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

ROY MCALISTER and KATHLEEN MCALISTER, husband and wife, AMERICAN HYDROGEN ASSOCIATION, an Arizona corporation; TRANS ENERGY CORPORATION, an Arizona corporation; EMERGENT CORPORATION, an Arizona corporation; LARSEN RADAX CORPORATION, an Arizona corporation, Plaintiffs-Appellants, v. FRED GIESZL and CAROLYN F. GIESZL, husband and wife, Defendants-Appellees.	1 CA-CV 08-0306 DEPARTMENT D **MEMORANDUM DECISION** (Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court of Maricopa County

Cause No. CV 2006-090307

The Honorable Joseph C. Kreamer, Judge
The Honorable Helene Abrams, Judge

AFFIRMED

Libby Hougland Banks — Phoenix
Attorney for Plaintiffs-Appellants

Stein and Stein PC — Mesa
By Henry M. Stein
Attorneys for Defendants-Appellees

T H O M P S O N, Judge

¶1 Plaintiffs-Appellants Roy and Kathleen McAlister, American Hydrogen Association, Trans Energy Corporation, Emergent Corporation, and Laresen Radax appeal the trial court's judgment in favor of Defendants-Appellees Fred and Carolyn F. Gieszl. For the following reasons, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 In 2001, Fred Gieszl agreed with Roy McAlister to store a truck and three trailers on Gieszl's land in Gilbert, Arizona. The equipment remained on Gieszl's land for the next four years. In spring 2005, Gieszl learned that Arizona State University (ASU), which he had believed owned the equipment, did not own the truck or the trailers. Gieszl then relocated it to his storage yard a few miles away. He opened the trailers and discarded those papers inside that had been destroyed by exposure to the elements.

¶3 In October 2005, McAlister contacted Gieszl and requested he return the truck and trailers. Gieszl explained what had occurred and offered to return the truck, trailers, and the remaining trailer contents to McAlister. McAlister then sent a letter to Gieszl on behalf of American Hydrogen Association (AHA) demanding the return or restoration of various items allegedly contained in the trailers. Gieszl responded

that he would surrender the truck, trailers, and the remaining contents if AHA confirmed it was the rightful owner of the property.

¶4 On February 7, 2006, Plaintiffs filed a complaint in which they alleged the Gieszls had converted their property, including intellectual property contained in the trailers valued in excess of $84 million, and demanded return of the property. Plaintiffs sought an injunction to prohibit the Gieszls from using or disclosing the trade secrets and intellectual property purportedly contained in the documents in the trailers. In addition, Plaintiffs alleged that the Gieszls had broken into, or encouraged others to break into, the residence of the former president of plaintiff Larsen Radax, Melvin J. Larsen, and stolen intellectual and other property belonging to Roy McAlister and Larsen Radax. They asked for a declaratory judgment that the Gieszls had wrongfully taken Larsen Radax's property from Melvin Larsen's home and for an order directing the Gieszls to return the property. The Gieszls denied the allegations.

¶5 On April 12, 2006, the court entered an order allowing Plaintiffs to retrieve the truck, trailers, and the remaining trailer contents from the Gieszls' land. The court ordered Plaintiffs to deposit the property at a secure third-party

storage facility until they demonstrated ownership of it to the Gieszls or the court.

¶6 During the litigation, Plaintiffs refused to respond to the Gieszls' discovery requests that they identify the alleged contents of the trailers and explain their damage calculations, claiming the information sought was a trade secret or otherwise confidential, and requested the court enter a protective order that would allow only the Gieszls' counsel to view Plaintiffs' responses. The Gieszls asked the court to compel Plaintiffs' responses. The court denied Plaintiffs' motion for a protective order and granted the Gieszls' motion to compel. Thereafter, the Gieszls moved for sanctions pursuant to Arizona Rule of Civil Procedure 37(b)(2)(C) on the grounds that Plaintiffs had not complied with the court's order directing them to respond to the Gieszls' discovery requests. Over Plaintiffs' objection, the court granted the motion and directed Plaintiffs to provide the Gieszls certain specific information no later than December 19, 2006. Plaintiffs failed to fully produce the discovery responses and the Gieszls filed a second motion for sanctions asking the court to dismiss Plaintiffs' lawsuit or preclude them from offering evidence or seeking damages relating to the unanswered discovery. The court granted the second motion for sanctions and ruled that Plaintiffs could not seek damages for, or offer evidence relating to, those

