interest appertaining to the unit.”); 19A NY JURISPRUDENCE, SECOND EDITION, CONDOS. AND COOP. APARTMENTS § 78 (noting leases and deeds must contain a description of the individual and common property).

relinquish the individual unit owner from any significant personal control over the common areas.³¹ Unit owners are assessed a monthly common charge according to their respective common interest, to be used to pay for the maintenance of common elements.³² An elected board of managers or unit owners association oversees the management and maintenance of the common elements.³³ Courts and commentators have analogized the duties of the association to that of a landlord, particularly when the condominium association maintains the common areas under its exclusive control.³⁴ A duty of due care is imposed upon associations to maintain the physical condition of the common areas and repair or replace any defects.³⁵ Although there is a clear similarity between the roles of landlords and owners associations, it is important to distinguish the two and acknowledge that an owners association has a more limited level

³¹ See Schriefer, *supra* note 1, at 255 (arguing “[a]n individual unit owner . . . possesses only an indirect and highly attenuated responsibility for management and maintenance of the complex as a whole”); see also Rohan, *supra* note 3, at 25 (noting unit owners are not responsible for the general maintenance of the common areas). See generally *Bonifacio v. 910-930 Southern Boulevard LLC*, 295 A.D.2d 86, 89 (N.Y. App. Div. 2002) (holding an owner is not held liable under Multiple Dwelling Law § 78 for keeping a building in good-repair when he has completely parted with possession and control).

³² See Condominium Act § 339-m (declaring “common expenses shall be charged to, the unit owners according to their respective common interest”); *White v. Cox*, 17 Cal. App. 3d 824, 828 (1971) (finding maintenance fees for the maintenance of common areas come from fees charged to apartment owners).

³³ See Condominium Act § 339-v(1)(a) (providing for the election of a board of managers and a description of their powers and duties); Condominium Act § 339-ee(1) (stating that the board of managers shall be responsible for maintaining the common areas); *White*, 17 Cal. App. 3d at 828 (mentioning that the owner’s association is responsible for the maintenance of common areas).

³⁴ See *Reeves v. Carrollsburg Condo. Unit Owners Ass’n*, 96 CV 0185, 1997 U.S. Dist. LEXIS 21762, at *25 (E.D.N.Y. Feb. 20, 1997) (finding “[o]ther courts have held that condominium associations, like landlords, are responsible for maintaining the common areas and enforcing regulations of the association for the benefit of the residents.”); *Martinez v. Woodmar IV Condo. Homeowners Ass’n*, 189 Ariz. 206, 209 (1997) (holding “[l]ike a landlord . . . the condominium association controls all aspects of maintenance and security for the common areas and, most likely, forbids individual unit owners from taking on these chores . . . therefore . . . with respect to common areas under its exclusive control, a condominium association has the same duties as a landlord.”).

³⁵ See *Martinez*, 189 Ariz. at 209 (holding condominium associations responsible for maintenance of common areas); *Mazun*, *supra* note 1, at 327 (stating “the association has a duty of due care to maintain the physical condition of the premises as well as protect the unit owners and guests from dangerous activities.”); see also *Orten & Zacharia*, *supra* note 1, at 649 n.4 (arguing “the owners association typically has exclusive authority and control over the common elements and the maintenance, repair, and replacement obligations for the common elements.”).

of control over the individual units.³⁶ In contrast, the landlord has a duty of due care for the individual units and the responsibility to maintain them.³⁷ Although, condominium associations do not have an affirmative duty of due care with respect to the maintenance of the individual units, they have the right to request access to individual units for the purpose of inspecting them to ensure adherence to building regulations and condominium agreements.³⁸ Of course, it does not have an affirmative duty of due care with regard to the maintenance of the individual units.³⁹

The issues that arise are: (1) what is the extent of the unit owner's duty with regard to the common elements, (2) what is the extent of the duty of due care that the association must exercise over the common elements, and (3) how should the duty of due care be apportioned between unit owners and the association when limited common elements are at issue?

A. *The Extent of the Unit Owner's Duty with Regard to the Common Elements*

As previously stated, the unit owner does not have an affirmative duty of due care over the maintenance and management of the common elements; such duty resides with the

³⁶ See *Gazdo Properties Corp. v. Lava*, 565 N.Y.S.2d 964, 964 (1991) (holding condominium unit owner responsible for maintenance and repair within his unit); see also *In re Matter of William B. May Co. v. Dep't of Health*, 475 N.Y.S.2d 224, 226 (1984) (declaring unit owner is responsible for his individual unit); Andrea Nadel, *Personal Liability of Owner of Condominium Unit to One Sustaining Personal Injuries or Property Damage by Condition of Common Areas*, 39 A.L.R.4th 98 (1999) (noting individual unit owners have exclusive possession and control over their units and are responsible for its maintenance).

³⁷ See *Hamel v. Schmidt*, 431 N.Y.S.2d 770, 771 (Sup. Ct. 1980) (stating landlords have a duty to keep housing accommodations at a minimal standard of acceptability); James Campbell, *The Taming of a Duty - The Tort Liability of Landlords*, 81 MICH. L. REV. 99, 102-03 (1982) (discussing landlord's duty to use reasonable care to keep the premises that he retains control over in a reasonably safe condition and confirming possession and control are vital elements for establishing this duty).

³⁸ See *Cohan v. Riverside Park Place Condo. Ass'n*, 123 Mich. App. 743, 749 (1983) (declaring a board must "at reasonable times, have the right to request an inspection of the premises so as to ensure compliance with the terms of the condominium agreement, statutes, rules and regulations."); Janet Jones, *Right of Condominium Association's Management or Governing Body to Inspect Individual Units*, 41 A.L.R.4th 730 (1993) (confirming associations have the right to request access to individual units "in order to inspect it for suspected violations of condominium building regulations.").

³⁹ See *King's Grant*, 418 Pa. Super. 260, 268-69 (1992) (highlighting that a person in possession is in the best position to identify and correct dangers on their property); Nadel, *supra* note 36, at 98 (clarifying individual unit owners are responsible for unit maintenance).

elected owners association.⁴⁰ The unit owner does, however, have a duty to contribute financially towards the maintenance of the common elements.⁴¹ The contribution takes the form of “common charges”⁴² used to pay for “common expenses;”⁴³ meaning the unit owner pays a monthly fee into a fund controlled by the association, used to provide for the maintenance of the common elements.⁴⁴ The duty to pay common charges is a statutorily enforced duty⁴⁵ and usually established in the condominium bylaws or declaration.⁴⁶ Common charges cannot be avoided. Regardless of whether a unit owner uses the common elements, their duty to pay for its maintenance is mandatory.⁴⁷

⁴⁰ See *King's Grant*, 418 Pa. Super. at 268–69 (stating the unit owner in possession of property is in the best position to discover and control dangers occurring on that property); Nadel, *supra* note 36, at 98 (noting unit owners are responsible for individual unit maintenance).

⁴¹ See Condominium Act § 339-m (declaring “[c]ommon expenses shall be charged to, the unit owners according to their respective common interest”); Constance R. Boken, *Developer's Fiduciary Duty to Condominium Associations*, 45 S.C. L. REV., 195, 195 (1993) (stating condominium associations have a duty to maintain common areas but must do so with money paid by the unit owners). See generally Gary A. Poliakoff, *Real Property, Probate, and Trust Law: The Phantom of the Condominium*, 72 FLA. BAR J. 44, 45 (1998) (noting a unit owner receives a prospectus describing the unit purchased, its designated ownership share of the common elements, and the amount of common expenses the unit owner will be responsible for).

⁴² See Condominium Act § 339-e(2) (stating “[c]ommon charges means each unit's proportionate share of the common expenses in accordance with its common interest.”).

⁴³ See Condominium Act §§ 339-e(4)(a)-(b) (providing that “[c]ommon expenses means and includes: (a) Expenses of operation of the property, and (b) All sums designated common expenses by or pursuant to the provisions of this article, the declaration or the by-laws.”).

⁴⁴ See Condominium Act § 339-m (stating “[c]ommon expenses shall be charged to, the unit owners according to their respective common interest.”); see also Boken, *supra* note 41, at 195 (stating common area maintenance shall be paid with common fund money paid by the unit owners); Matthew J. Leeds & Joel E. Miller, *Condominium Act Addition Gives New York Boards of Managers Effective Borrowing Ability*, 73 ST. JOHN'S L. REV. 135, 139 (1999) (stating board of managers collect common charges against unit owners in order to carry out their duties).

⁴⁵ See Condominium Act § 339-m (requiring “[c]ommon expenses shall be charged to, the unit owners according to their respective common interest”). See generally Leeds & Miller, *supra* note 44, at 139 (noting lawsuits can be brought to recover unpaid common charges).

⁴⁶ See Condominium Act § 339-n (allowing the condominium declaration to describe the common interest of each unit owner in the common elements).

⁴⁷ See Condominium Act § 339-x (stating “[n]o unit owner may exempt himself from liability for his common charges by waiver of the use or enjoyment of any of the common elements or by abandonment of his unit.”). See generally Newport West Condo. Ass'n v. Veniar, 134 Mich. App. 1, 10–11 (1984) (enforcing Michigan law which forefends a unit owner from exemption of his share of common expenses by nonuse or waiver of use of the common elements, or by abandonment); Rohan, *supra* note 3, at 25 (discussing statutory requirement for unit owners to continue paying their monthly common charges to the association even when forced out of possession of their unit).

