IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

JEFFREY M. BROWN ASSOCIATES, INC., Plaintiff, vs. CARSON CONCRETE CORPORATION, Defendant.	:	DECEMBER TERM, 2013 NO. 2440 COMMERCE PROGRAM Superior Court Docket No.: 2181 EDA 2016
BEAUMONT CONDOMINIUMS ASSOCIATION, Plaintiff, vs. JEFFREY M. BROWN ASSOCIATES, INC., CARSON CONCRETE CORPORATION, BEAUMONT CORPORATION, MONTVUE CONSTRUCTION, INC., and PENNONI ASSOCIATES, INC., Defendants.	:	JANUARY TERM, 2014 NO. 1896 COMMERCE PROGRAM Superior Court Docket No.: 2177 EDA 2016

OPINION

BY: Patricia A. McInerney, J. September 12, 2016

I. BACKGROUND

On December 19, 2013, Jeffrey M. Brown Associates, Inc. ("JMB") commenced an action against Carson Concrete Corporation ("Carson") for breach of contract, negligence, and contractual indemnification. Therein, JMB averred it "was construction manager for a construction project located at 110 South Front Street in Philadelphia known as the 'Beaumont Condominium' project (the 'Project')." (JMB Compl. ¶ 4). JMB further averred "[b]y

subcontract dated March 22, 2004 (the 'Subcontract') JMB engaged Carson as a design-build subcontractor to design and build the concrete superstructure for the Project." (Id. at ¶ 5).

In the complaint, JBM asserted that in January 2013, it "was notified by the developer of the Project that an incident had occurred in one of the condominium units in which something – later determined to be one of the tendons from the post-tension system[] – had broken out of the floor in the unit's bathroom, causing damage to the finished floor and bathroom fixtures." (Id. at ¶ 10). JMB further asserted that this happened because "one of the tendons lost its tension and 'snapped' out of place, as a result of the fact that specified hairpins were never installed in certain locations on that floor[,]" and that "[d]ue to the fact that the hairpins and tendons were fully enclosed within the concrete, it was not possible for JMB to discover that Carson had failed to install hairpins until the tendon broke free from the concrete in the Tenth Floor Unit." (See id. at ¶¶ 11, 14).

As for damages, JMB asserted "[t]he Beaumont Condominium[s] Association had demanded that JMB indemnify [it] [for] all costs and expenses arising out of the failure of the post-tension system." (Id. at ¶ 15). JMB further asserted:

> In order to remediate the damaged tendon and missing hairpins, it will be necessary, *inter alia*, to remove part of the concrete slab[] on the affected floor[] de-tension the tendon bundle, splice in new section, install hairpins and epoxy into the slab, replace the failed concrete and re-tension the tendons. Although the exact scope of the deficiencies – and thus the scope of remediation – is not yet known, it is expected that the remediation project will cost no less than $100,000. Including, without limitation, design and construction costs, as well as the cost of relocating residents as [repairs are made].

(Id. at ¶ 16).

On January 17, 2014, the Beaumont Condominiums Association (the "Association") commenced an action by writ of summons against JMB; Carson; Beaumont Corporation, the original owner of the property; Montvue Construction, Inc., the developer of the Project; and

Pennoni Associates, Inc. ("Pennoni"), the inspector for the original owner and developer. On February 3, 2014, the Association filed its complaint. Therein, the Association asserted it was "acting in its own name pursuant to 68 Pa. C.S.A. §3302(a)(4) on a matter affecting the condominium" and brought "this action exclusively to enforce the rights of the Association, independent of the right of any individual Unit owner, past or present." (The Association's Compl. ¶ 3). Thereafter, the Association asserted a number of causes of action, including negligence and breach of warranty against all the defendants and breach of contract against Beaumont Corporation.

On September 30, 2014, the Bergamo Trust, the owner of the Tenth Floor Unit, filed a petition to intervene as a plaintiff in the Association's case. There was no opposition to the petition, and after it was granted, the Bergamo Trust filed its complaint against the defendants, which included causes of action against all the defendants for negligence and breach of implied warranty of habitability.

On March 16, 2015, JMB filed a motion for summary judgment against Carson. In its motion, JMB stated the Association's costs related to the blowout totaled more than $175,000 and in February 2015, JMB and Pennoni settled with the Association for $175,000[1] with $140,000 paid by JMB. JMB also stated that at that time it and Pennoni settled the Bergamo Trust's claim for lost rental income for the Tenth Floor Unit for $45,000 with $36,000 paid by JMB. Thereafter, JMB argued Carson was likely to argue the statutes of limitation preclude it claims, but that its "indemnification claim could not have arisen until the blowout occurred and JMB incurred losses as a result of it." (JMB's Mot. For Summ. J. Mem. pp. 10-12). As for its

[1] JMB's Motion states $176,000 was paid to the Association by JBM and Pennoni to settle the Association's claims, but the exhibit to the Motion and the evidence at trial establish it was $175,000.

other claims, JMB argued a latent construction defect tolls the statute of limitations, and the construction defect at issue was latent "[d]ue to the fact that the hairpins and tendons were enclosed within the concrete slab...." (Id. at pp. 10-11). Having also argued the undisputed facts of record leave no doubt that Carson's negligence caused the blowout, JMB argued it was entitled to summary judgment in the amount of $210,154.88; $176,000[2] for its settlement payments to the Association and the Bergamo Trust, $7,598 for engineering fees, and $26,556.88 for legal fees related to this matter.