discovery requests for which Plaintiffs had not provided full and complete answers.[1]

¶7 In the meantime, the Gieszls moved for partial summary judgment on Plaintiffs' claim for declaratory judgment regarding the alleged burglary of Melvin Larsen's home. They offered Fred Gieszl's affidavit that he was not involved in any burglary of the Larsen home and did not benefit from any such burglary. They also argued that Plaintiffs' claim was not amenable to declaratory relief because it did not seek a declaration as to the "rights, status, or legal relationship" between the parties, as required by Arizona's Declaratory Judgment Act, Arizona Revised Statutes (A.R.S.) sections 12-1831 to -1846 (2003 & Supp. 2008). Plaintiffs opposed the motion and sought, in the alternative, additional time to conduct discovery before the court ruled. The court granted the motion, finding no genuine issue of disputed fact that Fred Gieszl was not linked to the burglary of Melvin Larsen's home.

¶8 The Gieszls also moved for summary judgment on Plaintiffs' claim for conversion and return of property, and on their claim for damages. Plaintiffs moved, pursuant to Arizona Rule of Civil Procedure 56(f), for additional time to obtain the evidence necessary to justify a good faith opposition to the

[1] The specific requests at issue were the Gieszls' interrogatories numbered one through five.

Gieszls' motion. The court allowed Plaintiffs sixty days to complete the discovery necessary to respond to the motions and ordered Plaintiffs to file their responses by December 8, 2006.[2]

¶9 On November 14, 2006, Plaintiffs' counsel filed a motion to withdraw. The Gieszls did not oppose the motion, but noted that the corporate plaintiffs were required to be represented by counsel. On December 18, 2006, the court allowed Plaintiffs' counsel to withdraw and granted Plaintiffs until January 31, 2007 to retain new counsel.[3] Thereafter, once Plaintiffs had retained new counsel, the court granted them two additional thirty-day extensions to respond to the motions for summary judgment. The Gieszls argued Plaintiffs should not be allowed to respond to the motions for summary judgment unless they first demonstrated good cause for their failure to respond by the court-ordered deadline of December 8, 2006 and moved to strike Plaintiffs' responses as untimely. The court granted the motion to strike and granted the Gieszls' motions for partial summary judgment.

[2] The court denied Plaintiffs' alternative request that it continue the summary judgment proceedings until the parties completed discovery.

[3] On the December 8, 2006 deadline to respond to the Gieszls' motions for summary judgment, the McAlisters attempted to file a response on behalf of all Plaintiffs. The trial court granted the Gieszls' motion to strike that response.

¶10 Thereafter, Plaintiffs' new counsel moved to withdraw. The court granted the motion, but set a deadline for Plaintiffs to retain new counsel. Plaintiffs did not timely retain counsel. The Gieszls then moved for entry of judgment on the claims for which the court had granted summary judgment and moved to dismiss the remaining claims, which belonged to the unrepresented corporate Plaintiffs. The court granted the motion and entered judgment for the Gieszls, awarding them $50,000 in attorneys' fees. Plaintiffs timely appealed.

¶11 We have jurisdiction pursuant to A.R.S. § 12-2101(B) (2003).

ISSUES

¶12 Plaintiffs raise several issues on appeal:

1. Whether the trial court abused its discretion when it sanctioned Plaintiffs for their discovery violations.
2. Whether the trial court erred in striking Plaintiffs' responses to the summary judgment motions and granting the motions.
3. Whether the trial court erred in awarding attorneys' fees to the Gieszls pursuant to A.R.S. § 12-341.01 (2003).

