

**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' RESPONSE TO AMICUS BRIEF**

Louis W. Horowitz, Esq. [S.B. #020842]  
LORBER, GREENFIELD & POLITO, LLP  
3930 E. Ray Road, Suite 260  
Phoenix, AZ 85044  
TEL: (602) 437-4177  
FAX: (602) 437-4180  
[lorowitz@lorberlaw.com](mailto:lorowitz@lorberlaw.com)

Dennis I. Wilenchik  
WILENCHIK & BARTNESS, P.C.  
2810 North Third Street  
Phoenix, AZ 85004  
[admin@wb-law.com](mailto:admin@wb-law.com)  
[diw@wb-law.com](mailto:diw@wb-law.com)

*Attorneys for Defendants/Appellees  
K. Hovnanian at Gallery, LLC and  
K. Hovnanian Arizona Operations, LLC*

**TABLE OF CONTENTS**

TABLE OF AUTHORITIES ..... iii

RESPONSE TO ARGUMENT SUMMARY ..... 1

    I.    The Statute at Issue Creates Pre-Suit Notice Requirements. It  
        Does Not Create New Powers or Causes of Action.....3

        A.    A Planned Development Community Association Was  
            Not Granted the Same Powers as a Condominium  
            Association.....3

        B.    Amicus Curiae Misunderstands the Statute .....5

        C.    Maintenance Does Not Equal Ownership.....6

    II.   Arizona Common Law Created a Special Implied Warranty  
        for Buyers of New Homes, Not for Homeowners’  
        Associations.....10

        A.    The Implied Warranty of Workmanship and Habitability  
            Claim Recognized in *Columbia Western* and *Powercraft*  
            Creates a Special Right of Action for Purchasers of  
            Residences.....10

        B.    Amicus Curiae is Wrong About the Scope of the  
            *Powercraft* Implied Warranty, But the Scope is Not at  
            Issue in the Instant Case.....12

        C.    Arizona Law Does Not Support the Extension of The  
            Powercraft Implied Warranty to Associations, Since this  
            Remedy is Contract-Based for the Benefit of Purchasers.....13

        D.    No Statute Creates the Power that Amicus Curiae  
            Assumes to Exist.....17

CONCLUSION.....17

## TABLE OF AUTHORITIES

### Cases

<i>Cameron v. Sisson</i> , 74 Ariz. 226, 246 P.2d 189 (1952).....	11
<i>Columbia Western Corp. v. Vela</i> , 122 Ariz. 28 (App. 1979).....	2, 10, 11, 12, 13
<i>Dillig v. Fisher</i> , 142 Ariz. 47, 688 P.2d 693 (Ariz. App. 1984) .....	14
<i>Kubby v. Crescent Steel</i> , 105 Ariz. 459, 466 P.2d 753 (1970).....	11
<i>Lakeview Rsrv. Homeowners v. Maronda Homes, Inc.</i> , 48 So. 3d 902, 909 (Fla. Dist. Ct. App. 2010) .....	8
<i>Lofts at Fillmore Condo. Ass'n v. Reliance Com. Const., Inc.</i> , 218 Ariz. 574, 190 P.3d 733 (2008).....	3, 6, 10, 11, 12, 13, 15, 16
<i>Maronda Homes, Inc. of Fla. v. Lakeview Rsrv. Homeowners Ass'n, Inc.</i> , 127 So. 3d 1258 (Fla. 2013).....	8
<i>Moxley v. Laramie Builders, Inc.</i> , 600 P.2d 733, 735 (Wyo. 1979).....	12
<i>Reliable Electric Co. v. Clinton Campbell Contractor, Inc.</i> , 10 Ariz. App. 371, 459 P.2d 98 (1969).....	11
<i>Richards v. Powercraft Homes</i> , 139 Ariz. 242 (1984).....	2, 10, 13, 14, 15, 16, 17
<i>Zambrano v. M &amp; RC II LLC</i> , 254 Ariz. 53, 517 P.3d 1168 (2022).....	14, 15