On April 16, 2015, Carson filed its opposition to JMB's Motion for Summary Judgment. In its response, Carson made a number of arguments as to why there were factual issues as to whether "any of the Defendants bear responsibility for the tendon rupture[,]" including its proximity in time to Hurricane Sandy. (Carson's Opp'n to JMB's Mot. For Summ. J. Mem. p. 9). Carson also addressed JMB's claim "that the issue of statute of limitations is no longer a valid issue since its claims for indemnification arose more recently." (Id. at p. 10). Here, Carson argued:

> What JMB misses, however, is that its obligation to pay, which it assumed voluntarily, is only subject to indemnification if the underlying claim for which it paid was not time barred. More specifically, the Superior Court has held:
>
> > To establish a right to indemnification where a case is resolved by settlement, the party must establish that the settlement was reasonable, that the underlying claim was valid against it, that the claim is within the coverage of the agreement, and that any counsel fees were reasonable.
>
> *County of Delaware v. J.P. Mascaro & Sons, Inc.*, 830 A.2d 587, 593 (Pa.Super. 2003). JMB has failed to establish, at this juncture, that the settlement was reasonable, that the underlying claim was valid against it (e.g. not time barred) and that this type of claim was covered by the indemnification obligation in the contract. Therefore, the statute of limitations issue remains before the jury as it is the crux of the "valid" prong of JMB's *prima facie* elements.

(Id.).

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2 Though, the actual amount was $175,000.

After summary judgment was denied, the above-captioned matters proceeded to a three-day bench trial before this Court, commencing February 1, 2016. The following facts were adduced at trial.

By contract dated June 30, 2003, Montvue Construction, Inc. hired JMB to be the general contractor/construction manager for the construction of the Beaumont Condominium building at 110-112 South Front Street, Philadelphia, PA. (*See* Day 1, 82-83; Pls' Ex. 1A). By contract dated March 22, 2004, JMB hired Carson as a subcontractor to design and build the building's concrete superstructure using a post-tension system. (Day 1, 82-83; Day 2, 70-71, 75-76; Pls.'s Ex. 1).

"[C]oncrete [used in building construction] is always reinforced with some steel." (Day 1, 132). One way to reinforce concrete is to place steel rebar that are not stressed or tensioned where the concrete is going to be poured. (Id.). Another way to reinforce concrete is to place steel cables, or tendons, that are stressed or pulled where the concrete is going to be poured, "which is called pre-stressed concrete...." (Id.). Another way is to place steel cables that are un-stressed or tensioned where the concrete is to be poured, "the concrete is poured, and then the cables are tensioned afterwards[,]" which is called post-tensioned concrete. (Id.).

The Beaumont Condominium building was constructed with post-tensioned concrete. (Id.). At certain places, the plans for the post-tension system called for the use of use of hairpins. (Day 1, 133). Hairpins are U-shaped pieces of steel rebar that used to reinforce and confine cables that are laid with a horizontal curve. (Day 1, 135,160). The cables are placed and at any sweeps or curves, hairpins are installed and tied with tie wire, which prevents the hairpins from moving around during the pour and "which is the same wire that ties the rest of the reinforcing steel together..." (Day 2, 83).

With post-tensioning, the cables are generally pulled or tensioned a few days after the concrete is poured. (Day 2, 97-98). Concrete continues to strengthen over time, but a majority of its strength is achieved in the first 28 days after it is poured. (Day 1, 178-79). Thus, all other things being equal, a blowout of a cable through the concrete (at a curve or otherwise) is most likely to occur when the cable is tensioned or shortly thereafter. (*See* Day 2, 97-98).

On July 6, 2004, Pennoni inspected the reinforcing steel and post-tensioning cables for the 10th Floor. (Day 2, 19; Def.'s Ex. 4). On that day, Pennoni reported:

> Rebar was placed throughout the A.M. by Carson's rodsetters to the engineers specifications.
> Was able to verify top & bottom mats for size, spacing, quantity & location per drawings. Post tensioning cables were also verified for locations, spacing, clearances, quantities, & backing reinforcing bars. Hairpins were placed @ sweeps as designed.

(Def.'s Ex. 4). Thus, on that day, Pennoni reported that all the hairpins for the 10th Floor were placed at the sweeps or curves as designed. (Day 2, 20). And shortly thereafter, the concrete for the 10th Floor was poured. (*See* Day 2, 79-80, 82, 87).

Carson finished its work on the Project in mid- to late 2004. (Day 2, 87). Around New Year's 2013, a post-tensioned cable tendon in the concrete floor of the 10th Floor Unit blew out through the concrete. (Day 1, 15-19). This blowout dislodged hardwood flooring and a toilet in the 10th Floor Unit and was reported to the Association's property manager by the tenants of that unit following their discovery of the damage upon their return following a few days' absence. (Day 1, 16-17, 43).

At trial, JMB presented the expert testimony of Christopher Pinto, PE. (Day 1, 126-28). Mr. Pinto testified a number of hairpins, which were called for by the drawings, were missing from the site of the blowout. (Day 1, 133-46). Mr. Pinto further testified "the lack of hairpins in this section of the tendon that was curving directly led to the failure of the concrete in this area[,]

because "[t]he hairpins serve to restrain the tendons from moving the exact direction they did." (Day 1, 151-52). Had the hairpins been present, Mr. Pinto opined the cables "would have not been able to pull out of the concrete and move in that direction." (Day 1, 152). However, "[w]ithout the presence of the hairpins," Mr. Pinto opined "the concrete was the only thing restraining those [cables] from moving and when [the concrete] failed, [the cables] burst out of the slab." (Id.).