DISCUSSION

A. Sanctions

¶13 Pursuant to Rule 37, when a party fails to comply with an order to permit or provide discovery, the court may, among other sanctions, order that the party may not support designated claims or introduce designated matters into evidence. Ariz. R. Civ. P. 37(b)(2)(B). We will affirm such a decision unless the record reflects a clear abuse of discretion. *See Rivers v. Solley*, 217 Ariz. 528, 530, ¶ 11, 177 P.3d 270, 272 (App. 2008).

¶14 In this case, as relevant, the Gieszls' discovery requests asked Plaintiffs to:

1. Provide an item-by-item listing of the property Plaintiffs claim was converted;
2. Provide an item-by-item listing of the property Plaintiffs claim ought to be returned to Plaintiffs;
3. Indicate, as to each item of property either converted or to be returned, whether the Plaintiff was the owner of such property or, if not, the identity of the owner;
4. Provide detailed information as to circumstances under which the Plaintiff acquired an interest in each item of property;
5. Provide detailed information as to the Plaintiffs' assertion of value as to each item

of property, along with the basis of such assertion;

6. Explain in detail the basis for Plaintiffs' allegation that the property at issue was valued in excess of $84 million.

The Gieszls also sought copies of all documents Plaintiffs relied on in providing answers to these interrogatories.

¶15 Plaintiffs initially refused to provide any answers to these discovery requests, claiming that all of the requested information was confidential and proprietary. After the trial court denied Plaintiffs' motion for a protective order and granted the Gieszls' motion to compel Plaintiffs' responses, Plaintiffs produced partial responses to these requests. The court then sanctioned Plaintiffs and ruled they could not seek damages for, or offer evidence relating to, those discovery requests for which they had not provided full and complete answers by December 19, 2006. Plaintiffs argue the trial court's preclusion of their claims and evidence as a sanction under Arizona Rule of Civil Procedure 37(c) was an abuse of discretion and tantamount to a dismissal of their claims.[4]

[4] Plaintiffs also assert the court abused its discretion by refusing to grant their request for a protective order to govern their discovery responses. We find no abuse of discretion in the court's ruling as Plaintiffs did not provide sufficient evidence to support their contentions that the information sought constituted a trade secret or was otherwise confidential

¶16 Arizona Rule of Civil Procedure 26.1 requires a plaintiff to disclose in writing the factual basis for its claim, a computation of the damages it seeks, and evidence and documents relevant to its claim. Ariz. R. Civ. P. 26.1(a)(1), (7)-(9).[5] The purpose of Rule 26.1 disclosure is "to give each party adequate notice of what arguments will be made and what evidence will be presented at trial." *Clark Equip. Co. v. Ariz. Prop. & Cas. Ins. Guar. Fund*, 189 Ariz. 433, 440, 943 P.2d 793, 800 (App. 1997). Rule 37(c)(1) provides that if a party fails to timely disclose information, it shall not be used unless the failure to disclose was harmless or unless the court finds that there is good cause for granting relief from the exclusion. *See also Allstate Ins. Co. v. O'Toole*, 182 Ariz. 284, 896 P.2d 254 (1995)(stating information or witnesses disclosed in an untimely manner shall be excluded from evidence unless there is good cause for granting relief from the exclusion). As Arizona courts endeavor to maximize the likelihood of a decision on the merits, sanctions for discovery abuses may not be used as a

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such that public disclosure would damage them. *See* Ariz. R. Civ. P. 26(c)(2). Further, even if the court did err in ruling on that request, Plaintiffs were required to either challenge the ruling via a special action or to produce the discovery responses and could not unilaterally decide to withhold any information they believed should be subject to a protective order.

