NO. 122022

IN THE SUPREME COURT OF ILLINOIS

SIENNA COURT CONDOMINIUM ASSOCIATION, an Illinois not-for-profit corporation, *Plaintiff-Appellee,* *v.* ROSZAK/ADC, LLC, *Defendant/Counterplaintiff,* *and* DON STOLTZNER MASON CONTRACTOR, et al, *Defendants/Counterdefendants-Appellants,* *and* CHAMPION ALUMINUM CORP., et al, *Defendants/Counterdefendants.*	Appeal from the Appellate Court of Illinois for the First Judicial District No. 1-14-3364, 14-3687 and 1-14-3753 (consolidated) There Heard on Appeal from the Circuit Court for Cook County, Illinois No.: 13 L 002053 The Honorable **Margaret Brennan,** Judge Presiding.

APPELLANTS' ADDITIONAL BRIEF AND ATTACHED APPENDIX

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ORAL ARGUMENT REQUESTED

POINTS AND AUTHORITIES

NATURE OF THE CASE

Plaintiff, the Sienna Court Condominium Association, seeks recovery for a variety of alleged defects in the construction of the Sienna Court Condominiums. This appeal arose from plaintiff's attempt to assert claims for breach of the implied warranty of habitability against six subcontractors and material suppliers who contributed to the construction of the condominiums. (C5478-5517.) On appeal pursuant to Supreme Court Rule 308 (Ill. S. Ct. R. 308), the appellate court held that implied warranty claims could not be asserted against material suppliers. (A24, ¶ 69–74.) The appellate court held that such claims could be asserted against subcontractors, however, upon showing that the developer and general contractor are insolvent, regardless of whether the plaintiff condominium association enjoys continued recourse to the developer and general contractor through the developer and general contractor's liability insurance policies and the developer's warranty fund. (A36, ¶ 99.)

ISSUES PRESENTED FOR REVIEW

1. Ordinarily, claims for breach of the implied warranty of habitability cannot be brought against subcontractors. Is there an exception to this rule where the property owner has no recourse to the developer or general contractor as a result of the developer's or general contractor's insolvency?

2. If claims for breach of the implied warranty of habitability can be brought against subcontractors as a result of the developer's or general

contractor's insolvency, is the critical factor insolvency or the absence of recourse?

STATEMENT OF JURISDICTION

On October 29, 2014, the trial court certified four questions for interlocutory appeal pursuant to Supreme Court Rule 308. (A44.) The appellate court granted leave to appeal on December 11, 2014. (A43.) The appellate court had jurisdiction over this appeal pursuant to Supreme Court Rule 308. Ill. S. Ct. R. 308.

The appellate court's opinion was published on February 17, 2017, answering the questions certified by the trial court pursuant to Supreme Court Rule 308 in Appeal No. 1-14-3364 and deciding two other consolidated appeals brought pursuant to Supreme Court Rule 304(a) (Ill. S. Ct. R. 304(a)). (A3.) This Court granted leave to appeal on September 27, 2017. (A2.) This Court has jurisdiction pursuant to Supreme Court Rule 315. Ill. S. Ct. R. 315.

STATEMENT OF FACTS

In its Third Amended Complaint, plaintiff asserted claims for breach of the implied warranty of habitability against: (1) the developer of the condominium, TR Sienna Partners, LLC ("TR Sienna"); (2) the general contractor, Roszak/ADC, LLC ("Roszak"); (3) design professionals; (4) material suppliers; and (5) several subcontractors, including Don Stoltzner Mason Contractor, Inc., BV and Associates, Inc., d/b/a Clearvisions, Inc., Lichtenwald-Johnston Ironworks Co., and Metalmaster Roofmaster, Inc. (collectively, "the

Subcontractors"). (C5478.) Plaintiff alleged that the general contractor, "Roszak[,] was responsible for the construction" and each of the Subcontractors "was a subcontractor to Roszak." (See, e.g., C5497.)

Both the developer and general contractor dissolved in 2010 following liquidation in Chapter 7 bankruptcy proceedings. (C4394.) In May 2013, a few months after filing its initial complaint in this action, plaintiff sought and was granted relief from the automatic bankruptcy stay so that it could pursue its claims against the developer and general contractor to the extent of their available insurance. (C515, C517.) In seeking relief from the bankruptcy stay, plaintiff explained that, under the Illinois Insurance Code, the bankruptcy or insolvency of the insured "shall not relieve the insurer from its liabilities in case of any loss occasioned during the term of the policy." (C2824 and C4514, quoting 215 ILCS 5/388.) In subsequent discovery, the developer and general contractor each disclosed two separate insurance policies, each providing coverage of $1,000,000 per occurrence with $2,000,000 aggregate limits. (C2812, C2817.)

The Subcontractors, together with additional subcontractors and material suppliers, moved to dismiss the implied warranty claims against them. (C2707–26.) In their motion, they acknowledged the First District's holding in *Minton v. Richards Group of Chicago*, 116 Ill. App. 3d 852 (1983), which expanded the implied warranty of habitability to permit claims against subcontractors "where the innocent purchaser has no recourse to the builder-vendor." (C2715.) Nevertheless, the subcontractors and material suppliers argued, that rule does not

apply where, as here, the purchaser still has "recourse" to both the developer and the general contractor. (C2715.) (In addition to the insurance coverage noted above, plaintiff had already obtained a remedy of at least $308,285.48 from the developer through a Warranty Escrow Fund established pursuant to Evanston City Ordinance § 5-4-3-4. (C4159–63, C4271–84.))

The trial judge noted the unique issues presented here where, despite the insolvency of the developer and general contractor, the plaintiff specifically sought and obtained relief from bankruptcy stays permitting plaintiff to proceed with claims against the developer and general contractor to the extent of their available insurance coverage. (A196.) The trial judge further noted that, despite continuing efforts of the First District to clarify the rule in *Minton* and its progeny, the issues arising in this area remain "unnecessarily complicated." (A195.)

Anticipating that "the Appellate Court at this juncture would once again struggle between the recourse, no recourse" issue under *Minton* and its progeny, the trial judge denied the motion to dismiss, but invited a motion pursuant to Supreme Court Rule 308 to certify the issue for interlocutory appeal. (A196.) The trial judge ultimately certified four questions for interlocutory appeal. (A45.) Collectively, the certified questions ask whether a property owner may pursue claims against a subcontractor for breach of the implied warranty of habitability where an insolvent developer or general contractor nevertheless has applicable

insurance coverage or a warranty fund which provides an actual or potential remedy. (A45.)

Specifically, the trial court certified the following four questions:

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 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 implied warranty of habitability against subcontractors and/or material suppliers, which are not in privity with the property owner, under the *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?

(A45.)

The appellate court granted leave to appeal. (A43.) The Rule 308 appeal (No. 1–14–3364) was subsequently consolidated with two additional appeals brought in this same matter pursuant to Supreme Court Rule 304(a): (1) an appeal by the general contractor of an order dismissing its counterclaims against the subcontractors and material suppliers (No. 1–14–3753); and (2) an appeal by the plaintiff of an order dismissing its claims for breach of the implied warranty of habitability against the design professionals and material suppliers (No. 1–14–3687). (A4, ¶1.)

On appeal, the appellate court rejected the argument that the rule in *Minton* should no longer be followed. (A35, ¶96.) Despite acknowledging that "courts outside of the First District have rejected Minton" (A35, ¶ 96, citing *Lehmann v. Arnold*, 137 Ill. App. 3d 412 (4th Dist. 1985), and *Bernot v. Primus Corp.*, 278 Ill. App. 3d 751 (2d Dist. 1996)), the appellate court nevertheless "decline[d] to deviate from Minton" in light of "over 30 years of subsequent precedent" applying the Minton rule within the First District. (A35–36, ¶¶ 96–98.)

In addition, the appellate court held that "the relevant inquiry" in determining whether implied warranty claims may be pursued against a subcontractor "is the insolvency of the developer or general contractor," not the

availability of recourse. (A34, ¶ 95.) An insolvency test, the appellate court reasoned, is more easily applied than a more, "fact-intensive inquiry into whether a purchaser has 'recourse' to the developer or general contractor." (A35, ¶ 95.)

ARGUMENT

At the heart of each of the four individual questions certified by the trial court for interlocutory appeal is a single question: does the implied warranty of habitability extend to subcontractors or material suppliers, even though the purchaser still has recourse to the developer and builder, merely because the developer and builder are "insolvent"? The appellate court held that, as to subcontractors, it does. (A36,¶ 98.)

This Court should reverse the appellate court and overrule the decision in *Minton* upon which the appellate court relied. Subcontractors who participate in the construction of a new home should be able, at the time that they perform their work, to identify the duties to which they will be subjected. Their duties to a new home purchaser should not depend on the future financial solvency of the developer or builder. Alternatively, should this Court approve the *Minton* court's expansion of the implied warranty of habitability to subcontractors, it should not do so where, as here, the property owner still has recourse under the developer or builder's liability insurance or warranty fund despite the builder or developer's balance-sheet insolvency.

I. This Court's review is *de novo*.

Supreme Court Rule 308 permits interlocutory appeal upon the trial court's certification of questions of law. Ill. S. Ct. R. 308. "By definition, certified questions are questions of law subject to *de novo* review." *Rozsavolgyi v. City of Aurora*, 2017 IL 121048, ¶ 21.

II. The expansion of the implied warranty of habitability in *Minton v. Richards*, 116 Ill. App. 3d 852 (1st Dist. 1983) should be overruled.

A. The validity of the *Minton* court's expansion of the implied warranty of habitability is properly before this Court.

In addressing the four questions certified by the trial judge, the appellate court below considered and rejected the Subcontractors' argument that *Minton* should be overruled. (A35–36, ¶ 95.) The Subcontractors acknowledge that the four questions certified by the trial court do not directly ask whether the *Minton* court's expansion of the implied warranty of habitability was proper. To the contrary, each of the trial court's certified questions assumes the validity of the *Minton* rule, which is binding authority as to trial courts within the First District. See *Aleckson v. Round Lake Park*, 176 Ill. 2d 82, 92 (1997) ("when conflicts arise amongst the districts, the circuit court is bound by the decisions of the appellate court of the district in which it sits"). Because the certified questions cannot be answered without first addressing the validity of the *Minton* rule, this issue was properly before the appellate court and is properly before this Court on review.

The "scope of review is generally limited to the certified question" in an appeal under Rule 308. *Rozsavolgyi*, 2017 IL 121048, ¶ 25. Nevertheless, where "the certified question does not represent the full range of issues presented," this Court "may go beyond the limits of a certified question in the interests of judicial economy and the need to reach an equitable result." *Johnston v. Weil*, 241 Ill. 2d 169, 175 (2011). Where necessary to "reach an equitable result," this Court will "go beyond the question of law presented and consider the propriety of the order that gave rise to the appeal." *Bright v. Dicke*, 166 Ill. 2d 204, 208 (1995).

Where the certified question is premised on an assumption of fact or law, review under Rule 308 requires review of that underlying assumption. For example, in *Fireman's Fund Insurance Co. v. SEC Donohue, Inc.*, 176 Ill. 2d 160, 164–65 (1997), the trial court denied a professional engineering firm's motion to dismiss, but certified the following question for interlocutory review pursuant to Rule 308:

> Is a professional engineer who prepares plans and specifications for a construction project in the business of supplying information to others for the guidance of the recipient in its business dealings with third parties and liable in tort for negligent misrepresentations under *Moorman Manufacturing Co. v. National Tank Co.*, [citation][?].

(Modification in original.) *Id.* at 163. This Court recognized that the framing of this question was premised on a number of appellate court decisions holding that, to establish a negligent misrepresentation claim, a plaintiff would be

required to demonstrate that the information was supplied for guidance in business dealings *with third parties.* *Id.* at 166.

This Court, however, had "never included an additional requirement that those business transactions must be made specifically with third parties." *Id.* at 165. This Court overruled the "[a]ppellate court decisions that refer to an additional third-party requirement," and modified the certified question accordingly. *Id.* at 166.

Similarly, the appellate court in *People ex rel. Board of Trustees of Chicago State University v. Siemens Building Technologies, Inc.*, 387 Ill. App. 3d 606, 617 (1st Dist. 2008), addressed a two-part certified question asking:

> "Does the 2007 amendment to [the Public University Energy Conservation Act] merely clarify the language of section 25, or does it effect a substantive change? If it effects a substantive change, is the change retroactive?

The first part of this question, the appellate court noted, "assume[d] the premise that the drafters' intent cannot be ascertained from the statutory language alone." *Id.* at 618. Because "the legislative intent that controls the construction of a public act is the intent of the legislature which passed the subject act, and not the intent of the legislature which amends the act," the appellate court concluded that it could not simply assume the premise that the pre-amendment language of the statute was unclear. *Id.* Instead, in the interests of reaching an equitable result, the court was required to go beyond the certified question to construe the "plain language of the preamended version" of the statute. *Id.*

Here, each of the four questions certified by the trial court assume the premise that a cause of action for breach of the implied warranty of habitability may be brought against subcontractors under the First District's expansion of the implied warranty in *Minton*, asking the appellate court (and now this Court) to determine only the specific circumstances under which that expansion will apply. But, like the third-party requirement overruled in *Fireman's Fund Insurance Co.*, this Court has never adopted the expansion of the implied warranty of habitability to subcontractors. The appellate court is split as to the propriety of this expansion. Compare *Minton*, 116 Ill. App. 3d at 855 with *Lehmann*, 137 Ill. App. 3d at 417-18 and *Bernot*, 278 Ill. App. 3d at 755.

In the interests of reaching an equitable result, this Court should not simply assume the validity of the First District's expansion of the implied warranty in *Minton*, but should go beyond the certified questions to resolve the conflict within the appellate court on this issue and decide whether *Minton* should be overruled. If this Court overrules *Minton*, further consideration of the certified questions will be unnecessary: claims for breach of the implied warranty of habitability could not be brought against subcontractors regardless of the insolvency of, or availability of recourse to, a developer or builder. If this Court approves the expansion of the implied warranty crafted in *Minton*, resolution of the certified questions will then require this Court to decide whether "insolvency" or "no recourse" provides the appropriate basis for expanding the duties of subcontractors.

B. The First District's expansion of the implied warranty of habitability in *Minton* should be overruled.

In the context of residential construction, this Court has long recognized that "implied in the contract for sale from the builder-vendor to the vendees is a warranty that the house, when completed and conveyed to the vendees, would be reasonably suited for its intended use." *Petersen v. Hubschman Const. Co., Inc.*, 76 Ill. 2d 31, 42 (1979). The implied warranty is necessary, this Court has explained, because "the buyer of a newly constructed house 'has little or no opportunity to inspect' and 'must rely upon the integrity and the skill of the builder-vendor.'" *Fattah v. Bim*, 2016 IL 119365, ¶19, quoting *Petersen*, 76 Ill. 2d at 40.

In light of the "unusual dependent relationship" between a builder or developer of a new home and the purchaser, adoption of the implied warranty of habitability is necessary to ensure that a purchaser "receive[s] that for which he has bargained and that which the builder-vendor has agreed to construct and convey to him, that is, a house that is reasonably fit for use as a residence." *Peterson*, 76 Ill. 2d at 40. "[T]he implied warranty of habitability," this Court stressed, remains "based in the contract of sale" (*Fattah*, 2016 IL 119365, ¶20), even though "it exists independently" (*Redarowicz v. Ohlendorf*, 92 Ill. 2d 171, 183 (1982)).

This Court has twice expanded the scope of the implied warranty of habitability. First, in *Redarowicz*, this Court expanded the warranty to protect

subsequent purchasers of a new home. 92 Ill. 2d at 185. This expansion, however, was "limited to latent defects which manifest themselves within a reasonable time after the purchase of the house." *Id.* This Court emphasized that "a builder-vendor should know that a house he [or she] builds might be resold within a relatively short period of time and should not expect that the warranty will be limited by the number of days that the original owner chooses to hold onto the property." *Id.* Because "[t]he purpose of the warranty is to protect purchasers' expectations by holding builder-vendors accountable" this Court concluded that it would not be "logical to arbitrarily limit that protection to the first purchaser of a new house." *Id.*

This Court expanded the warranty once again in *VonHoldt v. Barba & Barba Constr., Inc.*, 175 Ill. 2d 426, 431 (1997), holding that the warranty will also apply "when a builder makes a significant addition to a previously built home." This Court emphasized that the "purchaser of both a completed home and an addition places the same trust in the builder that the structure being erected is suitable for living." *Id.* at 432. "In both cases, the owner of the house usually has little knowledge regarding the construction" and "is not in a position to discover hidden defects in a structure even through the exercise of ordinary and reasonable care." *Id.*

This Court has also approved decisions of the appellate court expanding the doctrine to the construction of new residential condominium units. See *Kelley v. Astor Investors, Inc.*, 106 Ill. 2d 505, 511 (1985), citing *Tassan v.*

United Development Co., 88 Ill. App. 3d 581, 587 (1st Dist. 1980) (warranty applies against developer-seller of new condominium unit), *Herlihy v. Dunbar Builders Corp.*, 92 Ill. App. 3d 310, 315–16 (1st Dist. 1980) (warranty applies to actions arising from defects in common elements of condominium that interfere with habitability of residences). In these cases, the appellate court noted, there is little basis for purposes of the warranty to distinguish between single-family residences and residential condominiums or townhomes. See *Herlihy*, 92 Ill. App. 3d at 317 ("Purchasers of condominium units, just as buyers of single family residences, often are not knowledgeable in construction practices and must, to a substantial degree, rely upon the integrity and skill of the developer-vendor.")

This Court has never, however, extended the warranty to impose duties on parties other than the builder- or developer-vendor involved in construction of a new home, condominium, or addition. Illinois courts have held that subcontractors involved in the construction of a new home—but who are not builder-vendors or otherwise parties to the sales contract—cannot be held liable for breach of the implied warranty of habitability. *Waterford Condominium Association v. Dunbar Corp.*, 104 Ill. App. 3d 371, 375 (1st Dist. 1982); *Washington Courte Condominium Association-Four v. Washington Golf-Corp.*, 150 Ill. App. 3d 681, 688–90 (1st Dist. 1986).

In *Waterford Condominium Association*, the appellate court recognized that the implied warranty was properly applied to builders and developers because "the builder or developer was in the best position to know who could

perform the work adequately and see that it was properly done." 104 Ill. App. 3d at 375. The same reasoning does not apply to subcontractors who "merely are employed by the builder." *Id.*

In *Minton*, however, the First District crafted an expansion of the implied warranty, holding that implied warranty claims may be asserted against 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." *Minton*, 116 Ill. App. 3d at 855.

Courts in the Second and Fourth Districts have rejected *Minton.* "If a subcontractor impliedly warrants his work to the purchaser," the Fourth District reasoned, "then his liability should be independent of the builder's solvency." *Lehmann*, 137 Ill. App. 3d 417-18. The Second District agreed, adding that expanding the implied warranty beyond the builder-vendor "would undermine the privity requirement as recognized in the *Moorman* line of cases." *Bernot*, 278 Ill. App. 3d at 755.

This Court has never adopted the *Minton* court's expansion of the implied warranty. This Court's recent decision in *Fattah* makes clear why such an expansion is inappropriate. In *Fattah*, this Court addressed claims raised by a subsequent purchaser of a new home for breach of the implied warranty despite "a valid, bargained-for waiver of the warranty was executed between the builder-vendor and the first purchaser." *Fattah*, 2016 IL 119365, ¶ 2. Relying on *Redarowicz*, the appellate court in *Fattah* concluded that the warranty extended

to the subsequent purchaser as a matter of course. *Id.* ¶ 15. Although the original purchaser had "executed a valid, bargained-for waiver of the warranty," the appellate court held that the subsequent purchaser, having never executed an independent waiver of the warranty, was free to proceed. *Id.* ¶¶ 16–17. This Court disagreed.

First, this Court observed that in *Petersen* it "held that the warranty may be waived" so long as the waiver is contained in "a conspicuous provision that fully discloses its consequences and establishes that the waiver was in fact the agreement reached by the parties." *Id.* ¶ 21. This Court next explained that, in *Redarowicz*, it permitted a subsequent purchaser to invoke the implied warranty of habitability, despite not being a party to the original contract for sale out of which the implied warranty arose, based on "the short time period—approximately one year—between the completion of the construction of the house and the time the plaintiff, the second purchaser, bought it." *Id.* ¶ 25. This Court emphasized that this short time period "meant that the plaintiff occupied the house during a time when the original owners would still have been covered by the implied warranty of habitability if they had remained in the house." *Id.* Thus, "allowing the plaintiff to pursue a cause of action for breach of the implied warranty would not alter the burdens or risks that were already placed on the builder-vendor and, importantly, would not alter the builder-vendor's reasonable expectations." *Id.*

Expanding on its analysis in *Redarowicz* and *Petersen*, this Court in *Fattah* declined to expand the implied warranty to a subsequent purchaser where the original purchaser had already waived the warranty. This Court made clear that "it is reasonable to extend the implied warranty of habitability to a second purchaser when doing so does not alter the burdens already placed on the builder-vendor." *Id.* ¶ 27. When a subsequent purchaser is permitted to invoke the "implied warranty of habitability that arises out of a sales contract between the first purchaser and the builder-vendor," the subsequent purchaser "is merely stepping into the shoes of the first purchaser." *Id.* ¶ 34. "[I]f there is valid, bargained-for waiver by the first purchaser," however, "the implied warranty cannot fairly be extended to the second purchaser." *Id.* "Extending the implied warranty in these circumstances would significantly alter the burdens and expectations of defendants and would be inequitable." *Id.* ¶ 28.

Similarly, extending the implied warranty to subcontractors based on a developer and builder's subsequent insolvency would significantly alter the burdens and expectations of subcontractors. *Allowing* a subsequent purchaser to step into the shoes of the original buyer, as in *Redarowicz*, is sharply distinguishable from *forcing* subcontractors to step into the shoes of an insolvent builder or developer, as in *Minton* and its progeny. When a subsequent purchaser steps into the original purchaser's shoes, "the builder-vendor's burdens are not changed." *Fattah*, 2016 IL 119365, ¶ 26. The builder-vendor is subject only to the duties and risks it voluntarily accepted when entering into the contract

for sale and the builder- or developer-vendor continues to enjoy the protection of any bargained-for waiver of the implied warranty it negotiated with the original buyer. Extending the warranty to a subsequent purchaser (in the absense of a waiver by the original purchaser) is fair because "a builder-vendor should know that a house he builds might be resold within a relatively short period of time and should not expect that the warranty will be limited by the number of days that the original owner chooses to hold onto the property." *Redarowicz*, 92 Ill. 2d at 185.

In contrast, if a purchaser is permitted to thrust a subcontractor into the shoes of an insolvent builder- or developer-vendor, years after the original sale, the subcontractor's burdens are significantly changed. When entering into its original contract with the builder-vendor, a subcontractor should not be expected to anticipate that the builder-vendor will someday become insolvent. Nor should a subcontractor expect that its duties to a purchaser will be expanded (in fact, created) based on the vagaries of a builder- or developer-vendor's financial condition. Extending the implied warranty to permit claims against a subcontractor subjects the subcontractor to duties and risks to which the subcontractor was not subject at the time of the sale, and to which the subcontractor only becomes subject if both the builder and developer someday become insolvent. Extending the implied warranty in these circumstances would be inequitable. *Fattah*, 2016 IL 119365, ¶ 28.

Perhaps most troublingly, the subcontractor (who is not a party to the contract for sale) does not enjoy the builder- or developer-vendor's opportunity

to bargain for a disclaimer of the implied warranty within the sales contract. The subcontractor has no contractual relationship with a new home purchaser at all, but is "merely... employed by the builder." *Waterford Condominium Association*, 104 Ill. App. 3d at 375. And, at least within the First District, the subcontractor is foreclosed from relying on a bargained-for disclaimer of the warranty negotiated by the builder-vendor. See *1324 W. Pratt Condominium Ass'n v. Platt Const. Group, Inc.* ("*Pratt II*"), 2012 IL App (1st) 111474, ¶¶32–33.

"[I]t is reasonable to extend the implied warranty of habitability" only "when doing so does not alter the burdens already placed" on the defendant. *Fattah*, 2016 IL 119365, ¶ 27. Extending the implied warranty of habitability to impose liability on a subcontractor where the builder- or developer-vendor has become insolvent indisputably alters the burdens placed on the subcontractor. Because such an expansion is unreasonable, this Court should overrule the First District's holding in *Minton*.

C. The *Minton* court's expansion of the implied warranty of habitability undermines the purposes of that warranty.

As the Second District recognized in *Bernot*, expanding the implied warranty beyond the builder- or developer-vendor "would undermine the privity requirement as recognized in the *Moorman* line of cases." 278 Ill. App. 3d at 755. "Although *Redarowicz* extended the availability of the cause of action to include subsequent purchasers, it did not extend the scope of possible defendants

beyond the builder/vendor or builder/developer to include subcontractors." *Washington Courte Condominium Ass'n-Four*, 150 Ill. App. 3d at 688.

"[T]he rationale for extending the cause of action to subsequent purchasers was to assure that builder/vendors were held accountable and could not escape liability simply because the initial purchaser had sold the home before the latent defects became patent defects." *Id.* Extending the cause of action to impose liability on subcontractors—whether on the basis of the builder or developer's insolvency or because the purchaser otherwise has no recourse to the builder or developer—flips this rationale on its head, allowing the builder or developer to escape liability while shifting the builder/developer's responsibilities onto the shoulders of subcontractors.

Here, plaintiff alleged that the developer (TR Sienna) was "established as a single purpose entity to transact the business of developing, marketing, and selling the Units [of the Sienna Court Condominiums] and Common Elements of the Property." (C5480.) In other words, the developer was deliberately structured as a single-purpose LLC that would exist as a legal entity, and remain solvent, only until it completed the "developing, marketing, and selling" of the property at issue in this case.

The business structure adopted by TR Sienna is not novel. See, e.g., *Trapani Const. Co., Inc. v. Elliot Group, Inc.*, 2016 IL App (1st) 143734, ¶20 (recognizing "common practice in the residential development industry to establish a 'single-purpose LLC'" to develop and sell property). The "developer

of [a condominium] project is often a single-purpose limited liability company (LLC) that may disappear once all the units are sold, or end up insolvent." G. William Quatman, Heber O. Gonzalez, *Right-to-Cure Laws Try to Cool Off Condo's Hottest Claims*, Construction Law, Summer 2007, at 13 (2007).

As a practical matter, expanding liability under the implied warranty of habitability to subcontractors whenever a purchaser is without recourse to the developer or the developer is insolvent allows developers to escape liability by structuring as a single-purpose entity designed to remain solvent only until the project is complete. Developers will have no incentive to ensure that the single-purpose entity remains sufficiently capitalized to remedy latent defects that might become apparent after the project is complete. Nor will developers have any incentive to maintain adequate insurance to remedy such defects. If developers' liability is shifted to subcontractors as soon as the developer either becomes insolvent or lacks sufficient insurance to otherwise provide recourse, then any sensible developer will ensure that it will be insolvent and without adequate insurance as soon as a project is complete.

In its opinion below, the appellate court emphasized the purported imperative of using the "easily applied" (A35, ¶95), bright-line test of "solvency," rather than determining whether or not the homeowner would have "recourse" against another source of recovery, such as a warranty fund or millions of dollars in liability insurance. But under this "insolvency" test, subcontractors (but not design professionals or material suppliers, which the First District has excluded

from derivative liability for the implied warranty of habitability) will become *de facto* guarantors that the developer has built the project to the ultimate satisfaction of the homeowners where the developer is structured as a single-purpose entity designed to exist and remain solvent only until the building project is complete.

Taken to its logical extreme, an original or subsequent purchaser would actually be in a *more favorable position*, should a putative claim arise regarding the project, if the single-entity developer was substantially undercapitalized. In this instance, because the original or subsequent purchaser could avoid the limiting effect of an implied warranty disclaimer executed by the original purchaser at the property closing. In the First District, at least, such a disclaimer has been held unenforceable by the subcontractor, who is considered to be a stranger to the agreement. See *Pratt II*, 2012 IL App (1st) 111474, ¶¶ 32–33.

Subcontractors, in contrast, would have no ability to structure their affairs to avoid having the builder or developer's responsibilities under the implied warranty of habitability thrust upon them. Under the "no recourse" approach, a subcontractor's potential liability to the purchaser will depend entirely on the unilateral decision of the builder or developer as to whether to maintain adequate insurance or capital to satisfy any implied warranty claims that may arise.

Adoption of an "insolvency" test would leave subcontractors even more vulnerable. Subcontractors would not be able to limit their potential liability by insisting that the builder or developer maintain adequate insurance because the

builder or developer's insolvency alone will open the subcontractor to liability even if the purchaser's claimed loss is fully covered by the builder or developer's available insurance. And because subcontractors are not parties to the sales contract from which the implied warranty arises, and have no contractual relationship with purchasers, subcontractors will not be in a position to negotiate for any disclaimer of the implied warranty. Under controlling First District precedent, they do not enjoy the protection of the disclaimer obtained by the general contractor or developer that hired the subcontractor. *Pratt II*, 2012 IL App (1st) 111474, ¶¶32–33.

Notably, plaintiff alleges in great detail the purported errors and omissions of the Design Professionals (Wallin-Gomez, Matsen Ford and HMS Engineering), and how those purported errors and omissions have led to the defects and damages at issue. (C5492.) Yet, the appellate court affirmed the dismissal of the Design Professionals, finding that the Design Professionals, as a matter of law, were not "involved in the actual construction" and would constitute "an entirely different category of defendant" to which derivative liability for the implied warranty of habitability under *Minton* should *not*, as a matter of public policy, be extended. (A23–24, ¶¶ 66–67; A24–25, ¶ 70; A26, ¶¶ 73–74.) The distinction between subcontractors and design professions appears wholly arbitrary for purposes of the implied warranty. If the purpose of extending the implied warranty beyond the builder or developer is to protect new home purchasers from latent defects, it should make no difference whether those

defects arise from the physical work of construction (as performed by subcontractors) or from defects in the design specifications guiding the physical work of construction (as prepared by design professionals).

As demonstrated by the foregoing, the First District's continued expansion of *Minton* to a scenario where the plaintiff has the potential to recover more than $2.3 million dollars of the alleged $2.5 million in damages (if it proves all of the elements of the breach of implied warranty of habitability and purported damages at trial), while *also* being permitted to proceed against the subcontractors with whom the plaintiff has *no contractual privity* due to the fortuity of purchasing the property from a single-purpose entity that subsequently filed for bankruptcy. If the First District's expansion of *Minton* and elimination of any consideration of recourse is allowed to stand, the exception will swallow the rule. This result would be an unreasonable and uncompensated burden-shifting to subcontractors that greatly exceeds the underlying public policy goals of holding developers liable for their own conduct.

Respectfully, this Honorable Court should not countenance such an inequitable and unjust result that makes the subcontractors the *de facto* uncompensated insurers of both the developer and general contractor's continued viability and construction choices.

III. If this Court adopts *Minton's* expansion of the implied warranty of habitability, the test should be lack of recourse rather than insolvency.

In the event that this Court deems an expansion of the implied warranty of habitability to subcontractors appropriate, this Court should adhere to the "no recourse" formulation articulated in *Minton*. In holding that expansion of the warranty to subcontractors should depend on "insolvency" of the builder or developer rather than "recourse" available to the purchaser, the appellate court reasoned that an "insolvency" test "can be much more easily applied" by Illinois courts. (A35, ¶95.) But ease of application alone cannot justify an expansion of the implied warranty of habitability that does not further the policy purposes that led this Court to adopt the implied warranty in the first place.

As the appellate court below recognized, the application of an "insolvency" test for extending the implied warranty to subcontractors finds its origin in *Pratt III*, 2013 IL App (1st) 130744. Prior to that decision, the *Pratt* case had already come before the appellate court twice. In *Pratt I*, the plaintiff condominium association had appealed the dismissal of its implied warranty claim against a builder. On appeal, the builder argued that the implied warranty of habitability had historically been applied only to builder- or developer-vendors and should not extend to a builder not involved in the actual sale of the home. *1324 W. Pratt Condominium Ass'n v. Platt Construction Group*, 404 Ill. App. 3d 611, 617 (1st Dist. 2010) ("*Pratt I*"). The appellate court disagreed, finding that "the primary objective of the implied warranty of habitability has always been

to hold builders themselves accountable for latent defects because they are in the best position to ensure that the residences they build are habitable and free of defects that unsophisticated home buyers are unable to detect." (Emphasis added.) *Id.* The court in *Pratt I* did not address implied warranty claims against subcontractors.

Following remand, the case returned again to the appellate court on appeal from the dismissal of implied warranty of habitability claims against the builder and a subcontractor. *Pratt II*, 2012 IL App (1st) 111474. The trial court had dismissed the condominium association's claims based on a disclaimer of the implied warranty of habitability contained in the condominium association's contract with the developer-vendor. *Id.* ¶ 19. Finding that the language of the disclaimer explicitly waived the implied warranty only as to the developer-vendor, the appellate court permitted the plaintiff to pursue its implied warranty claims against the builder.

The subcontractor, however, additionally argued that the condominium association was required to show that the builder was insolvent before it could pursue an implied warranty of habitability claim against the subcontractor. *Id.* ¶ 35. Noting that the developer-vendor was insolvent but the builder was not, the appellate court held that "the condominium association cannot proceed against the subcontractor...while it still has recourse against [the builder]." *Id.* ¶ 39. The distinction between insolvency and recourse does not appear to have been before

the court in *Pratt II*, and the language of the decision does not point clearly toward one test or the other.

The case returned to the appellate court for a third time in *Pratt III*, this time on interlocutory appeal pursuant to Supreme Court Rule 308. In this appeal, the appellate court addressed a certified question as to whether a plaintiff condominium association could pursue an implied warranty of habitability claim against a subcontractor where the general contractor was "insolvent, but ... in good standing with limited assets." *Pratt III*, 2013 IL App (1st) 130744, ¶ 9. Responding to the certified question, the court held that "in [the] particular situation" presented in *Pratt III*, the plaintiff could proceed against the subcontractor because the developer was insolvent. *Id.* ¶ 1.

The subcontractor in *Pratt III* argued that post-*Minton* precedent left "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." *Id.* ¶ 19. The appellate court disagreed, indicating that "[a]n 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." *Id.*

But nothing in *Pratt III* suggests that the appellate court considered the general contractor's "limited assets" in that case sufficient to offer the purchaser "recourse." Thus, any suggestion in *Pratt III* that a general contractor's insolvency alone is sufficient to justify expansion of the implied warranty to subcontractors,

despite the availability of recourse, was *dictum.* The appellate court's decision in the present case appears to be the first decision in which the appellate court was required to address head-on whether a new home purchaser can pursue implied warranty claims against subcontractors despite the continued availability of recourse to the developer and builder. The appellate court's decision to ignore the availability of recourse in favor of a "more easily applied" "insolvency" test fails to further the purposes of the implied warranty of habitability and should be rejected by this Court.

