

NOTICE: NOT FOR OFFICIAL PUBLICATION.  
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL  
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

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

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RUSSO AND STEELE, L.L.C., an Arizona limited liability company,  
*Plaintiff/Appellee,*

*v.*

TRI-RENTALS, INC., an Arizona corporation; CLASSIC PARTY  
RENTALS, INC.,  
*Defendants/Appellants.*

No. 1 CA-CV 16-0042  
FILED 5-18-2017

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Appeal from the Superior Court in Maricopa County  
No. CV2010-011542, CV2010-012757, CV2010-015105, CV2010-052812,  
CV2011-008605, CV2011-010179, CV2011-013784, CV2011-095160,  
CV2011-095290, CV2012-003021, CV2012-003048  
(Consolidated)  
The Honorable J. Richard Gama, Judge (Retired)

**AFFIRMED**

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COUNSEL

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**MEMORANDUM DECISION**

Presiding Judge Samuel A. Thumma delivered the decision of the Court, in which Judge Diane M. Johnsen and Judge Patricia K. Norris joined.

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**T H U M M A**, Judge:

¶1 Defendants Tri-Rentals, Inc., and Classic Party Rentals, Inc. (collectively Tri-Rentals) appeal from a final judgment, entered after a lengthy jury trial, against them and in favor of plaintiff Russo & Steel, L.L.C. for negligence and contractual breach of the covenant of good faith and fair dealing. Because no error has been shown, the judgment is affirmed.

**FACTS<sup>1</sup> AND PROCEDURAL HISTORY**

¶2 Russo operates an annual collector car auction in Scottsdale. The January 2010 auction involved nearly 700 cars. Pursuant to a contract between the parties, Tri-Rentals provided Russo “two huge 100 x 820-foot vehicle display tents, an auction tent, several vendor tents, a kitchen tent,

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<sup>1</sup> On appeal, this court views “the evidence in the light most favorable to upholding the jury’s verdict.” *Powers v. Taser Int’l Inc.*, 217 Ariz. 398, 399 n.1 ¶ 4 (App. 2007).

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an office tent, and a restroom tent.” During a severe storm, the tents failed, damaging many collectible cars, resulting in significant damage to Russo.

¶3 Russo sued Tri-Rentals, alleging negligence and contractual breach of the implied covenant of good faith and fair dealing, seeking as damages loss of business and income. After significant motion practice, a six-week jury trial followed. At the close of Russo’s case in chief, Tri-Rentals unsuccessfully moved for judgment as a matter of law on the contract claim for breach of the implied covenant, arguing Russo had failed to show “some intent element” or that Tri-Rentals put their interests above Russo’s. After deliberation, the jury returned verdicts for Russo on both counts. The jury awarded Russo \$3.7 million in damages and, on the negligence count, found Tri-Rentals 85 percent at fault.

¶4 Over Tri-Rentals’ objection as to form, the court entered a final judgment. This court has jurisdiction over Tri-Rentals’ timely appeal pursuant to Article 6, Section 9, of the Arizona Constitution and Arizona Revised Statutes (A.R.S.) sections 12-120.21(A)(1) and -2101(A)(1) (2017).<sup>2</sup>

## DISCUSSION

### I. The Superior Court Did Not Err In Addressing Russo’s Contract Claim.

¶5 The core of Tri-Rentals’ argument is that for Russo’s contract claim for breach of the covenant of good faith and fair dealing, Russo was required to prove “self-dealing conduct”<sup>3</sup> by Tri-Rentals. Building on that premise, Tri-Rentals argue that the jury instruction on breach of the covenant of good faith and fair dealing was erroneous and the evidence was insufficient to support the verdict on the contract claim. This court reviews de novo the denial of a motion for judgment as a matter of law and whether a jury instruction correctly states the law. *See Desert Mountain Properties Ltd. P’ship v. Liberty Mut. Fire Ins. Co.*, 225 Ariz. 194, 200 ¶ 12 (2010); *A Tumbling-T Ranches v. Flood Control Dist. of Maricopa County*, 222 Ariz. 515, 533 ¶ 50 (App. 2009). This court “view[s] the evidence and the inferences in the light most favorable to upholding the judgment.” *Mealy v. Arndt*, 206 Ariz. 218,

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<sup>2</sup> Absent material revisions after the relevant dates, statutes cited to refer to the current version unless otherwise indicated.

<sup>3</sup> At oral argument, Tri-Rentals clarified that the focus was the lack of self-dealing, clarifying that self-dealing occurs when a party to the contract “purposely undercuts the party’s deal to benefit [itself].”

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221 ¶ 12 (App. 2003). Because a claim for breach of the implied covenant does not require self-dealing conduct, Tri-Rentals' arguments fail.

