DIVISION ONE
FILED: 10/10/2013
RUTH A. WILLINGHAM, CLERK
BY: mjt

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

KEITH MATLOCK, an unmarried man,	)	1 CA-CV 12-0832
	)	
Plaintiff/Appellee,	)	DEPARTMENT D
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication –
SHARON MATLOCK-PAGE and ROBERT PAGE, husband and wife,	)	Rule 28, Arizona Rules of Civil Appellate Procedure)
	)	
Defendants/Appellants.	)	

Appeal from the Superior Court in Maricopa County

Cause No. CV2010-032269

The Honorable Randall H. Warner, Judge

AFFIRMED

Christopher S. Short, P.C. — Glendale
By Christopher S. Short
Attorneys for Appellee

Trullinger & Wenk, P.L.L.C. — Goodyear
By Charles E. Trullinger
and Russell F. Wenk
Attorneys for Appellants

K E S S L E R, Judge

¶1 Sharon Matlock-Page and Robert Page ("the Pages") appeal from a judgment in favor of Sharon's son, Keith Matlock ("Matlock"). They argue that the trial court erred when it

answered a jury question regarding contract formation and timing. For the following reasons, we affirm.

FACTUAL AND PROCEDURAL HISTORY

¶2 In 2008, Matlock provided the Pages with $35,000 to be used as a down payment on their home. The Pages contended the transaction was a gift, and Matlock contended the transaction was a loan. Matlock argued the Pages promised to repay the funds within a few months after the loan began, and the Pages claimed that they only agreed to pay Matlock back after he allegedly denied them access to their grandchildren in 2010. There is no evidence of a written contract or loan formalized at the time Matlock gave the Pages the funds. The Pages made one payment to Matlock in February 2010, but refused to make any further payments. In later emails from December 2010, the Pages acknowledged that that they were indebted to Matlock.

¶3 Matlock brought an action against the Pages for breach of contract and unjust enrichment. The jury returned a verdict in favor of Matlock and awarded him $33,100.[1] In response to supplemental verdict forms to explain which claim(s) the jury found for Matlock, the jury returned only the form finding for Matlock on the breach of contract claim.

[1] This amount represents the original $35,000 less $1,900 the Pages gave Matlock in 2010.

¶4 The Pages timely appealed. This Court has jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101(A)(1) (Supp. 2012).

ISSUE AND STANDARD OF REVIEW

¶5 The Pages argue that in responding to a jury question, the trial court erroneously instructed the jury that not all of the elements of a contract need exist at the same time for a contract to be formed, thus causing the jury to misapply the facts when reaching its verdict.[2] "We review de novo the

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[2] Citing *Cullum v. Cullum* and *State v. Dann*, Matlock argues that the Pages have waived this argument. *See Cullum v. Cullum*, 215 Ariz. 352, 355 n.5, ¶ 14, 160 P.3d 231, 234 n.5 (App. 2007) ("As a general rule, a party cannot argue on appeal legal issues not raised below."); *State v. Dann*, 205 Ariz. 557, 570 n.8, ¶ 46, 74 P.3d 231, 244 n.8 (2003) ("[F]ailure to develop legal argument waives argument on appeal." (citation omitted)). Matlock's argument is based on the Pages' failure to proactively form an alternative jury instruction, citation to new case law on appeal, and not fully developing their argument below. We disagree with Matlock.

To preserve an issue for appeal, "[a] party must make a specific and timely objection at trial." *State v. Hamilton*, 177 Ariz. 403, 408, 868 P.2d 986, 991 (App. 1993). In discussing the trial court's proposed answer to the jury question, the Pages objected and opined that the jury should determine the intent of the parties at the time consideration was given: "My problem with that is the ownership of the property has already been transferred, and there's no meeting of the minds at that time. . . . Two years later she already has the money, and her promise to repay is not met with any new consideration." We find this objection exceeds the requirements for preserving an appeal. In addition, although the Pages rely on new authority in their brief, they do not raise any new issues on appeal. *See Retzke v. Larson*, 166 Ariz. 446, 449, 803 P.2d 439, 442 (App. 1990) (stating that a party may cite new case law on appeal in support of theories or issues raised below). We therefore decline to find the argument waived.

question [of] whether jury instructions correctly stated the law." *State v. Morales*, 198 Ariz. 372, 374, ¶ 4, 10 P.3d 630, 632 (App. 2000). "We consider all of the instructions together to determine whether they misled the jury," and "[w]e will reverse only if an erroneous instruction prejudiced the appellant's rights." *Desert Mountain Props. Ltd. v. Liberty Mut. Fire Ins. Co.*, 225 Ariz. 194, 199, ¶ 11, 236 P.3d 421, 426 (App. 2010); *see also State ex rel. Thomas v. Granville*, 211 Ariz. 468, 471, ¶ 8, 123 P.3d 662, 665 (2005) ("[W]e read the jury instructions as a whole to ensure that the jury receives the information it needs to arrive at a legally correct decision.").

DISCUSSION

¶6 "The purpose of jury instructions is to inform the jury of the applicable law in terms it can readily understand." *Barrett v. Samaritan Health Servs., Inc.*, 153 Ariz. 138, 143, 735 P.2d 460, 465 (App. 1987). The trial court initially instructed the jury on breach of contract as follows:

> [Matlock] claims that [the Pages] breached a contract. On this claim, [Matlock] must prove there was a contract with [the Pages] and [the Pages] breached the contract.
>
> A contract is an agreement between two or more persons. For a contract to exist, there must be an offer, acceptance of the offer, and consideration.

