No. 122022

In The
Supreme Court of Illinois

SIENNA COURT CONDOMINIUM ASSOCIATION,

Plaintiff-Appellee,

v.

CHAMPION ALUMINUM CORP., *et al*.,

Defendants-Appellants.

On Petition for Leave to Appeal from the Appellate Court of Illinois, First District
Case Nos. 1-14-3364, 1-14-3687, and 1-14-3753

Heard on Appeal from the Circuit Court of Cook County, Illinois
The Honorable Margaret Brennan, Judge Presiding.
Case No. 13-L-2053

BRIEF OF PLAINTIFF-APPELLEE SIENNA COURT CONDOMINIUM ASSOCIATION

SAUL EWING ARNSTEIN & LEHR LLP
161 North Clark Street
Suite 4200
Chicago, Illinois 60601
(312) 876-7100
Of counsel:
Hal R. Morris (hal.morris@saul.com)
W. Matthew Bryant (matthew.bryant@saul.com)
Elizabeth A. Thompson (elizabeth.thompson@saul.com)
Michael A. Jacobson (michael.jacobson@saul.com)

ORAL ARGUMENT REQUESTED

E-FILED
4/24/2018 12:08 PM
Carolyn Taft Grosboll
SUPREME COURT CLERK

POINTS AND AUTHORITIES

NATURE OF THE CASE

Sienna Court Condominium Association ("Sienna Court") brought this action against a developer and the developer's subcontractors seeking to remedy the pervasive, serious defects in the construction of the Sienna Court Condominium buildings. The Sienna Court buildings, as constructed, continue to suffer from significant, unabated water infiltration and other serious problems caused by Subcontractors. These defects have damaged the individual units in the buildings, the common elements, improvements within units, personal property, and have materially affected the livability of the buildings. The defects continue to drastically impact the habitability of the buildings for Sienna Court's many owners and residents.

Subsequent to completion of construction, but prior to Sienna Court's discovery of the material, latent defects, the buildings' developer, TR Sienna Partners, LLC ("TR Sienna"), and general contractor, Roszak/ADC, LLC ("Roszak"), were both insolvent and dissolved. Each entity has since been adjudicated bankrupt, by the United States Bankruptcy Court for the Northern District of Illinois, in Chapter 7 bankruptcy proceedings. Without a solvent developer or general contractor whom could compensate Sienna Court for the multimillion dollar cost to repair the latent defects, Sienna Court filed suit against, *inter alia*, the various subcontractor and material suppliers (e.g. the "Subcontractors") whose defective work caused the wide-spread defects. Sienna Court properly alleged in its lawsuit claims for breach of the implied warranty of habitability. Subcontractors, however, contended that subcontractors and material suppliers cannot and should not be held accountable to innocent home purchasers for their own defective work.

In this Court, Subcontractors repeat the same unsuccessful arguments rejected by the Circuit Court and Illinois Appellate Court, First District. Subcontractors argue that they should be categorically shielded from liability, irrespective of the developer and general contractor's adjudicated insolvency. In support, Subcontractors argue that Sienna Court's possible recovery of a *de minimis* portion of its damages from: (a) certain insurance policies previously issued to TR Sienna and Roszak (under which the insurers reserved rights and have denied coverage; and (b) a municipal warranty fund not belonging to the developer, necessarily limits the class of potential defendants to the general contractor and developer in a breach of implied warranty of habitability claim.

Ignored by Subcontractors is the fact that the Circuit Court and Appellate Court decisions, *Minton v. Richards Group of Chicago*, 116 Ill. App. 3d 852 (1st Dist. 1983) ("*Minton*"); *1324 W. Pratt Condominium Association v. Platt Construction Group*, 2013 IL App (1st) 130744 ("*Pratt III*"), and *Sienna Court Condo. Ass'n v. Champion Aluminum Corp.*, 2017 IL App (1st) 143364, make clear that a homeowner may pursue a claim for breach of the implied warranty of habitability against a subcontractor when the general contractor/developer is insolvent. Indeed, it is, and has been, the long standing policy of this State, as embodied in the Illinois Constitution, Ill. Const. Art. I, Sec. 12, that the law provides remedies for wrongs and that individuals are responsible for their own wrongful actions. Therefore, this Court should affirm the decision of the First District, which affirmed the decision of the Circuit Court of Cook County, holding that subcontractors that perform defective work should be held responsible to innocent purchasers where the developer/general contractor is insolvent.

COUNTER-STATEMENT OF ISSUES ON APPEAL

Whether the decades-long law and policy, as articulated by *Minton* and its progeny consistent with this Court's decisions, that a subcontractor should be held liable for its defective work when the developer/general contractor is insolvent should remain the law of Illinois or whether a subcontractor should enjoy complete immunity from the consequences of its own defective work because there may be recourse against the insolvent developer/general contractor available to the innocent homebuyer.

COUNTER-STATEMENT OF FACTS

Sienna Court believes it is important to place this matter in its proper context. Therefore, Sienna Court submits this counter-statement of facts.

Sienna Court is an Illinois not-for-profit corporation that governs the residential buildings known as the Sienna Court Condominiums, located at 1720 and 1740 Oak Avenue, Evanston, Cook County, Illinois (the "Property"). (R. C005479.) The Association consists of 111 residential units – 60 units in the "1720 Building" and 51 units in the "1740 Building."

A. The Development and Construction of the Buildings.

TR Sienna was the developer of the Sienna Court Condominiums. (R. C005480.) The Project consisted of two towers, the 1720 Building and the 1740 Building (1720 Building and 1740 Building are collectively, the "Buildings"), each containing eight floors of residential condominium units, as well as commercial units, together with parking facilities. (R. C005480.)

In connection with the construction of the Buildings, TR Sienna entered into a contract with Roszak wherein Roszak was to serve as the general contractor. (R. C005480, 005483.) In turn, Roszak contracted with architects and engineers to design the Buildings. (R. C005482, 2034-37, 2106-2111, C005483, C002952-2954, C003028-3029.) Roszak further contracted with Champion Aluminum Corp. d/b/a Champion Window and Door ("Champion Aluminum") to supply the window wall systems, window units, and spandrel units for the 1720 Building (R. C005478-5480), BV & Associates, Inc. d/b/a Clearvisions, Inc. ("Clearvisions") to supply and install the window walls, window units, and spandrel units for both the 1720 Building and the 1740 Building (R.

C005478-82; 2121-25), Lichtenwald – Johnston Iron Works Co. ("Lichtenwald") to supply and install the structural steel on the project (R. C005478-82; 2121-2), Metalmaster Roofmaster Inc. ("Metalmaster") to supply and install the roofs on the condominium buildings (R. C005478-82; 2121-26), Don Stoltzner Mason Contractor, Inc. ("Stoltzner") to construct the masonry walls for the project (R. C005478-82; 2121-26), and Tempco Heating and Air Conditioning, Co. ("Tempco") to design and install the heating, ventilation, and air conditioning systems ("HVAC") at the project. (R. C005478-82; 2127-27.) (Collectively, Champion, Clearvisions, Lichtenwald, Metalmaster, Stoltzner, and Tempco are herein referred to as the "Subcontractor and Material Supplier Defendants" or "Subcontractors").

Except for a small portion of the construction project, which was designed for commercial use, both the 1720 Building and the 1740 Building were designed, constructed, marketed, and sold to the members of Sienna Court for the purpose of providing residences for individuals and families. (R. C005486.) The Buildings were completed by TR Sienna and Roszak with the assistance and materials provided by the Subcontractor and Material Supplier Defendants. Thereafter, the condominium units were marketed and sold to individual home purchasers. (R. C005486.) However, at the time that the residential condominium units were sold to individual home purchasers, the condominium units contained a number of significant hidden and latent defects. (R. C005486.)

