

EXHIBIT J

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2019-011921

06/14/2021

HONORABLE DANIEL G. MARTIN

CLERK OF THE COURT
J. Eaton
Deputy

CITY OF PHOENIX

STEPHEN E JACKSON

v.

PULTE HOME CORPORATION INC, et al.

STEPHEN E RICHMAN

ERICK S DURLACH
ANDREW Q EVERROAD
DEE ROLAND GILES
ANDREA R LOGUE
KRISTINA PYWOWARCZUK
RINA K RAI
SHANNON G SPLAINE
KENNETH W WELSH
CELEENA B POMPEO
CHRIS R BANISZEWSKI
TODD ALAN BAXTER
ANDREW J ALVARADO
LEONARD T FINK
PAUL BALLOU
M. RYAN WILLIAMS
JUDGE DANIEL MARTIN

UNDER ADVISEMENT RULING

Pending before the Court are (1) Defendants Pulte Home Company LLC and Anthem Arizona LLC's (the "Pulte Defendants") February 12, 2021 Objection to Plaintiff's New Expert Reports, Plaintiff City of Phoenix's (the "City") March 8, 2021 response, and the Pulte

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Defendants' March 22, 2021 Reply, and (2) Defendants' March 3, 2021 Joint Objection to Plaintiff's Untimely Production of Reports by Madsen, Kneppers & Associates (Supplement No. 1) and M.R. Tanner Construction (Repair Costs), in which the Pulte Defendants join, the City's March 8, 2021 Response, and Defendants' March 22, 2021 Reply, in which the Pulte Defendants join. The Court heard oral argument on April 14, 2021, at which time the matters were taken under advisement. Having considered the positions of the parties, and for the reasons stated herein, the Court grants the Pulte Defendants' motion, and grants Defendants' Joint Objection.

The City initially filed its Complaint on August 23, 2019. Thereafter, the City filed a First Amended Complaint (September 25, 2019) and a Second Amended Complaint (November 21, 2019). By its pleadings, the City alleged that the Defendants were negligent in constructing sidewalks and streets in a residential community near Anthem known as Arroyo Grande.

On May 12, 2020, the Court entered the Scheduling Order for this case. Among other things, that scheduling order required that the City disclose the identity and opinions of its experts by August 31, 2020.

On August 27, 2020, the City disclosed its *Preliminary Civil/Geotechnical Evaluation of City Maintained Asphalt Pavement and Concrete Flatwork* prepared by its expert, Madsen, Knepper & Associates, Inc. ("MKA"). See Exhibit A to Defendants' Joint Objection (the "MKA Report"). Among other things, the MKA Report stated that "additional discovery, potentially including destructive testing," may be required. Defendants objected to any additional testing (and by extension, additional expert opinions based on that testing), as violative of the August 31, 2020 disclosure deadline. On November 12, 2020, the Court conducted a status conference to address the dispute. At the conclusion of that conference, the Court ordered that the City disclose any supplemental expert opinions not later than December 31, 2020. The Court cautioned that *new* opinions may be excluded, and provided Defendants until Friday, February 12, 2021 "to file any objections or other requests for relief as to the supplemental opinions rendered, including relief that may be case dispositive."

On December 30, 2020, the City disclosed MKA's December 29, 2020 Civil/Geotechnical Evaluation of City-Maintained Asphalt Pavement and Concrete Flatwork – Supplement No. 1. See Exhibit B(1) to Defendants' Joint Objection (the "MKA Supplemental Report"). The City also disclosed a two-page "Contract/Proposal" prepared by M.R. Tanner Construction dated December 18, 2020. See Exhibit D to Defendants' Joint Objection (the "M.R. Tanner Proposal"). The M.R. Tanner Proposal (which is referenced in the MKA Supplemental Report) provides a total estimated repair cost of \$6,179,839.53. The present objections followed.¹

¹ On February 9, 2021 (misstated in the briefing as February 9, 2020), the City disclosed additional MKA opinions and an updated proposal from M.R. Tanner, which revised the repair cost to \$7,044,964.80.

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DISCUSSION

The procedural posture of this case, and the context in which the present dispute has been brought before the Court, is particularly important for the resolution of the pending motions. The City filed this lawsuit in August 2019, and has named fifteen separate defendants. Having made serious allegations against these defendants as to the quality of their workmanship, the City bears, and at all times bore, the responsibility to timely apprise the defendants as to the basis for its claims against them. This duty applies particularly to expert testimony, inasmuch as such testimony establishes the particulars of the defendants' alleged negligence. *See* A.R.S. § 12-2602. The City was on notice of the deadlines set forth in the Scheduling Order for this case, including the deadline to disclose the identity and opinions of its experts. That the City produced only a *preliminary* evaluation as of the deadline speaks to a serious failure of its obligations to the defendants.² As the party with the burden of proof, it was incumbent on the City to produce a full and complete expert report. The City failed to do so. Only *after* the disclosure deadline, and *after* the deficiencies in its disclosure were brought out, did the City seek to produce the expert opinions that it should have produced in the first instance.

