

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

*** FILED ***
03/08/2002

03/06/2002

CLERK OF THE COURT
FORM V000A

THE HONORABLE SHERRY HUTT

L. Muhammad
Deputy

CV 1999-019065

FILED: _____

MANNY AROZ, et al.

JEFF R WILHELM

v.

AIG FOOTHILLS LIMITED PARTNERSHIP, WILLIAM H DOYLE
et al.

JAMES M MALDONADO
JOSEPH B SWAN JR
GARY L BIRNBAUM
JAMES K KLOSS
RICHARD A SEGAL
SARAH D JARRETT
MITCHELL J RESNICK
BRUCE M PRESTON
JONATHAN D SCHNEIDER
JOHN H ISHIKAWA
MICHAEL J FRAZELLE
JOSEPH A KULA
DENNIS REID GARREY
G MICHAEL TRYON
WILLIAM A NEBEKER
JAY R GRAIF

MINUTE ENTRY

PENDING are motions in limine to be heard on **March 7, 2002 at 9:00 a.m.** Those motions which can be ruled upon in consideration of the pleadings, and removed from oral argument, are as follows:

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

*** FILED ***
03/08/2002

03/06/2002

CLERK OF THE COURT
FORM V000A

THE HONORABLE SHERRY HUTT

L. Muhammad
Deputy

CV 1999-019065

1. Television and Radio Coverage:
No opposition.
GRANTED.
2. Settlement Offers:
No opposition.
GRANTED.
3. Unrelated Registrar of Contractors Complaints:
No opposition.
GRANTED.
4. Expert testimony: Extrapolation:
GRANTED.

Plaintiffs assert that experts should be allowed to testify that if damage exists in some homes, it is likely to be present in other homes, based on a statistical analysis of all homes by a builder that were built at about the same time in the same tract. Plaintiffs assert the objection goes to weight only.

THE COURT FINDS that the weighing of testimony is the domain of the jury, but competence, relevance, and foundation must first be determined by the Court.

Plaintiffs have brought a case of workmanship, predicated on poorly compacted soils. Plaintiffs assert that the developments rest on an area where certain portions were not properly treated. Therefore, Plaintiffs' case rests on a spatial, and not statistical, analysis.

Scientific evidence may be deemed credible when the methodology is based upon reliable data and employs a method likely to result in information which will assist the trier of fact on the issues before them. When the methodology is transparent, the determination of foundation for the opinion is readily ascertained.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

*** FILED ***
03/08/2002

03/06/2002

CLERK OF THE COURT
FORM V000A

THE HONORABLE SHERRY HUTT

L. Muhammad
Deputy

CV 1999-019065

It is apparent from Plaintiffs' response to the motion that they intend to bring capable professionals to the stand and produce calculations as though relevance and foundation do not apply to "forensic" evidence. The Court knows of no such exception to the rules of evidence. The qualifications of an expert may be formidable, but they must use a credible process.

The Court can imagine some instances herein where extrapolation evidence may apply, such as to diminution of value, but no evidence will be admitted which is merely supposition based on statistics.

5. Lot 200:
GRANTED.
6. Liability Insurance:
GRANTED.
7. Subsequent Remedial Measures:
GRANTED.
8. Report of Tom Thomas:
DENIED.

Defendant's object to Plaintiffs' utilization of Defendants consultant as work product, to which Plaintiffs object, given prior orders.

9. Punitive Damages:
GRANTED.

Defendants object to the use of the words "punitive" and "exemplary" in the opening statement or until a basis for punitive damages is established, to which Plaintiffs object.

The Court having had the opportunity to consider this issue in the context of the summary judgment motion, is concerned that there is insufficient basis to discuss the claim with the jury in opening statement. The purpose of such discussion would be to inflame the passions and prejudice of the jury, and if

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

*** FILED ***
03/08/2002

03/06/2002

CLERK OF THE COURT
FORM V000A

THE HONORABLE SHERRY HUTT

L. Muhammad
Deputy

CV 1999-019065

insufficient evidence is present, not only would the Court be faced with a directed verdict, but also a mistrial. It is apparent from Plaintiffs' pleadings in the motion for summary judgment, that the claim that the Defendant knew or should have known of the defect prior to sale of the home, may apply as to some Plaintiffs and not to others. The timing of Defendants' knowledge relative to the time the home was purchased, is important, and has not been dealt with by Plaintiffs' pretrial, so it must be addressed by the Court in the trial. To avoid tempting a mistrial, it is appropriate to grant the motion in limine.

10. Prior Suits:

GRANTED.

THE COURT FINDS that facts of prior knowledge of soil condition are admissible, but not lawsuits and the resolution of actions.

11. Offers to Compromise:

GRANTED.