While he was not able to identify what exactly caused the change in tension of the cables that led to the blowout, and agreed with Carson's expert that the 68 mile per hour winds from Hurricane Sandy could have affected the structure, Mr. Pinto testified he did not agree with Carson's expert that this failure could have occurred as a result of Hurricane Sandy even if the hairpins had been in place. (*See* Day 1, 161-62; Day 2, 132-33). Mr. Pinto believed this in part because there were no failures on the other floors of the Beaumont Condominium building where hairpins were installed. (Day 1, 164). Rather, Mr. Pinto testified "[i]f the hairpins had been in place, [he] d[id] not believe this failure would have occurred due to Hurricane Sandy." (*See* Day 1, 161-62).

As discussed above, the Association and the Bergamo Trust sued a number of parties following the blowout. JMB and Pennoni settled with the Association for $175,000 and the Bergamo Trust for $45,000, with JMB paying 80%, or $176,000 ($140,000 to the Association and $36,000 to the Bergamo Trust), and Pennoni paying 20%, or $44,000 ($35,000 to the Association and $9,000 to the Bergamo Trust). (Day 1, 93, 99-101; Pl.'s Ex. 16). In addition to "indemnification of the settlement payments that were made to the two plaintiffs…[,]" in the case before this Court, JMB sought to recover legal expenses and investigating and engineering expenses pursuant to a contractual indemnification clause. (Day 1, 95).

Following the conclusion of the bench trial, this Court made a number of findings of fact and issued conclusions of law. Factually, the Court found "that the hairpins were missing, that Carson did not put hairpins in the area of the blowout, that the Pennoni field report [was] in error, that the hairpins were not there when the concrete was poured, and that the blowout would not have occurred but for the absence of the hairpins." (Day 3 p. 55). The Court concluded Carson, as the subcontractor, was negligent and breached its Subcontract with JMB "in failing to place hairpins at the sweep at issue in this case." (Discussion and Conclusions of Law ¶ 1). The Court also concluded Pennoni, as the inspector for the original owner and developer, "was negligent in failing to detect the absence of the hairpins at issue...upon its inspection of the 10th Floor before the concrete was poured." (Id. at ¶ 2).

After the Court attributed 60% of the negligence that was a factual cause of the blowout to Carson and 40% to Pennoni, the Court addressed Carson's statute of limitations defense and JMB's invocation of the discovery rule. Here, the Court concluded "[i]n terms of JMB's claims against Carson for breach of contract and negligence,...JMB failed to satisfy its burden of establishing the inability to know Carson failed to place the hairpins despite the exercise of reasonable diligence[,]" pointing to the fact that "[t]he original owner and developer as well as JMB retained the right to inspect the work performed by Carson," Pennoni had in fact inspected the 10th Floor prior to the pour and found the "[h]airpins were placed @ sweeps as designed[,]" and "JMB had representatives on the job site daily with ample opportunity to inspect the construction prior to the pour." (Id. at ¶¶ 12-16). As such, the Court determined JMB's claims against Carson for breach of contract and negligence failed.

Next, the Court addressed JMB's claim for contractual indemnification. Here, Carson argued JBM was not entitled to indemnification because it had not established the validity of the

underlying claims of the Association and the Bergamo Trust against it. In terms of the validity of those claims, JMB argued, notwithstanding a lack of privity, the Bergamo Trust and the Association had valid breach of implied warranty of habitability claims against it or the developer and those claims would not be time-barred as to the Bergamo Trust and the Association because under the discovery rule, those parties would not have had knowledge of the fact that the hairpins were missing from the concrete slab until the blowout occurred.

The Court agreed the Association's and Bergamo Trust's breach of implied warranty claim would not be barred by the statute of limitations because the absence of the hairpins would have been a latent defect as to those parties as they were not there during construction and even exercising reasonable diligence would not have known of the absence as it was enclosed within a concrete slab after the pour. The Court, however, concluded only the claim of the Bergamo Trust was otherwise valid.

Regarding the validity of the implied warranty claims, the Court determined that as the Association itself was not a purchaser of a unit, it never had an implied warranty. As to the Bergamo Trust, however, the Court determined "JMB established at trial that the Bergamo Trust was the first purchaser to use or occupy the 10th Floor condo as required post-*Conway v. Cutler Group, Inc.*, 99 A.3d 67 (Pa. 2014), for it to have a valid breach of implied warranty claim." (Id. at ¶ 24). Specifically, the Court found JMB established this point through David Rasner, Esquire, a Bergamo Trust trustee, "who testified the only asset the Bergamo Trust has is the 10th Floor unit and he ha[d] been [a] trustee of that trust since the condominium was established." (Id.). As such, the Court found JMB to be entitled to indemnification for the money it paid to the Bergamo Trust as settlement for lost rent ($36,000.00); reasonable attorneys' fees for the Bergamo Trust matter ($13,488.23); and engineering costs it incurred ($13,022.50).

On February 26, 2016, JMB filed timely motions for post-trial relief. In its motions, JMB made a number of arguments, including that the missing hairpins were latent defects as to JMB and that the Association had a valid implied warranty claim. Regarding latency, JMB argued "[t]he issue is...whether JMB's failure to detect the missing hairpins was reasonable[,]" and it was reasonable because, *inter alia*, the parties contracted for Carson to perform all required inspections. (JMB's Post-Trial Mots. ¶¶ 13-29). Regarding the Association's implied warranty claim, citing cases such as *Long Trail House Condominium Association v. Engelberth Construction, Inc.*, 59 A.3d 752 (Vt. 2012), JMB argued that "[a]lthough there is no Pennsylvania case directly addressing this question, all states that have considered the question have held that condominium associations can bring claims for breach of implied warranties against developers and/or builders for construction defects affecting the condominium." (Id. at ¶ 43).

