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Unit Owner's Liability for Tort Claims Arising from Common Elements Due to Negligence of Owner's Association Limited to Proportionate Ownership in Common Elements Symposium - Selected Topics on Land Use Law - Case Note.

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CASENOTES

CONDOMINIUM LAW—Allocation of Tort Liability—Unit Owner's Liability for Tort Claims Arising from Common Elements Due to Negligence of Owner's Association Limited to Proportionate Ownership in Common Elements.

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

Mr. and Mrs. Owens leased a condominium apartment from J.A. Dutcher, the unit owner, whose interest included a proportionate undivided ownership in the common elements.[1] The Owens received property damage from a fire originating in the common area[2] due to negligent maintenance by the owners' association.[3] The trial court held the owner vicariously liable but only for damages based on his proportionate share in the common elements.[4] The appellate court reversed in part, holding the owner jointly and severally liable.[5] Dutcher appealed to the Texas Supreme Court to determine the extent of a condominium owner's liability for negligence of the owners' association.[6] Held—*Reversed, judgment of trial court affirmed.* Unit owner's liability for tort claims arising from common elements due to negligence of owners' association is limited to proportionate ownership in

1. *See* Dutcher v. Owens, 647 S.W.2d 948, 949 (Tex. 1983). Dutcher owned a 1.572% proportionate undivided share in the common elements as a tenant in common with the other co-owners. *See id.* at 949.
2. *See id.* at 949. Damage of $69,150.00 to the Owen's property resulted from a fire caused by an improperly insulated light fixture in an exterior wall. *See id.* at 949.
3. *See id.* at 949. Prior to trial the other defendants which included the owners' association, other owners represented by the association, the developer, and an electric company were granted a change of venue. *See id.* at 949. The trial court found that only the association was negligent. *See id.* at 949.
4. *See id.* at 949.
5. *See* Owens v. Dutcher, 635 S.W.2d 208, 211 (Tex. App.—Fort Worth 1982), *rev'd,* 647 S.W.2d 948 (Tex. 1983). The appellate court stated that there was neither case law nor statute to support the trial court's verdict. *See id.* at 211.
6. *See* Dutcher v. Owens, 647 S.W.2d 948, 949 (Tex. 1983).

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the common elements.[7]

The condominium project[8] is a new form of property ownership.[9] Title to a condominium combines the ownership of two estates in one; the unit owner owns both a fee simple interest in the individual unit and an undivided proportionate interest in the common elements as a tenant in common with the other co-owners.[10] The condominium project is usually managed by an owners' association which is responsible for administration and maintenance of the common elements.[11] The national trend is toward recognition of the association and its members, the unit owners, as separate legal entities.[12] Courts have been divided, however, as to whether the

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7. *See id.* at 951. The only issue on appeal was the judgment allocation. *See id.* at 949.

8. *See* TEX. REV. CIV. STAT. ANN. art. 1301a, § 2(c) (Vernon 1980). A condominium project is defined as a multiple unit complex offering units for sale. *See id.* The unit itself may be for residential, office, or other business purposes. *See id.* § 2(e). The project also includes common elements which are owned by all the co-owners, each according to his proportional share as specified in the declaration. *See id.* § 7(B)(6). The common elements basically include everything in the project except the interior walls of the unit and the area which these walls enclose. *See id.* § 2(l). Typical examples of common elements are swimming pools, stairways, exterior walls, and walkways. *See id.* § 2(l). *See generally* Comment, *An Analysis of the Texas Condominium Act: Maintenance and Operation of a Condominium Project,* 11 ST. MARY'S L.J. 861, 863 (1980) ("first generation" enabling statute subject to later expansion and revision).

9. *See* Condominium Act, ch. 191, § 26, 1963 Tex. Gen. Laws. 512 (legislature recognized condominium innovative ownership concept). *See generally* 1 P. ROHAN & M. RESKIN, CONDOMINIUM LAW & PRACTICE § 1.01 (1983) (new form of ownership mandates new prodecures).

