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

THOMAS AND WONG, GENERAL CONTRACTOR, INC.,	1 CA-CV 08-0634
	DEPARTMENT C
Plaintiff-Appellant/ Cross-Appellee,	**MEMORANDUM DECISION**
v.	(Not for Publication – Rule 28, Arizona Rules of
JAN WALLACE, an individual,	Civil Appellate Procedure)
Defendant-Appellee/ Cross-Appellant.	

Appeal from the Superior Court in Maricopa County

Cause No. CV 2005-051325

The Honorable Robert C. Houser, Judge

REVERSED IN PART; AFFIRMED IN PART

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B R O W N, Judge

¶1 Thomas & Wong General Contractor, Inc. ("Thomas & Wong") appeals from the grant of Wallace's motion for new trial. Jan Wallace cross-appeals from an order denying her motion for judgment as a matter of law ("JMOL"). For the following reasons, we reverse the trial court's grant of a new trial and affirm the denial of the motion for JMOL.

BACKGROUND[1]

I. Procedural History

¶2 Thomas & Wong sued Wallace, alleging she breached her fiduciary and contractual duties to represent the interests of Thomas & Wong in a loan transaction for $1.5 million that Thomas & Wong made to third party BDV Investments, Inc. ("BDV").[2] Wallace denied liability and moved to dismiss, claiming that Thomas & Wong lacked standing to sue because it was a foreign corporation unauthorized to conduct business in Arizona. The trial court denied Wallace's motion and a trial to a jury was held. Upon conclusion of Thomas & Wong's case-in-chief, Wallace

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[1] We review the facts and inferences in the light most favorable to upholding the jury's verdicts. *See, e.g.*, *Powers v. Taser Int'l., Inc.*, 217 Ariz. 398, 399, n.1,¶ 4, 174 P.3d 777, 778 n.1 (App. 2007).

[2] Thomas & Wong also sued Gary Blume and the Blume Law Firm, P.C., but those claims were settled prior to the trial. Wallace attempted to join the Blume defendants' notice of non-parties at fault, but her joinder was found to be untimely and thus the trial court denied her motion.

moved for JMOL asserting that in addition to lacking standing to sue under Arizona Revised Statutes ("A.R.S.") section 10-1502(A) (2004)[3], Thomas & Wong had failed to sufficiently demonstrate that Wallace acted as their agent in the transactions surrounding the loan to BVD. The trial court denied the motion as to standing, and determined the evidence on fiduciary duty was sufficient to present the case to the jury. The jury returned a verdict in favor of Thomas & Wong.

A. The Parties and Related Entities

¶3 Thomas & Wong is a corporation with its principal place of business in Brunei.[4] Ed Tarapaski is a representative of Thomas & Wong, assisting with the purchase and sale of oil field equipment around the world. Tarapaski has been vacationing in Arizona since the 1970s, but Thomas & Wong has never maintained an office in Arizona or stationed employees here.

¶4 Wallace is an experienced venture capitalist. Having served previously as the chief executive officer of six publically traded companies, she specializes in SEC compliance issues, and joins corporate boards to oversee investor money. Prior to the transactions at issue here, Wallace and Tarapaski

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[3] We cite the current version of the applicable statutes if no revisions material to this decision have since occurred.

[4] Brunei is a country located on the northern coast of the island of Borneo in Southeast Asia.

had never met and Wallace had never engaged in business with Tarapaski or Thomas & Wong.

¶5 BDV is a corporation formed by John Beardmore and Dulce Vida de Vallarta, S.A., a company that owned, and subsequently transferred to BDV, gold doré[5] allegedly valued at $50 million. Beardmore, as president of BDV, intended to finance various business operations, including a mobile check-cashing business, using the gold doré as collateral.

B. Interaction of Wallace and Tarapaski

¶6 Wallace and Tarapaski met while Tarapaski was vacationing in Arizona. Tarapaski learned that Wallace was trying to arrange financing for Beardmore, who was negotiating a $35 million loan ("the primary loan") with a private funder for the check-cashing business, but needed a "bridge loan" of $1.5 million with a sixty-day term until the primary loan closed so he could retire debts he owed to Lake Bank.

