IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

GALLERY COMMUNITY ASSOCIATION, Plaintiff, vs. K. HOVNANIAN AT GALLERY LLC, ET AL., Defendant.	No. CV2020-008714

Phoenix, Arizona
January 13, 2023
9:01 a.m.

BEFORE THE HONORABLE KATHERINE COOPER

TRANSCRIPT OF PROCEEDINGS

Motion Hearing

Proceedings recorded by electronic sound recording; transcript produced by eScribers, LLC.

JOANNA SARGENT

I N D E X

January 13, 2023

APPEARANCES

January 13, 2023

Judge: Katherine Cooper

For the Plaintiff:

Penny Jane Manship

Craig Nuss

Witnesses:

None

For the Defendant Hovnanian:

Louis Horowitz

Dennis Wilenchik

Witnesses:

None

For the Defendants Desert Vista and Renco:

Rina Rai

Witnesses:

None

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(The Honorable Katherine Cooper Presiding)

MOTION HEARING:

THE COURT: -- a motion's set at that time. So given what we got to work with, I think that's going to give us a sufficient amount of time. I've read everything. I'm obviously familiar with the case already. I know you're on -- practically on the eve of a trial date here. So got to get these rulings out to you as quick as I can. Obviously, I think you need, hopefully, that direction in terms of whether or not we're going to trial.

So let's do this. Let me start with -- I want to start with Desert Vista and Renco's motion for summary judgment. I want to take that one up first, and then we'll do the Plaintiff's motion. Okay.

Okay. So Counsel, I'd ask that you really -- I mean, the way I see this issue teed up is whether or not there is sufficient evidence to go to a jury on causation with respect to claims against Desert Vista and Renco. I want you to focus on what was disclosed and what the evidence will show, not including the new opinions and reports that the Court excluded in July. Okay.

You make an alternative argument in your motion that even if those were -- those opinions and reports were

admissible, blah, blah, blah. They are not. So we are really focusing on whether or not there is sufficient evidence of causation without those reports and opinions. So if you could just go that direction, that would be helpful to me.

MS. RAI: Okay. And Your Honor, there's obviously the breach of contract claim and the breach for failure to name as an additional insured. Did you want me to touch on that briefly? I think that will only take a minute or two.

THE COURT: Yes.

MS. RAI: Okay. Relative to the breach of contract there really is no independent breach of contract claim pled here by K. Hov. This is an indemnity case. K. Hov's response admits that. This is a derivative liability case derivative of whatever claims and damages is established by the Plaintiff. It is not an independent breach of contract claim, i.e. you breached your -- the terms of your contract and caused direct damages to K. Hov, except for the failure to name K. Hov as an additional insured on the policies of insurance general liability coverage provided by K -- I'm sorry, Desert Vista and Renco.

Relative to that issue, Judge, as you know, the contract required that my clients name K. Hov as additional insured on their policies of insurance. That was, in fact, done. What happens next in these cases is K. Hov then asked the carrier directly for a defense. That also occurred.

Neither Renco or Desert Vista are privy to those conversations. That is a direct communication between K. Hov and the carrier.

The carrier in this case accepted the obligation and has been funding on behalf of Renco and Desert Vista the defense of K. Hov. Subcontractors can't really afford to pay for the full defense of big builders in this country. And so they obtain policies of insurance on their behalf in order to satisfy that obligation. So the only breach of contract claim viable in the case is breached for failure to name as an AI.

Now, we wouldn't know whether or not the AI was accepted or not. That's something that K. Hov would have known. The fact that that the tenders were made and the requests for defense were made and accepted by the carrier were not known to Desert Vista or Renco until it did its investigation to file the subject motion.

Given that K. Hov filed a claim for breach of contract for failure to name as an AI, we would have expected a disclosure that, in fact, we did meet that contractual obligation. The claim would -- should have been withdrawn, and we should have further been provided with information that Renco and Desert Vista were, in fact, satisfying their obligation to defend K. Hov vis-a-vis the policy of insurance. So I think that that additional claim goes away.

K. Hov has acknowledged the contribution claim and negligence claims are gone, so we can focus now on the

indemnity case and the causation issue that you've wanted us to solely focus on.

In this case, the Court has already acknowledged the necessity of competent expert testimony to establish causation for defects in this case. Plaintiff's obligation in this case is limited to identifying those defects and proving that those defects stem from the construction activities, which were the responsibility of K. Hov. Plaintiff has provided expert reports to that extent.

K. Hov's obligation then is to defend those claims, you know, to the extent that they can, but then to also identify those subcontractors that they think are responsible for those deficiencies. The causation requirement is problematic here because, as the Court may well know from other construction defect cases, there are many different causes for a particularized defect.

It could be a design deficiency. It could be an engineering deficiency. It could be a field change. It could be the work of other subcontractors. It could be partially the fault of one subcontractor and partially the fault of another subcontractor. It could be, as in this case, the subcontractor following K. Hov's standard specifications that are different from the plans and specifications.

I believe on Exhibit 1, paragraph 9 of the subcontract agreements essentially say that if you cover

another -- a subcontractor's work that's deficient, you buy that. My client, for example, Desert Vista, covered the stucco -- covered the framing with their stucco. Will I be at trial with an argument that that Desert Vista's responsible for framing deficiencies? I don't know, because, as the Court was homing in on, none of that type of information or opinion testimony has been disclosed.

Prior to the supplemental report that were precluded by the Court, I had a conversation with K. Hov's attorney, then Holly Davies. And she had just come into the case and had indicated that there were problems with the extra reports that needed to be addressed. By that time, as the Court well knows, all of the expert discovery and investigation by the subcontractors were completed, and therefore the subcontractors would be prejudiced.

So K. Hov itself in trying to supplement those reports implicitly acknowledged the fact that that testimony was necessary. When you ask, Judge, what is disclosed in this case, I'll tell you. Plaintiff has disclosed a laundry list supported by expert testimony of deficiencies that they claim exist at the project. They go from the ground up. It's soil related. There are framing issues. There are stucco issues, window issues. There are roofing issues and more.

Plaintiffs have also disclosed costs of repair and methods of repair for each of those deficiencies. What K. Hov

did is they provided a responsive report to Bert Hal (phonetic), and that responsive report either agreed or disagreed with the existence of those deficiencies. K. Hov's experts also rendered opinions on the method of repairing those deficiencies and the -- and I think it stops there.

What we don't have from Bert Hal and associates is which subcontractor might be responsible for any particular defect alleged by the Plaintiffs in this case. And also, Bert Hal has no independent cost of repair. So there's a damage element that's missing, but the issue is really related to causation.

As the Court knows also, ARS 11 -- I think it was -- or 32-1159.01(a) has come into play, and it subsumes or trumps written indemnification agreements that purport to indemnify the indemnity for their own negligence, which is the case here. So under Arizona's statutory scheme, it is per public policy, the law that my clients could only be responsible to indemnify K. Hov for defects or to the extent that they were negligent.

And so the extent of that negligence is necessary. Were there two sub trades that work together to create a deficiency, is it both a design issue and an issue with installation -- those things. What K. Hov has done in their response is said, well, if you look over here at this report, and you look at this expert over here, and then you go to the Plaintiff and you look at their report, and then you go look at

the contract and you see this contract document, you look at the scope of work, and then you go back and you look at the cost of repair -- we're there, Judge. And my claim is that's exactly what their experts should have done.

They need to explain to the jury how they get there relative to each defect with each subcontractor, and that is devoid and missing from the record in this case in its entirety. After the Court's preclusionary order in this case, the depositions had not been taken. So K. Hov had an additional opportunity to take the depositions of the subcontractors, of the subcontractors' experts. And nothing in those depositions provided any additional support that any particular subcontractor would be responsible.

For example, they weren't -- they didn't get anything from our client that said, hey, if this ends up being a defect, we acknowledge that's our fault. None of that is on the record even after K. Hov was aware that their expert reports were precluded.

So to answer your question candidly, there is -- what the jury won't hear at the time of the trial based on the court's prior ruling is that the -- I'm going to make it up -- that the stucco cracking that occurs at the project for which Plaintiff is claiming, you know, $100,000 for resulted from the negligence of Desert Vista because they improperly mixed the stucco and they improperly cured the stucco. Something of that

nature.

They also don't have -- while the stucco cracks aren't the fault of Desert Vista, they're really the result of soil movement. So we're blaming the soils people, the rough graders or the final graders, landscapers, those people for cracks in the stucco.

So I'm headed into trial now without any opinion from any K. Hov expert or any expert, frankly, in the case as to whether or not those stucco cracks are my fault, or whether those stucco cracks are the fault of a design issue, or whether they're the fault of the graders, or whether they're the fault of K. Hov for not following soils recommendations.

In other words, are they the result of building movement or are they result of faulty installation by the subcontractor at issue? So the long and short of it is there is no such evidence and testimony. And if the Court denies the subject motion for summary judgment, K. Hov -- I'm sorry -- Renco and Desert Vista would be placed in the position to sit at trial and constantly trying to enforce the Court's preclusionary motion while simultaneously defending itself and funding K. Hov's defense as well.

So it's time to sort of clean up the pleadings. But as the Court well knows, because it was contained in your prior ruling, this expert testimony and these opinions are absolutely necessary to carry K. Hov's burden of proof in this case. They

don't have it. The Court's aware that they don't have it. They attempted to get it in. It was precluded. And so there's no just reason for my clients to be at trial when nothing will go to the jury in the way of why or how or even which defects are claimed against Renco or Desert Vista.

THE COURT: All right. Thank you very much. Okay. Who's going to speak for --

MR. WILENCHIK: I will, Your Honor.

THE COURT: (Indiscernible). Okay. All right. You know what? I realized you're, like, involved in all three of these motions, so I will (indiscernible). I can -- go ahead, go ahead. We got plenty of time.

MR. WILENCHIK: Your Honor, to be blunt, this is kind of a ridiculous motion. There is not one case anywhere that I've seen, not one piece of authority cited in anywhere says that our client as third-party plaintiff has to have an expert to establish a claim such as this, which is a derivative claim, a pass-through claim.