This Court adopted the implied warranty to mitigate the "unjust results of Caveat emptor" and to protect the right of a new home purchaser to "receive that for which he has bargained and that which the builder-vendor has agreed to construct and convey to him, that is, a house that is reasonably fit for use as a residence." *Peterson*, 76 Ill. 2d at 40. "The purpose of the warranty is to protect purchasers' expectations by holding builder-vendors accountable." *Redarowicz*, 92 Ill. 2d at 185. This protection "is implied as a separate covenant between the builder-vendor and the vendee because of the unusual dependent relationship of the vendee to the vendor." *Fattah*, 2016 IL 119365, ¶ 20, quoting *Peterson*, 76 Ill. 2d at 41.

The appellate court below did not suggest that its "insolvency" test was justified by any "unusual dependent relationship" between subcontractors and purchasers of new homes—no such relationship exists as subcontractors are "merely... employed by the builder" (*Waterford Condominium Association*, 104

Ill. App. 3d at 375) and have no contractual relationship at all with purchasers. Nor did the appellate court claim that an "insolvency" test would further the purpose of "holding [developer- or] builder-vendors accountable"—such a test *absolves* builders or developers of any accountability so long as they are insolvent. And, while the appellate court below acknowledged the Subcontractors' argument that an "insolvency" test does not reliably further the purpose of protecting innocent purchasers (A35, ¶ 94), the appellate court brushed this concern aside based solely on its finding that an "insolvency" test "can be more easily applied" than a test that looks to the availability of recourse (A35, ¶ 95).

For the sake of purportedly easy application, the appellate court has adopted a test that is effectively indifferent to whether innocent purchasers either need or will reliably enjoy greater protection under that test. The insolvency test endorsed by the appellate court expands the potential liability of subcontractors even in cases (like this one) where an expansion is unnecessary to protect purchasers while continuing to exempt subcontractors from liability in cases where the "innocent purchaser" would be left without a remedy. That is, the test does not promote the purpose of the implied warranty to protect purchaser's expectations. A test that fails to further the purposes of the implied warranty ought not be adopted merely because it is perceived as "more easily applied."

The facts in this case illustrate well the way the "insolvency" test adopted by the appellate court expands subcontractor liability even where such an

expansion is unnecessary to protect a new home purchaser. Here, plaintiff has already collected $308,285.48 from the developer (through a Warranty Escrow Fund established pursuant to Evanston City Ordinance § 5-4-3-4) as compensations for alleged defects in the condominium construction. (C4159–63, C4271–84.) In addition, with permission from the bankruptcy court, plaintiff is pursuing implied warranty claims against both the developer and general contractor, to the extent of their available insurance, based on the same alleged defects at issue in plaintiff's claims against the Subcontractors. Here, the developer and general contractor are insured by two separate insurance policies, each providing coverage of $1,000,000 per occurrence with $2,000,000 aggregate limits. (C2812, C2817.)

The warranty escrow funds and available insurance combine to offer plaintiff considerable recourse (should it prove its claims). Yet the appellate court's "insolvency" standard allows plaintiff to simultaneously pursue the same implied warranty claims against the Subcontractors and presumably elect from whom to collect should those claims be successfully proven. Where a purchaser continues to have recourse to the general contractor and developer—here, substantial recourse—no expansion of the implied warranty is necessary to satisfy the warranty's purpose of protecting innocent purchasers. In this sense, the "insolvency" standard is overbroad, expanding liability to cases where no expansion is necessary.

In another sense, however, the "insolvency" standard can be seen as overly narrow, failing to expand the warranty in cases where a purchaser might nevertheless be left without any remedy. "Insolvency simply means that a party's liabilities exceed the value of its assets." *1324 W. Pratt Condominium Ass'n v. Platt Construction Group* ("*Pratt III*"), 2013 IL App (1st) 130744, ¶ 25. Thus, a builder or developer with few or no liabilities may remain legally "solvent," despite having minimal assets and no insurance available to compensate a purchaser for latent defects. If a purchaser's potential damages far exceed the builder or developer's limited assets, the purchaser will be left with no meaningful remedy, notwithstanding the builder or developer's balance-sheet "solvency."

Applying an "insolvency" rather than "no recourse" test, in other words, does not guarantee that an innocent purchaser will enjoy the protection the implied warranty of habitability was crafted to provide and may expand subcontractor liability needlessly where the purchaser is able to obtain full relief from an insolvent but adequately insured builder or developer. The "no recourse" formulation originally articulated by the *Minton* court is more than adequate to ensure that an innocent purchaser will have an appropriate remedy for any defects that may render the home unfit for use as a residence.

Until recently, the few courts that applied *Minton* (all within the First District) adhered to the "no recourse" requirement. See, e.g., *Swaw v. Ortell,* 137 Ill. App.3d 60, 64 (1st Dist. 1984) (where plaintiffs had "recourse" against the

builder-vendor, *Minton* did not apply and there was no action for breach of the implied warranty of habitability against a subcontractor); *Washington Courte Condominium Association-Four*, 150 Ill. App. 3d at 689 (plaintiffs' claims that their "only recourse [was] against the subcontractors" not properly before the court where their "allegation that [the general contractor/builder/vendor was] insolvent" was "legally unsubstantiated and a matter *de hors* the record"). *1324 W. Pratt Condo. Ass'n v. Platt Const. Group, Inc.* ("*Pratt II*"), 2012 IL App (1st) 111474, ¶ 39 (holding condominium association could not "proceed against the subcontractor... while it still has recourse against" general contractor-builder). But *cf. Board of Managers of the 1120 Club Condominium Ass'n v. 1120 Club, Ltd.*, 2016 IL App (1st) 143849, ¶ 29 ("to pursue a claim against a subcontractor, the plaintiff must demonstrate that the builder-vendor is insolvent (as opposed to showing a lack of recourse against the builder-vendor)"), citing *Pratt III*, 2013 IL App (1st) 130744, ¶ 20.

Indeed, prior to the appellate court's decision below, no Illinois court has ever extended the implied warranty of habitability to subcontractors where the purchaser still has—and is actively pursuing—claims against the developer or builder. For that matter, the Subcontractors have found no case in any other state or federal court extending the implied warranty to subcontractors under such circumstances.

When the *Minton* court first expanded the implied warranty to subcontractors, it made clear that "recourse" was the controlling factor—"[W]e

hold that in this case 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, the warranty of habitability applies to such subcontractor." *Minton*, 116 Ill. App. 3d at 855. The availability of recourse to the builder-vendor provided an appropriate basis for expanding the implied warranty because a lack of available recourse would leave innocent purchasers unprotected. The "no recourse" standard limited the *Minton* expansion to those cases where an expansion of liability was necessary to satisfy the "purpose of the implied warranty... to protect innocent purchasers" (*Id.*).

While *Minton* and its progeny seek to ensure the protection of innocent purchasers, none of these cases explain why a subcontractor's duties to such purchasers should depend on the financial health of builders and developers. As discussed above, the *Minton* court's expansion of the implied warranty in such a way as to alter the burdens and risks placed on subcontractors was unreasonable. See *Fattah*, 2016 IL 119365, ¶ 27. Should this Court decline to overrule *Minton*, however, then this Court should adopt the "no recourse" test because the "insolvency" test implemented by the appellate court below will not further the purpose of the limited exception as shown by the circumstances at issue here.

The limited *Minton* exception extends the implied warranty of habitability to a subcontractor only "where the innocent purchaser has *no recourse* to the builder-vendor." (Emphasis added.) *Id.* at 855. In doing so, the *Minton* court agreed with this Court in *Redarowicz v. Ohlendorf*, 92 Ill. 2d 171 (1982) that the

purpose of the implied warranty of habitability is to protect innocent purchasers. *Id.* Replacing *Minton's* "no recourse" requirement with an "insolvency" requirement as the appellate court did below would have the consequence of extending the implied warranty to subcontractors where such an expansion is unnecessary—as is the case here—while failing to extend the warranty to subcontractors in cases where the "innocent purchaser" would be left without a remedy.

If this Court is inclined to expand the implied warranty of habitability, then the "no recourse" standard that the *Minton* court originally found to be the appropriate standard will more faithfully advance the purposes of the implied warranty of habitability: "to protect purchasers' expectations by holding builder-vendors accountable." *Redarowicz*, 92 Ill. 2d at 185.

In requesting permission from the bankruptcy court to pursue claims against the developer and general contractor to the extent of their available insurance, plaintiff acknowledged that the Illinois Insurance Code ensures that the insurance coverage afforded under an insured's insurance policy is still available even where the insured itself is insolvent. Specifically, § 388 of the Illinois Insurance Code requires that every policy of insurance issued or delivered in Illinois contain "in substance a provision that the insolvency or bankruptcy of the insured shall not release the company from the payment of damages for... loss occasioned during the terms of such policy." 215 ILCS 5/388.

Thus, in cases like this one, where the insured developer and/or builder becomes insolvent, § 388 of the Illinois Insurance Code expressly satisfies the dual purposes of the implied warranty of habitability. Ensuring that the insolvent developer or builder's insurance continues to provide coverage serves "to protect purchasers' expectations" by ensuring that such purchasers will continue to have "recourse" based upon the developer and/or builder's insurance coverage. And this continuing coverage serves to "hold[ ] builder-vendors responsible" by ensuring that the builder-vendor's insurance remains responsible for compensation to the purchaser. Where, as here, a purchaser continues to have recourse to the developer and general contractor's insurance coverage, extending the implied warranty to subcontractors is unnecessary to protect purchasers' expectations.

In sum, the "no recourse" requirement rather than the appellate court's new "insolvency" standard affords adequate protection to the innocent purchasers, which was the purpose behind the *Minton* exception. As shown by application of the "no recourse requirement here, the innocent purchasers have a remedy since there is still recourse available against the developer and builder. However, applying the "insolvency" standard adopted by the appellate court below is unnecessary given the developer and general contractor's insurance coverage. Moreover, as shown above, the "insolvency" standard has the potential to leave innocent purchasers with no remedy. Therefore, if this Court does not overrule *Minton*, then this Court should require a showing that the purchaser has

"no recourse" to the builder or developer rather than "insolvency" for any extension of the implied warranty of habitability to subcontractors or material suppliers.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this Court overrule *Minton* in its entirety, or in the alternative, require a showing that the purchaser has no "recourse" to the builder or developer before the implied warranty of habitability can be extended to subcontractors or material suppliers.

Respectfully submitted,

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Dated: December 28, 2017

CERTIFICATION OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of the brief, excluding the pages containing 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 36 pages.

/s/ Kimberly A. Jansen

CERTIFICATE OF SERVICE

On December 28, 2017, I filed a motion for leave to file the foregoing Appellants' Additional Brief and Attached Appendix *instanter* together with a copy of the brief and attached appendix by electronic means on the Clerk of the Illinois Supreme Court.

On December 28, 2017, I also served the Appellants' Additional Brief and Attached Appendix on counsel of record for all parties in this case by sending a copy to each of the email addresses contained in the attached service list.

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure (735 ILCS 5/1-109), the undersigned certifies that the statements set forth in this instrument are true and correct.

/s/ Kimberly A. Jansen

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APPENDIX

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SUPREME COURT OF ILLINOIS

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September 27, 2017

In re: Sienna Court Condominium Association, etc., et al., Appellees, v. Champion Aluminum Corporation, etc., et al. (BV and Associates, Inc., etc., et al., Appellants). Appeal, Appellate Court, First District. 122022

The Supreme Court today ALLOWED the Petition for Leave to Appeal in the above entitled cause.

We call your attention to Supreme Court Rule 315(h) concerning certain notices which must be filed.

Very truly yours,

Carolyn Taft Grosboll

Clerk of the Supreme Court

2017 IL App (1st) 143364, consolidated with 1-14-3687 and 1-14-3753

SIXTH DIVISION
FEBRUARY 17, 2017

SIENNA COURT CONDOMINUM ASSOCIATION, an Illinois not-for-profit corporation, Plaintiff-Appellant, v. CHAMPION ALUMINUM CORPORATION, a New York Corporation, d/b/a CHAMPION WINDOW AND DOOR; BV AND ASSOCIATES, INC., a Michigan corporation, d/b/a CLEARVISIONS, INC.; WOJAN WINDOW AND DOOR CORPORATION, a Michigan corporation; MATSEN FORD DESIGN ASSOCIATES, INC., a Wisconsin corporation; WALLIN-GOMEZ ARCHITECTS, LTD., an Illinois corporation; HMS SERVICES INC., an Illinois corporation, d/b/a HMS ENGINEERING, Defendants-Appellees, LICHTENWALD-JOHNSTON IRON WORKS COMPANY, an Illinois corporation; METALMASTER ROOFMASTER INC., an Illinois corporation; DON STOLTZNER MASON CONTRACTOR, INC.; TEMPCO HEATING AND AIR CONDITIONING COMPANY, Defendants-Appellees and Counter-Defendants-Appellees, ROSZAK/ADC, LLC, an Illinois limited liability company, Defendant and Counter-Plaintiff-Appellant (MTH Enterprises LLC, an Illinois limited liability Corporation, d/b/a MTH Industries, NGU Inc., a New York Corporation d/b/a Champion Architectural Window and Door, TR Sienna Partners, LLC, an Illinois limited liability company Defendants).	)	Appeal from the Circuit Court of Cook County. No. 13 L 2053 Honorable Margaret A. Brennan, Judge Presiding.

JUSTICE CUNNINGHAM delivered the judgment of the court, with opinion. Presiding Justice Hoffman and Justice Delort concurred in the judgment and opinion.

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1-14-3687)
1-14-3753) Cons.

OPINION

¶ 1 This opinion addresses three consolidated appeals, all arising from the plaintiff condominium association's lawsuit alleging defects in the design and construction of a condominium development in Evanston, Illinois.

¶ 2 The first appeal concerns whether claims for breach of the implied warranty of habitability may be asserted against design professionals and material suppliers who otherwise did not actually perform construction work. We hold that these claims were properly dismissed.

¶ 3 A second appeal asks us to resolve a number of related certified questions, asking whether a property owner may assert a claim of breach of implied warranty of habitability against a subcontractor of an admittedly insolvent developer or general contractor. We answer those questions in the negative.

¶ 4 In the third appeal, the condominium development's general contractor (which is insolvent and has been dissolved) appeals the dismissal of its counterclaims against various entities, asserted long after its dissolution. We hold that the counterclaims were properly dismissed.

¶ 5 BACKGROUND

¶ 6 These consolidated appeals arise from alleged defects in the design and construction of a condominium development known as Sienna Court Condominiums in Evanston, Illinois (Sienna Court). Sienna Court was developed by TR Sienna Partners, LLC (the developer), who was

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named as a defendant but is not a party to this appeal. Roszak/ADC, LLC (Roszak), an Illinois limited liability company, acted as the general contractor for the project.[1]

¶ 7 Sienna Court was designed by entities including Wallin-Gomez Architects (Wallin-Gomez) and two engineering firms, HMS Services, Inc. (HMS) and Matsen Ford Design Associates (Matsen) (together, the "design defendants").

¶ 8 In addition, Roszak contracted with numerous subcontractors to construct Sienna Court, including: Don Stoltzner Mason Contractor, Inc. (Stoltzner); Metalmaster Roofmaster, Inc. (Metalmaster); Lichtenwald-Johnston Iron Works Co. (Lichtenwald); Tempco Heating and Air Conditioning Co. (Tempco); and BV and Associates, Inc. d/b/a Clearvisions, Inc. (Clearvisions); (collectively, the "subcontractors").

¶ 9 Separately, Champion Aluminum Corporation (Champion) and Wojan Window and Door Corporation (Wojan) (together, the "material suppliers") provided materials for Sienna Court's window wall systems, spandrel units, and window units. Notably, unlike the subcontractors, the material suppliers did not install such materials at Sienna Court or otherwise perform construction work.

¶ 10 Prior to April 2009, the developer sold Sienna Court's condominium residential units to individual purchasers. The Sienna Court Condominium Association, the plaintiff herein, is comprised of the owners of the individual condominium residences at Sienna Court. Sienna Court was turned over from the developer to the plaintiff in April 2009.

¶ 11 According to their discovery responses, the developer and Roszak were insured for liability with respect to the Sienna Court project by two insurers; each insurer's policy provided

[1] The plaintiff alleges that the same individual, Thomas Roszak, was a co-owner of both the developer and Roszak.

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coverage in the amount of $1 million per occurrence and an aggregate limit of $2 million. These insurers are providing coverage in this action under a reservation of rights.

¶ 12 In June 2009, Roszak filed a Chapter 7 petition in the United States Bankruptcy Court for the Northern District of Illinois (bankruptcy court). In its bankruptcy petition, when asked to disclose any "contingent and unliquidated claims of every nature, including *** counterclaims of the debtor, and rights to setoff claims," Roszak responded that there were none. In July 2010, Roszak was involuntarily dissolved by the Illinois Secretary of State for failure to file an annual report. Separately, the developer was dissolved and declared bankrupt in February 2010.

¶ 13 On February 26, 2013, the plaintiff condominium association filed a verified complaint, alleging various defects in the Sienna Court condominiums, including defects in the windows and roofs that allowed water infiltration and resulted in property damage. The complaint asserted claims of breach of implied warranty of habitability against certain of the design defendants, material suppliers, and subcontractors, including Clearvisions, Wojan, Champion, Stoltzner, Metalmaster, Lichtenwald, Wallin-Gomez, and Matsen.

¶ 14 The complaint specially pleaded that the developer and Roszak had filed for bankruptcy protection in May 2009 and that on May 5, 2009, "The Bankruptcy Court issued discharges to [the developer and Roszak] *** having found that, in each case, [the developer and Roszak] were insolvent and had no assets with which to pay the claims of unsecured creditors."

¶ 15 On April 19, 2013, the plaintiff filed a first amended complaint, adding a breach of implied warranty claim against Tempco. The first amended complaint also named the developer, Roszak, and HMS as respondents in discovery; those three parties were later converted to defendants by order dated October 28, 2013.

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¶ 16 On May 3, 2013, the plaintiff filed a motion in the bankruptcy court to reopen Roszak's bankruptcy case and lift the automatic stay, "so that the [plaintiff] may proceed against [Roszak] solely for the purpose of recovering from third party, non-debtor insurance companies" to the extent of Roszak's insurance coverage.

¶ 17 On May 16, 2013, the bankruptcy court issued an order, granting the plaintiff's request, reopening Roszak's Chapter 7 case, and allowing the plaintiff to pursue its claims against Roszak "solely for the purpose of recovering from third party, non-debtor insurance companies *** that have insurance claims relating to the property" at Sienna Court. It is undisputed that Roszak did not disclose to the bankruptcy court the existence of any potential counterclaims arising from the plaintiff's lawsuit.

¶ 18 On May 13, 2013, the Matsen engineering firm filed a motion to dismiss the implied warranty of habitability claim asserted against it, pursuant to section 2-615 of the Code of Civil Procedure. 735 ILCS 5/2-615 (West 2014). Among other arguments, Matsen contended that no implied warranty of habitability attaches to the services of design professionals. On June 20, 2013, Wallin-Gomez, Sienna Court's architect, filed a similar motion to dismiss, asserting that "claims for breach of implied warranty of habitability do not apply to architect and building designers who do not engage in the construction of the allegedly defective structure."

¶ 19 The plaintiff filed a response to Wallin-Gomez's motion on September 12, 2013. In that response, the plaintiff argued that it could maintain its warranty of habitability claim on the basis of this court's decision in *Minton v. The Richards Group of Chicago*, 116 Ill. App. 3d 852 (1983). The plaintiff argued that *Minton* "extends the implied warranty of habitability beyond the builder/vendor where the innocent purchaser has no recourse against the builder/vendor." The

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plaintiff argued that *Minton* applied to permit recovery against Wallin-Gomez in this case, since the developer and Roszak were dissolved and insolvent, such that the plaintiff had "no recourse" against those entities.

¶ 20 Matsen and Wallin-Gomez's motions were heard on December 10, 2013. On December 10, 2013, the circuit court entered an order dismissing the counts of the plaintiff's complaint against Matsen and Wallin-Gomez. Notably, the December 10, 2013 order specified that, pursuant to Supreme Court Rule 304(a) there was no just reason to delay appeal. See Ill. S. Ct. R. 304(a) (eff. Feb. 26, 2010). However, on January 7, 2014, the trial court vacated its Rule 304(a) finding with respect to the December 10, 2013 dismissal order. It was not until October 29, 2014, that the trial court entered separate orders reinstating the Rule 304(a) findings with respect to the December 10, 2013 dismissal of the claims against Matsen and Wallin-Gomez. On November 26, 2014, the plaintiff filed its notice of appeal from the dismissal of those claims.

¶ 21 On January 27, 2014, the remaining design defendant, HMS, filed a motion to dismiss the plaintiff's implied warranty claim asserted against it, arguing (as had Matsen and Wallin-Gomez) that the implied warranty of habitability did not apply to it. After the parties briefed the motion, HMS' motion to dismiss was granted on June 2, 2014.

¶ 22 Meanwhile, on June 20, 2013, Wojan, one of the material suppliers, filed a section 2-619 motion to dismiss the claim for breach of implied warranty asserted against it. 735 ILCS 5/2-619 (West 2012). Wojan asserted two primary arguments: (1) that it was not subject to a claim for breach of warranty of habitability because it was not a "builder-vendor" and did not perform any construction work, but merely supplied goods and (2) that the plaintiff's claim was untimely pursuant to section 2-725 of the Uniform Commercial Code (UCC) (810 ILCS 5/2-725(1) (West

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2012)) because the claim was not brought within four years of Wojan's last delivery of goods for the Sienna Court project. Wojan's motion was supported by an affidavit and invoices for products it had sold to Clearvisions and Roszak, indicating that its last delivery of goods for Sienna Court occurred in November 2007.

¶ 23 On December 31, 2013, the plaintiff filed a second amended complaint, naming the developer and Roszak as defendants and asserting claims for breach of warranty of habitability against them.

¶ 24 In response to the second amended complaint, on January 27, 2014, Wojan filed an amended section 2-619 motion to dismiss, again asserting that (1) the plaintiff's claim was time-barred by section 2-725 of the UCC, and (2) that a breach of implied warranty of habitability claim could not be maintained against a defendant that merely supplied goods for the condominium project. Wojan's motion to dismiss was argued at a June 2, 2014, hearing. At that time, the court granted Wojan's motion, citing the four-year statute of limitations period set forth in section 2-725 of the UCC. The court entered a written order on June 2, 2014, granting Wojan's motion to dismiss.

¶ 25 Champion (which was also alleged only to have supplied goods), subsequently filed its own motion to dismiss premised upon the same UCC statute of limitations, attaching invoices and an affidavit indicating that its goods had been delivered no later than June 2006. On October 29, 2014, the court granted Champion's motion to dismiss, specifying that there was no just reason to delay appeal pursuant to Rule 304(a).

¶ 26 After being named as a defendant in the plaintiff's December 2013 second amended complaint, Roszak asserted counterclaims against certain subcontractors and material suppliers,

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alleging that they performed defective work and supplied defective materials for Sienna Court. On February 26, 2014, Roszak asserted counterclaims including breach of contract, breach of express and implied warranties, and indemnity claims against Lichtenwald, Metalmaster, Stoltzner, Tempco, Clearvision, Wojan and Champion (collectively, "the counter-defendants").

¶ 27 On May 14, 2014, the counter-defendants filed a joint motion to dismiss Roszak's counterclaims. That motion argued (1) that Roszak had no standing or legal capacity, as a dissolved limited liability company (LLC), to assert counterclaims; (2) that Roszak could not maintain a claim because it was not "the real party in interest," as Roszak "cannot be directly liable to the Plaintiff *** due to the bankruptcy court's order limiting the Plaintiff's potential recovery to [Roszak's] insurance policies"; and (3) that Roszak should be judicially estopped from asserting its counterclaims, since Roszak had never disclosed its potential counterclaims as assets in its bankruptcy court filings.

¶ 28 In addition to the joint motion, on July 14, 2014, Wojan filed a supplemental motion to dismiss Roszak's counterclaims against Wojan. That motion asserted that Roszak's counterclaims against Wojan could not be maintained because the plaintiff's underlying claim against Wojan was time-barred by the UCC statute of limitations.

¶ 29 At a hearing on October 9, 2014, the court indicated that it would grant the joint motion to dismiss Roszak's counterclaims on the basis of the counter-defendant's judicial estoppel argument:

> "So the next issue has to do with when you filed your petition of bankruptcy because I think this is about the most significant and telling thing, and you don't include any assets. These are not

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> unsophisticated parties, and failure to include a counterclaim or potential counterclaim when you're already in litigation at the time you file the bankruptcy is quite telling, and I think that it is, in essence, playing a hide-the-ball with the Court, and therefore judicial estoppel applies, and the motion to dismiss is granted."

¶ 30 During the same hearing, the court allowed Champion's oral motion to join Wojan's separate motion to dismiss counterclaims based on the UCC statute of limitations. The court proceeded to dismiss Roszak's counterclaims against both Wojan and Champion on that basis.

¶ 31 On October 29, 2014, the court entered an order dismissing Roszak's counterclaims on the basis of judicial estoppel. In the same order, the court also granted Wojan's and Champion's separate motion to dismiss the counterclaims against them. Thus, with respect to Wojan and Champion, Roszak's counterclaims were dismissed both on the basis of judicial estoppel and on the grounds of the statute of limitations.

¶ 32 The trial court's order of October 29, 2014 found, pursuant to Rule 304(a), that there was no just reason to delay appeal from the dismissal of Roszak's counterclaims. On November 24, 2014, Roszak filed a notice of appeal. On November 25, Roszak filed an amended notice of appeal from the October 29, 2014 order.

¶ 33 Meanwhile, on January 27, 2014, certain of the subcontractors and material suppliers—Clearvisions, Lichtenwald, Champion, Metalmaster, Tempco, and Stoltzner, (the subcontractor-appellants)—filed the "Subcontractor and Material Supplier Defendants' Joint § 2-619(a) Motion to Dismiss" (the joint motion), seeking dismissal of the implied warranty of habitability claims alleged against them by the plaintiff.

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¶ 34 The subcontractor-appellants recognized our court's 1983 holding in *Minton* that a homeowner may proceed against a subcontractor of the builder vendor, if the builder is insolvent and the purchaser has "no recourse." The joint motion argued that, under *Minton*, the plaintiff could not maintain breach of warranty of habitability claims against the subcontractor-appellants, because the plaintiff still had "recourse" against the developer and Roszak, the general contractor. The joint motion cited the bankruptcy court orders permitting the plaintiff to pursue claims against Roszak and the developer to the extent of their insurance coverage, as well as discovery responses indicating that those entities were insured by two separate insurance policies, each with a per occurrence policy limit of $1 million.

¶ 35 The plaintiff filed a response on March 12, 2014, which relied largely on a 2013 decision of our court which permitted a condominium association's warranty of habitability claims against a subcontractor, where the developer was insolvent but was alleged to have some assets. See *1324 W. Pratt Condominium Ass'n v. Platt Construction Group, Inc.*, 2013 IL App (1st) 130744 (*Pratt III*).[2] Pursuant to *Pratt III*, the plaintiff argued that whether a property owner could bring claims against a subcontractor for breach of the implied warranty of habitability depends only on whether the builder is solvent, which "is measured solely by the assets and liabilities of the developer." The plaintiff argued that pursuant to *Pratt III*, the existence of liability insurance was not relevant in deciding whether the developer is "insolvent." Because the developer and Roszak were insolvent, the plaintiff argued it could maintain implied warranty of

[2] As discussed below, *Pratt III* was the third decision by our court in a number of related appeals arising from breach of warranty of habitability claims asserted by the same plaintiff condominium association.

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habitability claims against subcontractors, regardless of potential recovery from the developer and Roszak's insurers.

¶ 36 On April 11, 2014, the subcontractor-appellants filed a reply brief in further support of their joint motion. At the same time, they submitted documents obtained in discovery from the developer which, they contended, proved that the plaintiff had already obtained "recourse" in the form of funds disbursed from the developer's "TR Sienna Partners' Warranty Escrow Fund" (warranty fund), an escrow fund which had been funded by the sale of the condominium units. The subcontractor-appellants cited documents indicating that the plaintiff initially sought such funds in May 2009 in order to repair certain defects and that the plaintiff in January 2010 filed a motion in the developer's bankruptcy case seeking turnover of such escrow funds. The documents indicated that in February 2010, the plaintiff had received approximately $308,000 from the warranty fund. Thus, the subcontractor-appellants asserted that this recovery (in addition to the potential recovery from the developer and Roszak's insurers) was a source of "recourse" to the plaintiff, that barred the plaintiff from maintaining its claims against subcontractors pursuant to our holding in *Minton*.

¶ 37 The subcontractor-appellants' joint motion to dismiss was argued on June 2, 2014. On that date, the trial court denied the joint motion to dismiss, citing *Pratt III* and finding that the plaintiff had pleaded that the developer and Roszak were insolvent. However, during the June 2, 2014, hearing, the trial court expressed its belief that appellate court precedents, specifically *Minton* and *Pratt III*, were unclear as to whether "recourse" or "insolvency" determined whether a warranty of habitability claim could be asserted against a subcontractor: "I think unfortunately, the Appellate Court, while they keep trying to supposedly clarify the issue *** the issues get

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unnecessarily complicated." The court remarked that *Pratt III* "didn't ignore recourse *** but recourse has no bearing at all on the Court's analysis. I still think if you're going to argue that *Minton* is good law, then you have to look that *Minton* talked about insolvency and recourse."

¶ 38 The court noted that this case was "unique" and "factually distinct" from prior cases because the plaintiff had moved the bankruptcy court "to lift the stay so that they can proceed against these insurance proceeds," which had "identif[ied] *** a sum of monies that may be available to address the issues that they have with this building."

¶ 39 Nevertheless, the court denied the joint motion to dismiss, reasoning that "if you take the very straight line approach" that insolvency was the determining factor, "then we are looking at facts that are sufficiently pled to establish an insolvency." However, the court indicated that it would welcome a motion to certify related questions for interlocutory appeal pursuant to Rule 308. The court remarked: "I think the Appellate Court at this juncture would once again struggle between the recourse, no recourse" issue.

¶ 40 On July 3, 2014, the subcontractor-appellants filed a joint motion to certify questions for appeal pursuant to Illinois Supreme Court Rule 308 (eff. Feb. 26, 2010). That motion was argued in a hearing on October 9, 2014. Counsel for the movants argued that the existence of "recourse," as defined in *Minton*, is a substantial factor in whether a subcontractor of a builder may be sued for breach of implied warranty of habitability. In contrast, the plaintiff argued that pursuant to *Pratt III*, the "insolvency" of the builder or general contractor is the determining factor regarding whether the subcontractor may be sued.

¶ 41 In agreeing to certify questions pursuant to Rule 308, the trial court expressed concern as to whether a plaintiff needs to show that it has "no recourse" against the builder or general

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contractor in order to proceed against a subcontractor. During the October 9, 2014, hearing, the trial court indicated its belief that *Pratt III* was unclear as to whether "recourse is out of the picture" "because it didn't directly overrule other cases that talked about recourse." The trial court remarked that "If they really believed that insolvency is the only issue ***, then perhaps it needs to be stated as clearly as that. That recourse is—no longer matters so we're moving that from being a component."

¶ 42 On October 29, 2014, the circuit court certified the following four questions:

> "a) 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 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?
>
> b) 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?

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> c) 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 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?
>
> d) 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?"

On December 11, 2014, our court granted the application for leave to appeal pursuant to Supreme Court Rule 308.

¶ 43 Meanwhile, on November 26, 2014, the plaintiff filed a notice of appeal, seeking reversal of the orders dismissing the claims against the design defendants and material suppliers: the December 10, 2013, order dismissing its claims against Wallin-Gomez and Matsen; the June 2, 2014, order dismissing the plaintiff's claims against Wojan and HMS, and the October 29, 2014, order dismissing its claims against Champion.

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¶ 44 These appeals were subsequently consolidated with Roszak's appeal from the order dismissing its counterclaims against the counter-defendants.

¶ 45 ANALYSIS

¶ 46 We review (1) the plaintiff's appeal from the orders dismissing its claims against the design defendants and material suppliers, (2) the certified questions brought to this court pursuant to Rule 308 with respect to the plaintiff's ability to assert claims against subcontractors pursuant to *Minton* and its progeny, and (3) Roszak's appeal from the dismissal of its counterclaims against the counter-defendants.

¶ 47 We note that, with respect to the plaintiff's appeal from the orders granting the design defendants' and the material suppliers' motions to dismiss, we have jurisdiction pursuant to Rule 304(a), as the court, in orders issued on October 29, 2014, made the requisite findings of no just reason to delay appeal from the corresponding orders of dismissal against these defendants, including the December 10, 2013 order pertaining to Matsen and Wallin-Gomez.[3] See Ill. S. Ct. R. 304(a) (eff. Feb. 26, 2010). The plaintiff's November 26, 2014 notice of appeal was thus timely for purposes of appellate jurisdiction.

¶ 48 The first two appeals concern the viability of claims for breach of the implied warranty of habitability. Thus, we review the basis for that cause of action. "[T]he implied warranty of habitability is a 'creature of public policy' that was explicitly designed by our courts 'to protect

[3] On January 7, 2014, the trial court vacated its original Rule 304(a) finding contained in the December 10, 2013 order dismissing the claims against Matsen and Wallin-Gomez. As the Rule 304(a) findings with respect to the December 10, 2013 dismissal of those claims was not reinstated until October 29, 2014, the plaintiff's November 26, 2014 notice of appeal was timely with respect to its challenge to the dismissal of its claims against Matsen and Wallin-Gomez.

purchasers of new houses upon discovery of latent defects in their homes.' " *Pratt III*, 2013 IL App (1st) 130744, ¶ 14 (quoting *Redarowicz v. Ohlendorf*, 92 Ill. 2d 171, 183 (1982)).

¶ 49 "The rationale for the application of the policy has been threefold. [Citations.] First, purchasers of new homes generally do not [have] the ability to determine whether the houses they have purchased contain latent defects. [Citation.] Second, [t]he purchaser needs this protection because, in most cases, [he or she] is making the largest single investment of his or her life and is usually relying upon the honesty and competence of the builder, who, unlike the typical purchaser, is in the business of building homes. [Citation.] And finally, [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, rather than the innocent and unknowing purchaser. [Citation.]" (Internal quotation marks omitted.) *Id.*

¶ 50 Our court has extended the implied warranty to permit a claim by a condominium purchaser against the developer-seller of a new condominium unit. *Tassan v. United Development Co.*, 88 Ill. App. 3d 581 (1980).

