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Aire on McDowell Community Association

ARIZONA COURT OF APPEALS
DIVISION ONE

GALLERY COMMUNITY ASSOCIATION,
an Arizona non-profit corporation,

Plaintiff/Appellant,

vs.

K. HOVNANIAN AT GALLERY, LLC, et al.,
Defendants/Appellees.

Court of Appeals
Division One
No. 1 CA-CV 23-0375

Maricopa County
Superior Court
No. CV 2020-008714

**AIRE ON MCDOWELL
COMMUNITY
ASSOCIATION'S
MOTION FOR LEAVE
TO FILE AMICUS
BRIEF**

Pursuant to Arizona Rule of Civil Procedure 16(b)(2), Aire on McDowell Community Association ("Aire") asks the Court for leave to file

the attached amicus brief. Although Plaintiff consented to the filing of this amicus brief, Defendants refused thereby necessitating this motion and the Court's work on it.

1. The second issue raised in this appeal is whether the superior court erred "in holding Plaintiff Gallery Community Association, a 'planned community' homeowners' association under A.R.S. § 33-1801, cannot assert a claim for breach of the implied warranty of good workmanship to recover the cost of repairing material deficiencies in" various shared maintenance and common areas. (Opening Brief at 29.) Aire is a homeowners' association currently in litigation relating to the implied warranty over shared maintenance and common areas (the same issue in this case) with an affiliate of the Defendants developer in this case. (*See Aire on McDowell Community Ass'n v. K Hovnanian at Aire on McDowell, LLC, CV2022-008601.*) The Court's ruling in this case on whether HOAs can sue for breaches of the implied warranty will have a direct effect on the outcome of that lawsuit, and other similarly situated homeowners' associations and their members (i.e., homeowners). The law firm Kadan Turner Thomson Booth LLP, a nationally recognized law firm with over thirty years of experience as consumer advocates in the homebuilding industry, represents Aire in its case involving

the same issue presented here, and it has provided financial support for this amicus brief.

2. Undersigned counsel has read the parties' appellate briefs.

3. The Court should accept this amicus brief because it addresses and expands upon two important questions the Court faces in this case. First, Aire believes that A.R.S. § 33-2002(A), included in the attached brief's appendix, completely resolves the second issue raised on appeal, and does so in an easy and straightforward manner. This brief makes a detailed textual argument about the statute, precisely the type of argument courts find helpful when considering issues of statutory interpretation. (*Cf.* Answering Brief at 15 (“No part of A.R.S. §§ 33-2001et seq. . . . provide[s] 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.”)).

Given the significant impact this case will likely have on residential construction in Arizona and its quality going forward, the Court has a particularly strong interest in reaching the correct conclusion. The attached brief will help the Court to do that. *Cf. Wilson v. Indus. Comm'n of Arizona*, 147 Ariz. 261, 264 (App. 1985) (noting generally that statutory interpretation

“is a question of general public nature affecting the interest of the state at large.”) (citation omitted); *Evenstad v. State*, 178 Ariz. 578, 582 (App.1993) (explaining that “when we are considering the interpretation and application of statutes, we do not believe we can be limited to the arguments made by the parties if that would cause us to reach an incorrect result.”).

Second, this brief expands upon whether the common law authorizes a homeowners’ association to enforce the implied warranty in its own name either on behalf of itself or its members. Defendants argue extensively that the common law does not afford homeowners’ associations any right to enforce the implied warranty given in connection with residential development. (*See, e.g.* Answering Brief at 7-13, 19-25; Reply Brief at 27-29.) The attached brief will assist the Court in reaching the correct conclusion in this case concerning the common law, and avoid the mistakes implicit in Defendants’ reasoning that led the superior court astray.

The outcome in this case will have a significant statewide impact on residential development throughout Arizona, affecting numerous individuals other than that parties to this case. It is accordingly desirable for the Court to consider all relevant legal arguments to ensure the Court reaches the correct conclusion. The Court should grant this Motion.

RESPECTFULLY SUBMITTED this 24th day of January, 2024.

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