10. *See, e.g.,* Scott v. Williams, 607 S.W.2d 267, 270 (Tex. Civ. App.—Texarkana 1980, writ ref'd n.r.e.) (condominium two separate estates in one owner); Ventura v. Hunter Barrett & Co., 552 S.W.2d 918, 921 (Tex. Civ. App.—Corpus Christi 1977, writ dism'd) (condominium ownership in common elements tenancy in common); Comment, *The Condominium and the Corporation—A Proposal for Texas,* 11 HOUS. L. REV. 454, 454 (1974) (fee simple estate in apartment and tenancy in common in the common elements comprises condominium ownership). Tenancy in common is a form of concurrent ownership in which each owner owns a proportionate share, but all owners share the right of possession to the entire property. *See* 4A R. POWELL, LAW OF REAL PROPERTY § 601 (1982).

11. *See, e.g.,* White v. Cox, 95 Cal. Rptr. 259, 262 (Ct. App. 1971) (common affairs operated by management association); Scott v. Williams, 607 S.W.2d 267, 269 (Tex. Civ. App.—Texarkana 1980, writ ref'd n.r.e.) (administration board members mismanaged affairs of condominium regime); 1 P. ROHAN & M. RESKIN, CONDOMINIUM LAW & PRACTICE § 5.04 (1983) (condominium requires management system). The Texas Condominium Act does not specifically give the association authority for common element management but does allow an administrative body delegated by co-owners to sue on behalf of co-owners. *See* TEX. REV. CIV. STAT. ANN. art. 1301a, § 16 (Vernon 1980).

12. *Cf.* Marshall v. International Longshoreman's Warehouseman's Union, 371 P.2d 987, 989, 22 Cal. Rptr. 211, 213 (Cal. 1962) (member could sue union and unincorporated association because union separate legal entity); Diluzio v. United Elec., Radio & Mach. Workers of America, Local 274, 435 N.E.2d 1027, 1028 (Mass. 1982) (union can be sued as separate legal entity); Miazga v. International Union of Operating Eng'r, Local 18, 196

separate identity theory is supported by the owner's ability to sue the association[13] or the association's ability to sue on behalf of its members.[14] An assessment of the reality that an owner has little, if any, control over the association provides the strongest argument for the separation of owner and association.[15]

With the advent of the condominium form of ownership, creating an association which manages one of the owner's estates, but over which the owner has virtually no control,[16] a new problem has been recognized regarding the unit owner's liability arising from his undivided proportional

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N.E.2d 324, 331 (Ohio Ct. App. 1964) (union has distinct legal status from members). A California court concluded that since a condominium management association is similar to an unincorporated association because they operate in a comparable manner, the management association was a separate entity from its members. *See* White v. Cox, 95 Cal. Rptr. 259, 262 (Ct. App. 1971).

13. *Compare* White v. Cox, 95 Cal. Rptr. 259, 263 (Ct. App. 1971) (separate—member can sue condominium association for personal injury from fall over sprinkler in common area) *and* Schoondyke v. Heil, Heil, Smart & Golee, Inc., 411 N.E.2d 1168, 1170 (Ill. App. Ct. 1980) (separate—nonowner occupier sued association for injury suffered from fall on snow-covered walk in common area) *and* O'Bryant v. Veterans of Foreign Wars, No. 1552, 376 N.E.2d 521, 523-24 (Ind. Ct. App. 1978) (separate—association sued by member for injuries resulting from association's negligence) *with* Schwartzmann v. Association of Apartment Owners, 655 P.2d 1177, 1180 (Wash. Ct. App. 1982) (not separate—association members could not be sued individually by owner for mental distress when plumbing problem not corrected).