B. <u>The Association Discovers Significant Latent Defects in Construction.</u>

On April 20, 2009, the unit owners elected an independent Board of Managers. (R. C005491.) Subsequently, during February of 2012 Sienna Court began to discover a

number of latent, but serious defects in the construction of the Buildings. (R. C005487.) These defects included serious leaks caused by defects in the Buildings' window systems, spandrel glass units, masonry walls and terraces on both the 1720 and 1740 Buildings. (R. C005487.) Then, approximately on April 26, 2012, defects relating to the 1740 Building roof were discovered. (R. C005487.) Shortly thereafter, on approximately June 25, 2012, the 1720 Building roof was found to be defective. (R. C005487.) The discovery of defects continued. On approximately July 27, 2012, the Association discovered defects in the HVAC systems. (R. C005487.)

More specifically, the defects by the Subcontractor and Material Supplier Defendants (as alleged in the complaint that was sustained by the Circuit Court) consist of, but are not limited to, defective fabrication and installation of spandrel units located at the top of both buildings (R. C005487), defective installation of insulating glass as part of the window systems without proper drainage (R. C005488), defective assembly and installation of interior and exterior window frame systems and wall assemblies (R. C005488), defective installation of non-insulated metal that pierced the walls (R. C005488), defective design of the vapor barrier and defective installation of flashing of the window openings (R. C005488-89), defective installation of masonry walls that lack an effective drainage system and effective enclosure (R. C005488-89), defective installation of roofs and roof terraces (R. C005489), and defective installation of parapet walls (R. C005489).

These defects in the construction and material installation by the Subcontractor and Material Supplier Defendants caused significant water infiltration which, in turn, has caused and continue to cause damage to the individual condominium units, the common

elements of the two condominium buildings, personal property of the individual unit owners, personal property of the Association, improvements to condominium units, improvements to the common elements, and personal property of individual unit owners. (R. C005490.) Water soaking through or saturating walls and wall and floor coverings in the condominium units, has caused and, if not remediated, will cause additional decay, corrosion, rot, mildew and/or mold which are damaging to the building and personal property of individual unit owners and injurious to their health. (R. C005490.) In a very real way, the pervasive and significant defects impacted the habitability of the units.

C. TR Sienna and Roszak Dissolve and are Adjudicated Insolvent and Bankrupt.

TR Sienna was dissolved in 2010 and declared bankrupt by order of the United States Bankruptcy Court for the Northern District of Illinois on February 2, 2010. (R. C005480; 5486.) Roszak was dissolved in 2010 and declared bankrupt by order of the Bankruptcy Court on October 1, 2009. (R. C005480; 5486.) Therefore, before any action was brought in the Circuit Court, both the developer (*i.e.*, TR Sienna) and the general contractor (*i.e.*, Roszak) were insolvent and had been adjudicated bankrupt.

D. Sienna Court Files Suit to Redress the Many Defects in the Buildings.

Sienna Court filed suit in the Circuit Court of Cook County alleging that the improper design and construction of the Buildings breached the implied warranty of habitability. (R. C00002-28.) For clarity, at the time Sienna Court brought suit, both TR Sienna and Roszak were dissolved and insolvent. Consequently, Sienna Court alleged breach of the implied warranty of habitability claims against various other parties, including the Subcontractor and Material Supplier Defendants hired by TR Sienna and Roszak, which parties caused the defective work. (R. C005478-5517.)

The complaint alleged that TR Sienna was the developer of the Buildings and Roszak served as its general contractor. (R. C005478-83.) Together, TR Sienna and Roszak were responsible for the construction, which included the retaining of subcontractors, as well as the ultimate sale of the units to the individual home purchasers. (R. C005480, 5483-84.) However, as alleged, both TR Sienna and Roszak are bankrupt, insolvent, and had been dissolved. (R. C005480, 5485-86.) Because of the insolvency of the developer/general contractor, Sienna Court also named the Subcontractor and Material Supplier Defendants as responsible parties under the warranty of habitability. (R. C005478-5482; 2121-27.)

E. The Circuit Court Properly Refused to Dismiss the Subcontractors.

On June 2, 2014, Circuit Court Judge Margaret Brennan denied the Subcontractor and Material Supplier Defendants' Joint Motion to Dismiss various claims against them, including claims for breach of the implied warranty of habitability. (R. C005152-55.) Judge Brennan properly followed controlling Illinois precedent regarding the implied warranty of habitability, finding that Sienna Court had properly pleaded breach of implied warranty of habitability claims against each of the Subcontractor and Material Supplier Defendants. However, at the request of the Subcontractors, Judge Brennan certified four questions for interlocutory appeal to the First District, pursuant to Illinois Supreme Court Rule 308:

1. Does the existence of an insolvent developer's and/or insolvent general contractor's liability insurance policy(ies) bar a property owner from maintaining a cause of action for breach of the implied warranty of habitability against subcontractors and/or material suppliers, which are not in privity with the property owner, under *Minton v. Richards*, 116 Ill. App. 3d 852 (1st Dist. 1983) or its progeny?

2. Does the potential recovery against an insolvent developer's and/or insolvent

general contractor's liability insurance policy(ies) constitute "any recourse" under *Minton v. Richards*, 116 Ill. App. 3d 852 (1st Dist. 1983) or its progeny, thereby barring a property owner's cause of action for breach of implied warranty of habitability against subcontractors and/or material suppliers, which are not in privity with the property owner?

3. Does the actual recovery of any proceeds from an insolvent developer's "warranty fund," which was funded by the now insolvent developer with a percentage of the sales proceeds from the sale of the property, bar a property owner from maintaining a cause of action for breach of the implied warranty of habitability against subcontractors and/or material suppliers, which are not in privity with the property owner, under *Minton v. Richards*, 116 Ill. App. 3d 852 (1st Dist. 1983) or its progeny?

4. Does the actual recovery of any proceeds from an insolvent developer's "warranty fund" constitute "any recourse" under *Minton v. Richards*, 116 Ill. App. 3d 852 (1st Dist. 1983) or its progeny, thereby barring a property owner's cause of action for breach of implied warranty of habitability against subcontractors and/or material suppliers, which are not in privity with the property owner?

(C. R007170-71.)

F. The Illinois Appellate Court, First District Properly Answered the Certified Questions; Thereby Affirming the Circuit Court.

The First District ruled consistent with longstanding precedent in answering the certified questions, finding that Sienna Court could pursue its breach of the implied warranty of habitability claims against the Subcontractors who allegedly performed the defective work. Primarily, the Subcontractor and Material Supplier Defendants argued that the test for whether a claim could be pled against them was not dependent on whether the developer/general contractor was insolvent, but instead turned on whether there was "recourse." In rejecting that contention, the First District correctly held:

> We find that adhering to the clear, unambiguous rule in *Pratt III* is superior to applying a more ambiguous, fact-intensive inquiry into whether a purchaser has "recourse" to the developer or general contractor. As illustrated by the facts of this case, determining the viability of a claim against a subcontractor by reference to a more ambiguous "recourse" standard is made difficult by the numerous factual scenarios and

> arguments that could be raised to suggest that the plaintiff has some form of "recourse." As noted by the trial court and demonstrated by this case, litigating questions under a "recourse" test lends itself to confusion, unpredictable results, and the expenditure of large amounts of time and resources by the parties and the courts. We believe that the insolvency test, as set forth in *Pratt III* and reaffirmed here, provides guidance that can be much more easily applied by our courts and that will also provide parties with more certainty and predictability.

Sienna Court Condo. Ass'n v. Champion Aluminum Corp., 2017 IL App (1st) 143364.