Nonpayment can result in a lien held by the association, which may take priority over other liens held against the unit owner.⁴⁸

Monthly payments will typically be determined by an apportionment of the unit owner's common interest in the common elements.⁴⁹ Thus, owners of larger or more valuable units within the condominium project may be required to pay a larger apportioned share of the common charges.⁵⁰ The unit owner is given notice of his monthly maintenance obligation in the deed as well as in the declaration or bylaws.⁵¹ In addition to providing for the maintenance of the common elements, the declaration or bylaws typically require a portion of the common charges to be applied towards payment of the insurance premiums for the master insurance policy held by the association.⁵² It is the board's responsibility to obtain a master insurance policy over the common elements.⁵³ Master policies might not cover damage or injury caused by individual units,⁵⁴

⁴⁸ See Condominium Act § 339-z (empowering "[t]he Board of managers, on behalf of the unit owners, shall have a lien on each unit for the unpaid common charges thereof . . . prior to all other liens except only"); see also *Newport West*, 134 Mich. App., at 10–11 (declaring "[t]he sums assessed against a co-owner by the association that remain unpaid constitute a lien upon the delinquent co-owner's unit."); Leeds & Miller, *supra* note 44, at 139–40 (arguing "[t]he board of managers, on behalf of the unit owners, shall have a lien on each unit for the unpaid common charge thereof.").

⁴⁹ See Condominium Act § 339-e (2003) (providing common interest is "proportionate" to the "interest in the common elements appertaining to each unit"); *Lesal Assoc. v. Bd. of Managers of the Downing Court Condo.*, 765 N.Y.S.2d 352, 352 (2003) (finding defendant unit owner liable for common charges in proportion to defendant's "percentage of the common interests").

⁵⁰ See *Newport West*, 134 Mich. App. at 11 (reciting Michigan law that states unit owners' contributions for common expenses could be determined according to the percentage allocated to their apartment in the master deed); see, e.g., ARK. CODE ANN. § 18-13-112 (2003) (providing each unit owner's share in the common elements is equivalent to the value of the unit in relation to the whole property); FLA. STAT. ANN. ch. 718.404(3) (2004) (requiring apportionment of common elements to each unit based on the unit's square footage in relation to that of the other units).

⁵¹ See Condominium Act § 339-o(4) (requiring deeds of units state the common interest appertaining to the unit); 15A AM. JURISPRUDENCE, SECOND EDITION, CONDOS. AND COOP. APARTMENTS § 35 (2004) (stating common charges shall be in the declaration).

⁵² See Condominium Act § 339-bb (enabling board of managers to insure the building and deem the premiums for such insurance policy as a common expense); 15A AM. JURISPRUDENCE, SECOND EDITION, CONDOS. AND COOP. APARTMENTS § 27 (stating unit owners may be responsible for a pro rata share of insurance premiums if an appropriate bylaw is passed).

⁵³ See Condominium Act § 339-bb (explaining the insurance policies taken by the board of managers). See generally 16 OH JURISPRUDENCE, THIRD EDITION, CONDOS. AND COOP. APARTMENTS § 25 (requiring insurance by the board of managers unless otherwise stated in the bylaws).

⁵⁴ See *Schiller v. Community Tech.*, 433 N.Y.S.2d 640, 640 (1980) (finding New York statute provides for the board to insure the project without encroaching on the unit owner's right to insure his own unit for his own benefit so that both the project and the

and unit owners are wise to obtain their own homeowners policy.⁵⁵

B. The Association's Duty of Care Over the Common Elements

While the unit owner's duty of due care is limited with regard to the common elements, the association's duty is not.⁵⁶ Elected to maintain and manage the common elements on behalf of the joint unit owners,⁵⁷ the association must exercise due care in this regard.⁵⁸ Additionally, a duty can be imposed upon the association under the tort doctrine of assumption of duty or imposition of duty.⁵⁹ Thus, if the association takes action to repair a common element that may not be within their defined managerial responsibility under the bylaws or declaration, they can be said to have assumed a duty of due care for maintaining the element.⁶⁰ Once a duty of care is assumed, the association is

unit owners may be protected by insurance); 15A AM. JURISPRUDENCE, SECOND EDITION, CONDOS. AND COOP. APARTMENTS §27 (stating a master policy serves to protect the overall project and guards against gaps in the insurance of the individual owners); Rohan, *supra* note 3, at 27 (declaring a condominium's master casualty policy is paid out of the unit owner's monthly assessment and while it could provide for the full replacement cost of the units, it is typical for the carrier to denounce responsibility for covering the individual units).

⁵⁵ See Condominium Act § 339-bb (noting the board's ability to obtain an insurance policy on the building shall not prejudice the unit owner's right to insure his own unit for his own benefit); see also Schiller, 433 N.Y.S.2d at 640 (stating unit owners obtain their own insurance policies for extra protection).

⁵⁶ See generally 39 AM. LAW REPORTS 4th § 98, 1 (2004) (stating the "onus of liability for injuries arising from the management of condominium projects should reflect the degree of control exercised by the defendants.").

⁵⁷ See Condominium Act § 339-v (providing for unit owners to elect a board and to have discretion as to whether the board shall manage on their behalf); 15A AM. JURISPRUDENCE, SECOND EDITION, CONDOS. AND COOP. APARTMENTS § 25 (stating a board of governors is elected to maintain the common areas and act on behalf of unit owners).

⁵⁸ See generally *Winston Towers 100 Ass'n v. DeCarlo*, 481 So.2d 1261, 1262 (Fla. Dist. Ct. App., 1986) (requiring association to maintain hallway, a common area, in a reasonably safe condition); 15A AM. JURISPRUDENCE, SECOND EDITION, CONDOS. AND COOP. APARTMENTS § 33 (stating the association has a duty to maintain common areas in good repair); 59 AM. LAW REPORTS 4th § 489, 4a (equating the duties of a landlord to those of a condominium association).

⁵⁹ See ILLINOIS JURISPRUDENCE, PERSONAL INJURY AND TORTS § 31:3 (stating an association assumes liability "by virtue of the declaration" when such declaration requires the association to maintain the common elements); Mazun, *supra* note 1, at 330 (proposing a duty arises when the condominium association voluntarily assumes a duty over the property). See generally *Ladis v. Olcott Vista Condo. Ass'n*, 563 N.E.2d 77, 79 (Ill. App. Ct., 1990) (holding that by erecting a fence in the common areas where a pedestrian might fall on it, the association assumed liability for any injury it may cause).

⁶⁰ See generally ILLINOIS JURISPRUDENCE, PERSONAL INJURY AND TORTS § 31:3.

expected to exercise ordinary care under the circumstances,⁶¹ not only because they are acting on behalf of the unit owners, but because the owners association is considered the party in possession of the common elements.⁶² Furthermore, because the members of the board must actively seek election, they assume the duty and alleviate the owners of the responsibility for maintaining the common elements.⁶³ Unit owners pay monthly fees for the privilege of delegating the responsibility of maintaining the common elements to the condominium association.⁶⁴ The delegation of managerial responsibility over common elements is a major attraction of community living and one that is driving the condominium market and diminishing the market for detached private homes.⁶⁵

⁶¹ See *Davert v. Larson*, 163 Cal. App. 3d 407, 410 (1985) (reiterating the well settled principle that "an owner or occupier of land is required to exercise ordinary care in the management of his property and the breach of such duty constitutes actionable negligence."). See generally RESTATEMENT (THIRD) OF PROP. § 6.14 (stating that an association must use ordinary care in performing its functions).

⁶² See Condominium Act § 339-ee (2003) (declaring "the board of managers shall be deemed the person in control of the common elements."); RESTATEMENT (SECOND) OF TORTS § 365 (stating "[a] possessor of land is subject to liability to others outside of the physical harm caused by the disrepair of a structure or other artificial condition thereon. . ."). See also *Smith v. King's Grant Condominium*, 418 Pa. Super. 260, 264 (1992) (holding "liability is premised on possession and control - not ownership" and thus the condominium association was potentially liable for torts resulting from conditions of the common elements);

⁶³ See *Martinez v. Woodmar IV Condo. Homeowners Ass'n*, 189 Ariz. 206, 221 (1997) (holding when the duty to maintain the common areas is delegated to the association then the unit owners have no duty); *Pershad v. Parkchester S. Condo.*, 662 N.Y.S.2d 993 (1997) (absolving unit owner of liability for common plumbing because that duty had been delegated to the board); *King's Grant*, 614 A.2d at 271 (Cirillo, J., dissenting) (arguing unit owners pay for the privilege of delegating their responsibilities for the maintenance of common elements to the condominium association).

⁶⁴ See *King's Grant*, 418 Pa. Super. at 278 (Cirillo, J., dissenting) (declaring "[i]ndividuals purchase units on condominium complexes . . . to be relieved of personal responsibility for the care of structural and environmental elements of a dwelling . . . these tasks are delegated to the condominium association . . . unit owners are assessed a monthly fee for the privilege of delegating their responsibilities to the condominium association.").

⁶⁵ See Rohan, *supra* note 3, at 7 (stating, "[c]ommuters no longer seek their own detached, one-family homes with an acre of grass to cut. Instead, they look for a development featuring significant recreational amenities, i.e., golf course, swimming pool, tennis court and clubhouse, maintained by duly elected officers of a home owner association."); Wayne S. Hyatt & JoAnne P. Stubblefield, *The Identity Crisis of Community Associations: In Search of the Appropriate Analogy*, 27 REAL PROP. & TR. J. 589, 641 (1993) (noting public desire for unaffordable luxury amenities charged a move to community ownership).

