SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2000-006709 01/15/2004

HONORABLE JANET E. BARTON

CLERK OF THE COURT
D. Caggiano
Deputy

FILED: 01/26/2004

JAY POPEVIS, et al. BRYAN R SNYDER

v.

BEAZER HOMES SALES ARIZONA INC, et al. WILLIAM A NEBEKER

WILLIAM H DOYLE
DENNIS REID GARREY
KENNETH JANUSZEWSKI
JAMES K KLOSS
JOSEPH A KULA
VALERIE R EDWARDS
C COLE CRABTREE
SCOTT M ZERLAUT
M DUNCAN SCOTT
ANDREW PESHEK
THOMAS A WALCOTT
CHARLES D ONOFRY
ELDA E ORDUNO

MINUTE ENTRY

1:37 p.m. This is the time set for Oral Argument. Plaintiffs are represented by Bryan R. Snyder. Defendant Beazer Homes Sales Arizona, Inc. is represented by counsel, William A. Nebeker and Thomas Walcott. Defendant Pratte Development Co. Inc. is represented by counsel, M. Duncan Scott and Andrew Peschek. Defendant Gilbert Plumbing Co. is represented by counsel, Kenneth Januszewski, Charles Onofry and Elda Orduno. Defendant Sonoran Air, Inc. is represented by counsel, Valerie Edwards. Defendant Diversified Roofing is represented by counsel, C. Cole Crabtree. Defendant Leach Painting & Drywall, Inc. is represented by counsel, Dennis Reid Garrey. Defendant Masterview Window Company is represented by counsel, James K. Kloss. Defendant Pacific Stucco of AZ, Inc. is represented by counsel, Scott

Zerlaut, Asa Markel, Charles Onofry, and Elda Orduno. Defendants Royce Walls and Hubbell Drywall Insulation Specialists are represented by counsel, Charles Onofry and Elda Orduno.

Court reporter, Margie Riley, is present.

Arguments are heard with regard to various pending motions other than Motions in Limine.

Defense counsel William Nebeker presents argument re: Motion to Disqualify Plaintiffs' Counsel, Bryan Snyder.

IT IS ORDERED that Plaintiffs' counsel shall submit his reply to the Court regarding Defendants' Motion to Disqualify Plaintiffs' Counsel no later than **5:00 p.m. January 20, 2004**.

IT IS FURTHER ORDERED Plaintiffs' counsel shall hand deliver his reply to Defense counsel's office.

Defense counsel Kenneth Januszewski moves for a stay of the trial due to Gilbert Plumbing's intent to file a Petition for Special Action regarding this Court's prior ruling allowing the use of extrapolation at trial.

IT IS ORDERED denying Mr. Januszewski's Motion.

4:06 p.m. Matter concludes.

LATER:

1. Third-Party Defendant Royce Walls of Phoenix, Inc.'s Motion for Summary Judgment Re: Liability for Negligent Design and Request for Rule 11 Sanctions

Third-Party Defendant Royce Walls of Phoenix, Inc. ("Royce") claims it is entitled to summary judgment on Plaintiffs' negligent design claim because Plaintiffs' expert has no factual basis for his opinion that Royce's walls were negligently designed. Royce also seeks sanctions pursuant to Rule 11, Ariz.R.Civ.P., for Plaintiffs' failure to voluntarily dismiss their negligent design claim after their expert's deposition.

Despite Royce's contention to the contrary, Plaintiffs' expert does have a basis for his opinion that the walls were negligently designed. In that regard, he claims that his opinion is based upon the application of a wind load analysis. The fact that this basis, according to Royce, is premised upon faulty analysis and incorrect and incomplete information, does not make the testimony inadmissible. Therefore,

IT IS ORDERED denying Royce's Motion for Summary Judgment Re: Liability for Negligent Design and Request for Rule 11 Sanctions.

2. Third-Party Defendant Royce's Motion for Summary Judgment Re: Insufficient Evidence of Negligent Construction

Third-Party Defendant Royce also seeks summary judgment on Plaintiffs' claims that the perimeter walls for the project were negligently constructed. In this Motion, Royce raises many of the same issues raised in its Motion Re: Liability for Negligent Design – that the expert never reviewed the design plans for the project, was under the mistaken assumption that Royce was installing an Integra and/or Superlite wall system, did not perform a formal structural analysis, examined a woefully insufficient number of walls, and all but two of the walls he examined had been modified and/or altered by someone other than Royce. In essence, Royce argues that Plaintiffs expert's testimony is so flawed that it should not be permitted because it will not assist the trier of fact to understand the evidence or any issue in dispute.

