DIVISION ONE
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

JERRY SIMMS, a single man, Plaintiff/Appellee, v. NANCE CONSTRUCTION, INC., an Arizona Corporation, Defendant/Appellant.	1 CA-CV 10-0870 DEPARTMENT A **MEMORANDUM DECISION** (Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. CV2003-005205
CV2006-014591
(Consolidated)

The Honorable Eileen S. Willett, Judge

AFFIRMED

Hill & Hill, P.L.C. Phoenix
By R. Corey Hill
Ginette M. Hill
Attorneys for Defendant/Appellant

DeCiancio Robbins, P.L.C. Tempe
By Christopher Robbins
Attorneys for Defendant/Appellant

Warner Angle Hallam Jackson & Formanek P.L.C. Phoenix
By Stephen E. Jackson
Chris R. Baniszewski
Matthew J. Pierce
And

Law Offices of Joseph C. Dolan P.C. Phoenix
By Joseph C. Dolan
Attorneys for Plaintiff/Appellee

W I N T H R O P, Chief Judge

¶1 Jerry Simms filed suit against Nance Construction, Inc. ("Nance"), the general contractor who had been in charge of the construction of Simms' home several years prior, alleging that Nance was responsible for defects later discovered in the home's construction. Nance appeals the judgment in favor of Simms, raising several issues. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY[1]

¶2 In 2000, Nance completed construction of a $2.8 million home and guest house for Simms. Nance's subcontractors included Todd Willis d/b/a Northeast Valley Roofing ("Northeast") and Cobra Stucco, L.L.C. ("Cobra").

¶3 In March 2001, a home undergoing construction on a neighboring lot caught fire, extensively damaging Simms' home and guest house. Simms hired Dusty Creek Builders, Inc. ("Dusty Creek") to repair the damage.

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[1] We generally view the facts and resulting inferences in the light most favorable to upholding the jury's verdict. *Hutcherson v. City of Phoenix*, 192 Ariz. 51, 53, ¶ 13, 961 P.2d 449, 451 (1998); *Graber v. City of Peoria*, 156 Ariz. 553, 556, 753 P.2d 1209, 1212 (App. 1988).

¶4 Simms filed a negligence suit in superior court against the owners/developers of the neighboring house (Michael J. Peloquin, the principal owner of Downtown Community Builders Limited Partnership, and MK Custom Residential Construction, L.L.C. ("MK Residential")), as well their general contractor (Vision Building and Development, Inc. ("Vision")), a subcontractor (Christopher Watson), and others.[2]

¶5 During the course of discovery, defense experts opined both that Dusty Creek had negligently repaired the damage to Simms' residence and that many defects found in the houses were the result of defects in the original construction. Simms retained Jonathan Higgins, an engineer with Rimkus Consulting Group, who Simms would later present at trial as his construction expert against Nance.

¶6 Nance first became aware of issues regarding the original construction of the houses in late May 2005, when Simms and Higgins met with Nance to discuss problems, especially with the roofs. At the meeting, Nance offered to make repairs to the roofs, but Simms refused the offer, ostensibly because Nance requested a release once the repairs were completed.

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[2] Simms later recovered $50,000 from Peloquin and $645,000 from MK Residential's insurance carrier. Simms also recovered $232,643.21 from his homeowner's insurance company, State Farm, for repair of the fire damage, and collected an additional $41,000 from State Farm as a result of a bad faith insurance lawsuit in federal district court.

¶7 On November 28, 2005, counsel for Simms sent Nance a letter in an attempt to comply with Arizona Revised Statutes ("A.R.S.") section 12-1363, a "purchaser dwelling action" statute.[3] The letter specifically identified numerous construction defects, but advised Nance that the list was "not a comprehensive and final list of items." In a response letter dated January 25, 2006, counsel for Nance addressed the various defects alleged in the November 28 letter, disputed Nance's responsibility for some of the defects, requested access to the property to make repairs on the defects for which Nance accepted responsibility, and agreed to repair within sixty days those items Nance identified as original construction defects. In a reply letter dated February 24, 2006, counsel for Simms raised numerous "questions and comments" regarding Nance's letter, advised Nance that additional defects and "other potential problems with the original construction" likely existed, addressed many of Nance's responses, and advised Nance that,

[3] That statutory section is entitled, "Notice and opportunity to repair." A.R.S. § 12-1363 (West 2012). In 2006, the Arizona Legislature amended § 12-1363. *See* 2006 Ariz. Sess. Laws, ch. 275, § 1 (2nd Reg. Sess.) (effective Sept. 21, 2006). The primary amendment to the statute was the addition of a definition of the term "reasonable detail." None of the 2006 amendments materially affect our analysis in this case, and throughout this decision we cite the current Westlaw version of the statutes unless changes material to our analysis have since occurred.

given the trial court's deadline for adding defendants and the parties' differences, litigation would be necessary.

¶8 On March 13, 2006, Simms filed an amended complaint, adding Nance, Northeast, Cobra, and Dusty Creek as defendants. Simms alleged claims of breach of contract, breach of implied warranty of habitability, and negligence against Nance.