**Statutes**

A.R.S. § 12-1242.....2

A.R.S. § 12-1361.....2

A.R.S. § 12-1363.....11

A.R.S. § 33-1242.....4, 6

A.R.S. § 33-2001.....4

A.R.S. § 33-2002..... 1, 2, 4, 5, 6, 10, 11

The Brief of Amicus Curiae Aire on McDowell Community Assoc. (“Amicus Curiae”) repeats the same erroneous argument made over and over. Amicus Curiae argues that the Arizona statutes which govern how an action may be filed somehow empower a planned development community association to bring certain causes of action. The cited statute A.R.S. § 33-2002 does not expand the powers of an association or give it any new cause of action. Amicus Curiae also misconstrues the scope of the Implied Warranty of Workmanship and Habitability. Its arguments do not provide a basis to support Appellant Gallery Community Association’s claim that it has the power to pursue its own claim sounding in Implied Warranty nor do they support any argument that Appellant may bring claims of its member homeowner in any representative capacity.

### **RESPONSE TO ARGUMENT SUMMARY**

Amicus Curiae presumes incorrectly that A.R.S. § 33-2002 empowers a homeowners’ association “to bring a dwelling action for their [sic] affected homeowners.” And it presumes incorrectly that an association is empowered to bring an implied warranty claim “in its own name, whether on behalf of itself or its members.”

Amicus Curiae refers to a “Homeowners’ association dwelling action” as addressed in A.R.S. § 33-2002. The statute does not create an action or expand the scope of allowable actions. It provides requirements. (“§33-2002(A)... a

homeowners' association may file a homeowners' association dwelling action only after all of the following have occurred...")

Amicus Curiae repeats over and over that the statute must be meant to allow the claim at issue. A.R.S. § 33-2002. This statute and the Purchaser Dwelling Act, A.R.S. § 12-1361 et al, govern the process under which claims may be asserted. The statutes do not create the rights. Arizona's common law creates the causes of action.

Arizona's statutes define the powers of homeowners' associations. Two different types of associations may exist, a planned development community association or a condominium association. The homes at issue are townhomes existing on separately owned lots. A planned development community like Appellant has not been granted the power to pursue claims belonging to unit owners. Contrast that with a condominium association which has been empowered to pursue claims of the unit owners in its own name under A.R.S. § 12-1242.

Arizona law does not extend the Implied Warranty of Workmanship and Habitability to homeowner's associations. No case has found that. The Implied Warranty as defined by *Columbia Western*, *Powercraft*, and later cases belongs to owners. So some express power to pursue the homeowners' claims is required. The Appellant does not have that power. The statutes that govern a dwelling action do not empower this Appellant to pursue claims of the individual homeowners.

**I. The Statute at Issue Creates Pre-Suit Notice Requirements. It Does Not Create New Powers or Causes of Action.**

**A. A Planned Development Community Association Was Not Granted the Same Powers as a Condominium Association**

Planned Development Associations and Condominium Associations were not granted similar powers when it comes to pursuit of claims belonging to the homeowner-members.

The Arizona Supreme Court *Lofts at Fillmore Condo. Ass'n v. Reliance Com. Const., Inc.*, 218 Ariz. 574, 190 P.3d 733 (2008) addresses claims by individual buyers of condominiums who formed an Association. The Court explained that it was evaluating the issue of whether the buyers could pursue a claim against a builder who was not also a vendor. (“We next turn to the issue of whether suit on this warranty can be brought by residential homebuyers, like those in the Association, who had no direct contractual relationship with the builder.”) *Id.* 218 Ariz. 574, 577, 190 P.3d 733, 736 (2008). The claims were pursued by a condominium association but those claims arose from the Implied Warranty right of the buyers.

A.R.S. § 33-2001 contains the following definition--

5. “Homeowners' association dwelling action” means any action involving a construction defect as defined in § 12-1361 filed by a homeowners' association against the seller of a dwelling arising out of or related to the design, construction, condition or sale of the dwelling.