G. The Petition for Leave to Appeal.

Dissatisfied with the answer to the very certified questions that the Subcontractor and Material Supplier Defendants sought, the Subcontractor and Material Supplier Defendants now ask this court to both reverse the decision of the First District and to essentially reverse thirty-five years of decisions allowing claims under the implied warranty of habitability against subcontractors when the developer/general contractor is insolvent.[1]

ARGUMENT[2]

Since 1979, this Court has recognized that Illinois law protects homeowners from latent defects and the unjust results of *caveat emptor* in the purchase of a residence. *Petersen v. Hubschman Const. Co.*, 76 Ill. 2d 31, 39-40 (1979). It is beyond serious question that home ownership is part of the American Dream. Lawrence Yun, *Why Homeownership Matters* (Aug. 12, 2016), http://www.forbes.com/sites /lawrenceyun/2016/08/12/why-homeownership-matters/# 4381b5a6480f. The purchase of a home is a major investment, often the largest single investment in a person's

[1] *Minton v. Richards Grp.*, 116 Ill. App. 3d 852, 855 (1st Dist. 1983), was decided in 1983 and has stood as the unchallenged either by legislation or this Court since that ruling nearly thirty-five years ago.

[2] To avoid repetition, Sienna Court incorporates its Response to the Petition for Leave to Appeal.

lifetime. *Petersen*, 76 Ill. 2d at 40. However, most new home buyers lack the skill and expertise necessary to determine whether the home they purchased contain latent construction and material defects. *McClure v. Sennstrom*, 267 Ill. App. 3d 277, 281 (2d Dist. 1994). Often, the buyer of a home is not in an equal bargaining position and must rely on the competence, honesty, and expertise of those constructing the home before making the purchase. *Redarowicz v. Ohlendorf*, 92 Ill. 2d 171, 183 (1982); *Bd. of Managers of Park Point at Wheeling Condo. Ass'n v. Park Point at Wheeling, LLC*, 2015 IL App (1st) 123452, ¶¶ 7-8.

Based on the overriding and important social and policy considerations attendant to home ownership, including the fundamental right to a habitable dwelling, the implied warranty of habitability was adopted in Illinois specifically to protect innocent home purchasers from bearing the cost of repairing latent defects in their homes and to hold those responsible for the latent defects accountable. *1324 W. Pratt Condo. Ass'n v. Platt Constr. Grp.*, 2012 IL App (1st) 111474, ¶ 23 ("*Pratt II*"). In doing so, Illinois rejected the notion of *caveat emptor* as being against the public policy of our State. *Id.* at ¶ 24.

Since its initial recognition, the implied warranty of habitability has steadily developed in order to serve the underlying public policy of protecting innocent home purchasers. *Id.* In other words, if defects exist in home, then, in order to protect the innocent home buyer, the cost of repairing those defects should be borne by those who caused the defect. *Redarowicz*, 92 Ill. 2d at 183; *Minton*, 116 Ill. App. 3d at 854-55; *Bd. of Managers of 1120 Club Condo. Ass'n v. 1120 Club, LLC*, 2016 IL App (1st) 143849, ¶ 26. "Three major policy considerations underlie the warranty of habitability: (1) purchasers today typically do not have the ability to assess whether the home they

purchased contains latent defects; (2) in making what is most likely the single biggest investment of their lives, purchasers rely upon the honesty and competence of the builder [and the subcontractors involved in the construction]; and (3) *if defects exist in the home, the cost of repairing those defects should be borne by the builder [or subcontractor] who caused the defect." 1120 Club, LLC*, 2016 IL App (1st) 143849, ¶ 26 (emphasis added).

In 1983, the implied warranty of habitability was extended to place liability on subcontractors where an innocent home purchaser could not obtain a recovery against a builder/general contractor. *Minton v. Richards Grp.*, 116 Ill. App. 3d 852, 855 (1st Dist. 1983). Illinois law has since clarified that in order to make such a claim against a subcontractor, the builder/general contractor must be insolvent. *1120 Club*, 2016 IL App (1st) 143849, ¶ 29 (citing *Pratt III*, 2013 IL App (1st) 130744 at ¶ 25)).

In this case, when Sienna Court discovered millions of dollars of defective work impacting the habitability of its unit owners' homes, it brought claims for breach of the implied warranty of habitability against the Subcontractor and Material Supplier Defendants, among others, due to the fact that Sienna Court's developer and general contractor had been adjudicated insolvent by the United States Bankruptcy Court. The Subcontractor and Material Supplier Defendants sought and continue to seek avoidance of liability for their defective work. However, if this Court were to rule as urged by the Subcontractor and Material Supplier Defendants, then the goal of protecting homeowners could be subverted based on the financial viability of the builder-vendor (*i.e.*, whether there was recourse against them), or be totally eradicated. Further, the important policy considerations that have repeatedly and over time been upheld would be seriously compromised. As this brief sets forth, the law as articulated, by *Minton, Pratt,* and other

cases, makes clear that imposing the implied warranty of habitability against subcontractors where the developer/general contractor is insolvent should remain available to Illinois home owners so as to continue to protect home purchasers from the unjust results of *caveat emptor* in the purchase of a residence.

I. THE CLARIFICATION OF THE IMPLIED WARRANTY OF HABITABILITY UNDER PETERSEN, REDAROWICZ, MINTON, AND PRATT III SHOULD BE UPHELD.

At its origin, a builder/general contractor warrants to the first purchaser of a newly constructed home that the property was free from latent defects that interfere with the intended use of the residence. *Petersen*, 76 Ill. 2d at 42. This warranty is implied as a separate covenant between the builder/general contractor and the purchaser. *Id*. at 41.

Three years after *Petersen*, in *Redarowicz*, this Court held that "[i]f construction of a new house is defective, its repair costs should be borne by the responsible builder-vendor who created the latent defect." *Redarowicz*, 92 Ill. 2d at 183. Similar to the reasoning in *Petersen*, because the implied warranty is implied at law and is not a product of contract, it is the law, and not the builder/general contractor, that extends the warranty to the purchaser. *Id*. *Redarowicz* expanded the reach of the implied warranty such that subsequent purchasers of homes could also seek redress against the builder/general contractor. *Id*. at 185. Protection of subsequent purchasers aligned with the public policy to protect the first purchaser because the subsequent purchaser similarly was not knowledgeable in construction practices and effectively relied upon the builder/general contractor who built the home. *Id*.

In *Minton*, the First District, consistent with the policy articulated by this Court, extended the implied warranty of habitability to apply to a subcontractor "where the

innocent purchaser has no recourse to the builder-vendor and has sustained loss due to the faulty and latent defect in their new home caused by the subcontractor." 116 Ill. App. 3d at 855. There, the plaintiff-homeowners filed a complaint alleging that defective work done by a subcontractor caused their home to be uninhabitable. *Id.* at 853. The complaint additionally alleged that the builder of the home was dissolved. *Id.* The trial court dismissed plaintiffs' complaint against the subcontractor and the plaintiffs appealed. *Id.*

On appeal, plaintiffs argued that "the builder-vendor implied warranty of habitability against latent defects in a new house also applies to the subcontractors of the builder-vendor where the builder-vendor is dissolved and shows no assets." *Minton*, 116 Ill. App. 3d at 854. After discussing the policy behind the implied warranty of habitability, the First District agreed with the plaintiff and found that the implied warranty of habitability applied to subcontractors where the "innocent purchaser has no recourse to the builder-vendor" and has sustained loss as a result of the subcontractors' defective work. *Id.* at 855; *see also Dearlove Cove Condominiums v. Kin Constr. Co.*, 180 Ill. App. 3d 437, 439 (1st Dist. 1989) ("*Minton* held that where the purchaser of a newly constructed residential property has no recourse against the general contractor by reason of *insolvency* [emphasis added], and allegedly sustained loss due to defects caused by the subcontractor, the implied warranty of habitability would extend to the subcontractors who participated in the construction of the property.").

