ARIZONA COURT OF APPEALS
DIVISION ONE

GALLERY COMMUNITY ASSOCIATION, an Arizona non-profit corporation, Plaintiff/Appellant, v. K. HOVNANIAN AT GALLERY, LLC, et al., Defendants/Appellees.	No. 1 CA-CV 23-0375 Maricopa County Superior Court No. CV2020-008714

APPELLEES' ANSWERING BRIEF

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STATEMENT OF THE CASE

This case concerns claims arising from alleged construction defects at a planned community. Appellant Gallery Community Association ("Appellant") is a Homeowner's Association that pursued various causes of action including Implied Warranty, Express Warranty, and Breach of Covenant of Good Faith and Fair Dealing against Appellees, who included the seller of the individual homes, and the Declarant who formed the Association. [Index of Record on Appeal, "IRA" 1; Appendix, "KHOV APP," 1-7.]

Appellant took the position throughout the suit that these claims were its own claims belonging to itself.

Appellant stated in correspondence regarding its pre-litigation Notice of Claim under A.R.S. § 12-1361 et seq. and A.R.S. § 33-2002 et seq. that "The Notice was on behalf of the Association only and for issues that are within the Association's responsibility to maintain and repair under the Declaration of Covenants, Conditions, Restrictions and Easements for Gallery [and] The Association is not bringing claims on behalf of one or more individual unit owners for issues that the owners are solely responsible to maintain and repair." [IRA 187-193, p. 3, ¶ 11; KHOV APP 10.]

The only property owned by the Association was certain common areas that had been assigned by quitclaim deed.

Appellant brought claims on its own behalf against Appellees. [IRA 1; KHOV APP 1-7.]

Appellees moved for summary judgment early in the case on various grounds, including that the Implied Warranty of Workmanship and Habitability is a remedy belonging to individual homebuyers, and not a remedy extended to an Association [IRA 56, pp. 7-9; KHOV APP 71-73.] Appellant argued that an association did have its own right to pursue the Implied Warranty remedy as set forth in *Richards v. Powercraft*, 139 Ariz. 242, 678 P.2d 427 (1984). [IRA 59-61, generally and at pp. 10-13, KHOV APP 85-88.] The first motion was withdrawn without prejudice allowing Plaintiff to take requested discovery, and certain causes of action and claims against certain Defendants were withdrawn.

Appellees filed another Motion for Summary Judgment against Appellant in September 2022 after discovery closed. [IRA 203; KHOV APP 95-104.] Appellees requested Summary Judgment on the Implied Warranty, as the claim belonged only to individual purchasers of the units against their builder/vendors., not the Association itself. Appellees also requested summary judgment on the claims of Express Warranty and Breach of the Covenant of Good Faith and Fair Dealing. Appellant alleged that these causes of action arose from promises to construct in the Declaration of Covenants, Conditions & Restrictions ("CC&Rs" or "Declaration" as referenced in the trial court's order and Appellant's Brief), however, no such

promises were contained in that document, even were it considered a contract between the Declarant and the HOA Appellant, which was disputed.

The Superior Court ruled in favor of Appellees. The Court made the following findings:

"The Association filed this action on behalf of itself, not the individual homeowners within The Gallery." [IRA 290, p. 2, KHOV APP 291.]

"Plaintiff Gallery Community Association's ("Association"), a homeowner's association, cannot assert the claim for breach of the implied warranty of workmanship and habitability. (Count 3)"

"The Association cannot establish that KHov Gallery breached a contract or the implied covenant of good faith and fair dealing because the Declaration of Covenants, Conditions, Restrictions, and Easements for Gallery ("Declaration") does not impose a contractual obligation on KHov Gallery to perform or warrant construction. (Counts 2 and 4)." [*Id.*]

"In this case, the Association holds no implied warranty. It does not own the residences. It owns the Common Area that KHov Gallery conveyed to it in the quit claim deed and as defined in the Declaration. The Common Area is exactly that -- areas such as the parking lot, pool, and cabana intended "for the common use and enjoyment" of the homeowners, not the residences." [*Id.*, p. 4; KHOV APP 293.]

"The homes – and the implied warranty – belongs to the homeowners." [*Id.*]

Other pending motions were denied as moot in light of the ruling.

The Court awarded fees and costs to Appellees and to Third-Party Defendants. [IRA 325, 326; KHOV APP 112-117, 118-119.]

ISSUES PRESENTED

Appellant's first "Issue Presented" does not actually relate to any part of the Superior Court's ruling or any material issue. Appellant described an issue concerning the scope of the Implied Warranty of Workmanship and Habitability when the ruling addressed only the issue of whether Appellant had any legal right or authority to make that claim as an HOA on behalf of individual owners.

Appellant's second "Issue Presented" describes the substance of the Superior Court's ruling on the Implied Warranty of Workmanship and Habitability. Appellant brought a claim based on this cause of action. [IRA 1, 59-61, 242-247; KHOV APP 1-7, 76-94, 120-132.] The Superior Court ruled that the right belonged to purchasers of homes, or subsequent purchasers without notice, not to an association such as the Appellant that purchased nothing from Declarant. The Superior Court ruled that the Appellant lacked statutory authority to pursue claims by its members, the purchasers, against their builder/vendors. [IRA 290, KHOV APP 105-111.]

Appellant's third issue seeks to vacate the award of attorney's fees and costs against Appellant based on an argument that the Superior Court's ruling should be reversed. [Appellant's Opening Brief, "Brief," p. 30.] However, in its argument,

Appellant asks to vacate the fee award and remand for other reasons. [Brief, pp. 55-57.] Appellant there argues that the fees were unnecessary, that Third-Party Defendants should simply not have received fees, and argues the issues were not complex. Appellant has not raised arguments that a fee award was not authorized by Arizona case law or any statute, or that the amount of fees awarded were not appropriately awarded under the court's discretion.