A.R.S. § 33-2002 states that any such action may only be filed after providing specific notice to members:

“A. Notwithstanding any provision to the contrary in title 10, chapter 39 or chapter 9 or 16 of this title and in addition to any requirements prescribed in the community documents of a homeowners’ association, a homeowners’ association may file a homeowners’ association dwelling action only after all of the following have occurred:”

Although Amicus Curiae suggests that this provision is “substantively identical” to the language of A.R.S. § 33-1242, it is not . [AC Brief at p. 15]. This provision provides prerequisites to an Association before it may file an action. It does not include any expansion of the powers of an association. In contrast, A.R.S. § 33-1242 expressly empowers a condominium association to pursue claims belonging to unit owners.

A ‘homeowners’ association dwelling action’ could include claims by a condominium association asserting Implied Warranty claims or possibly express warranty or other claims arising from rights of two or more unit owners. A ‘homeowners’ association dwelling action’ could include express warranty claims owned by a planned community association or condominium association if warranties were given to the association by agreement. The fact that the legislature made prerequisites to filing a ‘homeowners’ association dwelling action’ does not lead to the conclusion that a planned community association must necessarily have the power to pursue claims belonging to unit owners like a condominium.

Statutory language that an association “may file a homeowners’ association dwelling action” simply does not support an interpretation that every association is granted the power to file an action arising from the rights of its members.

The definition of “Dwelling” in A.R.S. § 33-2002 does not mandate extension of the powers of a Planned Development Community. Homeowners have a right to pursue claims. The legislature did not extend to planned development associations the right to pursue claims belonging to its members, like it did for condominiums.

**B. Amicus Curiae Misunderstands the Statute**

Amicus Curiae cites to the tolling provision of A.R.S. § 33-2002(B). The provision simply allows an association to toll statutes of limitation by 60 days when the association gives its A.R.S. § 33-2002(A) notice to members less than 60 days before the expiration of the statute of limitations. It is unclear how this could possibly support Amicus Curiae’s argument that the statutes governing dwelling actions have extended rights or placed all associations “on an equal footing.” The tolling provision just allows additional time so that an association to comply with the pre-suit notice requirements before claims expire.

Amicus Curiae argues that “§ 33-2002 expressly instructs courts to *not* read § 33-1242 as somehow limiting an association’s right to file a dwelling action.” [AC Brief, pp. 24-25.] The tortured reading of the statute does not make sense.

A.R.S. § 33-1242 is part of Chapter 9. Condominiums; Article 3. Management of the Condominium. It describes powers of the condominium unit owners' association. It cannot be read to create or extend rights of a planned development association.

Amicus Curiae argues that the “two or more members” language from A.R.S. § 33-1242 is a limit the does not apply to planned development communities. [AC Brief, p. 26.] The statute actually grants a power to condominium associations. The statutes governing planned development communities do not contain a similar power.

Although Amicus Curiae claims that *Lofts* included an association who “sued in its own name in its capacity as a nonprofit corporation, [AC Brief, p. 27], the decision actually addressed rights belonging to individual homeowners as brought by a condominium association. No part of the *Lofts* decision extends the right of action to a condominium association. The discussion was entirely based on rights of the buyers of the units, and the question of whether their Implied Warranty claim could be pursued against a builder that was not also the seller. *Lofts, supra*, 218 Ariz. 574, 577, 190 P.3d 733, 736 (2008).

### **C. Maintenance Does Not Equal Ownership**

Amicus Curiae may be unfamiliar with the material issues of the instant matter and underlying property.

No homes were constructed on the common area. Further, the claims were predominantly based on alleged defects on the lots of the individual homes, not “common areas.” It is important to note that the minimal issues regarding common areas have been resolved by partial settlement.

Implied Warranty claims are the only claims subject to the appeal.