On March 4, 2016, Carson filed a timely motion for post-trial relief. Therein, Carson argued:

> JMB presented no evidence at trial showing that the Bergamo Trust was the first-time purchaser of the condominium, and, therefore, could sustain a valid implied warranty of habitability claim after [the] expiration of the statute of limitations. Further, the testimony of Mr. Rasner establishes that [the] Bergamo Trust was not a "residential purchaser." The Trust did not live in the unit, nor did the Trustees or even the beneficiaries. Rather, the Trust rented the unit.

(Carson's Post-Trial Mot. ¶ 19) (emphasis original). As such, Carson contended "JMB's argument that the implied warranty of habitability claims of [the] Bergamo Trust survive[d] expiration of the statute of limitations must fail, and the damages attributed to indemnification for that claim must be $0.00." (Id. at ¶ 21).

In response to the post-trial motions, the Court ordered briefs be filed if the parties had not already done so. The Court also heard oral argument on the motions on May 11, 2016. Then on June 7, 2016, the Court issued its order disposing of the parties' post-trial motions.

Regarding JMB's motions, the Court changed its finding that JMB failed to satisfy its burden of establishing the inability to know Carson failed to place hairpins despite the exercise of reasonable diligence. Here, the Court noted: "Pursuant to the discovery rule, reasonable diligence is an objective test that 'is sufficiently flexible...to take into account the difference[s] between persons and their capacity to meet certain situations and the circumstances confronting them at the time in question.'" (June 7, 2016 Order, *quoting Fine v. Checcio*, 870 A.2d 850, 858 (Pa. 2005)). Thus, while the absence of the hairpins was not a latent defect prior to the pour, that is not dispositive as to the applicability of the discovery rule, and this Court determined JMB was entitled to the benefit of the discovery rule for its breach of contract and negligence claims against Carson because "a reasonable construction manager in JMB's position would not have discovered that its design-build specialty concrete subcontractor neglected to install a few hairpins at one location in one floor of a 13-story building prior to the relevant pour, particularly where the subcontractor was contractually responsible for providing all testing and inspection services related to the work pursuant to the subcontract." (June 7, 2016 Order).

The Court, however, also concluded JMB, among other things, failed to establish any damages in regard to breach of contract or negligence as the only damages in this case related to the settlement of underlying plaintiffs' causes of action, and JMB's claims for indemnification of the settlement payments that were made to those plaintiff's and for legal expenses and investigating and engineering expenses pursuant to a contractual indemnification clause. Therefore, the Court determined JMB was not entitled to any further relief.

Regarding Carson's motion, the Court changed its finding that JMB established at trial that the Bergamo Trust was the first purchaser to use or occupy the 10th Floor Unit for it to have a valid breach of implied warranty claim. Here, the Court noted it did not agree with Carson's contention that it mattered that the Bergamo Trust rented the 10th Floor Unit to others, but agreed that Mr. Rasner's testimony was insufficient to establish the Trust was the first purchaser or the first "user-purchaser." The Court also noted that while it appeared the agreement of sale attached to the complaint filed by the Bergamo Trust confirmed the Court's original finding that the Trust was the first purchaser, it would be inappropriate to rely on this as evidence because it was not presented at trial, but rather by JBM in post-trial briefing. Moreover, the Court noted that if it considered the agreement of sale in favor of JMB regarding the Bergamo Trust's purchaser status, it would have also been confronted with whether to consider what appeared to have been a valid waiver of the implied warranty of habitability by the Bergamo Trust in the agreement of sale, with implied warranty claims being the very claims JMB relies on to say the Bergamo Trust and the Association had valid claims that needed to be settled.

On July 7, 2016, JMB filed notices of appeal. Thereafter, this Court ordered JMB file a *Pennsylvania Rule of Appellate Procedure* 1925(b) statement. In its 1925(b) statement, JMB complains the following are errors:

> a. The Court's finding that JMB "failed to establish any damages" on its breach of contract and negligence claims (June 7 Order, n.1) was wrong as a matter of fact and law, for the reasons set forth at pages 10-11 of JMB's post-trial brief and at oral argument on JMB's post-trial motion; and
>
> b. The Court's finding that JMB's settlement with the...Association and the Bergamo Trust was not reasonable, and therefore not subject to Carson's duty to indemnify was wrong as a matter of fact and law for the following reasons:
>
> i. The Court's finding that the evidence was insufficient to establish that [the] Bergamo Trust was the first purchaser of the 10th Floor Unit (June 7 Order, n.1), and therefore had no claim against JMB for breach of the implied warranty of habitability, was incorrect, based upon the trial testimony of David

Rasner as set forth in JMB's Opposition to Carson's Post-Trial Motion and on the Agreement of Sale attached to the...Associations' Complaint...;

ii. The Court's finding that JMB's indemnification claim failed because the...Association did not have an implied warranty of habitability in [the] Common Area where the tendon blowout occurred (February 11, 2016 Discussion and Conclusions of Law at Par. 24) was wrong as a matter of law and fact for, *inter alia*, the reasons set forth at pages 11-16 of JMB's Post-Trial Brief.

(JMB's 1925(b) Statement).