STANDARD OF REVIEW

This Court determines de novo whether there was a genuine issue of material fact and whether the Court correctly applied the law to the undisputed facts. The evidence is viewed in the light most favorable to the party against whom judgment was entered. The Court may affirm if the ruling was correct for any reason. *United Ins. Co. of Am. v. Lutz*, 227 Ariz. 411, 258 P.3d 229, 610 Ariz. Adv. Rep. 24 (App., 2011); *Sanchez v. Tucson Orthopaedic Institute*, 202 P.3d 502, 220 Ariz. 37 (App., 2008).

A trial court's decision awarding or denying fees will not be reversed unless there has been an abuse of discretion or the award otherwise lacks a reasonable basis. *Associated Indemnity Corp. v. Warner*, 143 Ariz. 567 (1985) *Bogard v. Cannon & Wendt Elec. Co,* 221 Ariz. 139 (App. 2009).

ARGUMENT

I. Introduction

The underlying decision and the instant Appeal concern only the Implied Warranty of Workmanship and Habitability and whether a residential planned area HOA has such a right implied by law, particularly as to the Declarant under CC&R's, that our courts have thus far reserved for purchasers of new homes or subsequent purchasers without notice against their builder/vendor. The decision and Appeal revolve around two questions. Who is owed the Implied Warranty under law, and can the Appellant enforce it against a Declarant, as to owner/member's individual lots and defects claimed thereon.

Appellant argued in the underlying case that a Homeowner's Association had its own right of action established under the Implied Warranty of Workmanship and Habitability. [IRA 1, 59-61, 242-247; KHOV APP 1-7, 76-94, 120-132.] The Superior Court correctly rejected this argument. No case has established such a right or cause of action by an HOA in these circumstances.

Appellant argued below that an Association somehow had its own right under the Implied Warranty of Workmanship and Habitability to bring actions against a builder-vendor on behalf of itself as to members' individual lots and the homes thereon as to construction defects. This was the only argument raised in favor of allowing this cause of action [*Id.*] All the other arguments raised now for the first

time in the Opening Brief are waived. Arguments regarding the right to pursue this action in a representative capacity were waived. Appellant's brief contains a short Section I regarding the "associational" right to action which it argued in the underlying case, and a long Section II regarding various "representational" claims that were not argued below. The "associational" argument has no legal support, as addressed in the Superior Court proceedings. The "representational" arguments each fail. None provide any reason to ignore or rewrite Arizona's Statutes on the powers and authority of a Homeowners' Association.

Appellant has only raised issues regarding Count Three of its operative Complaint. Appellant has not contested the denial of its other causes of action. Appellant has not argued that the Superior Court was incorrect when it found that it was uncontested that it did not receive any promise or agreement to construct, and when it dismissed its claims of Breach of Contract under the Declaration. The only substantive issue in the Appeal is whether a Planned Community Association has a right to pursue claims arising from the Implied Warranty of Workmanship and Habitability.

II. Appellant Does Not Have a Right to Recover for Defects Under the Implied Warranty of Workmanship and Habitability Argument

Appellant argued in the underlying case that a Homeowner's Association had its own right of action under the Implied Warranty of Workmanship and Habitability. [IRA 242-247; KHOV APP 120-132.] No Arizona Court has found

such an implied warranty as a matter of right to an HOA, and particularly as to member/owner's individual homes.

Appellant now misconstrues that the ruling against it was "on the basis that the property is not a home[.]" [Brief, p. 30.] Whether the property is a "home" was not the basis of the ruling. The Superior Court agreed with Appellee that the Implied Warranty of Workmanship created in *Columbia Western Corp. v. Vela*, 122 Ariz. 28 (App. 1979) and further defined in *Richards v. Powercraft Homes*, 139 Ariz. 242 (1984) is available to individual purchasers of homes. [IRA 290, p. 3; KHOV APP 207.] This was based on a strong public policy to avoid fly-by-night contractors who issued limited warranties of no value to purchasers without notice of the defect. Appellant argued that the Association had its own right to pursue the *Powercraft* Implied Warranty under *Lofts at Fillmore Condominium Assoc'n v. Reliance Commercial Construction*, 218 Ariz. 574 (2008). The Superior Court ruled the Implied Warranty belongs to the homeowners, not the Association, consistent with all prior reported Arizona decisions [*Id.*, p. 4; KHOV APP 208.] The Court explained that *Lofts* did not grant an Association a right to pursue a claim under the Implied Warranty, but instead found the Lofts Association had statutory authority to pursue claims on behalf of the unit owners pursuant to A.R.S. § 33-1242(A)(4) (defining powers of a Condominium Association). [IRA 290, p. 4; KHOV APP 208.] This HOA is not a Condominium regime, which has unique features such as common

walls and areas. The Superior Court explained "[H]ere the Association filed this lawsuit on behalf of the Association only and has no authority to bring an action for the affected homeowners. *Lofts* is consistent with *Columbia Western* and *Richards* and does not support the Association's position. Count 3 is dismissed." [IRA 290, p. 4; KHOV APP 208.][1] Nothing addresses an HOA such as the one here.

The Superior Court's ruling here was not based on any limitation of the scope of the Implied Warranty. Still, Appellant argues that the Superior Court "evidently accepted" that the Implied Warranty was "*restricted* to 'now homes or 'habitable structures[.]'" [Brief, p. 30.] The ruling did not do so. It was based on who received the warranty and who is authorized to pursue it based on current Arizona law. The Court's order does state that the remedy is limited to "homes" but does so in the context of the discussion of how the remedy under Arizona law is given "to the homeowner," [IRA 290, p. 3; KHOV APP 207.] a purchaser. Plaintiff purchased nothing from any homebuilder. It received a quit claim deed after inspection by a Board of Directors that had fiduciary duties of their own to the owners to do so.