Does Amicus Curiae seek a ruling regarding whether common areas are within the scope of an individual owner’s right to Implied Warranty? That is not relevant to the instant matter. This case is primarily concerned with alleged defects in the building envelope of individually-owned townhomes. The question of whether an individual purchaser’s Implied Warranty of Workmanship and Habitability includes the homeowner’s claims over common areas is not a material question here.

The instant case does not concern whether an individual homeowner has Implied Warranty rights that include common areas. [AC Brief, p. 29.] Indeed, the court should take judicial notice that 12 of 18 homeowners at Gallery have initiated Purchaser Dwelling Act notices and are pursuing their own Implied Warranty claims.

Issues regarding whether common area improvements “support the residence” are not relevant to the instant claim. References to cases on Florida Implied Warranty law in *Lakeview Rsrv. Homeowners v. Maronda Homes, Inc.*, 48 So. 3d 902, 909

(Fla. Dist. Ct. App. 2010), *aff'd sub nom. Maronda Homes, Inc. of Fla. v. Lakeview Rsrv. Homeowners Ass'n, Inc.*, 127 So. 3d 1258 (Fla. 2013) are not helpful.

Amicus curiae has not shown that any of the alleged defect conditions at issue would be within the scope of an Implied Warranty of Habitability and Workmanship claim under Arizona law. Nor that any claims would be within the scope of the types of improvements that “support the residence” under Florida’s Implied Warranty of Fitness, Habitability, Workmanship, or other warranties of the types discussed in *Lakeview Rsrv. Homeowners v. Maronda Homes, Inc., supra*.

The concern raised by Amicus Curiae about ‘multiplicity of lawsuits’ should not be an issue for claims which arise on the individual home lots if it’s a legitimate concern at all.

Amicus Curiae argues that “only an association has a claim for the full extent of the repair costs necessary to fully repair the shared maintenance areas.” [AC Brief, p. 31.] No support is cited. And the argument is inapplicable to the claims here. Defects that impair the value of the individual homes are addressed by Implied Warranty damage claims by the owners whose suffered contractual expectation damages, even if the association also has an argued obligation to perform maintenance. It is the owner whose property has diminished value who suffered the contractual losses that are the subject of the Implied Warranty.

“Forcing” individual homeowners to sue to pursue their rights does not require duplicative litigation. [AC Brief, p. 32.] Individual homeowners’ claims alleging damage to their own homes or lots may be pursued by the individuals as plaintiffs. If appropriate they may join their claims with other plaintiffs. It has nothing to do with the HOA.

Section 8.1.7 of the declaration states that the association will paint, repair, replace and maintain the exterior of the dwelling units to keep a uniform appearance. As correctly noted by the Superior Court, this does not mean that the Association is damaged by or is the appropriate party to recover for alleged defects in the individual units. It is not required, but rather an option for the HOA, and it has the right to reserve funds to perform these tasks or to tax the individual owner who adversely effects the common look of a community by placing a lien to satisfy the expense. It has nothing to do with these Defendants or any claim against them by the HOA and certainly creates no claim.

Amicus Curiae is wrong when it claims that “A.R.S. §§ 33-2002(A) is the easy solution” to a “collective action problem.” [AC Brief, p. 33.] There is no ‘collective action’ problem.

A condominium association is allowed to raise claims belonging to owners in its own name, and on its own initiative. As long as it follows requirements of the Declaration and applicable statutes – including the requirement to notify owners

prior to filing suit pursuant to A.R.S. § 33-2002 and to provide notice to the defendants under A.R.S. § 12-1363.

A planned development community was not given that same power. It may not force members into “collective action” to pursue their individual claims.

## **II. Arizona Common Law Created a Special Implied Warranty for Buyers of New Homes, Not for Homeowners’ Associations.**

Amicus Curiae has misinterpreted *Lofts* and *Richards*. Neither has granted an association its own right under the Implied Warranty of Workmanship and Habitability. The claim as 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 created in favor of the buyer of a single-family home or subsequent purchaser without notice of the defect.