[5] In addition, the Rules allow a party to obtain discovery upon written interrogatories or requests for documents. Ariz. R. Civ. P. 26(a); Ariz. R. Civ. P. 33.1(a).

"weapon" to dismiss cases on a technicality; sanctions must be appropriate and preceded by due process. *Zimmerman v. Shakman*, 204 Ariz. 231, 235, ¶ 13, 62 P.3d 976, 980 (App. 2003) (applying Rule 37(c) to determine whether sanctions are appropriate for late disclosure).

¶17 In this case, Plaintiffs repeatedly refused to fully respond to the Gieszls' discovery requests despite the trial court's order directing them to do so. By refusing to provide even basic information regarding the property they alleged the Gieszls had converted, Plaintiffs prevented the Gieszls from preparing a defense to the claims. As the purpose of Rule 26.1 disclosure is to give adequate notice of the arguments and evidence that will be presented at trial, *Clark Equip. Co.*, 189 Ariz. at 440, 943 P.2d at 800, it was clearly untenable to allow Plaintiffs to withhold the identity of the items they contended the Gieszls converted and were required to return. As Plaintiffs did not show good cause for their failure to disclose this information or as to why they should be relieved from the application of Rule 37, *Allstate*, 182 Ariz. at 287, 896 P.2d at 257, the trial court did not abuse its discretion.

¶18 Plaintiffs argue, citing *Zimmerman v. Shakman*, that the trial court's preclusion of evidence Plaintiffs had not disclosed by December 19, 2006, effectively dismissed their claims and was an abuse of discretion. In *Zimmerman*, the trial

court granted a motion in limine to preclude the plaintiff from introducing any evidence at trial because he had not satisfied his Rule 26.1 disclosure obligations; the court then determined the plaintiff could not prove his claims without any evidence and dismissed the complaint. 204 Ariz. at 234-35, ¶¶ 6-8, 62 P.3d at 979-80. On appeal, we held that the trial court erred by relying on the motion in limine ruling to grant the motion to dismiss because the trial date had been vacated and the prejudice of the late disclosure significantly reduced. *Id*. at 236, ¶¶ 16-18, 62 P.3d at 981.[6]

¶19 In this case, the trial court's exclusion of non-disclosed evidence was not tantamount to dismissal and the court did not dismiss Plaintiffs' claims for lack of evidence. Plaintiffs' claims survived insofar as the supporting evidence was timely disclosed. For example, the corporate plaintiffs claimed in response to the Gieszls' discovery requests that they owned certain property and were permitted to assert their conversion claims insofar as they involved that property. Accordingly, *Zimmerman* does not compel a reversal of the trial court's decision.

[6] In addition, we held that the trial court erred by dismissing the case without first making an express finding that the plaintiff himself shared the blame for the non-disclosure. *Zimmerman,* 402 Ariz. at 236, ¶ 19, 62 P.3d at 981.

¶20 We find no abuse of discretion in the trial court's imposition of discovery sanctions.

B. Motions for Partial Summary Judgment

¶21 Plaintiffs argue the trial court erred in striking their responses to the Gieszls' motions for partial summary judgment and in granting the motions.

¶22 The Gieszls filed their motions on August 4, 2006. The court allowed Plaintiffs an additional sixty days, through December 8, 2006, to obtain the evidence necessary to justify a good faith opposition to the Gieszls' motions and file their responses. Plaintiffs did not respond by the deadline. Thereafter, Plaintiffs informed the court they had retained new counsel, and the court granted them an additional thirty days, until March 21, 2007, "to respond to Defendant[s'] Motion[s] for Summary Judgment and provide, if necessary, a Motion to Extend Time to Respond to Defendants' Motions for Summary Judgment . . . ." At a status conference on March 20, 2007, the court noted that it had granted Plaintiffs "an additional 30 days to respond to the pending motions for summary judgment," because Plaintiffs' new counsel needed to obtain the file from previous counsel. The court stated that it "intended to allow 30 days for Plaintiffs to respond to the pending motions." Noting that Plaintiffs' counsel had not received the file until March 9,

2007, the court then allowed Plaintiffs until April 9, 2007 to file responses to the pending motions for summary judgment.