[1] In fact, *Lofts* did not even address the issue here before this Court. Neither did the Arizona Supreme Court address it in *Zambrano v. M & RC II LLC,* 254 Ariz. 53, 56-57 (2022) also cited by Appellant. The Court in *Zambrano* decided that a homebuilder-vendor cannot disclaim the implied warranty with a limited warranty given to the original purchaser. The Court did not change the nature of the right, it still is a promise to buyers of single-family homes.

Nothing in the Court's decision limited or restricted the right of any owner (purchaser) from making a claim as to any defect at their home.

Appellant cites to various cases addressing warranties arising from agreements to construct commercial property, that simply are inapplicable to the unique warranty created by law here as to residential construction. [Brief, pp. 30-31.] Appellant does so for the proposition that an "implied warranty" arises and gives it a cause of action under these circumstances, but no case it cites to has held that. In the commercial context, implied warranties arise from a promise or agreement to construct property. Arizona's reported cases on the nature of implied warranties in the commercial context confirm that. The Court in *Hayden Bus. Ctr. Condos. Ass'n v. Pegasus Dev. Co.*, 209 Ariz. 511 (Ct. App. 2005) ruled and clarified that implied warranties arising there from an agreement to construct commercial property run to the contracting party. Parties may assign the implied warranties that arise from the contract to construct. However, the court refused to give purchasers of commercial property the implied warranty like the non-disclaimable implied warranty granted to homebuyers under *Richards v. Powercraft*. The court in *Hayden* expressly rejected the purchaser's attempt to extend the *Richards v. Powercraft* exception outside the context of purchasers of homes, in fact.

The Court of Appeals addressed a similar issue in *Highland Vill. Partners, L.L.C. v. Bradbury & Stamm Const. Co.*, 219 Ariz. 147, 148, 195 P.3d 184, 185 (Ct.

App. 2008). That case involved another express assignment of implied warranties from original contracting parties to subsequent purchasers of that property. The Court ruled that the implied warranties arise from the construction contract there, and were assignable contractual rights.

"An implied-warranty-of-good-workmanship claim is one grounded in contract and therefore, with exception, can only be asserted by a party to the contract. *Highland Vill. Partners, L.L.C. v. Bradbury & Stamm Const. Co.*, 219 Ariz. 147, 149, 195 P.3d 184, 186 (Ct. App. 2008). "The implied warranty of workmanship and habitability is imposed by law in construction contracts." *Id.*, 219 Ariz. 147, 150, 195 P.3d 187.

Appellant also cites to *Buchanan v. Scottsdale Env't Const. & Dev. Co.*, 163 Ariz. 285, 286, 787 P.2d 1081, 1082 (Ct. App. 1989). That case concerned claims by the buyer of a home against the seller who constructed it. The Court refused to enforce a disclaimer of implied warranties in the agreement between the seller and purchaser of the home site. It found that the property was more than merely a sale of raw land, which would not include any such warranties. It ruled, "If one constructing homes is required to warrant fitness of both the house and the land on which it is built, we see no reason why one constructing a homesite should not be required to warrant that it is fit for the purpose for which it is sold." *Id.* Again, nothing in the foregoing case deals with an HOA obtaining any implied rights whatsoever from an

Owner/Member's homebuilder or the Declarant. Appellant cites to an irrelevant Illinois decision for the proposition that the public policy reasons for the implied warranty apply to appurtenant amenities and facilities and not just the facilities. [Brief, p. 30.] However, nothing in that decision deals with granting any such right to an HOA. The decision and quote referenced discussed duties to a purchaser. The instant case does not deal with the limits on the subject matter of an implied warranty claim to any owner as to its builder/vendor. The issues relate to whether Appellant owns its own claim or has authority to pursue claims on behalf of the owners. *Briarcliffe W. Townhouse Owners Ass'n v. Wiseman Constr. Co.*, 454 N.E. 2d 363, 365 (Ct. App. Ill. 1983) has no relevance to this case. Nothing here in the CC&R's, and certainly not in Arizona case law provides such a right, and Appellant failed to cite any applicable authority that does.

Appellant next argues that an implied warranty "applies to" new construction but ignores the origin and nature of the claim. Implied warranties arise from the construction contract. The warranties arising from the agreement to construct may be assigned from the parties to the construction contract when they sell the property. The issue under *Hayden* and *Highland Village Partners* was not whether implied warranties arise from commercial agreements to construct, but whether the recipient of the original warranty assigned it. Appellee never argued that a subsequent purchaser of a home, without notice of the defect, can bring an implied warranty

claim against the original builder/vendor, but that is not the issue here. The *Richards* case, *infra*, made that point clear.

Appellant assumes that since an implied warranty can arise that it somehow has the right to bring an implied warranty claim. Appellant never identified any contractual agreement to perform construction for the Appellant. Appellant never identified any assignment of rights to perform construction. The record showed, and the Superior Court noted, that the common areas of the Association were transferred to the Association by a quit claim deed without the expectation of any warranty. [IRA 290, p. 2; KHOV APP 106.] Appellant never identified any term of any agreement where either Defendant agreed to perform construction or warrant construction. [*Id.*] Nor did identify any case in Arizona allowing it a right to an implied warranty on common or individual property of owners either.

Simply put, the *Richards v. Powercraft* warranty was meant to protect "buyers of newly built homes and successive owners against latent construction defects," as confirmed in *Zambrano v. M & RC II LLC*, 254 Ariz. 53, 56-57 (2022). The right arises from the construction of the home itself. No home was constructed on the common areas, nothing was purchased from any Defendant om the common areas, and certainly nothing on any individual lot in the subdivision where defects were claimed bestowed any implied warranty right on Appellant.

III. Appellant Has Conceded That Summary Judgment on Its Own Contract Claims Was Proper

The Court will generally consider issues not raised in an opening brief as abandoned or conceded. *Robert Schalkenbach Found. v. Lincoln Found., Inc.*, 208 Ariz. 176, 180, ¶ 17, 91 P.3d 1019, 1023 (App. 2004); And See *Van Loan v. Van Loan*, 116 Ariz. 272, 274, 569 P.2d 214, 216 (1977); *Goldwater's v. Medar*, 82 Ariz. 344, 313 P.2d 410 (1957); *Hahn v. Pima Cnty*., 200 Ariz. 167, 172, 24 P.3d 614, 619 (Ct. App. 2001).