Minton is a logical extension and interpretation of *Redarowicz* and the policy considerations underlying the implied warranty of habitability. *Minton* restates and reaffirms the important public policy of Illinois that, in certain circumstances where the

builder/general contractor is insolvent, repair costs should be borne by the subcontractor who caused the latent defect. *Minton*, 116 Ill. App. 3d at 855. The basis for the holding in *Minton* echoed that of prior cases this Court decided (including *Petersen* and *Redarowicz*) – the implied warranty of habitability is a creature of public policy that has evolved to protect innocent purchasers. *Id*. at 854-55. The implied warranty exists independent of contract and is extended by virtue of the law because the purchaser is necessarily dependent on those constructing the home. *Id*. at 854.

Minton was decided in 1983. In the thirty-five years since *Minton*, neither the Illinois legislature nor this Court has ever sought to either limit or put a stop to *Minton's* extension of the implied warranty of habitability. Rather, both this Court in *Redarowicz* and the First District Appellate Court in *Minton* recognize that the implied warranty of habitability should not be rigidly applied, but instead should be implemented to align with public policy concerns. Expansion and scope of the implied warranty is justified if such expansion furthers the rationale underlying the public policy. Thus, under *Minton*, the class of potentially responsible defendants is appropriately expanded to include subcontractors. To exclude subcontractors from that class renders the homeowner remediless and burdened with an uninhabitable home that requires exorbitant repair costs. Clearly, *Minton* aligns with the public policy of protecting the expectations of home buyers.

Minton's application has been further clarified since the case was decided. *See 1324 W. Pratt Condo. Ass'n v. Platt Const. Grp., Inc.*, 404 Ill. App. 3d 611 (1st Dist. 2010) ("*Pratt I*"), *Pratt II*, *Pratt III*, and *Dearlove Cove Condominiums*. In *Pratt III*, the First District ruled that for purposes of pursuing a claim against a subcontractor for

breach of the implied warranty of habitability, the court must look to whether the developer and general contractor are "*solvent*." 2013 IL App (1st) 130744 ¶ 25. There, a condominium association brought a breach of the implied warranty of habitability claim against both the general contractor and a masonry subcontractor. *Id.* at ¶¶ 1, 4. In its fourth amended complaint, the plaintiff asserted that the general contractor was insolvent and the parties conducted limited discovery on the issue of solvency. *Id.* at ¶ 9. The trial court then found that although the general contractor was insolvent, it remained in good standing with limited assets. *Id.* It therefore certified the question of whether a homeowner "may pursue… claims against [a subcontractor]… when [the general contractor] is insolvent, but it is in good standing with limited assets." *Id.*

On appeal, the masonry subcontractor argued that after *Minton*, there remained "uncertainty as to whether the determining factor in whether a purchaser can proceed against a subcontractor is 'solvency,' 'no recourse' or 'the viability' of a corporation."[3] *Id.* at ¶ 19. As such, the masonry subcontractor argued, the fact that the general contractor was in good standing with some assets meant that the plaintiff could not pursue liability against it because there was "recourse." *Id.* The First District "strongly disagree[d]." *Id.* In fact, the First District stated, as if commenting on this case:

> [t]he law in Illinois is clear. An innocent purchaser may proceed on a claim for the breach of the implied warranty of habitability against a subcontractor where the builder-vendor is insolvent… [W]e hold and clarify that for purposes of determining whether a purchaser may proceed against a subcontractor on a breach of implied warranty of habitability claim, the court must look to whether the general contractor is solvent. Insolvency simply means that a party's liabilities exceed the value of its assets, and that it has stopped paying debts in the ordinary course of business.

[3] Of course, subsequent to *Pratt III* there can be no claim that there is any uncertainty.

Id. at ¶¶ 20, 25.

The First District went on to explain that:

> [i]nsolvency simply means that a party's liabilities exceed the value of its assets, and that it has stopped paying debts in the ordinary course of business. See Black's Law Dictionary 799 (7th ed. 2007); see also 740 ILCS 160/3 (West 2010) ("(a) A debtor is insolvent if the sum of the debtor's debts is greater than all of the debtor's assets at a fair valuation. (b) A debtor who is generally not paying his debts as they become due is presumed to be insolvent.").

Pratt III at ¶ 25. Thus, where the injured plaintiff can establish that the builder/general contractor is insolvent, it may proceed with claims for breach of the implied warranty of habitability against the subcontractor. *Id.* To rule otherwise, would leave the innocent home purchasers of Sienna Court with no avenue for recovery to repair the millions of dollars in damage resulting from the latent defects in their homes.

II. *MINTON* AND ITS PROGENY SHOULD NOT BE OVERTURNED.

The purpose of the implied warranty of habitability is to avoid unjust results by protecting the expectation of Illinois new home buyers. *McClure*, 267 Ill. App. 3d at 281; *see also Pratt I*, *Pratt II*, *Pratt III*, and *Dearlove Cove Condominiums*. Consistent with the strong public policy to both protect home buyers and to assess liability upon those responsible, application of the implied warranty places liability on the party responsible for defects in construction. A plaintiff homeowner holding a subcontractor directly responsible for a latent defect encourages more careful and thorough building practices.

When a builder/general contractor is insolvent, a homeowner's inability to seek redress for the faulty construction of their home directly against a subcontractor leads to harsh consequences that conflict with the long-standing public policy of protecting residential homeowners. As addressed by *Minton*, if construction of a new house is

defective, then the repair costs should be borne by the class of defendants who had some responsibility for causing the latent defect so that the homeowner is not left holding the bill. Often, the subcontractor is brought into the case by the builder-vendor as a third party defendant. There is no logical or policy based reason to allow the subcontractor to be sued by the builder/general contractor for defects but not by the innocent homeowner.

The protection afforded homeowners through the application of *Minton* is narrow. It may only be invoked in the limited circumstance in which the builder/general contractor is insolvent.[4] Subcontractor and Material Supplier Defendants, however, make a sweeping generalization that *Minton* somehow expands a subcontractor's duties. The subcontractor is a specialist engaged by the builder-vendor to perform a specific task such as plumbing, painting, or performing electrical work. The subcontractor is hired because it is a specialist that can provide a construction task better than the general contractor and surely better than a homeowner. The subcontractor should perform its work with the same level of sophistication and care in any circumstance; irrespective of whether it can be directly sued. Whether the consequences of a breach of the implied warranty are redressed in the main case filed by the homeowner or by way of a third party action filed by a builder/general contractor, the analysis regarding liability remains the same.

While Subcontractors downplay the relationship between a subcontractor and a homebuyer, Subcontractors ignore the ramifications of how the relationship between a builder-vendor and a homebuyer would change if *Minton* were overturned. Without the

[4] In contrast, as discussed later, looking to the undefined and factually ambiguous test of "no recourse" creates uncertainty and requires an analysis of both what is recourse and what is sufficient recourse. However, insolvency is a recognized concept of which our courts are familiar.

narrow extension of liability under *Minton*, builder/general contractors would be encouraged to set up their businesses as single-purpose entities that divest themselves of assets at the conclusion of construction projects. The builder/general contractor would be encouraged to cut costs and be careless in the construction (and derivatively, in selection of the subcontractor to perform the work) because, no matter what the outcome, the builder/general contractor and subcontractors could walk away with huge profits without ever being held accountable for the defective work that is later discovered to the very real detriment of the Illinois homebuyer. Moreover, because the builder/general contractor would be set up an assetless single-purpose entity, it would have no incentive to file third-party actions against the subcontractors as the builder-vender would be insolvent. Thus, as a very real consequence of Subcontractors' viewpoint, the implied warranty of habitability would be gutted as would the home ownership of Illinois homeowners because there would be no recovery available under any circumstance against anyone.