14. *See* Stony Ridge Hill Condominium Owners Ass'n v. Auerbach, 410 N.E.2d 782, 784 (Ohio Ct. App. 1979) (not separate—association represented members in suit for misrepresentation regarding common elements). *Compare* Quail Hollow East Condominium Ass'n v. Donald J. Scholz Co., 268 S.E.2d 12, 17 (N.C. Ct. App. 1980) (not separate—association could sue architect even though privity of contract was lacking between architect and association) *with* Strathmore Riverside Villas Condominium Ass'n, Inc. v. Paver Dev. Corp., 369 So. 2d 971, 973 (Fla. Dist. Ct. App. 1979) (separate—association, a nonprofit corporation, could not sue on behalf of owners not in privity with developer). In addition, Texas courts have considered members of a profit-making association to be partners or participants in a joint enterprise. *See* Port Terminal R.R. Ass'n v. Leonhardt, 289 S.W.2d 649, 651 (Tex. Civ. App.—Fort Worth 1956, no writ) (members of profit-making association jointly and severally liable on same basis as if partners); Golden v. Wilder, 4 S.W.2d 140, 142 (Tex. Civ. App.—Fort Worth 1928, no writ) (member of merchants' profit-making enterprise jointly and severally liable for enterprise's tort). Joint enterprise gives rise to vicarious liability, and when carried out for profit, is considered analogous to partnership in allocating tort liability. *See* W. PROSSER, LAW OF TORTS § 72, at 475-76 (4th ed. 1971). Parties in a joint enterprise have an equal right of control and a goal beyond association for a common purpose. *See* W. PROSSER, LAW OF TORTS § 72, at 478 (4th ed. 1971); *see also* TEX. REV. CIV. STAT. ANN. art. 6132b, § 6 (Vernon 1970) (partnership is association of co-owners for profit-making business).

15. *See* White v. Cox, 95 Cal. Rptr. 259, 262 (Ct. App. 1971) (owner not on board of directors, which appointed association manager, lacked control).

16. *See id.* at 263. The condominium plan explicitly stated that if association management was not to the owner's satisfaction, he had no recourse. *See id.* at 263.

interest in the common elements.[17] Commentators have suggested that tort liability for the unit owner is derived from the owner's duty as a landowner[18] and from the principle of *respondeat superior.*[19] Commentators and Texas courts have noted that the allocation of risk, particularly holding one party liable for the actions of another, has been a policy decision.[20] In the absence of a policy decision by statute, a condominium owner has been held jointly and severally liable for injuries originating in the common elements.[21] Statutes in some states, however, have allocated liability

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17. *See* 4B R. POWELL, LAW OF REAL PROPERTY § 633.25 [2] (1981) (in absence of statute limiting liability, great risk for owner from actions of employees concerning common elements); Rohan, *Perfecting the Condominium as a Housing Tool: Innovations in Tort Liability and Insurance,* 32 LAW & CONTEMP. PROBS. 305, 308-09 (1967) (co-owners probably liable under principles of land ownership and agency for torts within the regime unless liability disallowed by statute). The problem of tort liability for the condominium owner may be compounded by the possible interpretation of "may" in TEX. REV. CIV. STAT. ANN. art. 1301a, § 19 (Vernon 1980) as a mandate for *optional* insurance. *See* Comment, *The Condominium and the Corporation—A Proposal for Texas,* 11 HOUS. L. REV. 454, 456-57 (1974).

18. *See* 4B R. POWELL, LAW OF REAL PROPERTY § 633.25 [2] (1981). Powell also suggests that agency rules would hold an owner liable for authorized actions of the association. *See id.* Powell proposes that tenancy in common and partnership may be confused when land owned by a partnership is considered to be held by each partner as a tenant in common. *See* 1 R. POWELL, LAW OF REAL PROPERTY § 138 (1981). A partnership is a profit-making enterprise and is similar to a joint enterprise but tenancy in common alone does not establish partnership. *See* State v. Houston Lighting & Power Co., 609 S.W.2d 263, 267 (Tex. Civ. App.—Corpus Christi 1980, writ ref'd n.r.e.). Within a joint enterprise the parties are vicariously liable for torts of the enterprise predicated on their control of the enterprise. *See* W. PROSSER, LAW OF TORTS § 72, at 475 (4th ed. 1971).

19. *See* 1 P. ROHAN & M. RESKIN, CONDOMINIUM LAW & PRACTICE § 10A.05[2][a] (1982) (unit owner liable as management employer and landowner). Vicarious liability, called *respondeat superior,* holds one party liable for the actions of another. *See* W. PROSSER, LAW OF TORTS § 69, at 458 (4th ed. 1971). A master or principal is responsible for the actions of his servant or agent acting within the scope of his employment, based on the principal's control of the agent. *See* W. PROSSER, LAW OF TORTS § 69, at 458 (4th ed. 1971).

