

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

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

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

**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' MOTION FOR
RECONSIDERATION**

COME NOW Appellees K. Hovnanian at Gallery, LLC and K. Hovnanian
Arizona Operations, LLC and hereby move this Court for reconsideration of its

August 6, 2024 Ruling pursuant to ARCAP 22. This Court found that the enactment of A.R.S. § 33-2002 was intended to grant or authorize a Planned Community type Homeowner's Association to pursue a claim arising under the Implied Warranty of Workmanship and Habitability. Appellees contend that this point of law was erroneously determined and request that this Court grant reconsideration of its order for that reason, before we file a Petition for Review, all as set forth in the following Memorandum of Points and Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

The instant Appeal concerns one part of the trial court's grant of Summary Judgment. The trial court found that Appellant Gallery Community Association, a Homeowner's Association of the Planned Community Association type as defined in A.R.S. § 33-1802, lacked authority to pursue claims arising from the Implied Warranty of Habitability and Workmanship, and entered Summary Judgment against Appellant on that cause of action among others. This was based on the lack of any court's finding that such an HOA held any implied warranty right on its own, or authorization to bring claims on behalf of the individual owners.

This Court of Appeals found that A.R.S. § 33-2002, a statute describing conditions of or prerequisites for filing certain suits, could not apply to any actions unless it meant to create or authorize a right by Homeowners Associations' to pursue Implied Warranty claims against Sellers. This Court reversed the Judgment based on

its interpretation of A.R.S. § 33-2002. However, there is no reason to assume that the legislature intended to authorize this type of Association to pursue this type of claim by this statute. In fact there are other causes of action such as a breach of contract claim, which this HOA actually brought (albeit without any basis and dismissed which it did not appeal) in this very case. There is nothing in the legislative history or elsewhere that in any way expressly or impliedly gives rise to even any inference that this statute was brought with the implied warranty of habitability in mind, let alone that it in any way authorizes such a cause of action for this HOA impliedly at all.

Actions that a Homeowner's association might pursue that could be subject to the litigation prerequisites established by A.R.S. § 33-2002 may include multiple other types of claims that an association is authorized to pursue. An association might pursue claims arising from express warranties made to the association. An association may have specific authority in its community documents to pursue certain other claims. This Court here evaluated the community documents and did not identify any provision authorizing pursuit of unit owners' claims against a builder or seller. See August 6, 2024 Opinion of the Court, ¶ 8. An association may

also pursue claims arising from the rights of members if it is a Condominium Unit Owners Association, as per the authority granted in A.R.S. § 33-1242.¹

A.R.S. § 33-2002 , as originally enacted in 1999 and as modified in 2015, would apply to those types of claims. There is no reason to presume that the Legislature intended the statute to authorize a planned community association to pursue its members' Implied Warranty of Workmanship and Habitability claims let alone create one for the HOA.

I. History

The statutes in the chapter on “Homeowners Association Dwelling Actions” were originally passed in 1999 and numbered as A.R.S. §§ 33-1901, 1902, and 1903.

§ 33-1901, “Definitions,” originally contained the following definitions:

2. “Dwelling” means a newly constructed single family or multifamily unit designed for residential use and property and improvements that are either owned by a homeowners’ association or jointly by all of the members of a homeowners’ association. Dwelling includes the systems, other components and improvements that are part of a newly constructed single family or multifamily unit at the time of construction.

5. “Homeowners’ association dwelling action” means any action filed by a homeowners' association against the seller of a dwelling arising

¹ To the extent this Court even mentioned section 8 of the CC&R’s it was not as a basis for the Opinion, but in any event it misstated the provisions. This section is not requiring any maintenance or repair of individual’s exteriors or roofs but is rather a permissive right to do so and then only when the exteriors are not in uniformity with other design guidelines and in no way provides for the owner’s right of implied warranty as to its builder/vendor to be vested in the HOA.

out of or related to the design, construction, condition or sale of the dwelling.