C. *The Duty of Due Care for the Maintenance of Limited Common Elements*

Limited common elements pose a more difficult issue. A limited common element falls within the ambit of common elements; however, the use and enjoyment of limited common elements are restricted to certain unit owners.⁶⁶ A limited common element can describe any portion of the condominium project where its use is restricted to less than all of the unit owners; including a shared roof-top deck, semi-private garden, parking facility, or storage room.⁶⁷ Because only a few of the unit owners will benefit from the use of limited common elements, only those allowed access to them should share in the expense of maintaining it.⁶⁸ Limited common elements can also be considered part of the actual unit⁶⁹ and the declaration and deed shall include a description of the limited common elements included with ownership of the individual unit.⁷⁰ The management and maintenance of a limited common element shall be set forth in the bylaws and declaration.⁷¹ If the

⁶⁶ See *Taratuta v. Allyn*, No. 116732-02, slip op., 3 (N.Y. Sup. Ct. Jan. 8, 2004) (describing the roof in question as a limited common element because the declaration specified its use was for one or more specific units to the exclusion of all other units); see also *Landings Ass'n v. J.R. Truman & Ass'n.*, No. G89-30118, 1990 U.S. Dist. LEXIS 6311, at *5 (D. Mich. 1990) (noting the Michigan Condominium Act defines limited common elements as “common elements reserved in the master deed for the exclusive use of less than all of the co-owners.”); *Willow Springs Condo. Ass'n v. Seventh BRT Dev. Corp.*, 717 A.2d 77, 92 (Conn. Sup. Ct. 1998) (positing “[l]imited common element means a portion of the common elements allocated by the declaration . . . for the exclusive use of one or more but fewer than all of the units”).

⁶⁷ See generally *Landings Ass'n.*, 1990 U.S. Dist. LEXIS 6311, at *5 (defining “limited common element” and providing an example); *Preston v. Bass*, 680 S.W.2d 115, 116 (Ark. Ct. App. 1984) (noting that individual condominium owners are not free to treat general common elements as limited common elements).

⁶⁸ See Condominium Act § 339-m (stating “[p]rofits and expenses may be specially allocated and apportioned based on special or exclusive use or availability or exclusive control of particular units or common areas by particular unit owners”).

⁶⁹ See Condominium Act § 339-e (stating “[u]nit . . . may include such appurtenances as garage and other parking space, storage room, balcony, terrace and patio.”); OHIO REV. CODE ANN. 5311.01 (2004) (noting condominium declarations may define unit to include limited common elements).

⁷⁰ See Condominium Act § 339-n (requiring a declaration of the unit designation and common element to which the unit has immediate access as well as a description of the common elements and common interest of each owner); Condominium Act § 339-o (stating the deed shall include the common interest appertaining to the unit).

⁷¹ See Condominium Act § 339-v (requiring bylaws to include provisions regarding payment, collection and disbursements of funds for maintenance). See generally OHIO REV. CODE ANN. 5311.08 (2004) (specifying bylaws are required to contain the procedure

managerial responsibilities for the limited common elements are not specifically addressed – for example, it only states that the association is responsible for the maintenance and management of the *common elements* – an unsettled issue arises. It is contended that the responsibility should be determined based upon the extent of control the parties have over the limited common elements.⁷² However, it can also be argued that because a limited common element is a subset of the overall common elements, it too should be managed by the association. This issue will be addressed in my analysis of *Taratuta v. Allyn*.⁷³

III. TARATUTA, HOW SHOULD THE COURT DECIDE?

A. Background

In *Taratuta v. Allyn* the court denied summary judgment to defendants, condominium unit owners, where a portion of a chain linked fence fell from the roof of the condominium building striking and seriously injuring the plaintiff.⁷⁴ The court held that an issue of material fact exists as to whether the unit owners or the condominium board were negligent in the maintenance of the roof.⁷⁵

Defendants represent eleven unit owners within the condominium building,⁷⁶ each with an approximate 9% ownership interest in the common elements.⁷⁷ A condominium

by which maintenance to common elements will occur, including who is responsible for such maintenance).

⁷² See Katherine N. Rosenberry & Curtis G. Sproul, *Common Interest Development Communities: Part I: A Comparison of California Common Interest Development Law and the Uniform Common Interest Ownership Act*, 38 SANTA CLARA L. REV. 1009, 1057 (1998) (discussing the trend towards placing responsibility for maintaining limited common elements with the controlling unit owners). See generally CAL. CIV. CODE § 1364 (2004) (specifying individual unit owners in control of limited common elements are liable for resulting maintenance to those elements).

⁷³ *Taratuta v. Allyn*, No. 116732-02, slip op., at 3 (N.Y. Sup. Ct. Jan. 8, 2004) (denying defendants' motions for summary judgment with regard to claims for liability based on condominium unit owners' percentage ownership of common elements).

⁷⁴ See *id.* at 2 (stating "[o]n July 24, 2001, plaintiff . . . was walking on the sidewalk outside of the Building when a section of the chain link fence fell from the rooftop, striking him, and injuring him seriously").

⁷⁵ See *id.* at 12.

⁷⁶ See *id.* at 2 (stating that defendants are owners of eleven condominium units at 69 West 106th Street).

⁷⁷ See *id.* at 3 (explaining "[u]nder the Declaration, each unit carries with it a percentage ownership interest in the common elements of approximately 9%").

board ("Board") was elected by the unit owners to manage the common elements.⁷⁸ Under the bylaws, the Board was solely responsible for the maintenance, repairs and replacement of the common elements.⁷⁹ At some point prior to 2001 the building's sponsor erected a chain link fence on the roof of the building pursuant to the condominium declaration.⁸⁰ On January 15, 2001, the Board requested a building inspection by third party engineer Braxton Engineering.⁸¹ Braxton's inspection report does not mention the chain link fence on the roof, though it does mention a chain link fence in the courtyard.⁸² The report notes debris on the roof and recommends certain repairs to the roof to prevent further deterioration.⁸³

Subsequently, on July 24, 2001, plaintiff Michael Taratuta was struck and seriously injured by a section of the fence that fell from the roof while he was walking on the sidewalk outside the building.⁸⁴ Plaintiff's *guardian ad litem* filed a claim against the eleven condominium owners under the doctrine of *res ipsa loquitur*.⁸⁵ Plaintiff presented an expert at trial who claimed the

⁷⁸ See *id.* (finding "[m]anagement of the common elements has been delegated to a board . . . comprised of elected owners of the units in the Building").

⁷⁹ See *id.*

⁸⁰ See *id.* at 2 (noting "[t]he Declaration states that the sponsor of the condominium would erect a chain link fence on the roof of the Building . . . the sponsor did so").

⁸¹ See *id.* at 3 (acknowledging "[o]n January 15, 2001, at the behest of the Condominium Board, the Building was inspected by Braxton Engineering").

⁸² See *id.* at 12 (stating "[t]he engineering report . . . makes no mention of the security fence on the roof. However, it does mention a chainlink fence which surrounds the rear courtyard.").

⁸³ See *id.* at 4 (stating "[t]he report . . . notes only that the roof has debris scattered throughout, and that the surface should be re-coated").

⁸⁴ See *id.* at 2.

⁸⁵ See *id.* at 6. The plaintiffs sought to recover from the defendants as owners in fee of the common elements. See also *Kambat v. St. Francis Hosp.*, 89 N.Y.2d 489, 494 (1997). The court explained that when applying *res ipsa loquitur* a plaintiff need not conclusively eliminate the possibility of all other causes of the injury; it is enough that the evidence supporting the three conditions establishes that "it is more likely than not" that the injury was caused by defendant's negligence. See generally RESTATEMENT (SECOND) OF TORTS § 328D, stating:

(1) It may be inferred that harm suffered by the plaintiff is caused by negligence of the defendant when (a) the event is of a kind which ordinarily does not occur in the absence of negligence; (b) other responsible causes, including the conduct of the plaintiff and third persons, are sufficiently eliminated by the evidence; and (c) the indicated negligence is within the scope of the defendant's duty to the plaintiff. (2) It is the function of the court to determine whether the inference may reasonably be drawn by the jury, or whether it must necessarily be drawn. (3) It is the function of the jury to determine whether the inference is to be drawn in any case where different conclusions may reasonably be reached."

fence would not have fallen if it were properly restrained to protect against wind.⁸⁶ Defendants motion for summary judgment was denied by the court on the grounds that an issue of material fact exists as to (1) whether the unit owners or Board were in control of the roof, and (2) who owed a duty to exercise due care in its maintenance.⁸⁷

Defendants claim they had no control over the chain fence on the roof, no duty to inspect or maintain the roof, and that such duty was within the province of the Board by operation of the bylaws.⁸⁸ Defendants assert that this lack of control made it impossible for them to discover, much less correct, any hazardous condition of the fence.⁸⁹

Although the roof upon which the fence sat is defined in the declaration as a common element, it is further designated as a limited common element.⁹⁰ A "limited common element" is defined in *Taratuta* as an element "for the use of one or more specified units to the exclusion of all other units."⁹¹ Defendants, Hinojosa and Ragues, the top floor unit owners having exclusive use of the roof as a limited common element, share a 50% interest in the roof.⁹² The remaining nine unit owners do not have access to the roof, nor do they share in the common expense of its maintenance.⁹³

In denying summary judgment to all of the unit owners, the court considered several existing issues that may determine which party had the duty to maintain the limited common element.⁹⁴ The court analyzed; (1) the bylaws, (2) statutory requirements, (3) control over the limited common elements, and

⁸⁶ See *Taratuta*, No. 116732-02, slip op. at 12.

⁸⁷ See *id.* at 12-17 (noting the non-moving plaintiffs are entitled to the benefit of every favorable inference that may be drawn from the pleadings, affidavits, and competing contentions submitted by the parties).

⁸⁸ See *id.* at 7 (noting unit owners' argument that the instrumentality was not under their exclusive control). See generally Condominium Act § 339-ee (1) (stating "board of managers shall be deemed the person in control of the common elements, for purposes of enforcement of any such law or code, provided, however, that all other provisions of the multiple dwelling law or multiple residence law, otherwise applicable, shall be in full force and effect").

⁸⁹ See *Taratuta*, No. 116732-02, slip op. at 8.

⁹⁰ See *id.* at 3.

⁹¹ See *id.* (citing Article 7 of the Park 106 Condominium Declaration).

⁹² See *id.* (noting these interests are recorded).

⁹³ See *id.* at 3.

⁹⁴ See *id.* at 7-15 (noting it is not clear whether or not any of the defendants had actual or constructive notice of the condition of the fence).