> To find that the parties had a contract, you must find that they each intended to be bound by the agreement, and that they made that intention known to the other party.
>
> An offer is a proposal to enter into a contract on the terms contained in the offer.
>
> An acceptance is an expression of agreement to the terms of the offer by the person to whom the offer was made.
>
> Consideration is a benefit received, or something given up or exchanged, as agreed upon between the parties.
>
> A contract can be written or oral.
>
> . . .
>
> In deciding what a contract provision means, you should attempt to determine what the parties intended at the time that the contract was formed. You may consider the surrounding facts and circumstances as you find them to have been at the time that the contract was formed. It is for you to determine what those surrounding facts and circumstances were.
>
> To determine what the parties intended the terms of a contract to mean, you may consider the language of the written agreement; the acts and statements of the parties themselves before any dispute arose; the parties' negotiations; any prior dealings between the parties; any reasonable expectations the parties may have had as the result of the promises or conduct of the other party; and any other evidence that sheds light on the parties' intent.

During deliberations, the jury submitted the following question to the trial court: "For the 'Breach of Contract' ruling do we

have to determine that all the criteria for a contract were met at the time of the transaction [in 2008]?" Such a question indicated jury confusion. *See Warner v. Sw. Desert Images, L.L.C.*, 218 Ariz. 121, 135, ¶ 44, 180 P.3d 986, 1000 (App. 2008) ("A question by a single juror during the course of trial is substantially less indicative of jury confusion than a question asked by the jury panel during deliberations."); *see also Ott v. Samaritan Health Serv.*, 127 Ariz. 485, 491, 622 P.2d 44, 50 (App. 1980) (noting that "a number of courts have held that if the jurors thereafter express confusion or lack of understanding of a significant element of the applicable law, it is the court's duty to give additional instructions on the law to adequately clarify the jury's doubt or confusion."). Over the Pages' objection, the trial court answered: "No. A contract can be formed after one party has performed its part of the contract in full or in part, so long as all the requirements for a contract are met."

¶7 The Pages argue that the trial court provided an incomplete explanation to the jury question by omitting the importance of timing and a meeting of the minds. They argue that the trial court's answer did not reflect Arizona legal precedent because it "instructed the jury to consider a contract formed, regardless of timing and order of the necessary elements, as long as all requirements were met and one party had

performed on the contract." As they argued in the trial court, the Pages contend that they never agreed to a loan in 2008 and that any evidence that they agreed to repay Matlock in 2010 was not supported by any additional consideration.[3] The Pages state that considering the series of events, the instruction gave the jury no alternative but to find that a contract existed.

¶8 The trial court's instruction was not erroneous as a matter of law. An offeree can accept an offer by words or conduct and the acceptance need not be immediately upon the timing of the offer. *See* Restatement (Second) of Contracts § 18 (1981) [hereinafter "Restatement"] ("Manifestation of mutual assent to an exchange requires that each party either make a promise or begin or render a performance."); Restatement § 19 ("The manifestation of assent may be made wholly or partly by written or spoken words or by other acts or by failure to act."); Restatement § 22 ("A manifestation of mutual assent may be made even though neither offer nor acceptance can be identified and even though the moment of formation cannot be determined."); Restatement § 41 ("An offeree's power of

[3] Neither party on appeal contends that agreeing to repay Matlock in 2010 to obtain access to the Pages' grandchildren amounts to additional consideration for the agreement to repay Matlock. Nor does any party argue that if there was such a contract, it failed for lack of sufficient terms, such as interest and dates for repayment. Accordingly, we do not address those issues.

acceptance is terminated at the time specified in the offer, or, if no time is specified, at the end of a reasonable time.").

¶9 Nor can we say that the instruction was unsupported by the evidence. The Pages claim that the conduct and circumstances in this case do not support the finding of the existence of a contract or a meeting of the minds. *See Malcoff v. Coyier*, 14 Ariz. App. 524, 526, 484 P.2d 1053, 1055 (1971) ("The very existence of the contract itself, the meeting of the minds, the intention to assume an obligation, and the understanding are to be determined in case of doubt, not only from the words used, but also from the situation, acts and conduct of the parties, and from the attendant circumstances."). However, the Pages have failed to provide us with the trial transcript, so we assume that whatever evidence was presented to the jury supported the instruction. *See State ex rel. Dep't of Econ. Sec. v. Burton*, 205 Ariz. 27, 30, ¶ 16, 66 P.3d 70, 73 (App. 2003) ("An appellant is responsible for making certain that the record on appeal contains all transcripts or other documents necessary for us to consider the issues raised on appeal. When a party fails to do so, we assume the missing portions of the record would support the trial court's findings and conclusions." (internal citation omitted)). Moreover, a number of emails from the Pages to Matlock were introduced into evidence. Several of those emails, sent in 2010 when the

dispute arose about whether the funds were a gift or a loan, indicate that the Pages were conceding they were indebted to Matlock for the funds, separate and apart from any issue about access to the grandchildren. Indeed, in one email the Pages indicate they will repay the amount to Matlock and that they had hired an attorney to assert their grandparent rights, thus indicating that they were not agreeing to repay Matlock to obtain access to their grandchildren.

CONCLUSION

¶10 For the foregoing reasons, the trial court's judgment is affirmed.

/s/
DONN KESSLER, Judge

CONCURRING:

/s/
ANDREW W. GOULD, Presiding Judge

/s/
MICHAEL J. BROWN, Judge