Royce does not dispute that Plaintiffs' wall expert has the professional credentials to testify as an expert on structural wall issues. The issues Royce complains of – the character and degree of the expert's observations, the accuracy of his assumptions, and the thoroughness of his analysis – go to the weight to be accorded his conclusions, not their admissibility. Therefore,

IT IS ORDERED denying Royce's Motion for Summary Judgment Re: Insufficient Evidence of Negligent Construction.

3. Plaintiffs' Motion to Clarify Issues Certified

In this Motion Plaintiffs seek an Order from this Court "affirming that [P]laintiffs' defect GEO-2.2 Property Site Walls is included in the above-captioned action." There are two Rulings from the Court which discuss what defect issues are certified as part of this class action. First, there is Judge McNally's Ruling dated October 15, 2001, in which she grants Plaintiffs' Motion to Certify Class. In that Ruling, Judge McNally does not expressly identify the specific defect issues she is certifying. Rather, with respect to the defect issues, the Ruling states, "[i]n support of plaintiffs' Motion, a construction expert examined a sample of 63 homes and found them to have certain defects, including lack of window flashing, and defective roofs and windows." The construction expert Judge McNally refers to in her October 15, 2001 Ruling is Howard Dworkin, whose Affidavit was attached to Plaintiffs' April 2, 2001, Motion to Certify Class. In his Affidavit, Mr. Dworkin identifies the following defect issues – windows, sliding glass doors, roofing, exterior wood siding, and miscellaneous problems, which he identified as stucco, drywall, and concrete block walls.

On June 5, 2003, Judge Buttrick issued a Ruling that also addresses the defect issues certified as part of the class. That Ruling was based in large part upon a pleading filed by the Plaintiffs, at Judge Buttrick's request, entitled List of Defects in Addition to Those Previously

Certified. Two exhibits were attached to that April 4, 2003 pleading. The first exhibit (Exhibit "A") is entitled Supplemental List of Defective Conditions. The second exhibit (Exhibit "B") is entitled Defects Identified in the Motion to Certify. Exhibit "B" identifies "2.2 Property Site Walls" as a defect identified in the Motion to Certify. According to the Ruling issued by Judge Buttrick on June 5, 2003, the defect issues certified as part of the class consist of all of those previously certified by Judge McNally as well as certain of the defects identified on Exhibit "A" to Plaintiffs' April 4, 2003 pleading. Thus, the issue of whether "2.2 Property Site Walls" is a defect issue certified as part of the class depends upon whether Judge McNally certified that defect.

Defendant and the Third-Party Defendants argue that Judge McNally did not certify the property site walls. In support of their position in this regard, Defendant and the Third-Party Defendants rely upon the absence of any specific reference to property site walls in either Judge McNally's October 15, 2001 Ruling or Plaintiffs' Notice of Class Action. However, the wording in both of those documents establish that they were not intended to set forth an exhaustive list of each and every defect that was certified as part of the class.

Based upon Plaintiffs' Motion to Certify, the Affidavit of Mr. Dworkin attached to that Motion, Judge McNally's October 15, 2001 Ruling, Plaintiffs' April 4, 2003 pleading, including Exhibit "B" thereto, and Judge Buttrick's June 5, 2003 Ruling, this Court is of the opinion that Judge McNally's October 15, 2001 Ruling certified as defect issues each of the defects referenced in Mr. Dworkin's Affidavit, which, as noted above, included the property site walls. Therefore,

IT IS ORDERED granting Plaintiffs' Motion to Clarify Issues Certified.

IT IS FURTHER ORDERED affirming that Plaintiffs' defect GEO 2.2 Property Site Walls is included as a certified defect issue herein.

4. Third-Party Defendant Diversified Roofing, Corp.'s Motion for Summary Judgment

According to Third-Party Defendant Diversified Roofing Corp. ("Diversified"), the expert of Defendant/Third Party Plaintiff, Beazer Home Sales Arizona, Inc. ("Beazer") is of the opinion that Diversified's work on the project has performed as intended and met all applicable industry standards. Because Beazer's expert will testify that Diversified's work did not violate applicable standard of care in the roofing industry, Diversified claims that it is entitled to summary judgement herein on the claims asserted against it by Beazer in Beazer's Third Party Complaint. Diversified is wrong.