¶9 In March 2007, counsel for Simms wrote to counsel for the defendants asking whether any defendants were willing to offer any repairs before Simms "commenc[ed] repair through our own efforts." Nance apparently did not respond to this inquiry.

¶10 Simms ultimately decided that, rather than attempt to identify and repair all of the defects on an item-by-item basis, he would have the entire roof and EIFS system (the exterior coating of the home) replaced. In June 2007, Simms entered a fixed-price contract with Advanced Repair Technologies ("ART"), pursuant to which he paid $1,578,999 for repairs that included a complete remodel of the roof and the exterior stucco system.

¶11 That same month, Nance filed a motion for summary judgment/motion to dismiss, asserting that Simms had failed to adequately disclose the repairs for which he sought to hold Nance responsible and had failed to give Nance proper notice and an opportunity to repair as required under the statutes related to purchaser dwelling actions. *See* A.R.S. §§ 12-1361 to -1366. The trial court denied the motion.

¶12 In April 2010, in advance of trial, Simms filed a motion in limine to preclude Nance from introducing "character evidence of Plaintiff Jerry Simms." Nance responded that it sought to introduce evidence of Simms' conduct with and as documented by the Arizona Department of Gaming, which had denied Simms' application for a license after expressing concern he had been involved in "questionable business practices, illegal activities and financial transactions with a person purportedly involved in organized crime." The trial court granted Simms' motion to preclude the character evidence.

¶13 Trial began on May 17, 2010. By the time of trial, Simms had settled with most of the defendants, and only two remained: Nance and Vision, the general contractor on the neighboring house.

¶14 At trial, Simms' expert, Higgins, testified as to his repair recommendations for the defects that were found. Higgins conceded that he initially believed the defects could have been fixed on an item-by-item basis and that he did not specifically recommend the roofs be torn down to the studs, although he stated that it was an "alternate choice" available to Simms. He also conceded that he was not asked to prepare a cost-to-repair estimate. He further testified, however, that had he known beforehand of all the problems ultimately revealed by removal of the EIFS system and the roof, he would have recommended the

"teardown" repair approach be taken. He explained that doing the repairs on an issue-by-issue basis would have meant that the cost of the work would be determined by a "time and material" approach, a problematic and unattractive proposition for Simms because he would not know the total cost until all repairs had been completed.

¶15 Simms also called David Slany, the former project manager for ART.[4] Slany indicated he was knowledgeable concerning the work ART performed and was present during major phases of the work on Simms' property.[5] He testified as to the $1,578,999 contract price between Simms and ART, and he broke that figure into specific component costs – including for demolition, roofing, stucco, scaffolding, electrical and plumbing repairs, and replacement landscaping - although he did not directly testify as to the reasonableness of those

[4] ART had gone out of business in approximately 2008, and its former owner did not testify.

[5] At oral argument, appellate counsel for Simms stated that Slany had been disclosed as an expert before trial. Nance filed a post-argument "Motion to Take Notice of Misstatement at Oral Argument," in which Nance noted that, while testifying, Slany had agreed with defense counsel for Vision that he was "not an expert testifying here today." We note, however, that Slany was identified as a potential expert in the August 29, 2007 Joint Pretrial Conference Memorandum filed by counsel for Simms and signed by counsel for various defendants, including Nance. Given the record provided this court, we take notice of the statement of Simms' appellate counsel and the testimony of Slany, and take no further action on the motion.

individual costs.[6] He further testified that he had been involved in the initial meetings with Simms involving the work, but not in "[t]he final contract," and had not worked up the pricing himself. He admitted he did not have copies of the subcontracts, but stated that the ART-Simms contract was a fixed-price contract for which ART had obtained multiple bids for the subcontracts issued, and he explained the financial risks faced by ART and its subcontractors in entering the contract, as well as various logistical difficulties encountered in the repair that affected the agreed-upon cost. When Slany was asked if it was "reasonable and necessary to do what Mr. Simms did, in terms of this repair," there was no objection from Nance, and Slany affirmatively stated, "I think the only way that it could be done correctly was the way that it was done."

¶16 Simms also testified. He stated that, after reviewing Higgins' report and conducting its own investigation, ART recommended the EIFS be removed down to the studs and the roof replaced because "you don't know what's behind there." ART informed Simms that it would not do the work on an issue-by-issue basis because in its experience, entirely replacing the EIFS and roof was necessary. Simms submitted evidence of his

[6] When asked, Slany did give his opinion that the cost of the scaffolding was not "surprising," and he testified that the stucco system used by ART cost less than reinstalling the original EIFS system.

original contract with and payments to Nance, which ostensibly allowed the jury to compare the price of the original work with the price of the repair work. Simms also submitted evidence that he paid ART for the work it performed.