(4) the unit owners contribution, in the form of common charges, for the maintenance of the common areas under the Board's control.⁹⁵

B. *The Bylaws*

The bylaws the Park 106 Condominium state that "... maintenance, repairs and replacements, whether structural or non-structural, ordinary or extraordinary . . . in or to the Common Elements shall be performed by the Condominium Board . . . in its sole discretion."⁹⁶ Since the bylaws do not set forth a clear statement as to the maintenance responsibility of the limited common elements, it is Hinojosa and Ragues's contention that such duty resides with the Board because the roof is listed as a common element, for which the Board has a duty to manage and maintain.⁹⁷

C. *Statutory Requirements*

The general requirements set forth by the Condominium Act have previously been discussed in greater detail. The main requirements are for the bylaws to provide for the election of a board of managers and a designation of their duties.⁹⁸ In addition, the bylaws shall describe the operation of the property and the payment and collection of common expenses,⁹⁹ along with the requirements for the maintenance of the units and use of the common elements.¹⁰⁰ The declaration shall provide a designation of each unit, the common elements to which it has

⁹⁵ See *id.* at 7-15.

⁹⁶ See *id.* at 3 (quoting the bylaws of Park 106 Condominium).

⁹⁷ See *id.* at 7 (arguing plaintiffs therefore failed to properly assert the second element of *res ipsa loquitur*).

⁹⁸ See Condominium Act § 339-v (1)(a) (noting the bylaws shall also provide for the method of removal of board members, and whether or not the board may engage the services of a manager or managing agent or both); *Schoninger v. Yardarm Beach Homeowners' Ass'n*, 134 A.D.2d 1, 6 (1987) (stating the bylaws must contain provisions for the nomination and election of a board of managers to serve as the principal agents of the condominium and a statement of the powers and duties of that board).

⁹⁹ See Condominium Act § 339-v (1)(f) (requiring the bylaws to state what the common charges will be).

¹⁰⁰ See Condominium Act § 339-v (1)(i) (noting requirements should be designed to prevent unreasonable interference with the use of the respective units and of the common elements).

immediate access, and a description of the common elements and common interest of each owner.¹⁰¹ The deeds for each unit shall contain particulars relating to the common interest appertaining to the unit.¹⁰² Unit owners cannot exempt themselves from liability for their share of the common charges by waiver or abandonment of use.¹⁰³

These statutory requirements set forth a clear default rule that if the declaration and bylaws do not expressly provide for the responsibility of the management and maintenance of the common elements, then the board shall be deemed the party in control, and therefore under a duty to use due care in its maintenance.¹⁰⁴ Defendants maintain that the Condominium Act's interplay with Multiple Dwelling Law § 78 ("MDL"),¹⁰⁵ places liability with the Board.¹⁰⁶ The MDL provides that every part of a multiple dwelling, "including its roof or roofs," be kept in good repair and that the owner shall be responsible for compliance, as well as the tenant if the violation is caused by his own willful act, assistance, or negligence.¹⁰⁷ However, the court disagrees with defendants' assertion that the MDL and Condominium Act require considering the Board an owner of the

¹⁰¹ See Condominium Act § 339-n. See also 19A NY JURISPRUDENCE, SECOND EDITION, CONDOS. AND COOP. APARTMENTS § 80 (noting the declaration must contain a statement of each unit's location, approximate area, and number of rooms in residential areas).

¹⁰² See Condominium Act § 339-o (stating any further details which the grantor and grantee may deem desirable may also be set forth in the deed); see also 2-15 WARREN'S WEED NEW YORK REAL PROPERTY § 6.03(5) (2004) (noting at closing, title is transferred by a special form deed referring to conveyance of an undivided interest in the appurtenant common elements as well as the unit described in the declaration).

¹⁰³ See Condominium Act § 339-x (stating "[n]o unit owner may exempt himself from liability for his common charges by waiver of the use or enjoyment of any of the common elements or by abandonment of his unit."); see also Patrick J. Rohan & John P. Healy, *Home Owner Association Assessment Litigation In New York*, 73 ST. JOHN'S L. REV. 199, 202 (1999) (highlighting courts have held that property owners can not avoid paying assessments by surrendering their right to use common facilities and services). See generally *Pershad v. Parkchester South Condo.*, 174 Misc. 2d 94, 95 (1997) (holding an individual unit owner cannot withhold payment of common charges and assessments in derogation of the bylaws of the condominium based on defective conditions in his unit or in the common areas).

¹⁰⁴ See Condominium Act § 339-ee(1) (providing "the board of managers shall be deemed the person in control of the common elements").

¹⁰⁵ NY CLS Mult. D. § 78 (2003).

¹⁰⁶ See *Taratuta*, No. 116732-02, slip op. at 13 (noting "[d]efendants contend that because the Condominium Board is deemed to be in control of the common elements under 339-ee(1) of the Condominium Act, it should be considered an owner under MDL §78"). See generally *Pershad*, 174 Misc. 2d at 95 (highlighting "[a]n owner's duty to maintain the premises in good repair under Multiple Dwelling Law §78 is nondelegable").

¹⁰⁷ See NY CLS Mult. D. § 78.

common elements.¹⁰⁸ The court properly notes that the Condominium Act relies on “control,” not ownership, and therefore, the issue of liability, under *res ipsa loquitur* rests on which party maintains control over the common elements.¹⁰⁹

D. Control of Limited Common Elements

Under the Condominium Act, “each unit owner shall be deemed the person in control of the unit owned by him or her, and the board of managers shall be deemed the person in control of the common elements.”¹¹⁰ The court held that although the Board maintained the common elements, the unit owners did not relinquish control merely by the fact that they delegated the maintenance duties to the Board.¹¹¹ The court relies on the holding in *Matos v. New York Educational Construction Fund*,¹¹² which holds that “liability of the owner may be avoided by relinquishing *all* ownership, management, or control of the building.”¹¹³ According to the *Taratuta* court, the mere fact that the unit owners entered into a contract for the management of the common elements does not relinquish their ownership interest in them, and they can therefore be considered in control, albeit vicariously through the Board.¹¹⁴ Here, the court considers the Board an agent of the unit owners.¹¹⁵ General negligence principles hold that a possessor of land is subject to liability to third parties for their failure to exercise reasonable care, or by a

¹⁰⁸ See *Taratuta*, No. 116732-02, slip op. at 13 (finding “§339-ee(1) of the Condominium Act refers to control, not ownership”)

¹⁰⁹ See *id.* at 13–14 (holding “the doctrine of *res-ipsa loquitur* is not an absolutely rigid concept, but is subordinate to its general purpose, that it was probably the defendant’s negligence that caused the injury in question”).

¹¹⁰ Condominium Act § 339-ee(1).

¹¹¹ See *Taratuta*, No. 116732-02, slip op. at 14 (finding the “[d]efendants have entered into a contract for management services with the board; they have not relinquished any ownership whatsoever.”).

¹¹² *Matos v. N.Y. Educ. Const. Fund*, 151 Misc. 2d 1044 (N.Y. Sup Ct. 1990).

¹¹³ See *Taratuta*, No. 116732-02, slip op. at 14 (following the holding of *Matos*); see also *Matos*, 151 Misc. 2d, at 1047 (holding the defendant could not incur liability since there was a complete divestiture of the right to manage, control or make repairs).

¹¹⁴ See *Taratuta*, No. 116732-02, slip op. at 13–14 (highlighting “in order for an owner to escape liability, an owner must relinquish control, management and ownership.”).

¹¹⁵ See *id.* at 9 (noting owners entered into a contract with the Board to act on their behalf, creating an agency relationship. The court also notes the Declaration specifically refers to the Board as “the agent of the Unit Owners.”).

third party's failure to exercise reasonable care, when entrusted with the maintenance and repair thereof.¹¹⁶

It is the contention of this comment that any control over common or limited common elements by the unit owners needs to be examined on a case-by-case basis. It is inherently unfair to hold unit owners liable for an injury caused by the condition of a limited common element when they maintained no control over it nor had the privilege to use the area.¹¹⁷ Similarly, it is illogical to place the burden to repair a defect to a limited common element on a unit owner when such duty is delegated to the board.¹¹⁸ The board is elected by the owners to manage and maintain the common elements, with the owners funding the common expense through payment of common charges.¹¹⁹ The board is entrusted with the duty to maintain the common elements, and to determine whether repairs are necessary.¹²⁰ The extent of control maintained by the owners is merely to suggest a course of action to the board members, or to elect those board members the owners believe will perform in their best interest. In essence, a unit owner maintains "no more control over operations than he would have as a stockholder in a corporation which owned and operated a project."¹²¹

¹¹⁶ See RESTATEMENT (SECOND) OF TORTS § 365 (1965).

¹¹⁷ See Schriefer, *supra* note 1 at 255 (describing the condominium unit owner's responsibility for the management and maintenance of the complex as "indirect and highly attenuated"); see also Ron Galperin, *Ruling Means Condo Owners Should Review Insurance*, L.A. TIMES, Apr. 6, 1993, at 11 (highlighting condominium ownership is risky because individual owners do not have much control over the common areas, yet may find themselves individually liable for injuries that occur). *But see* Jay Ramano, *Liability Concerns for Condos*, N.Y. TIMES, Feb. 29, 2004, at 7 (positing "if individual unit owners cannot be held personally liable and board members cannot be held personally liable and the condominium association itself has no assets, a condominium building would be basically "judgment proof" for injuries caused by common elements.").

¹¹⁸ See *Pershad v. Parkchester South Condo.*, 174 Misc. 2d 94, 95 (1997) (positing "it is inconceivable and illogical to argue that the unit owner would be responsible for correcting the problem which is solely with the maintenance and control of the building association."); see also Brennan, *supra* note 20, at 3042 (highlighting condominium owners rely upon their board of directors to maintain the common elements).