In *Lofts*, the Court expressly addressed the issue of the Implied Warranty and the rights of the individual homebuyers. *Lofts at Fillmore, supra*, 218 Ariz. 574, 577, 190 P.3d 733, 736 (2008). There was no question that the condominium association formed by the owners was raising rights of the individual owners, and no question whether it was authorized to do so.

### **A. The Implied Warranty of Workmanship and Habitability Claim Recognized in *Columbia Western* and *Powercraft* Creates a Special Right of Action for Purchasers of Residences**

Amicus Curiae correctly recognizes that Arizona common law has created warranties that arise from the sale of a new home. [AC Brief, pp. 35-38.]

However, it then goes on to say equate the special remedy of the Implied Warranty of Workmanship and Habitability (given in favor of homebuyers) is identical in “residential and non-residential development contexts.” [AC Brief, p. 38.] Arizona’s courts have not recognized the same broad remedy that exists for a residential homebuyer outside the context of new homes.

Amicus Curiae cites to cases involving implied warranties between contracting parties for construction of non-residential construction but ignores the fact that these cases involve express agreements to construct. (See references to *Kubby v. Crescent Steel*, 105 Ariz. 459, 466 P.2d 753 (1970); *Cameron v. Sisson*, 74 Ariz. 226, 246 P.2d 189 (1952); and *Reliable Electric Co. v. Clinton Campbell Contractor, Inc.*, 10 Ariz. App. 371, 459 P.2d 98 (1969).) However, the Court in *Lofts* explained that “These cases are distinguishable from *Columbia Western*, as they involved agreements directly between the contractors and the plaintiffs for non-residential construction.” *Lofts at Fillmore Condo. Ass'n v. Reliance Com. Const., Inc.*, 218 Ariz. 574, 576, 190 P.3d 733, 735 (2008).

The instant case does not include any agreement to construct common areas. Appellant never identified a contractual undertaking to construct or warrant construction of improvements, as the trial court noted in its ruling. [IRA 290, pp 4-6; KHOV APP 208-210.]

**B. Amicus Curiae is Wrong About the Scope of the *Powercraft* Implied Warranty, But the Scope is Not at Issue in the Instant Case**

Amicus Curiae has incorrectly cited to *Lofts*. At page 39 of the Amicus Curiae Brief, it states that the Court in *Lofts* “confirmed” that the Implied Warranty applies to “any residential realty” and applies to “the residential structures as part of a package including the land” based on references to *Moxley v. Laramie Builders, Inc.*, 600 P.2d 733, 735 (Wyo. 1979).

First of all, the cited passage in *Lofts* includes a quote from *Moxley, supra*, which concerns the nature of a builder versus a builder-developer. As is clear from the complete quote, the Court in *Lofts* was not discussing or endorsing the scope of the Implied Warranty but rather whether it should apply to a builder that was not also a vendor:

Thus, although *Columbia Western* and *Richards* involved builder-vendors, both opinions—and our prior cases—make clear that an implied warranty arises from construction of the home, without regard to the identity of the vendor. *Moxley*, which we cited with approval in *Richards*, makes this point expressly:

We can see no difference between a builder or contractor who undertakes construction of a home and a builder-developer. To the buyer of a home the same considerations are present, no matter whether a builder constructs a residence on the land of the owner or whether the builder constructs a habitation on land he is developing and selling the residential structures as part of a package including the land. It is the structure and all its intricate components and related facilities that are the subject matter of the implied warranty. Those who hold themselves out as builders must be just as accountable for the workmanship that goes into a home ... as are builder-developers.

*Lofts at Fillmore Condo. Ass'n v. Reliance Com. Const., Inc.*, 218 Ariz. 574, 577, 190 P.3d 733, 736 (2008).

Also, second, Amicus Curiae ignores the fact that a condominium includes rights to an undivided ownership interest by each member. A planned community such as the one at issue has members with rights of use and enjoyment over common areas.