12. Computer Generated Evidence:

GRANTED.

The parties shall disclose by **March 25, 2002** the actual demonstrative exhibits each seeks to use. Disputes which arise concerning such exhibits shall be heard by the Court on **April 1, 2002 at 1:30 p.m.**

13. Plaintiffs' Motion Re Media Disclosure of Soil Problem is a Defense to Stigma:

DENIED.

THE COURT HAS FOUND that a Plaintiffs' statements to the media are admissible and are not hearsay.

14. Joe Frank:

Plaintiffs desire to establish the admissibility of the reports of Joe Frank, to which Defendants do not object, as long

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

*** FILED ***
03/08/2002

03/06/2002

CLERK OF THE COURT
FORM V000A

THE HONORABLE SHERRY HUTT

L. Muhammad
Deputy

CV 1999-019065

as Plaintiffs do not duplicate expert testimony or otherwise use the reports if not relied upon by their experts.

Plaintiffs further argue that Defendants may not equivocate on whether Mr. Frank will be called by Defendants.

IT IS ORDERED that in the final joint pretrial statement, the parties shall list their witnesses and exhibits for trial, and the procedural rules regarding experts shall apply.

15. Plaintiffs' Motion Re Duplicative Expert Testimony on Soils.

DENIED.

THE COURT FINDS that in those instances where Defendants in defense of their action have material differences of position and have diverging expert opinions, it would be an abuse of discretion to require Defendants to agree on a homogeneous position. The One Witness Rule does not preempt due process.

16. Site Developer Motion Re Negligence Per Se:
(NOTE: Some issues raised as in Plaintiffs' cross-motion for summary judgment re negligence per se)

GRANTED.

The Plaintiffs desire to show that soils reports were required. There were requirements for those reports, and the Defendant did not comply with the requirements in the submission of the reports or Defendant did not do that which was indicated in those reports.

THE COURT FINDS that failing to abide by specification within the reports throughout the development may be evidence of negligence, but unless the Statutes established a standard for soils, there is no negligence per se. Violating one's own plan may be negligence, but unless there is a standard of care within a code, there is no negligence per se. Plaintiffs' argument that

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

*** FILED ***
03/08/2002

03/06/2002

CLERK OF THE COURT
FORM V000A

THE HONORABLE SHERRY HUTT

L. Muhammad
Deputy

CV 1999-019065

the pertinent section of the code creates a standard, is not well taken.

17. Paul Evans:
WITHDRAWN.

18. Plaintiffs' Motion Re Pad Prep and Fill in Other
Neighborhoods:
DENIED.

THE COURT FINDS that to some extent the information Plaintiff seeks to exclude may be directly relevant to Defendants' response to issues of notice, Plaintiffs' claims of fraud, and breach of warranty. It may not be properly excluded, as long as the information has foundation and is relevant. If Defendants use and have used a certain soil mix with a good result and used that information in this development, such information is admissible.

19. Non-Parties at Fault:
DENIED.

Plaintiffs seek to preclude Defendants' defense of non-parties at fault. Defendants respond that the Court Order severing Defendants for trial changed the field, and that Plaintiffs have had notice of the defenses prior thereto.

THE COURT FINDS the notice of non-parties at fault to be timely and the claims among Defendants long well known to Plaintiffs. However, non-parties at fault may be of no consequence in the breach of warranty claims, against the builder. If the cause of Plaintiffs' problems are not from soil settlement, but are due to actions of others, then they fall upon the builder. If faulty soils are the cause of Plaintiffs' problems, then non-parties are not at fault, and the jury will find against the site developer Defendants. The verdict in this case will frame the damage parameters of the indemnity case. The non-party issue will assist the jury to assess liability among the Defendants before them. This is not the typical non-party at

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

*** FILED ***
03/08/2002

03/06/2002

CLERK OF THE COURT
FORM V000A

THE HONORABLE SHERRY HUTT

L. Muhammad
Deputy

CV 1999-019065

fault situation where fault attributed to a non-party falls
outside the case.

20. Superfund Site:

GRANTED.

THE COURT FINDS the reference to be unduly prejudicial
and not at all relevant to this case.

21. Low-Bid:

GRANTED.

22. Particle Size:

GRANTED.

The parties agree that particle size is not an issue.
Plaintiff takes issue with regard to compaction, soil, density,
voids, and removal of oversize rocks in the construction of the
home.

23. Salem Prouty:

GRANTED in part -- report.

DENIED in part -- result.

THE COURT FINDS that the license suspension of Mr.
Prouty if based upon work in the subdivision, is relevant, but
that if any party desires to admit the substance of the
Registrars' investigation, that information would be cumulative
of expert testimony and involve hearsay. As Plaintiffs' properly
point out such a report is analogous to a police report. The
officer may give the final opinion, but the investigative report
is not admitted.