So let me be clear on this. If the plaintiff establishes at trial that there is a defect such as what's claimed here, defective installation -- which is the issue here, more specifically -- it is the plaintiff who has the burden to carry the proof of that defect. Otherwise, okay, if I said I didn't (indiscernible).

THE COURT: Yeah. No, no, no, you're fine. You're

fine.

MR. WILENCHIK: The Plaintiff has to prove that. I want to be clear on this. We're not agreeing with the Plaintiff, as you can well imagine, that there are defects, obviously. But if the Plaintiff establishes that there are defects, like in any of these cases, the Plaintiff has to establish what that defect is and what it emanates from. Okay? And all we have to do as the defendant who's denying those allegations in a derivative type claim such as this is pass through that claim to people like her client and say, look, this falls within the scope of your work. That's all we have to do, period. There is nothing anywhere that says that we need an expert to do that, not one case in this country, let alone the state that supports her position here. And she hasn't cited one.

All we have to do is show that the Plaintiff's position and their expert -- and they have produced all that, and it's all in the papers in front of you. Not going to spend all the time going through each and every one. I'll give you couple examples. But it's all there in all of our response the Plaintiff establishes the defect. The Plaintiff says there's faulty stucco installation. We've turned to their subcontract, and we have deposed them, and they have admitted that their work falls within their scope.

Now, everything that she's arguing here is her

defenses, affirmative defenses to that. For example, telling the Court that we have to prove causation is a complete red herring, misnomer, whatever you want to call it. It's wrong. There's no case saying any of that. That's her saying it. We don't have to prove anything other than it falls within the scope of their work under their subcontract.

She can stand up all day long, contrary to what she just told the Court, and defend this case by saying, well, you know what? It isn't our problem. It's somebody else's problem. It's this. It's that. It's K. Hovnanian's fault. Whatever she wants to argue, whatever nonsense she wants to argue she can argue to a jury and try to shift the blame from her client who did that work and is responsible because it's defectively found and argue not our problem, not our fault.

That's fine. That's what trials are for. And she can try to do that at trial, although she hasn't done a good job of it yet. But all she's doing is raising a specter of nothing. She's trying to say, well, you know, they need to prove causation because there's lots of different causes, Your Honor. That's irrelevant. The Plaintiff needs to prove the damage. The Plaintiff needs to prove the defect, not us. All we're saying is if that's true, ladies and gentlemen of the jury, these guys, her clients, are the ones that did it, period.

Now, she can get up and say, oh, we didn't do it, and

it's somebody else, and the rabbit ate this and that, and all the rest of the stuff. It doesn't matter. That's her affirmative claims, her affirmative defenses. There's not one case anywhere that supports that an expert testimony is required for us to derivatively pass through the claim of the Plaintiff and say our subcontractor under their contract did this.

And she raises a statute, for example, that has absolutely nothing to do with this, saying that Arizona law is clear that you can only be indemnified -- you know, you can't be indemnified through your own negligence. We don't disagree with that. That's, you know, construction law 101. We get that. I don't know why she even raises it. What does that have to do with anything? That doesn't require an expert. That requires a contract and a scope of work. And if the scope of work fits what the Plaintiff is claiming a defect -- as such is exactly the case is here with the stucco and the roofing -- then they got a problem, and they got to deal with that problem, not us. And that's why we have indemnification.

Now, let me give you this quickly as an example of what I'm talking about, because there's lot of different possibilities. But for example, let's take the issue regarding allegedly defective WRB. Desert Vista provided it, and Desert Vista installed it. We've established that in the papers we've had. According to Desert Vista's own representative's

testimony, contrary to what you just told the Court, that none of these depositions meant anything. That's in K. Hov's statement of fact -- separate statement of facts in paragraph 38. Also, the contract which Stevie (phonetic) produced, which is K. Hov's SSOF37.

And its expert agrees this is typically done by the plasterer. And that's in Statement of Facts 41. If the Plaintiff -- again, I repeat -- is correct regarding its claims that the WRB was improperly installed, the evidence shows that Desert Vista was the party that installed it. We make a prima facie case. That's all we need to do. That's perfectly sufficient for our jury. We can come back again and argue otherwise, whatever her defenses. I don't care what they are right now. It doesn't matter. She can have 20 of them. It doesn't matter to me as K. Hovnanian passing this claim on to the person who did the work. That's all we have to show, that they did the work, not causation.

And we don't have to rule out -- this is a crazy claim that she's making. We don't have to rule out all possibilities that she raises. You know, if she sat here and said it could be this, it could be that, it could be this, it could be that -- great, great. Tell that to the jury, and I'm happy for you.

I'm not trying to say you did anything wrong. I'm saying the Plaintiff's claiming this is wrong, and now it's

your problem to explain it. So you tell the jury it could be this, this, and the other thing. That's what you're there for as a lawyer. That's why you're at trial, to explain all of that to the jury and to pass off your responsibility on to whomever else you think. But who is that? Who is that? I don't know who that is. She hasn't told me or you. All she says is it could be this, and it could be that, and there's this possibility, and that possibility, and everything else.

That's not evidence. If anybody's required to produce evidence, it's her, not me. She hasn't done anything except it could be this and it could be that. Well, great. Those are affirmative defenses. If she can prove that, I'm happy for her, but she hasn't done anything to prove any of that. It's just speculative possibilities and asking me to disprove all of them. That's not our burden to do at all in a derivative claim, and that's all this is. It's not my claim. It's the Plaintiff's claim.

And I'm saying, great. I don't really care. I'm a builder. And guess what? All I do is schedule people to do work, subcontractors like her clients. It's their work that's at issue, not ours. She hasn't produced a case saying we improperly supervised anything. And if she even did, that's a fact issue for the jury.

Now, another quick example regarding the foam EPS board. These are the big-ticket items. Desert Vista's

representative testified that Desert Vista supplied and installed the EPS board -- you know, after listening to her telling us there's no evidence of it. That's in our statement of facts at 38. Desert Vista's expert agrees that he was informed by Desert Vista's principal about the actual work. He was told, the expert, by Desert Vista's principal, her client, that Desert Vista understood what was required, including 12 inch on center grooves in the foam and that Desert Vista ordered and installed that product. That's paragraph 19 and paragraph 40 of our SSOF.

Now, if Plaintiff can prove again its claim that this EPS board -- just as I brought up on the other example -- was installed improperly -- and they claim they're going to do that -- and it lacked these proper grooves, my client isn't responsible for that. I don't need an expert to further bolster the Plaintiff's claim. The evidence then clearly shows that it fell under Desert Vista's scope and it was the party that supplied that board and installed it. Who else would be responsible? But again, that's a prima facie case.

If she wants to defend that case, go to it. I'm happy for her. But has nothing to do with me or my client and has nothing to do with proving causation by excluding all other possibilities. That's her affirmative defense, and those are facts that she needs to produce and establish and argue and present to a jury as her factual disputes and her defenses.

I don't know what else I can say about this wasteful motion, quite frankly. What they're trying to do is obviously -- hopefully to you obvious -- capitalize on your ruling, but your ruling doesn't affect us in reality.

Now, let me just say this. It would be nice, and we could produce experts. Let's say your ruling didn't exist. We could do that, certainly, and many people do that, to be clear, but we don't have to do that. There's no case that says we're burdened by having to produce an expert, to pass on the Plaintiff's claim, to show that it's under their scope of work. That's all we need to do. That's a prima facie case.

What else could we possibly need to produce? Evidence to rebut possible arguments that she's going to raise as affirmative defenses? No. She can raise those. And if she's successful in raising those and I can't rebut them, then more power to her. But it's not a part of my affirmative case to exclude all possibilities of somebody else maybe, maybe speculatively and conjecturally at fault. That's it. It's really that simple. It's a fact issue for the jury, and it's a waste of a motion, frankly, and has no merit whatsoever.

THE COURT: All right. Thank you.

Counsel, back to you.

MS. RAI: Yes, Your Honor. So as far as authority goes, 12-2602 statute requires before you file a claim against a contractor, that you have an affidavit that -- from an

engineer or an architect that says that you have proper bases to pursue that claim against that contractor. That's not limited to the Plaintiff --

THE COURT: Wasn't that for direct claims? I'm sorry to interrupt you, Counsel. This is always the problem with virtual. I wind up talking --

MS. RAI: Oh, that's --

THE COURT: -- over people, so I apologize.

MS. RAI: That's okay.

THE COURT: Isn't that applicable in direct claim situation?

MS. RAI: No, it is not. It's applicable in any situation where one party is suing a contractor for deficient work and requesting damages thereby. In addition to that, Judge, 32-1159.01, the new statutory scheme, was -- it came to be to cure the issue that a developer can't simply say, oh, it's stucco. You did the stucco. It's your fault. Oh, you know, because our indemnity agreements in the past and the one that's at issue in the contract here essentially says all we have to do is prove that this defect relates to your work or rises out of your work, not that you necessarily caused the defective condition to exist.

And that's the way we had been litigating these cases for years in this town and in other jurisdictions is the developers were saying, like Dennis is now, all that I have to

do is show that this rises out of or relates to your work because that's what my contract says. The statute comes in 32-1159.01 and says, no, that is patently unfair, and we are going to require that if you're going to ask a subcontractor to repay you for damages that you may owe a plaintiff or owner in a case, that you demonstrate the extent of their negligence. That's causation. That's fault. That's the law in Arizona.

Woodward v. Chirco is a longstanding Arizona case that requires expert testimony in order to support a claim, a deficient work of the subcontractor. In this case, for example, Judge, the windows. There's a claim that the windows were not installed per the plans and specifications in the case or the flashing around the windows, which arguably relates to or arises out of my client's work.

But in this case, K. Hov has standard specifications they put out as well that tells contractors how to do the work and says it trumps the plans. We performed our work pursuant to the standard specifications. So again, doesn't K. Hov have an obligation to say you were obligated to follow the plans, or you're still responsible for some reason?