**C. Arizona Law Does Not Support the Extension of The Powercraft Implied Warranty to Associations, Since this Remedy is Contract-Based for the Benefit of Purchasers**

Amicus Curiae seeks to expand and transform the Implied Warranty right. It argues that “any owner” can assert the *Powercraft* warranty. [AC Brief, p. 41.]

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 a remedy given to individual purchasers of homes.

As discussed in the Answering Brief and underlying motion practice, all cases addressing this right arise from rights of buyers of new homes. (See Answering Brief, pp. 12-18).

Amicus Curiae argues that it does not matter how an owner obtained a home, and that it still had the Implied Warranty claim, [AC Brief, pp. 47-48, 52.] The remedy protects a party who purchases a home from the economic impact of defects which could not be reasonably detected prior to purchase. It expressly is limited to

latent defects that would not have been discoverable had a reasonable inspection been made prior to purchase. *Richards v. Powercraft Homes, supra*, 139 Ariz. At 245, 678 P.2d at 430. To establish an implied warranty claim, a plaintiff must prove the existence of a latent defect, that the defect manifested after purchase of the structure, resultant damages, and the builder-vendor was the origin and cause of defect. *Id.*, *Dillig v. Fisher*, 142 Ariz. 47, 50-51, 688 P.2d 693, 696-697 (Ariz. App. 1984). It is not an unlimited cause of action as suggested by Amicus Curiae. The remedy is contractual and protects a purchaser – whether directly from the builder or a remote purchaser – from damages that come from payment for a home with defects that could not be discovered prior to the agreement to purchase. Amicus Curiae’s citation to North Carolina law does not relate to Arizona’s remedies. [AC Brief. pp. 47-48.] HOA’s, as here, inspect the property under a Quit Claim grant, and take with notice of the deficiencies and build it into their reserves assessed over time, or simply do not accept the property, being under no obligation to do so.

Amicus Curiae cites *Zambrano v. M & RC II LLC*, 254 Ariz. 53, 56-57 (2022) for the proposition that an Implied Warranty claimant does not need to be a “purchaser.” [AC Brief, p. 48.] This does not make sense and directly contradicts the actual text of the *Zambrano* decision. The Court discussed the history of the Implied Warranty and consistently referred to it as one in favor of ‘buyers’ or ‘purchasers of homes,’ for example in the following passage:

Since 1979, our courts have continuously applied the implied warranty as part of the common law. *See supra* ¶ 14. The legislature has explicitly approved causes of action based on the warranty by enacting laws governing their assertion. *See supra* ¶ 17. Indeed, explanatory documents supporting the bill enacted to amend the Purchaser Dwelling Act in 2019 reflected that **a purchaser of a home** may file a lawsuit against a builder-vendor for any construction defect after following the Act's procedures. *See* Ariz. State H.R. Summary for S.B. 1271, 54th Leg., 1st Reg. Sess. (Mar. 18, 2019); Ariz. State Senate Fact Sheet for S.B. 1271, 54th Leg., 1st Reg. Sess. (Feb. 19, 2019). The House of Representatives summary also cited an implied warranty case as authority that **the buyer** may only file suit against the party in privity. *See* Ariz. State H.R. Summary for S.B. 1271 (citing *Yanni v. Tucker Plumbing, Inc.*, 233 Ariz. 364, 367–68, 312 P.3d 1130, 1133–34 (App. 2013)). As previously explained, *see supra* ¶¶ 26–28, if the dissent's position prevails, the implied warranty would likely disappear, and without it **buyers** would have no cause of action to assert, making statutory references to the implied warranty superfluous. *See* § 12-552(E), (F); § 12-1362(E).

*Zambrano v. M & RC II LLC*, 254 Ariz. 53, 65–66, 517 P.3d 1168, 1180–81 (2022).

No part of the *Zambrano* decision discusses any finding that the Implied Warranty is extended to someone who is not a “purchaser.” Again, Amicus Curiae appears to rely on its misinterpretation of *Lofts* where it states incorrectly that the Court in *Lofts* found a right arising from the Association’s own rights rather than the rights of the individual homebuyers.