¶7 Wallace arranged a meeting between Tarapaski, Beardmore, and other BDV directors and investors to discuss whether Thomas & Wong might provide the bridge loan. During this meeting, Tarapaski learned that in addition to retiring debts, the loan would be used to purchase an office condominium

[5] Doré gold bars are unrefined gold bars of a variable purity. Most miners process their gold-bearing ore or dust at or nearby the the mine, producing low purity "doré" gold bars. *See* http://www.anglo-sanye.com/gold_dore_bars.html.

in Minneapolis, among other things. Tarapaski was also told that gold doré bars would be used as collateral, but when Tarapaski insisted that Thomas & Wong obtain possession of the collateral and test it prior to agreeing to a loan, BDV refused, so Tarapaski declined the loan. Soon thereafter, with the hope of satisfying Tarapaski's concerns about sufficiency of the collateral, Beardmore offered additional security in the form of a second mortgage on his Arizona home, various stocks, a car, and a boat. With the additional collateral, Tarapaski agreed to reconsider the loan.

¶8 Tarapaski discussed the loan with Wallace and the two drafted a due diligence list they agreed would be completed prior to funding the loan in order to protect Thomas & Wong's interests. Tarapaski was concerned about the stock collateral because he had no experience in that area. Because Wallace had significant experience managing such assets, it was agreed that she would handle the paperwork for the transaction, including managing and liquidating the stock collateral if it became necessary, and Tarapaski would assemble the funds.[6] In addition, Wallace selected an attorney to draft the loan documents, offered to pay for the attorney's services, and participated in

[6] Wallace suggested placing any stock used as collateral in one of her stock accounts so she could sell them in the event of a default on the loan.

the meeting in which the loan terms were discussed. Wallace also arranged for Thomas & Wong to open an escrow account with Cane O'Neill Taylor, L.L.C. & Associates ("Cane O'Neill"), a Las Vegas law firm she had used for SEC compliance issues since 1998, to hold the loan funds until the due diligence items were completed and the loan funded. Wallace and Tarapaski further agreed that Wallace would serve on the BDV Board of Directors ("the board") in order to "keep track of what was going on."[7]

¶9 Immediately following Wallace's election to the BDV board, the board approved a promissory note in favor of Thomas & Wong for $1.5 million.[8] The note was finalized and executed by all parties on March 8, 2003. Wallace did not tell Tarapaski that a few months earlier she had signed a contract with Beardmore to sell a shell corporation to BDV, in which she held 95 percent of the shares, or that as a result of this transaction she would receive $250,000, to be paid in installments, as well as shares in BDV.

¶10 Before funding the loan, Tarapaski wanted the due diligence checklist completed; in particular, he wanted to

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[7] Both Tarapaski and the board understood Wallace's placement on the board was "to represent Thomas and Wong."

[8] A separately executed note for $275,000 was incorporated by reference into the $1.5 million note, the proceeds of which were used to purchase the condominium in Minneapolis. Tarapaski testified that he knew nothing about the separate $275,000 note and never authorized its execution.

confirm the existence of the gold doré collateral and ensure that both the certificate of insurance for the gold and the safekeeping receipt that prohibited the gold from being moved without consent had been assigned to Thomas & Wong. Wallace agreed to attend a gold viewing to confirm the existence of the gold on behalf of Thomas & Wong, and assured Tarapaski that the certificate of insurance and the safekeeping receipt had been assigned to Thomas & Wong. Believing the checklist to now be complete except for the viewing of the gold, coupled with Wallace's insistence that she had protected Tarapaski well, Tarapaski agreed to fund the loan. On March 12, 2003, Tarapaski provided Wallace with written authorization to release funds from the Cane O'Neill account. Unbeknownst to Tarapaski, six days earlier, on March 6, 2007, Wallace instructed Cane O'Neill to release $275,000 to a company called L Trust, for the purchase of the Minneapolis condominium;[9] Wallace never disclosed this fact to Tarapaski. On March 21, 2007, Wallace authorized an additional $20,000 disbursement to L Trust, without Tarapaski's knowledge, for reasons she could not explain. Further, despite agreeing to do so, Wallace never personally viewed the gold to confirm its existence.