III. PRIVITY SHOULD NOT BAR SUBCONTRACTORS' LIABILITY.

Over time, courts and legislatures have eroded the traditional notions of privity as a barrier to recovery. Beginning, perhaps, in the 1916 case by Justice Cardozo of the New York Court of Appeals, strict privity was abolished in products liability actions. *See MacPherson v. Buick Motor Co.*, 217 N.Y. 382 (1916). The concept of privity continued to be eroded by the courts in the intervening years in other areas of law, such as professional malpractice (*Biakanja v. Irving*, 49 Cal. 2d 647 (1958)) and third party beneficiaries (*Pelham v.* Griesheimer, 92 Ill. 2d 13 (1982)). The fundamental reason for this trend is that "[e]quity will not suffer a wrong without a remedy." *Indep. Wireless Tel. Co. v. Radio Corp. of Am.*, 269 U.S, 459, 472 (1926). Indeed, although not

providing a specific claim, even our own state constitution states: "Every person shall find a certain remedy in the laws for all injuries and wrongs which he receives to his person, privacy, property or reputation." Ill. Const. art. I, §12.

Nonetheless, Subcontractors contend that, even when a subcontractor is the undeniable cause of the latent defect, our courts should shield the subcontractor from liability instead of holding the subcontractor proportionally responsible. As a basis for this contention, Subcontractors rely on a perceived lack of privity between the home buyer and the subcontractor. Innocent home buyers of defectively constructed homes should not be prohibited from seeking relief from the subcontractors simply because of the form of the business deal chosen between the builder-vendor and the subcontractor.

Privity should not be a critical factor to establish a subcontrator's liability. Subcontractors' argument misconstrues the implied warranty as a creature of contract law, when in fact the implied warranty exists independent of a sale and privity is not required. *Redarowicz*, 92 Ill. 2d at 183. From a practical standpoint, privity between the subcontractor and the homeowner is immaterial. The court can measure the scope of the subcontractor's contribution to the defect. Liability turns on what the subcontractors have done. Moreover, it is nonsensical for Subcontractors to disclaim that they are only performing the work on behalf of the general contractor when it is clear that the home will be sold to an eventual homeowner. There can be no serious question that a subcontractor engaged to perform work on a residential home is doing so for the benefit of an eventual home buyer.

Subcontractors' cry of lack of privity between homeowners and subcontractors is a galling hypocrisy. Subcontractors do not rely solely on the general contractor-

subcontractor relationship when payment for *their* services is at issue. Under the Mechanics Lien Act, 770 ILCS 60/1, *et seq*., a subcontractor is entitled to a lien for the value of any labor or services, furnished to the general contractor and for the value of any material the subcontractor furnishes in the process of construction. 770 ILCS 60/5(b)(ii); 770 ILCS 60/21(a). While the subcontractor's contract for services is between it and the general contractor, the mechanic's lien nonetheless attaches to the residence upon which the subcontractor performed the work. 770 ILCS 60/5(b)(ii). The homeowner is obligated to pay the subcontractor upon receiving notice of a claim. 770 ILCS 60/27; *Weather-Tite, Inc. v. Univ. of St. Francis*, 233 Ill. 2d 385, 394 (2009).

The purpose of permitting a subcontractor to lien the homeowner's property – despite the lack of privity between the subcontractor with the homeowner – is because a homeowner receives a benefit in the value of the property through a subcontractor's improvements or by the furnishing of labor or materials. *Weydert Homes, Inc. v. Kammes*, 395 Ill. App. 3d 512, 516 (2d Dist. 2009). A subcontractor filing a mechanics lien has no contract with the homeowner, may have never communicated with the homeowner, and may not even know the identity of the homeowner; yet, the subcontractor can seek redress directly against the homeowner for the contractual work it performed at the request of the general contractor.

The Mechanics Lien Act exposes the flaw in Subcontractors' contentions regarding lack of privity. Subcontractors, on the one hand, argue that lack of privity should prevent a homeowner from recovering against a subcontractor for defective work, but, on the other hand, disregard privity when seeking payment directly from the homeowner for the value of their work. Telling of the fallacy of Subcontractors'

argument is the fact that although Illinois abolished mutuality of remedy in contract formation, it retained that concept to ensure that relief (*e.g.*, a lien) "if rendered will operate without injustice or oppression either to plaintiff or defendant." *Gould v. Selter*, 14 Ill. 2d 376, 382 (1958) (citing *Epstein v. Gluckin*, 233 N.Y. 490, 494 (1922)). To allow a subcontractor to ignore privity to recover on a lien but to hide behind privity when sued by a homeowner surely operates to create "injustice or oppression" and should not be tolerated in the state of Illinois.

IV. THE IMPLIED WARRANTY OF HABITABILITY HAS EVOLVED IN THE COURTS TO FURTHER REAFFIRM PUBLIC POLICY CONSIDERATIONS.

The implied warranty of habitability has been anything but static. The scope of the implied warranty continues to develop. Indeed, this Court has expanded both the class of plaintiffs who have standing to sue and the types of structures subject to the implied warranty of habitability. These decisions have been guided by the same public policy considerations underlying *Minton* almost 35 years ago.

Minton aside, privity has evolved such that it is not a necessary element in the application of the implied warranty of habitability. Public policy extinguished the contractual privity requirement to extend the protection of the implied warranty to subsequent home purchasers. *Redarowicz*, 92 Ill. 2d at 183. Subsequent purchasers, like original purchasers, usually lack knowledge of construction practices and have little opportunity to inspect the construction process. *Id*. In *Redarowicz*, this Court followed several other state supreme court decisions, including *Barnes v. MacBrown & Co., Inc.*, 264 Ind. 227 (1976), and *Moxly v. Laramie Builders, Inc.*, 600 P.2d 733, 736 (Wyo.1979), to extend the implied warranty to subsequent purchasers, holding that

"any reasoning which would arbitrarily interpose a first buyer as an obstruction to someone equally as deserving of recovery is incomprehensible." *Id*. at 185.

The Court's decision in *Redarowicz* was not unbounded. The implied warranty extension to subsequent purchasers was limited to circumstances in which latent defects manifested within a reasonable time after the purchase of the house. *Redarowicz*, 92 Ill. 2d at 185. However, the public policy considerations behind this Court's decision were evident: the purpose of implied warranty is to protect the expectations of the home buyer and it would be illogical to arbitrarily limit those protections. *Id*.

As with *Redarowicz*, this Court should continue to set privity aside under the limited circumstances (*i.e.*, insolvency of the builder/contractor) as a reasonable means to protect innocent home purchasers from bearing the cost of repairing latent defects. Subcontractors should not be permitted to arbitrarily limit the protections of the implied warranty of habitability simply because the homeowner is not in contractual privity with the subcontractor.

In addition to extending the implied warranty to subsequent purchasers, this Court has also expanded the scope of the implied warranty to new additions to existing structures. *VonHoldt v. Barba & Barba Const., Inc.*, 175 Ill. 2d 426 (1997). In *VonHoldt*, this Court held that "when a builder makes a significant addition to a previously built home, an action for damages resulting from latent defects affecting habitability exists under the doctrine of implied warranty of habitability." *VonHoldt*, 175 Ill. 2d at 431. Again, the basis for the Court's decision was to provide protection to the homeowner discovering a defect in an addition in the same manner *Petersen* and *Redarowicz* protected a homebuyer for latent defects in a new home. *Id*. at 431-32. In

either circumstance, extension of the scope of the implied warranty was necessary because the buyer placed the same trust in the builder that constructed the home. *Id*. at 432. Further, this Court has itself recognized that the implied warranty of habitability *does* apply to subcontractors where the builder-vendor is insolvent. *See id*. at 431 (noting that "Illinois courts have defined and extended the circumstances under which claims based on an implied warranty of habitability can be recognized" and citing *Minton* for the premise that an "innocent purchaser could bring an action against a subcontractor when he had no recourse to the builder-vendor.").