The other issues -- for example, there's issues with slope, slope issues at parapet walls. Slope can be created in framing. Slope can be created by the stucco itself. Slope can be created by the work of the roofer. On the roofs, the slope can also be created by the framer. So if there's a lack of

slope, that's all that Plaintiff has to establish is there -- these don't slope -- the roofs don't slop to the drains, and that's a construction deficiency.

It is then K. Hov's obligation to say we agree or disagree with that contention, but in the event we agree or in the event a jury agrees, the party that was responsible for creating that slope was the framer. And so we want to be indemnified for that issue from the framer. Conversely, they may say that slope was supposed to be established by the roofing contractor in the foam that it applied. And so if there's a problem with that, then we want to go after the roofer for that. There may be a both you guys did it wrong. There might be a defense that I say, well, wait a minute. I followed the plans and specifications, so I don't think I'm at fault. I think the plans were deficient.

And so it is absolutely required that K. Hov have a burden of proof. If there's a statute that says I only have to indemnify you to the extent of my negligence, then you have to come forward with evidence demonstrating what the extent of my negligence is and why. There's 30, 40 subcontractors involved in the production of these types of projects, and so it is the party who's seeking to be indemnified's obligation to identify which of those deficiencies they are seeking indemnity from from a particular subcontractor.

Again, as I sit here today, I don't know if I am

going to be attempted to be held responsible for framing deficiencies because I covered it up with my work and because I have a contract that says I buy that if I do. And someone has to tell me, did I cover it up and why. So this idea -- I mean, I've been doing this for 27 years and most of it in Arizona, and I can't think of a single case where a developer has taken the position that they don't have a burden of proof to establish fault on the part of a subcontractor. That's even before the new statute came out.

So the idea that K. Hov did not need expert testimony to even identify which defects they're claiming against my client is astounding to me, astounding to me. The fact that the dry wall -- the stucco was cracked, then they say they installed the stucco. I've met my burden. But we all know that in case after case after case after case after case -- I mean, every Pulte (phonetic) case in town the claim is that the stucco's cracking because the building is moving because of soils issues, because of framing issues, those types of things. None of that's on the record. If it was, it would've been put in front of you in response to these motions.

And so to go to trial and to have K. Hov say all we have to do is show they did the work, that's enough to establish causation for the deficiency and causation for the defect is, I think, a little too rich. There's been testimony in this case that K. Hov (indiscernible) a lot of field

changes. Don't do it this way. Do it that way. Well, if I know that they're blaming me for a deficiency, then I would've had the opportunity with my experts to investigate whether that was the result of a field change. So it's not my fault. It's K. Hov's fault. We wouldn't --

THE COURT: Okay, okay.

MS. RAI: -- have that opportunity if the Court acknowledged that.

THE COURT: All right. I think I do -- I think I understand your position on it. Let's do this. Let me move -- I want to move on to the Plaintiff's motions, and then we'll see what we have left on time. We need to --

MS. RAI: Okay.

THE COURT: -- circle back to (indiscernible).

MS. RAI: Sure.

THE COURT: Okay. So let's talk about (indiscernible) motions, actually. There we go. Yes, K. Hov's motions. Okay. I don't care really what order you want to take them in. Let's just --

MR. WILENCHIK: Okay.

THE COURT: -- do it.

MR. WILENCHIK: Well, I'd like to address the main motion, I would call it. And Mr. Horowitz can address the other one if that suits the Court.

THE COURT: Sure.

MR. WILENCHIK: Thank you. This is a serious motion that is supported by authority as opposed to what counsel avows and I'll avow.

THE COURT: This the one about the unsupported defect? (Indiscernible) the one?

MR. WILENCHIK: No. This is the one that says there's no cause of action here at all by the Plaintiff --

THE COURT: Okay.

MR. WILENCHIK: -- for anything. And let me just start by saying I'm not going to go into my 45 years of experience to argue a summary judgment motion. But I will tell you this. I brought this motion before Judge Kemp right at the start of this case, and I argued it. And Ms. Manship argued her response. The judge at that time, to my great disappointment, basically punted and said that he wanted to hear -- have further discovery or allow them -- because they asked for it -- to have further discover to occur. Originally, I think he said 90 days. I could be wrong.

THE COURT: Was it on a motion to dismiss, then?

MR. WILENCHIK: What's that?

THE COURT: What it on a motion to dismiss?

MR. WILENCHIK: Yeah.

THE COURT: Okay. Well, that really calms me down a little bit because I was --

MR. WILENCHIK: Yeah.

THE COURT: -- horrified that this was being brought now.

MR. WILENCHIK: Yes.

THE COURT: But it wasn't brought -- it's not for the first time being brought now. Okay, got it.

MR. WILENCHIK: Right. It was brought right at the outset.

THE COURT: Okay.

MR. WILENCHIK: It was right at the outset. It was basically saying there are no issues of fact other than the complaint itself and what they're claiming. And that's still -- the reason I bring that up is that's still the case today. That's why I said I was disappointed in the ruling. I thought I was punting it because out of all the respect to Judge Kemp. Had nothing to do with any factual dispute. Nevertheless, they convinced him it did. And now, instead of the 90 days coming back, it got extended and extended and extended because discovery went on and on and on.

And now we're here on the eve of trial arguing it again. And I agree with you; it's very disappointing. But having said that, let me just get into the heart of it now and why I believe this case has to be dismissed, which I guess moots the argument we just had which probably I should've interrupted, so we should probably argue this first, but that's --

THE COURT: Okay.

MR. WILENCHIK: -- neither here nor there.

First of all, let's start with the implied warranty of workmanship and habitability. This is an HOA, just a plain vanilla HOA. And it is making claims here to being with, frankly -- I need to say at the outset to be clear -- that don't even involve common area elements. Okay? They don't have ownership of the areas that they're claiming defects in. They're owned by the owners on lots -- and I'll come back to this -- that they don't even own.

They can't do that under Arizona law. They don't have any right to be suing to begin with over individual owners' complaints. And they usurped those complaints unto themselves and basically argue that they have a right to argue and to complain about anything they want that has anything to do with anyone on the association or that's a member. That's ridiculous. That's not the law.

I'll come back to that, but the point is never anywhere in the history of Arizona am I aware -- having done this for 45 years -- am I aware of any case that has allowed an HOA the right to sue for the implied warranty of habitability and fitness against a declarant -- which is K. Hovnanian at Gallery LLC -- at all.

Now, there are other jurisdictions -- and I know counsel, with due respect to counsel, is from another

jurisdiction, and maybe that was the problem here. But this is not Colorado. It's not California. It's not other states. It's Arizona. And Arizona is very clear, very clear in the distinction between HOAs. There are condominium association HOAs -- which I want to bring up right at the outset because this is important -- that do have the right to bring claims on behalf of individual owners because, again, there are no lots, per se. There are common laws and so forth in condominiums which make them unique.

For example, the only case that they've cited to is a case that I actually was the attorney for the developer originally. So I'm very familiar with it. It's the Lofts at Fillmore case. I can tell you that that was a condominium association down here on Fillmore near downtown that was a conversion from an apartment complex. And in that case, you will not find anything in that case, not one word in that case, I'll avow to you, that in any way, shape, or form gives even that association, a condominium association -- the distinction will become evident in a minute. Even in that case, there's nothing discussing the right of an association to bring an implied warranty claim at all.

The only reason plaintiffs like this point to the case is because on its face, it appears to be an HOA suing a builder/vendor. But that case -- I can tell you from personal knowledge -- no one ever raised the issue back then of whether

or not an HOA was or had that right. It's not one issue that was ever raised in the case. It's not in the case. There isn't one word in the case that says -- that implied warranty rights. Everybody just assumed it, and here's why.

If you look at that case, it's a condominium association. And under the condominium statutes and statutory scheme 33-1201 et seq., you're going to see that it's quite different than the standard HOA that we're talking about here under 33-1801. Two separate statutory schemes. In a condominium association, again, the statute provides the right of the association for reasons I just discussed -- I'm keeping this brief. But for reasons I just discussed, the condominium association by statute and by fact because of the way the regime is set up has that right.

And particularly in Lofts, if you'll look at it, there's a specific discussion in there that ends this controversy because it says that the association in that case was formed after -- afterwards. That is when these issues arose. It wasn't like this case where there's an HOA from the outset that is a separate, independent company and upon turnover to the homeowners, at that point, you know, received by quitclaim deed the common area elements.

In that case, it specifically says that the HOAs form afterwards, and the owners -- although they don't have to under the condominium statute -- in that case, you'll see

specifically essentially signed over their rights individually to the HOA. Now, that's very important, but they didn't discuss that, but it's in the case. The case has absolutely no precedential value as to our discussion here about homeowner association under 12-1801 et seq. as opposed to condominium associations. And furthermore, where individual owners as in Lofts cede over for purposes of filing a lawsuit their individual rights.

That didn't happen here. It hasn't happened here. And even under the condominium statute, they're required to notify owners and get their permission and approval before lawsuits are brought under that statutory scheme because they have that right. Although many CCNRs, I'll avow, also now contain a provision where they require owners where lawsuits are brought to approve by, you know, two-thirds majority if the association wants to bring any kind of lawsuit. But it has nothing to do with this case.

There's not one other case in Arizona that I'm familiar with and I haven't seen cited that gives the right of implied warranty to this HOA. And the history of the implied warranty -- and again, I won't take all your time here. I'm going to try to keep this brief. But let me just quickly say that the Court first recognized limited right in Colombia Western v. Vela. It proceeded and was defined further in Richards v. Powercraft, which also talked about the right being

extended, but only to subsequent homebuyers who did not have notice of the defect.

Now, an association, I would argue, under a quitclaim deed does have notice of any defective construction because they are not required to accept that quitclaim deed. They do so voluntarily, and they do so upon inspection, and they do so to cover their own butt with experts looking at all of the conditions before they would accept the quitclaim did. Why? This quitclaim deed, as you all know, is different than a warranty. It's the exact opposite of a warranty.