20. *See, e.g.,* Newspaper, Inc. v. Love, 380 S.W.2d 582, 588-89 (Tex. 1964) (policy decision that master liable for servant due to master's control); Landers v. East Texas Salt Water Disposal Co., 151 Tex. 251, 255, 248 S.W.2d 731, 733 (1952) (joint and several liability arose from need for justice); W. PROSSER, LAW OF TORTS § 69, at 459 (4th ed. 1971) (modern concept of vicarious liability allocates risk based on policy considerations); *see also* Wigmore, *Joint-Tortfeasors and Severance of Damages; Making the Innocent Party Suffer Without Redress,* 17 ILL. L. REV. 458, 459 (1923) (allocation of tort liability based on justice).

21. *See* Pratt v. Maryland Farms Condominium Phase 1, 402 A.2d 105, 110 (Md. Ct. Spec. App. 1979) (owner liable for injury from negligent tree maintenance in common area); Port Terminal R.R. Ass'n v. Leonhardt, 289 S.W.2d 649, 651 (Tex. Civ. App.—Fort Worth 1956, no writ) (members jointly and severally liable for property submitted to association control); *see also* 1 P. ROHAN & M. RESKIN, CONDOMINIUM LAW & PRACTICE § 10A.03[2] (1982) (co-owners jointly and severally liable for torts in project); Schreiber, *The Lateral Housing Development: Condominium or Homeowners Association?,* 17 U. PA. L. REV. 1104, 1143 (1969) (liability for common areas might extend to all owners). *But cf.* King v. Ilikai

directly[22] or indirectly[23] according to the owner's proportionate interest in the common elements, or have absolved the owner personally from liability.[24]

The trend in Texas has been toward allocation of various types of liability among co-owners according to proportionate interest.[25] The Texas Condominium Act does not specifically address tort liability[26] but does mandate that payment by co-owners for expenses arising from the common elements be proportional,[27] that insurance beneficiaries and proceeds be allocated on a pro-rata basis,[28] and that co-owners pay according to their proportional interest in the project for building reconstruction costs exceeding insurance coverage.[29]

Properties, Inc., 632 P.2d 657, 661-62 (Hawaii Ct. App. 1981) (no duty for owner/landlord to protect tenant from actions of criminals, nor was condominium association liable since no special relationship to tenant).

22. *See, e.g.,* COLO. REV. STAT. § 38-33-109 (1982) (owner's liability for damages against association limited to percentage interest in common elements); FLA. STAT. ANN. § 718.119(2) (West Supp. 1983) (unit owner personally liable for association's actions concerning common elements according to proportionate interest in common elements); IDAHO CODE § 55-1515 (1979) (unit owner's liability concerning common area management limited to proprotionate interest in common area).

23. *See, e.g.,* ALASKA STAT. § 34.07.260 (1975) (only condominium association can be sued concerning common elements; then, members liable for common expense according to proportionate ownership in common area); MASS. ANN. LAWS ch. 183A, § 13 (Michie/Law. Co-op. 1977) (suits concerning common area limited to association; resulting judgments are expenses of association paid by members according to proportionate ownership); WASH. REV. CODE. ANN. § 64.32.240 (1966) (tort liability allocated proportionately by recognition as expense of association paid by owners according to their share in common elements).

24. *See* MISS. CODE ANN. § 89-9-29 (1972) (owner not personally liable for injuries arising from common elements); N.J. STAT. ANN. § 46:8B-16(c) (West Supp. 1982-1983) (no personal liability for unit owner for damages arising from common area). While the owner is not personally liable, he may be held liable if the association is sued, and the association subsequently levies against the owner for his share. *See* 1 P. ROHAN & M. RESKIN, CONDOMINIUM LAW & PRACTICE § 10A.03[2] (1982).