¶23 The Gieszls moved for clarification, arguing that Plaintiffs should not be allowed to respond to the motions for summary judgment unless they first demonstrated good cause for their failure to respond by the court-ordered deadline of December 8, 2006. Plaintiffs filed their responses to the motions for summary judgment on March 21, 2007. The Gieszls moved to strike the responses as untimely because Plaintiffs had not sought an extension of the court's December 8, 2006 deadline.[7] The court granted the motion to strike and granted the Gieszls' motions for partial summary judgment.

¶24 We agree with Plaintiffs that the trial court erred in striking the responses, as the court's rulings at the February and March status conferences unconditionally granted Plaintiffs additional time to file their responses.[8] To then strike the responses because Plaintiffs had not demonstrated good cause for

[7] Plaintiffs did file a motion to extend the December 8, 2006 deadline, which they later withdrew as unnecessary in light of the court's rulings at the status conferences in February and March 2007.

[8] Although the court stated in its February 23, 2007 order that Plaintiffs should "provide, if necessary," a motion to extend the time to respond to the motions for summary judgment, it did not require Plaintiffs to file a motion to extend and later stated that it intended to allow Plaintiffs thirty days to respond to the motions.

an extension was unfair and prejudicial. Nevertheless, because we will affirm the entry of summary judgment if it is correct for any reason, *Hawkins v. State*, 183 Ariz. 100, 103, 900 P.2d 1236, 1239 (App. 1995), we consider whether, in light of Plaintiffs' responses, the Gieszls were entitled to summary judgment.[9]

1. Conversion

¶25 The Gieszls moved for summary judgment on the McAlisters' claim for conversion, arguing they had not set forth a claim for relief because they had not disclosed any ownership interest in the property allegedly converted by the Gieszls.

¶26 "Conversion is an act of wrongful control or dominion over personal property in denial of or inconsistent with the rights of another." *Huskie v. Ames Bros. Motor & Supply Co., Inc.*, 139 Ariz. 396, 402, 678 P.2d 977, 983 (App. 1984). The act of conversion "rests upon the unwarranted interference by defendant with the dominion over the property of the plaintiff from which injury to the latter results." *Jabczenski v. S. Pac.*

[9] We find no indication in the record that the trial court considered whether the Gieszls' motions demonstrated that no genuine issue of material fact existed. Arizona Rule of Civil Procedure 56(e) permits the grant of a motion for summary judgment in the absence of a response from a non-moving party only when the moving party has presented evidence entitling it to judgment as a matter of law. *Schwab v. Ames Constr.*, 207 Ariz. 56, 60, ¶ 16, 83 P.3d 56, 60 (App. 2004).

Mem'l Hosp., 119 Ariz. 15, 20, 579 P.2d 53, 58 (App. 1978) (citation omitted).

¶27 In support of their motion, the Gieszls cited Plaintiffs' responses to their discovery requests regarding the basis for the conversion claim, in which Plaintiffs asserted that Emergent Corporation, Trans Energy Corporation and Larsen Radax Corporation owned the property the Gieszls allegedly converted. The Gieszls argued that because the McAlisters did not claim any interest in the property at issue, they could not state a claim for conversion of that property. In response, the McAlisters did not offer any evidence, or even assert, that they owned any of the disputed property.[10] Accordingly, no material question of fact existed, and the Gieszls were entitled to summary judgment on the McAlisters' claim for conversion.

2. Return of Property

¶28 The Gieszls moved for summary judgment on Plaintiffs' claim for return of property[11] on the grounds that Plaintiffs had

[10] The McAlisters cited the court's April 12, 2006 order regarding the disposition of the truck, trailer, and the contents of the trailer, and suggested that the order established evidence of ownership. The order did not contain any finding that the McAlisters had an ownership interest in the disputed property.