Beazer's real claim herein is a derivative claim based upon indemnity language contained in the contacts between Beazer and the Third-Party Defendants. Thus, Beazer's ability to prevail herein is not based upon its ability to produce evidence of defective workmanship. Rather, it is

based upon Beazer's ability to convince the jury that Diversified is legally required to indemnify Beazer in part, if not in whole, for any damages the jury decides to award Plaintiffs for defective roofs. Beazer can prevail on this claim without producing any independent evidence of roof defects attributable to Diversified. Therefore,

IT IS ORDERED denying Diversified's Motion for Summary Judgment.

5. Beazer's Motion for 23(b)(3) Class Decertification; Masterview Window Company's Response to and Joinder in Beazer Homes' Motion for Class Decertification; Royce's, Hubbell Construction's, and Pacific Stucco's Joinder in Beazer's Motion for Decertification; and Royce's Supplemental Joinder (and Response to) Beazer's Motion for Decertification

As noted above, on October 15, 2001 Judge McNally granted Plaintiffs' Motion to Certify. Subsequently, and after Judge Buttrick had been assigned to this case, Beazer filed a Motion for Class Decertification. On March 5, 2003, Judge Buttrick denied that Motion without prejudice. Subsequently, on June 5, 2003, Judge Buttrick affirmed the propriety of class certification herein by identifying the defect issues certified as part of the class action. Now, subsequent to the assignment of another Judge to this matter, Beazer has once again filed a Motion for Class Decertification.

This Court agrees that it has the authority to, and indeed should, revisit an earlier certification Order "if, upon further development of the facts, the original determination appears unsound." Carpinteiro v. Tucson Sch. Dist. No. 1 of Pima County, 18 Ariz. App. 283, 286 (1972). However, neither Beazer nor any of the Third-Party Defendants who joined in Beazer's Motion for Class Decertification have identified any facts developed since the filing of Beazer's previous Motion for Decertification, which supports the relief they are seeking herein. Indeed, Beazer's November 14, 2003 Motion raises either the same arguments that it raised previously – that any problems effecting the project's homes are due to unique factual circumstances surrounding the construction, maintenance and use of each individual residence, which differ from home to home and from class member to class member – or arguments that could have been raised previously – that the class members cannot adequately represent the class. The mere fact that another judge has assumed responsibility for this case is not the type of changed circumstance or further factual development that warrants the revisiting of an earlier certification Order. Therefore,

IT IS ORDERED denying Beazer's Motion for 23(b)(3) Class Decertification; Masterview Window Company's Response to and Joinder in Beazer's Motion for Class Decertification; Royce's, Hubbell Construction's, and Pacific Stucco's Joinder in Beazer's Motion for Decertification; and Royce's Supplemental Joinder (and Response to) Beazer's Motion for Decertification.

6. Plaintiffs' Motion to Amend Complaint and to Sever Individual Claims Regarding Soils Problems

The Motion to Certify filed by the Plaintiffs on April 2, 2001, does not identify soils problems as a defect Plaintiffs were seeking to have certified or included within the class action.

In Plaintiffs' April 4, 2003, List of Defects in Addition to those Previously Certified, Plaintiffs identified the additional defective conditions that they believed should be litigated in this action. The only additional defective condition identified by Plaintiffs in that pleading that could arguably be characterized as a soil problem is the Geotechnical condition. In his June 5, 2003 Ruling, Judge Buttrick identified those defects listed in Plaintiffs' April 4, 2003 pleading which he deemed to be certified for purposes of and at issue in this litigation. The Geotechnical condition was not one of the additional defective conditions certified by Judge Buttrick. Thus Plaintiffs knew as of June 5, 2003, that no soil issues had been certified as a defect at issue in this litigation.

The deadline in this case for filing pre-trial motions, other than motions in limine, was November 14, 2003. See March 17, 2003 Minute Entry. Plaintiffs' Motion to Amend Complaint and to Sever Individual Claims Regarding Soils Problems was filed on December 8, 2003, approximately three weeks after the deadline for filing such motion, and less than two months before the trial in this matter is set to commence. Plaintiffs have failed to provide this Court with any explanation as to why their Motion was not and/or could not have been timely filed. Nor have Plaintiffs offered any explanation as to why they waited over six months after Judge Buttrick denied any attempt to have soils problems included as a class issue to seek the relief they are requesting in their Motion to Amend. Therefore,

IT IS ORDERED denying Plaintiffs' Motion to Amend Complaint and to Sever Individual Claims Regarding Soils Problems.