25. *See, e.g.,* Scott v. Williams, 607 S.W.2d 267, 269-70 (Tex. Civ. App.—Texarkana 1980, writ ref'd n.r.e.) (award for damages to condominium regime in proportion to owner's share); Reynolds v. Haynes, 425 S.W.2d 29, 33 (Tex. Civ. App.—Eastland 1967, writ ref'd n.r.e.) (fire damage repairs to auction barn to be paid by co-owners according to proportional interest); Hicks v. Southwestern Settlement & Dev. Corp., 188 S.W.2d 915, 921 (Tex. Civ. App.—Beaumont 1945, writ ref'd w.o.m.) (in relation to owners not a party to suit, co-owner's damage recovery restricted to proportional share); *cf.* Cox v. Davison, 397 S.W.2d 200, 203 (Tex. 1965) (liabilities of undivided mineral interests are according to co-owner's proportional share). A California court suggested that allocation of liability according to proportionate interest extends to tort liability. *See* White v. Cox, 95 Cal. Rptr. 259, 263 (Ct. App. 1971).

26. *See* TEX. REV. CIV. STAT. ANN. art. 1301a (Vernon 1980 & Supp. 1982-1983).

27. *See id.* § 15 (Vernon 1980).

28. *See id.* §§ 19, 20.

29. *See id.* § 21. Condominium projects would have insurance to cover tort liability as

In *Dutcher v. Owens,*[30] the Texas Supreme Court decided that as a matter of public policy[31] a condominium co-owner is liable for torts arising from the common elements only in proportion to his share in the common elements.[32] Because the condominium is a new type of ownership mandated by the legislature,[33] "liability for injuries arising from the management of condominium projects should reflect the degree of control exercised by the [owners]."[34] The court recognized that the owner has no realistic control over the association.[35] The court also noted the California court's conclusion that the association is a separate legal entity from the unit co-owner.[36] Acknowledging lack of statutory[37] or legislative intent to the contrary,[38] the court allocated tort liability based on public policy,[39] noting the inequity of holding an owner jointly and severally liable for the negligence of an association[40] over which he has no control.[41] Indicating

well, so the unit owners' proportionate liability would include any amount exceeding insurance coverage. *See id.* § 21.

30. 647 S.W.2d 948 (Tex. 1983). This is a case of first impression on the specific issue of allocation of tort liability among co-owners for injuries originating in the common elements. *See id.* at 948.

31. *See id.* at 951. The court reiterated its position that allocation of tort liability is determined by the need for justice. *See id.* at 951 (citing Newspapers, Inc. v. Love, 380 S.W.2d 582, 589 (Tex. 1964)) (master's liability for servant a policy decision); *see also* Landers v. East Texas Salt Water Disposal Co., 151 Tex. 251, 255, 248 S.W.2d 731, 733 (1952) (demands of justice gave rise to joint and several liability); W. PROSSER, LAW OF TORTS § 69, at 459 (4th ed. 1971) (policy considerations are grounds for allocation of risk).

32. *See* Dutcher v. Owens, 647 S.W.2d 948, 951 (Tex. 1983).

33. *See id.* at 949. The court reasoned that a new type of ownership called for a new approach to allocation of liability. *See id.* at 950.

34. *Id.* at 950. "Owners" has been substituted for "defendants." *See id.* at 950.

35. *See id.* at 950. The court accepted the California court's conclusion in *White v. Cox* pointing out the similarity in lack of control between a unit owner and a stockholder if the project was administered by a corporation. *See id.* at 950 (citing White v. Cox, 95 Cal. Rptr. 259, 263 (Ct. App. 1971)). The owner's lack of control was further exemplified in the instant case by his out-of-state residence. *See* Dutcher v. Owens, 647 S.W.2d 948, 949 (Tex. 1983).

36. *See* Dutcher v. Owens, 647 S.W.2d 948, 950 (Tex. 1983) (citing White v. Cox, 95 Cal. Rptr. 259, 262 (Ct. App. 1971)).

37. *See* Dutcher v. Owens, 647 S.W.2d 948, 950 (Tex. 1983). The court pointed out that the Texas Condominium Act, TEX. REV. CIV. STAT. ANN. art. 1301a (Vernon 1980 & Supp. 1982-1983) does not provide for allocation of tort liability. *See* Dutcher v. Owens, 647 S.W.2d 948, 950 (Tex. 1983).

