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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);  
Ariz. R. Crim. P. 31.24



DIVISION ONE  
FILED: 09/30/2010  
RUTH WILLINGHAM,  
ACTING CLERK  
BY: GH

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

UTAZ DEVELOPMENT CORPORATION, ) 1 CA-CV 09-0609  
INC., an Arizona corporation, )  
 ) DEPARTMENT C  
Plaintiff/Appellee, )  
 )  
v. ) **MEMORANDUM DECISION**  
 ) (Not for Publication -  
PAUL M. O'CONNOR and KAREN ) Rule 28, Arizona Rules  
O'CONNOR, husband and wife; PAUL ) Of Civil Appellate Procedure)  
O'CONNOR ARCHITECTURE & )  
PLANNING, INC., an Arizona )  
corporation, )  
 )  
Defendants/Appellants. )

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Appeal from the Superior Court in Maricopa County

Cause No. CV 2008-091998

The Honorable Karen A. Potts, Judge

**REVERSED IN PART; AFFIRMED IN PART; REMANDED**

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The Doyle Firm, P.C. Phoenix  
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Attorney for Defendants/Appellants

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**D O W N I E**, Judge

¶1 Defendants/Appellants Paul M. O'Connor, Karen O'Connor, and Paul O'Connor Architecture & Planning, Inc. (collectively, "O'Connor") appeal the denial of their motion to dismiss Plaintiff/Appellee Utaz Development Corporation, Inc.'s ("Utaz") complaint. For the following reasons, we reverse the superior court's ruling on the breach of contract and breach of warranty claims, but affirm as to the negligence claim and remand for further proceedings.

#### **FACTUAL AND PROCEDURAL HISTORY**

¶2 Utaz filed a complaint against O'Connor and other defendants involved in the design and construction of certain professional office suites. The complaint alleged three claims for relief against O'Connor: (1) breach of contract, (2) breach of warranty/guarantee, and (3) negligence/negligence *per se*. O'Connor moved to dismiss the complaint based on the parties' contractual agreement regarding dispute resolution, which reads:

##### 1.3.5 Arbitration

1.3.5.1 Any claim, dispute or other matter in question arising out of or related to this agreement shall be subject to arbitration. Prior to arbitration, the parties shall endeavor to resolve disputes by mediation in accordance with paragraph 1.3.4.

1.3.5.2 Claims, disputes and other matters in question between the parties that are not resolved by mediation shall be decided by arbitration which, unless the parties mutually agree otherwise, shall be in

accordance with the construction industry arbitration rules of the American Arbitration Association currently in effect. The demand for arbitration shall be filed in writing with the other party to this agreement and with the American Arbitration Association.<sup>1</sup>

¶13 Utaz opposed the motion to dismiss.<sup>2</sup> The superior court denied the motion, ruling that resolution of Utaz's claims did not require reference to or construction of the parties' contract, but sounded in tort; it concluded that, pursuant to our decision in *Dusold v. Porta-John Corp.*, 167 Ariz. 358, 807 P.2d 526 (App. 1990), the claims were not subject to the arbitration agreement. O'Connor timely appealed.

#### ISSUES

¶14 O'Connor contends the superior court erred as a matter of law by refusing to dismiss Utaz's complaint in its entirety. Alternatively, O'Connor argues it was error not to dismiss the claims for breach of contract and breach of warranty.

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<sup>1</sup> O'Connor did not provide a complete, signed copy of the parties' agreement to the superior court. Although Utaz originally complained that O'Connor had not proven that the parties agreed to the contract provisions cited in the motion to dismiss, the court ruled that for purposes of the motion, Utaz could not disclaim the existence of the contract containing the arbitration provision. Because Utaz has not challenged that determination on appeal, we assume for purposes of our analysis that the parties agreed to the arbitration provision cited in the motion.

<sup>2</sup> O'Connor's co-defendant, Builders Guild, Inc. ("BGI"), also opposed the motion. BGI is not a party to this appeal.

## DISCUSSION

### 1. Appellate Jurisdiction

¶15 We first consider whether we have jurisdiction over O'Connor's appeal. See *Sorensen v. Farmers Ins. Co.*, 191 Ariz. 464, 465, 957 P.2d 1007, 1008 (App. 1997) (stating appellate court has an independent duty to determine whether it has jurisdiction to consider an appeal). O'Connor claims jurisdiction is proper pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101.01(A)(1) (2003), which states that an appeal may be taken from an order denying an application to compel arbitration. However, O'Connor does not cite, and we do not find, a motion to compel arbitration in the record. In its motion to dismiss, O'Connor asked only for dismissal of Utaz's complaint, not an order compelling arbitration.