This Court does not agree there are any errors of fact or law regarding the above matters. While the Court believes JMB did the morally correct thing in settling with the underlying plaintiffs and JMB's counsel did an excellent job trying the case in terms of establishing Carson failed to place the hairpins at issue and that was the factual cause of the blowout, JMB's case and counsel failed in other aspects such as overcoming the fact that: (1) JMB's damages related solely to voluntarily settling the Bergamo Trust and the Association's claims; (2) as JMB voluntarily settled those claims, it had to establish the validity of those claims; and (3) to be valid, a breach of implied warranty claim requires that the plaintiff be the first purchaser to use or occupy residential real estate, but the Association was never a purchaser and JMB and its counsel failed to establish that the Bergamo Trust was the first such purchaser. Thus, the Court issues this opinion in support of its findings of fact and conclusions of law as modified by its June 7, 2016 Order.

II. DISCUSSION

A. Standards and Scopes of Review

Judgment n.o.v. is an extreme remedy and should only be entered in the clearest of cases. *Moure v. Raeuchle*, 604 A.2d 1003, 1007 (Pa. 1992). "There are two bases upon which a judgment n.o.v. can be entered: one, the movant is entitled to judgment as a matter of law, and/or two, the evidence was such that no two reasonable minds could disagree that the outcome should

have been rendered in favor of the movant." *Id.* (citations omitted). "An appellate court will reverse a trial court's grant or denial of a JNOV only when the appellate court finds an abuse of discretion or an error of law." *Dooner v. DiDonato,* 971 A.2d 1187, 1193 (Pa. 2009).

A new trial should only be granted when the verdict is so contrary to the evidence so as to shock one's sense of justice. *Barrack v. Kolea*, 651 A.2d 149, 152 (Pa. Super. Ct. 1994). The decision of the trial court to refuse to grant a new trial will only be reversed when "there has been a clear abuse of discretion or an error in law determinative to the outcome of the case." *Id.*

During a bench trial, "[q]uestions of credibility and conflicts in the evidence are for the trial court to resolve and the reviewing court should not reweigh the evidence." *Adamski v. Miller*, 681 A.2d 171, 173 (Pa. 1996). "Absent an abuse of discretion, the trial court's determination will not be disturbed." *Id.*

B. JMB's Appeal

In its 1925(b) statement, JMB first complains this Court erred as matter of fact and law in concluding JMB failed to establish any damages for its causes of action against Carson for breach of contract and negligence. Second, JMB complains this Court erred as a matter of fact and law in concluding JMB failed to establish its right to indemnification from Carson because JBM failed to establish the Bergamo Trust had a valid implied warranty claim as the first purchaser or user-purchaser of the 10th Floor Unit and the Association never had a valid implied warranty claim as it was never a purchaser of any unit in the Beaumont Condominium building or the associated common elements. The Court will address JMB's complaints in reverse order.

1. JBM's failed to prove its cause of action against Carson for indemnification due do its failure to establish the validity of the third parties' underlying claims for breach of an implied warranty of habitability.

"An agreement to indemnify is an obligation resting upon one person to make good a loss which another has incurred or may incur by acting at the request of the former, or for the former's benefit." *Burlington Coat Factory of Pennsylvania, LLC v. Grace Const. Mgmt. Co., LLC*, 126 A.3d 1010, 1022 (Pa. Super. Ct. 2015) (quotations omitted). "Indemnity agreements are to be narrowly interpreted in light of the parties' intentions as evidenced by the entire contract." *Id.* (quotations omitted).

To establish the right to indemnification, the indemnitee must establish:

> the scope of the indemnification agreement; the nature of the underlying claim; its coverage by the indemnification agreement; the reasonableness of the alleged expenses; and, where the underlying action is settled rather than resolved by payment of a judgment, the validity of the underlying claim and the reasonableness of the settlement.

Id., *quoting McClure v. Deerland Corp.*, 585 A.2d 19, 22 (Pa. Super. Ct. 1991) (emphasis added). Here, JMB complains this Court erred in determining that it failed to establish the validity of the Bergamo Trust's and the Association's underlying claims for breach of an implied warranty of habitability.

In Pennsylvania, there is "an implied warranty of habitability in contracts where builders-vendors sell new homes to residential purchasers." *Pontiere v. James Dinert, Inc.*, 627 A.2d 1204, 1206 (Pa. Super. Ct. 1993). "The implied warranty requires that a builder, typically more skilled and experienced in the construction field than the purchaser, bear the risk that a home...will be functional and habitable in accordance with contemporary and community standards." *Id.* The implied warranty, however, "may be waived by clear and unambiguous

contract language [that is]...sufficiently particular to inform the home purchaser of the right he or she is waiving." *Id.*

In order to assert an action for breach of the implied warranty of habitability, the plaintiff must be in contractual privity with the builder-vendor or the first user-purchaser of the home. *See Conway v. Cutler Group, Inc.*, 99 A.3d 67, 73 (Pa. 2014) (noting that it was declining to rule on the Superior Court's holding in *Spivack v. Berks Ridge Corp.*, 586 A.2d 402 (Pa. Super Ct. 1990). In *Conway*, the Supreme Court of Pennsylvania held that in a case "where the builder-vendor sold a new home to a purchaser-user,...an action for breach of implied warranty requires contractual privity between the parties[,]" and does not extend to a second or subsequent purchaser-user. 99 A.3d at 69, 73.

In that case, a builder-vendor sold a new home. *Id.* at 68. After living in the house for three years, the first purchaser sold the house to the plaintiffs. *Id.* Two years later, the plaintiffs discovered water infiltration, which they alleged was cause by construction defects in breach of the implied warranty of habitability. *Id.* After the trial court sustained the builder-vendor's preliminary objections and dismissed the plaintiffs' complaint based on a lack of privity between the parties, the Superior Court reversed based on public policy considerations and reliance on its holding in *Spivack*, "a case in which the warranty of habitability was extended beyond the first purchaser...to the first 'user-purchaser.'" *Id.* at 69.

