

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 2001-019549

07/20/2006

HONORABLE PETER SWANN

CLERK OF THE COURT  
D. Kenney  
Deputy

FILED: 07/25/2006

ROBERT W JOHNSON, et al.

ANDREW F LLOYD

v.

DONROS DEVELOPMENT L L C, et al.

RICK K CARTER

CHRIS R BANISZEWSKI  
JACK G BARONE  
KEVIN E BARRY  
KIMBERLY A BAXTER  
KACI YOUNG BOWMAN  
BARTLET A BREBNER  
PETER C BROWN  
DAVID AARON BROWN  
JOHN A BURIC  
J GREGORY CAHILL  
C COLE CRABTREE  
ADAM B DELONG  
LINDSAY A EDMONDSON  
MICHAEL K GOODWIN  
BRIAN L HENRY  
JEFFREY D HOLLAND  
MARK A HOLMGREN  
KYLE A ISRAEL  
BRADLEY J JOHNSTON  
JASON M KELLY  
JOSEPH A KULA  
PAUL S KULAR  
ASA WILLIAM MARKEL  
DAMIEN R MEYER  
SALLY A ODEGARD  
ANDREW R PESHEK  
DAVID R REEDER  
GREGORY A ROSENTHAL  
GREGORY M SCHULMAN

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 2001-019549

07/20/2006

RICHARD A SEGAL  
JOHN SERAFINE  
LISA A SHANNON  
THOMAS SHEDDEN  
JAMES M SHINN  
THOMAS J SHORALL  
SANDRA A SHOUBE-GORGA  
JARED C SIMMONS  
BRYAN R SNYDER  
Jonathan D Schneider  
William G Stinson  
CHRISTY M THOMPSON  
STEPHANIE F VAN SPLUNDER  
WILLIAM WESLEY WEBB  
COLLIN T WELCH  
STEPHEN C YOST  
ELIZABETH J ZANON  
ROBERT B ZELMS

MINUTE ENTRY

Pending before the Court are Defendants' three Motions for Summary Judgment, each of which seeks the dismissal of certain plaintiffs or categories of plaintiffs in this class action construction defect case. The Court has reviewed the parties' Memoranda, considered oral argument, and now rules.

Motion No. 1 seeks entry of summary judgment against the Thursam plaintiffs. Amy Thursam is a named plaintiff and class representative, and at the time of certification was an owner of a residence within the subject development. After class certification, the Thursams sold their home. Defendants argue that the Thursams can no longer demonstrate that they have suffered any damages as a result of the alleged defects in the case, because there have been no disclosures pertaining to the cost of any repairs actually made before sale. On the same essential theory, Motion No. 3 seeks entry of summary judgment against all class members who sold their homes after the class was certified.<sup>1</sup> Plaintiffs respond that they should be permitted to prove the cost of repair that they would have incurred had they effected repairs before sale, and that that amount should be awarded to them. It is undisputed that there have been no disclosures of any

---

<sup>1</sup> A motion to decertify the class is pending, and this order is without prejudice to any future proceedings on that motion.

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 2001-019549

07/20/2006

diminution in value realized by either the Thursams or selling class members as a result of the alleged defects in connection with the various sales of the residents.

Defendants argue that recovery by a plaintiff who sold without effecting repairs would amount to a windfall without meaningful economic purpose, as any actual defects would never be corrected by such an award. Plaintiffs argue, with equal force, that entry of summary judgment would amount to a windfall for Defendants, who would escape all liability for defective construction by virtue of a fortuitous transaction that destroys privity between the developer and the resident who experiences harm.

Surprisingly, few appellate decisions throughout the country have addressed the issue, but the weight of current authority supports Plaintiffs' position. In *Wentworth v. Air Line Pilots Ass'n*, 336 A.2d 542 (D.C. 1975), the court adopted the reasoning that Defendants urge here, holding that Plaintiff's sale of the subject property made repairs impossible and limited recovery to diminution in value, if any. That decision appears to be the only example of such a result, and its reasoning has been expressly rejected by at least two courts of other states. See *St. Louis, LLC v. Final Touch Glass & Mirror, Inc.*, 899 A.2d 1018 (N.J. Super., App. Div. 2006); *Greene v. Bearden Enters., Inc.*, 598 S.W.2d 649 (Tex. Civ. App. 1980) (disapproved on other grounds). See also *Vaughn v. Dame Const. Co.*, 272 Cal.Rptr. 261 (1990). This Court is satisfied that the reasoning of the Texas and New Jersey courts reflects an economically rational approach to damages in such cases,<sup>2</sup> and one that is consistent with that taken by the Arizona Court of Appeals in an analogous context. See *Dixon v. City of Phoenix*, 173 Ariz. 612, 618 (Ct. App. 1992) (allowing recovery for property damage flowing from breach of entry agreement in condemnation case, despite the unavailability of such damages to a divested property owner as a matter of eminent domain law).

Accordingly,

IT IS ORDERED denying Motions for Summary Judgment No. 1 and No. 3.

Motion No. 2 seeks entry of summary judgment with regard to those class members who now own affected residences, but who purchased those residences after certification of the class. Defendants argue that in the absence of privity (which such class members lack), recovery is limited to "latent defects which become manifest after the subsequent owner's purchase and which were not discoverable had a reasonable inspection of the structure been made prior to purchase." *Richards v. Powercraft Homes, Inc.*, 139 Ariz. 242, 245 (1984). Because Plaintiffs have asserted in their own disclosure statements that the defects at issue in the certified claims "were and are apparent," Defendants assert that those defects were by no definition "latent." While the Court is inclined to agree with this reasoning, there is currently pending a motion to

---

<sup>2</sup> On a motion for summary judgment, the Court must give Plaintiffs the benefit of all inferences on their claims that repairs were necessitated by Defendants' defective work. Though Plaintiffs may not have chosen to effect such repairs, they would have been under no obligation to do so if they still owned the property.

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 2001-019549

07/20/2006

decertify the class. If that motion is granted in whole or in part, absent class members may not be bound by judicial admissions made to date concerning latency. Accordingly, the Court shall defer decision on Motion No. 2 until such time as the future contours of the class have been defined.