¹¹⁹ See *Smith v. King's Grant Condo.*, 418 Pa. Super. 260, 280 (Super. Ct. 1992) (Cirillo, J., dissenting) (noting "the condominium association is vested with authority to levy assessments against the unit owners in order to pay for the requisite maintenance or improvement of the common elements."); see also *Rivers Edge Condo. Ass'n v. Rere, Inc.*, 390 Pa. Super. 196, 198 (1989) (finding the Board is responsible for the replacement of common elements, and to do so, must collect monthly assessments from each unit owner).

¹²⁰ See *King's Grant*, 418 Pa. Super. at 279-80 (Cirillo, J., dissenting) (arguing "[t]he condominium association is the entity responsible for maintaining the common [element]. It is also the entity charged with responsibility for determining whether and when common elements need repair, reconstruction, or replacement.").

¹²¹ *Dutcher v. Owens*, 647 S.W.2d 948, 950 (Tex. 1983).

Where the onus of maintenance has been delegated to an association to which the unit owner contributes a monthly payment, the owner should be assured that the board will uphold their duty of due care and not blindsides the owner into potential liability to third party claimants.¹²² The alleviation of liability is a primary benefit and attraction to condominium living,¹²³ and what distinguishes condominium ownership from other traditional forms of ownership.¹²⁴

In *Taratuta*, an issue of fact existed as to whether the Board or Hinojosa and Ragues were in control over the limited common elements.¹²⁵ While neither Hinojosa nor Ragues seemed to claim a relinquishment of ownership, it appeared that the control of the roof, and therefore the duty for its maintenance, rested for the most part on the shoulders of the Board.¹²⁶ Not only by operation of the bylaws and general condominium law should the Board be responsible for ordinary care in the maintenance of the roof,¹²⁷ but under the doctrine of assumption of duty it can be said that

¹²² See *King's Grant*, 418 Pa. Super. at 278 (Cirillo, J., dissenting). Judge Cirillo noted that,

The unit owners are assessed a monthly fee for the privilege of delegating their responsibilities to the condominium association. Thus it is inconceivable to me that, in order to be 'made whole,' a unit owner damaged by the malfunctioning of a common sewer line must first present evidence to establish precisely what the association should have been doing to ensure that the sewer line functioned properly. Such a requirement defies logic and negates a primary benefit of condominium ownership.

¹²³ See *King's Grant*, 418 Pa. Super. at 278 (Cirillo, J., dissenting). Judge Cirillo stated that,

Individuals purchase units in condominium complexes for myriad reasons, among them the desire to be relieved of personal responsibility for the care of structural and environmental elements of a dwelling, such as the roof . . . and the grounds. In a condominium, these tasks are delegated to the condominium association, which is generally empowered to 'regulate the use, maintenance, repair, replacement and modification of common elements.'

See also Anthony Ambriano & Elizabeth Wolfe, *The Condominium Trust: Liability Issues for the Unit Owners Under Massachusetts and Florida Law*, 39 B.B.J. 14, 17 (1995) (declaring that condo ownership is attractive to buyers who do not have the inclination to assume liabilities of home ownership).

¹²⁴ See Schriefer, *supra* note 1, at 255 (stating "[t]he condominium unit owner's lack of significant personal control over management and maintenance of the condominium complex clearly distinguishes such unit owners from landlords and private homeowners.").

¹²⁵ See *Taratuta v. Allyn*, No. 116732-02, slip op., at 3, 12 (holding that a material issue of fact has been demonstrated so that summary judgment could not be granted).

¹²⁶ See *id.* at 3 (finding management of the common elements had been entrusted to the condo Board).

¹²⁷ See *id.* at 3, 9 (reviewing the bylaws of the condo which state that maintenance of common elements shall be performed by the Board).

the Board undertook a duty to use ordinary care in the roof's maintenance. Approximately six months prior to the injury, the Board requested a third party inspection of the roof.¹²⁸ Braxton Engineering, the engineer who conducted the inspection, acted on behalf of the Board.¹²⁹ While the inspection made recommendations for certain repairs to the roof, it neglected to mention anything about the fence that ultimately caused the injury.¹³⁰ The defendants argued that the Board owed a duty of ordinary care in inspecting the roof and that duty was carried out by Braxton.¹³¹ Hinojosa and Ragues further argued that, in failing to discover any deficiencies with the fence, Braxton, and therefore the Board, breached their duty and was negligent in inspecting the roof.¹³² Relying on case law, defendants finally argued that they, as owners, had no control over the rooftop fence that would have permitted them to rectify the dangerous nature of the fence.¹³³

The court applied the agency analogy in denying summary judgment.¹³⁴ Essentially the court said the unit owners could still be liable for negligent maintenance of the limited common element because, although the Board had the responsibility to maintain the common areas pursuant to the bylaws, the unit owners collectively pay for the repairs. Therefore, the Board is operating on their behalf;¹³⁵ the court considered the Board an agent of the unit owners.¹³⁶ The court was persuaded by the holding in *Dermatossian v. New York City Transit Authority*,¹³⁷

¹²⁸ See *id.* at 3 (discussing Board's hiring of Braxton Engineering).

¹²⁹ See *id.* (noting Braxton's inspection of the building on 1/15/01).

¹³⁰ See *id.* at 4 (discussing the inspection report's detailing of debris and the need to re-coat the surface).

¹³¹ See *id.* at 7, 9 (noting defendants' argument that any duty owed to the plaintiff was the responsibility of the condo Board).

¹³² See *id.* at 7 (arguing that only the Board could have known about a defect in the fence).

¹³³ See *id.* at 8 (discussing defendants' argument that they had no right or responsibility to tend to the rooftop fence).

¹³⁴ See *id.* at 9–10 (clarifying the definition of an "agency" relationship).

¹³⁵ See *id.* at 9 (suggesting the Board acts as agent for the owners because the latter operates and enters into contracts on the owners' behalf).

¹³⁶ See *id.* at 9 (finding support for considering the Board an agent of the owners in the condominium's Declaration).

¹³⁷ *Dermatossian v. New York City Transit Auth.*, 67 N.Y.2d 219, 226 (1986) (holding the necessary elements of *res ipsa loquitor* are "(1) the event must be of a kind which ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; (3) it must not

which applied the general rule that in a *res ipsa loquitur* case, one of the elements the plaintiff must prove is that the injury was “caused by an *agency* or instrumentality within the exclusive control of the defendant.”¹³⁸ The court loosely defines “exclusive control” and adheres to the notion that so long as the defendant was “probably” negligent this element of the *res ipsa* doctrine could be satisfied.¹³⁹

The court notes that it is unclear whether any work was done to the roof following Braxton’s report and whether such action or inaction impacted the condition of the fence that caused the injury.¹⁴⁰ If Braxton’s recommended repairs to the roof were made by the Board, then it should be assumed that the Board would have made any repairs to the fence had Braxton discovered the defect. Therefore, by both Braxton failing to discover the defect in the fence or even reference the fence in its report,¹⁴¹ and the Board failing to repair that which it would have had the responsibility to repair, it becomes clear that the Board would have been responsible for maintaining the roof. Because duty is premised on control, the Board’s apparent exclusive control over the roof’s maintenance would seem to absolve the unit owners of liability. Furthermore, there is no indication that either Hinojosa or Ragues partook in the maintenance of the roof.¹⁴²

The roof is clearly a “limited common element” as defined by the bylaws.¹⁴³ The limited common element is a subset of the common elements, for which the Board, by operation of the bylaws and statute, has the duty to maintain.¹⁴⁴ The Board does not contend that the roof is considered part of the units owned by

have been due to any voluntary action or contribution on the part of the plaintiff.” (quoting *Corcoran v. Banner Super Market*, 19 N.Y.2d 425, 430 (1967)).

¹³⁸ *Dermatossian*, 67 N.Y.2d at 226 (quoting *Corcoran*, 19 N.Y.2d at 430).

¹³⁹ See *Taratuta*, No. 116732-02, slip op. at 8 (discussing its application of the holding in *Nesbit v. New York City Transit Authority*, 170 A.D.2d 92, 98 (1991)).

¹⁴⁰ See *id.* at 16 (noting it is “not clear if the action or inaction impacted on the condition of the chainlink fence.”).

¹⁴¹ See *id.* (finding “[s]aid report is devoid of evidence that anything was wrong with the chainlink fence on the roof.”).

¹⁴² *Id.* at 3.

¹⁴³ See *id.* at 3 (noting a “limited common element” means it is for “the use of one or more specified Units to the exclusion of all other Units.”).

¹⁴⁴ See *id.* (explicating “[m]anagement of the common elements has been delegated to a board”).

Hinojosa and Ragues, instead it is a limited benefit enjoyed by the owners of the units with access to the common roof.

In addition to denying summary judgment to Hinojosa and Ragues, the court also denies summary judgment to the remaining unit owners, all of whom did not have any access, use, or enjoyment of the injury causing element.¹⁴⁵ This is the most erroneous of the court's holdings. The remaining unit owners had absolutely no control over the roof, nor any access to the roof.¹⁴⁶ If the roof were a general common element to which other unit owners had access, then the court may be able to apply its agency argument in denying summary judgment;¹⁴⁷ however, such argument cannot apply in this instance. Not only did the remaining unit owners lack control or access, but they seemingly did not contribute to the maintenance of the roof. The cost of maintaining the roof should, if at all, be assessed solely to Hinojosa and Ragues according to their fifty percent common interest in the roof.¹⁴⁸

E. Unit Owners' Contribution to the Maintenance and Management of the Common Elements

The court notes that while the Board has a responsibility to manage and maintain the common elements pursuant to the bylaws, the unit owners collectively pay for repairs through monthly common charges.¹⁴⁹ The court, in observance of the declaration, considers the Board to be an agent of the owners, operating on their behalf.¹⁵⁰ In the context of liability, an owner shall be liable for the negligent acts of its agents.¹⁵¹ While this issue has already been discussed, it is worth noting that this

¹⁴⁵ See *id.* at 16–17 (ordering which motions for summary judgment shall be denied).