And so they understand when they take that quitclaim deed from the declarant, the declarant is not necessarily the builder. The declarant has no contact with them. The declarant represents nothing to them in the CCNRs whatsoever about any conditions, except here's a quitclaim deed. You can either take it or not take it. That's it. And if you take it, there's no other consideration involved. It's on you.

And here's what's really galling. The Plaintiff in this case actually says -- incredibly says, well, you know what, you guys, K. Hovnanian, have admitted all that, so shame on you. You've admitted that you're responsible. Nonsense, absolute nonsense. And it's galling. They cite to paragraph -- primarily to paragraph 5 of their complaint and answer and also testimony at a deposition. And I want to quickly cover that.

If anything, we've admitted just the opposite of what they mislead the Court and contended we've admitted. Because paragraph 5 basically in their complaint says that the declaration requires the Association to repair, replace, or maintain the common elements, including but not limited to their property and the common area as those terms are defined in the declaration. And we said, yes, correct, you are required to do it. You are required to make change and repair, not us. We never admitted anywhere that we're responsible.

Similarly, they cite to a deposition of one of our representatives. And I'm going to -- Mr. Harvey (phonetic) at page 108 of this deposition. Now, listen to this. Notwithstanding the question is the foregoing. To the contrary -- they're quoting the same thing -- in no event shall an owner apply from -- they're quoting from the CCNRs. The paragraph, I think it's 1.8, but I could be wrong. Any paint to the exterior of the dwelling unit, including without limitation window or other trim, blah, blah, blah, or other exterior features, or replace the exterior masonry, or other surface installed by declarant.

In order to ensure a uniform appearance of the property, the Association will from time to time, as it may determine appropriate -- as it may determine appropriate -- paint -- it will paint the exterior and repair, maintain, and replace the exterior walls, stucco, facade, roof, or other

surfaces. "Do you see that" was asked of our witness. Yes, I do. Question at line 14: So does this section give the Association the right and obligation to maintain the exterior of the building of the project? Answer: Yes. The Association has that obligation, and somehow they've twisted that -- amazingly, to me -- in to saying, well, you guys have agreed with us that you have the obligation.

Now, how they did that, I don't know what legerdemain allowed them to do that, but they did it. And I'm here to call it out because it's not true. We didn't admit any such obligation on our part. We admitted only an obligation on their part. Nothing anywhere in the CCNRs -- and I've gone back and double-checked even those provisions -- says anything about that creating an implied warranty or even hints at it creating an implied warranty.

And it can't because the right of implied warranty under all those Arizona cases from Colombia through Richards, and even through Zambrano that just came out -- none of those cases have ever extended this warranty right, which is a creature of law created by the Supreme Court originally. It is not a contract claim, per se. It's considered contractual in nature according to the courts for purposes of attorneys' fees, but it's not, the warranty itself, a contract with anyone.

Now, they point to the CCNR and say, well, CCNRs are contract. So what? What is it under the CCNRs that gives them

a contract right -- because they also brought a breach of contract and a breach of a duty of good faith and fair dealing under a breach of contract right -- where anywhere in the contract have they pointed to any place, even assuming arguendo that the CCNRs are a contract for purposes our discussion here so as to not just waste the Court's time.

Where is there any provision that they cited to anywhere that amounts to a contractual obligation of the declarant when they give the quitclaim deed to back it up with an implied warranty right pursuant to the Arizona case law that is limited strictly to homebuyers -- strictly to homebuyers? Never been extended beyond homebuyers that I'm aware of, and certainly hasn't been and it can't be argued to any -- under any case extended to an HOA such as this one.

So not only are they making a claim that doesn't even involve common areas under definitions of the CCNRs -- including paragraph 1.25, which defines what a lot is. This is all defects on the lots. It is not defects in common areas. They don't own these units. They don't own the lots. They don't own the areas where they claim the major defects exist such as we're fighting between us, between the subcontractor and ourselves here today.

It's all moot. All of that is not in the common area. They usurp the claims of owners, which they do in other states. And that's why I think they didn't understand that

here. And Arizona is not other states. There are other states that allow for that, but we don't. So I'd like to know what case they rely upon other than Lofts, which I've already talked about. And I can't find any citation to any Arizona case that backs up or supports either an implied warranty right or any provision in the CCNRs that supports any contractual obligation other than their own that they understood undertook by acceptance of quitclaim and by paragraphs I believe 1.8 -- let me double-check that just to be sure. I'm sorry. 8.17 and -- is the paragraph. I had it transposed, and I apologized. I thought that.

And that's the paragraph that basically says that as they may determine appropriate, they can paint exterior, et cetera, et cetera, and that basically that's their responsibility, as was quoted in the deposition of our client, who agreed with them.

That's pretty much our argument here today. There's no other cause of action, really. Let me just make sure I've covered them all. Covering this broad, sweeping argument, the breach of contract, finally, I just argue -- and the duty of good faith and fair dealing, which is -- you know, arises out of a breached contract. You have to have a contract. And there is contract for purposes our argument today; it just doesn't provide that we have to do anything under it by providing any warranties, and it says just the opposite. I did

touch on this, but I'll just point out, and I'll save the rest of my remarks for my reply --

THE COURT: Okay.

MR. WILENCHIK: -- that they accepted these areas, and they weren't tricked or fooled into doing so. They knew it was under a quitclaim deed. Thanks, Judge.

THE COURT: Okay, thank you.

Counsel?

MS. MANSHIP: Your Honor, I want to start by clarifying something. The prior motion that Mr. Wilenchik was referring to was, in fact, a motion for summary judgment, not a motion to dismiss because they had already answered the complaint.

MR. WILENCHIK: That may be true, Your Honor. She may be right on that.

MS. MANSHIP: And also, the motion for summary judgment itself wasn't argued. I brought a motion to allow additional discovery because, at the beginning of the case, there were two additional defendants in the case, and part of their motion for summary judgment was that these two other entities had nothing at all to do with the sale or construction of the Gallery project. And so the -- part of the basis for my request for discovery was no discovery had happened yet, and you know, whether or not these two entities had anything to do with the construction or sale of the unit was an issue that no

discovery had been provided on yet, and --

MR. WILENCHIK: We argued all of this, Your Honor.

MS. MANSHIP: Yes. But I'm just explaining the actual motion for summary judgment was not argued. The motion where I requested more discovery was what was argued. There may have been some things that were discussed in the summary judgment that came up in that hearing, but that was the basis of why the court had a hearing and allowed additional time for discovery. Depositions happened, you know, and then new counsel came on, and there were some negotiations, and those two parties were dismissed.

THE COURT: Okay.

MS. MANSHIP: So the motion was withdrawn because that was the agreement. We would dismiss those defendants, and they would withdraw the motion. So that's what happened to that original motion for summary judgment. Okay. And so then they refiled this motion at this time.

THE COURT: Okay. This is all prior to your time though, right?

MS. MANSHIP: No. Mr. Wilenchik was the only counsel on at the time that the original motion for summary judgment was brought on.

THE COURT: Okay.

MS. MANSHIP: Mr. Horowitz' firm came on --

MR. WILENCHIK: Yeah, I might not agree with all

that.

MS. MANSHIP: Okay.

MR. WILENCHIK: The Court did give them the time and overruled my very same points for summary judgment that I argued then.

THE COURT: It's fine.

MR. WILENCHIK: Yeah, I'm just saying that --

THE COURT: I'm not going to --

MR. WILENCHIK: -- this was brought up timely.

THE COURT: Nobody's saying I can't hear the motion today --

MS. MANSHIP: No, no.

THE COURT: -- because it's already been ruled on.

MS. MANSHIP: No.

THE COURT: It has not been ruled on.

MR. WILENCHIK: Was never ruled on.

THE COURT: That's all I care about.

MS. MANSHIP: Correct.

MR. WILENCHIK: Right. I just wanted you to know we did bring up the issue though.

THE COURT: Okay.

MS. MANSHIP: Okay. I quickly want to touch on something that he said towards the end of his argument was that there's this quitclaim deed, and the Association had the opportunity to do an inspection of the property and decide

whether or not to accept common areas. That is actually not the case, and in our response to their separate statement of facts, we indicate in response to statement of fact J -- or sorry, our statement of fact J that it was -- the Association had to do -- it was automatically deemed that the common areas were accepted by the Association. They did not have a choice in whether or not to accept the common areas. So that is not true that the Association had the ability to have an inspection first and decide whether or not there were defects. It was deemed accepted by the Association.

And I'm not familiar with the exact dates, but I believe that even happened before homeowners were on the board, and it was while the developer was still in control of the Association. Also, there are no facts that they have regarding their argument that the Association had the ability to decide and have experts investigate that. So again, that's in separate statement J.

THE COURT: Well, you moved based on the Powercraft and Lofts case.

MS. MANSHIP: So our --

THE COURT: (Indiscernible) apply.

MS. MANSHIP: Okay. So this is essentially a standing argument in whether or not this type of an association has standing to assert the breach of implied warranty claim. Of course, there is no case that says they cannot. In this

instance, the Association is the owner of common areas that have defects that are alleged in the case. In their motion for this -- in this motion, they do not raise the argument or provide any evidence that there are no defects in the common areas. That is not something in their separate statement of facts for this motion.

If you go to the other motion, where there is evidence about what are all the defects and the cost of repair, there are repairs for the pool cabana, which the pool cabana is in an area that is the common area. There are defects at the stucco that covers staircases -- staircase walls that are in between the two buildings. There's four buildings total. Each of those two buildings has staircases that have a stucco wall that has a large crack in it that K. Hov tried to repair during the claim process. It's cracked again. That is on Association property in the common area.

So there are, in fact, defects. Again, they don't raise that evidence in this motion, but there is evidence of that in the response and in the motion for extrapolation or regarding extrapolation. So clearly, the Association as the owner of common areas that has defects in them are allowed to assert a breach of implied warranty against the builder and the vendor and it's the declarant, K. Hovnanian at Gallery, who conveyed title to the Association for those common areas.