¶16 The order denying O'Connor's motion to dismiss is not appealable. *United States v. Superior Court*, 144 Ariz. 265, 269, 697 P.2d 658, 662 (1985) (denial of a motion to dismiss is an interlocutory order and not appealable). In the exercise of our discretion, however, we elect to treat O'Connor's appeal as a petition for special action because there is no "equally plain, speedy, and adequate remedy by appeal," and the issues raised are purely legal. Ariz. R.P. Spec. Act. 1(a); *Ruesga v. Kindred Nursing Ctrs., L.L.C.*, 215 Ariz. 589, 594, ¶ 16, 161 P.3d 1253, 1258 (App. 2007).

## 2. Substantive Merits

¶7 We turn, then, to O'Connor's argument that the court erred by denying its motion to dismiss because the parties' agreement requires Utaz's claims to be resolved by arbitration. The interpretation of an arbitration agreement is a question of law that we review *de novo*. *Burke v. Voicestream Wireless Corp. II*, 207 Ariz. 393, 395-96, ¶ 11, 87 P.3d 81, 83-84 (App. 2004).

¶8 Although Arizona favors arbitration to resolve disputes, *Clarke v. ASARCO Inc.*, 123 Ariz. 587, 589, 601 P.2d 587, 589 (1979), parties are required to arbitrate only those disputes that they have clearly agreed to arbitrate. *S. Cal. Edison Co. v. Peabody W. Coal Co.*, 194 Ariz. 47, 51, ¶ 11, 977 P.2d 769, 773 (1999). If parties to a contract have not specifically included tort actions within the scope of an arbitration clause, they are presumed to have excepted such claims from contractually-imposed resolution. *Dusold*, 167 Ariz. at 362, 807 P.2d at 530.

¶9 In this case, the parties' arbitration agreement does not specifically include tort claims, stating instead that it only applies to claims "arising out of or related to" the agreement.<sup>3</sup> To characterize a dispute as "arising out of" or

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<sup>3</sup> We reject O'Connor's argument that the arbitration agreement expressly includes tort claims, as it does not mention such claims. *Dusold*, 167 Ariz. at 362, 807 P.2d at 530. Although O'Connor is correct that the arbitration provision

"relating to" a contract, the dispute must raise some issue that requires reference to or interpretation of some portion of the contract itself. *Id.* "The relationship between the dispute and the contract is not satisfied simply because the dispute would not have arisen absent the existence of a contract between the parties." *Id.* "If the contract places the parties in a unique relationship that creates new duties not otherwise imposed by law, then a dispute regarding a breach of a contractually-imposed duty is one that arises from the contract." *Id.* at 363, 807 P.2d at 531. If, on the other hand, the duty allegedly breached is one imposed by law and one generally owed to others outside a contractual relationship, the dispute does not arise from contract, but instead sounds in tort. *Id.*

¶10 Utaz alleged breach of contract, breach of warranty, and negligence/negligence *per se*. We consider each claim to determine whether it arises in tort or contract. *Thomas v. Goudreault*, 163 Ariz. 159, 163-64, 786 P.2d 1010, 1014-15 (App. 1989) (stating that to determine whether a tort or contract claim has been pled, a court must look at the substance of the allegations, not their labels).

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broadly applies to "[a]ny claim, dispute or other matter in question," O'Connor ignores the modifying language of the provision, which requires that such matters arise out of or relate to the parties' contract.

¶11 Utaz alleged that it contracted with O'Connor for architectural drawing and design work for the office suites at issue. It claimed that O'Connor "fell below the standard of care of an architect practicing in Arizona in that its drawings and plans for the project were vague, ambiguous, defective and/or inadequate and contributed to the defective conditions of [the office suites] - constituting a breach of [O'Connor's] contract with [Utaz]." Although Utaz included standard of care language that is commonly associated with tort claims, the essence of its claim is that O'Connor failed to properly perform the contract with Utaz. *Dusold*, 167 Ariz. at 362, 807 P.2d at 530 (stating parties may not "escape arbitration clauses by framing contractual disputes as tort claims.").<sup>4</sup> Accordingly, resolution of the claim will require reference to O'Connor's responsibilities under the contract. Utaz's breach of contract claim arises out of the parties' contract and is therefore subject to the arbitration agreement. The trial court erred by denying O'Connor's motion to dismiss this claim.