[9] L Trust was owned by Beardmore's girlfriend. Tarapaski never authorized any payments to L Trust and was unaware of the Trust's existence until after this litigation commenced.

C. Default; Collection Efforts

¶11 Despite repeated assurances that the primary loan would fund, it never closed and BDV defaulted on its obligation to Thomas & Wong. The additional collateral provided by Beardmore was insufficient to cover the loan, so at Wallace's request, Tarapaski authorized Wallace to collect the amounts due and "to act on [Thomas & Wong's] behalf regarding the promissory note with BDV Investments, Inc., and/or any other names representing BDV Investments, Inc." Although Wallace initially told Tarapaski that the gold had been sent to Salt Lake City to melt for sale, and then claimed that $12 million had been realized from the sale, Tarapaski ultimately learned that the gold had never been melted or sold. In Tarapaski's subsequent personal attempt to track and seize the gold, he found containers with what appeared to be gold concentrate; but tests later revealed that the material in the containers was worthless.

¶12 After the jury returned a verdict in favor of Thomas & Wong, Wallace filed separate motions for a new trial pursuant to Rule 59(a)(4), (5) and (8), and for JMOL pursuant to Rule 50. Ariz. R. Civ. P. 50; Ariz. R. Civ. P. 59(a)(4), (5) and (8). Thomas & Wong requested an award of attorneys' fees pursuant to A.R.S. § 12-341.01(A) (2003). Wallace objected that the claim

arose out of tort and the statute did not apply. The trial court denied the fee request.

¶13 After briefing and oral argument, the trial court also denied Wallace's JMOL but granted the motion for new trial pursuant to Rule 59(a)(5) and (8), filing a signed order on July 11, 2008. This appeal and cross-appeal followed. We have jurisdiction pursuant to A.R.S. § 12-2101(B), (F)(1) (2003).

DISCUSSION

I. Motion for New Trial

¶14 Thomas & Wong argues that the trial court erred in granting Wallace's motion for new trial under Rule 59(a)(5) and (8). We normally review a grant of a new trial on all issues for abuse of discretion. *Englert v. Carondelet Health Network*, 199 Ariz. 21, 25, 27, ¶¶ 5, 14, 13 P.3d 763, 767, 769 (App. 2000). Our scope of review is also affected by whether the trial court has complied with Rule 59(m) of the Arizona Rules of Civil Procedure.

A. Lack of Specificity

¶15 Rule 59(m) provides: "No order granting a new trial shall be made and entered unless the order specifies with particularity the ground or grounds on which the new trial is granted." The purpose of the rule is to narrow the issues and thereby facilitate the disposition of appeals. *Pima County v. Bilby*, 87 Ariz. 366, 373-74, 351 P.2d 647, 651-52 (1960). A

general statement such as "the judgment and verdict are contrary to the law and evidence" is not sufficiently specific. *Caldwell v. Tremper*, 90 Ariz. 241, 245, 367 P.2d 266, 268 (1962).[10]

¶16 Here, the trial court's order with respect to Rule 59(a)(8) lacks the specificity required by Rule 59(m). The order does nothing more than grant the new trial motion. We are thus left to speculate as to which of the several arguments made in the motion for new trial was persuasive to the trial court.

B. Weight of the Evidence – Breach of Fiduciary Duty

¶17 The order's lack of specificity affects our standard of review as to the Rule 59(a)(8) ruling. The original jury verdict is presumed correct on appeal. *Yoo Thun Lim v. Crespin*, 100 Ariz. 80, 83, 411 P.2d 809, 811 (1966). As the party who moved for a new trial, Wallace must convince this court that the trial court did not err in ordering a new trial. *Id.* Under *Yoo Thun Lim*, the appellate court must assume that the trial judge was in error and it falls to Wallace "to persuade us that the weight of the evidence pointed to a verdict in her favor." *Brooks v. De La Cruz*, 12 Ariz. App. 591, 593-94, 473 P.2d 793, 795-96 (1970). Courts have discretion to grant a motion for new trial based upon insufficient evidence only when the verdict is