Appellant has not contested or argued any error in the denial of its causes of action for Express Warranty and for Breach of Covenant of Good Faith and Fair Dealing. Appellant has not raised any question about the Court's finding that the Declaration did not include any promise to the Association to construct or to warrant property. These claims and causes of action are conceded and waived.

IV. Arizona Statutes Do Not Grant Appellant the Power to Bring an Implied Warranty Claim on Behalf of Its Members

Appellant does not own a right to pursue claims arising from its member's Implied Warranty rights as to their individual properties, and Appellant lacks its own Implied Warranty right to the Common Area against Declarant under the CC&R's or quit claim conveyance. Appellant misses the point of the notice prerequisites in its discussion of the Purchaser Dwelling Act, and of the statutes regulating Homeowners' Association Dwelling Actions. The statutes discussed create

procedural requirements, or impediments or conditions before bringing suit, and do not create any substantive right of action or grant any power to pursue others' rights.

A.R.S. § 33-2002 merely creates requirements that a homeowner's association must follow when filing a "dwelling action." A.R.S. § 12-1363 creates prerequisites that any claimant must follow before filing a dwelling action. These statutes do not create any cause of action, expand any cause of action, or grant any homeowner's association the right to pursue claims belonging to others. No part of A.R.S. §§ 33-2001et seq. (Title 33, Chapter 18 "Homeowners' Association Dwelling Actions") or §§ 33-1261et seq. (the Purchaser Dwelling Act) provide a basis for a homeowner's association to bring its own Implied Warranty claim, to bring one on behalf of others, or otherwise expand the powers of a homeowners' association. No part of either statute requiring prerequisites to filing a "dwelling action," has granted any association the right to its substantive claims or causes of action, or the authority to pursue others' claims.

As discussed above, the Implied Warranty of Habitability and Workmanship is a creature of law, and a right created by common law in favor of purchasers of single-family homes as a matter of public policy as set out in cases like *Columbia Western* and *Richards v. Powercraft*, *supra*. Other Implied Warranties may arise in the commercial context from agreements to construct. The Appellant is not a homeowner and does not have its own right to enforce claims under *Richards v.*

Powercraft. Nor is it a party to any agreement to construct or implied warranties arising from such an agreement. [IRA 290; KHOV APP 105-111.]

Arizona's statutes specifically give a condominium association the power to bring claims in its own name arising from the rights of two or more of its members. A.R.S. § 12-1242. Arizona's legislature did not decide to enact a similar power in favor of planned area community associations. A.R.S. § 33-1801 et seq.

Appellant argues that "the legislature has *not* attempted to intervene one way or the other in matters traditionally left to the judiciary" and that therefore a claim by a planned community association is not 'precluded.' [Brief, p. 17.] Wrong. This argument ignores the fact that both condominium associations and planned community associations were created by statute. Their powers are created by statute. Arizona's legislature granted the power to bring multiple unit owners' claims to condominium associations only, presumably because of their unique configuration as to shared walls and ownership.

Appellant argues that the court should follow Restatement (Third) of Property: Servitudes § 6.11 as the "majority rule." [Brief, p. 19.] The section provides "Except as limited by statute or the governing documents, the association has the power to institute, defend, or intervene in litigation or administrative proceedings in its own name, on behalf of itself, or on behalf of member property owners in a common-interest community on matters affecting the community." The

comments to the section of the Restatement note that, "The rule stated in this section is modeled on § 3-102(a)(4) of the Uniform Common Interest Ownership Act." Again, Arizona's legislature chose not to follow the model of the uniform code, and Arizona is not obliged to follow the Restatement where its law is on point. ("In Arizona, if there is no statute or case law on a particular subject, we have traditionally followed the Restatement of Laws," and generally will embrace the Restatement if it prescribes "a sound and sensible rule," *Cramer v. Starr*, 240 Ariz. 4, 10, 375 P.3d 69, 75 (2016), citing *Martinez v. Woodmar IV Condos. Homeowners Ass'n*, 189 Ariz. 206, 208, 941 P.2d 218, 220 (1997) and *Webster v. Culbertson*, 158 Ariz. 159, 162, 761 P.2d 1063, 1066 (1988). Arizona "do[es] not follow the Restatement blindly, ... and will come to a contrary conclusion if Arizona law suggests otherwise." *Alcombrack v. Ciccarelli*, 238 Ariz. 538, 545, 363 P.3d 698, 705 (Ct. App. 2015)

Appellant discusses the rights granted to homeowners' associations in other states [Brief, pp. 10-12], but other States should not govern Arizona's statutes or law. Appellant fails to show how any of this is even relevant to the case. Homeowner's associations and their powers are defined by statute. The Court should not disregard the statutes as written by Arizona's legislature in favor of other State's statutes. In Arizona, per statute, a condominium association has the power to bring claims on behalf of owners in its own name, but a planned community association

does not. As Appellant addresses, some states' statutes allow both to do so. The concept is not new or a legal trend, it is simply a power that Arizona has chosen not to grant to planned community associations. Just as our courts have never bestowed any implied warranty right under these circumstances to an HOA. The Uniform Common Area Interest Act has contained language for decades granting all community associations the power to bring claims in its own name on behalf of two or more members. (Uniform Common Interest Ownership Act (1994), (2014), (2021), § 3-102(4)).

V. Appellant's Argument to Allow Pursuit of Members' Claims Was Waived

Appellant argues various bases for a right to bring the Implied Warranty claim as a representative. None were argued in the Superior Court. This argument was waived.