¹⁴⁶ See *id.* at 3 (explaining Hinojosa and Ragues had exclusive use of the roof as a limited common element).

¹⁴⁷ See *id.* at 9–10 (noting the board is an agent of the unit owners and under the agency theory the unit owners have some responsibility for the maintenance of common areas).

¹⁴⁸ See *id.* at 3 (stating Hinojosa and Ragues each had a 50% recorded interest in the roof).

¹⁴⁹ See *id.* at 9 (noting the board votes for repairs and the repairs the board authorizes are paid for collectively by unit owners).

¹⁵⁰ See *id.* at 14–15 (declaring the Board to be an agent of the unit owners).

¹⁵¹ See RESTATEMENT (SECOND) OF TORTS §§ 364-365 (1965) (proposing rules for liability of "creation of maintenance of dangerous or artificial concerns" and for liability due to "dangerous disrepair").

would be a theory by which the court could potentially find Hinojosa and Ragues partially liable for the injury. Additionally, this theory of liability, as mentioned earlier, should absolve the remaining unit owners of liability since they lacked access or privilege to use the roof,¹⁵² and therefore had no responsibility to contribute towards its maintenance. If the court ultimately determines that Hinojosa and Ragues should share in the liability because of the contribution-agency theory, then the extent of their liability for damages becomes the second major issue. The remainder of this comment will deal with the apportionment of liability.

Before discussing the competing theories of liability, I would like to reaffirm my position that all of the unit owners who did not have access to, control of, use of, or the responsibility for the maintenance of the roof as a limited common element should not be held liable, nor be required to contribute to the plaintiff's damages. Only Hinojosa and Ragues should be at risk of contributing towards the damages. They were the only two unit owners sharing access to the roof and the only unit owners required to contribute towards the expense of its maintenance.¹⁵³ While Hinojosa and Ragues may not have had any effective control over the limited common element, the court could apply its "agency" theory with regard to control and find that the Board was the agent of Hinojosa and Ragues and therefore Hinojosa and Ragues maintained vicarious control for the purposes liability under the theory of *res ipsa loquitur*.

IV. AN ARGUMENT FOR UNIT OWNER LIABILITY TO BE LIMITED BY CAPPED APPORTIONMENT WITH MANDATORY INSURANCE

In order to be liable in negligence, it must be established that the party charged (1) owed a duty to the plaintiff, (2) breached his duty, and (3) the breach was the proximate cause of plaintiff's injury.¹⁵⁴ Should the court find Hinojosa and Ragues partially

¹⁵² See *Taratuta*, No. 116732-02, slip op. at 3 (noting defendants Hinojosa and Ragues were the only tenants entitled to use the roof).

¹⁵³ See *id.* at 3 (noting the top floor unit owners have "exclusive use of the roof as a limited common element").

¹⁵⁴ See RESTATEMENT (SECOND) OF TORTS § 284 (1965) (positing the Restatement standard for when negligence should be found).

liable for the damages sustained by the plaintiff, there are several theories of liability that can be applied: (1) joint and several liability, (2) straight apportionment of liability, (3) capped apportionment without mandatory insurance, and (4) capped apportionment with mandatory insurance.¹⁵⁵ The remainder of this comment will compare these theories of liability and argue in favor of applying the capped apportionment with mandatory insurance scheme with regard to Hinojosa and Ragues. Furthermore, this comment contends that the state legislature should determine the extent a unit owner could be liable for associational wrongs; such issue should not be left to the courts because of the risk of inconsistent opinions.

A. *Joint & Several Liability*

Joint and several liability seems to be the default theory according to most legal commentators.¹⁵⁶ Joint and several liability is a judicially created, pro-plaintiff theory of remedy, supported by public policy and its preference towards risk allocation.¹⁵⁷ Though it can make recovery easier for the plaintiff, it could have a devastating effect on condominium development and unit owners.¹⁵⁸ Under this theory, a plaintiff can sue a single unit owner, or any number of unit owners, to recover an entire judgment.¹⁵⁹ The defendant-owners would then seek contribution from the non-joined unit owners to share in the judgment.

Joint and several liability is perhaps the worst possible theory of liability for the issue presented in *Taratuta*. It creates the substantial risk that a single unit owner, who may have had

¹⁵⁵ See Schriefer, *supra* note 1, at 262–63 (reviewing multiple theories of liability that can be applied against unit owners for injuries caused by common elements under associational control).

¹⁵⁶ See *id.* at 256 (stating “[c]ommentators have generally agreed that, absent a statute to the contrary, courts would hold individual unit owners jointly and severally liable for associational wrongs.”).

¹⁵⁷ See *Dutcher v. Owens*, 647 S.W.2d 948, 950-51 (1983) (discussing joint and several liability); see also Schriefer, *supra* note 1, at 268 (noting joint and several liability serves to “allocate risk on public policy grounds”).

¹⁵⁸ See Schriefer, *supra* note 1, at 257 (noting joint and several remedies can leave unit owners with enormous liability); Edwin G. Alford, *White v. Cox: Tort Actions Against the Condominium Association – Implications for the Individual Owner*, 8 CAL. W. L. REV. 536, 543 (1972) (arguing liability for individual owners can stretch to imaginary reaches).

¹⁵⁹ See Schriefer, *supra* note 1, at 262 (declaring some states assign liability without any ceiling for single unit owners). See generally *In re Gap Stores Sec. Litigation*, 79 F.R.D. 283, 295 (N.D. Cal. 1978) (arguing joint and several liability can force some litigants to pay for everyone else’s actions).

little or no control over the injury causing element, could suffer unlimited liability merely because the plaintiff decided to sue him.¹⁶⁰ There need not be any rationale for suing a particular unit owner; in fact it could be an entirely arbitrary decision, one motivated by the unit owner's financial resources, or a decision made for pragmatic reasons.¹⁶¹ Essentially one unit owner could be held liable for the entire judgment.¹⁶² While it is more likely that a plaintiff will file suit against all unit owners of a condominium complex, there is no guarantee that random unit owners will not be subjected to extensive liability and legal costs.¹⁶³ An individual defendant-owner not only would have to satisfy the judgment and pay for the legal cost of defending against the plaintiff's claim, but also incur additional legal fees in filing contribution actions against the other unit owners.¹⁶⁴ In addition to impose added burdens upon unit owners who are sued, contribution suits create unnecessary burdens upon the court system through the creation of additional litigation.¹⁶⁵

The public interest and condominium structure is not best served through joint and several liability.¹⁶⁶ The theory does not bear any relationship to the unit owners' actual control over the

¹⁶⁰ See William K. Kerr, *Condominium - Statutory Implementation*, 38 ST. JOHN'S L. REV. 1, 17 (1963) (suggesting when all the unit owners are sued only one unfortunate owner would need to pay the judgment and would be forced to sue the others for contribution); Schriefer, *supra* note 1, at 255 (stating uncertainty exists as to what extent single unit owners would be liable for injuries sustained in common areas).

¹⁶¹ See Robert Mednick & Jeffrey J. Peck, *Proportionality: A Much-Needed Solution to the Accountants' Legal Liability Crisis*, 28 VAL. U. L. REV. 867, 906 (1994) (arguing when plaintiffs sue on joint and several liability claims, it is done because certain defendants usually have deep pockets).

¹⁶² See Schriefer, *supra* note 1, at 266 (stating that a court can impose liability for entire judgments on single owners). See generally *Pierce v. Wiglesworth*, 903 P.2d 656, 658 (Colo. App. Div. 1994) (noting that when common purposes are assigned to defendants, any single defendant can be fully liable).

¹⁶³ See Schriefer, *supra* note 1, at 255 (declaring uncertainty exists as to what extent single unit owners would be liable for injuries sustained in common areas).

¹⁶⁴ See Schriefer, *supra* note 1, at 269 (stating possibility that contribution could take years at high cost to owners).

¹⁶⁵ See Kneave Riggall, *The Tax Consequences of Statutory Duke Orders*, 14 WHITTIER L. REV. 809, 835 (1993) (arguing contribution actions can burden courts); see also Schriefer, *supra* note 1, at 270 (noting with joint and several liability, contribution is required).

¹⁶⁶ See Orten & Zacharia, *supra* note 1, at 666 (noting the inappropriateness of imposing joint and several liability); Schriefer, *supra* note 1, at 255 (acknowledging the potentially devastating result of imposing joint and several liability). See generally *Dutcher v. Owens*, 647 S.W.2d 948, 951 (Tex. 1983) (declaring its decision to deny application of joint and several liability is one "reached in the public interest").

associational wrong, nor their contribution or percentage ownership in the condominium complex, and thereby defies the foundation upon which condominium law is formed.¹⁶⁷ Essentially every common expense in condominium ownership is based upon the unit owners pro rata ownership;¹⁶⁸ thus, it is inconceivable that a unit owner with a 5% pro rata interest in a condominium complex could foresee being forced to shoulder the burden of an entire judgment.¹⁶⁹ The risk imposed by joint and several liability would outweigh the benefits of condominium ownership.¹⁷⁰

B. Straight Apportionment of Liability

The straight apportionment theory limits a unit owner's liability to an apportioned share of a judgment, determined by the owner's pro rata interest in the entire condominium.¹⁷¹ This standard of liability was created by the Texas Supreme Court in *Dutcher v. Owens*.¹⁷² The *Dutcher* court found an individual unit owner vicariously liable for the association's negligence which caused a fire in a light fixture in the common area and damaged the plaintiff's unit.¹⁷³ Unguided by the state legislature, the court held that the individual unit owner's liability was limited to

¹⁶⁷ See Orten & Zacharia, *supra* note 1, at 666 (suggesting joint and several liability might result in owner being held liable for something over which the owner does not have actual control); Schriefer, *supra* note 1, at 255 (noting single-unit owners have "only an indirect and highly attenuated responsibility for management and maintenance of the complex as a whole"); see also *Dutcher*, 647 S.W.2d at 950 (concluding a defendant's liability "should reflect the degree of control exercised by the defendant.").