¶ 51 Generally, the claim must be asserted against the builder-vendor. See *Paukovitz v. Imperial Homes, Inc.*, 271 Ill. App. 3d 1037, 1038 (1995) ("In order to prevail, the plaintiff must prove that the defendant was the builder-vendor of the home."). However, our court's 1983 decision in *Minton v. The Richards Group of Chicago*, 116 Ill. App. 3d 852 (1983) permitted a breach of implied warranty of habitability claim to be asserted against a subcontractor of the builder-vendor where the purchaser had "no recourse" to the insolvent general contractor. The *Minton* decision is central to several of the arguments asserted in these consolidated appeals.

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¶ 52 In *Minton*, the builder-vendor from whom the plaintiffs had purchased their home dissolved as an entity. *Id.* at 853. Prior to its dissolution, the plaintiffs had demanded that the builder-vendor correct peeling paint from the home's eaves and windows; the builder failed to remedy the issue. *Id.* The plaintiffs' original complaint sued the builder-vendor for violation of the implied warranty of habitability. *Id.* Following the builder-vendor's dissolution, the plaintiffs filed an amended complaint pleading a claim of breach of implied warranty of habitability against the subcontractor of the builder-vendor who had painted the home. *Id.*

¶ 53 The trial court granted the subcontractor's motion to dismiss the amended complaint. *Id.* at 854. On appeal, the plaintiffs contended that the implied warranty of habitability "applies to the subcontractors of the builder-vendor where the builder-vendor is dissolved and shows no assets." *Id.*

¶ 54 The *Minton* court reversed and permitted the implied warranty claim against the subcontractor. The court recognized that the "[t]he purpose of the warranty is to protect purchasers' expectations by holding builder-vendors accountable." *Id.* (citing *Redarowicz v. Ohlendorf*, 92 Ill. 2d 171 (1982)). The court further recognized that it was being "asked to extend the warranty of habitability to the subcontractors of a builder-vendor where the builder-vendor has been dissolved as an entity and is insolvent." *Id.* The court agreed to do so, reasoning: "Purchasers from a builder-vendor depend upon his ability to construct and sell a home of sound structure and his ability to hire subcontractors capable of building a home of sound structure. The plaintiffs here had no control over the choice of [the builder-vendor] to paint the eaves and windows of their home, and [the builder-vendor] was in the better position to know which subcontractor could perform the work adequately." *Id.* at 854-55. We concluded: "we hold that

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in this case 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, the warranty of habitability applies to such subcontractor." *Id.* at 855.

¶ 55 With this background in mind, we turn to the various substantive contentions regarding the implied warranty of habitability claims in these appeals now consolidated before us. First, we review and affirm the trial court's orders of dismissal of the plaintiff's implied warranty of habitability claims against the design defendants.

¶ 56 The dismissal of the design defendants was granted pursuant to section 2-615 of the Code of Civil Procedure. 735 ILCS 5/2-615 (West 2014). Thus, we review the dismissals *de novo* to assess whether the plaintiff's allegations pleaded a viable claim for relief. See *Illinois Insurance Guaranty Fund v. Liberty Mutual Insurance Co.*, 2013 IL App (1st) 123345, ¶ 14.

¶ 57 We note that, as urged by the design defendants, the issue of whether the implied warranty extends to such defendants as themselves was explored thoroughly in a factually similar 2015 opinion, in which we held that such claims could not be asserted against an architect. *Board of Managers of Park Point at Wheeling Condominium Ass'n v. Park Point at Wheeling, LLC*, 2015 IL App (1st) 123452 (*Park Point*). We agree with the design defendants that *Park Point* is dispositive and supports dismissal of the claims against them.

¶ 58 In *Park Point*, the plaintiff, a condominium association, asserted breach of implied warranty of habitability claims against the condominium project's architect (and other defendants) in connection with alleged latent defects in the design, materials and construction of the condominiums which allowed water and air infiltration to cause damage. *Id.* ¶ 4. However,

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"[t]he architect [was] not alleged to have taken part in the construction or sale of the units." *Id.* ¶ 2.

¶ 59 The plaintiff further alleged "that the developer-seller was insolvent" and incapable of satisfying the estimated $4 million cost of repairs. *Id.* ¶ 4. The plaintiff claimed that "it had no recourse against the original general contractor, because that entity was insolvent and no longer doing business, and had no recourse against the successor general contractor" because it "had either no assets or insufficient assets" to satisfy the estimated cost of repairs. *Id.*

¶ 60 After reviewing case law regarding the implied warranty, *Park Point* recognized that "generally speaking, only builders or builder-sellers warrant the habitability of their construction work. Engineers and design professionals *** provide a service and do not warrant the accuracy of their plans and specifications. [Citations.]" *Id.* ¶ 15.

¶ 61 We also noted that "breach of implied warranty of habitability claims against design professionals have [largely] been rejected in Illinois and most other jurisdictions." *Id.* ¶ 16. For example, our court approvingly cited the decision by our court's Third District in *Paukovitz v. Imperial Homes, Inc.*, 271 Ill. App. 3d 1037 (1995), which held that a breach of implied warranty of habitability claim could not be maintained against a home designer who only supplied materials and plans but did not participate in construction. *Park Point*, 2015 IL App (1st) 123452, ¶ 16. In *Park Point*, we recited the *Paukovitz* court's reasoning:

> " 'It is undisputed that [the designer] Imperial did no construction work on Paukovitz' home. It only supplied the shell materials and the plans which [the builder] then used to construct the residence. The parties do not cite, and we are unable to find,

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> any reported cases in which a court held that the supplier of plans and shell materials was a builder-vendor for the purposes of the implied warranty of habitability. *** Inasmuch as Imperial did not contribute to the actual construction of Paukovitz' home, we find that it was not a builder-vendor which could be held liable for the breach of the implied warranty of habitability.' " *Id.* (quoting *Paukovitz*, 271 Ill. App. 3d at 1039).

¶ 62 After summarizing additional cases from a number of other states that declined to apply warranty claims against architectural and engineering firms, *Park Point* stated: "two principles become clear from the case law. First, the implied warranty of habitability of construction is traditionally applied to those who engage in construction. Second, architects do not construct structures, they perform design services pursuant to contracts *** and courts have consistently declined to heighten their express contractual obligations by implying a warranty of habitability of construction." *Id.* ¶ 22.

¶ 63 In support of its argument that the warranty should extend to the defendant architect, the plaintiff in *Park Point* relied on our holding in *Minton*, which had extended the warranty to a subcontractor where the builder-vendor was insolvent and the plaintiffs otherwise had "no recourse." *Minton*, 116 Ill. App. 3d at 855. Similar to the plaintiff's arguments in this case, the condominium association in *Park Point* argued that "the work of the general contractors (builders) and subcontractors *** is similar to the work of architects" as "fault in the efforts of either a contractor or an architect may create latent defects *** and that the public policy underlying the implied warranty of habitability of construction work is to protect new

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homeowners from latent defects by holding the responsible party liable." *Park Point*, 2015 IL App (1st) 123452, ¶ 24.

¶ 64 *Park Point* recognized that, in *Minton*, we found "that the implied warranty of habitability should be extended to the subcontractor *** where the buyers had no recourse against the insolvent builder-seller." *Id.* ¶ 26 (citing *Minton*, 116 Ill. App. 3d at 855). However, our opinion in *Park Point* concluded that "*Minton* is properly limited to subcontractors *** that have helped with the physical construction or the construction-sale of the property. *** Property buyers such as the plaintiffs in *Minton* 'depend upon [the builder-seller's] ability to construct and sell a home of sound structure and his ability to hire subcontractors capable of building a home of sound structure.' " *Id.* ¶ 27 (quoting *Minton*, 116 App. 3d at 854).

¶ 65 *Park Point* reasoned that "[t]he role that the [architect] had in erecting the subject condominiums did not create a dependent relationship with the buyers like the one that existed in *Minton*." *Id.* We further held that "[t]he fact that the builders of the subject condominium complex are now alleged to be insolvent does not justify expanding *Minton*'s holding to an entirely different category of defendant." *Id.* As there was "no allegation that this architect took part in the construction or the construction-sale of real property," we concluded that "this architect should not be subject to the implied warranty of habitability of construction." *Id.* ¶ 27.

¶ 66 In this case, we find that our recent opinion in *Park Point* is well-reasoned and is dispositive with respect to the plaintiff's appeal from the trial court's dismissal of the implied warranty claims against the design defendants. As in *Park Point*, we reject the plaintiff's argument that we should expand the extent of the implied warranty of habitability to a new class

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of defendants who designed, but were not involved in the actual construction, of the condominiums at issue.

¶ 67 *Park Point* is also dispositive of the plaintiff's argument that *Minton* should be extended to the design defendants in this case due to the insolvency of the general contractor and Roszak. In *Park Point*, the plaintiff similarly argued for expansion of *Minton* on the basis of the developer's insolvency. *Id*. *Park Point* nevertheless held that the fact of insolvency did not justify expanding potential liability for breach of the warranty of habitability where there was "no allegation that [the] architect took part in the construction or the construction-sale of real property." *Id.*

¶ 68 We find no reason to depart from our precedent, including *Park Point*, which makes clear that an architect or engineering firm that assisted in design but otherwise did not participate in the construction of the real property is *not* subject to the implied warranty of habitability. Thus, we affirm the trial court's orders dismissing the plaintiff's warranty claims against the three design defendants—Wallin-Gomez, HMS, and Matsen.

¶ 69 We further conclude that the same precedent supports the dismissal of the plaintiff's claims against the material supplier defendants, Champion and Wojan. Those defendants moved to dismiss pursuant to section 2-619 of the Code, which "admits the legal sufficiency of the plaintiff's claim but asserts defects or defenses outside the pleading that defeat the claim." *Id.* ¶ 33. We review a dismissal pursuant to section 2-619 *de novo. Id.*

¶ 70 Champion and Wojan's motions sought dismissal based on application of the relevant statute of limitations under section 2-725(1) of the UCC, as well as arguing that an implied warranty of habitability claim could not be asserted against them because they did not perform

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construction work. The record indicates that the trial court granted Wojan and Champion's motions to dismiss primarily because it agreed that the claims were time-barred. As we are mindful that we may affirm dismissal on the basis of any ground apparent from the record (see *In re Detention of Duke*, 2013 IL App (1st) 121722, ¶ 11), we find that the defendants' status as material suppliers is sufficient to affirm the dismissal of the implied warranty claims against them.

¶ 71 Significantly, the relevant allegations of the plaintiff's complaint pleaded only that Champion and Wojan "supplied" materials used in the window wall systems, spandrel units, and window units of the Sienna Court condominiums. Wojan and Champion argue that they performed no construction work and thus cannot be considered the equivalent of the builder-vendor for purposes of the doctrine of implied warranty of habitability. We agree. Based on the same precedent discussed with respect to the design defendants, the implied warranty of habitability does not extend to material suppliers who did not perform any construction. Our precedent is clear that liability is limited to parties who actually "took part in the construction or construction-sale." *Park Point*, 2015 IL App (1st) 123452, ¶ 27. Although *Park Point* concerned an architect, the same principle applies.

¶ 72 Moreover, our Third District's decision in *Paukowitz*, 271 Ill. App. 3d 1037, whose reasoning we reaffirmed in *Park Point*, specifically held that a supplier of materials was not subject to a claim for implied warranty of habitability where it was not disputed that the defendant "did no construction work" but "only supplied the shell materials and the plans *** used to construct the residence." *Id.* at 1039.

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¶ 73 Although we recognize that *Paukowitz* did not discuss the solvency of the builder-vendor, we again reiterate our agreement with *Park Point*'s statement that "[t]he fact that the builders of the subject condominium complex are now alleged to be insolvent does not justify expanding *Minton*'s holding to an entirely different category of defendant." *Park Point*, 2015 IL App (1st) 123452, ¶ 27. Similarly, we do not interpret *Minton* as support for expanding liability for the implied warranty of habitability to an entirely new category of defendants—material suppliers who were not involved in constructing the property. As we concluded in *Park Point*, "*Minton* is properly limited to subcontractors *** that have helped with the physical construction or the construction-sale of the property." *Id.*

¶ 74 The plaintiff does not raise any argument to convince us to depart from the reasoning of *Paukowitz* and *Park Point* to extend liability for the implied warranty of habitability to material suppliers who had no additional role in constructing or selling the plaintiff's residence. On that basis, we affirm the trial court's June 2, 2014, order to the extent it dismissed the plaintiff's implied warranty of habitability claim against Wojan, as well as the October 29, 2014, order dismissing the implied warranty of habitability claim against Champion. As we affirm on this basis, we need not discuss the material suppliers' alternative argument that dismissal was warranted under the applicable Uniform Commercial Code statute of limitations.

¶ 75 We next address the questions certified to us following the trial court's denial of the subcontractor-appellants' joint motion to dismiss the plaintiff's claims against them on the basis of *Minton* and its progeny. We first note that we have jurisdiction to address these questions pursuant to Rule 308, which allows "permissive appeal of an interlocutory order certified by the trial court as involving a question of law as to which 'there is substantial ground for difference of

opinion' and 'where an immediate appeal may materially advance the ultimate termination of the litigation.' " *Pratt III*, 2013 IL App (1st) 130744, ¶ 11 (quoting Ill. S. Ct. R. 308 (eff. Feb. 26, 2010)). "As with all questions of law, we review questions presented for interlocutory appeal under a *de novo* standard." *Id.*

¶ 76 We address the following four questions certified by the circuit court:

> "a) 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 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?
>
> b) 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?
>
> c) 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 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?
>
> d) Does the actual recovery of any proceeds from an insolvent developer's 'warranty fund' constitute 'any recourse' under *Minton v. Richards*, 16 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?"

¶ 77 In summary, the certified questions ask whether a homeowner's claim for breach of the implied warranty of habitability may proceed against subcontractors and material suppliers of an admittedly insolvent developer or general contractor when either (1) the plaintiff has a potential source of recovery pursuant to the insurance policies of the insolvent entities or (2) where the plaintiff has already recovered proceeds from the insolvent property developer's "warranty fund."

¶ 78 As we have already ruled that property owners have no breach of implied warranty action against a mere material supplier, we will address the certified questions only as they relate to subcontractors. As recognized by the trial court and the parties' briefs, all of these certified

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questions arise from a basic disagreement as to whether the viability of an implied warranty of habitability claim against a subcontractor depends upon an inquiry into whether the plaintiff has "no recourse" against the developer or general contractor, as that phrase was used in *Minton*, or if the applicable test is whether the developer or general contractor is insolvent, pursuant to our decision in *Pratt III*. As set forth below, we find that our case law, particularly our decision in *Pratt III*, is clear and dispositive that insolvency is the determinative factor. That precedent compels us to answer each of the certified questions in the negative.

¶ 79 The subcontractor-appellants' arguments rely primarily on *Minton*, which permitted the plaintiffs to seek recovery against a subcontractor where the builder was insolvent and thus the homeowner had "no recourse" to seek recovery from the builder. *Minton*, 116 Ill. App. 3d at 855 ("[W]e hold that in this case where the innocent purchaser has no recourse to the builder-vendor *** the warranty of habitability applies to such subcontractor.").

¶ 80 The subcontractor-appellants argue that, in this case, it cannot be said that the plaintiff has "no recourse" against the insolvent developer or Roszak due to (1) the plaintiff's potential recovery from the developer and general contractor's insurers and (2) evidence that the plaintiff has already recovered approximately $308,000 from the developer's warranty escrow fund. In turn, they argue that the *Minton* "no recourse" exception is not implicated, and so the plaintiff is precluded from seeking recovery against the developer or general contractor's subcontractors.

¶ 81 However, our 2013 decision in *Pratt III*, 2013 IL App (1st) 130744, makes clear that the insolvency of the builder is the determining factor in whether a claim may proceed against such a subcontractor. *Pratt III* was the third opinion from our court stemming from the claims of a plaintiff condominium association against the general contractor (Platt) and one of its

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subcontractors, EZ Masonry. In a 2009 opinion, we reversed a trial court order granting Platt's motion to dismiss, as we concluded that " 'the [implied] warranty [of habitability] applies to builders of residential homes regardless of whether they are involved in the sale of the home.' " *Id.* ¶ 5 (quoting *1324 W. Pratt Condominium Ass'n v. Platt Construction Group, Inc.*, 404 Ill. App. 3d 611, 618 (2010) (*Pratt I*)).

¶ 82 Following remand and a subsequent appeal, we issued a 2012 opinion "holding that so long as Platt remained solvent, the condominium association could not proceed against EZ Masonry." *Id.* ¶ 8 (citing *1324 W. Pratt Condominium Ass'n v. Platt Construction Group, Inc.*, 2012 IL App (1st) 111474 (*Pratt II*)).

¶ 83 On remand from that decision, the plaintiff filed an amended complaint against both Platt and EZ Masonry, adding allegations that Platt was insolvent. *Id.* ¶ 9. After limited discovery, the circuit court held that Platt was " 'insolvent, but remains a corporation in good standing with limited assets.' " *Id.* The circuit court also held that the relevant date for determining the insolvency of a general contractor is the date on which the complaint is filed against the general contractor. *Id.*

¶ 84 The circuit court then certified two questions for interlocutory appellate review. The first certified question concerned whether the relevant date for determining the insolvency of a general contractor was the date a complaint was filed against the general contractor or when the construction was completed. *Id.* Second, and particularly relevant to this appeal, the circuit court certified the question of whether the condominium association could pursue its claim against subcontractor EZ Masonry when the builder, Platt, was " 'insolvent, but is in good standing with limited assets.' " *Id.*

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¶ 85 With respect to the second question, EZ Masonry, citing *Minton* and other decisions, argued that "it would be unfair to permit the condominium association to pursue its claim against EZ Masonry where Platt is a viable corporation that has succeeded in defending itself in this ligation for years." *Id.* ¶ 19. Citing *Minton* and subsequent decisions of our court, EZ Masonry argued that there was "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." *Id.* However, our court "strongly disagree[d]" and held that insolvency was the determining factor. *Id.* We held: "The 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." *Id.* ¶ 20.

¶ 86 *Pratt III* reviewed our holdings in *Minton* and subsequent decisions of our court, and found that they consistently held that the developer or general contractor's insolvency was the key factor in determining whether the purchaser can proceed against a subcontractor for breach of the implied warranty of habitability. The court recognized that in *Washington Courte Condominium Ass'n-Four v. Washington-Golf Corp.*, 150 Ill. App. 3d 681 (1986), our court concluded that "the *Minton* exception did not apply" to permit claims against subcontractors, where, under the record of that case, " 'the allegation of [the general contractor's] insolvency [was] 'legally unsubstantiated and [was] a matter *de hors* the record.' " *Pratt III*, 2013 IL App (1st) 130744, ¶ 22 (quoting *Washington Courte*, 150 Ill. App. 3d at 689). However, *Pratt III* emphasized that "nothing in *Washington Courte* negates the position that 'insolvency' of the general contractor is the determining factor in establishing whether a purchaser can proceed against a subcontractor on a breach of implied warranty of habitability claim." *Id.*

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¶ 87 *Pratt III* also noted that in *Dearlove Cove Condominiums v. Kin Construction Co.*, 180 Ill. App. 3d 437 (1989)), we held that a plaintiff "could proceed against the subcontractor even if he failed to file the complaint within the applicable statute of limitations so long as the action was timely filed against the general contractor" before the general contractor became insolvent. *Pratt III*, 2013 IL App (1st) 130744, ¶ 23. *Pratt III* emphasized that *Dearlove Cove* "reiterated that *Minton* stood for the proposition that a purchaser can proceed against a subcontractor if a builder-vendor is 'insolvent.' " *Id.* (citing *Dearlove Cove*, 180 Ill. App. 3d at 439-40).

¶ 88 Our *Pratt III* decision also recalled that in *Pratt II*, "under the record we had before us then, which included no allegations regarding Platt's insolvency, we held that the condominium association could not proceed against EZ Masonry 'while it still had recourse against Platt.' [Citation.] In doing so, we specifically held that unlike the developer, *** Platt was solvent. [Citation.]" *Id.* ¶ 24.

¶ 89 *Pratt III* then held:

> "Under the aforementioned precedent, which we find to be consistent, we 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. [Citation.] It is the burden of the purchaser to establish

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> that the general contractor is insolvent before it can proceed against the subcontractor on such a claim." *Id.* ¶ 25.

¶ 90 Under *Pratt III's* facts, we concluded that, since the circuit court found that the general contractor was " 'insolvent, but is in good standing with limited assets,' " we were "compelled to conclude that the condominium association may proceed with its breach of the implied warranty of habitability claim against EZ Masonry." *Id.* ¶ 26.

¶ 91 On appeal, the subcontractor-appellants assert various arguments seeking to undermine *Pratt III*'s emphasis on insolvency; they maintain that the possibility of "recourse" against the developer or general contractor is the determining factor in deciding whether subcontractors are subject to liability for the implied warranty of habitability. They proceed to argue that since the rationale for extending the implied warranty beyond a property's builder and developer is to ensure that innocent purchasers have a remedy, it is unnecessary to extend the warranty to subcontractors here because the developer and Roszak's insurance coverage and the warranty fund provide the plaintiff with a remedy.

¶ 92 The subcontractors-appellants contend that *Pratt III* "did not eliminate the 'no recourse' requirement." Their brief acknowledges that decision, but they urge that it did not substitute an "insolvency" test in place of a "no recourse" inquiry. They contend that *Pratt III's* analysis "was limited to the question of solvency" because the certified question in that case "was limited to the question of whether *Minton* applies where a developer, though insolvent, nevertheless has limited assets." They contend that "[t]he availability of 'recourse' simply was not presented" to the *Pratt III* court, such that *Pratt III* is not controlling.

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¶ 93 We find this argument unpersuasive. *Pratt III* specifically addressed and rejected the suggestion that there was "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." *Id.* ¶ 19. *Pratt III* strongly disagreed with that suggestion, and unequivocally stated that "we 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." *Id.* ¶ 25. With this emphatic language, *Pratt III* left no doubt that insolvency, rather than an inquiry into "recourse," determines whether such a claim may be asserted against a subcontractor.

¶ 94 Alternatively, the subcontractor-appellants urge that "an 'insolvency test does not further the purpose of the *Minton* exception." They argue that extending the implied warranty to subcontractors will be "unnecessary" in cases where the insolvent builder has insurance, as recovery from an insurer is sufficient to protect innocent purchasers. Conversely, they suggest that the "insolvency" test is not ideal to protect home purchasers, as there may be cases where a builder or developer with few liabilities may remain "solvent," despite having insufficient assets to compensate an innocent purchaser's potential damages. Thus they insist that a "no recourse" test is superior.

¶ 95 We disagree. *Pratt III* stated a clear, bright-line rule that the relevant inquiry is the insolvency of the developer or general contractor. Under *Pratt III*, "It is the burden of the purchaser to establish that the general contractor is insolvent before it can proceed against the subcontractor" on an implied warranty of habitability claim. *Id.* ¶ 25. Further, *Pratt III* defined insolvency to mean that a party's liabilities exceed the value of its assets and that the party has

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stopped paying its debts in the ordinary course of business. *Id.* 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.

¶ 96 We note that the subcontractors-appellants alternatively argue that *Minton* should be overruled in its entirety, essentially arguing that implied warranty claims should *never* be permitted against subcontractors. In support, the subcontractor-appellants argue that courts outside the First District have rejected *Minton*, citing the Fourth District's decision in *Lehmann v. Arnold*, 137 Ill. App. 3d 412 (1985), and the Second District's decision in *Bernot v. Primus Corp.*, 278 Ill. App. 3d 751 (1996).

¶ 97 The subcontractors further argue that extending the implied warranty of habitability to subcontractors does not further the original purpose of the implied warranty, to hold builder-vendors accountable given the dependent relationship of the builder and the home purchaser. They argue that extending such liability to subcontractors who have no direct relationship with the purchaser of the property does not serve the fundamental basis for the implied warranty. In

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other words, they contend that subcontractors' duties should be limited by their contracts and that it is unfair to expose them to liability to purchasers "with whom they have never negotiated contract terms." Thus they urge us to overrule *Minton*.

¶ 98 We decline to deviate from *Minton* and over 30 years of subsequent precedent from this court, which has consistently held that a home purchaser may proceed against the subcontractor of an insolvent developer/builder or general contractor for breach of the implied warranty of habitability. As explained in *Pratt III*, our decisions since *Minton* have deemed it appropriate to protect purchasers through this avenue of recovery, and that insolvency is a clear and appropriate measure by which to determine when a homeowner may seek recovery from a subcontractor who contributed to alleged defects. We do not find that the subcontractor appellants have offered any convincing reason to depart from this precedent.

¶ 99 As we reaffirm *Pratt III*'s holding that insolvency is the determinative test—and each of the four certified questions asks whether a claim is barred against the subcontractor of an *insolvent* entity—we answer each of the certified questions in the negative. In other words, with respect to the first two questions, 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, with respect to the third and fourth questions, 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.

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¶ 100 We now turn to Roszak's appeal from the trial court's order of October 29, 2014, dismissing its counterclaims against the counter-defendants.

¶ 101 The trial court dismissed the counterclaims under the doctrine of judicial estoppel, citing Roszak's failure to disclose such counterclaims as assets in its bankruptcy filings. The trial court apparently did not express any views on the merits of the additional arguments asserted by the counter-defendants: that Roszak's dissolution deprived it of legal capacity to assert counterclaims or that it was not the real party in interest because it did not stand to gain any actual benefit from the counterclaims.

¶ 102 We again note that a *de novo* standard of review applies. Further, although the trial court premised dismissal on the doctrine of judicial estoppel, we are mindful that we can affirm dismissal on any grounds apparent from the record. See *In re Detention of Duke*, 2013 IL App (1st) 121722, ¶ 11 ("A section 2-619 dismissal is reviewed *de novo*. [Citation.] We may affirm the dismissal of a complaint on any ground that is apparent from the record. [Citation.]"). As we conclude that Roszak lacked legal capacity as a dissolved LLC to assert its counterclaims, we affirm the dismissal of its counterclaims without need to reach the additional arguments raised by the parties.

¶ 103 The parties do not dispute that Roszak is governed by the provisions of the Limited Liability Company Act (Act). See 805 ILCS 180/1-1 *et seq.* (West 2014). Section 35-1 of the Act provides that an LLC which "is dissolved, and, unless continued pursuant to subsection (b) of Section 35-3, *its business must be wound up*," upon the occurrence of certain events, including "Administrative dissolution under Section 35-25." (Emphasis added.) 805 ILCS 180/35-1 (West 2014). Section 35-25 provides that the Secretary of State shall dissolve an LLC upon certain

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events, including failure to file an annual report. 805 ILCS 180/35-1 (West 2014). There is no dispute that Roszak was, in fact, dissolved by the Secretary of State on this basis in 2010, and there is no suggestion that Roszak has ever been reinstated since that time.

¶ 104 Section 35-3(a) of the Act provides that "Subject to subsections (b) and (c) of this Section, a limited liability company continues after dissolution *only for the purpose of winding up its business*." [4] (Emphasis added.) 805 ILCS 180/35-3(a) (West 2014).

¶ 105 Section 35-4 of the Act, regarding the "Right to wind up [a] limited liability company's business," further provides, in relevant part:

> "(c) A person winding up a limited liability company's business may preserve the company's business or property as a going concern *for a reasonable time*, prosecute and defend actions and proceedings, whether civil, criminal, or administrative, settle and close the company's business, dispose of and transfer the company's property, discharge the company's liabilities, distribute the assets of the company pursuant to Section 35-10, settle disputes by mediation or arbitration, and perform other necessary acts." (Emphasis added.) 805 ILCS 180/35-4(c) (West 2014).

¶ 106 Notwithstanding its July 2010 dissolution, Roszak contends that it maintained legal capacity to sue in February 2014 by taking an expansive view of the scope and duration of its "winding up" process. That is, Roszak asserts that its counterclaims in February 2014 constituted part of the "winding up" of its affairs.

[4] None of the parties contends that either subsection (b) or (c) of section 35-3 of the Act is implicated in this case.

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¶ 107 Roszak argues that the Act "contains no limitation as to the time for *** winding up" and "provides no definition of the activities included in the winding up" of an LLC. Roszak notes that whereas the Business Corporation Act of 1993 specifies that a dissolved corporation may pursue civil remedies only up to five years after the date of dissolution (805 ILCS 5/12.80 (West 2014)), the Act "contains no limitations on a dissolved LLC's right to wind up its business either substantively or temporally" and contains no specific time limit on a dissolved LLC's right to sue. Thus, Roszak urges that it had no time limit to sue following its dissolution in July 2010.

¶ 108 As further support for its position, Roszak refers to rules of statutory construction, citing the principle that courts look to the plain meaning of the statutory language as the best indication of legislative intent. See *JPMorgan Chase Bank, N.A. v. Earth Foods, Inc.*, 238 Ill. 2d 455, 461 (2010). Roszak argues: "The LLC Act specifically provides that a dissolved LLC continues after dissolution for the purpose of winding up the LLC's business. That language is clear and without limitation. Had the legislature desired to place any substantive or temporal limitation on the dissolved LLC's right to wind up its business *** it would have done so." In its reply, Roszak similarly argues that to set a limit on its right to sue would violate the principle that a court may not depart from plain statutory language by reading into it exceptions or limitations. See *Brunton v. Kruger*, 2015 IL 117663, ¶ 24.

¶ 109 We disagree. Although Roszak is correct that the Act does not state an exact time limit in which a dissolved LLC must complete "winding up," Roszak's claim that the Act "contains no limitations" is undermined by section 35-4(c)'s statement that "A person winding up a limited liability company's business may preserve the company's business or property as a going concern *for a reasonable time* ***." (Emphasis added.) 805 ILCS 180/35-4(c) (West 2014). In

this regard, we note the principle that a "statute should be read as a whole and construed so that no term is rendered superfluous or meaningless." (Internal quotation marks omitted.) *JPMorgan Chase Bank*, 238 Ill. 2d at 461. Further, we are mindful that we will not presume that the legislature intended an absurd result. *Land v. Board of Education of the City of Chicago*, 202 Ill. 2d 414, 422 (2002).

¶ 110 We recognize that section 35-4 of the Act specifies certain activities—including prosecuting civil claims—that the LLC may take after dissolution. However, we think it is disingenuous to suggest that the legislature intended for such rights to continue indefinitely following dissolution. Notably, the language regarding the right of a dissolved LLC to sue is in the same passage as language indicating that winding up means keeping the business going for a *reasonable* time. 805 ILCS 180/35-4(c) (West 2014). We believe it would be incongruous and illogical to infer that the General Assembly intended to limit the continuation of a dissolved LLC's business for a reasonable time, but that a dissolved LLC would maintain the power to sue and be sued indefinitely. See *Land*, 202 Ill. 2d at 422 ("Words and phrases should not be construed in isolation, but interpreted in light of other relevant provisions of the statute so that, if possible, no term is rendered superfluous or meaningless."). Viewing the statute as a whole, we believe that the legislature contemplated that a dissolved LLC could sue or be sued for a "reasonable time" after dissolution. In any event, we find that the plain meaning of the statutory phrase "winding up" clearly contemplates a finite period in which the LLC's affairs (including the resolution of litigation) are completed. Obviously, a dissolved LLC cannot be "winding up" indefinitely. By the same token, we cannot accept Roszak's position that there was no time limit on its ability to sue following dissolution.

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¶ 111 We recognize the apparent lack of case law discussing the outer limit of time by which an LLC may bring a lawsuit or counterclaim following its dissolution. However, we find it would be illogical to permit such suits to be asserted beyond a reasonable time. We do not purport to set forth a bright line rule as to what constitutes a "reasonable time." However, under the undisputed facts of this case, we cannot say that the lengthy gap between the July 2010 dissolution and February 2014 counterclaims constituted a reasonable time.[5]

¶ 112 Finally, Roszak argues in the alternative that, if it had no legal capacity to assert counterclaims as a dissolved LLC, then it had no capacity to be sued by the plaintiff, requiring dismissal of the plaintiff's claims against Roszak. First, we note that this argument does not appear in Roszak's July 18, 2014, response to the counter-defendants' motion to dismiss the counterclaims. As it was not raised before the trial court, that argument is forfeited for purposes of this appeal. See *In re Marriage of Epting*, 2012 IL App (1st) 113727, ¶ 27 ("Generally, issues concerning an alleged error not raised in the trial court are forfeited and may not be raised for the first time on appeal."). In any event, Roszak's suggestion that it could not be sued by the plaintiff ignores the undisputed record evidence that in 2013, the plaintiff expressly sought and obtained approval from the bankruptcy court to sue Roszak and the developer in this action.

¶ 113 Finally, we note that since we conclude that dismissal of the counterclaims against all counter-defendants was warranted due to Roszak's lack of legal capacity, we need not analyze

[5] Moreover, as the record indicates that Roszak remained an insolvent debtor subject to the authority of the bankruptcy court, including an automatic stay of pending litigation, we note the lack of any indication that Roszak ever sought approval from the bankruptcy court to assert any counterclaims.

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the UCC's statute of limitations (810 ILCS 5/2-725(1) (West 2012)), which also served as the basis for the trial court's dismissal of the counterclaims against Wojan and Champion.

¶ 114 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County and answer the certified questions in the negative as to subcontractors.

¶ 115 Affirmed and certified questions answered.

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In the
Appellate Court of Illinois
First Judicial District - First Division

SIENNA COURT CONDOMINIUM ASSOCIATION, an Illinois not-for-profit corporation, Plaintiff-Respondent, v. CHAMPION ALUMINUM CORP., A New York corporation, d/b/a CHAMPION WINDOW AND DOOR, BV AND ASSOCIATES, INC., a Michigan corporation, d/b/a CLEARVISIONS, INC., METALMASTER ROOFMASTER, INC., an Illinois corporation, DON STOLTZNER MASON CONTRACTOR, INC., an Illinois corporation, and TEMPCO HEATING AND AIR CONDITIONING CO., an Illinois corporation, Defendants-Petitioners.	)	On Appeal from the Circuit Court of Cook County No. 13 L 2053 Honorable Margaret Ann Brennan, Judge Presiding.

ORDER

This case comes before the court on petitioners' application for leave to appeal pursuant to Illinois Supreme Court Rule 308. See Ill. Sup. Ct. R. 308 (eff. Feb. 26, 2010). After due consideration, it is hereby ORDERED that:

1. Petitioners' motion is GRANTED.

ENTER:

ORDER ENTERED

DEC 11 2014

APPELLATE COURT, FIRST DISTRICT

Date: December ____, 2014

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IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT – LAW DIVISION

SIENNA COURT CONDOMINIUM ASSOCIATION, an Illinois not-for-profit corporation,	)	
Plaintiff,	)	No. 13 L 2053
v.	)	Judge Margaret Brennan
CHAMPION ALUMINUM CORP., a New York corporation, d/b/a CHAMPION WINDOW AND DOOR, *et al.*	)	Calendar N **JURY DEMAND**
Defendants.	)	

V
S.T.