¶6 Arizona law "implies a covenant of good faith and fair dealing in every contract. The duty arises by virtue of a contractual relationship." *Rawlings v. Apodaca*, 151 Ariz. 149, 153 (1986) (citations omitted). "The covenant requires that neither party do anything that will injure the right of the other to receive the benefits of their agreement." *Wagenseller v. Scottsdale Memorial Hospital*, 147 Ariz. 370, 383 (1985); accord *Wells Fargo Bank v. Arizona Laborers, Teamsters & Cement Masons Local No. 395 Pension Trust Fund*, 201 Ariz. 474, 490 ¶ 59 (2002) ("The implied covenant of good faith and fair dealing prohibits a party from doing anything to prevent other parties to the contract from receiving the benefits and entitlements of the agreement."); *Rawlings*, 151 Ariz. at 155 ("The essence of that duty is that neither party will act to impair the right of the other to receive the benefits which flow from their agreement or contractual relationship.").

¶7 The remedy for a breach of the contractual implied covenant of good faith and fair dealing "generally is on the contract itself." *Wagenseller*, 147 Ariz. at 383; accord *Rawlings*, 151 Ariz. at 158 ("We have previously noted that the remedy for breach of the implied covenant of good faith is ordinarily on the contract itself.") (citing *Wagenseller*). Although the breach of this covenant "may provide the basis for a tort claim" in certain circumstances, *Wagenseller*, 147 Ariz. at 383 (citations omitted), Russo pressed a contract claim for breach of the covenant, not a tort claim. Accordingly, this case does not involve a tort based on a breach of a duty of good faith and fair dealing.

¶8 A contractual breach of the covenant may be based on action "or may consist of inaction." *Airfreight Exp. Ltd. v. Evergreen Air Ctr., Inc.*, 215 Ariz. 103, 111 ¶ 23 (App. 2007) (quoting Restatement (Second) of Contracts § 205 cmt. d (1981)). As for what may constitute a breach of the contractual implied covenant of good faith and fair dealing:

Subterfuges and evasions violate the obligation of good faith in performance even though the actor believes his conduct to be justified. But the obligation goes further: bad faith may be overt or may consist of inaction, and fair dealing may require more than honesty. A complete catalogue of types of bad faith is impossible, but the following types are among those which

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have been recognized in judicial decisions: evasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of a power to specify terms, and interference with or failure to cooperate in the other party's performance.

Restatement (Second) of Contracts § 205 cmt. d.

¶9 Tri-Rentals have not shown that “self-dealing conduct” is required to prove a contractual breach of the covenant. Tri-Rentals cite no Arizona case holding evidence of self-dealing is required to support a claim for a contractual breach of the covenant. *Cf. Seven G. Ranching Co. v. Stewart Title & Trust of Tucson*, 128 Ariz. 590, 592 (App. 1981) (noting, in addressing claims by beneficiaries against trustee, “[g]enerally, self-dealing relates to transactions wherein a trustee, acting for himself and also as trustee, seeks to consummate a deal where self interest is opposed to duty.”)

¶10 The Arizona cases upon which Tri-Rentals rely do not require self-dealing for a plaintiff to show a contractual breach of the covenant. For example, *United Dairymen of Arizona v. Schugg*, 212 Ariz. 133 (App. 2006) does not, as Tri-Rentals claim, require a plaintiff “to prove that [defendant] intentionally impaired the benefits that should have flowed to [plaintiff] under the agreement.” Instead, in finding a contract claim failed because plaintiff showed no damages, *Schugg* stated that “[a] party can breach the implied covenant of good faith and fair dealing by acting in ways not expressly included in the contract but which nonetheless bear adversely on the other party's reasonably expected benefits of the bargain,” noting a jury “could have found” that defendants in that case “intentionally transferred possession and control” of cattle “to deprive [plaintiff] of the benefits it would otherwise have under the” contract. 212 Ariz. at 138 ¶ 20. That dicta does not purport to graft a self-dealing requirement onto a breach of contract claim for breach of the covenant of good faith and fair dealing.

¶11 And *County of La Paz v. Yakima Compost Co.*, also cited by Tri-Rentals, affirmed a verdict for breach of the covenant. 224 Ariz. 590, 605 ¶ 40 (App. 2010). *Yakima* did not, as Tri-Rentals claim, define bad faith as acting “out of spite, ill will, or any other non-business purpose,” but rather made that statement in noting what was *not* argued in *Sw. Sav. & Loan Ass'n v. SunAmp Sys., Inc.*, 172 Ariz. 553, 559 (App. 1992). *See Yakima*, 224 Ariz. at 604 ¶ 39; *see also SunAmp*, 172 Ariz. at 559 (“We note preliminarily that SunAmp does not argue that Southwest acted out of spite, ill will, or any other non-business purpose.”). Indeed, *Yakima* affirmed a jury verdict

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finding a breach of the contractual covenant and, in doing so, found sufficient evidence to support such a claim. 224 Ariz. at 604-05 ¶ 40. Tri-Rentals have not shown that *Yakima* imposes a self-dealing requirement for a contractual breach of the implied covenant of good faith and fair dealing.<sup>4</sup>