7. Third-Party Defendant Hubbell Construction, Royce Walls, Pacific Stucco, and Gilbert Plumbing's Motion for Summary Judgment Re Asserted Causes of Action; Masterview Window Company's Response to and Joinder in Hubbell Construction's Motion for Summary Judgment Re Asserted Causes of Action; Third-Party Defendant Pratte Development, Inc.'s Motion for Partial Summary Judgment Regarding Third-Party Plaintiff's Claim for Negligence, Breach of Implied/Equitable Indemnity, Breach of Contract, Breach of Implied Warranty, Declaratory Relief and Strict Liability; Third-Party Defendant Leach Painting's Joinder in Third-Party Defendant Pratte Development's Motion for Partial Summary Judgment Regarding Third-Party Plaintiff's Claim for Negligence, Breach of Implied/Equitable Indemnity, Breach of Contract, Breach of Implied Warranty, Declaratory Relief and Strict Liability; and Third-Party Defendants Royce Walls, Hubbell Construction, Gilbert Plumbing, and Pacific Stucco's Joinder in Third-Party Defendant Pratte Development's Motion for Partial Summary

Judgment Regarding Third-Party Plaintiff's Claim for Negligence, Breach of Implied/Equitable Indemnity, Breach of Contract, Breach of Implied Warranty, Declaratory Relief and Strict Liability

In these Motions, the Third-Party Defendants seek summary judgment on the tort claims asserted by Plaintiffs against Beazer (strict liability, negligence and negligence *per se*). In addition, the Third-Party Defendants seek summary judgment on the claims asserted against them by Beazer in its Third Party Complaint.

With respect to the Third-Party Defendants' request for summary judgment on the tort claims asserted by Plaintiffs, the Court notes that Plaintiffs strict liability claim has already been dismissed. See Order dated May 23, 2003. Therefore,

IT IS ORDERED denying the Third-Party Defendants' Motion for Summary Judgment on Count I of Plaintiffs' Complaint.

With respect to the other tort claims asserted by Plaintiffs herein (negligence and negligence *per se*), the Court agrees that such claims are barred by the economic loss doctrine. Therefore,

IT IS ORDERED granting the Third-Party Defendant's Motion for Summary Judgment on Counts III and IV of Plaintiffs' Complaint.

The Third-Party Defendants argue that the tort claims which Beazer has asserted against them (Counts I and X) are barred by the economic loss doctrine. The Court agrees. Therefore,

IT IS ORDERED granting the Third-Party Defendants summary judgment on Beazer's claims of negligence (Count I) and strict products liability (Count X).

The Third-Party Defendants argue that they are entitled to summary judgment on Beazer's implied and equitable indemnity claims (Counts III and IV). Specifically, the Third-Party Defendants argue that where parties have expressly agreed upon indemnity provisions in their contract, the extent of the duty to indemnify is defined by the contract itself rather than common law principles. The Court agrees. See INA Insurance Co. of North America v. Valley Forge, 150 Ariz. 248, 252, 722 P.2d 975, 979 (App. 1986). Therefore,

IT IS ORDERED granting summary judgment in favor of the Third-Party Defendants and against Beazer on Counts III and IV in Beazer's Complaint

In its various responses to the Third-Party Defendants' many pre-trial Motions and at the oral argument on those Motions, Beazer acknowledged that its real claim against the Third-Party Defendants herein, and the only claim which it intends to pursue at the trial, is its express indemnity (Count II) claim. Specifically, Beazer acknowledged at the oral argument that it is not seeking to recover any separate or independent damages from the Third-Party Defendants herein.

Rather, all Beazer is seeking herein is indemnification for any damages assessed against Beazer which are attributable to the Third-party Defendants' performance or lack of performance on the project. Moreover, Beazer acknowledged at the oral argument and in its various responses that it is seeking such indemnification pursuant to the express indemnification provision in the Third-Party Defendants' contracts with Beazer. Therefore,

IT IS ORDERED granting summary judgment in favor of the Third-Party Defendants on Beazer's claims of breach of contract (Count V), breach of express/implied warranties (Count VI), and declaratory relief (Counts VII, VIII and IX).