On appeal, the Supreme Court stated its adoption of the implied warranty of habitability "was rooted in the existence of a contract—an agreement of sale—between the builder-vendor of a residence and the purchaser-resident." *Id.* at 69-70. The Court also stated other jurisdictions that have addressed the issue of the need for contractual privity in a claim for breach of an implied warranty for a newly constructed residence had reached different conclusions. *Id.* at 71.

Our Supreme Court, however, reversed the Superior Court, (1) "conclud[ing] that the question of whether and/or under what circumstances to extend an implied warranty of habitability to subsequent purchasers of a newly constructed residence is a matter of public policy properly left to the General Assembly" and (2) noting that it declined to rule on the Superior Court's holding in *Spivack* as the facts of the case before it were readily distinguishable from the facts of that case. *Id.* at 73.

In *Spivack*, "the warranty of habitability was...extended to a second purchaser, but only under circumstances where the first purchaser had never used or occupied the home." *Conway*, 99 A.3d at 71. In that case, the plaintiffs "purchased a yet-to-be constructed condominium from a developer, which was an entity separate and distinct from the builder/general contractor of the condominium." *Id.* "Alleging that the condominium sold by the developer was deficient in numerous ways, the...plaintiffs sued the builder/general contractor for breach of the warranty of habitability." *Id.*

After the trial court sustained the builder/general contractor's preliminary objections and dismissed the plaintiffs' breach of the warranty of habitability claims, the plaintiffs appealed. *Spivack*, 586 A.2d at 404-05. On appeal, the Superior Court reversed and held: "Where the builder knows or should know that that particular purchaser will not be the first user...any implied warranties must necessarily extend to the first user-purchaser...." *Id.* at 405.

Here, JMB failed to prove the Bergamo Trust was in contractual privity with the builder-vendor or the first user-purchaser of the 10th Floor Unit so as have a valid breach of implied warranty of habitability claim post-*Conway*. Mr. Rasner's testimony, the only record evidence concerning the particulars of the Bergamo Trust, established that he thought he had been co-trustee of the Trust since the condominium was established; the Trust was funded by the

grandmother of the other co-trustee; the only asset the Trust has is the condominium unit at the Beaumont; and the Trust had been renting the 10th Floor Unit to tenants. (Day 1, 68-69). This testimony was insufficient to establish who purchased what at what time; probably because JMB's counsel was not trying to elicit from this witness the Bergamo Trust's purchaser status, but rather the reasonableness of its settlement with this underlying plaintiff. (*See* Day 1,71-76). Based on this limited testimony, the Bergamo Trust could have just as easily been a second or subsequent purchaser or recipient of the 10th Floor Unit, as it could have been in contractual privity with the builder-vendor or the first user-purchaser of the unit.

While the agreement of sale attached to the complaint filed by the Bergamo Trust and submitted to the Court post-trial by JMB appears to confirm the Court's original finding that the Trust was the first purchaser of the 10th Floor Unit, parties are prohibited "from using post-trial proceedings to plug evidentiary holes that [they] could have filled before the verdict through the exercise of reasonable diligence." *Drake Mfg. Co., Inc. v. Polyflow, Inc.*, 109 A.3d 250, 263 (Pa. Super. Ct. 2015). Otherwise, "the professional necessity for trial counsel to be prepared to litigate the case fully at trial and to create a record adequate for appellate review" would be removed and trial would just become a dress rehearsal. *Id.* (quotations omitted). As such, this Court concluded it would be inappropriate to rely on the Bergamo Trust's Agreement of Sale to establish its purchaser status because the Agreement of Sale was only presented to the Court by JMB in post-trial briefing and thus, was not part of the trial record.[3]

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[3] Moreover, if the Court would have considered the Agreement of Sale in favor of JMB in terms of the Bergamo Trust's purchaser status, it would have also been confronted with whether to consider what appears to be a valid waiver of the implied warranty of habitability by the Bergamo Trust, which would seem to invalidate all of JMB's claims related to warranties of habitability; an issue likely not addressed directly by the parties as the Agreement of Sale was only submitted to the Court post-trial.

In terms of the Association, an implied warranty of habitability never applied to it in the first place and does not apply now because it was never a purchaser of a unit. JMB complains "[t]he Court's finding that JMB's indemnification claim failed because the...Association did not have an implied warranty of habitability in [the] Common Area where the tendon blowout occurred...was wrong as a matter of law and fact for...the reasons set forth at pages 11-16 of JMB's Post-Trial Brief." (JMB's 1925(b) Statement ¶ 2(b)(4)). In its brief, JMB asserted "[t]he necessary implication of the Court's ruling is that only individual unit owners, but not...condominium associations, can assert claims for breach of implied warranty under Pennsylvania law." (JMB's Post-Trial Mots. Mem. 11). JMB argued "[t]his conclusion is not only contradicted by *1000 Grandwiew Ass[ociation, Inc. v. Mt. Washington Associates*, 434 A.2d 796 (Pa. Super. Ct. 1981)] ,...but would create new Pennsylvania law by holding, for the first time in any reported decision, that Pennsylvania does not recognize any implied warranty of habitability in the common elements of a condominium." (JMB's Post-Trial Mots. Mem. 13). JMB is wrong on all fronts.