¹⁶⁸ See *Dutcher*, 647 S.W.2d at 950 (noting a "co-owner has no more control over operations than he would have as a stockholder in a corporation which owned and operated the project" (citing *White v. Cox*, 17 Cal. App. 3d 824, 830 (1971)); Schriefer, *supra* note 1, at 255 (noting the straight apportionment standard used in *Dutcher* equates liability with a single-unit owner's actual control over the management and maintenance of the condominium). See generally Orten & Zacharia, *supra* note 1, at 648 (concluding pro rata apportionment is a more desirable measure).

¹⁶⁹ See Orten & Zacharia, *supra* note 1, at 667 (recognizing "an owner of 1/2500 interest cannot foresee the same kind of risk commensurate with ownership of a 1/5 interest").

¹⁷⁰ See Schriefer, *supra* note 1, at 255 (claiming joint and several liability would make the risk of owning a condominium outweigh the benefit).

¹⁷¹ See *Dutcher*, 647 S.W.2d at 950 (limiting defendant's liability to defendant's percent ownership); see also Orten & Zacharia, *supra* note 1, at 667 (describing how the pro rata approach distributes liability according to each owner's interest); Schriefer, *supra* note 1, at 255 (describing the straight apportionment standard of liability).

¹⁷² 647 S.W.2d 948 (Tex. 1983).

¹⁷³ See *id.* at 948 (reviewing facts of case).

his pro rata undivided ownership in the common elements.¹⁷⁴ The court rationalized its application of the straight apportionment theory by noting that condominium ownership includes a tenancy-in-common with the other co-owners in the common elements and requires a pro rata contribution by the owners for the maintenance of those elements.¹⁷⁵ Since essentially every aspect of condominium ownership is dictated by an owner's pro rata interest in the complex, the extent of his liability should also reflect that pro rata interest and contribution.¹⁷⁶ Where an owner's interest and contribution in a common element is only 1%, the extent of his liability should be 1% of the damages. This not only accurately reflects the pro rata apportionment of expenses and liability, but spreads the cost of the damages evenly among the owners in accordance with their interest and expectations.

Additionally, the *Dutcher* court noted that unit owners do not have any "effective control" over the operation and management of the common elements.¹⁷⁷ The court equates a unit owner's control over the common elements to that of a stockholder in a corporation.¹⁷⁸ An owner's limited control requires a limitation on liability that comports with the intent of the condominium statutes.¹⁷⁹ While I agree with the *Dutcher* standard, I believe it is flawed and not the best theory of liability for the issue presented in *Taratuta*. The straight apportionment theory would be improved if liability was capped by the value of an owner's individual unit, and adequate insurance policies were mandated not only for the condominium association but also the unit

¹⁷⁴ See *id.* at 951 (holding condominium co-owner's liability limited to pro rata interest in the common elements as a whole).

¹⁷⁵ *Id.* at 950 (discussing uniqueness of condominium ownership).

¹⁷⁶ See *Orten & Zacharia*, *supra* note 1 at 659 (citing Uniform Common Interest Ownership Act as adopting the *Dutcher* pro rata approach); *Rohan*, *supra* note 3 at 25 (explaining results of hybrid nature of condominium owner's separate interests).

¹⁷⁷ See *Dutcher*, 647 S.W.2d at 950 (declaring "to rule that a condominium co-owner had any effective control over the operation of the common areas would be to sacrifice reality to theoretical formalism").

¹⁷⁸ See *id.* at 950 (stating "a co-owner has no more control over operations than he would have as a stockholder in a corporation which owned and operated the project").

¹⁷⁹ See *id.* at 951 (holding "because of the limited control afforded a unit owner by the statutory condominium regime the creation of the regime effects a reallocation of tort liability. The liability of a condominium co-owner is limited to his pro rata interest in the regime as a whole, where such liability arises from those areas held in tenancy-in-common").

owners. The benefits of these suggestions will be discussed in my argument in favor of the capped apportionment with mandatory insurance standard of liability.

C. Capped Apportionment with Mandatory Insurance

The standard that I believe best serves the interests of plaintiffs, condominium associations, and condominium unit owners, is capped apportionment with mandatory insurance. Under this theory, a unit owner's liability is based upon his pro rata interest in the common element and capped by the value of his unit.¹⁸⁰ Limiting the owner's liability to the value of his unit is an accurate reflection of the actual control and interest a unit owner possesses over a common element.¹⁸¹ The *Dutcher* standard is flawed because the unit owner could be subjected to unlimited liability depending on the extent of the damages, whereas with this standard the worst scenario for a unit owner would be to surrender his unit in satisfaction of a judgment.¹⁸²

The mandatory insurance requirement provides maximum protection to unit owners and judgment creditors.¹⁸³ Requiring the association to carry an insurance policy over the common areas and to also carry a homeowner policy, enables the plaintiff to seek compensation from various pools of money and rarely suffer under-compensation.¹⁸⁴ A judgment creditor would first recover from the association's policy, and the unit owners' policies would cover the damages exceeding the coverage of the master policy.¹⁸⁵ As a last resort the judgment creditor could recover from the unit owners directly when the damages exceed

¹⁸⁰ See generally Rohan, *supra* note 3, at 25 (examining difficulties of condominium owner's interest and liability).

¹⁸¹ See Schriefer, *supra* note 1, at 259 (explaining utility of legislative treatment of liability for owners).

¹⁸² See Jeffries IV, *supra* note 2, at 218 (arguing apportionment is consistent with the ratio of common expense liability along with required liability insurance provides some limitation on owner liability); Schriefer, *supra* note 1, at 265 (stating capped apportionment with insurance affords the greatest protection to unit owners).

¹⁸³ See Schriefer, *supra* note 1, at 265 (explaining broadness of protection); Jeffries IV, *supra* note 2, at 220 (stating that this theory provides substantial protection to the consumer).

¹⁸⁴ See Schriefer, *supra* note 1, at 263 (covering various aspects of insurance policies).

¹⁸⁵ See generally Schriefer, *supra* note 1, at 263 (describing a Georgia statute mandating a minimum insurance as preventing injured plaintiffs from under-compensation).

the coverage of both policies;¹⁸⁶ however, the recovery is limited to the value of the units.¹⁸⁷

The unit owners benefit from this standard because in most instances the master insurance policy will sufficiently cover the damages and at worst, their liability is limited to the value of their investment.¹⁸⁸ Furthermore, the risk is spread among all the unit owners according to their pro rata interest.¹⁸⁹ For this standard to work properly, the legislature would have to mandate certain requirements of the insurance policies to ensure adequate coverage.¹⁹⁰ Not only would the master policy's coverage be required to meet certain levels of coverage for the complex, but the homeowner policies would have to provide coverage for associational wrongs when the damages exceed the coverage of the master policy.¹⁹¹ These modifications would benefit the judgment creditor by lowering the risk of under-compensation and allowing recovery from multiple pools of funds.¹⁹² Furthermore, unit owners benefit from the spreading of risk not only among the unit owners according to their pro rata interest in the common elements, but to insurance proceeds as well.¹⁹³ Capped apportionment also provides certainty for unit

¹⁸⁶ See generally Lawrence Charles Ashby & John H. Bailey, *Condominiums - Incorporation of the Common Elements - A Proposal*, 23 VAND. L. REV. 321, 327 (1970) (arguing that a judgment in excess of the master policy poses a threat of individual liability which cannot be met by insurance).

¹⁸⁷ See ALA. CODE § 35-8-12(d) (2004) (stating a unit owner's pro rata liability shall never exceed his interest in the unit); Vincent DiLorenzo, *THE LAW OF CONDOMINIUMS AND COOPERATIVES* § 1.04(2)(b) (1990) (noting a number of jurisdictions have limited exposure to liability to the value of the unit); Schriefer, *supra* note 1, at 263 (arguing that under capped apportionment with mandatory insurance the unit owner acquires a limited risk of liability and in no case will the risk exceed the unit value).

¹⁸⁸ See DiLorenzo, *supra* note 193 (stating the judgment is limited to the value of the unit); Schriefer, *supra* note 1, at 263 (declaring in most cases the master policy will cover the judgment).

¹⁸⁹ See Patrick Rohan, *Perfecting the Condominium as a Housing Tool: Innovations in Tort Liability*, 32 LAW & CONTEMP. PROBS. 305, 316 (1967) (arguing for limiting liability to the unit owner's pro rata share); Schriefer, *supra* note 1, at 263 (stating limiting liability to the value of the owner's unit is a limited risk).

¹⁹⁰ See Schriefer, *supra* note 1, at 260 (discussing various state requirements on insurance policy levels, including "reasonable" insurance policy limits and mandatory minimum policy limits).

¹⁹¹ See *id.* at 273 (stating that an owner can deflect their losses by purchasing insurance before the associational wrong occurs).

¹⁹² See *id.* at 263 (noting under an apportionment scheme with mandatory insurance, the creditor can receive compensation from insurance proceeds and seek compensation from the unit owners if the insurance doesn't fully cover the judgment).

¹⁹³ See *id.* (arguing unit owners in a capped apportionment with mandatory insurance scheme would have a limited risk of liability from apportionment, which would

owners by guaranteeing that two insurance policies will absorb the majority of most damages and if not, they would only be liable for an apportioned share of the judgment and their liability will not exceed the value of their investment.¹⁹⁴

When examining the values and benefits of owning condominiums, essentially everything is based upon the owners pro rata share or interest.¹⁹⁵ To allow liability beyond their percentage ownership, as with joint and several liability, or the *Dutcher* standard, would be to defy the structure upon which condominium law is based.¹⁹⁶

Critics could claim that capped apportionment could limit the amount recoverable. The concern that damages will exceed the value of insurance policies and unit values can be alleviated by mandating policy minimums upon associations and units, and requiring unit owner policies to include coverage of associational wrongs.¹⁹⁷ This ensures that some individual owners are not disproportionately penalized when a common element, over which they had no control, causes a severe injury, while at the same time providing the plaintiff with multiple pools of funds from which they could recover.¹⁹⁸

be further reduced by mandatory insurance, which in most cases would cover the judgment). See generally *Jeffries IV*, *supra* note 2, at 218–19 (discussing the potential difficulties that a unit owner faces in attempting a sale of his unit without mandatory insurance before a judgment creditor receives full compensation).