Beazer's claim of express indemnity (Count II) is discussed under item 15, below. For the reasons set forth under item 15, below,

IT IS ORDERED denying the Third-Party Defendants' request for summary judgment on Count II of Beazer's Complaint.

8. Plaintiffs' Motion to Certify Subclass or in the Alternative Confirm Sellers' Standing to Pursue Damages

On March 5, 2003, Judge Buttrick ruled that persons who purchased property at the project after Judge McNally's October 15, 2001 certification Order were not appropriate class members. In their Motion, Plaintiffs seek a ruling from this Court either establishing a subclass consisting of such purchasers or confirming that the persons who sold their homes to such purchasers remain class members herein.

As noted in Vaughn v. Dame Construction, 223 Cal. App.3d 144, 149 (App. Cal.):

> [t]he fact that the property was sold after the damage occurred does not mean the new owners are now the parties entitled to recover for the damage suffered by plaintiff while she was the owner. In order for the new owners to maintain an action, they would first have to establish damage to their interests in the property.

In this case, Plaintiffs have failed to establish that these subsequent purchasers suffered any damage to their interests in the property, even though Plaintiffs have had approximately eight months since Judge Buttrick's Order to obtain such evidence. In the absence of such evidence there simply is no basis for certifying these purchasers as a subclass herein.

At the November 6, 2003 Status Conference, the Court addressed the standing of those persons who have sold their homes at the project since the issuance of Judge McNally's October 15, 2001 certification Order. Specifically, the Court held that these sellers would remain as Plaintiffs herein provided they could establish damages, e.g., a diminution in the fair market value of, and thus, the price they received for, their property caused by one or more of the defects at issue herein, or that they were required to incur costs to repair such defects in order to sell their home.

Finally, Plaintiffs have offered no explanation as to why this Motion was filed and these issues raised on the eve of trial and after the close of discovery in this matter.

For the reasons set forth above,

IT IS ORDERED denying Plaintiffs' Motion to Certify Subclass or in the Alternative Confirm Sellers' Standing to Pursue Damages.

9. Third-Party Defendant Pratte Development, Inc.'s Motion for Partial Summary Judgment Regarding Speculative Damages; and Third-Party Defendant Leach Painting's Joinder in Third-Party Defendant Pratte Development's Motion for Partial Summary Judgment Regarding Speculative Damages

Pratte Development, Inc. ("Pratte") installed the windows and wood siding at the project. Pratte contends that it is entitled to summary judgment on all of Beazer's claims because Beazer has failed to properly disclose the cause or nature of the defect for the windows and wood siding and the responsible party.

Beazer's claim for indemnity is a derivative claim based upon indemnity language contained in the contacts between Beazer and the third-party defendants. Thus, Beazer's ability to prevail herein is not based upon its ability to produce evidence of defective workmanship. Rather, it is based upon Beazer's ability to convince the jury that pursuant to the indemnity clause Pratte is legally required to indemnify Beazer in part, if not in whole, for any damages the jury decides to award Plaintiffs for defective window installation and/or wood siding installation. Beazer can prevail on this claim without producing any independent evidence of defects attributable to Pratte's work. Therefore,

IT IS ORDERED denying Third-Party Defendant Pratte Development, Inc.'s Motion for Partial Summary Judgment Regarding Speculative Damages; and Third-Party Defendant each Painting's Joinder in Third-Party Defendant Pratte Development's Motion for Partial Summary Judgment Regarding Speculative Damages.

10. Masterview Window Company's Motion for Summary Judgment

Masterview Window also argues that it is entitled to summary judgment on Beazer's claims because Beazer had not produced any evidence that Masterview is responsible for any of Plaintiffs' alleged window defects. A jury could also conclude that there are deficiencies in the performance of the sliding glass doors attributable to installation issues. Therefore, for the same reason that this Court denied summary judgement under items 4 and 9, above,

IT IS ORDERED denying Masterview Window Company's Motion for Summary Judgment.

11. Third-Party Defendant Pacific Stucco's Motion for Summary Judgment Re: Insufficient Evidence to Establish Liability

Pacific Stucco also argues that it is entitled to summary judgment on Beazer's claims because Beazer has never stated why Pacific Stucco is responsible for any alleged defect at the project. Again, however, based upon Plaintiffs' evidence in this case, a reasonable jury could conclude that there are defects at the project attributable in whole or part to the installation of the stucco. Therefore, for the same reason that this Court denied summary judgment under items 4, 9 and 10, above,

IT IS ORDERED denying Third-Party Defendant Pacific Stucco's Motion for Summary Judgment Re: Insufficient Evidence to Establish Liability.