First, as discussed above, the implied warranty of habitability is "rooted in the existence of a contract—an agreement of sale—between the builder-vendor of a residence and the purchaser-resident[,]" *Conway*, 99 A.3d at 70, and only first purchasers, or first "user-purchasers," have valid implied warranty of habitability claims under Pennsylvania law. As the Association itself was never a purchaser of a unit, it never obtained a warranty of habitability in the common elements or otherwise. It is the unit owners themselves that have an undivided interest in the common elements and may or may not have obtained a warranty of habitability for their unit and their interest in the common elements. *See* 68 Pa. C.S. § 3103 (in defining "condominium," stating "[r]eal estate is not a condominium unless the undivided interests in the

common elements are vested in the unit owners[]"). Thus, contrary to JMB's assertion, this Court's conclusion is not that Pennsylvania does not recognize any implied warranty of habitability in the common elements of a condominium, but rather any such warranty of habitability and cause of action based thereon lies with the unit owners themselves, not the association.

Second, also contrary to JMB's assertion, the necessary implication of this is not that only individual unit owners can assert claims for breach of implied warranty under Pennsylvania law. Pursuant to our Uniform Condominium Act, an association can "[i]nstitute, defend or intervene in litigation or administrative proceedings or engage in arbitrations or mediation in its own name on behalf of itself or two or more unit owners on matters affecting the condominium." 68 Pa. C.S. § 3302(a)(4).

Here, the Association could have instituted litigation in its own name on behalf of two or more unit owners to assert those unit owners' implied warranty of habitability claims regarding their undivided interests in the common elements. *Cf. Meadowbrook Condo. Ass'n v. South Burlington Realty Corp.*, 565 A.2d 238 (Vt. 1989). Then the implied warranty right, if any, of each of those owners could have been examined. *See id. See also Pontiere*, 627 A.2d at 1205-07 (52 original purchasers of condominium units successfully bringing breach of implied warranty of habitability claims against the general contractor/seller of the units where such claims were found to have not been disclaimed by general waiver language that, unlike in this case, made no reference to the warranty of habitability).

The Association in this case, however, filed suit "acting in its own name pursuant to 68 Pa. C.S. § 3302(a)(4)...; bringing [its] action exclusively to enforce the rights of the Association, independent of the right of any individual Unit Owner, past or present." (Association Compl. ¶

3). The Association, however, did not have its own breach of implied warranty of habitability claim to assert, and there was no error by this Court in determining the Association itself did not have an implied warranty claim because it was not a purchaser of a unit. If any new Pennsylvania law was to be created, it would be a decision that a condominium association itself has a common law implied warranty of habitability in the common elements of the condominium despite never having been a party to any agreement of sale.

Finally, the above-conclusions are not in any way contradicted by *1000 Grandview Association* as JMB suggests. In that case, the Superior Court held under a predecessor statute to the Uniform Condominium Act, "an association may have representational standing to assert the rights of its individual members, if it alleges an immediate, direct and substantial injury to any one of them." 434 A.2d at 798. Here, the issue is not standing, it is who may have had a right of action for breach of an implied warranty of habitability and whose rights were being asserted.

As discussed above, it is the original individual unit owners themselves that may have (absent waiver) obtained a warranty of habitability for their unit and their interest in the common elements. Thus, any right of action based on breach of such warranty would properly lie with them. Moreover, as discussed above, the Association in this case was not "assert[ing] the rights of its individual members," *id.*, but rather "bringing [its] action exclusively to enforce the rights of the Association, independent of the right of any individual Unit Owner, past or present[,]" (Association Compl. ¶ 3). It was in that vein that the Association asserted a cause of action for breach of warranty against all the Defendants, alleging the "Defendants...owed [the Association] a warranty that The Building was...fit for...habitation...." (Id. ¶ 39). For the reasons stated above, it, however, had no such right of action to assert.

In conclusion, while JMB may have done the morally correct thing in settling with the underlying plaintiffs, it bore the risk of proving the validity of their claims for breach of an implied warranty of habitability. In terms of the Bergamo Trust, JMB failed from an evidentiary standpoint. In terms of the Association, JMB failed from a legal standpoint. Therefore, there was no abuse of discretion or error of law as JMB suggests and this Court's findings regarding indemnification and implied warranty of habitability should be affirmed.

2. JMB's failed to prove its cause of action against Carson for breach of contract or negligence due to, *inter alia*, its failure to establish any direct harm or damages, but rather only damages related to claims made by third parties, which are the subject of indemnification.

JMB also complains this Court's finding that it failed to establish any damages for its causes of action for breach of contract and negligence was wrong as a matter of fact and law. At trial, a JMB representative testified that JMB was only seeking damages based on indemnification. Specifically, JMB's representative testified:

> Q. Now, in this litigation currently against Carson is [JMB] seeking funds other than the indemnification of the settlement payments that were made to the two plaintiffs?
> A. Yes. We're seeking to recover legal expenses, as well as investigating and engineering expenses.
> Q. And is that pursuant to the contractual indemnification clause?
> A. Yes.

(Day 1, 95). JMB's representative likely made such a statement because its damages in this case all related to claims made by third parties, which are the subject of indemnification and the requirements of establishing the validity of the underlying claim and the reasonableness of the settlement. Moreover, its legal expenses, etc. would not be recoverable outside of contractual indemnification as Pennsylvania follows the American Rule whereunder "a litigant cannot recover counsel fees from an adverse party unless there is express statutory authorization, a clear agreement of the parties, or some other established exception." *Trizechahn Gateway LLC v.*

Titus, 976 A.2d 474, 482–83 (Pa. 2009). So, the issue is essentially whether the money JBM paid to settle the underlying plaintiffs' claims is recoverable by JMB under a cause of action against Carson for negligence or a cause of action against Carson for breach of contract outside of indemnification. It is not.