Amicus Curiae tries to support its ‘non-purchaser’ argument by misconstruing the point of *Richards v. Powercraft*. It states [AC Brief, p. 50] that the warranty “extended automatically as a matter of law from *Powercraft* to a federal agency

when the Farmers Home Administration repossessed some original buyers' homes," and "automatically extended from that federal agency to the *Richards* plaintiffs when they acquired the homes from that agency." [AC Brief, pp. 50-51.] The case actually concerned rights that arose to the buyers of the homes and were extended regardless of privity with the original builders. ("Plaintiffs Woodward, Fillion, Schaar, and Grant purchased their homes directly from Powercraft while plaintiffs Richards, Farina, and White bought repossessed homes from Farmers Home Administration." *Richards v. Powercraft Homes, Inc.*, 139 Ariz. 242, 243, 678 P.2d 427, 428 (1984).) Nothing in the decision states or suggests that the Farmers Home Administration had any right to pursue this claim or that it had passed any such rights to the plaintiffs. The court found that the purchasers could pursue the Implied Warranty claims even without privity with the original builder.

Nothing in *Lofts* found or supported a finding that the condominium association at issue had its own Implied Warranty right. Nothing therein dealt with an HOA like the one here.

Amicus Curiae notes that CC&Rs are contracts between the property owners as a whole and individual lot owners, but also argue that they may include terms between the declarant and association. [AC Brief, p. 55] Amicus Curiae cites to the Declaration where it states that it shall convey fee simple to the Common Area to the Association. [AC Brief, p. 56.] However, as noted by the trial court, Appellant

never identified any contractual agreement to perform construction. [IRA 290, pp. 4-6; KHOV APP 208-210.] There is no agreement between these parties and no privity to enforce any agreement.

Amicus Curiae argues that anyone with property rights in a residential development automatically receives an implied warranty. [AC Brief, p. 58.] This ignores the nature of the contractual Implied Warranty remedy and the limitations as set forth in *Powercraft* and subsequent decisions.

**D. No Statute Creates the Power that Amicus Curiae Assumes to Exist**

Amicus Curiae argues there is no law that “precludes” an association from enforcing rights held by its members. It does not explain how a planned development community should acquire the same power expressly granted to a condominium association by statute. And, to the extent the HOA acquires rights with notice of the defects, it would stand in no better position, even were it correct, than the subsequent purchaser with notice, referred to in the *Richards v. Powercraft* case, *supra*, that has no such warranty right.

**CONCLUSION**

Ultimately, Amicus Curiae has failed to provide any basis to overturn the summary judgment entered in favor of Appellees. The Superior Court correctly found that the cause of action for Implied Warranty of Workmanship and Habitability belonged to the individual homeowners, not the Plaintiff/Appellant

association. Plaintiff/Appellant alleged and pursued claims upon the claim that it owned the right to pursue those claims. The Superior Court correctly found that all claims including the Implied Warranty claim should be dismissed. Amicus Curiae argues that statutes which require pre-suit notice somehow expand or change the available causes of action. They do not. The statutes do not create new causes of action, and do not grant Appellant the power to raise owners' causes of action. The Judgment should be upheld and the arguments by the Amicus Curiae should be disregarded.

Dated: March 7, 2023

LORBER, GREENFIELD & POLITO, LLP

By: /s/Louis W. Horowitz  
Louis W. Horowitz, Esq.  
3930 E. Ray Road, Suite 260  
Phoenix, AZ 85044

and

WILENCHIK & BARTNESS, P.C.

By: /s/Dennis I. Wilenchik  
Dennis I. Wilenchik  
2810 North Third Street  
Phoenix, AZ 85004

*Attorneys for Defendants/Appellees  
K. Hovnanian at Gallery, LLC and  
K. Hovnanian Arizona Operations,  
LLC*