ORDER

This matter coming to be heard on Subcontractor and Material Supplier Defendants' Joint Motion to Certify Questions for Rule 308 Appeal, due notice being given, and the Court being advised in the premise, IT IS HEREBY ORDERED that:

1. The Court hereby grants Subcontractor and Material Supplier Defendants' Joint Motion to Certify Questions for Rule 308 Appeal; and

2. The Court finds that there is substantial ground for difference of opinion as to questions of law as set forth in the certified questions and as stated in the Parties' briefs and for the reasons stated in the hearings held on June 2, 2014 (hearing on motion to dismiss), on October 9, 2014 (hearing on Rule 308 Motion) and on October 20, 2014 (status hearing on entry of Rule 308 Certification); and

3. The Court further finds that an immediate appeal under Rule 308 from the Order on the Motion to Dismiss which resolves the certified questions will materially advance the ultimate termination of the litigation because said resolution:

   a) will shape and focus the direction of the litigation and provide the Court and parties with early guidance as core disputed legal issues in the pleadings and discovery to be conducted;

   b) may reduce the size of the case, amount of discovery and number of parties by possibly eliminating or narrowing claims against numerous subcontractor and material supplier defendants;

   c) will lessen the expense of the litigation;

   d) will streamline the litigation;

C 7170

e) will clarify the parties' liability evaluations, promote settlement negotiations and may lead to possible early resolution;

f) will promote judicial efficiency because the Rule 308 appeal will be accompanied by several other appeals under Rule 304(a) as to numerous parties whose Motions to Dismiss on other grounds have already been resolved.;

4. Based upon the foregoing findings, the following questions are hereby certified for Rule 308 Appeal:

4350

a) 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 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?

b) 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?

c) 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 implied warranty of habitability against subcontractors and/or material suppliers, which are not in privity with the property owner, under the *Minton v. Richards*, 116 Ill. App. 3d 852 (1st Dist. 1983) or its progeny?

d) 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?

ENTER:

Judge Margaret Brennan

Judge Margaret Ann Brennan

OCT 29 2014

Circuit Court - 1846

C 2171

IN TH CIRCUIT COURT OF COOK COU TY
COUNTY DEPARTMENT, LAW DIVISION

Sienna Court Condo et al
Plaintiff(s),

v.

Champion Aluminum Corp et al
Defendant(s)

No. 2013 L 002053

ORDER

Continued

This matter coming before the Court upon certain defendants motions to dismiss and the Court being fully advised in the Premises, It Is Hereby Ordered:

1) TR Sienna's motion is granted in part and denied in part as follows: i) Counts 2, 7, and 8 are dismissed without prejudice with respect to T.R. Sienna and ii) The last sentance of Paragraph 33 is stricken; iii) T.R. Sienna's motion is denied with respect to Count 1;

2) Sienna Court shall have until June 30, 2014 to replead with respect to Counts 2, 7 and 8

4271
5271,
4292

Atty. No.: 25188
Name: Raymond M Krawze
Atty. for: Anselmo Lehr
Address: 120 S. Riverside Plaza #1200
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ENTERED:

Judge Judge's No.

C 5152

IN TH CIRCUIT COURT OF COOK COU TY
COUNTY DEPARTMENT, LAW DIVISION

Sienna Court Condo et al
Plaintiff(s),

v.

Champion Aluminum et al
Defendant(s)

No. 2013 L 2053

Pg 2 of 4

ORDER

3) Subcontractors and material suppliers defendants Joint 2-619(a) motion To Dismiss Counts III - VI and IX of Plaintiff's second amended complaint is denied.

~~4) Walter Gomez~~

4) The hearing date for presentment of Wallin Gomez motion to dismiss on June 9, 2014 is stricken

5271

4330

Atty. No.: 25188
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ENTERED:

Judge Judge's No.

C 5153

A47

IN TH CIRCUIT COURT OF COOK COU TY
COUNTY DEPARTMENT, LAW DIVISION

Sienna Court
Plaintiff(s),

v.

Champion Aluminum et al.
Defendant(s)

No. 2013 L 002053

ORDER

Continued Page 3 of 4

(5) Counter-Plaintiff, Roszak/ADC LLC shall have until July 14, 2014 to respond to Counter-Defendant, sub-contractor and material supplier's Motion to Dismiss ("Motion to Dismiss Counterclaim")

(6) Counter-Defendants shall have until 08/11/14 to file their Reply

(7) Said Motion to Dismiss Counterclaim is set for clerk's status to 08/12/14 at 9:30 AM in Room 2307 and status of all pending matters.

O Defendant HMS granted leave to withdraw its Answer to Roszak's Counterclaim. HMS also granted leave to file its Motion to Dismiss Counts I & II of the Roszak Counterclaim;

O HMS' Motion to Dismiss Count V of Plaintiff's Second Amended Complaint is granted.

ENTERED:

Judge

Judge's No.

Atty. No.: 39611
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Address: 14 N. Peoria St., 2-C
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C 5154

IN TH CIRCUIT COURT OF COOK COU TY
COUNTY DEPARTMENT, LAW DIVISION

Sienna Court Condo's
Plaintiff(s),

v.

Champion Aluminum et al.
Defendant(s)

No. 2013 L 002053

ORDER

Continued
Page 4 of 4

(8) Subcontractor and material supplier Defendants shall ~~all~~ have until 07/28/14 to answer or otherwise plead to Plaintiffs' Third Amended Complaint

(9) Wojan's Motion to Dismiss Count III of the Second Amended Complaint is granted and its oral motion for 304(a) finding is entered and continued generally

(10) Wollan Gomez and Matsen's Motion to Dismiss TR Sienna's ~~Second~~ Third Complaint - TR Sienna to respond by 07/14/14; Design professionals to Reply by 08/11/14 - ~~&~~ clerk stated 08/12/14 at 9:30 AM

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Atty. for: Clearvisions
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City/State/Zip: Chicago, IL 60607
Telephone: 312/243-4500

ENTERED:

Judge Judge's No.
Judge Margaret Ann Brennan

JUN 02 2014

Circuit Court - 1846

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

SIENNA COURT CONDOMINIUM ASSOCIATION, an Illinois not-for-profit corporation,	
Plaintiffs,	Case No. 2013 L 002053
vs.	
CHAMPION ALUMINUM CORP., a New York corporation, d/b/a CHAMPION WINDOW AND DOOR, et al.,	
Defendants.	

ORIGINAL

REPORT OF PROCEEDINGS had at the hearing in the above-entitled cause before the Honorable MARGARET ANN BRENNAN, Judge of said Court, in Room 2307, Richard J. Daley Center, Chicago, Illinois, on October 9, 2014, at 10:31 a.m.

REPORTED BY: CYNTHIA J. CONFORTI, CSR, CRR
LICENSE NO. 084-003064

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THE COURT: Okay. Let's begin with Wallin-Gomez.

MR. FLANIGON: Thank you, Judge Brennan. Thomas Flanigon on behalf of Wallin-Gomez Architects.

MR. MOOTHART: Michael Moothart on behalf of TR Sienna Partners, LLC and also Roszk/ADC LLC, but I think this motion is directed against TR Sienna.

THE COURT: Okay. We are going to start with you, and then we'll go into -- each time we come up to a motion, just we'll go one at a time. It's just too many motions if I try and get too many of them argued at the same time, so we'll just have to go in order, all right? Go ahead.

MR. FLANIGON: Thank you, Judge. This is Wallin-Gomez' motion to dismiss Counts 1 and 2 of Roszak/ADC's third-party complaint.

Count 1 is for breach of contract. Count 2 is for breach of implied warranty of workmanship.

The breach of contract claims we're seeking -- the breach of contract we are

seeking to claim under both collateral estoppel and res judicata. And that's premised on a 2-619 motion and our motion to dismiss the breach of implied warranty premised on 2-615.

And if possible, your Honor, I'd like to try to short-circuit this and start with the collateral estoppel argument if that's okay with you.

THE COURT: Um-hmm.

MR. FLANIGON: It's a little bit reverse order, but we are seeking to preclude Roszak from relitigating the breach of contract claim, specifically, the spandrel window issues that are alleged in its third-party complaint, because those issues specifically were raised, litigated and decided against Roszak in a prior complaint, and which was filed in 2007.

For purposes of procedural history in 2007, TR Sienna Partners and Roszak/ADC filed a breach of contract complaint against my client Wallin-Gomez for breach of contract as well as Matsen Ford.

And in that case, your Honor, we attached it as an exhibit to our motion. It's

premised on breach of contract.

Specifically, Count 2 in that complaint alleges that Wallin-Gomez deficiently designed the condominium, including but not limited to the spandrel windows on the seventh and eighth floor of the premises.

The parties in that 2007 suit are the exact same parties in the third-party complaint. The matter was brought by TR Sienna Partners, its agent Roszak/ADC. Both defendants, Wallin-Gomez and Matsen Ford, are the two parties in this third-party complaint, so we have the exact contract at issue, the exact parties at issue.

In fact, the same contract is attached to both the 2007 complaint as well as the third-party complaint. We moved to dismiss that complaint -- it was filed in 2007. We moved to dismiss it in 2012. Matsen Ford initially moved to dismiss. We joined on that motion, and in January of 2013, Judge Griffin, the circuit court, dismissed Roszak's claim, third-party complaint with prejudice.

So that constitutes a final

judgment on the merits for purposes of both res judicata and collateral estoppel. And that's not contested by Roszak here. That's my understanding according to his brief.

With respect to the identity of issues, your Honor, we have established, we believe in our briefs, that the issues decided in that first lawsuit in 2007 regarding the spandrel windows are identical with the spandrel window issues in its third-party complaint that's before you.

And if you'll look at the -- we tried to set forth in our brief the specific allegations. In the initial complaint, they allege that Wallin-Gomez breached its contract by failing to design the spandrel windows on the seventh and eighth floor of the buildings and that they weren't double-paned.

There's a whole section in that initial complaint, several pages on this remediation of the spandrel window issues.

Those same allegations are brought on the seventh and eighth floor, the spandrel window issues on the seventh and eighth floor,

in the current complaint.

So we believe that unquestionably the identity of issues requirement has been satisfied for purposes of collateral estoppel.

Now, there was argument in Roszak's brief that some of these issues possibly weren't discovered by the Association until 2012. Well, we know the spandrel window issues were discovered in 2007 because they filed suit on it. They sought monetary damages for it.

And I think that was -- my understanding and my read, my review of the complaint, as well as being involved in that litigation, the primary aspect of the damages in that case, in excess of 300,000, was for the spandrel window issues. So that claim was previously decided, litigated, and judgment was entered against Roszak on that issue.

In addition, your Honor, there is case law which states that the bar extends to not only what was actually decided in the first action, but, also, as to all matters that could have been decided in that suit. So, clearly,

the spandrel window issues were brought, decided, and judgment was entered against Roszak.

And this is the purpose of collateral estoppel, to bar relitigation of claims that were previously litigated, to have finality to issues and claims. So we believe that element has been satisfied.

Then, finally, the privity of parties requirement. Application of collateral estoppel requires that the parties in the prior suit involve the same parties or those that are in privity with the same parties.

And essentially here, your Honor, we have, like I said before, we have the exact same parties: TR Sienna, Roszak, Matsen Ford and Wallin-Gomez.

The claims against my client were brought by Roszak/ADC because that's the party that we contracted with. And I don't think there's any dispute about that in counsel's brief either.

So for all those reasons, in sum, I set forth additional arguments in my brief,

but for purposes of brevity, the elements of collateral estoppel have been satisfied on that tissue. And we are seeking an order precluding Roszak from relitigating any spandrel window issues in this current third-party complaint.

THE COURT: Okay. You want to continue with your whole motion?

MR. FLANIGON: It depends what you want to do, your Honor. I can.

THE COURT: Why don't you that. I'm going party by party I guess is probably the easiest way to say it.

MR. FLANIGON: You know, as far as the application of res judicata, Roszak uses the terms interchangeably in its response, and they kind of meld the two together so that rather than repeating all of the arguments it previously made, we also believe that res judicata would bar the entire breach of contract claim because in order to apply res judicata you need a final judgment on the merits.

Number two, there is an identity of parties or their privies. And number three,

there is an identity of causes of action.

As argued previously, the final judgment on the merits has been entered. There's no contest regarding that issue. The identity of parties is the same. We've discussed that. We have the exact parties at issue here. And there is an identity of cause of action because the 2007 complaint, your Honor, was premised on breach of contract, which we have here, the same contract was attached to both complaints, the same parties, the same issues raised with respect to deficient design of the condominium and that we breached that contract.

So based on those facts, res judicata would apply to bar Count 1 in its entirety. And I think the only thing I was going to say on that, for purpose of brevity, Illinois courts have adopted the transactional test to evaluate whether there is an identity of cause of action. And under that test separate claims are considered the same cause of action for purposes of res judicata if they arise from a single group of operative facts,

regardless of whether they assert different theories of relief, and here it is the same group of operative facts. We have, again, the same contract, same parties, same cause of action.

THE COURT: And as to Count 2?

MR. FLANIGON: As to Count 2, your Honor, we are seeking dismissal of Count 2 with prejudice.

Essentially, breach of implied warranty of workmanship claims do not apply to a design professional. They have not cited a single case in Illinois which holds otherwise.

A reading of the cases that discuss the implied warranty of workmanship, it's clear that it applies to one who contracts or who constructs the actual premises. There's no allegations that Wallin-Gomez as the architect had any role in the construction of the premises.

In fact, the contract which they have entered into with us, it specifically excludes construction services. Page 1 of that contract specifically states the scope of work

is architectural only.

THE COURT: Okay.

MR. FLANIGON: And I mean, factually, that's even -- even further illustrates why that claim should not lie against Wallin-Gomez.

In addition, your Honor, we made other arguments. We cited the case law in breach of implied warranty of workmanship. It all applied to contractors who actually put hammer to nail, and if it were applied to a design professional, it would render the standard of care under which a design professional's liability is measured meaningless.

It would render the Supreme Court cases of Thompson v. Gordon meaningless as well. Under Thompson v. Gordon, a design professional's scope of duty is defined by its contract.

If we were to expose warranty liability on a design professional, it doesn't reconcile with the Supreme Court holding in Thompson, and especially considering our

contract specifically included construction services. So on that basis, we are seeking dismissal with prejudice of Count 2.

THE COURT: Counsel?

MR. MOOTHART: Thank you, your Honor.

I want to touch upon counsel's arguments about res judicata as well as collateral estoppel.

A couple important distinctions between the 2007 lawsuit and this lawsuit.

One very important distinction is that at the time that TR Sienna filed that lawsuit, they were the owner of the property in question.

Now, in this lawsuit, they are a defendant defending a claim by the condo association. Now they are filing a third-party complaint against Wallin-Gomez and Matsen Ford for what they may have to pay to the plaintiff. That's an important distinction.

Two, since that last 2007 lawsuit, TR Sienna has gone through a bankruptcy.

Third, regarding the similar

factual issues or even similar claims, TR Sienna's third-party complaint against Wallin-Gomez and against Matsen Ford is based upon the allegations made against TR Sienna in the Plaintiff's Second Amended Complaint.

And if you look at the Second Amended Complaint, specifically the various paragraphs that deal with the alleged damages to the property, starting with paragraph 52, paragraph 53 of the Second Amended Complaint, the Association says:

The Association discovered defects relating to the window system, spandrel glass units, masonry walls and terraces relating to the 1720 building and the 1740 building on or around February 17th, 2014.

The Association discovered defects relating to the 1740 building roof on or around April 26, 2012 -- I'm sorry.

It's February 17, 2012. The Association discovered defects relating to the 1740 building roof on or around April 26, 2012 and the 1720 building roof on or around June 25th, 2012. The Association discovered

defects related to the HVAC systems at the project on or around July 27, 2012.

Our third-party complaint is based upon these allegations. We have to defend these allegations. There will be an issue going on whether the Association can prove that they actually discovered these defects on those dates. But if the Association did discover the defects on those dates, they're obviously not the same claims as what TR Sienna was making back in 2007.

And on page four of my response brief, we've gone into great detail about the differences between the 2007 and our third-party complaint in this case.

In addition to the obvious differences just between the spandrel units, the plaintiff association in this case, a large part of their claim is that these alleged defects have caused water intrusion and water to damage not only the project but the property of the Association, common elements, property of unit owners.

My client has to defend these

allegations. My client is defending these allegations. And until we get these factual issues resolved, any dismissal of my client's claim based upon res judicata or upon collateral estoppel is inappropriate. And I've cited two cases that are on. Point on page seven of my response brief, talks about the Indian Harbor case. The citation is 2014 Il App (1st) 131734, paragraph 34.

And also I cited the Kasny, K-A-S-N-Y, which is 395 Ill. App. 3d 870. As counsel suggested, the transactional test would apply to cases such as this.

However, these are fact issues. These are fact issues that have not been resolved because this is their preanswer motion. We're not even at issue in the case, and they want to come in here and argue that these factual issues have already been resolved.

Any factual issue regarding whether these are the same claims or the same issues are brought up need to be resolved in favor of my client at this time. And we have

laid out, as I said, in great detail how this case is not remotely close to the 2007 case. The 2007 case, the largest event regarding that case was a garage collapse. That has nothing to do with this case.

Secondly, the identity of the parties, and this is an issue that's going to come up in the subcontractors' and material supplier's motion, TR Sienna is not bringing this third-party complaint for its own use and benefit. We've made no secret that the insurance companies that are defending TR Sienna and Roszak are the ones behind this. And so they're the ones that have potential liability to the plaintiff if there is a judgment entered against TR Sienna or Roszak.

The insurance companies who we've disclosed, they are the parties in interest. They are the parties pursuing this. TR Sienna is bankrupt. They're insolvent. They're no longer around, and they are not pursuing these claims against the design professionals. They're not pursuing these claims to try to get money like they were in the -- like TR Sienna

was in the 2007 lawsuit. And so they are not the same parties, and we lay that out not only in this response brief but the response brief to the subcontractors' joint motion.

We also lay that out with some of the discovery that we produced in this case. We were required to disclose who the insurance carriers are. We have done that. We have made no secret about who the party in interest is. And so it's our position they are not the same parties, and the case law that we cited, the Indian Harbor case and also the Oshana case, which is 994 N.E.2d 77, they talk about how it's the parties or the privities, but if you're in privity, that means you have similar interests.

TR Sierra's interests back in 2007 are not similar to what TR Sierra's interests are in this case. TR Sienna is defending a claim made by the condo association, and it's trying to pursue claims against the design professionals for what it may have to pay out, not so that it can put money into its own bank account.

And so it's our position the same issues are not involved, the same claims are not involved, the same parties are not involved. Any factual issue regarding the issues regarding the issues brought up in the two cases or the claims brought up in the two cases need to be resolved in favor of my client at this time. This is simply a preanswer motion. Whether the Association actually discovered these defects on this date, my clients will have to conduct discovery to figure that out, and I don't see why design professionals should not either.

As far as the breach of implied warranty claim, the burden is on Wallin-Gomez to prove it does not apply. They have cited one case. This is the Vicorp case, and Wallin-Gomez asserts that the Illinois courts have not allowed any implied warranties against design professionals. The cases they have cited do not say that. The cases they have cited the Court says: "Okay. You can apply it to this particular construction company." And so I don't think that they have come forward

with strong enough arguments to defeat our claim as to the implied warranty count, which I believe is Count 2 of our third-party complaint.

THE COURT: Reply?

MR. FLANIGON: Yes, Judge. Just with respect to the implied warranty claim that counsel just discussed.

Allowing that claim to go forward against the design professionals would create a new cause of action where none presently exists. And what counsel is saying is that, "I can't prove a negative." He's saying there's no cases out there which don't hold that, but we have cited the only cases that do exist, Dean v. Rutherford, the Vicorp.

It's clear that actual construction work on the premises is conditioned precedent to invoking the doctrine, and all the cases in Illinois with respect to the breach of implied warranty of workmanship apply two contractors that actually do the construction work. We're not in that circle, and the contract specifically states so.

With respect to the other arguments on collateral estoppel, your Honor, and res judicata, I think that's why we wanted to parse out our briefs on distinction between the two. I mean Roszak is melding both together.

But with respect to the -- I just want to address the privity issue with respect to the spandrel windows. Their argument is that privity doesn't exist between Roszak and its insurers because they don't share the same interests.

Well, according to the case law, insureds and insurers have a special relationship because they are in privity of contract, and privity exists where -- between two parties who actually represent the same legal interest, and it's our position without question that Roszak in the first claim and its insurers now, and Roszak now, they have the same legal interest, and we set forth several examples in our brief.

Procedurally if Roszak had won that 2007 case and recovered, you know, a

million dollars or $500,000 from my client on their spandrel window issues, they would not be able to assert that same claim now because it would constitute double recovery.

Another example, your Honor, procedurally, is if, for purposes of example, if Roszak was uninsured in this case and a money judgment was entered against it in the Association's underlying case and Roszak were successful in its prosecution of the third-party complaint, any judgment entered against my client would revert back to Roszak personally. It would reduce his liability in the underlying case. So there is privity between Roszak and insurers, and its interests are perfectly aligned in this case.

With respect, your Honor, to -- the other thing I'd like to point out is that the relief sought in both cases is identical. Roszak in the first case and the present case, they seek recovery for monetary damages for the repair and replacement of the spandrel windows. That hasn't changed through any of these -- either of these claims. We have the same

spandrel windows, the same contract, the same parties, the same breach of contract claim. That's what collateral estoppel is for to put finality to issues that were previously litigated.

With respect to the cases cited and referenced by counsel that Indian Harbor case, if we distinguish it, and there is multiple factors that make it inapplicable to our case. In that case it was a demolition company that tore down or that did work on a structure, and it caused structural damage to several walls in the building. It also caused personal property damage to some of the tenants.

Well, the plaintiff's in the first suit were tenants that had personal property damage in the amount of $9,000. And they filed a pro se complaint. Two years later the subrogated insurer filed a claim for $200,000 for damage to the structure and the property. And in that case the Court held res judicata did not apply because there wasn't a privity.

Here, I mean in Indian Harbor, you

have two completely different plaintiffs that seek completely different type of damages.

In our case you have the exact same plaintiff seeking the exact same damages.

Last thing, your Honor, as far as the fundamental -- Roszak makes the arrangement that it would be fundamentally unfair to apply either collateral estoppel or res judicata in this case. In addressing fairness, Illinois courts look to whether the party potentially estopped had a full and fair opportunity to litigate the issue in the prior action, and whether he had incentive to litigate in the prior action. And there's no question that Roszak had a full and fair opportunity to litigate the spandrel window claim in 2007, filed in 2007 and dismissed in 2013. That's five to six years, and they had a serious financial incentive to do so. Any unfairness that they're claiming would be if we're required to relitigate that issue, and I think I'll just adopt the arguments I made with respect to res judicata, that we do think it's applicable because the claims arise out of the

same operative facts.

THE COURT: Okay. So as to Count 1 of Roszak's claim against the breach of contract against Wallin-Gomez, in the 2012 or in this most recent third-party complaint, the only difference really between what the complaint in 2007 and this one is that in allegation 10(e) where --

MR. MOOTHART: I'm sorry. Where are you, your Honor?

THE COURT: Paage three of your complaint, allegation 10(e) in Count 1, where it says:

Specifically, Wallin-Gomez prepared designs, plans and specifications that led to the following defects:

The roofs of the buildings are defectively designed and that the design does not provide for adequate direction of rainwater to drainage openings resulting in pooling of water on the roof, deterioration of the roofing membrane and health and safety risk.

If you look at the complaint that was filed in 2007, breach of contract, it all

has to do with the spandrel windows.

Therefore, under collateral estoppel, I believe the spandrel windows issue is completely out as to Wallin-Gomez.

So breach of contract claims can only proceed as to Wallin-Gomez as to the allegation concerning 10(e), the roofing.

As to Count 2, not a single case that supports a finding that design professionals are liable under a theory of implied warranty and habitability. So no other Court has decided to expand it, and I'm certainly not going to go out on that ledge.

So Count 2 is out with prejudice. Count 1, with the exception of allegation 10(e) is out under collateral estoppel. So breach of contract goes forward only as to the design of the roof. All right. So that takes care of Wallin-Gomez sort of.

Let's go to Matsen Ford.

MS. FAHEY: Good morning, your Honor. Margaret Fahey on behalf of Matsen Ford Design Associates on our motion to dismiss.

MR. MOOTHART: Michael Moothart on

behalf of TR Sienna Partners, LLC.

MS. FAHEY: Well, your Honor, I wont repeat the arguments and the case law and so on that Mr. Flanigon ably put forth, and I will recognize there is a distinction here.

We filed the 2007 motion to dismiss motion in 2012 of the 2007 action brought by TR Sienna with whom Matsen Ford had a structural design contract. Wallin-Gomez joined, and the motion to dismiss was granted.

We have moved on the basis of res judicata based on the finality of judgment on its merits, identity of parties and identity of cause of action.

I think the real issue here, I think the same arguments about identity of parties is the same here. We'll pass them. You appear to have ruled that that is the case.

Identity of cause of action I think is where the difference lies, and we recognize that. However, we do believe that the breach of contract, obviously the same cause, it arose out of the same transaction, the same structural design services,

allegations of defective design. And we did not have anything to do with the spandrel windows. I don't think there's any allegations in the underlying complaint that we -- even though I know they're brief, some sort of suggest the same thing applies to it.

THE COURT: We're on the terrace.

MS. FAHEY: Yes, we're on the terrace. And we are on the vehicular ramp that allegedly vibrates too strongly, and that was not a subject matter of the 2007 lawsuit when it was filed in 2007.

However, as Mr. Flanigon pointed out, litigation continued on that case for five years at which time we filed a motion to dismiss, and I would like to point out, and as we have attached as Exhibit 6 to our motion to dismiss, that clearly was in play. That issue, that problem, that complaint about our structural design was clearly in play in 2009, when the punchlist that we have attached, as well as letters from counsel, Arnstein & Lehr and so on pointing out, "This is the problem that we have," Roszak was aware of it, Roszak

knew about it. It had a breach of contract based on our structural design. Its opportunity was there at that time to litigate that. It could have. Under the Rein case, Illinois Supreme Court Case, Rein, R-E-I-N, 172 Ill. 2d 325, identity of cause of action extends not only to what was actually determined but every matter that might have been raised and determined.

That was not raised, but it could have been raised. It was definitely an allegation that was out there. It was definitely an issue related to our structural design, which is the core of their complaint in the breach of contract was with our structural design services.

So we believe that the res judicata doctrine would equally apply to Matsen Ford in this instance and would ask that the Court apply that given the fact that they could have pursued it prior to the 2013 dismissal and chose not to do so.

We, again, the fairness here is whether we have to be dragged back into

something that we already spent five years litigating, the services under our structural design contract, because they did not see fit to add it in a timely fashion to their complaint.

Implied warranty, obviously, the same argument of workmanship, I assume would apply to a design professional such as Matsen Ford.

THE COURT: Counsel?

MR. MOOTHART: As far as the letter, the 2009 letter, we have asked in our response brief that it be stricken. We don't think it's a proper attachment to a 2-619 motion. It's not started by an affidavit. There's really no foundation for that letter being there.

I don't want to rehash too many of the arguments. I just ask that perhaps you look at the allegations that I'm referring to starting on page four of our third-party complaint.

So toward the bottom is the beginning of our breach of contract

allegations, if you flip to page five.

As far as the vehicular ramp, it's our position this was not raised in the original 2007 action. Certainly, the extent of the damage, the fact that it was causing structural damage or it was causing structural damage to the common elements of the premises, as well as the personal property, that was not litigated in the first action.

Secondly, if you look at paragraph 22 of our third-party complaint, the roofs, I think this is a new issue, completely new issue. We say that:

Matsen Ford failed to provide steel sport for the mechanical HVA units on the roof, causing water to accumulate around the HVA units, causing damage to the roof, creating risk of collapse in the event of heavy rain, creating a health hazard due to standing water and the attraction of insects such as mosquitos.

I don't think that's at issue that this is a brand new issue in the case. It's our position that collateral estoppel and res

judicata does not apply.

It's our position that they are not the same parties. I know we just made that argument.

The two cases I did cite, the Indian Harbor case, as well as the Oshana case, those are both cases where the Court held that the insurance company and the insured were not in privity for purposes of res judicata.

And as far as the breach of implied warranty of workmanship counts, I believe you've already made your decision on that. But for the record we think that that count should stand as well and you should deny their motion.

MS. FAHEY: They did not bring a motion to strike Exhibit 6. They just mentioned it in a footnote. I think that's inappropriate.

Also, I think 2-619 affords a means of disposing of issues based on not just affidavits but also other evidence that the Court can consider. I think that what is Exhibit 6 constitutes such an offer of proof

and should not be stricken. It should be considered.

And, again, I'm not going to make the distinctions again about identity of the parties, I think we have established that, and so I think the res judicata should apply for the reasons listed.

THE COURT: As to the roofing, there were steel supports that you were alleged --

MS. FAHEY: Yeah, that's in there, and I cannot say that I have found an allegation yet that I go off of from that to give on you that allegation on paragraph 22.

THE COURT: Okay. So I think you know where this is going.

Quite frankly, I am considering Exhibit 6. I'm denying your striking of that. It's clear back in 2009 you're aware of this complaint. Res judicata does apply to not only those claims that were brought but those claims that could have been brought. You can't sit here and have a claim or certain allegations, "Well, if that one didn't work, then I'm going

to bring a new lawsuit and try this one." I mean that's the whole point of having res judicata is that you don't have serial lawsuits. Eventually, at some point in time, people understand that they're free from continuing litigation.

And I think that this claim right now as to the ramp, that was not brought in the 2007 case. When you're aware of it in 2009, mistake on the part of those who were bringing the action at the time. They should have brought it in. It could have been addressed as part of the 2013 motion to dismiss the breach of contract claim.

The only thing that remains, and this is because I do believe that this was not contemplated through anything that I've seen in the 2007 lawsuit, is the roof.

MS. FAHEY: Paragraph 22.

THE COURT: Paragraph 22 as to Matsen Ford. As to the counts concerning design professionals and implied warranty of habitability, that's out, okay?

MS. FAHEY: Thank you, your Honor.

MR. MOOTHART: Just for the record HMS filed kind of a two-part motion. The second part of their motion is the implied warranty of workmanship issue.

THE COURT: Um-hmm.

MR. MOOTHART: So I'm not sure if you want to argue it separately. I think you've decided on it. We think it should be denied.

THE COURT: I'm going to try and be consistent with myself, maybe not every day, but at least in the same two hours I'll try to be consistent with myself, okay?

MS. SHEAFFER: That's correct, Judge. I don't need to address it again. I just want a ruling on at least Count 2. And Count 1 is going to be addressed in A joint motion to dismiss that was filed by the subcontractors and the material suppliers.

THE COURT: Right. So as to design professional, that count is out. Which count is it?

MS. SHAEFFER: Count 2.

MR. MOOTHART: I'm sorry. It was

Count 2 of HMS' motions to dismiss TR -- or --

MS. SHAEFFER: Roszak's.

MR. MOOTHART: Roszak's counterclaim.

MS. SHAEFFER: Thank you, Judge.

THE COURT: That is granted.

Your motion to dismiss is granted.

MS. FAHEY: And as to the claims that you have said res judicata and collateral step apply to, is that with prejudice?

MR. FLANIGON: On both Matsen Ford and Wallin-Gomez, your Honor?

THE COURT: Correct. We're not going to keep going back. At some we've got to unstick this and move it forward, okay?

MR. FLANIGON: Thank you, your Honor.

THE COURT: All right. So which one are we up to now?

MR. GOODSNYDER: This would be the subcontractors' joint motion to dismiss the counterclaim of Roszak.

Judge, Chris Goodsnyder on behalf of BV and Associates, d/b/a Clearvisions, but

I'm just going to be lead counsel on the motion, and then I'm going to reserve time for the other signatories to the motion.

THE COURT: Okay. So this is the material set of contract --

MR. FLANIGON: Correct. Contractors and -- subcontractors' and material suppliers' joint motion to dismiss.

THE COURT: Got it.

MR. GOODSNYDER: Good morning, your Honor.

Judge, one of my motivations for requesting this sequence of events was because you considered at great length the implications of the prior 2007 litigation, and although we don't have a direct collateral estoppel/res judicata argument based on the '07 case, we were not parties to that, in our motion to dismiss one of the sections pertains to whether Roszak should have raised these issues in their 2009 bankruptcy filing.

And one of the issues that is raised in Roszak's response brief is essentially argument that: "When the

bankruptcy was filed, we couldn't have known that we had these claims, and, therefore, by not disclosing them on the bankruptcy petition, we did nothing improper."

So just for the sake of logic, I'm raising that sort of out of order in the brief itself, but it's a corollary issue, so I'm going to read from the original 2007 L 13711 complaint, which is what everyone has referred back to --

MR. MOOTHART: Judge, this is not in their motion. They never cite it in their motion. It only has anything to do with Wallin-Gomez and Matsen Ford's motion. I don't think that reading it here is proper. I didn't have any idea this was going to be part of their argument today, reading from this complaint.

MR. GOODSNYDER: Well, Judge, obviously, the motions are before you with the other litigants, and this was an exhibit to the complaint, and you relied upon the existence of the 2007 case.

We're not arguing it in the --

again, directly for collateral estoppel. We're arguing it as to refute counsel's position that they could not have known in 2009, when they filed the bankruptcy, that they had these potential claims derivative of the spandrel glass issues, essentially the counterclaims.

They say in their response brief:

"We couldn't have known at the time we filed the 2009 bankruptcy that we had these potential counterclaims."

THE COURT: So you're basically saying the 2007 complaint, the Court should take judicial notice of the complaint that was filed that alleged spandrel glass window issues.

MR. GOODSNYDER: Exactly.

THE COURT: And that if you're a subcontractor dealing with spandrel glass that that would have been something that they could or should have known about at the time of filing the 2007 complaint, and if not then, certainly after in 2009.

MR. GOODSNYDER: Exactly, Judge.

THE COURT: So you're asking me to

just take judicial notice of pleadings.

MR. GOODSNYDER: Absolutely, your Honor.

THE COURT: For that reason I will take judicial notice of pleadings filed in this action and the underlying action. Continue on.

MR. GOODSNYDER: So now sort of more in keeping with the sequence of my motion, the first argument of the motion is premised upon the legal standing of the entity that's pursuing the cross-claim.

Roszak/ADC LLC was involuntarily dissolved on July 9, 2010, and an exhibit to our motion is the certificate from the Secretary of State certified that said:

Roszak/ADC LLC, having organized in the State of Illinois on January 31st, 1997, was involuntarily dissolved by the Secretary of State's office on July 9th, 2010, for failure to file an annual report thereby terminating its existence.