"To prevail on a negligence claim, a plaintiff must demonstrate the following: (1) the defendant owed a duty to the plaintiff; (2) the defendant breached that duty; (3) a causal relationship between the breach and the resulting injury suffered by the plaintiff; and (4) actual loss suffered by the plaintiff." *Reeves v. Middletown Athletic Ass'n*, 866 A.2d 1115, 1126 (Pa. Super. Ct. 2004). In this case, JMB failed to demonstrate either the causal relationship between the breach and the resulting injury suffered by it, or the actual loss suffered by it, necessary to support a cause of action for negligence.[4]

Regarding actual loss, Carson's negligence did not cause any actual physical harm or loss to JMB or its property as the only loss JMB suffered related to settling third party claims, which are the subject of indemnification. Regarding a causal relationship, Carson's negligence was not the factual cause in bringing about such loss. "Conduct is a factual cause of harm when the harm would not have occurred absent the conduct." Pa. SSJI (Civ) 13.20 (2014). Here, the underlying

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[4] Moreover, JMB's negligence claim against Carson would be barred by the economic loss doctrine. Under the economic loss doctrine, "no cause of action exists for negligence that results solely in economic damages unaccompanied by physical injury or property damage." *Excavation Techs., Inc. v. Columbia Gas Co. of Pennsylvania*, 985 A.2d 840, 841 n.3 (Pa. 2009). In this case, while there was property damage to the Bergamo Trust's and other unit owner's property, there was no damage to JMB's property; JMB's only damages being the money it paid to settle the underlying plaintiffs' claims and related expenses. Therefore, it is clear that the damages JMB suffered are purely economic and its negligence claim would also be barred by the economic loss doctrine. *See Ellenbogen v. PNC Bank, N.A.*, 731 A.2d 175, 188 (Pa. Super. Ct. 1999) (stating the economic loss doctrine bars "a plaintiff from recovering purely economic losses suffered as a result of a defendant's negligent or otherwise tortious behavior, absent proof that the defendant's conduct caused actual physical harm to a plaintiff or his property.") (quotations omitted, emphasis added).

lawsuits and JMB's voluntary settlement of those invalid claims is the factual cause of its loss. It is absent those things that JMB's loss would not have occurred, not Carson's negligence.

To prevail on a breach of contract claim, a plaintiff must demonstrate the following: "(1) the existence of a contract, including its essential terms, (2) a breach of a duty imposed by the contract and (3) resultant damages." *CoreStates Bank, N.A. v. Cutillo*, 723 A.2d 1053, 1058 (Pa. Super. Ct. 1999). And as "resultant damages" are required, the plaintiff must also "show a causal connection between the breach and the loss." *See Logan v. Mirror Printing Co. of Altoona, Pa.*, 600 A.2d 225, 226 (Pa. Super. Ct.1991). Stated another way:

> Where one party to a contract, without any legal justification, breaches the contract, the other party is entitled to recover, unless the contract provides otherwise, whatever damages he suffered, *provided* (1) they were such as would naturally and ordinarily result from the breach, or (2) they were reasonably foreseeable and within the contemplation of the parties at the time they made the contract, and (3) they can be proved with reasonable certainty.

Id. (emphasis original), *quoting Taylor v. Kaufhold*, 368 Pa. 538, 546, 84 A.2d 347, 351 (Pa. 1951). In this case, JMB failed to establish resultant damages.

Here, JMB's damages or loss was not such as would naturally and ordinarily result from Carson's breach. "Loss that results from a breach in the ordinary course of events is foreseeable as the probable result of the breach. Such loss is sometimes said to be the 'natural' result of the breach, in the sense that its occurrence accords with the common experience of ordinary persons." Restatement (Second) of Contracts § 351 (1981) cmt. b (citation omitted). If the loss, however, "results other than in the ordinary course of events, there can be no recovery for it unless it was foreseeable by the party in breach because of special circumstances that he had reason to know when he made the contract." *Id.*

Similar to what was discussed above, JBM's loss naturally and ordinarily flowed from the filing of the underlying lawsuits and JMB's voluntary settlement of those invalid claims, not

Carson's breach. Voluntary settlement of invalid claims is not a loss in the ordinary course of events or a "natural" result of a breach. Therefore, outside the context of contractual indemnification, the payments JMB made to settle with the Association and the Bergamo Trust are not recoverable as damages under its cause of action against Carson for breach of contract unless such loss was foreseeable by Carson because of special circumstances that it had reason to know when he made the contract.

JMB, however, did not prove its damages or loss was reasonably foreseeable and within the contemplation of the parties at the time they made the contract. *See Logan*, 600 A.2d at 226 (providing damages for breach of contract are recoverable provided "they were reasonably foreseeable and within the contemplation of the parties at the time they made the contract....". *See also* Restatement (Second) of Contracts § 351(1) (1981) (providing "[d]amages are not recoverable for loss that the party in breach did not have reason to foresee as a probable result of the breach when the contract was made."). While in some instances the settlement of a third party claim might be a foreseeable result of a breach of contract, *see id.* cmt. c, JMB did not establish in this case that Carson would have had any reason to foresee JBM would settle invalid claims related to the work Carson did. Therefore, outside the context of contractual indemnification, the payments JMB made to settle with the Association and the Bergamo Trust are not recoverable as damages under its cause of action against Carson for breach of contract.

WHEREFORE, for the above-mentioned reasons, this Court's June 7, 2016 Order should be affirmed.

BY THE COURT:

McINERNEY, J