The failure to raise an issue either at the trial level or in briefs on appeal constitutes a waiver of the issue. *Van Loan v. Van Loan*, 116 Ariz. 272, 274, 569 P.2d 214, 216 (1977) *Goldwater's v. Medar*, 82 Ariz. 344, 313 P.2d 410 (1957); *Hahn v. Pima Cnty*., 200 Ariz. 167, 172, 24 P.3d 614, 619 (Ct. App. 2001). Appellant repeatedly made clear its position was just the opposite below, and that it was bringing the claim in its own name with its own right to do so. Generally, a party cannot argue on appeal legal issues and arguments that have not been specifically presented to the superior court. *Alulddin v. Alfartousi*, 255 Ariz. 436, 532 P.3d 1172,

1178 (App. 2023); *Sobol v. Marsh*, 212 Ariz. 301, 303, ¶ 7, 130 P.3d 1000, 1002 (App. 2006).

Appellant argued that it has its own right to pursue the Implied Warranty claim and did not raise arguments or issues based on representational capacity.

Appellant argued only that it as an Association had its own right of action under the Implied Warranty of Workmanship and Habitability (and under the other dismissed causes of action that are not addressed in the appeal.) Appellant argued "First, well-settled and controlling Arizona law, which Defendants fail to cite, permits homeowner associations to assert breach of implied warranty claims against developers and builders such as Defendants for latent defects in multifamily residential developments." [IRA 242-247, p. 2; KHOV APP 121; Also see January 13, 2023 transcript of oral argument; KHOV APP 133-212.] The new arguments for reversal of the decision were not decided incorrectly, they were never argued at all and are waived on appeal. Thus, not only were they waived, but Appellant's arguments for allowing it to pursue claims as a representative under real party in interest, trustee, and newly concocted theories each fail as a matter of law, regardless.

VI. Appellant's Argument to Allow Pursuit of Claims as a Real Party in Interest or Representative Fail, Because Case Law Does Not Support the Expansion of Planned Community Associations' Power to Bring Actions for Damages as a Representative of Its Members

Appellant has argued on appeal that a "common-law tradition" exists allowing

its "representational standing" as a "Real Party in Interest." [Brief, pp. 20-22, 46-51.] Not so. The decisions cited by Appellant show that a claim by a representative seeking damages for individual members' rights has not been and would not be permitted under these theories under Arizona law.

Armory Park Neighborhood Ass'n v. Episcopal Cmty. Servs. in Arizona, 148 Ariz. 1, 712 P.2d 915, 916 (1985), was a public nuisance action to enjoin a church from providing a free food distribution program which attracted transients to the area. The plaintiff in that matter was not an HOA in a planned area community usurping owner's rights. It was a voluntary association dedicated to preserving and improving a historic neighborhood and district. Plaintiff was "a non-profit corporation organized for the purpose of 'improving, maintaining and insuring the quality of the neighborhood known as Armory Park Historical Residential District.'" *Armory Park Neighborhood Ass'n v. Episcopal Cmty. Servs. in Arizona*, 148 Ariz. 1, 2, 712 P.2d 914, 915 (1985). The Court phrased the relevant question at issue as "1) When does a voluntary association have standing to bring an action for public nuisance on behalf of its members?" *Id.*, 148 Ariz. 1, 3, 712 P.2d 914, 916 (1985). It must be emphasized to begin with, that a common public nuisance has no relevance at all to individual owner's defect claims that have in no way been shown to be identical or common as such to all owners.

The Supreme Court addressed certain standing issues including "the right of a private person, as distinguished from a public official, to bring a suit to enjoin the maintenance of a public nuisance." *Id.*, 148 Ariz. 1, 5, 712 P.2d 914, 918 (1985).

It evaluated the history and purpose of a private action for public nuisance:

> "Because the acts allegedly committed by the patrons of the neighborhood center affected the residents' use and enjoyment of their real property, a damage special in nature and different in kind from that experienced by the residents of the city in general, the residents of the neighborhood could bring an action to recover damages for or enjoin the maintenance of a public nuisance." *Id.*, 148 Ariz. 1, 5, 712 P.2d 914, 918 (1985).

The Court addressed the factors for when a voluntary association may have standing to pursue such claims on behalf of its members:

> "The United States Supreme Court has held that an association has standing to sue on behalf of its members when (a) its members would have standing to sue in their own right; (b) the interests which the association seeks to protect are relevant to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members." *Id.*, 148 Ariz. 1, 6, 712 P.2d 914, 919 (1985).

The Court relied on United States Supreme Court cases involving claims for declaratory and injunctive relief. *Warth v. Seldin*, 422 U.S. 490, 490, 95 S. Ct. 2197, 2201, 45 L. Ed. 2d 343 (1975) has plaintiffs who included "Metro-Act of Rochester, a not-for-profit corporation among whose purpose is fostering action to alleviate the housing shortage for low- and moderate-income persons in the Rochester area," and *Hunt v. Washington State Apple Advert. Comm'n*, 432 U.S. 333, 342, 97 S. Ct. 2434,

2441, 53 L. Ed. 2d 383 (1977) involved "a statutory agency for the promotion and protection of the Washington State apple industry." None of this has any relevance or application here.

The Court in *Armory Park* evaluated the relevant factors there which included that the claim sought injunctive relief, not damages for the individuals' claims. ("Further, APNA seeks an injunction rather than damages for separate property owners." *Id.*, 148 Ariz. 1, 6, 712 P.2d 914, 919 (1985).) Appellant here seeks damages for separate property owners.

Another case dealing with claims brought by an association as a representative and cited by Appellant is *Home Builders Ass'n of Cent. Arizona v. Kard*, 219 Ariz. 374, 199 P.3d 629, (Ct. App. 2008), as amended (July 10, 2008). This case involved a challenge to zoning laws brought by a builder industry association, again not having any relevance here.