Nowhere in the response brief do they ever refute that it was involuntarily dissolved or that they have taken any steps to

reinstate the entity.

So the only things that they attempt to distinguish as -- they don't argue that in and of itself somehow an LLC not in good standing somehow still could be a plaintiff. They split apart that somehow there's a distinction between being a counterclaimant and being a plaintiff.

So in the reply brief, what we do is we cite civil procedure sections and legal authority that says essentially counterclaims are held to the same standard as direct actions.

So although it's a distinction, it's a distinction without a difference. They're plaintiffs in this action. They're pursuing their rights, and, therefore, they, pursuant to the Limited Liability Act, they need to be in good standing.

One of the -- Section 30 subsection -- I'm sorry. Illinois Limited Liability Act 805 ILCS 180/1-30 (1) states that:

Each Limited Liability Company

organized and existing under the Act may do all of the following.

Number one is: Sue or be sued.

We go to great lengths to discuss that. It's more established in the corporate context just because of the breadth of corporations that are involved in it, but there's no debate. In order to pursue a case, you need to be in good standing, and they're not in good standing.

They also try to distinguish -- somehow they assert that they're not pursuing counterclaims for financial gain. Again, this is somewhat of an arbitrary distinction, because clearly what they're seeking in their wherefore clause, is recovery of up to $2.5 million from the subcontractors.

Now, the derivative components of it and where the money ultimately goes is a distinction without a difference.

From the counter-defendants' perspective, if they were to prevail on their counterclaim to the full extent that they're seeking the wherefore clause, that would be a

minus of potentially $2.5 million from the subcontractors and material suppliers. Clearly, that's a loss, and it's clearly to the benefit of the counter-plaintiff.

They also discuss, and it kind of comes up in two different contexts, the distinction between the real party in interest, but as we talked about in the context of the bankruptcy and the standing issue, clearly the named plaintiff in this case -- the named counter-plaintiff in this case is a dissolved LLC.

So at this juncture, the only case -- the only counterclaims that exist are from Roszak to the subcontractors, and Roszak doesn't have standing as an involuntarily dissolved LLC to pursue those, and the counter-plaintiff's attempt to distinguish the authority and the statutes should be unpersuasive to the Court.

Again, we said in our brief that there's no legal authority cited by counsel supporting their asserted proposition, and then, again, we say essentially they've waived

the argument by not supporting it.

Essentially that's a standing issue, so that's a 2-619(a)(2) issue that the LLC doesn't have standing to pursue the case.

The second thrust of the argument is that the insurers are the real party in interest. And that issue is used in one context as a shield, in the other context as a sword by the counter-plaintiff, but on either case, it's inappropriate.

All the attempts that the counter-plaintiff makes in an attempt to distinguish the authority that we cite is unpersuasive because they all turn on where the insured has some potential, even de minimis, exposure for financial liability, pecuniary harm.

In this particular case, it's not even subject to debate. We have a bankruptcy court order that specifically limits Roszak's potential exposure to only the insurance coverage. Under no set of circumstances, no matter how creative one could get, under no set of circumstances could the legal entity

Roszak/ADC LLC have any financial harm or interest in this case.

Therefore, the only entities that have real standing in this case are the two insurers, and they should be and are required to be disclosed as plaintiffs in this case.

Again, the distinction made of the cases we cite, if you look -- if the Court reads the two -- the Romanelli case and Oregel case, it's clear that the counter-plaintiff's attempt to distinguish those cases are not only unpersuasive, but the cases actually stand for -- support the proposition that we assert, which is that in the absence of any potential pecuniary interest in a case, it's only the real party in interest, the insurers that should be named as plaintiffs, and they're not much. So, again, we would move to dismiss under 619 for that reason.

Then we turn to -- we're sort of back to where we started in terms of the interplay of the bankruptcy case. And, again, the attempts to distinguish what was done in the bankruptcy should be -- should be rejected

because the cases that are cited where it's essentially we're not -- we're not saying that the liability insurance policies weren't assets of the case. There's authority on that determining whether or not an insurance policy is an asset of a case.

What we're saying here is, as I started with my arguments, your Honor, is that clearly back in '07, when they filed the complaint, judicial notice, they had knowledge of the spandrel glass issue.

Then we have the bankruptcy pending. Then we have the motion brought in the bankruptcy in 2010 for the turnover of that $300,000 plus warranty fund. Then we have the 2013 motion brought by the Association to reopen the bankruptcy and get the relief that they did.

At no point in time in that entire span did Roszak/ADC ever disclose that it had potential counterclaims against the subcontractors.

And just briefly, Judge, if there's any sort of an argument that, again, on

the knowledge front, there were two companion cases. Obviously, Roszak/ADC and TR Sienna are affiliates.

In the TR Sienna bankruptcy, the bankruptcy petition is attested to by Thomas A. Roszak, President -- Thomas A. Roszak, President, TR Sienna Managing Member. So TR Sienna bankruptcy petition signed by Thomas Roszak. Roszak/ADC's bankruptcy petition likewise signed by Thomas Roszak.

So there's no valid argument that when these bankruptcy petitions were pending that clearly Roszak/ADC knew that they had these potential claims.

Instead, when they filed their petition, in each of the places where they're required under law to disclose any assets, even chosen actions and potential claims. And specifically listing by category, there's three different categories where they had an opportunity to say any sort of disclosure whatsoever about potential counterclaims, they don't. So, at the very least, the counterclaims belong to the trustee. Again a

standing issue. Not Roszak/ADC.

Then we turn to the corollary to that argument which is the estoppel argument which says, in essence, that you can't take inconsistent positions in two litigations.

Here they've got bankruptcy petitions where they say, "We have no counterclaims." They get a discharge in bankruptcy. Creditors, such as my client and other subcontractors, lost out on the balance of the monies that they were owed on the work that they did on the project because it was a no asset case. That case is closed. It's never been reopened. To this day it's never been reopened to address this counterclaim issue. They're taking an inconsistent position by saying that somehow they have the right to proceed now on their counterclaim when they didn't disclose it in the bankruptcy petition.

So wrapping up, your Honor, again, we have those multifold bases to say that the counterclaim should be dismissed. And, again, I'm going to reserve some time for my colleagues if they have anything to add that

they think that adds some clarification after counsel --

THE COURT: Actually, I think they should add now so that counsel can respond to all of them.

MR. BONANNO: Very brief point to add, your Honor. Steve Bonanno, representing Stoltzner Mason Contractor.

The final point that Chris made about the bankruptcy estoppel, there's a little bit more to the factual context of it.

Once this suit is filed in 2013 and now pending for over a year, plaintiff went into bankruptcy court, lifted the stay as to Roszak to proceed herein. No one made any mention of potential counterclaims and amending bankruptcy schedules or bringing even to the bankruptcy court's attention that there might be counterclaims.

That's been pending for more than a year, and still to this date no one has gone in to alert the bankruptcy trustees, amend the schedule or bring the fact that these counterclaims are being made or could be made

to the attention of the bankruptcy court.

And that further point just highlights the points that Mr. Goodsnyder was making that not only did they act back then, at the time of the filing of the bankruptcy, as if there would be no counterclaims. Not only did they then proceed forward with the spandrel glass, et cetera, as if there would be no counterclaims, but even after the initiation of this litigation and the pendency of this litigation for some year and several months, no one has gone back in to alert the bankruptcy trustee or on the schedules.

That's classic estoppel. They cannot possibly take the position that they didn't know about potential counterclaims once the bankruptcy stay is lifted, and that's the final point that I would make, your Honor.

THE COURT: Anyone else what to add before I hear the response?

[No response.]

THE COURT: Okay.

MR. MOOTHART: I'll go through in the same order that Mr. Goodsnyder went

through.

As far as the standing, he said that we have not cited anything in our brief. We have cited cases in our brief, the Scachitti case, S-C-A-C-H-I-T-T-I, at 215 Ill. 2d 484, discussing who the real party in interest is; someone who, quote:

Has an actual and substantial interest in the subject matter of this action. End quote.

It is not Roszak that has taken an inconsistent position here. It is the subcontractors and material suppliers. They are saying on one hand Roszak is this shell corporation that doesn't exist. On the other hand, it's the insurance carriers that are really the real parties in interest. And they acknowledge that, and they also acknowledge that the liability insurance for Roszak and for TR Sienna are not property of the bankruptcy estate.

And so they have put forward that the real parties in interest are the insurance carriers. We agree with that. However, in the

cases that they cited, and I also cited them in our response brief, because they are actually favorable to Roszak, the Prudential v. Romanelli and the Oregel case.

They discuss that an insurance carrier does not need to be disclosed as the real party in interest until they make a payment.

And that is our position in this case. There's no question, given the discovery that's been produced in this case by my clients as well as other entities that are here today, who the real parties in interest are.

However, it is our position that we should not have to amend our counterclaim and add these insurance companies.

One is a practical reason. We have tendered to the defense to multiple subcontractors here and we are hearing back from some of them. I would have to amend my compliant every time there is a new insurance company that gets involved.

Secondly, it's extremely prejudicial. If we have to show up at trial

and say, "Good afternoon, ladies and gentlemen of the Jury. I represent Roszak/ADC. I also represent Fireman's Fund and Navigators" and possibly other carriers, as a counter-plaintiff in the case. When the other defendants in the case, they don't have to disclose the fact that they are being defended by insurance carriers to the jury essentially.

They're comes a time where Roszak would settle with the plaintiff and possibly sever off the counterclaim and try to pursue the counterclaim. Then, on that basis, I would agree that the insurance carriers would need to be disclosed because at that point they have suffered some damages. But what I'm worried about is their argument that somehow I need to disclose the insurance companies as the real party in interest. I file an amended complaint or an amended counterclaim, and all of a sudden they file a motion to dismiss saying, "Well, they haven't even made a payment yet, so they don't have standing there to even pursue a counterclaim." It just doesn't make sense. It's not practical, and it's really

inconsistent with the position they have taken in their motion to dismiss the plaintiff's complaint.

Their entire position is that Roszak/ADC and TR Sienna have all this liability insurance. Their position is that they're not a shell corporation. If they were a shell corporation, then the plaintiff could have a Minton claim directly against all of them, so that's the position they have taken throughout this case. They took it in their motion to dismiss. They're renewing it today in the 308 motion, and it's just inconsistent.

The fact is the real parties in interest are the insurance carriers, but they do not need to identify themselves at this time. There may be a time where we would have to identify ourselves -- themselves.

Getting to the judicial estoppel argument, and as I brought up in one of the last motion with the design professionals, our counterclaims are based upon a complaint that was filed in 2013 against our client. Our counterclaims didn't exist until then.

Counterclaims are derivative. That's why there's a different statute of limitations for counterclaims. They're derivative claims and they don't exist unless and until the original claim is filed against that particular defendant.

And I'll read very briefly, and this is from the Holland case I cited on page eight of my response brief at 992 N.E.2d 43:

Judicial estoppel is to prevent a litigant from, quote, "playing fast and loose with the courts," end quote, by intentionally taking contradictory positions in order to obtain an unfair advantage.

My client has not taken contradictory positions. The counterclaims that we have asserted in this case did not exist until the plaintiff's complaint was filed against us. And it is telling that the only case that they have cited in their position is Berge v. Mader. It's a recent case and it's a personal injury case. It was a personal injury plaintiff filed for bankruptcy, never disclosed the personal injury case during the pendency of

the bankruptcy, and then after the bankruptcy there was a motion to dismiss in the personal injury case. They have not cited to a single case that is even remotely close to this case, that is that even remotely close to construction negligence, subrogation or even counterclaims, and as far as the whole standing issue, they cited to two cases where the plaintiff -- it was simply a plaintiff wanted to sue someone after the plaintiff's entity was no longer in business. That's the cases they cited.

We are trying to pursue our counterclaims based upon the plaintiff's complaint against us. We are doing so for the use of benefit of the insurance carriers. We don't know what they're going to have to pay out, so right now listing them as counter-plaintiffs is just not prudent and it's not timely. There may be a time where their arguments might have more merit, but they do not now.

So I would ask that you deny their motion.

MR. GOODSNYDER: Judge, our brief is split into different legal theories in the alternative that each independently would support a dismissal, so they in and of themselves can form alternative basis for your ruling.

Counsel's argument, first off, as I said in sort of an analogy to the law of the assignments, essentially the subrogation rights, the insurance companies can't have any greater rights than Roszak/ADC would have, quoting Dix Mutual Insurance v. LaFramboise, 149 Ill. 2d 314, a 1992 Illinois Supreme Court case.

One who asserts a right of subrogation must step into the shoes of or be substituted for the one whose claims or debts has paid and can only enforce the rights the latter could enforce.

So, clearly, if Roszak/ADC doesn't have some rights against the subcontractors, their insurers wouldn't, so they don't get to -- also following up on that, even in the Indiana Harbor case, insurer subrogee could not

have made application of res judicata as this would afford the insured greater rights than the insured or subrogor.

So here there is no inconsistent position. We're saying as a reality they should have been disclosed. We're not saying in and of itself that had they been disclosed that they would have prevailed on it.

We're saying they should have been disclosed because Roszak/ADC has no potential liability whatsoever, and the authority that we cite in our brief is perfectly clear on that.

I also have a position in here that rejects the concept of prejudice that counsel's made, and it's unpersuasive to me.

Here this is a very sophisticated, multimillion dollar litigation. There is no possibility that Roszak/ADC has any potential financial liability in this case, and for that reason, under the authority, the insurance companies, although they have no greater rights than Roszak/ADC, would have to be properly disclosed.

So for the reasons -- I know it's

a lengthy brief and lengthy argument, for the reasons cited in the brief, at the very least we have the lack of standing issue because the LLC is involuntarily dissolved, and then we also have the interplay with the bankruptcy where this counterclaim -- one last thing, Judge. I'm going to read specifically item 21 on Schedule B, personal property, from Roszak/ADC's bankruptcy.

Other contingent and unliquidated claims of every nature including tax refunds, counterclaims of the debtor and the rights to set off claims. Give an estimated value of each. And the box "none" is checked. Never amended.

So they have been debating from minimum '08 on about construction issues with this building. They certainly were in control of it. In fact, before the board was turned over to the Sienna homeowners, Roszak himself was on the board, and in control of it, and as the minutes that have been party exhibits here show, all this was known back in '08.

So again, Judge, for the

reinstated before and you in the briefs, I'd ask that counterclaims be dismissed.

MR. BONANNO: Your Honor, I just have one point to add.

The comment has been made by counsel for Roszak that the Berge line of cases should not be construed to apply to a counterclaim.

I echo Mr. Goodsnyder's comment about the actual language of the schedules specifically identifying and listing cross-claims and counterclaims.

There is no authority cited by Roszak in any point in the brief suggesting that Berge and its progeny doesn't apply to counterclaims. Just a final point.

There is no authority suggesting that Berge is limited just to direct claims that a bankruptcy petitioner may have. It's clear that it applies to all claims.

THE COURT: Okay. All right. So as I went through the brief -- first of all, as to the argument as to whether or not you're a plaintiff or counter-plaintiff, I found that

entirely unpersuasive. I mean if you're a counter-plaintiff, you're prosecuting a claim, and even with your claim that it's derivative or things of that, you have your claim here you're pursuing against Wallin-Gomez, we have just talked about your going against Matsen Ford, you have your roof claims, things like that, so that was not persuasive at all to me.

So the next issue has to do with when you filed your petition of bankruptcy because I think this is about the most significant and telling thing, and you don't include an asset. These are not unsophisticated parties, and failure to include a counterclaim or potential counterclaim when you're already in litigation at the time you file the bankruptcy is quite telling, and I think that it is, in essence, playing a hide-the-ball with the Court, and therefore judicial estoppel applies, and the motion to dismiss is granted.

MR. GOODSNYDER: Thanks, your Honor.

THE COURT: All right. We are up

to --

MR. KONKEL: Brian Konkel for Wojan Windows. We joined the joint motion to dismiss the counterclaims, but just for the record I would like to have my supplemental motion heard in the event that there's an appeal on the other issue.

THE COURT: Okay.

MR. KONKEL: We filed an additional motion to dismiss based upon the UCC Statute of Limitations. Your Honor granted our motion on the UCC Statute of Limitations as applied to the plaintiff's claims.

THE COURT: Um-hmm.

MR. KONKEL: So now we are here before you to say that that same statute of limitations applies to Roszak's counterclaims.

The basis for our argument is that while generally Roszak would have two years from the date that the Association filed against Wojan, the exception in subpart C of 5/13-204 prevents that in that subsection.

In that subsection, Roszak only has the two years -- additional two years

statute of limitations for an indemnity claim only applies to the extent that the claims in the underlying action could have timely sued the party from whom indemnity is sought at the time that it subsequently filed that underlying action. Your Honor already ruled on that.

THE COURT: They can't. They didn't.

MR. KONKEL: So I guess I would just stand on my briefs.

MR. MOOTHART: Can I stand on my brief as well, your Honor?

THE COURT: Okay. That would be fine, and, as such, your motion to dismiss on the UCC Statute of Limitations is granted.

MR. KONKEL: Thank you.

MR. MOOTHART: Can I bring up one thing about not that motion but the last motion?

Given your ruling as to judicial estoppel, can I ask for leave to go into the bankruptcy court and file some type of a motion in bankruptcy court, reopening it, just as the plaintiff has done, to try to disclose these

counterclaims as assets.

MR. BONANNO: And, your Honor, my response to that is with all due respect to counsel, counsel has been a fair and cordial litigant throughout this time.

The time to do that was a year ago, and the point of Berge is you don't do it after the motion to dismiss has been granted. You do it when you're named in the case, you do it when plaintiff lifts the stay, and you do it when you know or could know that impending counterclaims may be coming.

So with all due regard to my able counsel who has been a fair and cordial litigant through this all, the time has passed for that. The motion should be --

THE COURT: Counsel, I'm not inclined -- I can shortstop this. I am not inclined to grant leave for you to go into bankruptcy on the record that's before me right now without a motion as to why you would be even entitled to get relief from the Court at this point in time.

And I think, also, that's a ruling

that has to go -- I think first you have to present your motion before the bankruptcy court I think first on that. You're bringing this out a little bit out of left field on me, counsel.

MR. KONKEL: If I could add one other thing. The Berge and its progenys, I want to keep, which was actually a subsequent amendment to the bankruptcy proceeding has no impact on the application of judicial estoppel.

THE COURT: Okay.

MR. GOODSNYDER: Just to clarify that would be a with prejudice dismissal, correct, your Honor?

THE COURT: Correct.

MR. SHAEFFER: We already heard HMS's motion, your Honor.

MR. MOOTHART: They adopted the subcontractors and material suppliers arguments as to --

MR. SHAEFFER: Breach of contract.

MR. MOOTHART: Yeah, the breach of contract claim.

THE COURT: So that should take

care of everything.

MR. SHAEFFER: Okay.

THE COURT: 308. Somebody want to do the 308 motion?

Did we do Champion? I think 308 is going to be the longer argument here. So I think we should do Champion first.

(Discussion off the record.)

MR. KEARNS: Christopher Kearns on behalf of Champion Aluminum.

MR. KRAUZE: Raymond Krauze on behalf of Sienna Court Condominium Association.

MR. KEARNS: Champion's motion to dismiss, which is before you, essentially mimics Wojan's motion to dismiss which has been briefed, argued, and you've issued a ruling.

The plaintiff hasn't added anything new in their response, so rather than rehash the same arguments, I would just ask that the motion be granted and the claims against Champion be dismissed with prejudice.

MR. KRAUZE: Your Honor, counsel is correct. Your Honor ruled on Wojan's motion to dismiss wherein --

THE COURT: The UCC Statute of Limitations.

MR. KRAUZE: UCC Statute of Limitations. Your Honor ruled in favor of Wojan and granted their motion to dismiss.

Counsel merely adopted most of the arguments set for Wojan's motion to dismiss.

Our response brief more or less is the same things we filed in Wojan, so unless your Honor is going to reverse herself --

THE COURT: It happened before, but I'm hoping, like I said, I can be consistent within several hours of myself.

And in this case, yes, your motion to dismiss is granted with prejudice.

MR. KEARNS: Okay. Thank you, and with that motion being granted, could I orally join Wojan's motion that was just heard, the motion to dismiss the counterclaim based on the UCC Statute of Limitations.

THE COURT: Do you have a --

MR. KEARNS: That same issue would apply to me.

MR. MOOTHART: MCH is a separate

separate issue, and I can bring that up later.

THE COURT: Right. Because I'm looking at status of 10/16 on that one. Your response to his motion to orally adopt Wojan's argument concerning the third-party complaint by Roszak, because I've just ruled that the UCC Statute of Limitations, and if I'm not, I may be mistaken, and please feel free to correct me, I thought Champion windows were even earlier in time at this job site than Wojan.

MR. KEARNS: That's correct.

MR. MOOTHART: I think what I will do is adopt all the arguments I made in my response to Wojan's motion to dismiss. I'm not waiving any right to appeal but I don't --

THE COURT: There's no need to.

MR. MOOTHART: I don't think that I need to brief that motion as long as you could take into consideration my written response to Wojan's motion.

THE COURT: I do. I take Champion's orally adopting Wojan's motion to dismiss the counterclaim, and I take your response to Wojan as being on the same legal

basis would be the same response of Champion, recognizing the facts are slightly different as to when Champion's materials even arrived on the job site, and then the reply would be the same as Wojan's, and therefore the motion to dismiss the counterclaim -- which count of the counterclaim was that on if you know. If you could just make sure you find that and put it in the order of Roszak against Champion is granted.

MR. KONKEL: That was Count 1 and 2.

THE COURT: All right. Very good.

(Discussion off the record.)

THE COURT: Just by my notes we are done with HMS. The only thing left is the defendant subcontractors' joint motion to certified questions for 308. That's all I am showing is left.

MR. BONANNO: I think that's correct, your Honor.

And I'm hoping that this is not going to be a lengthy argument, but we do need to hit the points.

THE COURT: Take your time.

MR. BONANNO: Your Honor, Steve Bonanno on behalf of Don Stoltzner Masonry Contractors, and while I'm speaking on behalf of my own client, this motion is brought by a group of defendants who we have been referring to during the course of the proceeding as the subcontractor defendants and material supplier defendants. And the record will make clear who those are all. But there's a number of them, and we decided for judicial efficiently and out of respect for the Court and counsel to file a unified brief on that, which is before you as well as the other counsels' briefing.

And I guess that kind of brings one of the important points home. This is a collective effort by the vast majority of the parties before your Honor to bring this important issue to the attention of the first district appellate court, which it is our position, remains unresolved. And that's the first element of the Rule 308 issue. Is there a substantial dispute as to a question of law. And I submit to you that that's probably going

to be the easier of the two things that you have to decide. Is there substantial dispute of a question of law?

Well, what is the question of law is the first question. Does the fact that Mr. Moothart's client Roszak has insurance, and he identified two carriers that are providing the defense for his client in the proceedings. Those are in the record already, but there's no doubt that there is insurance providing for Roszak and perhaps more on the way. Just got additional tenders out there.

(Brief interruption.)

MR. BONANNO: So the one part is undisputed is there is insurance provided by at least two carriers for Roszak and possibly more on the way. And that is the meat of the question that was originally briefed and presented before you on the joint subcontractors' and material suppliers' motion to dismiss pursuant to 619.

As to whether that existence of that insurance constitute recourse for the purpose of a Minton test at page 584, Minton

decision, where the word "recourse" is used.

This word recourse, insolvency, and we go back and forth with Justin or the plaintiffs as to which is the decisive test. It's a substantial question of law. Does the existence of that insurance constitute recourse, simply put, and a question for the appellate court to answer.

We feel that the existence of that insurance does constitute recourse, and therefore plaintiff would not be able to proceed against our respective clients.

Plaintiff feels that the test is insolvency and refers to Pratt III for that issue. We discussed that all at length in the briefing on the original motion, and, your Honor, frankly from my bench view during the course of that argument I wasn't sure which way you were going to go on the ultimate ruling until the very end, and I don't think you broadcast your intentions, but there were points in the hearing that we were thinking, "Well, maybe we have got it," and other points, "Well, we're not sure."

So this truly is a question of substantial dispute, and, in fact, I believe that the hearing transcript recounts that, and I cite it in the brief. I don't need to read it into the record here, but I think your Honor even recognized that the appellate court has created some confusion on this issue, perhaps unintentionally so, perhaps just because the novelty of this specific issue has not been presented to the appellate court yet. Perhaps because it just hasn't made its way up yet. Maybe there are other parties out there briefing it in this very courthouse, but it's a question that's not decided, that hasn't been resolved and that remains uncertain.

In fact, the very line of cases relied upon by plaintiff, the Pratt line of cases, utilize how Pratt III to say that well because the statute of limitations might be defined for purposes of, quote, "insolvency," and therefore having having a nice bright line point when he can foresee against subcontractors for the purposes of statute of limitations.

The Pratt III case just makes no reference whatsoever to the issue of does insurance constitute recourse. Or even is recourse still important. It doesn't even address that. However, Pratt II does and several other cases.

Minton mentioned it itself on page 584. The Dearlove case cited in our brief still uses the concept of recourse at page 1143, and the Pratt II decision, just a mere matter of two years ago, makes mention of the importance of recourse at page 290.

So it is important, recourse is still a part of the test and the availability of quote, and I use the quote from the 2012 decision of Pratt II, any recourse, not full recourse, not partial, but they use the term "any recourse," and so while I keep saying the availability of insurance is the question that we would send up to the appellate court.

There is yet a second, but Mr. Goodsnyder has been ably presenting the briefing up to this point as to whether the withdrawal of the 300 some thousand dollars

from the bankruptcy estate constitute some of that quote, "any recourse," and that has been fully briefed, fully discussed. It was raised in the motions to dismiss, counsel has addressed it. I believe the record on appeal would be clear enough for the appellate court to address that legal question as well.

And so we've --

THE COURT: And you're naming that just for purposes of the appellate record, the warranty fund?

MR. BONANNO: Yes, I am.

THE COURT: Okay.

MR. BONANNO: And I realize that appellate court could be reading this very transcript in some sort period of time, and I cite the pages I cite the record just for that purposes just for clarity of the record.

I know your Honor has reached this element and is intimately familiar with this case.

We feel that based on all of that there is a substantial dispute as to a question of law. We feel that the record made in the

briefing and hearing on the motion to dismiss made that clear.

We believe your Honor's made comments in the record that are consistent with that, and we believe that the appellate court would agree and allow that to proceed forward.

The real part that I think we need to discuss now is does sending this up now materially advance litigation, and the courts require, and in fact, the cases cited by counsel require that we make a written finding that it be in the record as to why this would materially advance litigation. I suggested we do so.

We are about to embark on hundreds of thousands of dollars of discovery, years of discovery, years of depositions. I count maybe a dozen parties here, I haven't counted them specifically, and the time is now to decide what this legal issue is before we now embark on all of that discovery.

It will shape the litigation, it will direct the parties, it will give us guidance not only on the pleadings but on the

discovery to be conducted and furthered on the possibility of potential early resolution.

If the appellate court comes down one way, perhaps counsel may see his case in a different light. If it comes down the other way, we may see it in a different light and we may be at a resolution opportunity.

That issue not only shapes the legal responsibilities, but the direction of litigation, the expense of litigation and possibilities for resolutions are that -- I count four reasons why it materially advances litigation so far.

Some of the cases that both counsel and I have cited, you know, is this an ancillary issue to the litigation? No, it's not. It's the core of the litigation.

Counsel cited a case called Voss in his briefing, and when I read through it I was like really, was that -- that's not really what we are talking about here. Voss was about the trial court's decision to exclude expert witness testimony from a matter pending before the Court. It was a discovery matter.

That went up on the 308 certification, the appellate court said:

No, this really isn't the kind of thing that should be up here for 308 certification, wait until a case is done, wait until the juries come back and made some kind of determination based on...

That was an expert issue, it was a discovery issue. Is that the kind of thing that should go up? No, it doesn't -- it didn't materially advance the case. It didn't form a key issue in the case to decide the direction of litigation.

So what is the other case that counsel's briefings cite? They side this Kincaid case, which was a statute of limitation issue in regards to -- I'm sorry. It was a question of expiration of the statute of limitations issue, and why did that get knocked up at a court, first district appellate court as an improper 308 appeal?

Well, it was because -- and this is why I'm bringing this forward as to why we have to make these findings as to why the 308

appeal materially advances. Kincaid said it can't come up to the appellate court because there were not written findings as to why the appeal materially advances litigation.

They didn't find disputes under statute of limitation was an improper 308 appeal. They said that there just wasn't a proper finding as to why the appeal materially advanced the litigation.

So, you know, what's a third case that they cite? Morrisey? Okay. Morrisey was a question of -- sent up to the first district, sixth division on a 308 appeal after the denial of the summary judgment motion. That's not what we have here. All right.

We haven't gone through all the discovery, done all the depositions and then brought a summary judgment motion before your Honor. The appellate court said where this is an improper appeal. Why are you bringing a 308 appeal up on a denial of a summary judgment motion. It didn't materially advance things and more importantly, the Court said in its ruling in Morrisey is that there was a huge

question of material fact, that as to the application of the governmental immunity that precluded the 308 appeal because the Court said there's this question of fact. This isn't just a question of law.

Here we are presenting just a question of law. We're not asking for factual findings. We're not going to ask the appellate court for factual findings and we don't feel that the factual findings or any factual findings that might be suggested by plaintiff would be dispositive in this appeal.

The question is does insurance coverage constitute recourse? Does the withdrawal of the $300,000 from the bankruptcy estate and the warranty fund constitute any recourse? Those are legal findings. They are not factual findings.

So the cases cited by counsel for the proposition that this is not a proper 308 appeal don't hold water. Well, what are the cases that we've cited that do find that this is a proper grounds for appeal. I think that's important to consider.

We cite at Pratt III, that's a construction defect case. It was a question of law. It focused question of law in a motion to dismiss phase. The appellate court said, yes, this is a proper 308 appeal. We submit that that would be applicable here. The question was answered and the certification by Judge Bartkowitz was sent back down.

What's the next one? Walker v. Carnival. An appeal from Judge Myron Johnson who certified a 308 appeal on the denial of the motion to dismiss. The appellate court answered it and the appellate court found that this was a proper 308 appeal.

The appellate court sent the question or the case back down. That's case number two. Proper procedural basis just like we're here.

So what's the next one? Washington court cited in the briefs an appeal from trial Judge Gomberg on a denial of a motion to dismiss. It was in a construction defect privity case as well. It's cited in the briefs, I'm sure everybody's familiar with the

Washington case.

The case went up on appeal. The Court found it was a proper 308 basis, answer the question, send it back down so the parties could proceed with their litigation.

Case number three in favor of finding a 308 appeal at this stage. And the final one that we cited was the Dearlove case, which was a Minton/statute of limitations issue in the construction defect litigation context.

In Dearlove the appellate court found that the denial of the motion to dismiss could be sent up on a 308 basis and the Court issued a ruling and found -- that gave guidance to the trial court.

One, two, three, four cases directly on point, denials of motions to dismiss sent up on 308 grounds and appellate court kept the case in its discretion and ruled on them all. Cases cited by opposing counsel have no application to the matters here I've cited, and distinguished each one of them and, you know, while I respect counsel, their briefing and their ability, they don't have

applicability here.

So all in all, your Honor, it's our position that it's time to send this issue up to the appellate court. It's time to take the questions that we've crafted in our motion and if tweaking needs to be done, we could work on that with counsel to polish the issue to a crisp form, but that could be done promptly.

But I feel that the questions, as phrased, are appropriate. The answers to those questions will materially advance this litigation, particularly in light of your Honor's prior rulings in this case.

The counterclaims by Roszak are now dismissed. The various other claims are ruled on appropriate for 304(a) language. This case, upon the granting of this motion, will take a number of issues up to the appellate court and allow them to respond to those motions that may have been granted on the 304(a) basis as well as this issue on a 308 basis.

And if it comes back down, we'll have the guidance and direction on the critical

issues of this case, it would streamline the litigation. I know we've tailored the pleadings and direct discovery. Thank you, your Honor.

MR. WEISBERG: Your Honor, Justin Weisberg on behalf of the plaintiff, Sienna court.

It's our position that you're ruling following what is now plans to Pratt III clear Illinois law.

I notice Pratt III wasn't in the original motion, it was in the reply but even in the reply they only notice that one of the questions that was certified. The second question that was certified is on -- off course with this judge's ruling. With respect to the Court never addressing the solvency or ever mentioning recourse, I'd like to take a quote right out of Pratt III:

EZ Masonry contends there remains uncertainty as to whether the determining factor, whether a purchaser can proceed against a subcontractor is, quote, "solvency," quote, "no recourse," or, quote, "the viability of a

corporation."

After review of those cases, we strongly disagree. The law in Illinois is clear. An innocent purchaser may proceed on a claim for the breach of the implied warranty of habitability against the subcontractor where the builder vendor is insolvent.

They clearly mentioned recourse in that. Now, I'm going to address that first part and that's what made it so clear between that initial motion to stay and then this Pratt III came down about being a substantial ground of -- a difference of opinion during the contractor arguments.

The subcontractors, the material suppliers conceded that that is a multimillion sophisticated litigation. This court has made rulings that could be considered first impression. The UCC, does that stretch beyond the Condo Act?

This ruling here we have much more guidance than any of those other rulings, and in the era of both efficiency and cost effectiveness and hopefully using the judicial

system to get a good result for all parties involved. Those could be found liable for defective construction. Those trying to rebuild the condo, an appeal at this point would just extend that litigation, because we were very confident that the Court was right, the Court read Pratt III. Pratt III was clear and Pratt III gave the guidance.

The second question in the reply, and I just want to clarify because I know the Court's read the briefs so I just want to clarify some things in the reply that I think are incorrect.

First of all, there were two questions in Pratt III. The one was a statute of limitation question. The second one was whether the condominium association may pursue its claims against EZ Masonry in this cause when Platt is insolvent but is in good standing with limited assets. That was the second certified question.

It's very close to the certification they are seeking today where they're asking for admitting in Pratt II

there's potential liability insurance coverage of the general contractor and/or developer constitute recourse thus precluding a property owner's lawsuit for the breach of the implied warranty of habitability against subcontractor and material supplier defendants.

In this case, certainly more than Pratt III, no one disagrees. In fact, you just heard the argument that the developer and the contractor are insolvent. In fact, they're dissolved and insolvent, and you just heard the arguments they are not in good standing. So this is much further than Pratt III and follows that reasoning.

The Court's saying we next turn to the second certified question. This is Pratt III again, whether the condominium association may pursue it's claim against EZ Masonry when Platt is insolvent but in good standing with limited interests.