Standing is about having a -- a plaintiff has to show

that they have a distinct and palpable injury, and that that injury is fairly traceable to the defendant's conduct, and that they're likely to be redressed by the recovery in the case. In this case -- I don't know about other associations for townhomes that may be involved in other cases where they need to get an assignment. But in this case, the Association has the obligation legally under the CCNRs to maintain and repair the building exteriors that are at issue in this case.

The homeowners cannot even paint the outsides of these buildings. The Association had the legal obligation to do that. That's our argument in our response. We didn't say that K. Hovnanian had the maintenance and repair responsibility at this time. It is the Association who has that ability or actually that legal obligation.

So by the fact that there are defects on these exteriors of the building that the Association is responsible to repair, they have suffered a distinct and palpable injury traceable to the Defendant's conduct of creating those defects. And that injury's likely to be redressed by awarding a cost of repairs to the Association. Again, the entity with the maintenance and repair obligation (indiscernible).

THE COURT: How does the maintenance and repair obligation translate to or get you to having the right to bring the lawsuit on behalf of the homeowner who owns that unit?

MS. MANSHIP: So standing means you have to suffer a

distinct and palpable injury.

THE COURT: They didn't really suffer the injury. They have an obligation to fix the injury, the Association does, or to maintain and repair. I get that, but it's not really their injury.

MS. MANSHIP: The Association is the one that will have to pay for that. I understand they'll have to increase assessments in order to raise that money, but the Association will have to be the one that pays for those damages.

THE COURT: I know, but it's still not theirs. It's not their property that was damaged. They just have an obligation to maintain and repair it, at least what you're saying with respect to those exteriors. I mean, that's what I'm -- that's my understanding of the basic, you know, plaintiff 101.

MS. MANSHIP: Your Honor, I would like to -- I have other arguments regarding --

THE COURT: Go ahead.

MS. MANSHIP: -- the issue.

THE COURT: No, go ahead.

MS. MANSHIP: I understand Your Honor's position. So with respect to Lofts and Richard v. Powercraft, there's a paragraph which has discussed the public policy reasons behind extending this breach of implied warranty to people that aren't in privity, which is essentially the position that our

association has been as well.

So in their motion, defendants have argued that the implied warranty arises out of the purchase agreement. Well, that's actually not the case. The implied warranty actually arises out of the construction. So I would like to quote from Lofts. It says the implied warranty arises from the construction of a new home, and the Lofts court actually emphasized the word "construction". And it arises from the construction whether or not the builder is also a vendor of the home.

And so in that case, they extended the implied warranty to a builder who is not in privity of contract with any homeowners. And so regardless of the fact that an implied warranty is implied in every purchase agreement, they still made the vendor responsible for that implied warranty as well, an entity who's not a party to that contract. And in addition, Richard v. Powercraft extended the implied warranty to a subsequent purchaser, who again is not a party to the original purchase agreement.

There's a recent case called Zambrano which also discussed the public policy reasons behind the breach of implied warranty and acknowledged that these other cases have extended it to a builder who's not a vendor and subsequent purchasers. And Zambrano found that it was a matter of common law, the breach of implied warranty.

So going on to the policy reasons that Fillmore -- Lofts at Fillmore and Zambrano talked about. It's to protect innocent purchasers and to hold builders accountable. In this case, if you have homeowners who are not allowed to do the repairs themselves; they're not able to protect their interests. The Association is able to protect their interests because the Association has that maintenance responsibility. So allowing the Association to bring this claim for the repairs it has the maintenance responsibility for protects the homeowners, and it holds the builder responsible for their faulty work.

THE COURT: But couldn't one of these homeowners have filed this lawsuit against K. Hov?

MS. MANSHIP: That homeowner only has the ability to bring their claim for their one unit. There's all 18 --

THE COURT: Right, but they --

MS. MANSHIP: -- units and all four buildings.

THE COURT: -- could have done -- they could have.

MS. MANSHIP: One homeowner could have brought a claim for their one unit, but all of the buildings need to be fixed, and that homeowner can't fix their building. They can't fix the outside of their units. The Association is the one that has to do it.

So having that -- having one homeowner in the case bring in a claim against K. Hovnanian will not result in that

homeowner's building being fixed because the homeowner cannot actually do it. He would have to have all 18 homeowners do it, and then they would have to give the money to their Association to do it. I just want to kind of -- if you have another question --

THE COURT: No, that's okay.

MS. MANSHIP: Okay.

THE COURT: That's okay.

MS. MANSHIP: Okay.

THE COURT: You were talking about the policy behind --

MS. MANSHIP: Yeah. I was just looking in my notes again to see if I'd covered all the ones already. So I'd also like to talk about Zambrano again, who also extensively talked about the public policy reasons. Zambrano was a case where the issue was whether or not in a purchase agreement or at all in a warranty or anywhere could a vendor, seller of new home just claim implied warranties that are implied into their contracts.

And after an extensive analysis of the public policy reasons behind enforcing contract versus the public policy reasons for allowing an implied warranty of workmanship inhabitability, the court concluded the public policy reasons for implying that breach of warranty outweigh the public policy reasons for enforcing contract with respect to new home construction.

And part of the reason that the Zambrano court gave was they expressed concern that if we allow these waivers of implied warranties, all builders are going to start putting these waivers in their contract, and there basically will be no breach of implied warranty claims anymore. And the court actually said, you're essentially eliminating that implied warranty claim, which would gut a homebuyer's ability to hold a builder responsible for defects, increase the likelihood that homes will remain unrepaired, which is detrimental to homebuyers, their neighbors, and the public generally.

And the court in Zambrano also noted that the Purchaser Dwelling Act permits a homebuyer to sue a builder vendor for construction defects provided they follow the claim process. But the Purchaser Dwelling Act does not provide a cause of action for those homeowners, and the -- I'm quoting from Zambrano. Without the ability to enforce implied warranty of workmanship and habitability, there is no legal cause of action to remedy these defects.

Now, while Zambrano dealt with individual homeowners and the Purchaser Dwelling Act, there is also a homeowner's association dwelling act that the legislator has also recognized that homeowner associations like our association, a planned community association, can bring construction defect claims against builders. It's codified in Section 33-2001. That's the homeowners' association dwelling action. And it

defines a homeowner's association as an association as defined in Section 33-1202, which is the Condominium Act, or 33-1802. 33-1802 relates to associations for planned communities, which is what this association is.

So the homeowners' association dwelling act specifically says what a association such as Gallery has to do to bring a construction defect claim. It recognizes they have the power to bring a construction defect claim. And we followed that process. You know, both sides engaged in that process prior to doing this lawsuit.

So just as the Zambrano court recognized that the Purchaser Dwelling Act does not give a cause of action to homeowners specifically and you need the breach of implied warranty to have a construction defect claim as a homeowner, the homeowners' association dwelling act does not give a specific right of action to a planned community association. But by recognizing that they have the ability to bring such a construction defect case must find that that means they have a breach of implied warranty claim.

If you follow Mr. Wilenchik's argument to its conclusion, his opinion or his argument is that a planned community association does not have the ability to bring a breach of implied warranty claim on its own. It doesn't have a breach of contract claim because there never are contracts between the association and the developer. And so you know,

negligence claims really are very weak for construction defect cases because you need resulting damage to other property, and that just rarely happens.

So basically, following Mr. Wilenchik's argument, an association for a planned community would never be able to bring a construction defect claim, but the legislature has recognized in the homeowners' association dwelling action that, in fact, planned community development associations are able to bring construction defect cases.

So just like the court in Zambrano had reason, without being able to assert this breach of implied warranty claim, there really is no construction defect claim in Arizona. And so the Zambrano court protected that for individual homeowners, and this Court should protect that for planned community associations. With respect to the breach of contract claim, CCNRs are a legally enforceable contract. Do you have any questions about the --

THE COURT: No, no.

MS. MANSHIP: So CCNRs are a legally enforceable contract. There are no Arizona cases that say otherwise. And there are cases such as the Pinnacle Nubian (phonetic) case in California that very explicitly say that a declaration is a contract between a developer and an association. This declaration specifically has language in it creating obligations and duties on both sides. I'm quoting from it. It

says there are mutually beneficial covenants, meaning mutually beneficial to the declarant, to the association, to homeowners with respect to the proper development, use, and maintenance of the property. And that's in our statement of facts G that the purpose of the CCNRs is, quote, enhancing and perfect the value, desirability, and attractiveness of the property. That's our statement of fact H.

And the CCNR requires that all dwelling units on the property must be constructed by K. Hovnanian or one of its designees. So the CCNRs actually create an obligation on K. Hovnanian to construct the dwelling unit, and that's in CCNR Section 8.1.30. This language creates an obligation on K. Hovnanian to construct the dwelling units in conformance with the CCNRs, which are proper development and enhancing and protecting the value, desirability, and attractiveness of the property. Those are what we're relying on.

Whether or not K. Hovnanian failed to properly do that per the terms of the CCNRs is a triable issue of fact, obviously. And then the breach of the implied covenant of good faith and fair dealing claim is essentially based on the fact of, you know, the violation of the contract of the CCNRs.

THE COURT: Okay. Very briefly.

MR. WILENCHIK: Well, I'd like to just state each point as quickly as I can. First of all, most of that is entirely 100 percent irrelevant, everything she just argued.

First of all, they've admitted that they have not brought this claim. Both in the PDA notice as well as in the complaint and elsewhere, they have admitted here that they are not bringing these claims on behalf of the owners.

So everything she just told you about statutes and everything else is nothing to do with anything here. They're bringing this claim on behalf of themselves, the HOA, not on behalf of the owners. That's been admitted by them repeatedly. So all that's a bunch irrelevant discussion. Zambrano, as I brought up -- Zambrano had nothing to do with this case whatsoever, period. Zambrano had to do with a limited warranty such as the type of K. Hovnanian issues that's coextensive with an implied warranty.

In that case, the developer or builder argued as to an individual homeowner's claim -- not an HOA. Nothing to do with this case. But it has nothing to do with anything anyway because the issue in that case was whether or not the builder's limited warranty could supplant by its terms in the contract with the owner the implied warranty. Okay? It was coextensive.

