

STATE OF MAINE

BUSINESS AND CONSUMER COURT

Cumberland, ss.

ARUNDEL VALLEY, LLC and  
KATE'S HOMEMADE BUTTER, INC.,

Plaintiffs

v.

Docket No. BCD-CV-13-15 ✓

PEACHEY BUILDERS, INC.; GARY R. PEACHEY;  
KEVIN BROWN ARCHITECTURE, LLC; KEVIN BROWN;  
BRANCH RIVER PLASTICS, INC.; ROBERT MAYO;  
HOUSE & SUN, INC., and KEL HOUSE,

Defendants

DANIEL J. PATRY and KAREN I. PATRY,

Third-Party Defendants

**CASE MANAGEMENT SCHEDULING ORDER NO. 3**

A status conference was held in this case January 12, 2015, with attorneys Bryant and Piper representing the Plaintiffs; attorney Douglas representing Defendant Branch River Plastics, Inc., and attorney Williams representing Kevin Brown and Kevin Brown Architecture, LLC. As a result, it is ORDERED as follows:

1. **Discovery:** Discovery is complete except with regard to two potential defense witnesses, Larry Turner and Craig Barnes. Branch River's counsel will advise Arundel Valley's counsel by January 20, 2015 whether either witness will be called, whether as a fact witness or expert witness. If either will be called, Arundel Valley may take the depositions upon oral examination of that witness.

2. **Settling Defendants:** The Defendants in this case other than Branch River and Robert Mayo have reached a settlement with the Plaintiffs. Pursuant to 14 M.R.S. § 164, Branch River has elected to have the value of the consideration obtained by Plaintiffs for the settlement deducted from the amount of any judgment rendered against Branch River. Branch River's counsel has been made aware of the terms of the settlements. The settling Defendants will be dismissed from this case on motion,

3. **Motion for Reconsideration:** The Plaintiffs have filed a Motion for Reconsideration of certain rulings in the November 5, 2014 Order on Defendants' Motion

for Summary Judgment. The primary focus of the Motion to Reconsider is Plaintiffs' negligent misrepresentation claim.

Plaintiffs point out that the negligent misrepresentation on which they rely predates the actual purchase of the product here, and that the misrepresentation goes to the very nature of the product, not merely to the quality of the product. Those are distinctions without a difference. In essence, the principle underlying the economic loss doctrine is that when the claim is that a product is not as promised or warranted, and when there is no personal injury or property damages, the plaintiff's remedy lies in the sphere of contract and warranty, not in tort recovery. Here, the essential claim is that Branch River sold a product that was not what Branch River represented it to be, and that therefore was not suitable for Plaintiff Arundel Valley's purposes and had to be removed. Thus, the claim presents a classic breach of express and/or implied warranty of fitness for particular purpose. The court remains persuaded that the Law Court's decision in *Oceanside at Pine Point Condominium Owners Assn. v. Peachtree Doors*, 659 A.2d 267 (Me. 1995) precludes a negligent misrepresentation claim in an action for a defective or improper product, not involving personal injury or damage to other property.

That said, the Plaintiffs may still be able to present the same evidence on the remaining warranty claims that they would have presented on a negligent misrepresentation claim in terms of both liability and damages. Those issues have yet to be determined. Plaintiffs' other contentions in their Motion to Reconsider do not require discussion here.

Plaintiffs' Motion for Reconsideration is denied.

**4. Judicially Assisted Settlement Conference:** As the initial Case Management Scheduling Order indicated might occur, the court is scheduling a judicially assisted settlement conference before another judge. Unless specifically excused from attending in advance by the presiding judge, at least one officer of each Plaintiff and of Branch River are hereby ordered attend throughout, in person, and an adjuster for any insurer who might be liable to indemnify Branch River will also attend in person unless excused in advance. The Judicial Scheduling Secretary will contact counsel regarding dates for the conference.

**5. Trial Venue and Dates:** The parties have agreed to a transfer of venue to Cumberland County for purposes of jury trial, in light of the likely delay associated with scheduling a jury trial in York County. See BCD Standing Order On Transfer of Venue. [http://www.courts.maine.gov/rules\\_adminorders/adminorders/so\\_JB-07-1.html](http://www.courts.maine.gov/rules_adminorders/adminorders/so_JB-07-1.html) Trial is hereby scheduled as follows: Jury selection with trial to follow immediately at **8:30 a.m., Monday, June 22, 2015 at the Cumberland County Court House.** The court is allocating five days for trial.

**6. Conference of Parties and Joint Final Pretrial Statement:** On or before **June 17, 2015**, the parties shall file a Joint Final Pretrial Statement, based on a conference between the parties, which shall comply in all respects with M.R. Civ. P. 135. Counsel for the Plaintiff shall have primary responsibility for coordinating the conference and filing the Joint Final Pretrial Statement and related material. If counsel for the Plaintiff is unable timely to comply with this requirement, counsel shall notify the court in writing of the reasons therefor and request a status conference.

7. **Exchange of Witness and Exhibit Lists.**

(a) At or before the conference of the parties, the parties shall meet to mark all exhibits to be offered at trial, and to attempt to stipulate to the authenticity of exhibits without waiving objections to their admissibility at trial, and shall inspect and attempt to agree to all exhibits to be used as demonstrative or visual aids.

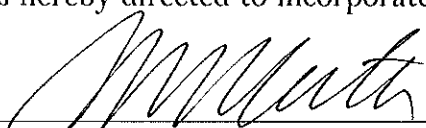
(b) The parties shall each submit a list of witnesses and exhibits with the Joint Final Pretrial Statement. Exhibits not pre-marked and included on the exhibit list are subject to exclusion upon objection or the court's own motion.

8. **Pretrial Conference:** The pretrial conference will be held at **1 p.m. Thursday, June 18, 2015 at the Cumberland County Court House.** At the pretrial conference, all parties must be prepared and authorized to discuss the matters identified in M.R. Civ. P. 136 and in the Joint Final Pretrial Statement.

9. **Previous Orders:** Except to the extent inconsistent with this Order, the previous Case Management Scheduling Orders in this case remain in effect.

Pursuant to M.R. Civ. P. 79(a), the clerk is hereby directed to incorporate this order by reference in the docket.

Dated January 13, 2015

  
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A. M. Horton  
Justice, Business and Consumer Court

Entered on the Docket: 1-14-15  
Copies sent via Mail  Electronically