¶12 Utaz next alleged that O'Connor expressly and impliedly warranted its work, but breached those warranties by

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<sup>4</sup> The nature of Utaz's claim is further evidenced by its request for attorneys' fees pursuant to the relevant provisions of the parties' contract and A.R.S. § 12-341.01 (2003), which provides for a discretionary award of fees to the successful party in an action arising out of a contract.

failing to properly design the office suite buildings. Utaz claimed that these breaches caused problems at the office suites, including surface drainage, flooding, structural cracks, slab movement, water pooling, and aesthetic and structural damage.

¶13 Generally, a claim for breach of an express or implied warranty sounds in contract. *Lofts at Fillmore Condo. Ass'n v. Reliance Commercial Constr., Inc.*, 218 Ariz. 574, 575, ¶ 5, 190 P.3d 733, 734 (2008) (implied warranty of workmanship and habitability); *Colberg v. Rellinger*, 160 Ariz. 42, 51, 770 P.2d 346, 355 (App. 1988) (express warranty), *overruled on other grounds by Flagstaff Affordable Hous. Ltd. P'ship v. Design Alliance, Inc.*, 223 Ariz. 320, 325, ¶ 23, 223 P.3d 664, 669 (2010). Utaz alleged that O'Connor violated express and implied promises by failing to properly design the office suites, resulting in a deficient product. Utaz's breach of warranty claim arises out of the parties' contract and is therefore subject to the arbitration provision. The trial court erred by denying O'Connor's motion to dismiss this claim.

¶14 Third, Utaz alleged that O'Connor, as a regulated professional, had a duty to exercise ordinary and reasonable care to avoid reasonably foreseeable injury and damages to Utaz, but instead performed negligently. Utaz also alleged that, to the extent O'Connor's work violated applicable building codes,



its conduct constituted negligence *per se*. Utaz thus claimed that O'Connor breached duties imposed by law and generally owed to others outside a contractual relationship. *Dusold*, 167 Ariz. at 363, 807 P.2d at 531. Accordingly, Utaz's negligence claim does not arise out of the parties' contract, but sounds in tort, and does not fall within the scope of the parties' arbitration agreement. The superior court properly denied the motion to dismiss this claim on the grounds raised.<sup>5</sup>

¶15 Finally, O'Connor contends that the denial of its motion to dismiss had the effect of denying its motion to compel arbitration under A.R.S. §§ 12-1501 and -1502 (2003) and asks that we direct the superior court to order enforcement of the arbitration agreement. However, as we discussed *supra*, O'Connor did not move to compel arbitration. Accordingly, we deny O'Connor's request. See *Broemmer v. Otto*, 169 Ariz. 543, 550, 821 P.2d 204, 211 (App. 1991), *aff'd in part, vacated in part on other grounds sub nom. Broemmer v. Abortion Servs. of Phoenix, Ltd.*, 173 Ariz. 148, 840 P.2d 1013 (1992).

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<sup>5</sup> Because the parties do not discuss the economic loss rule, we express no opinion regarding its applicability to Utaz's negligence claim. See *Flagstaff Affordable Hous.*, 223 Ariz. at 326-27, ¶ 33, 223 P.3d at 670-71 (holding that a plaintiff who contracts for construction cannot recover in tort for purely economic loss, unless the parties' agreement specifically allows such a recovery; doctrine barred building owner's professional negligence claim against architect).

**CONCLUSION**

¶16 For the foregoing reasons, we reverse the denial of O'Connor's motion to dismiss the breach of contract and breach of warranty claims. We affirm as to the negligence claim, and we remand for further appropriate proceedings.

¶17 In the exercise of our discretion, we deny O'Connor's request for attorneys' fees pursuant to A.R.S. § 12-341.01. O'Connor is, however, entitled to recover costs on appeal upon compliance with Arizona Rule of Civil Appellate Procedure 21.

/s/  
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MARGARET H. DOWNIE, Judge

CONCURRING:

/s/  
\_\_\_\_\_  
MAURICE PORTLEY, Presiding Judge

/s/  
\_\_\_\_\_  
PATRICIA A. OROZCO, Judge