The cases Subcontractors rely upon do not support their assertions. *Fattah v. Bim*, 2016 IL 119365, recognized that the purchaser of a new home is entitled to the protection of the implied warranty of habitability unless the seller showed that the purchaser waived the implied warranty of habitability. *Id.* at ¶21. However, the Court's holding in *Fattah* is merely that when an original purchaser validly waives the implied warranty of habitability, that waiver is imputed to a subsequent purchaser. *Id.* at ¶34. There is no application of the rule in *Fattah* to the issue before the Court as to the more general question concerning the responsibility of the Subcontractors for their defective work.

The Subcontractors' two other main cases purporting to show that relief under the implied warranty of habitability is not available against subcontractors similarly are not relevant to the issue before the Court. *Lehmann v. Arnold*, 137 Ill. App. 3d 412 (4th Dist. 1985), addresses whether the seller of raw unimproved land could be held liable for breach of the implied warranty of habitability to subsequent purchasers. *Id.* at 416. Unsurprisingly, because the land seller had no relation to the construction of the house

that forms the basis of the implied warranty of habitability, the raw unimproved land seller had no liability under the implied warranty of habitability. *Id.* at 417.

Bernot v. Primus Corp., 278 Ill. App. 3d 751 (2d Dist. 1996), is a subrogation case against only the land seller for damages from "structural problems which appeared to have resulted either from improper grading and filling of the soil or from defects in the soil itself." *Id.* at 752. Significantly, the grading subcontractor that actually performed the work in that case settled its own liability to the homeowner separately from that of the land seller. *Id.* The appellate court cited *Lehman* in determining that there was no cause of action stated for subrogation against the land seller. *Id.* at 754. The appellate court discussed the fact that *Minton* allowed recovery against a subcontractor under an implied warranty theory, but that the *Lehman* court had ultimately refused to create any liability against the seller of the land. *Id.* at 754-55. In the case at bar, Sienna Court does not seek relief from the seller of the raw unimproved land. Instead, Sienna Court is looking to recover its damages caused by the defective work of the Subcontractors that actually performed defective work.

The above cases and analysis make clear that the implied warranty of habitability is considered in Illinois as necessary to protect innocent home buyers. Whether a home buyer is seeking recovery against a builder/general contractor, he stands in the same position in seeking to hold the appropriate party accountable. Consistent with Illinois public policy, a home buyer should not be frustrated in recovering because of the nature of the relationship between the home buyer, the builder/general contractor, and the subcontractor. Moreover, in practical terms, a homeowner is effectively relying on the expertise and knowledge of the subcontractor who performs the work. Illinois courts

should not turn a blind eye to the very cause of the defect simply because the builder/general contractor is insolvent.

V. LIABILITY IS BASED ON RELATIVE CULPABILITY, LIKE IN TORT LAW, AS OPPOSED TO THE LEGAL FICTION OF PRIVITY.

The value of privity has been diminished in Illinois to coincide with public policy considerations to protect innocent plaintiffs. Illinois courts have discarded the artificial privity requirement in the area of tort law. For example, lack of privity between a consumer of a product and the manufacturer of the product does not preclude an action against the manufacturer. Tort liability developed in Illinois to measure liability by the scope of the duty the owed. *Rozny v. Marnul*, 43 Ill. 2d 54, 62 (1969). The Contribution Act, 740 ILCS 100/1, *et seq*., first enacted in 1979 ten years after *Rozny*, embodies public policy of promoting equitable apportionment of damages among tortfeasors. *Johnson v. United Airlines*, 203 Ill. 2d 121, 133 (2003).

Minton is analogous to a strict liability tort claim where privity is not necessary to measure the scope of one's relative liability. One tortfeasor's liability can be compared to a joint tortfeasor's culpability for the same injury. *Coney v. J.L.G. Indus., Inc.,* 97 Ill. 2d 104, 118 (1983). The process involves comparison of relative causation regardless of the technical basis of the defendant's liability. Similarly, under *Minton*, a subcontractor's liability is capable of being evaluated.

A subcontractor held responsible for its defective work is analogous to imposing liability on a component supplier of a defectively manufactured product. Under Illinois product liability law, unhampered by privity, a plaintiff may plead claims against those who sell, distribute, or manufacture a defective product, as well as pleading claims

against the component manufacturers who supplied materials and labor to create specific, individual components of the defective product. *Thomas v. Kaiser Agr. Chemicals,* 81 Ill. 2d 206, 216 (1980).

Construction of a residential home is like manufacturing an integrated product for sale to a consumer. The builder/general contractor assembles the completed home for sale to the end user, the residential home buyer. The home is not constructed by the builder/general contractor alone, but is constructed in various segments by different subcontractors specializing in certain construction tasks. The failure of any one of these specialized tasks (e.g. components) results in a defective home, rendering the home (*e.g.* the overall product) defective. Because an implied warranty of habitability claim is not governed by contract, there is no reason why the implied warranty should not be similarly applied against a subcontractor in the same way a tort claim is applied against a component part supplier.

VI. THE PRINCIPLES ESTABLISHED IN *MINTON* HAVE BEEN CODIFIED IN AT LEAST ONE OTHER JURISDICTION.

The public policy considerations underlying *Minton* are manifest in other jurisdictions, including Connecticut. Under § 47-121 of the Connecticut General Statutes (formerly § 52-563(a)), the issuance of a certificate of occupancy for a newly constructed single family dwelling provides an implied warranty to the purchaser that the vendor who constructed the home has complied with the applicable municipal building code. C.G.S.A. § 47-121. The term "vendor" was broadly defined to include "[a]ny person engaged in the business of erecting or creating an improvement on real estate[.]" C.G.S.A. § 47-116. The plain language of that statute intends that, for single family residences, purchased presumably by single families, the definition of "vendor" under the

statute was to include subcontractors. *Fava v Arrigoni*, 35 Conn. Supp. 177, 179-80 (Super. Ct. 1979). Accordingly, Connecticut does not concern itself with the financial viability of the builder/general contractor but instead takes the practical and sensible approach of imposing the implied warranty against any party that contributed to the innocent purchaser's harm.

VII. THIS COURT SHOULD AFFIRM THAT INSOLVENCY OF THE BUILDER/GENERAL CONTRACTOR IS THE DETERMINATIVE FACTOR FOR ALLEGING A CLAIM AGAINST A SUBCONTRACTOR.

Subcontractors argue that, to the extent *Minton* is not overturned, the Court should apply a "no recourse" test before imposing liability. Subcontractors contend that if there is recourse against the builder-vendor, then a plaintiff should not be permitted to allege a claim against the subcontractor. At odds with Subcontractors' contentions is that "recourse" is a poorly defined concept in the law, as opposed to insolvency. Does recourse have to be sufficient, does it have to be reasonably available, and/or does it have to be without additional cost? All told, to rely on recourse is to insert into a case by a homeowner a concept that is known nowhere else in the law. One must ask: why in warranty of habitability cases should our courts look to recoverability when recoverability is not an element of other claims at the pleading stage?