[11] Although the parties do not discuss it in detail, Plaintiffs' claim appears to be one for the common law remedy of replevin, which applies only where there has been a tortious taking of property. *First Nat'l Bank of Ariz. v. Super. Ct. of Maricopa County*, 112 Ariz. 292, 295, 541 P.2d 392, 395 (1975).

retrieved all property held by the Gieszls. The Gieszls offered evidence that, in accord with the court's April 12, 2006 order allowing Plaintiffs to retrieve their claimed property from the Gieszls and hold it in a secure third-party storage facility, Plaintiffs removed all of the property held by the Gieszls. Fred Gieszl avowed that prior to the litigation he had disposed of certain items of property that were damaged by exposure to the elements, Plaintiffs had retrieved the remainder of the property in April 2006, and he did not thereafter retain any property in which Plaintiffs claimed an interest.[12] Plaintiffs did not controvert this evidence. Instead, they argued that the motion should be denied because further discovery might reveal that the Gieszls had retained some of the property they claimed to have discarded. However, as Plaintiffs did not comply with Arizona Rule of Civil Procedure 56(f), the trial court would have abused its discretion if it allowed them additional time to obtain evidence necessary to justify a good faith opposition to the Gieszls' motion. *See Lewis v. Oliver*, 178 Ariz. 330, 338, 873 P.2d 668, 676 (App. 1993)(moving party must state what evidence has not been gathered, its location, what it will

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We note that the record does not contain any allegations that the Gieszls wrongfully obtained possession of the disputed property.

[12] Plaintiffs, apparently inadvertently, did not retrieve one item, a snow blower. The Gieszls do not claim an interest in this equipment and had requested Plaintiffs remove it.

demonstrate, the methods that are needed to obtain the evidence, and the time required); *Magellan S. Mtn. Ltd. v. Maricopa County*, 192 Ariz. 499, 502, ¶ 10, 968 P.2d 103, 106 (App. 1998)(vague summary is insufficient under Rule 56(f)).

¶29 Plaintiffs failed to raise a material question of fact regarding their claim for return of property and the trial court properly granted summary judgment for the Gieszls on this claim.

3. Damages

¶30 The Gieszls moved for summary judgment on Plaintiffs' claim for damages arising out of the conversion cause of action. They argued Plaintiffs were seeking damages not cognizable under Arizona law by requesting damages for speculative lost profits.

¶31 The Gieszls first asserted that under Arizona law, the measure of damages for a conversion claim is limited to the market value of the converted property less any salvage value. From our review of Arizona law, we determine that the proper measure of damages for property wrongfully taken and held is the value of the property plus damages for wrongful detention. *Phelps v. Melton*, 14 Ariz. App. 296, 297, 482 P.2d 905, 906 (1971). Thus, Plaintiffs were not precluded as a matter of law from recovering damages for profits lost while the Gieszls wrongfully held the property.

¶32 The Gieszls also argued, however, that Plaintiffs' damage claim failed as a matter of law because they were seeking

speculative lost profit damages not allowed under Arizona law. Arizona allows a party to recover damages for lost profits "where evidence is available to furnish a reasonably certain factual basis for computation of probable losses . . . even where a new business is involved." *Rancho Pescado, Inc. v. Northwestern Mut. Life Ins. Co.*, 140 Ariz. 174, 184, 680 P.2d 1235, 1245 (App. 1984) (citation omitted)(affirming trial court's finding that the plaintiff had failed to show that he would have been successful at a new business for which he sought lost profit damages). Although the owner of a new business cannot rely on an established profit history to support his damage claim, he may nevertheless recover lost profit damages if he devises some method of computing his net loss in order to establish damages with reasonable certainty. *Id*. This is no easy task, however, as such a party must show with reasonable certainty that the new business would have been feasible, would have yielded a profit, and prove how much profit the business would have realized. *Id*. at 184-85, 680 P.2d at 1245-46. "While absolute certainty is not required, the court or jury must be guided by some rational standard in making an award." *Id*. at 184, 680 P.2d at 1245.