12. Motion for Summary Judgment re: Extrapolation

Beazer's Motion for Summary Judgment re: Extrapolation asks this Court to preclude Plaintiffs from offering extrapolation testimony at the trial. Beazer claims that such testimony should not be allowed because Plaintiffs have produced no evidence that their experts' opinions were rendered in accordance with any generally accepted extrapolation theory or methodology. Basically, what Beazer is arguing is that even if extrapolation is an acceptable way of determining the extent of the defects in class action construction defect cases such as this one, the extrapolation must still be modeled properly to be admissible and in this case it was not. Plaintiffs, not unexpectedly, argue that their expert did use a correct and acceptable extrapolation methodology. The Court is of the opinion that the extrapolation methodology used by Plaintiffs' experts is an acceptable methodology and, as a result, the attacks made by Beazer to that methodology go to the weight, not the admissibility of Plaintiffs' extrapolation testimony. Therefore,

IT IS ORDERED denying Beazer's Motion for Summary Judgment re: Extrapolation.

13. Third-Party Defendant Hubbell Construction d/b/a Hubbell Drywall's Motion for Summary Judgment Re Insufficient Proof

Hubbell seeks summary judgment because, according to Hubbell, Beazer has not produced evidence that Hubbell is responsible for any of the alleged drywall defects. With respect to the vapor barrier issue, Beazer acknowledged in its Response that this alleged defect is no longer at issue in this litigation. Therefore,

IT IS ORDERED granting summary judgment in favor of Third-Party Defendant on the vapor barrier issue.

The cause and extent of the other alleged drywall defects are in dispute. Moreover, based upon Plaintiffs' evidence in this case, a jury could conclude that these alleged defects are attributable, at least in part, to Hubbell's installation of the drywall. Therefore, for the same reason that this Court denied summary judgment under items 4, 9, 10, and 11, above,

IT IS ORDERED denying summary judgment in favor of Third-Party Defendant Hubbell on all drywall issues other than the vapor barrier issue.

14. Beazer's Cross-Motion for Summary Judgment Re: Express Indemnity

Beazer's Cross-Motion for Summary Judgment was filed on December 10, 2003. The deadline for filing pre-trial motions other than motions in limine was November 14, 2003. See March 17, 2003 Minute Entry. Beazer has failed to establish good cause for its failure to timely file its Motion for Summary Judgment. Therefore,

IT IS ORDERED denying Beazer's Cross-Motion for Summary Judgment re: Express Indemnity on the grounds and for the reason that it is untimely.

15. Pratte's Motion for Summary Judgment Re: 1. Express Warranty 2. Express Indemnity, Alternatively, Motion for Partial Summary Judgment Re: Design Defects; Sonoran Air's Joinder in Pratte's Motion; Masterview Window Company's Response to and Joinder in Pratte's Motion; and Third-Party Defendant Leach Painting's Joinder in Pratte's Motion.

This Court has already granted summary judgment in favor of the Third-Party Defendants and against Beazer on its express warranty claim (Count VI). See item 7, above.

The express indemnity (paragraph 27) in the Third-Party Defendants' contracts with Beazer provides that with respect to all work that is covered by or incidental to the subcontract, the subcontractor shall defend, indemnify and hold Beazer harmless from any claim, liability, loss or damage, including costs and attorneys' fees

> arising by reason of the death or bodily injury to persons, injury to property, design defects (if the design was originated by the SUBCONTRACTOR, his supplier, employee or agent), or other loss, damage or expense, including any of the same resulting from CONTRACTOR'S alleged or actual negligent act or omission, . . . provided, however, the SUBCONTRACTOR shall not be obligated under this SUBCONTRACT AGREEMENT to indemnify the CONTRACTOR with respect to damages which are due to the sole negligent or willful misconduct of the CONTRACTOR, his agents or servants.