To begin with, Subcontractors improperly conflate pleading an allegation that the plaintiff has "recourse" against a general contractor with proof of damages at the pleading stage. Under Subcontractors' view, before alleging a claim against a subcontractor, an intensive factual inquiry and investigation must first be satisfied regarding the general contractor's assets, liabilities, and/or other resources that could be recovered. This notion of proving what Subcontractors argue to be a disputed fact at the

pleading stage is impracticable and frustrates the purpose of the implied warranty of habitability.

Subcontractors' position is further based on the fragile assumption that amounts constituting "recourse" are a fixed sum. The value of any asset is inherently variable. There is no protection from the builder/general contractor moving or selling an asset during the pleading stage. If there are other related entities to the general contractor that the plaintiff could recover from, those entities could also divest themselves of assets to become judgment proof. The subcontractors are asking the plaintiff to hit a moving target and our courts to decide questions of recoverability before a judgment.

Subcontractors' insistence of applying the "no recourse" test to the facts of this matter demonstrates the test's absurd results. Subcontractors claim that because both TR Sienna and Roszak maintained commercial general liability insurance policies, and because a municipal warranty fund exists, Sienna Court has "recourse." However, Subcontractors do not control the insurance carrier's evaluation and payout of claims. There is no assurance that the insurance carrier will provide coverage and reimbursement. The insurance policy could be exhausted by the time the matter proceeds to trial. The mere existence of an insurance policy provides no guarantee that there will be any funds to cover the repairs should the plaintiff be successful after a trial. Indeed, the insurers have declined coverage and are not making payments.

Moreover, because the developer does not control the municipal warranty fund and the assets held in the municipal warranty fund do not belong to the developer, there is no certainty that the fund will be available to the plaintiff. The municipality could change the law regarding the use and payout of the proceeds held in the warranty fund. The

municipality could also sweep the funds into other accounts and use the funds for other purposes. Again, the Subcontractors are accelerating the need to determine if a judgment is collectable before collection can even commence as there is no judgment at the pleadings stage.

Subcontractors' contentions that the existence of liability insurance should bar a breach of implied warranty of habitability claim is contrary to the public policy for which the implied warranty was created. For example, under the Subcontractors' construction of the "no recourse" test, the existence of an insurance policy required an innocent purchaser to first take legal action against the insolvent builder/general contractor. The innocent home purchaser would necessarily allocate his limited resources to pursue the insolvent builder/general contractor in order to recover the proceeds (all the while he is still living in an inhabitable residence rife with defects).

However, in the same factual scenario, the insurance carrier could file a declaratory action – which they have here – denying coverage under the liability policy. The innocent home purchaser would need to divert his resources to defend against the declaratory action because the home purchaser is a necessary party. If the insurance carrier succeeds, the innocent home purchaser would then have to amend his pleading to proceed against the subcontractors. Likely, considerable time will have passed (as it has since this case was first filed) and the innocent home purchaser would have expended considerable unrecoverable costs and fees only to get to the point to being permitted to allege claims against the subcontractors (which could then be disputed and the claims linger several more years before advancing to trial). All the while, no repairs are made to

the latent defects and the innocent home purchaser experiences an unenviable and persistent disruption to his personal life.

The Appellate Court in this matter was not swayed by Subcontractors' argument for utilizing the "no recourse" test. Relying on *Pratt III*, the First District described its reasoning for favoring *insolvency* over *recourse* as follows:

> *Pratt III* stated a clear, bright-line rule that the relevant inquiry is the insolvency of the developer or general contractor . . . We find that adhering to the clear, unambiguous rule in *Pratt III* is superior to applying a more ambiguous, fact-intensive inquiry into whether a purchaser has "recourse" to the developer or general contractor. As illustrated by the facts of this case, determining the viability of a claim against a subcontractor by reference to a more ambiguous "recourse" standard is made difficult by the numerous factual scenarios and arguments that could be raised to suggest that the plaintiff has some form of "recourse." As noted by the trial court and demonstrated by this case, litigating questions under a "recourse" test lends itself to confusion, unpredictable results, and the expenditure of large amounts of time and resources by the parties and the courts. We believe that the insolvency test, as set forth in *Pratt III* and reaffirmed here, provides guidance that can be much more easily applied by our courts and that will also provide parties with more certainty and predictability.

Sienna Court Condo. Ass'n, 2017 IL App (1st) 143364, ¶ 95.

Thus, the insolvency approach makes the evaluation of a claim against the subcontractors infinitely more clear and uses an analysis familiar to courts. An insurance policy is not relevant to determining whether an entity is "insolvent" and surely not relevant to whether a plaintiff has a claim against a defendant in other cases. Insurance proceeds are not necessarily the property of the developer and/or the general contractor - the overriding question is whether the insured would have a right to receive and keep those proceeds when the insurer paid on a claim. *Matter of Edgeworth*, 993 F.2d 51, 55 (5th Cir. 1993); *see also In Re Stinnet*, 465 F.3d 309, 312 (7th Cir. 2006). Under a typical insurance policy, the insured will not have a cognizable interest in the proceeds of

the policy. *Matter of Edgeworth*, 993 F.2d at 56. The Second District has also recognized the insolvency of a vendor despite the builder's liability insurance policy in a claim involving a breach of warranty of habitability claim. *Stonebridge Dev. v. Essex Ins.*, 382 Ill. App. 3d 731, 737 (2d Dist. 2008).

VIII. 735 ILCS 5/2-621 ECHOES THE INSOLVENCY TEST.

Conditioning a claim on a defendant's "insolvency" is not an outlier concept. As set forth above, retailer, suppliers, and distributors may be held strictly liable in tort if such entities put a defective product into the stream of commerce or had a share in the responsibility for the creation of a production. *Hammond v. N. Am. Asbestos Corp.*, 97 Ill. 2d 195, 206 (1983). A non-manufacturing defendant may seek dismissal of a strict liability claim where it can certify the identity of the manufacturer. 735 ILCS 5/2-621(a). However, even after dismissal, Illinois has codified an exception whereby a plaintiff may nonetheless hold a non-manufacturing defendant responsible under a strict liability claim when the plaintiff can show that "the manufacturer is unable to satisfy any judgment as determined by the court[.]" 735 ILCS 5/2-621(b)(4); *Kellerman v. Crowe*, 119 Ill. 2d 111, 114 (1987).

The purpose of Section 2-621(b)(4) is to ensure the burden of loss due to a defective product is not borne by the consumer but instead remains with those who placed the product in the stream of commerce. *Thomas v. Unique Food Equip., Inc.*, 182 Ill. App. 3d 278, 282 (1st Dist. 1989). Put another way, Illinois public policy disfavors limiting injured consumers from seeking recovery solely from a manufacturer because there is recourse, while the non-manufacturer defendants that profited from the sale of the product and could have contracted with the manufacturer for insurance coverage or

indemnification "simply sit and watch from the sidelines." *Cassidy v. China Vitamins, LLC*, 2017 IL App (1st) 160933, ¶ 35.

The extension of the implied warranty of habitability is like the Section 2-621(c) exception. The extension of liability in *Minton* cannot be invoked unless the builder-vendor is insolvent. The builder/general contractor who assembles a completed home is akin to a manufacturer assembling a completed product. When the builder/general contractor is insolvent, like a manufacturer under 735 ILCS 5/2-621(b)(4), *Minton* permits the home buyer to recover for the same claim against the subcontractor in the way that an injured consumer may recover against a non-manufacturer. The subcontractor stands in a same position as the non-manufacturer – the subcontractor is in a class of defendants that assisted in preparing the "product" for delivery to the home buyer. The subcontractor is capable of preventing the defects in the home. *Minton* and Section 2-621(b)(4) are consistent with Illinois public policy to protect innocent plaintiffs that cannot control how the product is delivered to them and, under limited circumstances, hold all of those who contributed to the injury responsible.