The Court again cited standards from *Warth v. Seldin*, *Supra*, 422 U.S. 490, 95 S. Ct. 2197, 45 L.Ed.2d 343 (1975) and *Hunt v. Washington State Apple Adver. Comm'n*, *Supra*, 432 U.S. 333, 343, 97 S. Ct. 2434, 53 L.Ed.2d 383 (1977), for when an association may have standing in such circumstance to sue to enforce its members' interests:

> "A court also may consider relevant factors identified by the United States Supreme Court, which are whether: (a) the association's "members would have standing to sue in their own right; (b) the interests ... the association seeks to protect are relevant to the

> organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members." *Home Builders Ass'n of Cent. Arizona v. Kard*, 219 Ariz. 374, 377, 199 P.3d 629, 632 (Ct. App. 2008), as amended (July 10, 2008).

In that case, the Court rejected plaintiff HBACA's claim. Key factors included that the relief involved damages which would require individual proof, as is the case here:

> "The Court observed that whether an association had standing 'depend[ed] in substantial measure on the nature of the relief sought' and that in most cases in which the Court had found standing, the subject association had sought declarative or injunctive relief. It also emphasized that the nature of the claim could not make participation of each injured party indispensable to the proper resolution of the suit." *Id.*, *Home Builders Ass'n of Cent. Arizona v. Kard*, 219 Ariz. 374, 377, 199 P.3d 629, 632 (Ct. App. 2008), as amended (July 10, 2008), citing *Warth*, *supra*, 515, 95 S. Ct. 2197.
>
> "Home Builders similarly seeks damages based on allegations that the defendants have collected excess permit fees and have improperly imposed civil penalties based upon the size of each sanctioned entity. These claims would require individualized proof, which Home Builders concedes in its reply brief by noting that its members' testimony 'may indeed be relevant' and that the case will require 'individualized calculations for each affected member.'" *Id.*, 219 Ariz. 374, 378, 199 P.3d 629, 633 (Ct. App. 2008), as amended (July 10, 2008).

The Court in *United Food & Com. Workers Union Loc. 751 v. Brown Grp., Inc.*, 517 U.S. 544, 546, 116 S. Ct. 1529, 1531, 134 L. Ed. 2d 758 (1996), another decision cited by Appellant to support its "representational" and "Real Party in Interest" argument, also noted that the factors discussed in *Hunt* would not likely be met in a case seeking damages to the members:

> "Hunt held that 'individual participation' is not normally necessary when an association seeks prospective or injunctive relief for its members but indicated that such participation would be required in an action for damages to an association's members, thus suggesting that an association's action for damages running solely to its members would be barred for want of the association's standing to sue." *United Food & Com. Workers Union Loc. 751 v. Brown Grp., Inc.*, 517 U.S. 544, 546, 116 S. Ct. 1529, 1531, 134 L. Ed. 2d 758 (1996).

The claim here is for damages based on rights that belong to multiple individual unit owners, that would be indispensable, not by rights belonging to the association. The claim for Implied Warranty is based on the question of breach and amount of cost to repair damages for each individual unit owner's lot. Each unit owner has their own individual requirement of proof of claims, including proof that the damages are within the scope of the Implied Warranty.

The claims in this case are unlike the nuisance and injunctive relief claims asserted in *Armory Park, Warth,* or *Hunt*. This claim includes damages only and further those damages require individualized proof for each owner's right and measure of damages. As noted in both *Armory Park* and *Kard*, these factors would weigh heavily against allowing a voluntary association to pursue claims on behalf of members.

Appellant has not cited to cases which involved evaluation of whether a homeowners' association created under Arizona's common area interest association statutes could bring claims as a representative under the principles discussed in *Warth, Hunt, Armory Park,* and *Kard*. None of these cases address claims pursued

by a homeowner's association. *Armory Park* involved a "voluntary association" dedicated to neighborhood preservation and improvement. Planned communities may currently exist in the Armory Park Historic Residential District, but the plaintiff in that matter was not a statutory planned community association like Appellant.

The powers of a homeowner's association are set forth by statute. As discussed, Arizona's legislature chose to grant the power to bring cases on behalf of two or more members to a condominium association, but not to a planned community association.

VII. Rule 23 Class Certification Is Irrelevant to the Claims

Appellant's discussion of class certification is not helpful nor relevant. This matter concerns claims of damages on 18 owner's lots, not claims by numerous unknown potential parties. None of the citations are to Arizona decisions.

Only two of the cases cited by Appellant in this section concern a homeowner's association. Both involve condominiums in states where, like Arizona, a condominium association is specifically empowered to pursue members' claims. ("Without limiting the rights of any unit owner, action may be brought by the manager or management committee ... on behalf of two or more of the owners...." *Brickyard Homeowners' Ass'n Mgmt. Comm. v. Gibbons Realty Co*., 668 P.2d 535, 542 (Utah 1983), *Brickyard Homeowners' Ass'n Mgmt. Comm. v. Gibbons Realty Co*., 668 P.2d 535, 542 (Utah 1983), citing Condominium Ownership Act, § 57-8-33,

Utah Code Ann.; "[Fla. R. Civ. P.] Rule 1.221 expressly authorizes condominium associations to 'institute, maintain, settle, or appeal actions or hearings in its name on behalf of all association members concerning matters of common interest to the members.'" *Allied Tube & Conduit Corp. v. Latitude on the River Condo. Ass'n, Inc*., 306 So. 3d 312, 313–14 (Fla. Dist. Ct. App. 2020).

VIII. Appellant's Trustee Argument Fails

Appellant argues that it should be treated as a trustee of a common law trust. This new and novel argument was not raised previously and was waived on appeal as well. Appellant's arguments ignore the nature of the association, which has powers and responsibilities defined by Arizona Statute and by its own governing documents. Reference to common law trust principles to create new powers is unnecessary and irrelevant.