¶17 After Simms rested, Nance moved for judgment as a matter of law[7] on the basis that Simms had failed to offer evidence that ART's cost of repair was reasonable. Counsel for Simms argued that prima facie evidence of reasonableness existed in the form of testimony that indicated the ART-Simms contract "was an arms-length transaction and not a cost-plus contract, like Nance['s]"; the owner of ART "was a skilled and experienced construction remediation, construction defect contractor" who had been independently recommended to Simms; and Slany had given "a breakout of the information that he had from ART at the time the job was being done, as to what the component parts were . . . [and] how in his estimation that will be allocated in terms of his job." The trial court denied Nance's motion.

¶18 Nance then sought to show that ART's cost of repairs was unreasonable. Nance presented testimony that its overhead profit for building Simms' houses was approximately 2.5 percent, in contrast to Slany's testimony that eighteen percent overhead and profit was part of the ART-Simms contract. Nance's expert, Gary Davis, testified that the total cost for fixing all alleged

[7] *See* Ariz. R. Civ. P. 50(a).

defects on an item-by-item basis would have been $46,719.46, and although he did not consider the teardown and rebuild as completed by ART necessary, at most it should have cost only $600,627.82.[8]

¶19 On the sixteenth day of trial, the jury returned a verdict against Nance on the breach of contract claim in the amount of $870,200, while specifying that $435,100 of that amount had resulted from Northeast, Nance's roofing subcontractor.[9]

¶20 On July 12, 2010, Nance again moved for judgment as a matter of law and for a new trial, arguing primarily that Simms had failed to meet his burden of establishing the reasonableness of the costs of repair arising out of his remediation contract with ART. Nance maintained that the jury could not base an award of damages on the contract price without expert testimony as to the reasonableness of that price, and that both Simms' construction expert, Higgins, and the representative from ART, David Slany, had failed to testify whether ART's contract price was reasonable or competitive. Nance further argued that the

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[8] Vision's construction expert, Dave Garcia, also testified that he could see no justification for the extent of the teardown, and repairs could have been done on an "issue-by-issue" basis. Vision's roofing expert, Jerry Conrad, provided similar testimony.

[9] The jury also awarded Simms $150,552.67 for fire damages and $200,000 for the loss of use of his home against Vision and two non-parties.

trial court had erred in refusing to allow Nance to impeach Simms' credibility with his purported prior acts of dishonesty after Simms opened the door by offering favorable evidence of his personal and professional background.

¶21 The trial court denied the motions by minute entry filed September 22, 2010, concluding in part that "[s]ufficient evidence was presented to the jury from which it was able to determine reasonableness of the contract price for work performed by [ART]." The court also awarded Simms the full amount of his requested attorneys' fees - $445,792.20 - against Nance.

¶22 On October 22, 2010, the trial court issued its final judgment. In pertinent part, the court found in favor of Simms and against Nance in the amount of $870,200, plus attorneys' fees, costs, and accruing interest, and ordered Northeast jointly and severally liable with Nance in the amount of $435,100.

¶23 We have jurisdiction over Nance's timely appeal. *See* A.R.S. §§ 12-120.21(A)(1), -2101(A)(1), (5)(a).[10]

[10] The Arizona Legislature renumbered A.R.S. § 12-2101 in 2011. *See* 2011 Ariz. Sess. Laws, ch. 304, § 1 (1st Reg. Sess.) (effective July 20, 2011).

ANALYSIS

I. The Necessity of Expert Testimony

¶24 Nance argues that it was entitled to judgment as a matter of law because Simms failed to offer expert testimony that ART's cost of repairs was reasonable. We disagree that Nance was entitled to judgment as a matter of law.

¶25 We review *de novo* the trial court's denial of a motion for judgment as a matter of law. *A Tumbling-T Ranches v. Flood Control Dist. of Maricopa County*, 222 Ariz. 515, 524, ¶ 14, 217 P.3d 1220, 1229 (App. 2009); *Aegis of Ariz., L.L.C. v. Town of Marana*, 206 Ariz. 557, 566, ¶ 34, 81 P.3d 1016, 1025 (App. 2003). A motion for judgment as a matter of law should be granted when the facts presented in support of a claim have so little probative value that a reasonable person could not find for the claimant. *See A Tumbling-T Ranches*, 222 Ariz. at 524, ¶ 14, 217 P.3d at 1229; *Shoen v. Shoen*, 191 Ariz. 64, 65, 952 P.2d 302, 303 (App. 1997). If reasonable minds could differ, however, the motion should be denied. *See generally Shafer v. Monte Mansfield Motors*, 91 Ariz. 331, 333, 372 P.2d 333, 335 (1962); *Huggins v. Deinhard*, 127 Ariz. 358, 361, 621 P.2d 45, 48 (App. 1980).[11]

[11] Also, we will not overturn the trial court's decision to deny a motion for new trial absent a clear abuse of discretion. *Delbridge v. Salt River Project Agric. Improvement & Power Dist.*, 182 Ariz. 46, 53, 893 P.2d 46, 53 (App. 1994).