EZ Masonry contends that it would be unfair to permit the condominium association to pursue its claim against EZ Masonry where Platt is a viable corporation that has

succeeded in defending itself in this litigation for years.

In their reply, defendants ignore the fact that there were two questions -- oh, and this is the second question. And in this question the Court found they made the determination that the law in Illinois is clear. An innocent purchaser may proceed on a claim for the breach of the implied warranty of habitability against the subcontractor where the builder vendor is insolvent. That's what we have here, the builder vendor is insolvent and the Court denied the motion to dismiss.

I think Pratt III gives the guidance to the Court, and I think to send this up on a 308 would be to bring a case that's very similar to Pratt III. Now that Pratt III has come down, the certification with this 2013 case, we get into a whole new area of law.

Pratt III did point to it, it said insolvency and in this case we clearly have insolvent builder and vendor. I'd like to clarify a couple of cases they cited, one was Dearlove. And they contend that Dearlove

states that:

The plaintiff cannot proceed against the subcontractor, material supplier, defendants pursuant to the implied warranty of habitability if either the developer or general contractor has liability insurance available to serve as a fund which the claimant could have recourse.

Dearlove didn't say anything about insurance. Dearlove was purely a statute of limitation case. Maybe there's some confusion between the Pratt III and their reply and the Dearlove in their motion. But all Dearlove said was, and this is its holding:

The plaintiffs had two years from the time they knew or should have known of the general contractor's insolvency and what had happened was they originally sued the developer and the suit's going on and then they find out the general contractor's insolvent so they sue the general contractor, and the defendant in that case said: Wait a minute. Statute of limitations gone.

And they said why. Well, they

said we knew of the damage before two years ago but we didn't know the sub was insolvent. So in Dearlove they said:

Okay. Well, there's a cause of action until you learn that that sub is insolvent. It had nothing to do with recourse, it had nothing to do with insurance.

And they certainly didn't say -- I think it's paragraph 6 of their motion that if there's insurance you can't submit 'til there's no insurance.

Washington court, and I know facially if you look at that paragraph, they say: Liable concern is recourse. I would say to the same extent viable concern of solvency. Just Pratt III. In that case the Court only talked about insolvency and that was a case where the -- it was a 308 case and the Court said they should have dismissed that.

So the reason they did was the subcontractor and the word used was insolvency, first said that general contractor was insolvent at the appellate level six months after the defendants replied. And they said,

they used this word, great Latin word for lawyers, the course of the record. That it's not before us.

And there are all these other issues about -- it was a 1986 case and we were just getting into the privity arguments, and Rodowitz was one of the first implied warranty habitability arguments I think maybe came down in '83, and they had all these argument about the economic loss doctrine and whether you're limited by that.

And in that, in the very end, they talked about insolvency and they said:

You never said the general was insolvent until six months after the reply brief. It's not before us, it's the force of the record, and therefore you never established this insolvency.

Again, at least the Washington court viable concern and that word was used, went with solvency, but with Pratt III I think Pratt III is pretty clear. I think the judge's ruling was very clear and, therefore, I think a 308 certification would most likely delay us by

a year or a year-and-a-half at which time the appellate court would say:

We ruled on Pratt III. You're asking us to basically make the same determination. In that case that was a going concern that was defending itself but the claims against it were much greater than its assets and as soon as you can establish that you have the right under Minton to go after the sub.

In that case, I even note that the parties weren't even dissolved. You've heard extensive argument how the developer and contractor are dissolved in this case, involuntarily dissolved.

So I think that this case falls right into Pratt III's fact pattern, and I think we would just spend a year-and-a-half arguing about Pratt III and having the Court possibly say: We ruled on this in Pratt III.

As for going forward with the litigation, I think that it might have even been noticed in this court when this action was first filed and all these parties came in here

that these actions in many, many cases or almost every case says.

We talked about years of discovery and extensive litigation. I'm hopeful that we can find a solution for the client in this case, my client, from my view, and it wouldn't be a great solution for my client as they're trying, they are fixing this building. They have hired an architect, they're doing intermediate repairs. They borrowed every cent that that condo can borrow which isn't enough to pay the $4 million in estimated repairs for beams that go from inside and out and for the spandrel glass, for the roof that leaks that they need gutters, for the way the windows are connected. They have to fix it. They're undergoing it.

The best, most efficient solution is once we are all in here I'm hopeful that everyone's not into litigating this for three years. At least from the plaintiff's sign we would be very motivated to reach a mediated solution to get everyone involved, to get -- those subs know what they did wrong. They can

look at the reports, they know exactly what they did to go out to the building and to say you know what? This is a proper fix and we disagree with the fix.

This is a betterment, this isn't a betterment. This isn't something you have to do or you're not going to be able to live in this place. And say oh, yeah, that was our work and okay, we'll put in a portion and hopefully with everyone trying to lift the wheel before we litigate for the next four years and expend all these funds, which I think if we go on appeal, we'll end up coming back and they'll say: Pratt III, go ahead and litigate.

We can get everyone together and they can say: Let's get this building fixed, let's get it livable and let's get the solution for them.

And those issues, I don't think the discovery is going to have to be too overwhelming. I'm dealing with the very substance of the construction.

I'm hoping we don't have to have a

trial with ten different parties about why this building is defective in ten years, and I think the Court would be right that the majority of these cases set, that maybe even 90 percent of them settle and my client's not unreasonable. My client's just trying to get livable spaces, so going through full appellate belt briefing for a year and a half in my idea at this point isn't efficient.

May there be appeals in the end? Yes, the -- with the rulings with the supplier, the window suppliers, you have insulated windows. Yeah, does the UCC apply over the Condo Act statute of limitations? That would be a question of first impression.

Does -- right now with respect to the architect I'm told by other parties that they -- the issue about whether the implied warranty applies to an architect has been argued at the appellate level for 120 days since briefing so we're waiting for a decision.

That may not go on appeal during the litigation, we'll see what happens. Those are issues that we would look at to appeal.

Whether the Court would refine what it decided already in Pratt III, given these completely insolvent dissolved entities, I don't have much doubt that the Court was completely right in its ruling.

I am very confident that the appellate court would say the Court was right in its ruling and that Pratt III has settled that issue. So we would just ask to keep things efficiently going to allow us to move forward. We started with discovery.

If the parties want to talk about mediation and really start looking at the defects and see how we can get these people in a house that they can live in without it getting wet every other day, that would be a nice way to go. So we think the best way to a resolution is to keep going forward.

Thank you, your Honor.

MR. BONANNO: Very briefly, just to reply on a couple of points that Justin made.

Pratt III itself, Pratt III itself continuously refers to the question of

recourse. And I don't know that I need to read it into the record, but we're talking about pages 252 to 253.

In discussing Minton, the Pratt III court indicates that Minton itself extended the warranty to subcontractors where building-vendor is insolvent and the purchaser has no available recourse against it.

And it goes on further down that same page and makes three additional comments about the importance of recourse. So why is Pratt III not dispositive of this issue?

Your Honor commented on pages 88, 89 and 90 of your original ruling. Pratt III was about statute of limitations, and you need to have an accrual date that doesn't create an entire bundle of additional litigation.

Insolvency is a definable point that the appellate court felt would be a good time to determine accrual of statute of limitations. It didn't talk Pratt III. It didn't talk about the existence of the right or what the merits of that right are. And that's where the question of recourse comes in.

Minton said both. Minton said:

Insolvency and recourse, any recourse and the following cases did discuss the important of recourse including Pratt II and even Pratt III.

There is uncertainly. We all know that. We wouldn't be briefing this back and forth from the very inception of this case with a motion to stay, which notably counsel took an appeal from pursuant to Rule 307. He wanted this issue up on appeal as much as the rest of us did, at least at that time until things maybe went his way for a little while.

Now at this point we are dealing with the starting of discovery and hundreds of thousands of dollars and discovery and depositions and reams of litigation only to be followed perhaps by a summary judgment motion by all of these parties and a trial, and then an appeal.

Finally, to get to this issue, your Honor, of whether insurance constitutes recourse. And then perhaps to come back again. So, you know, this isn't putting the cart

before the horse. This is feeding the horse before it goes on to the field and can pull the cart.

We need to know the answer to this issue before we move onto the litigation. And if the answer to this question from the appellate court comes back one way, it could change the litigation one way. If it comes back the other way, it changes it the other way. And it defines where we go from here.

To take the time to resolve this important issue now is a worthy investment and may actually end up benefitting counsel in terms of resolution and moving forward with his clients that are having the water problems.

On the merits of it, he brings up the merits of it. My client, of course, denies that it did anything wrong. It conformed with the masonry plans and specifications as Roszak presented them to them, and there would be a vigorous defense on it, but we should do this legal question first to know whether or not we have responsibility directly to them, whether or not the appellate court agrees with you on

the motion to dismiss the counterclaim.

We need to shape these answers and get them now so that we're not going back up and down like the parties did in Pratt I, II and III. Let's do it now, let's get it up there, let's resolve these issues.

And if we're coming back down, let's do it in an orderly fashion. That's why this answer will materially advance the resolution of the litigation.

Thank you, your Honor.

THE COURT: Okay.

MS. DE LA TORRE: Jasmina De La Torre on behalf of Tempco.

Your Honor, I just want to say counsel stated that the subcontractors know what they did wrong, but I don't think we all have to chime in and say we don't.

Tempco, and I'm sure most of the other subcontractors don't know what they did wrong because we didn't do anything wrong.

So -- just so there's no silence on at that point and also just to underscore the discovery point, coincidentally, even

though counsel is arguing to you today that Wojan wanted to find some other way to resolve this hearing. This is a motion to compel brought at the very first possible opportunity, and your Honor, can see I think it's probably in your stack, the pages and pages and pages of discovery that have been already issued so you don't have to speculate as to the scope of what this is, the very first get out of the gate is pages against all the various subcontractors, so just to underscore that point, your Honor.

THE COURT: Okay. All right.

First of all, it has been argued to me not only in this courtroom but I think specifically on this case that after Pratt III, recourse is out of the picture, has been actually stated in argument before me.

And I've always struggled because I think that recourse is still part of the picture, and I think Pratt III didn't properly address, to my satisfaction, maybe the appellate court believes that they have been clear as glass.

I think it's been clear as mud and

I think that there's a tremendous amount of litigation occurring in this courthouse and throughout Illinois concerning this exact issue, causing many parties great expense and it needs to have clarity.

This case I think for the first time, whether through happenstance, through teeing up motions, I think given the fact that many of the parties here have gotten 304(a) language today or at least they had it in their motion when I granted their motions it included 304(a). It wasn't really argued.

So we already have a body of litigation on this particular case ripe to move forward to the appellate court. I think to bring as much to the appellate court's attention on this case and to address issues that I do not find are clear, I don't think Pratt III has been as clear because it didn't directly overrule other cases that talked about recourse.

If they really believed that insolvency is the only issue and we need to provide an avenue for individuals to go after

and collect and be made whole down the road, then perhaps it needs to be stated as clearly as that. That recourse is -- no longer matters so we're moving that from being a component.

But Minton said insolvency and no recourse, without any recourse. Here we have been presented -- the Court's been presented with four questions. I did have a little bit of drafting on the questions that were presented. And I do believe that, as counsel said, with -- as Kincaid I do have to make a written finding, but just for the record today and arguments of counsel, I'm looking in this courtroom that I have numerous parties in here.

I've already mentioned the expense of the litigation, and we look at the hourly rates that these attorneys are entitled to charge and their clients will be paying for. It's an expensive proposition to move forward with this many parties and the cost of the litigation.

It also is logistically difficult to get this much. I think answering these questions will direct the litigation. I think

depending on which way the answer comes down, it will definitely lead to, if not an early resolution, it will materially advance the litigation, and for those reasons I do find that 308 questions should be certified for interlocutory appeal.

The questions as drafted state when a developer -- I think it is important to include in that an insolvent developer, because we don't -- the issue here is we've got an insolvent party, that's not in dispute here. It's really do we want to see does recourse matter.

And/or an insolvent general contractor have liability insurance. Does the Minton exception allow a lawsuit for breach of implied warranty of habitability against subcontractors and/or material suppliers which are not in privity with the property owner.

Does anyone have -- as phrased with the insolvent, does anyone have an objection to that question? Did you want to go back and work with counsel on tweaking questions.

MR. Weisberg: I mean look, I mean with the phrase "with the insolvent" I think it certainly really clarifies the whole insolvency versus recourse question directly in front of the Court as that --

MR. BONANNO: And I believe --

MR. WEISBERG: I would say Pratt III, that paragraph I cited I thought it was clear, and I would admit, I thought Pratt III extended Minton because that wasn't a -- that was an insolvent builder, but it wasn't a dissolved builder, and Minton was dissolved and insolvent.

So but that -- with the writing I imagine that's probably pretty close. I guess within seven days we can see.

MR. BONANNO: Your Honor, I would agree with that. To -- and can we just go back and check with our appellate department to help craft this motion, and I can -- the group of us can confer with Justin and plaintiff's counsel.

THE COURT: Okay.

MR. WEISBERG: We are going to say objection on appeal, we're going to say: Of

course, that it wasn't properly sent to the appellate court.

THE COURT: I understand. I'm not requiring anyone to waive anything or not preserve their rights to object to anything.

MR. BONANNO: And I'm not suggesting that by participating in a crafting of an appropriate question for appellate review that Justin is somehow waiving his right to object to a 308 review, although I think it's in his client's interest to have it reviewed just as much as ours.

THE COURT: I'll say this:

Quite frankly, I think when you're taking an issue like this that all the attorneys here are doing one of the requirements as attorneys which is actually assisting the Court in resolving issues which many -- unfortunately people get so caught up in litigation they forget that -- one of their obligations as attorneys.

So I actually appreciate that you're going to work together to craft appropriate questions for the review.

Yes, counsel.

MR. MOOTHART: If we are going to be having the parties get together to try to work on language can we possibly defer the 304(a) language to some of these other motions that were granted today otherwise I'm going to have a deadline rolling.

MR. WEISBERG: On us as well. I'm hopeful that while it's interlocutory and we'll talk about it, but I'm hoping if there's going to be 304, the issue let's say with Wojan and Champion which would -- as a matter of right I imagine if you grant that would go up, an appellate court might want to look at it all together.

THE COURT: Um-hmm. They can handle all the different motions in one fell swoop like I did today.

MR. MOOTHART: But what I'm saying if you grant 304(a) language today --

THE COURT: No, I agree and so what I think we should do, you've asked for seven days to go back and confer with your appellate department so that you can craft the

language and work together.

Is seven days reasonable? I don't want to drag this out too long because there are attorneys here who are chomping at the bit --

MR. BONANNO: I'd like to do it in seven days because I start a three-week trial shortly after that.

THE COURT: Okay.

MR. GOODSNYDER: The only thing is to come back in I'd ask for Monday the 20th.

(Discussion off the record.)

THE COURT: The 20th.

MR. MOOTHART: So the request for all 304(a) language, it should be deferred until this next hearing.

THE COURT: 304(a) language is granted but stayed until the 20th because that's the day I'm going to enter the certified questions.

MR. KONKEL: So you're saying that that will be the deadline?

THE COURT: That will start the...

MR. WEISBERG: I know everyone

wants certainty and they want to hear it's granted. The way appellate courts can sometimes be is there a chance you could just leave your decision knowing you're going to grant it so Monday the 20th...

THE COURT: We have the 30 days here, and also can you get me -- if you've agreed on these questions, so that we can have that -- the writing and the basis.

Are you also going to include in -- with the questions the bases that I've stated on the record today?

MR. BONANNO: We'll get an immediate on the transcript, assuming our kind court reporter can help us out.

***

MR. GOODSNYDER: Counsel can take the lead on that just addresses everything that you found today, and just say all matters are entered and continued to 10/20 for entry of an order consistent with today's rulings, and then that starts the clock and then you can circulate that.

MR. BONANNO: Take the findings

that you stated on the record, put them in on the material --

THE COURT: And then everyone can make sure that by the rulings I've made I've addressed everything that you had in your motions, and then you can have a written order for you also reflecting that if you orally joined in Wojan's motion, if I have the right defendants.

MR. KEARNS: Right.

MR. MOOTHART: We are entering learing on order today?

THE COURT: Yeah, the order today -- I think counsel had the right idea.

The order today is the order will be entered on 10/20 consistent with the rulings the Court made on the record today, in essence, you know, indicating the granting of all these motions that I've granted and knowing there was purpose on the others.

MR. BONANNO: And for clarity, I know you gave us some suggestions for a question to be sent up.

There were two questions of that

flavor about the insurance. Second two questions were about the warranty finding. What's your position on that?

THE COURT: I had on that:

"When a plaintiff has recovered fund from a warranty fund set up by the now insolvent developer with sales proceeds is property owner permitted to proceed against subcontractors and/or -- and then as the other one under Minton and Pratt II does recovery -- my only concern about this one is do we really want to limit it to Minton and Pratt II because we discussed today Pratt III, and I basically said that I think they really need to -- I would hope that the appellate court at this point in time would look at the issue and maybe say it's clear for all the parties that its insolvency and recourse, and any recourse constitutes it whether it's insurance proceeds, warranty funds or the others' piggybank.

(Discussion off the record.)

MR. BONANNO: Just for clarity of the record, the two questions that you're referring to on page nine of the motion for

certification were lettered A and C subject to the suggested revisions that you just made.

THE COURT: Right.

MR. WEISBERG: And I just have one issue of clarification. If Wojan's here and Champion's here, they were seeking 304(a) language. Is that both with respect to --

MR. KONKEL: Yes, with respect to the plaintiff's compliant as well as the counterclaim by Roszak.

MR. WEISBERG: Okay. So --

MR. KONKEL: It's the same issue.

THE COURT: There hasn't been 304(a) yet.

MR. WEISBERG: I just wanted to make sure since we didn't have any record on it that -- we'll put in the order we circulate that --

MR. KEARNS: And Champion would make the same request.

MR. KRAUZE: Just for purposes of entering an order today, we are going to say that we are going to enter on order consistent with the findings and rulings today on 10/20

and then strike the October 16th court date.

THE COURT: Right. And the motion to compel at this point in time, we'll sort everybody out and everything, I think you're going to -- I can't remember who it's against.

MR. KRAUZE: It's against Clearvisions, Stoltzner and Tempco.

THE COURT: So Tempco everybody's out. So yeah, motion to compel is withdrawn.

MR. WEISBERG: Or stayed with the 308. The Court can go forward or the Court can stay, and I guess you'll see decide that on Monday.

MR. GOODSNYDER: I was going to address the motion to compel, just the sufficiency of it on its face, so it's obviously without prejudice, but if you withdraw it, then when the case comes down however it comes out --

THE COURT: I'd rather not have a motion hanging out there while this is going up, so that they can deal with that and I know that we are basically leaving this case, you know, nicely boxed up on a shelf and then

depending -- it'll come back from the Court one way or another giving us guidance, so why don't you withdraw without prejudice, and then we'll see where we are at.

MR. WEISBERG: Then the only other issue is we are going to be circulating an order. I know there's some issues that are unaffected by the appeal. Some issues that are. Is the Court going to stay the action during the appeal or are we going to move forward?

MR. BONANNO: I think that's the whole point of going up, so we're not embarking on all of this expensive discovery in the meanwhile.

MR. KRAUZE: 308 doesn't require that the case be stayed. The interlocutory appeal may proceed forward with the case while it's up on appeal.

THE COURT: I understand that, and my thought is part of my finding today was that the expense for all the parties.

If it's not stayed, these attorneys then and their clients have to be

full participants in any discovery and anything moving forward even while the issues that -- the questions I certified for appeal are being reviewed. So it really kind of undermines the whole reasoning of trying to avoid undue cost and expensive litigation.

MR. BONANNO: Finally, your Honor, as to the other two questions, B and D, I think I can recraft those two.

THE COURT: So you went to A, B, D on your conclusion, and I had gone actually on 8.

MR. BONANNO: Okay. I'm looking at the motion. I think you may have the reply. I'm not sure.

THE COURT: I'm looking at your argument. You're looking at your prayer for relief.

MR. BONANNO: So referring to what your Honor was referring to earlier, it's paragraph 8A, B, C and D on pages 4 and 5 of the motion for 308 certification.

I guess my point was you commented on questions B and D that the Minton and Pratt

language should come out, so we'll recraft those two to reflect that.

THE COURT: Yes. And also you want to make sure that it talks about insolvent so that we know.

MR. MOOTHART: Your Honor, I have a couple housekeeping matters.

MCH Enterprises, as you know, filed a motion to dismiss. I've spoken with their attorney just last night. We resolved that issue. We are going to nonsuit MTH today. We have an agreed order.

The other issue, at the last status hearing I added Hillside Industries as a third-party defendant on behalf of Roszak, and I have not yet served them because I actually -- I got leave to issue summons against them. I had the proper registered agent on the summons, and the Cook County Sheriff served the wrong agent, and the agent sent me a letter and said, I'm not even the agent on your summons. I had nothing to do with this, so I don't -- I know you've ruled with respect to my counterclaims, but I don't want any statute of

limitations or service issues to just be hanging out there while this case is up on appeal.

So as far as this is concerned, I would like to probably reissue summons to Hillside Industries.

THE COURT: I have it stayed until the 20th, so it shouldn't take them that long to serve the proper agent, if they have the proper agent --

MR. MOOTHART: Okay.

THE COURT: So go ahead, just so that you can get service on that until the order gets entered on the 20th.

MR. MOOTHART: Okay. So I have leave to issue alias summons against them within a certain amount of time, seven days?

THE COURT: I'd get it out really quickly because it's coming back on the 20th. Did you go with the Cook County Sheriff?

MR. MOOTHART: I did and they just served the wrong agent.

THE COURT: Either go with the Cook County Sheriff or it's a drop-off order to

get a special process server if you want to get one in tomorrow morning that this thing has to be noticed up against --

MR. MOOTHART: I'd rather do an alias summons through the Cook County Sheriff. Hopefully, we can get the right person.

THE COURT: Okay. They should be able to do it.

MR. MOOTHART: Can I put it in today's order?

THE COURT: Sure.

(Time noted: 12:52 p.m.)

STATE OF ILLINOIS)
) SS:
COUNTY OF C O O K)
IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT - LAW DIVISION
SIENNA COURT CONDOMINIUM)
ASSOCIATION, an Illinois)
Not-for-profit corporation,)
Plaintiff,) No. 13 L 2053
)
vs.)
)
CHAMPION ALUMINUM CORP., a)
New York corporation, f/k/a)
CHAMPION WINDOW AND DOOR,)
et al,)
Defendants.)
----------)
HMS SERVICES, INC., an)
Illinois Corporation, d/b/a)
HMS ENGINEERING, CHAMPION)
ARCHITECTURAL WINDOW AND)
DOOR, a New York)
corporation, TR SIENNA)
PARTNERS, LLC, an Illinois)
Limited Liability Company,)
ROSZAK/ADC, LLC, an)
Illinois Limited Liability)
Company,)
Respondents.)

REPORT OF PROCEEDINGS at the hearing of the above-entitled cause before the Honorable Margaret Anne Brennan, Judge of said Court, at the Richard J. Daley Center, Room 2307, on the 2nd day of June, 2014, at the hour of 2:00 p.m.
Reported By: Melissa C. Guandique, CSR
License No. 084-004335

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(Whereupon, the following proceedings were held in open court:)

THE COURT: Do we have everybody? I think we have everybody here.

All right. Rather than have you all stand up at one time -- did you have a suggestion of seeing who goes first? I'm waiting for my law clerk to come back with the calendar. Why don't we begin with TR Sienna Partners' motion to dismiss.

MR. MOOTHART: Good afternoon. Michael Moothart for defendant TR Sienna Partners, LLC.

THE COURT: Counsel, would you identify yourself for the record.

MR. WEISBERG: Good afternoon, your Honor. Justin Weisberg on behalf of Sienna Court Condominium Association.

MR. MOOTHART: Your Honor, we're here on TR Sienna's motion to dismiss Counts 1, 2, 7, and 8, and to strike Paragraph 33 of plaintiff's second amended complaint.

I just want to clarify something for the record, I brought this up in my reply, I'm only

seeking your Honor to strike the last sentence of Paragraph 33 of plaintiff's second amended complaint. I will get into that briefly. I don't have a whole lot to add beyond what's in our brief.

Plaintiff on December 31, 2013, filed a second amended complaint against several entities, one of which was the developer/owner on the project, TR Sienna.

Attached to the plaintiff's second amended complaint is a sample condominium purchase agreement entered into between individual unit owners and the developer, or the seller TR Sienna.

As we argued in our motion Count 1 of the second amended complaint, which is a breach of express warranty cannot stand. The express warranty is spelled out in the individual purchase contracts. There are certain condition precedents that must be met to make a claim -- any warranty, any express warranty claim against TR Sienna.

The plaintiff's have not pled that they've provided adequate notice, as required in the contract, to TR Sienna. And they're also limited to repair or replacement. They're not entitled to money damages based upon those individual purchase

contracts.

That's the long and short of it. TR Sienna filed for bankruptcy and was discharged, that's pretty much undisputed. And at this point they cannot pursue a claim for money damages against TR Sienna based upon the -- excuse me, the clear language of the individual purchase contract, which are part of their complaint. Exhibit A to their complaint, that's part one of my motion.

Part two deals more with the implied warranty of habitability claims. Those are Counts 2, Count 7, and Count 8 within the individual purchase contract, which I said is attached to the association's complaint, there are clear waivers, there is a clear waiver of any implied warranty of habitability.

The plaintiff in their response brief have cited case law stating that this is a very high burden to meet, it's my burden to meet. And I agree it is a very high burden to meet, but I think we have met that burden. These waivers cannot be any more clearer. They're conspicuous. They're bold. They're set off.

More importantly, this is the contract

that the plaintiff is claiming their clients entered with TR Sienna. They cannot argue that this contract applies to this case, this is the basis for the lawsuit, and that they're not bound by all the provisions in that contract.

They've put this forward as the contract entered into between the unit owners and TR Sienna. They're bound by it. And it precludes any implied warranty of habitability claim against TR Sienna.

Now, with the -- what the plaintiff has tried to do is get around this language by saying in Paragraph 33 of their complaint, I'm referring to the last sentence, it says, each condominium purchase agreement was negotiated individually with TR Sienna potentially resulting in modifications to the standard terms and conditions, which are unique to the individual unit owners.

These are not allegations of fact in that sentence. They're basically saying, well, there may be modifications there may not be modifications, we don't really know, we're not complete as such. They've put this forward as the contract entered into between the unit owners and my client. They're bound by that language in

there, and that sentence cannot be used to try to create any issue of fact.

If they file a complaint and they said, here are the contracts, there are a couple unit owners that didn't sign it or didn't completely waive it, that would be a fact that they're putting forward. But they're not putting forward a fact. They're saying potentially resulting in modifications.

There is really know way that my client could defend that allegation. And this is -- I'm focusing on one sentence, but this is a huge part of it. Three of the counts against my client are implied warranty of habitability, there is clear waiver in there. If they're saying that somebody did not waive it for some reason, they need to plead that as a fact and not just as a bald conclusion.

And that's it. So I'm asking you to dismiss Count 1, Count 2, Count 7, and Count 8, and then to strike that last sentence of count -- Paragraph 33. That's it.

MR. WEISBERG: I will start with the express warranty, your Honor, because that's what counsel

started with.

First of all, in the motion to dismiss counsel seems to either be everyone against itself [sic] or confusing the warranty period with the statute of limitations. They basically state -- they admit within their brief that on November 25th, 2008, that they were by right asking you to take the escrow that everyone's been talking about to help fix the spandrel built glass and TR Sienna was requesting that. TR Sienna was fully aware that the spandrel glass was broken. They cite to the express warranty, which says four years from the first date of closing, or two years from when 60 percent of the units are sold.

And I look at the four years, that earlier date of closing, certainly by 2008 that's within the two years of the first one being closed because 2006 is when the first unit is being built. So they were aware within four years, and there was a latent defect discovered within four years, they admit it right in the brief. Then they -- but they didn't file suit until February, I think, 2013, when the suit was initiated. That's a statute of limitations. Once they breach, they have their

warranty period, it ran for four years, ran until sometime they say in 2012, they didn't fix it.

Unfortunately, we've got $3.7 million of repairs that have to be done to this building, and these aren't dollars we're pulling out of the air. That's a lot of money spent on engineers to stop the water from flowing into the units, or right now ADA repairs are going on. A lot of disabled people are living, not all, but a greater number because that's how it was advertised by TR Sienna, it would be a great condo for disabled people.

And they did file suit. If you say once they breach they know they have a defect, it's within four years of their express warranty, and then there is four years from the discovery. They even allege the fact of discovery. It's their affirmative defense. We allege what the discovery was, and you'll see when we argue with the subs it's tied to an engineering report. Actually, two engineering reports, one for each building February of 2012.

But they knew there was a spandrel glass issue. They knew there were defects. They allege in their motion on November 25th, 2008, they did

not dispute they never fixed it. They breached that warranty obligation.

Money damages is the proper remedy for breach. If someone doesn't fix with materials or fix and repair something, it doesn't mean that all you can ever go after them for is to come and fix it. It would be asking for specific performance that once they breach, the only remedy left available is the money damages to fix or repair, that's exactly what Sienna Condominium Association is seeking. We can't ask for an injunction to order a bankrupt entity to fix and repair it, we can only seek for money damages.

And that's the main thing. Within their own motion on the express warranty they admit within that four-year period they knew the defect. And it's never been fixed, and that's what the complaint alleges, the cost of fixing it. At least that defect they saw, as well as other defects, which were all related to water infiltration that they were fully aware of.

And it's two things, water infiltration, and because they didn't do a proper thermal barrier there is massive condensation, which in the winter

causes it to rain inside. A nightmare.

I can move now to the implied warranty of habitability because I think once we look at their own assertion that within four years or whatever latent defect and didn't fix it, I don't think we have to go any further.

With respect to the implied warranty of habitability, (inaudible) v. Hutchin, we have it in the brief, and Pasquinelli, the burden was upon the builder/vendor to prove the waiver of the implied warranty of habitability. It must in addition be a conspicuous provision which fully discloses the consequences of its conclusion, and that it was an agreement by the parties.

The party claiming waiver -- approving waiver has to show they knowingly waived their right. In this case we did allege this was a blank contract, we didn't attach the signed contract. He said there were riders in individual negotiations. They have every contract. According to Tassan v. United Builders, and they were right and they admit this, if one single unit owner didn't agree to the waiver, or if one single unit owner didn't know of the waiver, that single unit owner -- it carries

the right of all the owners, of all the condominiums to the common elements. He's what they call the tenant in common in Tassan v. United. So they have the burden of establishing every single unit owner waived that. They don't attempt to do it, they say let's do it under 2-615 because we have an unsigned contract here.

The contract by its face and looking at units, some are signed, as they understand because they have every contract, and they alluded to some not being signed on that waiver, and some maybe being signed on the closing date rather than the date the contract was entered by some escrow agent who couldn't explain what the waiver was, who just put a document in front of them. One looked like it was sent by e-mail or something, and it was signed.

So each individual had a different way of whether they signed it, whether they didn't sign it, whether it was waived. But if one individual unit owner didn't sign that, the implied warranty is not waived with TR Sienna, and that's not disputed.

The burden is on them. Any dispute

resolves in the favor of the non-movant here. All allegations are pled as accepted by the movant, and they've accepted our allegations as true. And, therefore, we would get the benefit of any doubt, in this case no burden has been met whatsoever.

Finally, while it wasn't discussed in the subcontractor motion, it seems like they argued for the motion to dismiss of TR Sienna on the statute of limitations, and I just want to make sure I get this on the record, even though we don't know why the subs would have been -- according to Cook County Property Act 765 ILCS 605/18.2(f), the statute of limitation for a cause of action where the condominium association runs from the date of turnover, any action at law which the condominium association may bring shall not begin to run until the unit owners have elected a majority of the members of the board of managers. In this case there is no dispute that didn't occur until sometime in 2009.

Illinois law is clear for condominium associations that the statute of limitations for cause of action that an association may bring begins to run from the date of turnover where unit

owners have elected a majority of the members of the board of managers.

Other statutes with similar provisions have recognized that the statute of limitations for condominium associations cause of action is tolled until the date of turnover. One is Toppino and Sons v. Seawatch at Marathon Condominium Association, a Florida case, 58 South Second 922, explaining the -- for a condominium association is intended to prevent a developer who controls that condominium association before turnover from suing having to sue itself. In this case requiring TR Sienna, which is controlling the Association until the first election, from saying, okay, I'm going to sue myself for the defects and units and common elements that I sold you.

THE COURT: Okay.

MR. MOOTHART: Very briefly. My motion focuses on the pleadings. And part of the pleadings and part of the plaintiff's complaint is the contract that the unit owners entered into. They are bound by the limitations of that warranty. It is an express warranty claim, they're bound by whatever limitations are in there.

As far as the implied warranty of habitability I completely agree, it's a high burden for us to meet. But we have met that burden just by looking at the waivers themselves. In both our motion and our reply we cited to the Tassan case versus United Developing Company. It says at 88 Ill. App. 3d, 589, quote, there may exist a situation where the language used in a contract is so clear and so conspicuous that no other reasonable conclusion could be reached that the buyer both read and understood the language in which case a Court could find as a matter of law implied warranty was effectively disclaimed, end quote.

These waivers could not be more clear. These waivers were clearly drafted in response to some of this case law. And in response to Mr. Weisberg's argument that there may be people that didn't sign it, people that didn't understand it, if that's the case, they need to plead that in their complaint. If there is a waiver of implied warranty of habitability in these contracts and somebody didn't understand it, somebody didn't read it, somebody didn't sign it, they need to plead

that because my client needs to know that and that's the only way that we can adequately defend this case in the discovery stages of this case.

So that's it. That's the gist of our argument. I appreciate your time. Thank you.

THE COURT: Okay. In looking at this purchase agreement that was attached as Exhibit A to the verified second amended complaint, it was -- I guess I'm going to go in reverse order.

First of all, as to striking the last sentence of Paragraph 33, when I read that sentence, it was clear to me that it was asking for speculation, conjecture. There is nowhere in the complaint that it is pled that any party specifically elected to not agree to this waiver.

There is nowhere where the modifications set out with sufficient specificity that the defendants have any idea what they're actually defending against with regards to the allegations made in Paragraph 33 saying that some may have -- may not have agreed or may have amended this purchase contract. Well, is that saying that they want formica counter tops versus granite? I mean, what is the amendment? Is the amendment actually

as to waiver? It's not laid out well in your complaint at all on that. For that reason I'm going to strike that.

Which leads me then to look at the allegations of waiving the implied warranty of habitability, which is set forth in 2, 7, and 8 of TR Sienna's motion. They're arguing that that in fact has occurred. Based on my striking of the last sentence of Paragraph 33, and in addition to the Tassan case, you can't assert that a contract is valid, except for those provisions that you don't wish to have valid. You can't look and claim you didn't see. That's what you're asking the Court to buy into here. I'm not inclined to do so. And, therefore, Counts 2, 7, and 8 will be dismissed with prejudice.