24. Steve Piceno:

GRANTED in part.

DENIED in part.

To the extent the supervisor of the site was not a
licensed engineer and the Defendants indicated a licensed
engineer would be the supervisor, there is a deviation in
performance which is relevant to the overall allegation of
negligence. Whether Mr. Piceno was otherwise competent to

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

*** FILED ***
03/08/2002

03/06/2002

CLERK OF THE COURT
FORM V000A

THE HONORABLE SHERRY HUTT

L. Muhammad
Deputy

CV 1999-019065

supervise becomes part of the evidence. The jury can weigh whether the situation constituted negligence that was a cause of Plaintiffs' problems.

In order for Plaintiff to offer evidence that fault is established per se by the use of Plaintiffs as a supervisor, then Plaintiffs must have evidence of the Code governing such conduct.

25. Other Lawsuits:
GRANTED.

26. Nuisance.
GRANTED.

27. Testimony of Non-Witness, to which Plaintiffs respond, such witnesses are unknown.
GRANTED.

28. Stan Luhr and Anthony Trinca:
Plaintiffs avow neither witness will be called.
MOOT.

29. Evidence of Insurance:
GRANTED.

30. Negative Public Perception:
THE COURT FINDS that negative public perception is an amorphous damage concept, subject to proof by competent evidence. If Plaintiffs intend to show damage through sales price data, testimony of would-be purchasers, or other admissible evidence, it will be allowed.

The motion must be considered as precautionary only, and to that extent, it is **GRANTED.**

31. Plaintiffs' Opinions:

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

*** FILED ***
03/08/2002

03/06/2002

CLERK OF THE COURT
FORM V000A

THE HONORABLE SHERRY HUTT

L. Muhammad
Deputy

CV 1999-019065

Plaintiffs may testify as to their losses, if not covered by other witnesses, and of those facts known to them. All parties are bound to the same rules of evidence.

32. Walt Winius:

Walt Winius will give testimony for Plaintiffs on Plaintiffs' stigma damages, as duty or part of Plaintiffs' tort claim in fraud. These are damages which remain above and beyond costs to repair or remediate as part of the breach of contract claim. Such damages by their nature require an objective assessment of loss. However, to be recoverable, such damages must be quantifiable or they simply duplicate punitive damages. Mr. Winius will give opinion testimony on stigma damages. As previously ordered by the Court, these damages will be the diminished value of the real estate shown by competent means, that is, the difference between fair market value of such comparable real estate without the injury, less the residual value increased by the costs to repair. To simplify the formula using Arizona law and advancing national theories:

$$\text{FMV} - (\text{residual value} + \text{repair costs}) = \text{stigma damages.}$$

This is a fair construct as repair costs may exceed the fair market value, which is a risk undertaken by Defendants when they assess a home and determine not to buy out the homeowner.

For those Plaintiffs whose damage claims are time barred, they may still claim stigma damages by inserting the cost to repair otherwise applicable.

Plaintiffs receiving repair/remediation damages are not required to use those sums for repair or remediation, but are still entitled to stigma damages, which are only designed to make Plaintiffs whole.

Like damages for lost profits, such damages must be proven by competent evidence. The parties may differ on their

03/06/2002

CLERK OF THE COURT
FORM V000A

THE HONORABLE SHERRY HUTT

L. Muhammad
Deputy

CV 1999-019065

assessment of any figure in the model, which is a dispute to be weighed by the jury.

Where the residual value plus the costs to repair/ remediate exceed the fair-market value of the home, Plaintiffs shall not receive stigma damages. Stigma damages are to make the Plaintiff whole and are not windfall damages.

Stigma damages are unlike the subjective analysis applied to personal injury.

The Court assumes that Plaintiffs' expert, Mr. Winius, is an expert real estate appraiser who can opine on pre- and post-injury damages. The jury will be asked to insert the cost/award of repair/remediation, and the difference is stigma damages. The jury will then consider whether Plaintiffs have exacerbated their stigma damage by their own actions and consider whether such action should reduce the stigma damages of that Plaintiff. Such matters are left to the sole discretion of the jury.

Counsel shall submit jury instructions on **April 1, 2002**, which shall include proposed instructions on stigma damages, consistent with this Order. Counsel shall also submit a proposed form of verdict to be replicated for each Plaintiff.

33. Gregg Creaser:

THE COURT FINDS that the substance of the testimony of Plaintiffs' geotechnical expert is hotly disputed, and there is no discrete point illuminated in the pleadings upon which the Court can give a definitive ruling. Therefore, the Court can only advise the parties that the opinions of the expert, upon foundation, which are relevant to the case and therefore probative of the jury inquiry, will be allowed.