¶26 As Nance notes, Arizona has previously adopted the Restatement (First) of Contracts ("the Restatement") § 346(1)(a) (1932). *See Blecick v. Sch. Dist. No. 18 of Cochise County*, 2 Ariz. App. 115, 122, 406 P.2d 750, 757 (1965), *overruled on other grounds by Donnelly Constr. Co. v. Oberg/Hunt/Gilleland*, 139 Ariz. 184, 187, 677 P.2d 1292, 1295 (1984).[12] Section 346(1)(a) of the Restatement provides that a party may generally recover the reasonable cost of remedying defective construction:

> (1) For a breach by one who has contracted to construct a specified product, the other party, can get judgment for compensatory damages for all unavoidable harm that the builder had reason to foresee when the contract was made, less such part of the contract price as has not been paid and is not still payable, determined as follows:
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> > (a) *For defective or unfinished construction he can get judgment for* either
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> > (i) *the reasonable cost of construction and completion in accordance with the contract, if this is possible and does not involve unreasonable economic waste*; or
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> > (ii) the difference between the value that the product contracted for would have had and the value of the performance that has been received by the plaintiff; if construction and completion in accordance with the contract would involve unreasonable economic waste.

(Emphasis added.) *See also Sorensen v. Robert N. Ewing, Gen'l Contractor*, 8 Ariz. App. 540, 544, 448 P.2d 110, 114 (1968) (finding that a general contractor was entitled to recover the

[12] *Donnelly* was rejected in part on other grounds in *Gipson v. Kasey*, 214 Ariz. 141, 144, ¶¶ 14-15, 150 P.3d 228, 231 (2007).

reasonable cost of remedying defects caused by a subcontractor). Thus, under the Restatement, Simms could recover the reasonable cost of the repairs to his home that were due to Nance's defective construction.

¶27 Nance maintains that because determination of the cost of repairs is an appropriate subject of opinion testimony when given by properly qualified witnesses, *see Blecick*, 2 Ariz. App. at 122, 406 P.2d at 757; *Sorensen*, 8 Ariz. App. at 545, 448 P.2d at 115, Simms was required to offer expert testimony that ART's cost of repairs was reasonable. Nance argues that the only evidence regarding a reasonable cost of repairs conclusively showed that the ART contract price was unreasonable, and further states that such evidence would not even have been offered by the defense if the trial court had properly granted Nance's first motion for judgment as a matter of law.

¶28 The Arizona cases on which Nance relies for his argument that Simms was required to present expert testimony that the cost of repairs was reasonable are *Blecick* and *Sorensen*.[13] In *Blecick*, this court found the opinion testimony of a project's architects, who were "qualified in the class of work in question," was sufficient to establish the anticipated

[13] *See also Dawn Court Assocs. v. Cristia*, 761 N.E.2d 705, 709 (Ohio Ct. of Common Pleas 2001) ("Plaintiff must establish by expert testimony that any repair cost expended was reasonable." (citing an unreported decision)).

cost of repairing construction defects. 2 Ariz. App. at 122, 406 P.2d at 757. Similarly, in *Sorensen*, this court concluded that an award for repairs was supported by competent evidence when witnesses who were "qualified in the class of work in question" provided estimates as to the costs of those repairs. 8 Ariz. App. at 545, 448 P.2d at 115. Neither *Blecick* nor *Sorensen*, however, held that an expert must testify that the cost of repairs was reasonable when the repairs have actually been performed and the costs incurred. *See Blecick*, 2 Ariz. App. at 121-22, 406 P.2d at 756-57; *Sorensen*, 8 Ariz. App. at 544-45, 448 P.2d at 114-15; *see also Murdock-Bryant Constr., Inc. v. Pearson*, 146 Ariz. 57, 67, 703 P.2d 1206, 1216 (App. 1984) (rejecting the contention that *Blecick* and *Sorenson* required the use of expert testimony to establish the reasonable value of construction site work when "both [witnesses] were, if not formal rock or demolition experts, at the very least qualified in site excavation work, and . . . their testimony was probative on the question of the reasonable value of the services rendered"), *approved in part and disapproved in part on other grounds*, 146 Ariz. 48, 703 P.2d 1197 (1985).[14]

[14] *See also United Metro Materials, Inc. v. Pena Blanca Props., L.L.C.*, 197 Ariz. 479, 486, ¶ 39, 4 P.3d 1022, 1029 (App. 2000) ("A materialman who has contracted with a contractor rather than with the owner of the property has lien rights only for the 'reasonable value' of what it has furnished . . . regardless of the price agreed with the contractor . . .