¶12 That other jurisdictions “require self-dealing to constitute a breach of the duty of good faith,” as Tri-Rentals suggest, is of no moment. To the extent that Tri-Rentals’ argument is that this court should depart from Arizona Supreme Court precedent and require self-dealing as an element when analyzing a contract claim for breach of the covenant, this court rejects that argument. *See Craven v. Huppenthal*, 236 Ariz. 217, 220 ¶ 13 (App. 2014) (“We are constrained by decisions of the Arizona Supreme Court and may not overrule, modify, or disregard them.”). Moreover, Tri-Rentals have not shown how or why this court should reject Arizona case law concepts in favor of cases from other jurisdictions. This is particularly true given the significant differences among the various jurisdictions in addressing the parameters and nature of the contractual covenant of good faith and fair dealing. *See generally* Steven J. Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 Harv. L. Rev. 369 (1980). For these reasons, the court rejects Tri-Rentals’ argument that Russo was required to prove “self-dealing conduct” to properly assert a contractual claim for a breach of the implied covenant of good faith and fair dealing.

¶13 With this understanding of what is required to properly assert such a claim under Arizona law, Tri-Rentals’ challenge to the jury instructions fails. The jury was given the following final instructions for Russo’s contract claim:

A party to a contract has a duty to act fairly and in good faith. This duty is implied by law and need not be in writing. This duty requires that neither party do anything that prevents the other party from receiving the benefits of their agreement.

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<sup>4</sup> Other cases relied upon by Tri-Rentals discuss the required showing for the tortious breach of the duty of good faith and fair dealing, a claim not present in this case. *See Deese v. State Farm Mut. Auto. Ins. Co.*, 172 Ariz. 504, 507 (1992) (noting “the tort of bad faith only arises” when the defendant “intentionally” takes action “without a reasonable basis for such action”) (citation omitted); *see also Nahom v. Blue Cross & Blue Shield of Ariz., Inc.*, 180 Ariz. 548, 557-58 (App. 1994) (addressing “tort of bad faith”).

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If you find that Tri-Rentals . . . have breached their duty of good faith and fair dealing, Russo . . . is entitled to recover damages provided by the evidence to have resulted naturally and directly from the breach.

As discussed above, this instruction is consistent with the requirements for a contractual implied covenant of good faith and fair dealing claim under Arizona law.<sup>5</sup> Moreover, this instruction uses the language set forth in Recommended Arizona Jury Instruction (RAJI) (5<sup>th</sup> Civil) Contract Instruction 16. Although Tri-Rentals correctly state that using a RAJI instruction is not “authoritative on Arizona law,” there is no showing this RAJI is erroneous. *Accord* RAJI (5<sup>th</sup> Civil) Contract Instruction 16 cmt. (“Contract Instruction 16 is intended for use in cases in which the court has concluded that only contract damages are available for the breach of the duty of good faith and fair dealing.”). On this record, the superior court did not err in instructing the jury on the contract claim. For these same reasons, the court rejects Tri-Rentals’ argument that the evidence was insufficient to support the verdict on the contract claim because the record does not show Tri-Rentals acted by “self-dealing or acting out of spite, ill will, or for some self-interested non-business purpose.”

## II. The Judgment Properly Reflects The Jury’s Verdicts.

¶14 Tri-Rentals contend the superior court erred by “includ[ing] language in the judgment awarding [Russo] \$3,145,000 on the negligence claim and also \$3,700,000 on the breach of good faith and fair dealing claim.” Tri-Rentals argue the judgment “makes it seem that the jury awarded [Russo] \$6,845,000, but the court was ultimately awarding [Russo] only \$3,700,000.”

¶15 There is no dispute that the verdicts were for the same damages and that Russo is entitled to recover no more than \$3,700,000 in damages (the verdict on the contract claim), not \$6,845,000 in damages. Contrary to Tri-Rentals’ argument on appeal, the final judgment makes that distinction plain:

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<sup>5</sup> Tri-Rentals’ revised proposed jury instruction effectively tracked the RAJI, adding a sentence stating “[g]ood faith means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade.” On appeal, Tri-Rentals do not challenge the omission of this sentence in the final instructions given to the jury.

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IT IS FURTHER HEREBY ORDERED that [Russo] is granted Judgment against [Tri-Rentals] with respect to the negligence claim in the amount of \$3,145,000, and [Russo] is also granted Judgment against [Tri-Rentals] with respect to the claim for breach of the implied covenant of good faith and fair dealing in the amount of \$3,700,000; *provided, however, that because the damages awarded on the negligence claim and the claim for breach of the implied covenant of good faith and fair dealing overlap, and to prevent a double recovery, the total base amount (i.e. before costs, fees, and interest) [Russo] is entitled to recover against [Tri-Rentals] is \$3,700,000 (i.e. the full amount of its damages under the verdict for the breach of the implied covenant of good faith and fair dealing claim without allocation of fault).*

This judgment properly reflects the jury's verdicts and the damages Russo is entitled to recover. Accordingly, Tri-Rentals have not shown error in entering this final judgment.

**CONCLUSION**

¶16 The judgment is affirmed. Russo is awarded its taxable costs incurred on appeal contingent upon its compliance with Arizona Rule of Civil Appellate Procedure 21.



AMY M. WOOD • Clerk of the Court  
FILED: AA