Having been called out on the deficiencies in its disclosure, the City now seeks to introduce new expert opinions under the guise of supplementing its original report. Such efforts not only violate the Scheduling Order, but impose on the defendants additional, and unwarranted, litigation burdens.

The MKA Supplemental Report

In order to assess the MKA Supplemental Report, it is important first to understand the limitations of the original MKA report. There, MKA made five findings: (1) "The city-maintained asphalt pavement and concrete flatwork have experienced damage that exceeds normal expectations"; (2) "Excessive settlement of soils, within trenches and backfill around utility structures, has occurred and has resulted in widespread damage to the asphalt pavement and concrete flatwork"; (3) "Expansive soils exist in the subgrade and have resulted in some damage to city-maintained property, including the concrete flatwork"; (4) "There are problems with the construction of some elements of the city-maintained property that have resulted in unacceptable damage that is beyond the ordinary realm of maintenance"; and (5) "The repair strategy, yet to be fully defined, should address both the resulting damage and their root cause(s)." MKA Report, at page 10 of 24 through page 13 of 24. The MKA Report does not allocate fault; rather, the work of Pulte and its subcontractors is "implicated", and the subcontractor defendants deemed

² The Report itself states: "It is important to note that this evaluation is preliminary and that there has been very limited discovery to date." MKA Report, at page 1 of 24.

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“potentially responsible”. *Id.* at page 14 of 24 through page 22 of 24. In short, the MKA Report provides, at best, general observations of conditions and a list of the parties potentially responsible for those conditions.

In its Supplemental Report, MKA “documents the results of our recent investigative work and provides our updated recommendations.” December 29, 2020 Letter Report. The “recent investigative work” referenced in the report consisted of 18 test excavations at various locations throughout the subdivision. As Defendants correctly observe, the opinions based on that investigative work cannot fairly be characterized as supplemental, inasmuch as they are based on work performed subsequent to the initial report, and the findings that they claim to supplement are themselves only general observations. Nor can MKA’s assignment of specific percentages of fault to individual Defendants be fairly construed as supplemental opinion, when the original report merely “implicated” the Defendants as “potentially responsible”. Finally, MKA’s opinions as to repair types and the proposed costs for those repairs are not supplemental, as neither repairs nor costs are referenced in the original report (at best, there is a reference to a “repair strategy, yet to be fully defined”). Given these circumstances, the Court agrees with the Defendants that the MKA Supplemental Report is untimely, that to allow the opinions would unfairly prejudice the Defendants, and that the opinions set forth in the report should therefore be precluded.

The M.R. Tanner Proposal

The City urges that the M.R. Tanner Proposal does not run afoul of the expert identity and opinion disclosure deadline because it is not, in fact, expert opinion. But this position is plainly untenable. The issue of specific repair costs – a central and significant issue in this case – is not a proper area for lay witness testimony. The City acknowledged as much in its July 1, 2020 Disclosure of Areas of Expert Testimony. While it is true, as the City contends, that lay witnesses may testify to the fact that costs were incurred, and to the amount of those costs, the determination of those costs in the first instance is a matter requiring specialized knowledge, that is, expert testimony. In this regard, it is particularly telling that the M.R. Tanner Proposal speaks not to costs of repairs already completed, but instead an estimate based on the scope of repairs identified by MKA in its Supplemental Report. *See* MKA Supplemental Report, at page 9 of 26 (“M.R. Tanner was provided with our repair recommendations and made their own assumptions to complete their estimate.”)

The City was obligated to disclose expert opinions as to the costs of proposed repairs not later than August 31, 2020. The City failed to do so, and has unfairly prejudiced the Defendants. The M.R. Tanner Proposal will be precluded.

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DISPOSITION

IT IS ORDERED granting the Pulte Defendants' Objection.

IT IS FURTHER ORDERED granting Defendants' Joint Objection.

IT IS FURTHER ORDERED precluding the City of Phoenix from offering any of the expert opinions set forth in either the MKA Supplemental Report or the M.R. Tanner Proposal.

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MINUTE ENTRY

Pending before the Court is Plaintiff City of Phoenix's (the "City") July 15, 2021 Motion for Reconsideration and/or for Clarification of June 16, 2021 Under Advisement Ruling, Defendants Pulte Home Company LLC and Anthem Arizona LLC's (the "Pulte Defendants") August 13, 2021 Response, and Defendants' August 13, 2021 Joint Opposition. The City and the Pulte Defendants requested oral argument; however, such argument would not assist the Court in resolving the matter at bar. *See* Rule 7.1(d), Ariz. R. Civ. P.

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Having considered the positions of the parties,

IT IS ORDERED denying the City's motion for reconsideration.

IT IS FURTHER ORDERED, with regard to the City's motion for clarification, that the City may not offer lay testimony as to the costs it incurred in repairing the damage it alleges to have been caused by Defendants. As Defendants correctly observe in their Joint Opposition,

a bid cannot support a cost of repair without the underlying repair recommendations. The Court precluded Plaintiff's experts from testifying as to the repair recommendations that were made for the first time in its untimely disclosed "supplemental" report in December 2020. Without that expert opinion, Plaintiff's employee lacks foundation that any bid is based on appropriate repair recommendations.

Joint Opposition, at page 5.