¶29 Moreover, the record is clear in this case that, through the testimony of Higgins, Slany, and Simms himself, Simms submitted evidence from which the jury could evaluate the reasonableness of Simms' claim for the cost of repairs. Higgins testified that, although he did not specifically recommend the roof be torn down to the studs, after discovering all the problems revealed by removal of the EIFS system and the roof, he believed such work was necessary. Slany testified as to the breakdown of the costs to repair Simms' houses and that "the only way that it could be done correctly was the way that it was done." Slany also testified that ART received multiple bids for

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although the contract price constitutes prima facie proof of reasonable value." (citations omitted)); *but see Mustang Pipeline Co. v. Driver Pipeline Co.*, 134 S.W.3d 195, 200-01 (Tex. 2004) ("Evidence of the amounts charged and paid, standing alone, is no evidence that such payment was reasonable and necessary." (citation omitted)); *GATX Tank Erection Corp. v. Tesoro Petroleum Corp.*, 693 S.W.2d 617, 619 (Tex. App. 1985) ("The only evidence presented by Tesoro as to the cost of repairs is basically proof of the payment of certain invoices or accounts as to the repairs, without proof as to the reasonableness of such costs."). Simms cites *United Metro* and other "lien cases" for the proposition that the contract price for construction work constitutes prima facie evidence of reasonable value. Nance argues that the cases cited by Simms are "inapplicable" and should be distinguished because they "involved disputes between contracting parties" in which the parties themselves negotiated, accepted, and effectively waived any dispute regarding the contract price. We note, however, that the cases actually involved materialmen or subcontractors asserting a lien against the owner of the property, with whom they did not have a contract; instead, the claimants' contracts were with the general contractor. *See United Metro*, 197 Ariz. at 486, ¶ 39, 4 P.3d at 1029; *Lenslite Co. v. Zocher*, 95 Ariz. 208, 214-15, 388 P.2d 421, 425-26 (1964).

the subcontracts it issued, and he testified as to various issues affecting the price before ART and Simms entered the fixed-price contract, all of which allowed the jury to evaluate the reasonableness of the cost of the repair work. Additionally, the jury was presented with evidence that allowed it to compare the cost of the original construction with the price charged to repair Nance's work. Nance had a full opportunity to challenge the necessity of the teardown and the reasonableness of the costs Simms incurred pursuant to the ART-Simms contract, which Nance did with its own expert witness. Ultimately, the issue of reasonableness was a factual question for the jury, *see generally Univ. of Ariz. Health Scis. Ctr. v. Superior Court*, 136 Ariz. 579, 586, 667 P.2d 1294, 1301 (1983), and Nance's disagreements with the evidence Simms used to establish the amount and cost of the repairs simply go to the weight of the evidence. *See Felder v. Physiotherapy Assocs.*, 215 Ariz. 154, 164, ¶ 47, 158 P.3d 877, 887 (App. 2007). The trial court did not err in concluding that Simms presented sufficient evidence for the jury to determine the reasonableness of the contract price for the work performed by ART and therefore denying Nance's motions for judgment as a matter of law and motion for new trial.[15]

[15] Because we affirm the trial court on this issue, we do not address Nance's further argument that it "is entitled to a new

II. Application of A.R.S. § 12-1363

¶30 Nance next argues that the trial court erred in denying its motion for summary judgment/motion to dismiss because Simms failed to comply with A.R.S. § 12-1363 by giving sufficient notice of the defects being claimed against Nance and an opportunity for Nance to repair those defects.[16] We disagree.

¶31 We review the denial of a motion for summary judgment for an abuse of discretion. *Sonoran Desert Investigations, Inc. v. Miller*, 213 Ariz. 274, 276, ¶ 5, 141 P.3d 754, 756 (App. 2006); *Blanchard*, 196 Ariz. at 117, 993 P.2d at 1081. In making

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trial solely on liability and the remaining mold remediation and loss of use damages."

[16] Because matters outside the pleadings were submitted and considered by the trial court, we treat Nance's motion as one for summary judgment. *See* Ariz. R. Civ. P. 12(b); *Blanchard v. Show Low Planning & Zoning Comm'n*, 196 Ariz. 114, 117, 993 P.2d 1078, 1081 (App. 1999) (citing *Frey v. Stoneman*, 150 Ariz. 106, 109, 722 P.2d 274, 277 (1986)). Further, although the parties do not raise the issue, the denial of a motion for summary judgment is normally neither an appealable order nor reviewable upon appeal from a final judgment, except under unusual circumstances. *Safeway Stores, Inc. v. Superior Court*, 19 Ariz. App. 210, 212, 505 P.2d 1383, 1385 (1973) (citing *Navajo Freight Lines, Inc. v. Liberty Mut. Ins. Co.*, 12 Ariz. App. 424, 427-28, 471 P.2d 309, 312-13 (1970)). In this case, evidence of the parties' proposals and negotiations was generally inadmissible at trial for consideration by the jury. *See* A.R.S. § 12-1363(F) (providing that a purchaser's good faith notice to the seller, the seller's good faith response or offer, the purchaser's good faith response or counteroffer made to the seller's offer, and the seller's good faith best and final offer are not admissible in any dwelling action). Consequently, we address the merits of Nance's argument. *See generally Hauskins v. McGillicuddy*, 175 Ariz. 42, 49, 852 P.2d 1226, 1233 (App. 1992) (concluding that this court had jurisdiction to decide if the trial court reached the right conclusion in denying a motion for summary judgment).

our determination, we review interpretation of the applicable statutes *de novo*. *N. Valley Emergency Specialists, L.L.C. v. Santana*, 208 Ariz. 301, 303, ¶ 8, 93 P.3d 501, 503 (2004). The best and most reliable indicator of a statute's meaning is its language. *Id*. at ¶ 9 (citing *State v. Williams*, 175 Ariz. 98, 100, 854 P.2d 131, 133 (1993)). If the language is clear, we apply it without resorting to other methods of statutory interpretation, unless our application of the statute's plain meaning would lead to impossible or absurd results. *Id*. (citing *Bilke v. State*, 206 Ariz. 462, 464, ¶ 11, 80 P.3d 269, 271 (2003)).