The definitions in the § 33-1901 refer both to Condominium Associations under A.R.S. § 33-1202 and to associations defined by A.R.S. § 33-1802. Section 33-1802 is the ‘general conditions’ section of the chapter on Planned Communities also enacted in 1999.

Both the original and amended version of the statute have generally similar definitions (33-1901 and 33-2001) and general conditions (33-1903 and 33-2003).

The statute as passed did refer to requirements applicable to actions asserting construction defects. The section heading for § 33-1902 and modern § 33-2002 is “Homeowners’ association dwelling actions; conditions.”

II. Purchaser Dwelling Act

The Purchaser Dwelling Act, A.R.S. § 12-1361 et al, was enacted in 2002. The definition of “defect” as used in that statute did not exist in 1999.

The 1999 version of A.R.S. § 33-1901 had no reference to the Purchaser Dwelling Act, A.R.S. § 33-1361 et al, which was enacted in 2002. The 1999 version of A.R.S. § 33-1901 referred to actions arising from defects, and the 2015 version added a reference to the definitions from the Purchaser Dwelling Action:

A.R.S. 33-1901(A)(5): “Homeowners’ association dwelling action” means any action 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. 33-2001(A)(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.

This Court addressed definitions of “construction defect” from A.R.S. § 12-1361(4)(c) and found that there was overlap between that definition and the subject matter of the Implied Warranty of Workmanship and Habitability. The Court went on to say “When pressed at argument, even counsel for Hovnanian conceded the overlap in coverage between the statute and the implied warranty.” August 6, 2024 Opinion of the Court, ¶ 20. That is not so. No concession was made that the statute creates any such right of implied warranty at all. Counsel merely agreed that the legislature “could” do so, but not that it had done so. There is no question that the Purchaser Dwelling Act, A.R.S. § 12-1361 et al, also creates prerequisites to filing actions arising from defect claims if that is what the Court is referring to. However, the definition of “construction defect” which triggers the responsibility to provide statutory notice is not limited to Implied Warranty claims or Implied Warranty claims pursued by a planned community type homeowner’s association. A.R.S. § 33-1261 et al governs all defect claims and contains no reference or limitation to Implied Warranty claims. Claims that fall within the definition and which much comply with the prerequisites and conditions of the statute include claims by individuals, claims by Associations including condominium associations, and

claims that arise from causes of action that may include breach of contract or express warranty. The bottom line is that nowhere do we concede or agree with the Court creating an implied warranty right out of the statute which was designed to create procedural pre requisites only for an otherwise authorized cause of action or claim brought by the Association. Court was in error and should correct the decision.

III. Differences

As this Court itself notes, but then apparently ignores, our Arizona Supreme Court has ruled that “The [Purchaser Dwelling] Act does not itself provide a legal cause of action for such lawsuits.” *Zambrano v. M & RC II LLC*, 254 Ariz. 53, 62, 517 P.3d 1168, 1177, ¶ 25 (2022). This is clear and unambiguous, yet this Court essentially did otherwise with respect to a similar statute.

This Court goes on to presume that A.R.S. § 33-2002 must have somehow been meant to authorize an association to pursue an Implied Warranty claim but there is no support at all for this presumption:

“But the reverse is true of A.R.S. § 33-2001 and § 33-2002 – when the legislature wrote them, no court had recognized an implied warranty right in HOAs to sue for construction defects. These statutes are either rules for a nonexistent cause of action, or themselves an authorization of one.” August 6, 2024 Opinion of the Court, ¶ 25.

But, again, no Court had found such an implied warranty right for such an HOA to the time of this Court’s opinion. It is therefore obvious that the legislature did not create such a right by not expressly saying it was doing so. And, contrary to this Court’s statement, there are other contract based claims and causes of action for such claims

beyond those found in implied warranty, as well as by assignment to the extent such are allowed as to the owner's claims.