Like, for example, ours was a ten-year warranty, which is longer than the statute of repose. But nevertheless, the court upstairs took the case after Judge Viola dismissed it and took it and said, hey, we're going to keep the implied warranty as to homeowners, and you can't disclaim it, which was

an issue that was kind of bouncing around in the courts from time to time, but never really addressed by the Supreme Court. You can't disclaim the implied warranty.

That's all that case stands for, period. Has nothing to do with this case whatsoever. It doesn't support anything that they're -- that they brought here. We don't have any issue that homeowners can bring claims. They can. And if they want to bring them as 18 people, it's done all the time, and they can do it. That doesn't give this HOA the right to step in and do it for them under their name and then tell us they're not doing it for them and admit that and then come into court and tell us otherwise. Okay?

And secondly, the opportunity -- I want to back up because I'm rushing through this because Court asked me to, but let me just stop for a second. I want to start from the beginning quickly. The issue that was brought up is correct. She is technically correct as I recall now. They filed, you know, a 56 whatever it is now. They changed the number. 56 it was called to seek more time. We filed our motion.

I thought it was a dismissal because we filed it right at the outset, but she may be technically correct. I don't remember. It was a summary judgment. I'll accept that. But the issue that's here that's important is, well, we did argue all these issues. I remember distinctly arguing all these issues. And they argued, Judge, we need more time.

Okay? So I want to get that clear. This has never been ruled on by the court, okay? It was put off for them to do discovery for reasons unknown to me as to why that's relevant. That's why I said I was disappointed.

Let's talk about paragraph J that she brought up. She claimed that this supports her position that -- in terms of the quitclaim deed that they didn't have a right to do an inspection, and it was foisted upon them somehow, and that, you know, they didn't -- they were required to accept the quitclaim deed or something to the effect.

Well, I'm looking at J right now on page 6 that she's referring to, and here's what it says -- and it's long, so I'll just summarize. The rights and duties granted to declarants, its affiliates, and related entities include, but are not limited to -- that's what J has to say. And then she goes into one, two, three, four, five areas of rights and duties of the declarant. I can't find -- if she can find it, I'll stand corrected, because I'm looking at it. I cannot find anywhere in here, any to support the statement that she said that an inspection was not allowed to them -- because it doesn't even deal with that -- or that they don't have any right to do an inspection because it doesn't deal with any of that. I don't see one word in here about any of that.

So I'll let the Court read it on your own, and you tell me if I've missed it, but I don't think so. So J is

nothing to do with this case. We agree that they have the obligation to maintain. Keep saying that. He says basically the Court -- if I can translate, well, because we have this obligation we took on, somehow it's K. Hovnanian's fault. Basically, that's what she's saying. Or we assume from that the next step, which is that somehow you gave us an implied warranty.

I'll repeat, contrary to what she just told the court, there's not one word in any of the CCNRs that even imply that right. Now, the fact that they have this obligation she says is causing them standing and damage. Well, you know what? They have a right to assess those same owners to pay for that damage if that's true. If her position is even correct, she had a right, under those same CCNRs she's just admitted, to assess. That's how she gets paid for it. The homeowners pay for it by them assessing. Instead, they chose not to do that -- to maintain their property or to repair it or fix it -- but instead go back and claim some implied warranty right.

Now, not one case she has talked about here, not one, including Lofts, ever gave an HOA other than arguably a condo association -- and that's not even clear except under the statute -- the right to bring an implied warranty claim at all, period. So that's gone. And as far as the contract claim is concerned or the duty of good faith and fair dealing arising out of the contract, again, have we heard one single, solitary

sentence from counsel cited from CCNRs as to where there's an implied warranty given? No.

And I beg to differ completely, and I'll challenge the statement. There's not one place in any Arizona case anywhere that gives that right as opposed to jurisdictions elsewhere that she practices in. And I assume she thought that when she filed this. But it doesn't exist except in her head.

And if the Court can find any place or any Arizona case that's persuasive, binding, or whatever on this court gave that HOA that right, then I will tell the Court I haven't seen it, okay, and I haven't heard it here in court. So there is no such right, and there is nothing in the CCNRs that gives that right. And there's nothing that gives a right to even sue us because there's no obligation that a declarant took on of any warranty, except to disclaim the warranty by the quitclaim deed, period. That's the reality of this.

So if there's a problem with this common area, which is -- this is so silly because they're not making allegations here that relate to the common areas. They're really not. All of these things relate to individual lots and ownership by the owners. And the Court hit it right on the head. Those owners can bring those claims. She says, well, they exist in all the units. Fine. Then all the owners can bring those claims. But it's not her claim to make.

And if they want to assign them to the HOA, which I

haven't heard here, I suppose they could try to do that, but they haven't, and I haven't heard that. And more importantly, I've heard throughout this litigation just the opposite, that they are not bringing this claim in the name of the owners or based on an assignment, but based on their right to somehow bring this claim under an implied warranty theory or contract theory.

Judge, look, I'll end it with this. Not one thing she said persuades or should persuade this Court in any way, shape, or form that doesn't apply to our breach of contract or any obligation by any defendant here whatsoever. The fact that K. Hovnanian is listed as the builder of the units, the dwelling units -- which has nothing generally to do with an HOA which deals with common area -- what does that have to do with this case? Because K. Hovnanian builds dwelling units, somehow that gives the HOA a right to sue them? Under what theory would that be? It's outrageous.

That's why I brought this at the beginning of this case. I was disappointed, I repeat, that the Court, you know, shuffled it off. They brought their argument that they needed discovery. Well, you know what's really also appalling? What discovery that they claimed in good faith they need to put off my motion, what discovery do we hear here today that they did that in any way is relevant to defending this argument that I made at the beginning of the case and I repeat at the end?

Nothing. There's not one piece of discovery that was relevant. They put it off hoping it would go away.

And Your Honor, I know there's a trial set, and I know there's a temptation because of that to say, well, there's a trial, and therefore, it has to go. But there is no cause here that can be heard. And therefore, as I said, it moots any argument between Rina Rai and I as to our particular differences on issues relating to the subcontractors because we never get there. This moots it because the case is over or should be over. And frankly, if they want to appeal that, it would be a matter of first impression for the Court to deal with.

And I believe based on what I've seen because this isn't the first rodeo that the court upstairs is not going to find an HOA has a right in its own name to bring claims on behalf of owners willy-nilly or tear asunder the whole scheme of what's gone on all these years. Homeowners bring those claims. They have that right, not an HOA. That's it. I'll be glad to answer any, but there's nothing further to it. Case needs to be dismissed.

THE COURT: All right. Thank you.

MR. WILENCHIK: Thank you.

THE COURT: Hey, you get to follow that.

MR. HOROWITZ: I've been sitting for a while. I'm going to move over to the podium just to get my blood moving,

get a little less cozy, and mix things up a little. You know, this issue may be potentially moot, but if any part of this case goes ahead, it could be a potentially serious issue. I'm addressing K. Hovnanian's motion for partial summary judgment regarding unobserved defects.

And Your Honor, you've probably heard similar motions brought regarding defects that were extrapolated or projected where there are arguments regarding the evidence of statistical sampling, statistical extrapolation, or projection. Here, it's a little bit of that, but really, it is about defects that Plaintiff's expert says are generally persistent throughout the property where there are one -- where the expert actually contends to have observed one instance of this defect or a handful of instances of the defect. And --

THE COURT: Let me just --

MR. HOROWITZ: Sure.

THE COURT: -- kind of set the table a little. When I read your motion, it kind of struck me as more of a Daubert motion aimed at a criticism of the Plaintiff's expert's methodology. I mean, we've had this discussion around here with my colleagues on some of these motions for summary judgment that we get that turn on the admissibility of an expert. It's kind of six of one, half dozen of the other. So that's how I'm looking at this --

MR. HOROWITZ: Well --

THE COURT: -- in large part. You'll have to tell me if --

MR. HOROWITZ: Well, that is --

THE COURT: -- there's more to it.

MR. HOROWITZ: There is more to it. And often these are very closely intertwined with Daubert. I wasn't going to -- I was going to try to break the trend and not talk about my own experiences, but I've been arguing similar motions under the old rules and under new rule 702. But this is a case where -- this is not a case where Plaintiff's experts have employed statistical sampling. They have acknowledged that they have not. The issue is there are things you need to cut open the building to look at and see and observe and count.

Plaintiff's expert is saying in his claims on three keys issues -- he's saying that there are these issues, that they exist, they're persistent. He's saying I have seen them in one location. And for two issues, I'd say two locations. Plaintiffs say four or five. For sake of argument, we're talking about one location for issue number 1, five locations each for issue number 2 and number 3.

Plaintiff is not saying I am statistically projecting this throughout the property. Plaintiff is saying generally I didn't see it ever done right. Plaintiff is generalizing that these conditions that you can't see without opening up the building are done wrong everywhere. These are major issues

because the repair that results is Plaintiff saying there's a whole layer of the building underneath the building that you can't see, and it's bad, and it's bad because I am saying I just didn't ever see it right anywhere.

And the facts that this expert has actually presented, the evidence that this expert has actually presented, if you look at what he gave us, it really doesn't -- there is no support for that. And it is so dangerous to allow to the jury to say you can't see how they did it wrong every single place, but they did it wrong every single place. And I'm an expert. I'm a scientist. I wear a white coat. I know how things are. It's a little bit of Daubert, but here there is not somebody saying he is -- this expert is speculating that it's bad everywhere. He is not saying I've done a survey. My statistician told me how to do the sampling. K. Hovnanian can have their statistician quibble with it, and we can come to the judge and -- you know, and it'll be a combat all the experts. It'll be a question of fact.

We're not doing that. We have somebody who says, I saw the structural sheathing bad in one location. This is Ed Fronapfel, Plaintiff's expert. I have, you know, had the privilege of deposing him and getting to be familiar with the way that he presents his cases and the way he puts together his reports that get shared with the defendants.