¶32 In general, a person must first comply with the purchaser dwelling statutes before filing such an action. *See* A.R.S. § 12-1362(A) ("Except with respect to claims for alleged defects involving an immediate threat to the life or safety of persons occupying or visiting the dwelling, a purchaser must first comply with this article before filing a dwelling action."). Further, A.R.S. § 12-1363 provides an outline of the process for parties to follow:

> A. At least ninety days before filing a dwelling action, the purchaser shall give written notice by certified mail, return receipt requested, to the seller specifying in reasonable detail the basis of the dwelling action. . . . For the purposes of this subsection, "reasonable detail" includes a detailed and itemized list that describes each alleged defect and the location that each alleged defect has been

observed by the purchaser in each dwelling that is the subject of the notice.

B. After receipt of the notice described in subsection A of this section, the seller may inspect the dwelling to determine the nature and cause of the alleged defects and the nature and extent of any repairs or replacements necessary to remedy the alleged defects. The purchaser shall ensure that the dwelling is made available for inspection no later than ten days after the purchaser receives the seller's request for an inspection. . . .

C. Within sixty days after receipt of the notice described in subsection A of this section, the seller shall send to the purchaser a good faith written response to the purchaser's notice by certified mail, return receipt requested. The response may include an offer to repair or replace any alleged defects, to have the alleged defects repaired or replaced at the seller's expense or to provide monetary compensation to the purchaser. The offer shall describe in reasonable detail all repairs or replacements that the seller is offering to make or provide to the dwelling and a reasonable estimate of the date by which the repairs or replacements will be made or monetary compensation will be provided.

. . . .

E. Within twenty days after receipt of the seller's offer made pursuant to subsection C of this section, the purchaser shall provide a good faith written response.[17] A purchaser who accepts the seller's offer made pursuant to subsection C of this section shall do so in writing by certified mail, return receipt requested. A purchaser who rejects the seller's offer made pursuant to subsection C of this section shall respond to the seller in writing by certified mail, return receipt requested. If the seller provides a specific factual basis for the

[17] In general, whether a party has acted in "good faith" is an objective determination based on all the circumstances. *See In re Guardianship of Sleeth*, 226 Ariz. 171, 178, ¶ 30, 244 P.3d 1169, 1176 (App. 2010) (citing *In re Estate of Gordon*, 207 Ariz. 401, 406, ¶ 24, 87 P.3d 89, 94 (App. 2004)).

> offer, the response shall include the specific factual basis for the purchaser's rejection of the seller's offer and the purchaser's counteroffer, if any. Within ten days after receipt of the purchaser's response, the seller may make a best and final offer to the purchaser in writing by certified mail, return receipt requested.
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> . . . .
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> G. A purchaser may amend the notice provided pursuant to subsection A of this section to include alleged defects identified in good faith after submission of the original notice during the ninety day notice period. The seller shall have a reasonable period of time to conduct an inspection, if requested, and thereafter the parties shall comply with the requirements of subsections B, C and E of this section for the additional alleged defects identified in reasonable detail in the notice.
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> H. A purchaser's written notice made pursuant to subsection A of this section or an amended notice made pursuant to subsection G of this section tolls the applicable statute of limitations . . . until ninety days after the seller receives the notice or for a reasonable period agreed to in writing by the purchaser and seller.

A.R.S. § 12-1363.

¶33 In its November 5, 2007 minute entry denying Nance's motion, the trial court addressed Simms' compliance with A.R.S. § 12-1363. The court found "no genuine issue that Nance had the opportunity to inspect the dwelling." The court also found that, before Simms sent his November 28, 2005 letter in an effort to comply with § 12-1363, he had sent letters detailing the alleged defects to Nance's two previous attorneys, and the parties had "exchanged correspondence for some time." The court

further found that, after Simms sent his February 24, 2006 reply letter, it did "not appear that [Nance] ever responded to the terms of this February 24th letter." The court then addressed the substance of Nance's argument:

> Defendant argues that Plaintiff's November 28, 2005 letter was deficient because it did not itemize the defects, that Nance was never allowed access to the property to make repairs and that the closing paragraph in Plaintiff's letter was vague, thereby preventing Nance from exercising its right to repair.
>
> Addressing these issues in reverse order, the aforesaid paragraph states that Plaintiff's list is not a final itemization and that his correspondence is an effort to resolve his grievance. To the extent that Defendants argue that this notice fails because Plaintiff reserved the right to add more defects, the Court rejects Defendants' argument. Section 12-1363(G) provides the right to amend after the initial notice. If Defendants are arguing that Plaintiff's letter is only an attempt to begin resolving the complaints, then their argument again fails because the statute's very purpose is to get the parties to resolve the issues short of trial.
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> As to the issue of repairs, Defendant's January 25th letter requests that Plaintiff allow access to the property to make repairs. While Plaintiff did not respond within the statutory time frame, section 12-1363 does not require the Plaintiff to accept an offer for repairs. Therefore, the Court finds that any delay by Plaintiff in responding to Defendant's offer to repair is inconsequential and caused no prejudice to the Defendant.
>
> Finally, Defendants' argument that Plaintiff's notice lacks reasonable detail is specious. Plaintiff's November 28 letter outlines the items that Plaintiff believes are defective, their general location and the desired method of repair.

¶34 We find no abuse of discretion in the trial court's denial of Nance's motion for summary judgment. The record supports the trial court's characterization of the events and its conclusion that Simms' correspondence was sufficient to comply with A.R.S. § 12-1363. Nothing in § 12-1363 precluded Simms from seeking clarification as to Nance's offer to repair, and nothing precluded Nance from responding further.[18] *See* A.R.S. § 12-1363(E). Additionally, although § 12-1363 required Simms to provide a good faith written response to Nance's offer, the statute did not *require* Simms to accept Nance's offer for repairs, especially in light of the facts of this case. The record makes clear that the parties were far apart in their belief of the nature of repairs necessary – Simms sought a comprehensive plan that addressed all discovered and potential problems, whereas Nance disputed many of the defects alleged and offered to make repairs on an item-by-item basis.

¶35 In sum, we cannot say as a matter of law that Simms failed to comply with the requirements of A.R.S. § 12-1363.

[18] Although it appears that Simms' February 24 letter was sent after the statutory time frame set forth in A.R.S. § 12-1363(E), the record indicates that Nance was still afforded at least ten days to make a "best and final offer" as contemplated by the statute before Simms filed suit against Nance. Also, as we have noted, even after Simms added Nance to the lawsuit, Simms attempted to enlist Nance's assistance in a global repair effort.

Accordingly, the trial court did not abuse its discretion in denying Nance's motion for summary judgment.

III. Impeachment of Simms' Credibility

¶36 Nance also argues that the trial court abused its discretion by refusing to allow Nance to impeach Simms' credibility with his alleged prior acts of dishonesty, even after Simms elected to take the stand to testify and arguably "opened the door" by offering evidence of his personal and professional background. Nance maintains that Simms' character for truthfulness was always at issue, and even more so once he took the stand.

¶37 We review the trial court's decision to exclude credibility evidence for an abuse of discretion and resulting prejudice. *Schwartz v. Farmers Ins. Co. of Ariz.*, 166 Ariz. 33, 37, 800 P.2d 20, 24 (App. 1990); *State v. Carter*, 1 Ariz. App. 57, 63, 399 P.2d 191, 197 (1965).

¶38 Under Rule 608(b), Ariz. R. Evid., specific instances of the conduct of a witness may, in the discretion of the court, be inquired into on cross-examination of the witness if probative of the witness's character for truthfulness or untruthfulness.[19] Further, Rule 611 provides that a witness may

[19] Effective January 1, 2012, the Arizona Rules of Evidence were amended to conform to a recent restyling of the federal evidence rules. The amendments reflect an effort to make the rules more easily understood and to make style and terminology

be cross-examined on relevant matters, including credibility. Ariz. R. Evid. 611(b). Even relevant evidence, however, may be excluded by the court if its probative value is substantially outweighed by the danger of unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence. Ariz. R. Evid. 403.[20]

¶39 We find no abuse of the trial court's discretion. Although Simms' credibility, as with any witness, was at issue, the trial court could properly have found that the probative value of the evidence Nance sought to introduce was substantially outweighed by the considerations enunciated in Rule 403, including potential confusion of the issues and considerations of undue delay and waste of time in what was already a lengthy trial. Nance's proposed evidence would have had little or no probative value to the core issues of the case, and would likely have required more time for Simms to contest or

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consistent throughout the rules. The changes were intended to be stylistic only, with no intent to change any result in any ruling on evidence and admissibility. Although our review in this case involves the evidence rules in existence when the trial court's rulings were made, because the recent changes to the evidence rules were meant to be stylistic only, our citations conform to both the current and former versions of the rules. *See Cal X-Tra v. W.V.S.V. Holdings, L.L.C.*, ___ Ariz. ___, ___ n.20, ¶ 34, 276 P.3d 11, 23 n.20 (App. 2012).