38. *See* Dutcher v. Owens, 647 S.W.2d 948, 950 (Tex. 1983). There was no indication of contrary intent by the legislature, in spite of its refusal to pass House Bills 439 and 2233 which would have allocated liability on a proportional basis. *See id.* at 950. The proposed bills would have reorganized the entire Act, and there is no legislative history to indicate disapproval of the specific section on reallocation of liability. *See id.* at 950.

39. *See id.* at 950-51.

40. *See id.* at 951.

41. *See id.* at 950.

that the Texas Condominium Act provides for proportional allocation of other expenses arising from ownership of the common elements,[42] the court then declared that tort liability should be considered *in pari materia*[43] with provisions dealing with other common expenses, and co-owners should be liable only according to their proportional ownership in the common elements.[44]

The Texas Supreme Court explicitly recognized the proportional allocation of tort liability for injuries originating in the common elements which several sister states recognize implicitly.[45] Because *Dutcher* was a case of first impression[46] with little direct precedent,[47] the court was faced with resolving the conflict between finding a basis on which to hold the owner liable and recognizing that the new form of ownership[48] called for a more equitable[49] allocation of liability.[50] The court, in upholding the trial

42. *See id.* at 950. The court noted that the Act allocated other common expenses and benefits proportionately. *See id.* at 950; TEX. REV. CIV. STAT. ANN. art. 1301a, § 15 (Vernon 1980) (repairs and maintenance for common elements to be shared proportionately); *id.* § 19 (common element insurance beneficiaries according to proportional ownership); *id.* § 20 (common element insurance proceeds paid to owners on pro-rata basis).

43. *See* Dutcher v. Owens, 647 S.W.2d 948, 950 (Tex. 1983). *In pari materia* means on the same subject or matter. *See* Bernhardt v. Long, 209 S.W.2d 112, 118 (Mo. 1948). Statutes pertaining to the same subject or having the same purpose are construed together. *See* Goldman v. State, 277 S.W.2d 217, 222 (Tex. Civ. App.—Amarillo 1954, writ ref'd n.r.e.). Provisions within the same statute are considered *in pari materia*. *See* Dutcher v. Owens, 647 S.W.2d 948, 950 (Tex. 1983).

44. *See* Dutcher v. Owens, 647 S.W.2d 948, 951 (Tex. 1983).

45. *See, e.g.,* ALASKA STAT. § 34.07.260 (1975) (tort judgment for injuries arising in common area limited to association which then assesses members proportionately); MASS. ANN. LAWS ch. 183A, § 13 (Michie/Law. Co-op. 1977) (members pay pro-rata for judgment against association, but cannot be sued directly for torts originating in common elements); WASH. REV. CODE ANN. § 64.32.240 (1966) (only association party to common area tort action, but members pay judgment according to proportionate ownership).

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

47. *See* Scott v. Williams, 607 S.W.2d 267, 269-70 (Tex. Civ. App.—Texarkana 1980, writ ref'd n.r.e.) (owners awarded proportionate share of entire damages to condominium regime); Pratt v. Maryland Farms Condominium Phase 1, 402 A.2d 105, 110 (1979) (owner liable for negligent tree maintenance in common area); *see also* White v. Cox, 95 Cal. Rptr. 259, 262-63 (Ct. App. 1971) (unit owner could sue association for injury received when he fell over sprinkler in common area).

48. *See* Condominium Act, ch. 191, § 26, 1963 Tex. Gen. Laws 512.

49. *See* Owens v. Dutcher, 635 S.W.2d 208, 210 (Tex. App.—Fort Worth 1982), *rev'd,* 647 S.W.2d 948 (Tex. 1983). The court of appeals acknowledged the inequity of holding one co-owner jointly and severally liable, but proceeded to do so, stating lack of precedent to rule otherwise. *See id.* at 211; *cf.* Telephone interview with Wayne Nance, Nance & Associates, San Antonio developer (June 3, 1983) (new ruling on proportional allocation seems to be fair law).