Appellant discusses various rights to repair common areas '*or any other area placed under its jurisdiction.*" [Brief, p. 39.] However, Appellant does not and has not pointed to any part of the Declaration which grants it jurisdiction to sue on behalf of the individuals' warranty rights or empowers it to enforce those rights. Appellant cites to §§ 8.2.3 and 8.2.3.2 of the Declaration. Section 8.2.3 is titled "Maintenance by Association." [Brief, p. 39, and IRA 187, Exhibit A, pp. 30, 31; KHOV App 197, 198.] The section and subsections deal with maintenance by the Association or its agent and are actually clear that it is the HOA that has the obligation to repair, replace

or maintain the common areas, not the Defendant's. And, only where individual owners fail to maintain the uniformity required in the community documents MAY the HOA intervene with their properties to correct such deficiencies only, and then the HOA may charge the Owner with the cost thereof, and even lien their property to pay for it. There is no general right to pursue claims of owners against their builders under their implied warranties. Indeed, the CC&R's make clear that the HOA shall reserve funds from the owners continually to make any repairs, replacements or improvements desired in the common areas.

Appellant argues that "Individual homeowners may take no action," but this lacks any support or foundation. It is true the HOA shall maintain, repair or replace common area elements but that does not grant in any way the HOA's right to an implied warranty against the Declarant at all. No part of the Declaration states or is cited for the proposition that individual owner-members of the Appellant do not assert their own Implied Warranty rights.

Appellant refers to a lack of claims over unit interiors. [Brief, p. 39, footnote 7.] That is true, but it is not only interiors that the HOA has no rights over. The CC&R's clearly provide for the owners their right to maintain all aspects of rights over their homes and lots. It was undisputed and noted by the Superior Court that the common area consists of the parking lot, pool area, and cabanas, and that the definition of common area expressly excludes areas located on the lots. [IRA 290,

p. 4, KHOV APP 108.] The issue was not whether the claims were based on conditions on the exterior or interior of residences, the issue was that the claims belonged to the owners. [*Id.*]

The elements of a common law trust include intent. Essential elements include "clear and unequivocal intent to create a trust." *Golleher v. Horton*, 148 Ariz. 537, 543 (App. 1985). Other elements are a settlor, a trustee, an ascertainable trust res, and identifiable beneficiaries. *Id.* These elements have no application here.

A.R.S. § 14-10106 provides further instruction to the courts in evaluating the law of trusts:

> **A.** The common law of trusts and principles of equity supplement this chapter, except to the extent modified by this chapter or another statute of this state.
>
> **B.** The court shall look to the restatement (second) of trusts for interpretation of the common law and not to subsequent restatements of trusts to determine:
>
> 1. The rights and powers of creditors of beneficiaries.
>
> 2. The duties of trustees to distribute to those to whom a beneficiary owes any duties.
>
> 3. Whether public policy may affect enforceability and effectiveness of the terms of the trust.
>
> 4. And effectuate the settlor's intent. A.R.S. § 14-10106.

Appellant argues that it is in the role of a trustee and has trustee's responsibilities. However Appellant has not clearly explained how any of the elements can possibly be met.

Appellant describes a definition of trusts that includes property with title held by a trustee for the benefit of its beneficial owner. [Brief, pp. 39-41.] It argues that a trustee is "the real proprietor" who "sues in his own right," citing *Navarro Svgs. Ass'n v. Lee*, 446 U.S. 458, 463 n. 10 (1980).

Appellant has not explained what it purports the trust res to be. The residences are not legally titled to Appellant. Appellant has not explained whether it purports the seller or owners or anyone to be the settlor. And Appellant has not identified any expression of intent to create a trust. The Appellant is not the "owner" of the residences as a trustee or in any way.

IX. Appellant's Form Over Substance Argument Misstates the Decisions

Appellant argues that "possession, management, and control" and "dispositional rights" of buildings were ceded to it, despite its lack of any ownership of the lots (which include the buildings and their exteriors). [Brief p. 45.] As discussed above, Appellant has failed to cite any portion of the Declaration or the record where it was given any right to pursue of dispose of claims by the owners of the residences, nor any right of its own in implied warranty, as to common area elements either.

Appellant cited to two property sale decisions, *Kadera v. Superior Court*, 187 Ariz. 557 (App. 1986) and *E-Z Livin' Mobile Sales, Inc. v. Van Zanen*, 26 Ariz.App. 363 (App. 1976). Both cases concerned claims between sellers and buyers where the seller characterized the transaction as a "lease," despite the parties intentions to transfer a fee or ownership interest. Neither case is persuasive or applicable. *E-Z Livin'* involved a sale of an interest between two parties which was characterized as a clear attempt to subvert the public policy of the state against forfeitures." *Kadera*, *Supra*, involved a sale of an interest in a residential cooperative which was characterized as a lease for HUD purposes but characterized as an ownership interest in a housing cooperative in the sale documentation. No evidence, and no decision, supports any finding that the Appellant association was intended to be a trust or should be treated as one.

Appellant, in its discussion on *Kadera*, *Supra*, seems to suggest that the notion of who is the "owner" is vague here. It is not. And, that Appellant should be able to exercise broad rights arising from "ownership." [Brief, pp. 45-6.] But, Appellant owns nothing but the common area at best were this concept even to be accepted. But, it should not be. The *Kadera* decision did involve some rights arising from the owner's "rights in her individual unit" as a "member of a residential collective.'" In that case, the Court determined that the seller could not pursue a forcible entry and detainer action against a purchaser who bought an interest in a "residential

cooperative corporation" and had a "occupancy agreement" because the forcible entry and detainer statute made a specific exception for cooperative owners. But, "[T]he legislature unequivocally excluded from the reach of ARLTA [Arizona Residential Landlord and Tenant Act] a residential occupant who is also an "owner of a proprietary lease in a cooperative." *Kadera*, *Supra*, 187 Ariz. 557, 562, 931 P.2d 1067, 1072 (Ct. App. 1996). The Court did not create broad or vague rights for any party who simply claims an "ownership" interest without title. Instead, the Court explained that its decision was meant to confirm that cooperatives were governed by Arizona real estate law. *Kadera v. Superior Ct. In & For Cnty. of Maricopa*, 187 Ariz. 557, 566–67, 931 P.2d 1067, 1076–77 (Ct. App. 1996). Again, entirely off point.