[20] *See also* Ariz. R. Evid. 404(b) (precluding evidence of other crimes, wrongs, or acts for the purpose of proving "the character of a person in order to show action in conformity therewith").

explain these collateral matters. The trial court was in the best position to make this evaluation, and we find no abuse of its discretion in declining to allow Nance to impeach Simms' credibility with prior acts indicating dishonesty.[21]

IV. The Trial Court's Award of Attorneys' Fees

¶40 The trial court granted Simms' request for attorneys' fees in the amount of $445,792.02 pursuant to A.R.S. § 12-341.01(A). Nance argues that, under the totality of the circumstances of this case, the court abused its discretion because Simms failed to give Nance an opportunity to repair, allegedly tried to "extort" $3,000,000 from Nance if it wanted to avoid being sued, and "did everything in his power to thwart settlement," including making demands for compensation for which he was not entitled.

¶41 An award of attorneys' fees under A.R.S. § 12-341.01(A) is discretionary. *See* A.R.S. § 12-341.01(A) ("In any contested action arising out of contract, express or implied, the court *may* award the successful party reasonable attorney fees." (emphasis added)). Although we review *de novo* the court's determination as to the applicability of the statute, we review the trial court's determination regarding the amount of fees awarded for an abuse of that discretion. *Nolan v.*

[21] Given our resolution of this issue, we do not address Simms' argument that Nance failed to properly disclose any evidence related to this issue before trial.

Starlight Pines Homeowners Ass'n, 216 Ariz. 482, 490, ¶ 34, 167 P.3d 1277, 1285 (App. 2007). We will not disturb the trial court's award if a reasonable basis exists to uphold it. *See In re Estate of Parker*, 217 Ariz. 563, 569, ¶ 31, 177 P.3d 305, 311 (App. 2008). "[T]he question is not whether the judges of this court would have made an original like ruling, but whether a judicial mind, in view of the law and circumstances, could have made the ruling without exceeding the bounds of reason. We cannot substitute our discretion for that of the trial judge." *Assoc'd Indem. Corp. v. Warner*, 143 Ariz. 567, 571, 694 P.2d 1181, 1185 (1985) (citation omitted).

¶42 We conclude that the trial court did not abuse its discretion in awarding attorneys' fees to Simms. Although the jury did not award Simms the full amount he sought, Simms was clearly the successful party in the litigation. Further, the affidavit submitted by Simms' counsel appears to contain sufficient detail, and in the trial court, Nance failed to make specific objections to Simms' time entries submitted with his motion for attorneys' fees. *See Nolan*, 216 Ariz. at 490-91, ¶¶ 37-39, 167 P.3d at 1285-86. Although Nance maintains that Simms should not have received all his requested fees because the litigation could have been avoided had Simms been more reasonable, once the trial court determined that Simms was entitled to an award of attorneys' fees pursuant to A.R.S. § 12-

341.01(A), the court was within its discretion in awarding all the fees requested, and whether we would have awarded the full amount of attorneys' fees ourselves is not the standard on which we base our review. *See Warner*, 143 Ariz. at 571, 694 P.2d at 1185. We find no abuse of discretion in the trial court's award of attorneys' fees.[22]

V. Costs and Attorneys' Fees on Appeal

¶43 Both sides request an award of costs and attorneys' fees associated with this appeal pursuant to A.R.S. § 12-341.01(A). In this contested action, Nance is not the successful party on appeal, and therefore we deny Nance's request. Given the record before us, we exercise our discretion and decline to award attorneys' fees to Simms as well. We do, however, award Simms his costs associated with this appeal, contingent on his compliance with Rule 21(a), ARCAP.

[22] In his application for attorneys' fees, Simms included his charges from DigitaLaw, Inc., which assisted Simms with trial exhibit preparation and presentation. Nance maintains that DigitaLaw's bills are not recoverable, however, because they do not qualify as paralegal fees. Simms maintains that DigitaLaw was performing paralegal services. Paralegals, legal assistants, and law clerks may perform legal services properly considered as a component of attorneys' fees. *See Aries v. Palmer Johnson, Inc.*, 153 Ariz. 250, 261, 735 P.2d 1373, 1384 (App. 1987). On this record, we find no error in the court's determination that DigitaLaw's fees were properly recoverable.

CONCLUSION

¶44 For the aforementioned reasons, we affirm the trial court's judgment. We award Simms his reasonable costs on appeal, contingent on his compliance with ARCAP 21(a).

_____/S/_____
LAWRENCE F. WINTHROP, Chief Judge

CONCURRING:

_____/S/_____
ANN A. SCOTT TIMMER, Presiding Judge

_____/S/_____
PATRICK IRVINE, Judge*

*Judge Patrick Irvine was a sitting member of this court when the matter was assigned to this panel of the court. He retired effective December 31, 2011. In accordance with the authority granted by Article 6, Section 3, of the Arizona Constitution and pursuant to A.R.S. § 12-145, the Chief Justice of the Arizona Supreme Court has designated Judge Irvine as a judge pro tempore in the Court of Appeals, Division One, for the purpose of participating in the resolution of cases assigned to this panel during his term in office.