The Third-Party Defendants contend that the express indemnity is inapplicable herein because it is limited in scope to negligence type tort claims and related injuries or design defects. Because such claims are barred herein by the economic loss doctrine, the Third-Party Defendants claim that they are entitled to summary judgment on Beazer's express indemnity claim (Count II). See Third-Party Defendant Hubbell Construction, Royce Walls, Pacific Stucco, and Gilbert Plumbing's Motion for Summary Judgment Re Asserted Causes of Action, and Masterview Window Company's Response to and Joinder in Hubbell Construction's Motion for Summary Judgment Re Asserted Causes of Action. The Third-Party Defendants also argue that even if the express indemnity provision does extend to non-tort type claims, such as those asserted by

Plaintiffs herein, the Third-Party Defendants are nevertheless entitled to summary judgment because the express indemnity provision is subject to the one year statute of limitations set forth in the express warranty provision (Paragraph 23) in the contracts between Beazer and the Third-Party Defendants.

The express language of the indemnity provision does not limit its scope to negligence type claims. Rather, according to its express wording, the indemnity provision requires each Third-Party Defendant to indemnify Beazer for any damages incurred by or assessed against Beazer which are attributable to work covered by or incidental to the Third-Party Defendant's subcontract and which arise from: (1) death or bodily injury to persons, (2) injury to property, (3) design defects, if the design was originated by the Third-Party Defendant, his supplier, employee or agent, or (4) **other loss, damage or expense**. Moreover, the indemnity provision in the Third-Party Defendants' contracts with Beazer simply is not reasonably susceptible to the interpretation advanced by the Third-Party Defendants herein. Finally, the indemnity provision at issue does not circumvent, and is not barred by the one year statute of limitations contained in, the express warranty provision of the Third-Party Defendants' contracts with Beazer. Nor are the two provisions (the express warranty and indemnity provisions) reasonably susceptible to such an interpretation. In that regard, the express warranty provision in the contracts (paragraph 23) specifically states:

> Nothing contained in this Section shall operate to relieve the SUBCONTRACTOR for responsibility after one year from the date of receipt of final payment for the work hereunder, for damages resulting from defects, both latent and patent, departures from the requirements of the SUBCONTRACT AGREEMENT, fraud, or such other gross mistakes or gross and wilfull negligence as amount to fraud, and the SUBCONTRACTOR shall indemnify and save the CONTRACTOR and OWNER harmless from and against liability, loss or damage arising by reason of any and all of such matters. Neither acceptance of the work performed hereunder, nor payment of sums to the SUBCONTRACTOR for the said work, nor any provision in these documents, shall be deemed to be a waiver by the CONTRACTOR or the OWNER, nor to relieve the SUBCONTRACTOR of any responsibility under this SUBCONTRACT AGREEMENT.
>
> Therefore,

IT IS ORDERED denying the Third-Party Defendants' request for summary judgment on Count II of Beazer's Complaint.

IT IS FURTHER ORDERED precluding the Third-Party Defendants from arguing at the trial that the indemnity provision in their contracts with Beazer is limited to negligence claims, subject to a one year statute of limitations, and/or circumvented by the contracts' express warranty provision. See Taylor v. State Farm, 175 Ariz. 148, 152-155, 854 P.2d 1134, 1138-1141

(1993) (Parol evidence of antecedent understandings and negotiations is not admissible to vary or contradict a written contract. A trial court should consider extrinsic evidence to determine whether, on the basis of such evidence, the language in the contract is reasonably susceptible to the interpretation asserted by the proponent of the extrinsic evidence. If it is, then the parol or extrinsic evidence is admissible to determine the meaning intended by the parties. If it is not, then the parol evidence is inadmissible. Whether the contract language is reasonably susceptible to the interpretation asserted by the proponent of the parol evidence, so that the parol evidence is admissible, is a question of law for the court).

Finally, Pratte seeks summary judgment on certain of the design defects alleged by Plaintiffs. Pratte's position is that none of the design defects arguably related to its work constitute designs originated by Pratte, its suppliers, employees or agents and the indemnity provision does not require Pratte to indemnify Beazer for a design defect unless the design was originated by the SUBCONTRACTOR, his supplier, employee or agent. The Court agrees with Pratte's interpretation of the indemnification provision as it pertains to design defects. The Court further agrees that a reasonable person simply could not find from the evidence in this case that the following alleged defects, even if they exist, were attributable to a design that originated with Pratte, its suppliers, employees, or agents – Architectural Defect 7.5a, Structural Defect B1, and Structural Defect D. Therefore,

IT IS ORDERED granting summary judgment in favor of Pratte and against Beazer with respect to alleged design defects Architectural Defect 7.5a, Structural Defect B1, and Structural Defect D.