“Hovnanian is right that “the association may . . . institute . . . litigation,” the wording in A.R.S. § 33-1242(A)(4), is modestly different from “a homeowners’ association may file a[n]... action,” the language in A.R.S. § 33-2002(A). But the difference is minor and immaterial – their phrasing is similar and parallel, and they both authorize suits by their plain language.” August 6, 2024 Opinion of the Court, ¶ 26.

This Court ruled that the language authorizing a condominium to pursue certain claims is only “modestly different” from the language of A.R.S. § 33-2002 but ignored the fundamental difference between a condominium regime and a planned area community in that the HOA common area in the condominium context is different than in a planned area community where owners do not share common walls and each have an undivided interest in the common areas.

A.R.S. § 33-1242, in the condominium chapter, has the section heading “Powers of a Unit Owners Association.” That section provides, “A. Subject to the provisions of the declaration, the association may...4. Institute, defend or intervene in litigation or administrative proceedings in its own name on behalf of itself or two or more unit owners on matters affecting the condominium.”

The language is more than “modestly different” from any part of A.R.S. § 33-2002 or its predecessor.

A.R.S. § 33-1902, as originally enacted and A.R.S. § 33-2002, as modified and renumbered in 2015, both provide that “[A] homeowners’ association may file a homeowners’ association dwelling action only after all of the following have occurred[.]” Both the 1999 and 2015 versions of the statute describe notice to members, a meeting, and board authorization. The revised statute also makes reference to compliance with the builder notice provision of A.R.S. § 33-1263 in the Purchaser Dwelling Act. Nowhere does it provide an implied warranty cause of action is created thereby even assuming the Legislature could have done so. It is apparent it never did and no legislative history provided by either party here or the Court provided even an inkling of such an intent.

Section 33-1342 in the condominium chapter specifically is concerned with granting power to a Condominium Unit Owners Association. Sections 33-1902 and 33-2002 concern conditions applicable to certain types of actions. Section 33-2002 and its predecessor state that actions fitting the definition may only be filed after multiple conditions have occurred. And the main difference between the 1999 and 2015 versions of the statute is that the later version adds a fourth condition to the list of prerequisites, which is compliance with the Purchaser Dwelling Act notice requirement from A.R.S. § 12-1363. Nowhere is there any intention to create a cause of action for the HOA here that does not otherwise exist.

A.R.S. § 12-1363 defines prerequisites for certain actions and does not create or expand the rights of action existing or create a new one. It follows that A.R.S. § 33-2002, a statutory provision which lists conditions required before filing an action including compliance with A.R.S. § 12-1363, should not be read to create or expand causes of action not otherwise found by any Court to exist. Both A.R.S. § 12-1361 and A.R.S. § 33-2001 apply to “Associations” and both statutes use definitions of “Association” which apply to both Condominium Unit Owners Associations and Planned Community Associations.

CONCLUSION

Appellees request that this Court find that its Ruling was based on an error of law, and on assumptions that simply have no basis. Based on the language of the applicable statutes, and as confirmed by *Zambrano, supra*, and confirmed further by review of the history of the legislation no such assumption was needed, nor correct. An Association may have contractual rights to sue on its own behalf, as this very HOA did here and lost on and did not appeal. But, the statute in question is a procedural one detailing pre-requisites to filing an otherwise allowable cause of action. No Arizona court, including this one, found any reason to provide such an independent right in implied warranty as to a Declarant over common areas to date. And, no other reason to provide such a right for individual owners in a planned area community who own their exteriors and roofs, as opposed to ownership of such

common areas in a condominium regime, has ever been provided by any Court in Arizona that has dealt with the issue. To somehow infer from this procedural statute an independent cause of action that is a creation of law by the Courts, to this legislative statute creating hurdles, if anything, to bringing an otherwise authorized claim, is error and unsupported. Appellees respectfully request that this Court grant their Motion for Reconsideration and enter a ruling upholding the original Judgment.

Dated: August 21, 2024

LORBER, GREENFIELD & OLSEN, 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*