[10] Wallace has misplaced her reliance on *Liberatore v. Thompson*, with respect to the Rule 59(a)(8) argument. 157 Ariz. 612, 614, 617, 760 P.2d 612, 614, 617 (App. 1988). In that case, the trial court supplied a paragraph outlining several reasons justifying a new trial. *Id.* at 614, 760 P.2d at 614.

against the weight of the evidence. *Styles v. Ceranski*, 185 Ariz. 448, 450, 916 P.2d 1164, 1166 (App. 1996) (granting a new trial because no evidence justified the jury's verdict that only one of two physicians was at fault).

¶18 As explained, *see infra* ¶ 42, Wallace admitted that she served as Thomas & Wong's agent for the purpose of releasing funds from the Cane O'Neill account. There was also evidence that Wallace repeatedly failed to disclose material information, released funds without authority before the note had been signed, and profited personally as a result of the transfer of Thomas & Wong's funds. Wallace has not persuaded us that the weight of the evidence pointed to a verdict in her favor on the breach of fiduciary duty claim.

C. Weight of the Evidence - Damages

¶19 Wallace alternatively maintains that the jury awarded excessive damages. A damages award is within the province of the jury and "will not be disturbed on appeal except where the verdict is so exorbitant as to show passion, prejudice, mistake or complete disregard of the evidence." *Valley Nat'l Bank v. Brown*, 110 Ariz. 260, 264, 517 P.2d 1256, 1260 (1974).

¶20 Thomas & Wong argued to the jury that it had suffered $1.5 million in damages, of which it had collected $452,000 for a total initial loss of $1,048,000. It also claimed $4,500 for furniture sold at the Beardmore residence that Wallace refused

to turn over. The jury found that Thomas & Wong sustained $1,554,934 in damages and held Wallace liable for 84% of this amount, or $1,306,144.56. The record is unclear as to how the jury arrived at this particular figure in awarding damages.

¶21 The jury instructions on damages, to which Wallace did not object, provided:

> If you find Defendant is liable to Plaintiff on the breach of fiduciary [duty] claim, you must then decide the full amount of money that will reasonably and fairly compensate Plaintiff for any of the following elements of damage proved by the evidence to have resulted from Defendant's breach of this duty:
>
> (1) Loss of money or other property; and,
>
> (2) The profit or proceeds that Plaintiff would have received had Defendant performed her duties.

We need not determine nor evaluate how the jury arrived at its final award, we only need to determine whether the award was so excessive as to disregard the evidence. *See Cervantes v. Rijlaarsdam*, 190 Ariz. 396, 402, 949 P.2d 56, 62 (App. 1997) (holding that unless a jury award is "so exorbitant as to indicate passion, prejudice, mistake or complete disregard of the evidence and instructions," it must be sustained). The evidence presented at trial showed that Thomas & Wong sustained an initial loss of $1,048,000 and an additional $375,000 loss from anticipated interest income. Even without accruing any

interest on that sum over the course of this litigation, the 84% attributable to Wallace equates to nearly $1.2 million. Adding even a nominal amount of interest accrued over the five-year period that Thomas & Wong was without the funds, as the jury was permitted to do, would easily support the jury's award. *See Hercules Drayage Co., Inc. v. Chanco Leasing Corp.*, 24 Ariz. App. 598, 601, 540 P.2d 724, 727 (1975) (finding that as long as there is some reasonable basis for estimating lost profits, certainty as to amount of damages is not essential to recovery). The jury here was presented with evidence that the note included a 25% interest rate and a $1 million penalty fee. The jury was free to consider these provisions in determining Thomas & Wong's estimated lost profits.