As to the express warranty claim, you argue in your response, Counsel, and you didn't highlight this as much, but you talked about a tolling of this, and you did talk a little bit about the Condominium Act and that it wouldn't occur until the turnover. And -- I guess where I got stuck with that -- and then you talk about there was impossibility to give notice because this

we're able to show riders where they show that it wasn't signed until the date of closing. One of my partners talks about that. Hutchins (phonetic) talks about how there needs to be a negotiation and explanation. Months after the contract is agreed to if a document is put in front of someone, even Breckenridge (phonetic), where they said -- testified you knew what it was. Even taking that agreement, if we attach actual signed agreements -- unfortunately, only TR Sienna has all the signed agreements that show it either wasn't signed or it wasn't timely signed. And if we could show affidavits that say they never talked to us about what this was, it was in a stack of paper that we just signed, couldn't we reallege this? I mean, you're dismissing with prejudice. Without prejudice the opportunity to attach such riders.

THE COURT: You made an allegation in this complaint at Paragraph 33 saying that there was a possibility that perhaps you may have -- you know, at some point in time you should have had your pleading out there.

I know that there has been extensive briefing and motions to reconsider and things of

case -- TR Sienna was in bankruptcy at the time and therefore -- I don't understand where notice is excused because of the bankruptcy element.

You don't really -- you just kind of gloss over that quite frankly in your response. You say that the bankruptcy prevented you from doing all sorts of things. As to the tolling during the warranty period, the managing member even tried to do repairs during this period of time, so where does the tolling fall and where does the purchase agreement provide for the tolling?

MR. WEISBERG: If I could explain that, but I'd like to go back really quickly to the implied warranty of habitability. With prejudice, we don't have a confidentiality agreement. Tassan says if one hasn't entered -- and we don't have all the agreements like they do. We asked unit owners and they say with permission if it's confidential we can use it and we've gotten a bunch. Without the confidentiality agreement it's a little bit more difficult the protective order.

But with prejudice if we're able to attach agreements showing a rider where they cut off the waiver of the implied warranty of habitability, if

that nature, but I'm looking that this is an early 2013 filing on a building that the first unit was sold in 2006. So we're going -- if we just went on straight, you know, calendar time here, we're looking at that this is eight years. And now I'm hearing that, well, we might have a client -- you know, you are representing the condo association where, at least by the record put before me so far, I'm showing that there were lots of meetings about these windows long before it was even completely turned over.

I mean, this isn't new information. And if they chose not to present this information to you, their attorney, that's one thing. If you had the information and decided it wasn't germane in your pleading, that's another thing. No, my ruling stands, Counsel.

MR. WEISBERG: We have gotten --

THE COURT: Then why wasn't that presented earlier?

MR. WEISBERG: They have the burden that they didn't --

THE COURT: You elected, you elected, Counsel. You elected to sit here and play hide the ball or

I'm going to be clever and stay here in the woods.
MR. WEISBERG: I've been told I can't use these without a protective order. I've been told from unit owners these are our personal contracts, we don't want them in a public record. And the burden is on them. It's a 2-615 motion --
THE COURT: And I'm saying there is no cause of action that could be presented as to an implied warranty of habitability when you're not putting forth in a pleading that in fact it has been waived.
You're not -- you're saying it may have been waived. Somebody might have thought of waiving it --
MR. WEISBERG: That's their burden to say it's waived. It's an affirmative defense. They have the affirmative burden to prove waiver. That's why it's an affirmative burden of theirs. Not our burden. Once they --
THE COURT: And they put it forward in a motion and you did not respond with anything.
MR. WEISBERG: A 2-615 saying we should allege that it was specifically waived, and we haven't attached a single factual -- this is the first time

it's been brought.
We haven't attached a single factual proof that any person didn't sign it, that's what they allege in their 2-615 --
THE COURT: You sat here, Counsel -- you sat here knowing that they have moved not only under the express warranty, but the implied warranty on three counts, as well as giving you -- probably painting it red and raising it up on a flag pole the last sentence of Paragraph 33 saying, where is it, where is your proof, and you have failed to plead any of that.
MR. WEISBERG: Well, in the argument you'll hear that we both -- they admitted and I brought up they admitted that some weren't signed, and that's why I talked about Tassan. Because they said if one wasn't signed --
THE COURT: You didn't say one wasn't signed, you said one wasn't agreed to.
MR. WEISBERG: But I said they even admit there is some signature problems on some --
MR. MOOTHART: I never admitted --
MR. WEISBERG: -- and one wasn't signed, and they did mention that, and they said we should have

to attach them. To tell you the truth, the only way to get all of the agreements would be for TR Sienna to produce them.
After this was pled, and it's their burden, we went into trying to attempt to get riders. Some parties have sent us riders of what they signed. It was too late to attach them to anything. It takes a while. We don't have every single box like TR Sienna does. All we can do is go to the unit owners.
It's their burden of proof. They moved for 2-615. They didn't move with prejudice saying it wasn't waived -- or -- yeah, they didn't move with prejudice saying it wasn't waived.
All I am asking is that 2-615 be granted without prejudice so we can put riders together and put them through. As I mentioned, if a single rider isn't signed -- if a single rider wasn't signed the date of contract, if a single person will testify that I got this by e-mail and no one explained to me what it meant, according to both the Supreme Court and the Appellate Court that's not a waiver.
THE COURT: Counsel?

MR. MOOTHART: Your Honor, as you pointed out, this complaint was filed a long time ago, last year, this is the second amended complaint.
The first amended complaint named my clients as respondents. They weren't defendants, they were respondents. And I had produced, I think it was 16 Bankers Boxes of documents. I produced the documents that I had.
As you may recall plaintiff filed a motion to compel against me on the exact same day that I filed an appearance for these entities. So we scrambled, we got everything we could from two bankrupt entities. We made our entire project file available, which was 16 Bankers Boxes, and we provided everything we have.
And they have a disk, most of the attorneys in this room have received a disk of thousands of documents of what was scanned from counsel's record copy service based upon review of my client's files.
So I just want to address the argument saying that it's up to us and it's our burden to come up with the documents and come up with the contracts. We provided every single thing that we

have. We provided every document that we have. They're two bankrupt entities and a lot of these documents are not readily available.

MR. WEISBERG: They didn't attach the purchase agreement, and I can't believe they can't find one, they never produced a single purchase agreement. That was the first part, we were trying to get the purchase agreement. But then we went to the owners, because it's always a problem getting them from the owners, then they want the protective order so they're confidential with the court because of the personal finances, personal cost.

It was well into the response by the time we went through their documents and found out we didn't get a single purchase order. I don't know how you lose every single purchase order. But now they're asserting that it was waived and they can't produce one signed signature.

With respect to the waivers, yeah, we did begin to work to get from the unit owners these purchase orders, and what we found was headings that don't appear in the complaint, appearing that it was either e-mailed or something, clear indication that nothing was ever explained to

anyone.

We looked at things and it seems like one that was signed on the date of closing rather than the date of contract, meaning -- would be a valid contract because they're all factual issues. And being a 2-615, and seeing if, even though they have the burden --

THE COURT: Okay. I understand. I'm allowing you to make your record. And you have made this -- there is one other point I want to get across from you. If you are permitted to file a third amended complaint, one thing that you have played around with these amended complaints so far that I've seen before me is when you're caught in a position where, well, I guess that's not really where I want to go, or I guess I'm going to have to be putting that out there so that somebody could defend.

I'm not seeing a complaint before this Court that I feel that I am being represented by counsel -- having an accurate representation of your case such that you're being forthright with me as the judge. I think when you're caught, you then, oh, maybe that will satisfy.

If you're going to bring forward these

allegations, here you are trying to plead around -- you're trying to plead that in fact the implied -- the waiver of the -- I'm sorry, the implied warranty of habitability was not waived. I mean, if you're going to go out there and plead that this actually applies, then you have to already be anticipating what the defenses are going to be as to that, and you should be pleading around them.

What I'm saying when I look at your complaint is you're waiting until I get a series of motions, then say I guess I'll toss that in there, or I guess I'll have to put that in there after all. Even in your response, Counsel, it's just -- well, I only have to go so far. I'm telling you that if you know you have to run a whole marathon, don't stop at the 5K. I want to see you run the whole marathon.

This is just wasting a lot of my time and a lot of attorneys' time on serial briefing because you don't want to put all your eggs in a basket and run with it. You want to sit there and just parse it out, just a little bit at a time. And the problem is then we're getting discovery that's all disjointed, we're getting a pleading that's all

disjointed. And it's really terribly frustrating to have to approach it from that standpoint. Oh, it's only a 615, well, where are you, your pleading is not sufficient then. And why are you as the plaintiff going, well, that's okay, I can go on my third -- which would be my fourth bite at this complaint and I should be allowed to do so.

MR. WEISBERG: This is only the second with this party because we --

THE COURT: It should have been done on the first. You're not a novice.

MR. WEISBERG: We didn't have the burden there. And what we --

THE COURT: You have a burden to bring a proper complaint.

MR. WEISBERG: But we thought that this was, given the case law, given the well grounded case law at best an issue for summary judgement. And we thought, okay, we're going to get discovery, we're going to get all these agreements, they're probably going to take a couple depositions because even if you look at Breckenridge they required people to testify --

THE COURT: Each condominium purchase agreement

was negotiated individually with TR Sienna potentially resulting in modifications to the standard terms and conditions which are unique to the individual unit owners.

Where is that a decent allegation right there?

MR. WEISBERG: I could have attached 104 purchase agreements and that would have been --

THE COURT: You only had to, according to the case law you cited in your brief, attach one, which showed a waiver, or a failure to waive, or acknowledge, not 104. Do not exaggerate. Either --

MR. WEISBERG: And the prior case law an affidavit -- but, I mean, that was in place of getting a hold of 104 --

THE COURT: That was improper.

MR. WEISBERG: We figured on summary judgment we would change facts, we would change documents --

THE COURT: Change facts at summary judgement?

MR. WEISBERG: Exchange facts.

THE COURT: Oh, I thought you said change facts.

MR. WEISBERG: No, no. Exchange. And we would

exchange documents and they would assert their position. If they thought they had to take a dep, they'd take it. And we'd deal with it given that it's their burden, and given the case law, the clear case law by Pasquinelli (phonetic) that these are supposed to be decided as a question of fact, we would deal with it at best as a summary judgment motion, if not a trial motion. But that's what the case law said --

THE COURT: Summary judgment goes to the pleading that's on file. I'm saying your pleading is already defective, and you're saying it's not defective, and you want another shot at it, but no matter what if I am going to find it defective you want another shot at it.

But you're saying right here it's not defective, we can deal with that in summary judgment, but now if you say it's defective then I don't have to --

MR. WEISBERG: I'm saying that's what I originally thought --

THE COURT: And I'm telling you --

MR. WEISBERG: -- the riders, okay, which we've been trying to get. We've gotten a small

percentage of the riders, and they clearly have things that look like that no one sat down with anyone and told them what it meant.

We can attach the riders. But given the case law we had it didn't appear that we had to attach the riders.

THE COURT: But you put this allegation out there.

MR. WEISBERG: As well as the contracts, the signed contracts, and then we would ask if we can enter a protective order because these residents have asked for it. And TR Sienna -- we were hoping we could avoid that by getting the production from TR Sienna. They don't have a single purchase order, not a single contract, that's why they didn't attach one. They didn't attach a single signed contract to their motion.

So we are stuck with going owner to owner asking for it and then we could attach it. But that's --

THE COURT: Counsel?

MR. MOOTHART: I just want to respond to the earlier suggestion about us -- we're the only attorneys, the only parties who have produced a

single document in this case, 16 Bankers Boxes, 20-some-thousand pages. Nobody else has produced anything. The plaintiff hasn't produced anything besides the complaint.

We'd ask that you dismiss these counts with prejudice. Paragraph 33 was undoubtedly drafted in an attempt to get around -- as you mentioned before, they were anticipating my argument, that's exactly why they put that in there. We know they're going to argue that implied warranty of habitability was waived, they're going to put a sentence in there saying, well, some of them may not have been waived. They could have done that before.

I don't even think they needed to have attached a single contract. They could have just said some of the unit owners didn't sign this or some of the unit owners didn't understand this. They haven't even alleged that. And that's -- my whole point is they haven't even alleged facts. My client cannot defend just pure conclusions.

MR. WEISBERG: Your Honor, response to 2-615 I couldn't have attached an affidavit, it was a 2-615 --

THE COURT: But you should have pled it in the first place. I'm telling you that your complaint -- that sentence alone has taken great -- a huge problem with your complaint.

MR. WEISBERG: Counsel just said three sentences we could have alleged.

THE COURT: I'm asking you on your second amended verified complaint you're looking at a fourth option to plead and, yes, it's only two times against this defendant --

MR. WEISBERG: And the first time he's ever brought this issue up.

THE COURT: But do you not understand that you have a responsibility as the plaintiff to plead a proper complaint?

I mean, you sit there and say, well, they didn't bring it up, so I didn't know I had an improper complaint. You should know by your pleading.

MR. WEISBERG: Your Honor, it's their burden, it's an affirmative defense. If it was an element that I had to plead and prove, it wouldn't be an affirmative defense, they could just deny it. It's an affirmative defense because it is their burden

to plead and prove.

But if the Court wants it, we can allege that. But it's not our burden. They couldn't just say we deny it, they have to actually affirmatively plead it, and that is what is required of them. That's why all of these cases say --

THE COURT: But if you're attaching the purchase agreement and the agreement contains a provision as clearly as this agreement shows in bold, in caps, talking about waiving the implied warranty of habitability, why, as the plaintiff, do you not plead, knowing the case law, that element that would get you around that waiver? Why didn't you do that? Because you knew it was coming, that's why it was there in the catchall legal conclusion that you put in as the last sentence of 33.

I'm just telling you, Counsel, that if you're going to present and be asking for not having a dismissal with prejudice when you're coming up on your fourth amended -- your fourth pleading here, you really, again, like I said, you're just parsing it out day by day. Stand up and say, yes, you're right, Judge. In the future I

would sit there and say if I'm attaching a complaint, a contract to a complaint and I know its got a provision that I'm going to have to plead around, I might as well plead around it on the first go.

MR. WEISBERG: Your Honor, if you want us on its face to get unit owner contracts if it's not signed or certainly not given in person and explained and attach affidavits, or at least allege that these people did not waive the implied warranty of habitability, we only have to plead one, I guess we could do it that way. But my question is it's a 2-615 --

THE COURT: Counsel, if you know that there is a question amongst unit owners of those who have not signed it, those who knowingly -- all you had to do as counsel said was plead around it. You were trying to plead around it with this catchall --

MR. WEISBERG: We haven't analyzed every contract. And when this came up we started asking for contracts, we started talking to unit owners. It takes a lot of time.

We are burdened with these motions, okay.

We are burning an incredible amount of money that would be available to these unit owners to fix their condominiums. We try to be as efficient as possible. We try not to burn every discovery possibility we could, but --

THE COURT: All right. We have a lot more motions.

MR. WEISBERG: -- and we would be willing to attach and talk -- and we'd only ask if counsel would agree and we could enter a protective order, because when we would get these they would say not with client's permission, we don't want this in a public caveat.

THE COURT: Counsel, you need to listen to what I have said. I have said you had to plead around. I didn't say you had to attach affidavits. I didn't say that you had to get waivers and do all this. You had to plead around it.

Alls I'm telling you is in the future think about your pleading and instead of putting a legal conclusion in there and thinking that's going to be sufficient, plead around it. If you know, and if you didn't know and you're standing on this and telling me right now that I think this is what

it is, I think it could have been this, that, or another thing. But you're telling me right now that you believe in good faith before this court that you have ample evidence and facts that you'll be able to put forth that show that at least one unit owner did not knowingly waive that, that's what you're telling me, why didn't you plead that unit owners did not knowingly waive this. Boom. Then we wouldn't be where we're at having an extensive motion to dismiss because of your pleading.

Take ownership of your pleading and understand where you could have cleaned it up and clean it up. I will allow it to be without prejudice as to that. Paragraph 33, last sentence is stricken.

MR. MOOTHART: With prejudice?

THE COURT: With prejudice. You have to get a fact pleading.

MR. WEISBERG: With respect to the express warranty issue, it was confusing the way I brought it up. They talk about the four years and in their pleading they talk about this November 25th date. They're admitting they knew about it and they were

offering what they really didn't have to fix it, they knew at least the spandrel glass -- that's not -- what they confuse -- the statute of limitations, that's the tolling period, it's like a warranty for four years. A latent defect comes up in four years, I'm entitled to get that latent defect fixed.

And then, at best, construction statute, if the Condominium Act statutes are going to come into play, I have four years to sue if you don't fix it. There is no dispute they didn't fix it. They don't allege -- they don't assert that they didn't have notice that the defect didn't occur in four years. They're saying you'd didn't sue us in four years. That's not what that express warranty states. It says we're giving the common areas a four-year warranty for any latent defect that occur, to get notice within a reasonable time.

In their own pleading they admit they had notice. They were trying to negotiate how they would fix it. They didn't just come out and fix it. Then they say, but they didn't sue within four years. We didn't have to sue in four years, that's the statute of limitation, that's totally different

than the four-year limitation that is in their express warranty for latent defects.

What they said is for four years if it's a latent defect, it's our problem. That doesn't mean for four years it's our problem, by the way, you better sue right away, immediately.

THE COURT: Replead Counts 2, 7, and 8. Count 1 defendant to answer within 28 days.

All right. Now we're up to -- I believe this is -- I have Wojan's motion to dismiss under 2-619 Count 3.

MS. OURY: Jeanine Oury, O-u-r-y, on behalf of Wojan.

THE COURT: Your name for the record

MR. KRAUZE: Raymond Krauze on behalf of Sienna Court Condominium Association.

THE COURT: It's your motion.

MS. OURY: Good afternoon, your Honor. We're here on Wojan's motion to dismiss Count 1 of the Association's second amended complaint, it's a breach of implied warranty claim. I'll be brief because I am resting on the brief.

Wojan is a window material supplier. It supplied windows to Clearvisions, who in turn

performed the work for the general contractor and developer.

Wojan's dismissal is based on two things, the first being that the statute of limitations under the UCC, which is four years from the date of delivery of the goods, has expired by the time that the plaintiff's brought their complaint in February of 2013.

The second being that to make an exception has not carved an exception for breach of implied warranty to apply to window material suppliers.

The first point, based upon plaintiff's response, the real issue is whether the tolling provision of the Condominium Act 18.2(f) applies to two claims brought against the windows material supplier. Plaintiff hasn't cited any case law to show that it applies to materials supplier.

The -- if you look to -- if you pull up the statute on Westlaw or anything else, the other parts of the statute don't have anything to do with construction defect claims against material supplier. They're just fiduciary duty, things like that.

There is no -- you can't allow the statute

of limitations to be tolled in any circumstances because then how long could that be? The Association couldn't be turned over for years, it could never be turned over and so the statute of limitations could potentially be tolled forever and that just can't be the case here.

Essentially plaintiffs have admitted that the UCC statute of limitations applies, and unless the tolling provision applies, it has expired.

The second point I'd like to make is Minton versus Richards has not carved out a new rule. It carved out a very narrow exception.

In that case the subcontractor that the Court found the implied warranty of habitability applied to was as subcontractor that performed work, they painted windows. Here we're a windows materials supplier. We have not performed any work. And the implied warranty of habitability never applies to a supplier of goods, as the Pokowitz (phonetic) case said, and therefore, it can't apply in this instance even if Minton versus Richards did apply.

THE COURT: Okay.

MR. KRAUZE: Okay. First things first, your

Honor, with respect to the statute of limitations issue, counsel raises this issue that there is no case, that we didn't cite any case authority supporting our argument to the contrary.

Strangely, counsel in their brief say that it's very clear that on its face the statute 18.2(f) doesn't apply, it doesn't apply to the situation that we have here. There is no qualifying language in this statute whatsoever.

The statute is very clear on its face. My colleague Mr. Weisberg read it during the first argument. 18.2(f) says very clearly, the statute of limitations for any actions in law or equity, which the Condominium Association may bring, shall not begin to run until the unit owners have elected a majority of the members of the board of managers. You look anywhere else in 18.2 there is absolutely no qualifying language to that tolling provision in 18.2.

Now, strangely, or rather ironically, counsel says that we cite no case law. Counsel hasn't cited any case law that says it doesn't apply. In their brief they say that statute of limitations are not to be expanded beyond what they

say in the express statute themselves.

I believe it's in their initial -- I believe it's in the reply brief that they say that, you know, you can't expand the statute of limitations beyond what it necessarily says in the statute itself.

The statute itself is very clear. We're not asking this Court to expand anything. We're asking the Court to interpret 18.2 of the Condominium Act as it is written without qualification. It shall not begin to run until the unit owners have elected a majority of the members to the board of managers.

Counsel raised another issue that kind of related to this statute of limitations issue wherein they said that if we allow this, then there would never be -- the statute of limitations would never run.

But as we quote -- as we cited in our response brief the Seawatch at Marathon Condo case, this is on Page 4 of our response brief, albeit it's a Florida District Court case, they explain very specifically that the whole reason for such a tolling statute for condominium associations was

intended to prevent developer from retaining control of the association until such time as though statute of limitations ran. So whereas counsel is necessarily is saying, well, you'll never have the statute of -- there will never be an expiration of the statute of limitations issue. This case authority that we cited speaks contrary to that, which is the whole purpose of having these types of tolling statutes in the Condominium Act is to protect the interest of the individual unit owners.

And that's why until such time as the developer board turns over the association to the unit owners control and managed board, all legal actions are tolled. There is no qualifying language.

Now, as to counsel's other argument about Minton, a couple things about that. Number one, Pokowitz, it seems like it's going to be a theme today that people are citing Pokowitz. Pokowitz does not say anything related to what counsel said it does. In Pokowitz you are dealing with -- first of all, let's back up.

The implied warranty of habitability is

only supposed to apply in situations where you have a home purchaser, and you have a builder developer or builder vendor, or builder and/or vendor.

In this particular case, Pokowitz case, there was no such thing. There wasn't a home purchaser, the individual -- the plaintiff owned the property. They requested -- they requested design plans and materials from a third party, received it, and then sued them on the idea of breach of implied warranty of habitability, try saying that three times. But the sole issue before the Court in that particular issue was whether or not this third party vendor necessarily qualified as a builder/vendor.

And Court said, no, it's not a builder/vendor. The implied warranty doesn't apply here because you're not dealing with -- the defendant in Pokowitz was neither a builder nor a vendor.

Here it's quite the opposite. We have a builder, we have a vendor, they're both insolvent, they both dissolved, and we have a supplier. Now, we've cited -- we've cited cases in our response brief that are very clear with respect to whether

or not the implied warranty of habitability applies.

Here it says to establish a breach of implied -- this is Page 6 of our response brief, to establish a breach of implied warranty of habitability one must prove that the home had a latent defect caused by improper design, material, or workmanship. That is very clear as to what the Illinois courts are interpreting the implied warranty of habitability to mean in the context of construction cases.

In this particular instance, again, we had a builder/vendor, builder developed, builder insolvent, and we have a condominium association that discovered latent defects. Therefore, it is our position that contrary to what Wojan is saying in its briefs that Pokowitz does not say what they represent it says. And, number 2, Illinois courts, this is a First District case, 1996, saying that breach of implied warranty applies to latent defects caused by improper design, material, or workmanship.

I think that's clear on its face that the implied warranty applies to material suppliers in a

construction case where the innocent purchaser, in this case the individual condominium purchaser, had no way of knowing of these latent defects when they purchased the condominium units.

They were relying on the builder and vendor, and/or both, to provide a good workmanlike product. They didn't receive that. There were latent defects, which no one could reasonably have seen, they relied on that. The builder/vendor are both dissolved and insolvent, therefore, the Minton exception does most certainly apply in this particular instance to Wojan because they supplied defective materials.

THE COURT: Okay.

MS. OURY: I'm going to respond to counsel's argument. The fact that counsel has cited to a Florida case, interpreting a Florida statute, means to me that they have cited no case law to support the application of the tolling provision to this case.

The Florida statute when you look at it is a stand alone provision. It's not like 18.2(f), which is a subsection that contains multiple causes of action that one could bring against a developer.

There are no allegations that Wojan violated the Illinois Condominium Property Act, and therefore, I see no basis for the Court to apply that tolling provision.

Moving on to the Minton argument. Counsel's interpretation of the definition of an implied -- breach of implied warranty of habitability claim directly contradicts Pokowitz, which is still good law. Pokowitz says suppliers of materials are not liable under breach of implied warranty of habitability claim.

The other fact of the matter is that there is still a viable upstream contractor from Wojan. Clearvisions is in this case, counsel is sitting in the room, this is not the case where there is a -- that Wojan is sitting just on the other side of the general contractor and developer that are insolvent. There is an entire layer of protection before Wojan.

And the other -- the last point I want to make is that although the purpose of the implied warranty of habitability claim is to protect the purchasers, the other side of that is that -- the purpose of it is because the builder/vendors or

contractors are in the best position to discover latent defects because they're actually performing the work. That's not the case with Wojan here.

And for those reasons I ask the Court to dismiss Count 1.

MR. KRAUZE: Your Honor, if I could just reply to a few things she brought up in the reply that she didn't initially say in her argument with respect to --

MS. OURY: Over my objection.

THE COURT: Counsel, first of all, this has been briefed, there was an initial motion, your response, and her reply.

I didn't hear counsel argue anything currently in her reply that wasn't in her written submissions that the Court had an opportunity to go through, which talked about the statute of limitations from turnover, and the Illinois Condo Act.

Additionally, she brought up -- and it was in the motion about the fact that Clearvisions was upstream, so to speak, from Wojan. So I don't believe that at this point we're going to keep going back and forth.

MR. KRAUZE: Fair enough, your Honor. But she made a representation about the Pokowitz case, which clearly does not say that in the case, and I want to clarify that for the record, because it says that the supplier -- they were dealing with the issue of whether or not they were a builder/vendor. It does not say -- no where in this case does it say anything that a material supplier does not -- that the implied warranty does not apply to the material supplier.

THE COURT: Next time when I say that we've already had the argument, I mean we've had the argument.

MR. KRAUZE: My apologies, your Honor.

THE COURT: As I said, I had an opportunity to have the motion, the response, and reply, based on those documents, as well as the argument of counsel, I think it's important for everyone to realize when laws are enacted why they are enacted.

And if one looks at the UCC, there is a lot of reasons why there are statute of limitations concerning the goods in the UCC. The desire to have goods out in the market place and have a set period of time where at some point in time you

can think that you are free from certain types of lawsuits, and so that it keeps commerce moving. And that is a significant issue in why Illinois adopted the Uniform Commercial Code.

And as such based on that argument and the other argument Wojan is out with prejudice.

MR. GOODSNYDER: Good afternoon, your Honor, Christopher M. Goodsnyder on behalf of Clearvisions, d/b/a BV and Associates.

MR. ENRIQUEZ: Good afternoon, your Honor, Allan Enriquez on behalf of Lichtenwald-Johnston Iron Works.

MR. KEARNS: Christopher Kearns on behalf of Champion Aluminum.

MR. KINGSLEY: Adam Kingsley on behalf of Tempco Heating and Air Conditioning.

MR. BONANNO: Steven Bonanno on behalf of Don Stoltzner Masonry Contractor, B-o-n-a-n-n-o.

MR. CANO: Chris Cano on behalf of Metal Master.

MR. MOOTHART: Michael Moothart on behalf of defendants TR Sienna.

MR. WEISBERG: Justin Weisberg on behalf of Sienna Condominium Association.

MR. GOODSNYDER: Good afternoon, your Honor. Thank you so much for the time you took to go through the materials. They were rather voluminous. Obviously, the Court has had a chance to read through the materials, so I will try and be brief.

Obviously, the focus of our motion is upon the -- whether the expansion set forth in the 1983 case of Minton versus Richards Group of Chicago should be expanded to interpret the situation here and permit the plaintiff to proceed against the subcontractor and material suppliers.

The key provision of Minton is the paragraph that appears at 854, Page 854, and I quote, we hold that in this case 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, the warranty of habitability applies to such contractor.

For the reasons addressed in substantially greater detail in the subcontractor and material suppliers' joint motion to dismiss the plaintiff's second amended complaint, it's clear that the

implied warranty does not extend to the subcontractor and materials supplier defendants because the plaintiff is -- two factors -- not, one, an innocent party as was the plaintiff in Minton. And two, has recourse against both the developer TR Sienna and the general contractor Roszak/ADC.

As discussed in the motion and in the reply, despite alleging in the plaintiff's verified complaint, and repeated in the second amended complaint, the plaintiff claims in an attempt to extend the application of the statute of limitations that the plaintiff did not discover the purported defects until 2012. The documentary evidence in the record clearly demonstrates this is not true.

In addition to Mr. Kenny who is the president of the Association, and the individual who verified the first amended complaint, being personally present for Association meetings setting back to as early as February of 2008 where the alleged construction defects were specifically alleged, he also participated in the presentment of the January 2010 motion that was filed in the TR

Sienna bankruptcy proceeding seeking a turnover of the $300,000 plus dollar warranty escrow fund based upon the specific claims of construction defects that mirror those alleged in the counts that we're seeking to dismiss.

Furthermore, the plaintiff's current counsel was involved in asserting these claims no later than March of 2009 as evidenced by the documents produced in response to subpoena that was issued to Fidelity National Title, and those documents are attached as exhibits to the reply.

Despite having received over $308,000 in February of 2010, which but for the diligence of defense counsel, this honorable court would have been left with the false impression from the plaintiff and the allegations in second amended complaint that without the right to bypass the developer and general contractor and proceed directly against the subcontractor and material suppliers, the plaintiff would be utterly without recourse.

However, in addition to the $308,000 in recourse that the plaintiff has already obtained from the developer back in 2010. And then from the

earlier argument before you, Judge, it sounds like a substantial portion of that money might have been set aside just to present this case, I don't know that to be the case, but that was implied from counsel's argument at the earlier motion.

Plaintiff moved and was granted leave by the bankruptcy court to proceed against both the -- proceed against both TR Sienna and Roszak/ADC's two $1 million insurance policies that are identified in the defendant's -- co-defendant's discovery responses.

While the plaintiff in its response seeks to redirect the focus of the Court's analysis to the overwhelmingly simplistic and rigid single-factor test of whether or not the developer and general contractor were technically insolvent under the meaning of that concept under the federal bankruptcy codes, the holding in Minton makes it clear that being permitted to proceed against the subcontractors in the absence of privity is only available to an innocent homeowner without recourse.

As discussed in greater detail in the briefs, there is $2 million in available insurance

coverage, although not technically an asset of TR Sienna and Roszak/ADC's bankruptcy estate, which would have been subject to litigation to standard creditors, contract creditors, such as in my client's case they were creditors in the bankruptcy case who didn't receive any disposition because they were credited the case. Unlike the -- and I'm sure many of the other material suppliers were also creditors who didn't receive full payment for the work they did on this project, and that's why the bankruptcy had, I believe, over $10 million in debt.

Unlike that, we have here the plaintiff who persuaded the bankruptcy court to turnover that $308,000 fund that was essentially really just the profits, one percent holdback from the proceeds from the sale of each closing. And as I indicated there was even another $6800, roughly, that seems to have fallen through the cracks from that same fund from maybe some later closings.

If you add it all up, you arrive at the conclusion that the plaintiff is simply not able to state a cause of action against the subcontractor material supplier defendants under the limited

Minton exception seeking to expand the implied warranty of habitability.

Accordingly, your Honor, we would request respectfully that the Court dismiss Counts 3 through 6 and Count 7 of the second amended complaint with prejudice.

And I'm going to defer to my colleagues who are co-signers to the brief to see if anyone has something they want to supplement, if we could, before we turn it over to the plaintiff.

THE COURT: Anyone else have anything to add before we turn it over for response?

MR. BONANNO: If I could reserve a limited time for reply, if necessary?

THE COURT: Okay. All right.

MR. WEISBERG: Good afternoon. First of all, they brought a 2-619, and I just want to make sure I put in the record, although we have it the brief, in moving on a motion to dismiss under 2-619 all well pled facts must be accepted as true.

A motion to dismiss raises the defense such as an action should be dismissed or was not commenced within a time limited by law. A 2-619 motion will not feed a cause of action if the

affirmative matter is merely evidence that movant expects to submit in contesting the ultimate fact contained in the pleading.

In this case partial evidence was brought, but first we'll talk about the very simple issue of law, and the change in law since the motion to stay I think is very important as we discussed in the brief about Pratt III because in Pratt III the Court clarified itself.

First of all, in Minton, never in the briefs -- they never say what Minton said about recourse. They said -- this Court is asked to extend the warranty of habitability to the subcontractors of the builder/vendor where the builder/vendor has been dissolved and the entity is insolvent. That same case, that same Minton case 20 so years ago, that's what they were talking about.

But then Pratt III comes up. Pratt III there was a question of -- and it's a very interesting case because it's very on point to this case. How is it on point in that case? Builder/Vendor insolvent, well, vendor is insolvent, dissolved. Builder, they determined the

builder to be insolvent. Builder is still being sued. Builder is still defendant. Builder has some assets, $3500 receivable in that case. And then that case they go return -- certify the question whether the condominium association may pursue its claim against EZ Masonry, that was the sub, versus Pratt who is insolvent, but in good standing limited assets. EZ Masonry contends that it would be unfair to permit the Condominium Association to pursue its claim against EZ Masonry where Pratt is a viable corporation that has succeeded in defending itself in litigation for years.

Very close to this is except you don't have a bankruptcy rule rendering the contractor dissolved and insolvent, that would be Roszak. And because of maybe the confusion at the trial level on September 19, 2013, after that motion to stay when we're looking for some more guidance, Pratt III says the law in Illinois is clear, an innocent purchaser may proceed on a claim for a breach of the implied warranty of habitability against a subcontractor where the builder/vendor is insolvent.

There is no dispute in this case that the builder and vendor are insolvent. Not only has that been ruled upon in a bankruptcy proceeding, but in the latest briefs filed, the motions to dismiss, which are now matters of record by the subcontractors. Now Roszak, who has brought a claim against them, they say has no standing because he's dissolved and insolvent. So no one in this case disagrees that the builder and vendor are dissolved and insolvent.

Just some of the important points, under the aforementioned precedent in Pratt III, which we find to be consistent, we hold and clarify that -- they wanted to clarify the law because apparently the trial courts were looking for some guidance for purposes of determining whether a purchaser may proceed against a subcontractor in a breach of implied warranty of habitability claim, the Court must look to that party's -- whether the general contractor is insolvent. Insolvency simply means that a party's liability exceed the value of its assets and that it has stopped paying debts in the ordinary course of business.