IX. IF THE COURT HOLDS THAT THE TEST IS WHETHER A PLAINTIFF HAS RECOURSE AGAINST THE BUILDER-VENDOR, IT SHOULD BE CLARIFIED THAT THE RECOURSE MUST BE *ADEQUATE.*

To the extent that the Court finds that the "no recourse" test is the appropriate inquiry to allege a breach of implied warranty claim against a subcontractor, the test, as it is currently applied, could lead to inconsistent and inequitable results.

"No recourse" is defined as "[t]he lack of means by which to obtain reimbursement from, or a judgment against, a person or entity. Black's Law Dictionary (10th ed. 2014). Subcontractors contend any recourse that is available to the plaintiff is sufficient for the subcontractors to avoid liability. Put another way, through the lens of Subcontractors, a builder/general contractor with assets equal to $1, a nominal amount, is sufficient for the Subcontractors to avoid liability. From a technical standpoint, the plaintiff would have "recourse" because even $1 is reimbursement obtained from the builder/general contractor.

The above example demonstrates the flaw in Subcontractors' advocacy of the "no recourse" test. It can hardly be said that such a recovery constitutes "reimbursement" as that term is contemplated in the legal definition of "no recourse." The public policy considerations underlying the implied warranty of habitability are upended if a court were to conclude that a nominal or fractional recovery is "recourse" that satisfies the innocent home purchaser's claim against the builder-vendor. The "no recourse" test fails because it does not take into account the cost to remedy a plaintiff's damages to their home. A "no recourse" test does not and cannot protect the innocent home buyer from the burden of extraordinary repair costs when the recovery from the builder/general contractor is nominal.

In this case, the homeowners suffered millions of dollars in damages and may only recover a fraction of the amounts needed to make all required repairs. The limited municipal fund was not an asset of the developer/builder and does not bear on the solvency determination. Indeed, the bankruptcy trustee for the estate of the Developer acknowledged that the municipal fund was not property of the bankruptcy estate, which had no interest in the funds. (R. C41398.) However, Subcontractors continue to argue that this limited fund, which is clearly insufficient to pay the many millions of dollars in damages occasioned by their pervasive latent defects, should cut off liability on the part of the subcontractors. The Court in *Pratt III* already and soundly rejected such an argument by its holding that even limited assets do not cut off subcontractor liability when the developer/builder is insolvent. *Pratt III*, 2013 IL App (1st) 130744 ¶ 26.

Further, the potential recovery of any more proceeds, through an insurance policy or otherwise, is not availing. As further reasoned by the First District in this matter:

> we do not find that *potential* recovery from insurance policies held by an *insolvent* developer or *insolvent* general contractor precludes an implied warranty of habitability claim against subcontractors who participated in the construction of the residence. Similarly . . . we do not find that the recovery of any proceeds from an *insolvent* developer's "warranty fund" bars a property owner from maintaining a cause of action for breach of implied warranty of habitability against subcontractors of the developer who participated in the construction of the residence.

Sienna Court Condo. Ass'n v. Champion Aluminum Corp., 2017 IL App (1st) 143364, ¶ 99 (emphasis in original) The "no recourse" test is inconsistent with the policy behind the implied warranty of habitability and the public policy of protecting innocent home purchasers against shoddy construction would be vitiated. Innocent home purchasers should not be deprived of a remedy to recover for latent defects from the subcontractor if only a nominal sum can be obtained from the builder-vendor.

To the extent that the Court implements a test involving recourse, the Court should impose a qualification for recourse that is consistent with protecting an innocent home purchaser. Thus, the availability of a claim against a subcontractor should first consider whether the plaintiff has *adequate* or *sufficient* recourse against the builder-vendor. Sufficient or adequate recourse would allow the court to determine whether the builder/general contractor holds assets in such an amount that could be used to correct the defects in the home.

Pursuant to the public policy on implied warranty of habitability claims, as appropriately extended by *Minton* in furtherance of protecting innocent home buyers, the Court should find in favor of Sienna Court and affirm the Circuit Court's June 2, 2014 Order denying the Defendants-Appellants' Joint Motion to Dismiss.

CONCLUSION

Illinois law has progressed from *caveat emptor* and strict privity of contract to a recognition that those who are the cause of an injury should be held responsible. Subcontractors should not be permitted to hide behind fictional walls to deflect liability for their very real and defective work. Thus, the Sienna Court Condominium Association respectfully submits that this Court should affirm the Illinois Appellate Court, First District's Opinion holding that subcontractors that perform defective work should be held responsible to innocent purchasers where the developer/general contractor is insolvent. By affirming the First District's Opinion, a strong message will be sent to those responsible for building Illinois homes and our courts. This Court's message will reaffirm the overriding and important social and policy considerations attendant to home ownership, including the fundamental right to a habitable dwelling and that those

responsible for latent defects will be held accountable when the builder-vendor is insolvent.

Respectfully submitted:

Sienna Court Condominium Association

By: /s/ Hal R. Morris
One of its attorneys

SAUL EWING ARNSTEIN & LEHR LLP
161 North Clark Street, Suite 4200
Chicago, Illinois 60601
(312) 876-7100
Of counsel:
Hal R. Morris (hal.morris@saul.com)
W. Matthew Bryant (matthew.bryant@saul.com)
Elizabeth A. Thompson (elizabeth.thompson@saul.com)
Michael A. Jacobson (michael.jacobson@saul.com)

CERTIFICATION OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages contained in the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 37 pages.

/s/ Hal R. Morris

CERTIFICATE OF SERVICE

I, Hal R. Morris, an attorney, under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, certifies that the statements set forth in this instrument are true and correct, and that the attached **Brief of Plaintiff-Appellee Sienna Court Condominium Association** was filed by electronic means with the Clerk of the Illinois Supreme Court, on April 24, 2108, and was served on the following Counsel of Record:

Christopher M. Goodsnyder Perl & Goodsnyder, Ltd. 14 North Peoria Street, Suite 2-C Chicago, Illinois 60607	Thomas S. Flanigon Adler Murphy & McQuillen LLP 20 South Clark Street, Suite 2500 Chicago, Illinois 60603
Dave Johnson Michael Resis Brian C. Konkel Smith Amundsen 150 North Michigan Avenue Chicago, Illinois 60601	Gregory Adamo Clingen Callow & McLean LLC 2300 Cabot Drive, Suite 500 Lisle, Illinois 60532
Kimberly Kearney Margaret Fahey Clausen Miller 10 S. LaSalle Street , Suite 1600 Chicago, Illinois 60603	Chris M. Cano Franco Moroney 500 W. Madison, Suite 2440 Chicago, Illinois 60661
Heather L. Kingery Brian P. Schaughnessy Cremer Spina One N. Franklin, 10th Floor Chicago, Illinois 60606	Kimberly A. Jansen Steven R. Bonnano Anne C. Couyoumjian Hinshaw & Culbertson LLP 222 North LaSalle Street, Suite 300 Chicago, Illinois 60601
Bob O'Donnell Adam M. Kingsley O'Donnell Law Firm, Ltd. 14044 Petronella Drive, Suite 1 Libertyville, IL 60048	Julie Teuscher Thomas Boylan Michael P. Moothart Cassiday Schade LLP 20 N. Wacker Drive, Suite 1000 Chicago, Illinois 60606
Christopher R. Kearns Kearns Law Firm LLC 739 S. Western Avenue Chicago, Illinois 60612	Madelene G. Sheaffer Thomas Orlando Douglas Palandech Foran Glennon 222 N. LaSalle St., Suite 1400 Chicago, Illinois 60601

by depositing same in the U.S. mailbox situated at 161 N. Clark Street, Suite 4200, Chicago, Illinois, on April 24, 2018, before 5:00 p.m.

/s/ Hal R. Morris