So in this case, I asked him specifically, I know

that you do not provide me as a defendant in a Ed Fronapfel case -- I don't get from you a list of all the locations where you found the issue that you say is defective, and he agreed with that. And I said, I know that I'm going to get from you instead what you call your observations drawings. He will take floorplans, and he will have -- him and his staff will write down everywhere where they saw these issues.

You may have -- it doesn't matter how the expert puts it together. I'm not going to compare him to how experts do it. I'm saying he told us that I cannot look at his report to find a count of issues that are defective. But I'm going to see examples in his report. And if I wanted to count everywhere where he found a problem with the lateral force resistive system, I could go through his observation drawings, I could count everywhere he's got a problem, and that is going to tell me everywhere where he's got an issue.

THE COURT: Well, let me ask you this.

MR. HOROWITZ: Yeah.

THE COURT: If the records -- if it's in the record that -- let's say the particular sub that it slides a foam board --

MR. HOROWITZ: Um-hum.

THE COURT: -- okay, said, this is how I always do it. This is how I did it. This is how I did it in all the buildings. And then Plaintiff's expert says, well, way it was

done here is not right, and that's what the problem is. Why isn't it up to the jury then to take from that collective evidence a reasonable inference that if it was applied the same way throughout, there could be -- there's a defect throughout?

MR. HOROWITZ: Well, in a case where the evidence was -- in a case where the evidence was the subcontractor said this is the way I did it throughout, that would be the case. This is a case, however, where the expert says, generally, it was done wrong. The report he gives us, the evidence he gives us says -- you look at it and say, gee, you only have one location where you saw it done wrong. And nobody has said, I installed the structural sheathing wrong throughout the property.

THE COURT: But isn't there some testimony that says, I installed it this way throughout the property?

MR. HOROWITZ: There isn't for any of these three issues that I'm asking you about, Your Honor. There's evidence that it's the same person. You know, arguably, there's evidence that it's the same person for one aspect of it, ordering this board. But for everything else -- you know, please bear me -- bear with me and consider the evidence -- is not that there's a method. The method is bad. And if we see it's bad in enough places, we know it's going to be bad in most or all the places.

THE COURT: Is there testimony by the people who did

the work as to their method?

MR. HOROWITZ: There isn't. There isn't testimony. And the issue is -- for example, second issue I'm asking about is the weather resistive barrier. And Plaintiff says you're supposed to have two layers of building paper, two layers of the WRB, the weather resistant barrier, over sheathing. Ed Fronapfel says generally -- his conclusion is, generally, I didn't see the right number of layers, and this whole component of the structure needs to be replaced.

His evidence shows over and over he's observing this correct. He's observing everywhere -- everything that he gave us -- the documents that we got in his report, the documents that came with his report, the documents that he explained and confirmed at -- when we deposed him all say, look, this is -- we went through the exercise of what he said you needed to do to find out everywhere where he actually saw the problem.

There's two places where he says that it's not the right number of layers. There's no testimony from the stucco subcontractor that says, yeah, we screwed up, and we put in one layer instead of two layers consistently throughout. This is a different kind of animal than the case where there's a specific method and it's bad, and you know, if I look at enough to see that it's generally bad, I've got it.

Here's a guy that says, I'm poking holes in a lot of different places, and generally it's bad. But that's not the

data or the evidence he gave us. He gave us two photographs of an area where it's bad. Or he gave us, you know, his observation drawings that identify two locations where his staff doesn't think there are the right number of layers, dozens of locations where his staff documented that it's done right. And he's going to bring to the jury a claim that somehow I can generalize that it's done wrong everywhere.

If this was a kind of issue where the -- if this was the kind of issue where he could say, you know what, this is just systematically bad because of testimony that we have that it was always done this way, we would be in a different kind of situation, but it's not. This first issue, his structural issue, is -- you know, is a really, really glaring problem because Plaintiff acknowledged -- and there's no doubt there is one location on the entire project where he identified an area where he said there should be structural sheathing and it's missing.

And he said in this same location, there's a bent metal strap. And his instruction to his cost guy is to say you are going to need to assume that this issue will be uncovered in other locations throughout the property. He's not saying I've seen enough to know that it's always done bad. He's just saying you should speculate that there are more instances of this.

He is saying you should cost out an amount equal to

ten percent of the cost of all of the stucco work in order to replace this issue that we anticipate you're going to come across somewhere else. That's speculation. That's not anywhere near the kind of issue where we have a claim where someone says this method is wrong. The evidence shows that the method was followed consistently. You know, here we go.

For these other two issues, Plaintiff is going to give conclusions. The Plaintiff is going to give repair recommendations to take off all of the stucco on all parts of the residential buildings and replace them based on these claims not that something is systematically and, you know, methodologically done wrong, but based on these claims of, you know, I saw it bad in a few places. Generally, it's just not done right anywhere, even though the evidence that I presented to you shows that I saw it bad in two locations and good in many locations.

And that really isn't supported. It's not exercise of statistics. It's just a claim that has no support besides speculation of the expert. And you know, the law on whether speculative evidence comes in, you know, I cover age page 6 of the motion. I don't need to rehash it there. You have to prove these defects. You have to prove that there's something more than speculation. He wants to say -- he wants to be able -- Plaintiff wants to be able to bring in a case -- the Plaintiff wants to be able to say that this is problematic or

that this entire system needs to be replaced due to the specific issues. He should not be able to say that there is a systematic problem with layers of the weather resistant barrier, because there is no evidence to support that.

I have not gone into specifically the amount of dollars at issue for this, but both of these issue are -- you know, the repair that Ed Fronapfel recommends for both of these specific issues is -- both of these things you have to take off all the stucco, fix this layer behind the stucco, put it back on. You've got the knowledge cost of repair on the records. For context, we are talking about a repair that is 1.6 million dollars before their markup. It's over two million dollars with their markup. This is most of the dollars in the case. Everything else is $3,000, $50,000.

These are issues -- and these are issues where Plaintiff is going to say not I observed, I walked around the building, I counted the areas where I thought there should be controlled joints and there weren't. We have the evidence because everybody can see the whole building, and everybody's photographed all the different sides of the building. We can see the control joints. We can see -- you know, we can see whether there's exterior -- you know, exterior weeps and flashing over window heads.

But for them to say there's a issue, it's behind the skin, you can't see it, I saw it in two places, I get to tell

you that generally it's bad everywhere -- that's not supported by the evidence, and that's what I'm asking for in this motion.

THE COURT: Okay. Thank you.

Counsel?

MS. MANSHIP: Your Honor, you brought up from the get-go the exact point that I was going to raise is that this is really a Daubert motion about the adequacy of the Plaintiff experts testing and their opinions based on inferences from that investigation.

I don't know the ability of the Court to turn a motion for summary judgment into a Daubert motion, but if the Court is inclined to decide whether or not our expert is able to give opinions, that to me -- exclusion of that kind of evidence is a Daubert motion. Judgment can't really be entered that's excluding evidence.

So I would ask that we have -- we continue this hearing and my expert be allowed to testify in person, be cross-examined. I would ask that their expert come and testify about the investigation. They have not offered any opinion saying that the investigation was not adequate by any of their experts. Their experts attended all of the testing. They've had Mr. Fronapfel's reports dated June of 2021. They had Mr. Fronapfel's deposition. There's no evidence that they've submitted saying that it was insufficient.

THE COURT: Well, what was his methodology?

MS. MANSHIP: Well, there's only four buildings and only 18 units in this complex. There's not really a statistical sampling that you can do.

THE COURT: So they didn't do that?

MS. MANSHIP: They didn't do statistical, because then you could end up randomly picking all one building. You know, there's only four buildings. Their methodology was we're going to test each and every building, which they did. They picked cuts that cover all the units. There were 44 intrusive openings that took place at this complex. And based on their experience with methodologies of construction, they picked locations where they would open up areas of concern. And then from their experience with construction, they surmised that the way that construction is done, WRB paper, you know, is rolled out, you know. And so if you're finding one sheet here and you're finding one sheet there, that roll is probably consistent.

Or the fact that at each building at this particular type of location we found that 100 percent of the locations there wasn't -- for example, the EPS foam board didn't have the tongue in groove. They found no locations of that. They found no adequate groove. The EPS foam board was inadequate with respect to the groove that are necessary where any sheathing or framing is. So it was, I think, 26 locations that they did at OSB sheathing or framing areas that have particular types of

defects. And at 26 of the locations, 100 percent of them had the EPS foam board problem or some problem with the EPS foam board. And then 20 out of those 26 had problems with the WRB.

This is a triable issue of fact. Or the Court can have a Daubert hearing where the experts explain that -- we submitted Mr. Felderman's (phonetic) affidavit where he showed the Court where you can look at the observation drawings, the photographs that are referenced in those observation drawings to see these conditions. And he highlighted in Exhibit 1D the locations. They're highlighted on these drawings. They attached some example photographs that refer to this defective condition and showed how he came up with the numbers of locations.

There's just simply a difference in the way that the stucco experts did it in his depo where he (indiscernible) only a couple. They make an argument that Mr. Fronapfel testified you just have to read the observation drawings, and you'll find the defect locations.

If you read the deposition of Mr. Fronapfel, which was Exhibit B of their -- to their motion, specifically on page 46, the question was, if I look at page 4459, which is part of your observation drawing set, I will see notes that have photo references and a description of defect conditions or damages that you found during your observation. That's what you're saying? Meaning that's what you're saying is what you have to

look at for determining locations. And Mr. Fronapfel's answer was yes. And then the next question was, there isn't anywhere besides the observation matrices that I can look to get a comprehensive summary of either the intrusive testing or the observation, correct? Answer: Outside of reading the report in full, no.

So there's also the report that you have to look at. They're relying only on another expert's interpretation of what the observation drawings say. Again, Mr. Fronapfel says that you have to look at the photo references. That was his answer to the question about photo references. And if you look at the photo references, as Mr. Felderman went through for the Court, you can see all the highlighted areas where they found issues. And again, he counted those up. 44 intrusive openings, all with various defects. 100 percent of the buildings have defects related to the stucco. 26 locations where they were testing over this sheathing where 100 percent of those 26 had EPS foam problems and 20 out of the 26 had WRB problems.