Kadera at its heart dealt with whether to follow the Arizona statute that said a cooperative member could not be evicted, or to follow the designation of the property as a lease as it was designated for federal purposes: "[W]hile the legislature authorized the use of summary proceedings in the residential landlord-tenant context, it excluded a holder of a proprietary lease in a cooperative from the reach of these proceedings." *Kadera v. Superior Ct. In & For Cnty. of Maricopa*, 187 Ariz. 557, 563, 931 P.2d 1067, 1073 (Ct. App. 1996).

X. There Is No Assumption on the Assignment of Property

Appellant includes a misleading comment in its footnote 1 at p. 14 of its Brief. Appellant states that the trial court's ruling was made "assuming that having been conveyed title by quit-claim deed and (supposedly) not 'pursuant to' any contract 'containing' an implied warranty," but that is not so. The Court's ruling does not rely on whether the quit claim granted an implied warranty- but rather on the fact that no Arizona authority has ever granted such an HOA any such warranty. Appellant further speculates that the property "*was"* transferred pursuant to a contract, either the member's purchase agreements or the Declaration. [Brief, p. 14, fn 1.] But, neither is so. The property was transferred via Quit Claim Deed and this was never disputed. The evidence presented to the trial court with Appellee's Motion for Summary Judgment included specific evidence that only common areas were conveyed pursuant to the quit-claim deed. [IRA 56, p. 3; IRA 69-61, pp. 2, 5; IRA 290, p. 2; KHOV APP 67, 77, 80, 106.] The evidence further showed that there was no agreement to construct, or agreement to warrant construction in the Declaration, or anywhere else, as noted specifically in the trial court's ruling. [IRA 290, pp 4-6; KHOV APP 208-210.] The trial court pointed this out in its discussion of its ruling on the two causes of action arising from the Declaration. [*Id.*] Neither of those causes of action are addressed in the Appeal.

XI. Fees Were Properly Awarded by the Superior Court

Appellant argues that fees should not have been awarded as the issue presented was not a subject of prior reported decisions. However, the lack of reported opinions on an issue does not mean that Appellant raised a novel legal question. The cause of action at issue has been repeatedly determined to arise from rights of buyers of homes. The Court in *Hayden v. Pegasus*, *Supra*, declined to extend a similar right to commercial entities. The Superior Court found here expressly that there were no warranties extended to the Appellant either though the Declaration or under the well-settled law of the Implied Warranties. [IRA 290; KHOV APP 205-211.] The arguments raised by Appellant did not raise complex issues, just issues that misinterpreted the law on Implied Warranties and the statutes requiring pre-claim notices.

There is no issue with novelty that suggest that the factors of *Associated Indemnity Corp. v. Warner*, 143 Ariz. 567 (1985) were not properly applied. Appellant acknowledges that the appropriate standard for review on the award of fees is abuse of discretion under *Warner*, *Supra*, and *Bogard v. Cannon & Wendt Elec. Co*, 221 Ariz. 139 (App. 2009). A sufficient record was set to support the Court's opinion. [IRA 296-297, and 320-321; KHOV APP 213-224, 225-234.]

As to fees awarded to Third-Party Defendants, these were authorized under *Fulton Homes Corp. v. BBP Concrete*, 214 Ariz. 566, 155 P.3d 1090 (Ct. App. 2007)

as argued by the Third-Party Defendant subcontractors. [IRA 299, pp. 3-5; KHOV APP 237-239.] As argued by Third-Party Defendants in the Superior Court, awarding fees against Appellant was proper and just, as they initiated the unjust claim and action, and awarding fees against Appellees would be unjust, as they were required to put Third-Party Defendants on notice and pursue their Third-Party Complaint under A.R.S. § 12-1363. [*Id.*, p. 5; KHOV APP 239.]

APPELLEES' REQUEST FOR FEES ON APPEAL AND RESPONSE TO APPELLANT'S REQUEST

Appellees request an award of their fees and costs on appeal pursuant to ARCAP 21(a) and under A.R.S. § 12-341.01 as the claims asserted against it arise from or are intertwined with claims arising from contract or alleged contract. Courts have held claims for implied warranties arise out of contract for purposes of fee awards. "It is well-established that a successful party on a contract claim may recover not only attorneys' fees expended on the contract claim, but also fees expended in litigating an 'interwoven' tort claim. *Ramsey Air Meds, L.L.C. v. Cutter Aviation, Inc.*, 198 Ariz. 10, 13, 6 P.3d 315, 318 (Ct. App. 2000). If Appellees are successful in the appeal, they will be successful parties on the merits of the case in its entirety.

CONCLUSION

This matter was correctly decided by the Superior Court when it entered Summary Judgment in favor of Appellees. Appellant is not the holder of the

Richards v. Powercraft warranty, which is a remedy extended to purchasers of new homes and their successors without notice of defects. Other causes of action arising from the Appellant's own contractual rights were also decided correctly and have not been contested by Appellant. There too no implied warranty right has been found by any Arizona Court, particularly under the circumstances here where Appellant inspected and accepted the Quit Claim Deed and assessed reserve fund fees to repair or replace the common area elements over time anyway. There was no contractual relationship between Declarant and Appellant and certainly nothing in the CC&R's that could constitute any agreement to construct, let alone repair any common area element conveyed freely. The Superior Court did not have the opportunity to rule on the representational theories, as they were not raised to the Superior Court. These theories have all been waived. They further lack legal merit, especially considering the nature of the relief at issue. The Superior Court's ruling and judgment should be affirmed, and Appellees should be granted their fees and costs on appeal.

Dated: December 1, 2023

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