So they gave very clear very limited

instructions. In conclusion, we hold that where a plaintiff timely files an action against a general contractor for faults or defects in construction, and that general contractor subsequently becomes insolvent allowing the plaintiff to bring an action against the subcontract for breach of the implied warranty of habitability under Minton, the statute of limitations, and this is Darlow (phonetic), which was cited, the statute of limitations is triggered not when there is a recourse, they keep citing Darlow, at the time the plaintiff knew or reasonably should have known of the general contractor's insolvency. Again, Darlow looks to insolvency, but really I guess it's all water under the bridge now because Pratt III said we clearly mean insolvency, not recourse. And that's what we have here.

Now, knowing that the law is clear and there is an undisputed fact that the contractor and the developer are insolvent, there is all this other -- all these other attacks, but they don't give you the full information.

And I'm sorry, your Honor, this came in the response, it came in some arguments. The first

one, as you heard in the argument is the warranty escrow. Now, nowhere in the warranty escrow -- first of all, there is a misstatement, twice. They said turnover. There was no order as a public record, and I don't know if the Court wants to see it, the subcontractors have it, I'm sure -- I would be surprised if Mr. Goodsnyder didn't have it because when he filed the motion to stay he said he looked at the bankruptcy document, so in order to miss the actual order telling -- the Court telling the trustee that any interest or rights are abandoned in the escrow, he didn't turn it over, it was all with an escrow with Chicago Title Evanston law required money to be put aside for the condominiums when the units closed. It was never the developers.

The order by the Court authorizing and directing trustee to abandon any interest in warranty escrow funds -- all the bankruptcy court did is it stated when we look at those escrow funds, we can't attach them, we can't demand that you bring them to us. They didn't ask for a turnover.

They just asked, because it's a bankruptcy

and you know, there is the stay and you can't take assets of the estate, if there could be a declaration regarding whether that escrow fund was an asset of estate. We know -- admitted they were a creditor in that action so they're bound by that determination. Judge Sonnerby (phonetic) determined those escrow funds were not assets of the estate, and then she determined that the developer was insolvent. If they were assess of the estate, I imagine they would have been distributed pursuant to some formula the bankruptcy courts follow.

The escrow fund wasn't hidden. Everyone knew about it. I think it was Lichtenwald that was a party in the litigation. It wasn't a secret, it's clearly on the docket, you didn't have to go to Chicago Title, everyone had it. Yet no one attaches it to their motion or their responses when it first comes out. The order authorizing and directing the trustee to abandon any interest in warranty escrow funds and the motion for entry of order authorizing and directing trustee to abandon any interest of warranty escrow funds. Basically saying you have no right to this, please declare --

you have no right to it so we can go to Chicago Title and get certain things done.

And right in there it says what they wanted to get done, and it included, they mentioned spandrel, but they also mentioned the ADA issues.

And what they said is prior to the commencement of this case, the Association --

THE REPORTER: I'm sorry, Counsel, you're reading very quickly. Please, slow down.

MR. WEISBERG: Sorry. Prior to the commencement of this case, the Association and various owners of the units of Sienna Court made such demands about upon the debtor pursuant to 5434 of the ordinance to appear defects in the common elements and individual units, the defects included but are not limited to faulty spandrel glass that leak water into the common elements.

THE COURT: Slow it down, Counsel.

MR. WEISBERG: Faulty spandrel glass that leak water into the common elements, individual units in the buildings walls, multiple failures of the common elements to be ADA compliant, water infiltration into parking garage, and missing common elements. Subsequent to the commencement of

this case the Association restated its warranty claims to the trustee.

And the Court found this matter coming to be heard on the motion of Sienna Court Condominium Association for entry authorizing and directing the Chapter 7 trustee of the estate of TR Sienna Partners debtor to abandon any interest the debtor's estate may posses in certain warranty escrow funds.

The Court having jurisdiction, only the subject matter and the party to the motion, the trustee having acknowledged that warranty escrow funds are not property of the debtor's estate and that the debtor's estate does not have any interest in the warranty escrow funds.

The Court finding and concluding that good and sufficient cost authorizing the relief [sic] exist because trustee has exercised sound and good faith business judgment in agreeing to such relief. The Court's finding and concluding that doing sufficient notice of the motion under the circumstances has been provided, and no other or further notice is necessary. And the Court being fully advised in the premises it is hereby ordered

the motion is granted.

The trustee is authorized and directed to abandon any interest in the debtor's estate in the warranty escrow fund. The entry of this order shall constitute trustee's abandonment of any interest of the debtor's estate in the warranty escrow funds. This Court shall retain jurisdiction and herein determine all matter arising from the implementation of this order.

What the Court was saying is they're not saying to turn over the funds. They're just saying TR Sienna has no interest in the funds. It's not their property. It's not their estate.

Taking you back to the very simple issue, Pratt III has said, and that's what the motion before you is, you look to the solvency of the party.

In this case with respect to the warranty of the escrow funds, that has no impact on the solvency of the party. And as to the party's claiming that they're going to get a credit of $308,000 of over $3 million that are required to repair this, that's a different issue, but that doesn't go to whether, for example, Clearvisions is

going to be liable for its defective spandrel glass, or it's defective installation of that spandrel glass.

And then I want to get into one other issue. They spend pages, now, it really isn't material to their motion for summary judgment, but I think I have to address it because --

THE COURT: You mean their 2-619?

MR. WEISBERG: Yes. Before I do that, they say insurance, well, Pratt III didn't deal with insurance. It's not that didn't have insurance. Every contractor has insurance, that's what I thought. Is there any way to find out -- I imagine you might want to know is there any way to find out if Pratt Construction Group had insurance, because they don't even talk about it. They don't even consider insurance. This thing coming up that insurance is part of the estate, the Court doesn't even mention it. We gave tremendous authority showing insurance has no impact on the estate. It was not part --

THE COURT: I think they even argue in their brief that they do not -- it's part of the estate.

MR. GOODSNYDER: Just to clarify, Judge, if

counsel is going to make reference to some document now at oral argument referencing another case, I'm going to object and I'm going to say that that's highly improper. It's a disservice to the parties and the Court to reference trial court documents and things like that. So if that's where counsel is going, that's a -- I'm going to object to that.

MR. WEISBERG: Your Honor, on the motion to strike they came in with two cases that were not briefed. They talked about two cases I have not seen, they were not handed to us.

They brought in numerous escrow documents of the secret escrow that they supposedly knew nothing about, which as you can see is a matter of public record. That is a public record, there was a coverage action, Cincinnati Insurance sued Pratt over whether they had coverage in the Pratt v. Platt case. But the Court in that case, and the Appellate Court reviewing, I think it was Judge Bartkowicz, never considered insurance to have anything to do with whether you have a Minton claim.

You can get the complaint off the docket. I can leave it for the Court, counsel can look at

it, it has all the insurance policies to it, it has the complaint for coverage. Pratt v. Platt there was insurance, it didn't stop the Minton claim.

In fact, this latest Appellate Court, regardless of the insurance, they said you have to look at the solvency of the entity. And the solvency of the entity in this case are TR Sienna and Roszak, you're right, undisputed they're insolvent. They go recourse, recourse is just for these purposes Pratt III says what we meant was was this party solvent?

Sure, there was recourse against Platt Construction, they're defending the action. They've been defending it for years. They're a party to the action. They at least had the $3,500 receivable, but the courts only look at solvency. Do their debts exceed the amount of their assets? That's all we're looking at. And Pratt III after your motion to stay clarified it for all the trial courts.

And I just wanted to clarify one last thing -- then they focus on this February 2012, saying we're making a misrepresentation saying -- by the way, the law -- really facts and law are

against us. Let's talk about this big misrepresentation. They keep talking about this February 17, 2012, date, but we have all this notice that they knew about it earlier. We rely on the condominium, the Illinois condominium statute that says nothing begins to run until 2009. We think that's a good statute.

So when we put down the date of discovery we looked at Illinois law, and Illinois law said you have to know the purpose of the discovery. Now, this is nothing new to a number of subcontractors in here. They didn't put it in their brief when they called us liars. But they had this in their two reports, and these are very complicated damages. I know Champion had it, for a year we're trying to negotiate, we're saying, look, look what we have for a year before this suit, these are the defects, please --

MR. GOODSNYDER: I object again for going beyond the record.

MR. WEISBERG: Your Honor, in their response, or reply, which we couldn't respond to, you said we dishonestly put a date. We have two reports that these subcontractors had, or some of these

subcontractors had that have made that accusation, which have that date of February 17, 2012.

It was our first intensive report and a lot of things we thought as to the cause of the leaks were incorrect. Because after -- before we filed our suit we did our investigation because we hired Wiss, Janney & Elstner, they did an extensive investigation, which took a lot of time and money. And on February 17, 2012, they issued one report for each building. That's where the date came from. It wasn't trying to mislead anyone. And it certainly was something that everyone was aware of because we were giving the report out trying to negotiate.

So to say we are misleading the Court because we're relying on the date that we have a comprehensive report as it what the defects are, to try to take the Court's attention away from the fact that in Pratt III has said its solvency, and no one disagrees that Roszak and TR Sienna are insolvent is just something we have to respond to.

So I just wanted the Court to be aware. There is a basis for that, and parties that moved, they knew what the basis was, they didn't tell you

about the report, but they know that's why we use that date.

MR. GOODSNYDER: A Couple things, your Honor, first off, a lot of inaccuracies in counsel's position. Exhibit 11 to the reply brief is a complete copy of the notice of motion filed in the bankruptcy and the final document is the order that said somehow we were misleading you by not providing you a copy of this order. So, one, that was in the record.

Then if you look at the record, there was no response brief filed in the bankruptcy opposing to this, and counsel has referenced a couple times before you somehow that because my client was a listed scheduled creditor, somehow they had notice of this motion. First off, in bankruptcy court in order to get notice, you have to file an appearance and request notice. My client did not do that, I wasn't a party to it, and my client never had an opportunity to review this timely or respond to it.

What was done was, if you look at $10 million worth of debts, if -- if you look at the notice that was given on the motion, there is probably -- there is a single creditor and the rest

were the trustee and related parties, not a single party responded to that motion. It was treated as a fait accompli that the $300,000 was going to the plaintiffs on their escrow claim.

So if I had been involved, or going back in time, if you look at the law, that $300,000 belonged to the developer. It was proceeds from the sale of each unit, one percent, by ordinance that was set aside. Had there been no problems whatsoever, that money at the end of the process would have gone back to TR Sienna, to the principals of the company. It was profit. The fact that no one objected to it and they allowed this money to go, different issue.

Counsel takes issue, he uses the word turnover, I don't know how you make a distinction. When I see two checks that are $308,000, whatever you want to call them, they went into the Association's bank accounts. Okay. So whatever you want to call them transfers, deposits, releases, assignments, or turnovers, that $300,000 plus was recoursed to the plaintiff.

The fact that it happened to be early in the process also irrelevant. What they have here

is at least $300,000 in recourse. It's TR Sienna's money and it went to the plaintiff's.

Then you have this -- I believe counsel is misconstruing Pratt III. None of these finite issues about insurance coverage were in play in that case. What we have here is discovery responses from Roszak/ADC and TR Sienna saying that they have two $1 million policies available. Until and unless that plays out down the road at some point in time, either they are sufficient and the plaintiff collects $2 million plus the $300,000 from those parties, more power to them, that's the prerogative of plaintiff and those defendants.

In our particular case what we have is an exception to an exception here. He have the Minton rule. We have one issue on the timing issue. Now, counsel says I've never seen that Wiss Janney report. That being said, I didn't -- I'm not the one who left dates out of the original complaint, that was the plaintiff. And we -- at a status hearing I suggested to the Court that if they were going to -- with a limited statute of limitations that the plaintiff should have to at least plead some facts that go to notice.

At that point in time they had the opportunity knowing that we were in the case, knowing that this same law firm had been in the case since at the minimum before the even effective turnover of March of '09. Same law firm. They're the ones who filed this 2010 turnover motion in the bankruptcy court. Why not allege in your complaint, if you wanted full disclose, that we had discussions, presentations, issues? Even the individual unit owners were submitting assertions about the sufficiency of the construction to TR Sienna back in, I think, as early as '06, but let's just say when it was still within the board, and you're talking '08, '09, 2010. They sat on it.

The clear issue here -- one of the other issues we talked about in our response is the concept of inequitable conduct, which is the concept that a party owes a duty of candor, good faith, and honestly before the tribunal.

They had an opportunity to tell you that they got $308,000 in this case. They have a 30-some odd page lawsuit, give or take, ten plus counts, they've had three tries at it, why not tell that you that they got $300,000?

Another issue on the solvency issue, and counsel referenced the other pending motion on the cross claim, which is the fact that Roszak/ADC is not in good standing, and in order to proceed under Illinois law, and in order to have the benefit of being a plaintiff in a lawsuit if you're an entity, you have to be in good standing.

So at some point in time either when we fully brief that up, I believe the Court will find that either they have to reinstate or they can't proceed. So at some point in time you're going to have the general contractors being reinstated.

I think what counsel does in this case is focus on the absolute minutia. The practicalities -- again, in that discussion that you had in the last motion with Wojan with a distinction about the Condominium Act tolling issue and whether or not it would apply to every potential defendant versus just what it was truly, I believe, intended to be, meaning the developer.

Here -- what we have here is a focus on technical insolvency as opposed to the practical consideration that's the underpinning of all this Minton exception stuff is we -- in the unusual

scenario where there isn't a pot of money from the developer or the general contractor. Again, every one of these cases is one expansion built on another expansion, built on another expansion. At some point in time the public policy is met, they've gotten $308,000, there is another $6,800 available, they've got $2 million in insurance coverage, and until and unless that's denied or avoided, they're going to have that recourse against the two parties that had control of this construction. The developer and the general contractor.

And that's why they went into bankruptcy court and asked for the relief that they did last summer because they wanted to proceed against insurance policies. As we talked about in our motion there is a distinction, all those other probate context. Under Illinois law we have a concept that there is a distinction between direct actions about having a fund available to an injured party. And they have $2 million, plus the $308,000 they've already gotten. So I defer to --

MR. BONANNO: I actually reserved a little time for reply.

THE COURT: Go ahead.

MR. BONANNO: Steven Bonanno. A couple quick points. First is counsel suggested that the word recourse and Minton was this inadvertent babbling of the Appellate Court without thinking about it, that's not true. The very case that he comes in here arguing supercedes that language. Pratt III, somehow absolved that language and makes it disappear, but Pratt II, the very line of cases that he's relying on, specifically, quote, Page 290 of the Northeast, we are compelled to conclude that the condominium association cannot proceed against subcontractor EZ Masonry while it still has recourse against Pratt. I will leave it for counsel.

The very line of cases that he is relying on for the wiping of this word recourse off the books -- now, more practically, your Honor, let's turn to the facts of this case. This Minton exception is supposed to resolve the situation where Roszak and TR Sienna are wiped off the books and nothing to get from them. I will leave aside the 300K issue, counsel more than addressed that.

But counsel has gone into bankruptcy

court, he's lifted the stay. There is two primary TGL policies with a million in limits. There is not even a DJ pending against -- he wants to run back and quote court files that he hasn't even attached to the record or cited in front of your Honor.

He can't so much as go down to the 8th floor and check to see if there is a DJ pending against TR Sienna or Roszak, and there is not.

So I would submit that in the facts of this case, counsel is simply trying to have his cake and eat it too. He wants Roszak in, he wants them in real bad, and he wants to add to the two primary $1 million policies, but he wants all of us here too. He wants to get everybody together and start picking as many pockets as he can. We have not even reached the facts of Pratt III. Pratt III hasn't happened. Arguably it's moot. It's premature. The statute hasn't even begun to run against us arguably, we'll leave that argument for another day if we ever get to statute of limitations issues. But that's not where we are yet.

My bottom line, your Honor, is the Minton

exception was intended to apply narrowly. Multiple cases have said it supposed to apply narrowly. He's in here trying to blow it up into this hot air balloon to carry this case to Oz, but it doesn't apply here. He's trying to have a his cake and eat it too.

We have to stop this now before we turn this into more litigation costs than the case would ever even be worth. Thank you for your time.

MR. MOOTHART: I have one thing to add because I do represent the entities that are kind of in the middle of all this.

The whole reference about available insurance coverage, there may not be any insurance coverage. These entities -- the insurers have reserved rights. They're often is not insurance coverage for these type of construction defect claims. So the argument that there is just going to be a pot of $2 million just sitting there for the plaintiff at the end of the day, that argument cannot be made.

We don't know. We don't know if there is going to be any indemnity coverage for the Roszak entities. That's all I wanted to point out. And

given the fact that the insurance coverage of my client has come up several times in this case.

MR. BONANNO: Until such point, your Honor, as there is no coverage for TR Sienna and Roszak, until such point they've been determined that there is no, quote, recourse, as required under Pratt II, he hasn't reached the point where he's allowed to trigger that narrow, narrow, narrow exception and drag us all in here.

By the way, we all face similar issues ourselves on insurance coverage, and I don't hear anybody crying us a river about it. We're here to invoking the narrow protections that counsel is supposed -- we're here to protect our rights, and to let him proceed with what he may have against the general contractor and builder.

And by the way, you just ruled, you just nearly ruled with prejudice. He doesn't even have a cause of action for implied warranty against the very party he was in privity with. How many moving hands are we going to -- (inaudible) before we get to somebody that he might be able to collect against?

Thank you for your time, your Honor.

MR. GOODSNYDER: In conclusion, it's a joint motion, but I'm going to present this from my client's perspective.

Although we asked for dismissal with prejudice, we think it's appropriate on the fact that they've had recourse, and that that in and of itself is an element that's missing from being able to proceed.

If the Court were to determine that that alone isn't in and of itself sufficient to end the inquiry, then I would ask for dismissal without prejudice while they proceed against the GC and the contract -- the GC and the developer. And if at some point in time there is no coverage, then that's a different issue. But I think as we've all talked about, even counsel for the developer used the phrase -- and they -- a lot of the same subjective things that came out in the earlier argument, may even, possibly, and potentially, and things like that, as counsel said, there is no declaratory judgment case even pending yet. Reservation of rights, that's a different issue than the determination that there isn't coverage. So in the alternative, although, I think based upon

what's already been recovered, that it should be dismissed with prejudice, should the Court be inclined to do so, then without prejudice. But a dismissal today as to these parties is what I move for on behalf of my client.

MR. BONANNO: My only additional comment on that point is we're not in a situation where it's one pleading as it was against my respected colleague counsel for Roszak and TR Sienna. We're on the third shot at the apple here, more than a year in. Numerous rounds of briefing, we tried to limit it down by doing joint briefs. But we've all got substantial time and expense on this. Many, many opportunities to amend on the plaintiff's side. It's time to pull the trigger, respectfully.

THE COURT: Okay. I think, unfortunately, the Appellate Court, while they keep trying to supposedly clarify the issue for the trial court, I think Pratt II by putting the language in only about insolvency and solvency, what they were talking about at that point in time is, again, if you go back and read it, and I've reread it several times because I keep trying to get this right, as I'm sure my colleagues and I'm sure the Appellate

Court is trying to get it right too, but the way these things come before the Court they get unnecessarily -- the issues get unnecessarily complicated.

What Pratt III was talking about is when you determine the start of the statute of limitations, when there is solvency or a determination as to insolvency. It didn't ignore recourse as counsel would kind of argue that it had superseded, but recourse has no bearing at all on the Court's analysis.

I still think if you're going to argue that Minton is good law, then you have to look that Minton talked about insolvency and recourse.

And, again, I've said this repeatedly on this case, it's not a question of whether or not there is sufficient recourse or adequate recourse, it's whether or not there is no recourse.

We have two issues, and where this I believe is factually distinct from any of the Platt cases is where we do have Sienna Court Condominium Association going into the bankruptcy court specifically requesting relief from the bankruptcy court to lift the stay so that they can proceed

against these insurance proceeds, it's basically identifying that there is a sum of monies that may be available to address the issues that they have with this building. I think that is unique, and not presented in Pratt, and it is unique and not presented in the other cases and, therefore, this is factually distinct from that.

This doesn't go to Pratt III and the statute of limitations and the question of solvency and insolvency. If you take -- they even quote Black's Law Dictionary for their definition of insolvency. If you take that very straight line approach as to whether or not you can pay your bills in the ordinary course, then we are looking at facts that are sufficiently pled to establish an insolvency.

But the issue then comes back to the recourse and the innocent purchaser here. What I really also struggle with this case is you have Mr. Kenny, who has been in the know from 2008 at the latest, very much involved in this matter, and so that's where I struggle when you bring up a 2012 date as, wow, this is new, new information, when there was certainly sufficient information on the

condominium association's part much prior to that.

With those thoughts in mind, unfortunately, I don't think that the -- I think the Appellate Court at this juncture would once again struggle between the recourse, no recourse. I think you've made your record though for going forward should you depending on what happens with this case.

As such the motion to dismiss under 2-619 because it does come to the Court making determinations of fact is denied.

MR. GOODSNYDER: Thank you so much for your time.

THE COURT: All right. There are other motions being presented today.

We have the joint defendant motion to dismiss Roszak's counter claim, HMS Services dismiss Count 10. I have that one up next.

MR. GOODSNYDER: Maybe we -- we're just going to do a briefing schedule on our joint motion on the cross claim.

MR. KLINGER: William Klinger for HMS Services. One thing to add with respect to the counterclaim by Roszak, there was a two count counterclaim

against my client HMS, which was a project engineer, one of the counts was for implied warranty, the other was for breach of contract.

At the time in compliance with the Court order we filed a motion to dismiss Count 2, the implied warranty, and partially answered the breach of contract count.

I'd like to request the Court's permission to withdraw that answer and join the arguments presented by the subcontractors, which I think equally apply to us. I don't think there is any prejudice to any of the parties given that the briefing schedule will be entered today.

THE COURT: Okay.

MR. KLINGER: I talked previously to Mr. Moothart about it. I'm not sure what his position is. I can file a written motion if you need me to, but just to keep it on the same track I thought it made sense to present it to the court.

MR. GOODSNYDER: Counsel and I spoke, we have no objection to them joining our motion.

MR. MOOTHART: Well, Mr. Klinger is indicating that the motion will be similar to what the other subcontractors, but I haven't seen his actual

motion. You're joining --

MR. KLINGER: I have it to file instanter, but it presents my arguments against the implied warranty, but then with respect to the breach of contract, it's the same arguments as the subcontractors make.

THE COURT: Okay.

MR. MOOTHART: I'll leave his request up to your Honor.

THE COURT: Thank you. I will allow you to withdraw your answer to the first count against HMS, and you can file that motion instanter. Because you haven't had a chance to see it, Counsel, I'm going to build a little bit more time because you have to respond to everybody's motion at this point in time. 35 days?

MR. MOOTHART: Yes, 35 is fine.

THE COURT: That would be July 7. I don't know if that interferes with any vacation plans.

MR. MOOTHART: Does not.

THE COURT: I don't know if you wanted additional time, I will give it to you. 7/7 to respond --

MR. GOODSNYDER: Judge, me personally I happen

to have an appellate brief due in exactly that 14 days. If I could just have the flexibility of the 28 in July, that takes us to the beginning of August. And then whatever your Honor for scheduling -- we also -- it's always little bit of a challenge. One of us takes the lead on it and then we have to circulate it among seven parties, so it's little harder than just --

THE COURT: Would you like to go out to 8/4?

MR. GOODSNYDER: 8/4 for our reply.

MR. MOOTHART: I'm sorry, could I get an extra week? I'm looking at not only those motions but the -- 7/14 is what I'm asking, then if I could have 28 to respond to that.

THE COURT: 8/11. All right. Let's get you in here 8/14. Actually, I'm going to have you in 8/12. I'm not sure which date is move-in date for my son at college, I want to make sure I get him down there. 8/12 9:00 a.m. for court status.

Okay. So that would be, just so I'm clear, subcontractor material supplier defendants' joint motion to dismiss on the counterclaim.

MR. BONANNO: One quick question before we go off on our own, would you be willing to entertain a

Rule 308 petition in regards to the Minton issue as it pertains to the subcontractors and material supplier defendants? I'm just throwing it out there. I didn't consult it with the other parties or my client, but I didn't want to spring it on the Court --

THE COURT: So you want to draft a petition and present it to the Court with the specific question to take it up?

MR. BONANNO: Perhaps. Would you be willing to entertain such --

THE COURT: Oh, I certainly would entertain a motion like that.

MS. OURY: I'm not sure if we can just -- if you want to allow me to bring in after that claim was decided, how you would like to --

THE COURT: You're still to having to deal with the claim from Roszak?

MS. OURY: Yes.

THE COURT: I think what you should do is enter and continue your 304(a) until after the determination of Roszak to see whether you're in or out. Because if for some reason they're still here, you don't want to be fighting on two fronts

at that point in time.

MS. OURY: Okay. Thank you.

MR. GOZDZIAK: I represent Matsen Ford Design Associates, and we also filed a motion to dismiss --

MR. MOOTHART: I was referring to them when I was asking for the days.

MR. FLANIGON: Your Honor, Thomas Flanigon, I represent Wallin-Gomez Architects. We filed a motion to dismiss Roszak's third-party complaint, slash, counterclaim the clerk said presentment on June 9th, a week from today, we can strike it or --

MR. MOOTHART: I suggest we strike it. I've seen the motion --

THE COURT: Absolutely. Let's keep you also on the same track. So we'll have design professionals -- all issues dealing with the counterclaim will be on this other briefing schedule with a response date of July 14, and a reply date of August 11, and a court status on August 12th. I think that takes care of those motions.

HMS Services' motion to dismiss Count 2.

MR. KLINGER: William Klinger, for the record, on behalf of HMS.

This is our motion to dismiss Count 10, your Honor, which is sounding in the breach of implied warranty of habitability, you may recall, Judge, same issue as presented to the court in December. At that time you granted the motion in favor of the design professionals in the case at that time.

Subsequently, we were converted from respondents in discovery to actual defendants. Our motion just follows that motion. Illinois law is quite clear, I believe, that the implied warranty of habitability does not lie against design professionals.

I believe that the count should be dismissed on that basis and you've heard a lot about the implied warranty, so I will spare you further and give it over to my counsel here.

MR. KRAUZE: Your Honor, Raymond Krauze on behalf of Sienna Court Condominium Association.

Your Honor, I respectfully disagree with my colleague here that Illinois law is clear on the issue of whether or not an implied warranty claim of habitability lies against the design professional. If that were the case, I would think

that counsel would cite to such a case in his brief. There is no citation to such a case. Closest thing is Pokowitz versus Imperial, and I'll get to that in just a moment.

I do want to backtrack just a minute with respect to the implied warranty. The implied warranty of habitability is a creature of public policy, it's primary purpose is to protect the innocent home purchaser. Minton v. Richards, as you know, as we've discussed numerous times today, has extended that implied warranty in instances where the developer and the vendor are both insolvent.

Following Minton Illinois courts have in fact recognized that latent defects -- that the implied warranty does in fact apply to latent design defects. We've cited Grow v. Huffman (phonetic), Hadis versus Shaft (phonetic), Fisher versus GS Builders. Those are cited in our response brief, as well as two recent Circuit Court cases here in Cook County, Judge Goldberg and Judge Taylor both having found that the implied warranty of habitability does in fact apply to design professionals.

Here HMS provided defective design services that resulted in latent defects, therefore, we believe that the implied warranty of habitability should apply in this particular instance.

To address the whole issue of Pokowitz, just again, I want to read for the Court, it does not say that implied warranty of habitability does not apply to design professionals. Again, Pokowitz was dealing with a very specific issue of whether or not a design professional could be considered builder/vendor for purposes of application. Of the implied warranty of habitability. That is not the case here as I mentioned to you when we were arguing for Wojan, in the Wojan motion. That is not the instance here. The applied warranty applies to new home purchases and when you're dealing with a builder/vendor. That was not the case in Pokowitz.

There was no vendor in Pokowitz. Again, what I was saying is that the primary question in Pokowitz was whether or not the defendant was a builder/vendor, and the Court ruled that it was not.

Now the Court -- counsel has said in his brief, as have others before this Court, that Illinois law is very clear on the issue that the implied warranty of habitability does not apply to design professionals. Not one case, not one case has been cited in any brief that says implied warranty of habitability does not apply to design professionals. If that were the case, counsel would have cited it. And that has not been cited because no such case exists.

The cases that I've cited make very clear that it applies to latent defects in the design as well as the workmanship of a new home construction.

Also, there is this issue that counsel raises in his brief, well, as a design professional we had no involvement in the construction in this place, therefore, that's another argument as to why it shouldn't apply to us. In Tassan versus United Development, again, another case that's been cited here today, in that particular case the First District found that even though the developer in that particular case had come nowhere close to the construction of those homes, that they could still be liable for the implied warranty of habitability.

So not only have they not cited any cases that definitively say the implied warranty of habitability does not apply to design professionals, their other argument that they weren't involved in the construction is at odds directly with the First District Appellate Court case from 1980, which says even though the developer did not build the condos or have any involvement in the actual construction, that the implied warranty of habitability relied against that particular defendant.

It is very clear that there is no case authority to support counsel's claim that the implied warranty does not apply to design professionals. And there is no -- the authority that does exist with respect to whether or not they were involved in the construction is contrary to what they're saying before the Court in their pleadings.

Just one or two other points. The other cases that they've cited, Mississippi Meadows, Bates and Rogers, none of those cases involve the implied warranty of habitability. In one particular case they were dealing with a -- [sic]

doctrine in certain of those instances.
Your Honor, I think it's very clear that despite counsel's representation that Illinois law is clear, if that were the case, they would cite authority that says as much. There is no authority that says that. To the contrary, there is a number of Appellate Court cases that say that applies to latent design defects and there are also cases that say -- the Tassan case which says you do not have to be involved in the construction to be found liable for the implied warranty of habitability. Therefore, I think the implied warranty of habitability applies here, and therefore, counsel's motion should be denied.
MR. KLINGER: Judge, I disagree. We do cite several cases that, I think, are very clear in explaining that the implied warranty does not apply to design professionals, Rosas (phonetic) is one of them.
It all goes back to the UCC. Just like lawyers or physicians who don't imply or warrant their services, neither do design professionals. For those reasons, the reasons that are stated in the brief the motion should be granted just as you

granted the motions in favor of Wallin-Gomez in December.
THE COURT: Based on the record and arguments heard today, the motion to dismiss Count 10 of plaintiff's second amended complaint is granted.
MR. KLINGER: Thank you, Judge.
THE COURT: I think that wraps up everything today.
MR. BONANNO: May I approach?
THE COURT: Yes, you may.
MR. BONANNO: Steven Bonanno for Don Stoltzner Mason Contractors. We briefly conferred outside on the issue of a potential 308 motion, and since other briefing is going on we wanted to work on that contemporaneously and try and get back here, if we all collectively agree to present one, we're not a hundred percent for sure, filed within about 21 days. We have to get the transcript and then --
THE COURT: Right. Okay. 21 days are you seeking to present the motion?
MR. BONANNO: Present the motion and I don't know if --
THE COURT: And after you've had a chance to see it at that point in time you'll determine

whether or not --
MR. BONANNO: Justin will decide what he wants to do, if he wants to go up now or go up later.
THE COURT: I think his preference is later.
MR. WEISBERG: Yeah, I mean --
THE COURT: I think that also has to do with how much discovery, there are certainly factors that would weigh in favor of having this recourse insolvency issue looked at one more time. It's about as clear as mud as far as I'm concerned so far, and not because everyone isn't making great attempts to try and clear it up.
I'm happy to have you put it on my motion call or if you really think you can get it done in 21 days and want an opportunity to see the motion before you determine whether or not you want to take that up.
MR. WEISBERG: Yes, your Honor.
MR. BONANNO: I don't know that we need to put it in the order for today --
THE COURT: I don't think you need to. Do it and get -- I know that my motion call is not closed on June 23rd, and it is open also on June 30th, so that's the sort of time period you would be looking

at. In fact, I don't think my motion call will be closed until July 21st, it will only be closed the one Monday.
Now with all the rulings and things we have, I'm not showing that we have a future status date in this case.
MR. BONANNO: We have August 12.
THE COURT: Okay. That's the clerk status date. Okay. I was looking prior to today's order we had not set anything.
Have the answers on file that you're going to have. So that August 12th status, let's make that 9:30 instead of 9:00 for all the motions and such.
MR. WEISBERG: One question, as I put in the time to do the amended pleadings with respect to TR Sienna, should I notice up a motion if I get an agreement for a protective order if we want to put in --
THE COURT: If you can get an agreed -- because there is not a protective order on this case yet? I have so many where there are.
MR. WEISBERG: No, that's why we have to get it entered anyway --

THE COURT: So if you cannot agree to the language of the protective order, then notice up a motion. If you can get an agreed protective order, then just walk it in and I'll have a chance to look at it and sign off.

I don't know if I said specifically you had 28 days to file an amended pleading on that or not, but do give yourself the 28 days.

MR. WEISBERG: Thank you.

MR. GOODSNYDER: Just to clarify, are we going to -- does it make sense for us to respond to the second amended if it's going to be superseded by the third amended?

I don't know, I think maybe it makes more sense to wait for counsel to filed the third amended and respond to that. If he doesn't change anything, it would be straightforward, but if he adds something --

THE COURT: In fact, keeping a status date of August 12th means that you should be able to get your amended pleadings on file and for them to answer prior to that August 12th date.

MR. WEISBERG: Should I put 28 days for us to amend and then 28 days for them to --

THE COURT: Answer or otherwise plead. Even though we do have some pending motions as far as the counterclaims and things like that, I don't think whatever is happening with the plaintiff's third amended complaint is going to impact on the counterclaims and such. I think those are different issues.

MR. GOODSNYDER: Just for clarification, if the order could reflect that answer or otherwise plead to the third amended, and I understand you've made your ruling on these issues, so we understand that we'll reference those, but if something else comes up --

THE COURT: Clearly if there is something new that came up during the pleading, you'd certainly be entitled to go through that.

MR. WEISBERG: For that reason I'm not going to redraft except for those issues.

THE COURT: Okay. August 12.

(Proceedings concluded at 4:10 p.m.)

STATE OF ILLINOIS)
) SS:
COUNTY OF C O O K)

MELISSA C. GUANDIQUE, as an Officer of the Court, says that she is a shorthand reporter doing business in the State of Illinois; and that she reported in shorthand the proceedings of said hearing, and that the foregoing is a true and correct transcript of her shorthand notes so taken as aforesaid, and contains the proceedings given at said hearing.

IN TESTIMONY WHEREOF: I have hereunto set my verified digital signature this 5th day of June, 2014.

Melissa C. Guandique
Illinois Certified Shorthand Reporter

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