¹⁹⁴ See *Schriefer*, *supra* note 1, at 263 (arguing mandatory insurance would cover a potential judgment, and when it does not, the liability of a unit owner would be limited to the unit value).

¹⁹⁵ See 8 RICHARD R. POWELL, *POWELL ON REAL PROPERTY* §54A-12 (2)(a) (Michael Allan Wolf ed., 2004) (noting that a unit owner's contract liability is limited to the value of his investment, or his pro-rata share); *Schriefer*, *supra* note 1, at 268 (noting the lack of control over common elements, and allocation of expenses are characteristic of condominiums).

¹⁹⁶ See *Leeds & Miller*, *supra* note 44, at 136, 141–45 (explaining the contradictory partnership and corporate aspects of the condominium).

¹⁹⁷ See *Schriefer*, *supra* note 1, at 263 (noting that the impact of a judgment exceeding insurance would spread amongst all of the unit owners in a capped apportionment with mandatory insurance scheme). See generally GA.CODE ANN. §44-3-107 (2004) (requiring the condominium association to purchase liability insurance for a set amount).

¹⁹⁸ See Marianna Brown, *Living in a Condominium: Individual Needs Versus Community Interests*, 46 U. CIN. L. REV. 523, 536 (1977) (advocating mandatory liability insurance for associations and unit owners).

D. An Issue for the Legislature, Not the Courts

Just about every issue related to condominium law is governed by state statute.¹⁹⁹ It naturally follows that the issue of what extent unit owners can be liable for associational wrongs is one that should be decided by the legislature as well. Currently the New York courts have no guidance on the issue, from the legislature or case law, and are required to balance the legislative intent in the condominium laws with policy concerns in an effort to enable the plaintiff to recover a sufficient judgment.²⁰⁰ Clear legislative action would guide the courts, prevent continued uncertainty with regard to the precise degree of unit owner liability, and restrict courts from changing the standard to accommodate a particular plaintiff.²⁰¹ Courts are also less likely to require associations and homeowners to carry insurance policies with minimum coverage standards.²⁰² Furthermore, the legislature is in a better position than courts to conduct a comprehensive analysis of the issue.²⁰³

V. CONCLUSION

In *Taratuta*, the plaintiff's damages exceeded the value of the master insurance policy and as a result the plaintiff is suing every unit owner, even those who maintain no interest in the

¹⁹⁹ See Wayne S. Hyatt, *Symposium: Common Interest Communities: Evolution and Reinvention*, 31 J. MARSHALL L. REV. 303, 320 (1998) (describing the initial statutes enacted to create condominium associations by legislatures); see also Mazun, *supra* note 1, at 331 (noting that condominiums are "creatures of statute"); James M. Pedowitz, *Condominium Unit Title Insurance*, 73 ST. JOHN'S L. REV. 183, 184 (1999) (describing condominiums as a unique form of ownership that is based upon state statute).

²⁰⁰ See Schriefer, *supra* note 1, at 205-06 (noting that New York has not passed legislation to deal with the extent of unit owner liability for associational wrongs); Orten & Zacharia, *supra* note 1, at 650 (declaring only two states have taken definitive stances on the tort liability of a unit owner for a common area).

²⁰¹ See Schriefer, *supra* note 1, at 275, (noting "[s]tate legislatures can treat unit owner liability in a way that provides maximum protection to unit owners and injured parties," while "[c]ourts . . . cannot address the problem with such broad strokes.").

²⁰² See Schriefer, *supra* note 1, at 266 (discussing the judicial systems' reluctance to mandate insurance for unit owners and associations); see also Orten & Zacharia, *supra* note 1, at 667 (advocating state legislatures adopting legislation that requires insurance in order to address public policy concerns that arise from inadequate liability insurance).

²⁰³ See Schriefer, *supra* note 1 (noting legislatures can handle the liability issue with "greater sensitivity to complex public needs than courts"); see also *Hunter v. Eugene*, 309 Ore. 298, 303-04 (1990) (declaring that without proper legislative guidance, the court is in no position to place limitations on liability).

limited common element that caused the injury.²⁰⁴ It would be inherently unfair to hold the unit owners who did not have access to, or a duty to care for the limited access roof, liable for the injury it caused. By not having any control over the maintenance of the roof and no access, those unit owners did not have the ability to create a dangerous condition by their conduct.²⁰⁵ Of equal significance, those unit owners had no duty to provide for its maintenance via their common charges because their monthly maintenance should only contribute towards the maintenance of the common elements to which they had access.

It would be equitable to hold Hinojosa and Ragues liable for the plaintiff's injury if it can be shown that they either (1) contributed towards creating the dangerous condition or (2) unreasonably relied upon the Board to maintain the fence of the roof. If either of these two facts can be proved, it is reasonable to assume they reserved some level of control over the roof and therefore shared in the duty for its maintenance. Their liability should not be based upon the court's "agency" theory and thereby be premised upon the mere fact that they contributed towards the maintenance of the roof via their monthly common charges. An owners association, or board, is an elected body created to provide for the care of the condominium complex on behalf of the owners.²⁰⁶ This service is a primary benefit of the condominium form of ownership.²⁰⁷ To hold unit owners liable merely because they pay for the cost of the maintenance of the common elements would defeat perhaps the most valued benefit of condominium ownership and essentially make condominium ownership significantly less distinguishable from private home ownership.

²⁰⁴ See *Taratuta v. Allyn*, No. 116732-02, slip op., at 3 (N.Y. Sup. Ct. Jan. 8, 2004).

²⁰⁵ See *id.* at 8 (arguing they have no control over the condition of the fence). See generally *Smith v. Parkchester N. Condo.*, 163 Misc. 2d 66, 69 (N.Y. Misc., 1994) (finding a petitioner who was the owner of a unit in a condominium found in violation of building codes to have "no control over the common areas/elements that would enable him to correct the violations found by the housing inspector.").

²⁰⁶ See *Orten & Zacharia*, *supra* note 1, at 649 (explaining the role and function of the owners association).

²⁰⁷ See Sharon L. Bush, *Beware the Associations: How Homeowners' Associations Control You and Infringe Upon Your Inalienable Rights*, 30 W. ST. U. L. REV. 1, 3 (2003) (finding "a community under association control provides attractive well-maintained common areas without the responsibility of maintenance. This can benefit the owners by maintaining property values if the board of directors is reasonable and uses common sense regarding the use of the association's money").

Such a result would have a deleterious effect upon one of the fastest growing forms of housing.²⁰⁸

Finally, if the court finds that Hinojosa and Ragues are partially liable for the plaintiff's injuries, then the extent of their liability must be limited under the capped apportionment theory. Capped apportionment limits an owner's liability to their pro rata interest in the injury causing common element, and caps it at the value of his unit.²⁰⁹ This theory is an accurate reflection of not only the control and interest a unit owner possesses over a common element, but also of their expectations and reasons for buying into a condominium complex.²¹⁰

By legislating for mandatory insurance, third parties and owners are adequately protected.²¹¹ Three pools of money are created from which the plaintiff can recover, starting with the master insurance policy, followed by the individual unit owner policies that would provide coverage for associational wrongs, and finally from the unit owners themselves when it is shown that they contributed in some way to the injury.²¹² At worst, the unit owner would surrender his unit in satisfaction of any judgment against him, but would not suffer the inequitable

²⁰⁸ See Sara K. Clarke, *Condominium Demand Expected to Increase; Market: Builders are Designing Complexes with Amenities to Lure Empty-Nesters and Buyers Priced Out of Other Housing Options*, THE BALTIMORE SUN, Aug. 8, 2004, at 1L (finding "nationally, sales of condominiums and cooperative apartments have risen more than 40 percent in the past three years.").

²⁰⁹ See *Dutcher v. Owens*, 647 S.W.2d 948, 951 (1983) (holding "the liability of a condominium co-owner is limited to his pro rata interest in the regime as a whole, where such liability arises from those areas held in tenancy-in-common"); Orten & Zacharia, *supra* note 1, at 660-61 (explaining under the capped apportionment method "a judgment lien is a direct lien against each unit which can be discharged by payment of a pro rata share of the judgment . . . the share of the judgment is based on the allocation of liability for common expenses.").

²¹⁰ See *Dutcher*, 647 S.W.2d. at 950 (theorizing that "the onus of liability for injuries arising from the management of condominium projects should reflect the degree of control exercised by the defendants."); Kristin L. Davidson, *Bankruptcy Protection for Community Associations as Debtors*, 20 BANK. DEV. J. 583, 613-14 (2004) (arguing states that do not follow the pro rata method "alter the expectations of homeowners who believe that the association's incorporation provides them limited liability.").

²¹¹ See Orten & Zacharia, *supra* note 1, at 668 (recommending legislation that would compel owners' associations to carry liability insurance which "will address the public policy concerns of fair compensation to injured parties in tort actions").

²¹² See Orten & Zacharia, *supra* note 1, at 667 (recommending "to avoid a surprise allocation of tort liability to property owners in a common interest community, the owners association should carry and maintain adequate general liability insurance. Additionally, owners associations may desire to carry an umbrella insurance policy to extend liability coverage to protect individual unit owners from being personally liable for amounts over the owners association's general liability limits.").

financial burden of having to pay damages beyond the value of his investment.