And it's from that information -- again, we're only talking about 18 units, yet here's 26 openings that they found 100 percent problems with the foam. They have surmised based on their experience in construction that you're likely to find this throughout the project. The defense admits that you can't expect a -- an association, a plaintiff in one of these cases to completely skim the building to look to see where every

defect is. So they presented nothing saying that the number of locations here is insufficient to reach these inferences. So again, I -- oh, I'm not done.

MR. HOROWITZ: Yeah, I realized, and -- I realized and started returning. I apologize.

MS. MANSHIP: Yeah. So again, this all goes to, you know, the sufficiency of the evidence. The Defense would have a chance to cross-examine Mr. Fronapfel in the trial. The jury could decide if they believed Mr. Fronapfel's testimony that all of these locations had these problem or if these, you know, things were defects. But if the Court wants to decide whether or not some information should be excluded, again, I ask that Mr. Fronapfel be here to testify. I ask that their expert be here to testify as to why he thinks that there was not enough of an investigation.

So this really comes down to, you know, their argument that there's just a few locations. Even if you accept that, you can't enter judgment that the homeowners' association is entitled to no cost of repair for the WRB issue. They admit there's at least a few locations. So what portion of that cost of repair will judgment be entered as to? There's just no way. And again, there's a triable issue as to how many locations are there.

If you look at their motion, what they initially requested was judgment that the Association cannot get any cost

of repair for WRB LFRS or the foam -- any cost of repair. Well, again, they admit that there are at least a few locations where --

THE COURT: But there's no opinion as to the cost of repairing a particular spot.

MS. MANSHIP: They have not --

THE COURT: (Indiscernible) a particular roll of, as you were saying, where the defects might be due to just a particular way -- a particular roll where the sheathing was laid. We don't even have -- we don't have an opinion that breaks it down like that, right?

MS. MANSHIP: And they have not suggested that they have a method for determining that either, though. You know, our -- there's just this triable issue of fact of how many locations. So the Association, if our expert is to be believed, as -- in his opinion about the numbers of locations, the cost estimator has provided a cost of repair estimate that basically says we have to fix all the stucco for a variety of reasons. And so that is the way that the cost of repair is set up.

A jury can decide, well, I don't think that, you know, the WRB is as bad; therefore, they don't deserve all of this cost of repair for the stucco on the WRB, but they deserve it for this other thing. Or say, the jury doesn't believe any of the other defects and only believes the WRB, but it's only a

portion of them, that's for the jury to decide how much of that cost of repair the Association is entitled to get.

We don't have to provide a cost of repair that says, well, jury, if you only believe, you know, three locations or you only believe half, you know, then this is the cost of repair for that. You know, our expert's opinion is that it is widespread. It all needs to be replaced. If the jury believe it's only 26, the jury then has information that's in the cost of repair about what it cost to fix stucco, and they can determine what the appropriate cost of that is. So it should not be --

THE COURT: Not sure how, but --

MS. MANSHIP: Okay.

THE COURT: I'm not sure how.

MS. MANSHIP: You know, based on the expert's testimony at the trial, you know, they can determine if they can do that or not. But again, this is not --

THE COURT: I'm just going to have you wrap it up because --

MS. MANSHIP: Okay, okay.

THE COURT: -- I need to finish.

MS. MANSHIP: Okay, I understand. I understand. Let me just go through my notes because I kind of got off track of where I was going. With respect to the LFRS issue, we acknowledge there was a mistake in the cost estimate and in the

report as far as adding an additional ten percent contingency. The existence of the one location where the LFRS system was found to be detective, while Mr. Fronapfel does have the opinion that you may find that in other locations, it should have just been covered under what are typical contingencies.

THE COURT: Okay.

MS. MANSHIP: So we are not making an argument for -- we are making an argument there that defect exists and may be found in other locations, but we're not asking for any additional money over and apart from a normal contingency.

THE COURT: Okay. Counsel, briefly.

MR. HOROWITZ: Very briefly. For this last issue, that is my concern is that Plaintiff saw an issue in one location. The issue is he wants to say this is an issue they should be compensated for because it is going. You're going to find more of it when you open up more. This issue is not supported.

It's not accurate that they're not asking for money for this and that it's only in contingency. They're asking for $200,000 for this issue before markups, before contingency, before everything else. And that's not an error. That's exactly what Ed Fronapfel said to do. He said ten percent of stucco costs. The expert who did the costs came up with $160,000. I don't know why they tweaked it up. There's testimony that they decided that -- they decided to change the

formula and make that 200,000 instead of -- you know, instead of 160.

But this is -- you know, this is an issue which was -- an issue just that they want a finding that they should recover for something that project-wise that they haven't even complained to have seen project-wise. There is not a cost of repair provided to repair the instance where they identified or where they claim to have identified a structural framing deficiency in the one location. They don't cost it out. They just say -- assume that you're going to repair this project-wise.

For these other issues, Mr. Felderman, who gave the affidavit, is not a designated expert. He hasn't been disclosed. He is a partner of Mr. Ed Fronapfel, or he's someone else at Mr. Fronapfel's firm or his former firm. I think he is (indiscernible) relevant here.

Mr. Felderman is coming in and saying, you know, I believe that if you were to look at every single photograph in the pile, you could find some things that SPSA firm -- you know, that you would find something that we would quibble with. If I looked at every photograph in the pile, I'm going to find some areas that -- find some areas that Plaintiff's expert would like to say looks like it might be three-eighths of an inch of foam here instead of half an inch. Looks like we're going to have a quibble with this area.

What Mr. Fronapfel testified to clearly is he likes to hide the ball. He doesn't give me a list of quantifies. He gives me or any other defendant who faces him two or three examples in his report or sometimes one of a condition he doesn't like, and he gives observation drawings. And he says if you want to see everywhere where I find it to be problematic, everything I'm going to claim at trial is wrong, every instance I'm going to claim at trial we have the wrong number of layers of building paper, you can look at my observation matrix and find that.

THE COURT: Okay.

MR. HOROWITZ: The affidavit from his partner or his associate that says you could maybe look at all my -- you could maybe look at all the photographs that I really took and find some more areas where there's a problem, that doesn't change Mr. Fronapfel's testimony. Fronapfel's the expert here, not Jeff Felderman.

There's a reference by Plaintiff's counsel to a matrix that shows an X at four buildings. I don't care if they made an X at four buildings. They are talking about -- they are talking about issues that they say occur in numerous locations. If Jeff Felderman wants to say or if Ed Fronapfel wants to say, actually, I gave you evidence that I found this issue to be deficient in five locations, great, we would deal with that. But as you've pointed out already, I had to bring

this motion because I didn't have a cost to repair for two locations, three locations, or five locations where the weather resistant barrier didn't have enough layers or where the EPS foam board wasn't the right thickness.

I have only one recommended repair. So one recommended repair for those specific issues is to repair and replace the entire stucco envelope on the building. And that is just a completely unsupported position, and it's not based on methodology. You've heard it's not based on statistics at all. It's based on Ed wanting to say -- Ed Fronapfel wants to say, well, generally, it's bad. You have evidence to support that? The evidence to support that is, as you heard today, we opened the areas of concern. We found somewhere between two and five locations that we found to be problematic. We want to do $2 million-plus worth of stucco repairs.

That's why I have to bring the motion. I don't have a cost to repair two locations, four locations, five locations and get the opportunity to say, well, this is one that's documented. This is one that's maybe not documented, but we (indiscernible) it. Frankly, if we were looking at an issue where we're repairing weather resistant barrier in five locations or five units, we could live with that, and I wouldn't have to say, hey, please knock out this claim where I have a $2 million repair for two locations, four locations, five locations. Give them 26, which there aren't, where there

is -- you know, where there's an issue where we need to go underneath the stucco and we need to fix this bottom layer of the stucco. That's really all there is to this motion.

THE COURT: Okay. All right. Well, obviously, I'm going to take these under advisement. Let's talk about your all's schedule and my schedule. So we got a -- right now the final trial management conference is set for February 10th, and trial's set for March --

UNIDENTIFIED SPEAKER: 13th.

UNIDENTIFIED SPEAKER: 13th.

THE COURT: The 13th, okay. Trial's not moving. Trial's staying put. But I'm inclined to consider moving that TMC back a little bit because it'll make the date of your joint pretrial statement due a little bit -- it'll give you a little breathing room on that, and it'll give me a little breathing room on these rulings. I'm good, but I'm not sure I'm that good as far as getting you a ruling before you all even gear up for trial, which I think's going to happen way before the (indiscernible) case. About the time the joint pretrial statement's due. I'm open to that. Do you want me to keep the date on right now for the 10th for the final trial management conference? That's fine with me. Anybody have any thoughts?

MS. MANSHIP: I'm not in the same room with Mr. Nuss, so I don't know his schedule. I'm fine with it.

Craig?

MR. NUSS: Yes, Your Honor. We can move it to a later date if they -- if it's good for the Court.

THE COURT: I'm not even sure what I have. What would we have the following --

THE CLERK: February (indiscernible).

THE COURT: That's a week, two weeks, three weeks. February (indiscernible).

MR. HOROWITZ: Your Honor, that is problematic for me. I anticipate I am going to be in -- I'm probably going to be out of states for -- out of state for some depositions on the 23rd and 24th that were pretty difficult to put together and would not be able to be in person for that.

THE COURT: Okay. Let's just keep it on the way it is for right now. And if you all -- I mean, I'll do the best I can, but you may not get the ruling before you need to file what you need to file for the TMC. That's my point. So let me do what I can do. I know what's ahead of me, and I -- you know, most of you know I don't usually just do a sentence or two. And I think these motions are obviously very -- they're very important to all the parties who are involved. So let me get my hands around this, and I'll get you a ruling just as quick as I can. All right? Y'all have a good weekend.

MS. RAI: Thank you, Your Honor.

MR. NUSS: Thank you, Your Honor.

(Proceedings concluded at 10:53 a.m.)

CERTIFICATE

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JOANNA SARGENT, March 21, 2023
Transcriber