¶33 The Gieszls argued the lost profits sought by Plaintiffs were too speculative and failed as a matter of law. Plaintiffs responded they were entitled to an award of damages

based upon the lost profits that might have been generated by, or in connection with, the disputed property. Plaintiffs relied on the affidavit of their damages expert, engineer Lane S. Garrett, to estimate the value of the new technologies and potential profits that may have resulted from the equipment and information stored in the trailers. The Gieszls attacked the computation of Plaintiffs' damages found in Garrett's affidavit as unsupported speculation or estimate.

¶34 Mr. Garrett stated in his affidavit that in 2003 he evaluated certain proprietary technologies, set forth in an attachment to his affidavit that purports to have been authored by Roy McAlister[13], for the purpose of creating "business plans concerning the development of an industrial park to launch new ventures" from a facility in Mesa, Arizona. He opined that the net present value of these proprietary technologies was "well over 80 million dollars and that this was considerably lower value than the expected profit from the production of the technologies." He further wrote that the damages resulting from these technologies falling into the control of competitors would exceed their $80 million net present value and estimated their

[13] The Gieszls correctly characterized that document as: "a laundry list of technologies, inventions, concepts, programs, goals, aspirations, designs, philosophies and assorted things, all of which are dependent upon countless variables."

replacement value to be more than $4.8 million plus “additional millions" for necessary facilities and equipment.

¶35 Mr. Garrett did not provide the basis for his opinions or the assumptions underlying his analysis. He did not detail to what use the disputed property would have been put, that such use would have resulted in a feasible business that yielded a profit, or state how those profits could be calculated. Without this information, Plaintiffs could not create a material question of fact regarding whether they could prove their claim for lost profit damages with reasonable certainty. *See Rancho Pescado*, 140 Ariz. at 184-85, 680 P.2d at 1245-46.

¶36 Accordingly, the trial court properly granted the Gieszls’ motion for summary judgment regarding damages.

C. Attorneys’ Fees

¶37 After the court dismissed Plaintiffs’ final claims, the Gieszls requested an award of fees pursuant to A.R.S. §§ 12-341.01(A),(C), -349 (2003), and Arizona Rule of Civil Procedure 11. The court awarded them $50,000 for their reasonable attorneys’ fees, but did not specify the basis for its award. Plaintiffs argue the trial court erred in awarding the Gieszls their attorneys’ fees pursuant to A.R.S. § 12-341.01(A) because its claims did not arise out of contract. As Plaintiffs did not challenge the Gieszls’ request for an award of attorneys’ fees

on these grounds in the trial court[14], we will not consider their argument for the first time on appeal. *Trantor v. Fredrikson*, 179 Ariz. 299, 300, 878 P.2d 657, 658 (1994) ("Because a trial court and opposing counsel should be afforded the opportunity to correct any asserted defects before error may be raised on appeal, absent extraordinary circumstances, errors not raised in the trial court cannot be raised on appeal.").

¶38 The Gieszls request an award of reasonable attorneys' fees and costs on appeal. We award fees pursuant to A.R.S. § 12-341.01. *See Wenk v. Horizon Moving & Storage Co.,* 131 Ariz. 131, 133, 639 P.2d 321, 323 (1982).

CONCLUSION

¶39 For the foregoing reasons, we affirm the superior court judgment.

/s/

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JON W. THOMPSON, Judge

CONCURRING:

/s/

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JOHN C. GEMMILL, Presiding Judge

/s/

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PATRICK IRVINE, Judge

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[14] Although the McAlisters each opposed the Gieszls' application for an award of attorneys' fees, neither of them argued that such an award would be improper under A.R.S. § 12-341.01 or any other legal basis; instead, they merely reargued the merits of the suit.