50. *Compare* 4B R. POWELL, LAW OF REAL PROPERTY § 633.25[2] (1981) (liability for unit owners probably joint and several) *and* 1 P. ROHAN & M. RESKIN, CONDOMINIUM LAW

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court's decision, based the owner's responsibility on *vicarious* liability,[51] because this theory provided the means by which an owner could be made to pay for the association's negligence.[52]

A contradiction in the court's logic arose, however, when the court grounded its argument that the owner be liable only for an amount derived from his proportionate ownership in the common elements on his lack of control over the association.[53] Since vicarious liability is predicated on control by the person being held vicariously liable for the negligence of another,[54] the owner's proportionate liability is held to be based at the same time on both control and lack of control.[55] While the contradiction concerning control seems irreconcilable, the court could have bolstered its policy argument[56] by citing to the trend in Texas toward recognizing that various forms of ownership mandate different forms of allocation of responsibility.[57]

Regardless of the problems in logic,[58] the court has made a clear statement on liability of condominium owners for torts arising from the com-

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& PRACTICE § 10A.03 [1] (1982) (unit owners jointly and severally liable) *with* COLO. REV. STAT. § 38-33-109 (1982) (pro-rata ownership in common area determines proportionate liability) *and* IDAHO CODE § 55-1515 (1979) (unit owners liable according to proportionate share in common elements).

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

52. *See id.* at 949 (*only* association found negligent). Vicarious liability holds one party liable for the actions of another. *See* W. PROSSER, LAW OF TORTS § 69, at 458 (4th ed. 1971).

53. *See* Dutcher v. Owens, 647 S.W.2d 948, 951 (Tex. 1983); *cf.* White v. Cox, 95 Cal. Rptr. 259, 262 (Ct. App. 1971) (unit owner did not realistically have any control over association's management of common elements).

54. *See* W. PROSSER, LAW OF TORTS § 69, at 459 (4th ed. 1971).

55. *See* Dutcher v. Owens, 647 S.W.2d 948, 948, 951 (Tex. 1983). Part of the conflict over the basis for liability may be due to confusion between tenancy in common and partnership. *See* 1 R. POWELL, LAW OF REAL PROPERTY § 138 (1981). While a partner may convey the entire property and a tenant in common may convey only his share, confusion was created by the decision that partners held title as tenants in common. *See id.* at 138.

56. *See* Dutcher v. Owens, 647 S.W.2d 948, 950-51 (Tex. 1983).

57. *See, e.g.,* Scott v. Williams, 607 S.W.2d 267, 269-70 (Tex. Civ. App.—Texarkana 1980, writ ref'd n.r.e.) (proportional award for damages to condominium regime according to owner's share); Bullard v. Broadwell, 588 S.W.2d 398, 399 (Tex. Civ. App.—Eastland 1979, writ ref'd n.r.e.) (owner's proportional liabilities based on proportional share of undivided mineral interests); Reynolds v. Haynes, 425 S.W.2d 29, 32 (Tex. Civ. App.—Eastland 1967, writ ref'd n.r.e.) (fire damage repairs to auction barn to be paid by co-owners according to proportional interest).

58. *See* Dutcher v. Owens, 647 S.W.2d 948, 951 (Tex. 1983). An additional problem is the court's irrelevant discussion of statutory construction. *See id.* at 951. The court does not construe provisions within the Act which it considers *in pari materia* with tort liability, but rather uses strict statutory construction as a predicate to a public policy decision stating that the statute is silent as to tort liability. *See id.* at 951. This reasoning detracts from the court's statement of its responsibility for judicial allocation of tort liability in the absence of a statute. *See id.* at 951.

mon elements.[59] This holding is consistent with provisions of the Texas Condominium Act which allocate other expenses and benefits based on the owner's proportionate share in the regime.[60] This definitive statement should result in a benefit both to the individual unit owner and to condominium development in Texas.[61]

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59. *See id.* at 951.

60. *See* TEX. REV. CIV. STAT. ANN. art. 1301a, §§ 15, 19, 20, 21 (Vernon 1980).

61. Telephone interview with Robert Callaway, President of Robert Callaway Corporation (June 16, 1983). The court's definitive statement on liability answers questions posed by unit owners and should definitely be helpful both to developers and owners. *Id.*