¶22 Wallace contends that the late fee and liquidated damages provision are unenforceable penalties creating a forfeiture under *Larson-Hegstrom & Assocs., Inc. v. Jeffries*, 145 Ariz. 329, 333-34, 701 P.2d 587, 591-92 (App. 1985). Wallace, however, failed to object to the provisions' application in the trial court. *See Santanello v. Cooper*, 106 Ariz. 262, 263-64, 475 P.2d 246, 247-48 (1970) (confining appellate review of a motion for new trial to issues argued in the trial court and specified in the order for new trial). Additionally, as noted by Thomas & Wong, Wallace failed to request special interrogatories or object to the jury

instruction on damages. A challenge to the validity of a general verdict will not be heard if the defendant does not request a special verdict or object to the verdict form used. *Mullin v. Brown*, 210 Ariz. 545, 551-52, ¶¶ 25-26, 115 P.3d 139, 145-46 (App. 2005). Further, we will uphold a general verdict if any issue sustains it. *Id*. at 551, ¶ 24, 115 P.3d at 145. Because we find that the evidence in this record reasonably supports the jury's damages award, we find the trial court abused its discretion in granting a new trial on that basis.

D. Allocation of Fault

¶23 Wallace also challenges the jury's allocation of 84% fault to her. Under A.R.S. § 12-2506(B) (2003), the jury is generally required to consider the fault of all persons who contributed to an injury regardless of whether or not they are parties to the suit. *See Dietz v. Gen. Elec. Co.*, 169 Ariz. 505, 511, 821 P.2d 166, 172 (1991) (requiring fault to be allocated to a non-defendant employer who had been named as a nonparty at fault). Wallace ascribes fault to several other parties besides Thomas & Wong, including BDV and its directors. She failed, however, to file a timely joinder to Blume's notice of non-parties at fault. *See* Ariz. R. Civ. P. 26(b)(5) (setting a deadline of 150 days after the filing of a party's answer or the time of compliance with Rule 38.1(b)(2), whichever is earlier). This oversight prevents our consideration of additional parties'

fault in this appeal. *See Lyphomed, Inc. v. Superior Court*, 172 Ariz. 423, 428, 837 P.2d 1158, 1163 (App. 1992) (holding that one party cannot rely upon the notice of nonparty at fault given by another party).

¶24 Furthermore, we will not second guess the jury's allocation of fault between Wallace and Thomas & Wong. In the broad scope of the trial, there was consistent evidence of Wallace's deviation from her fiduciary duties. The jury could have found that Wallace's actions were less reasonable than Thomas & Wong's, and that Wallace deprived Thomas & Wong of material facts that would have safeguarded the company. *See Hutcherson v. City of Phoenix*, 192 Ariz. 51, 53, 57, ¶¶ 10-11, 37, 961 P.2d 449, 451, 455 (1998) (upholding the jury's allocation of 75% fault to a 9-1-1 operator and 25% fault to a murderer).

II. Attorneys' Fees

¶25 Thomas & Wong also challenges the trial court's denial of its attorneys' fee request under A.R.S. § 12-341.01(A). The application of the statute to a particular claim raises a question of law and is subject to de novo review. *Hampton v. Glendale Union High Sch. Dist.*, 172 Ariz. 431, 433, 837 P.2d 1166, 1168 (App. 1992).

¶26 To qualify for fees under A.R.S. § 12-341.01(A), the relevant claim must arise out of an express or implied contract.

Attorneys' fees are not recoverable if the contract serves only as a factual predicate for the action and not its essential basis. *Cashway Concrete & Materials v. Sanner Contracting Co.*, 158 Ariz. 81, 83, 761 P.2d 155, 157 (App. 1988). We examine the nature of the action and the surrounding circumstances to determine whether the action arises out of contract. *Marcus v. Fox*, 150 Ariz. 333, 335, 723 P.2d 682, 684 (1986).

¶27 Thomas & Wong's claim for breach of fiduciary duty does not qualify. *See Barmat v. John and Jane Doe Partners A-D*, 155 Ariz. 519, 747 P.2d 1218 (1987). In *Barmat*, the Arizona Supreme Court held that when an implied contract "does no more than place the parties in a relationship in which the law then imposes certain duties recognized by public policy, the gravamen of the subsequent action for breach is tort, not contract." *Id.* at 523, 747 P.2d at 1222 (citation omitted). As a result, *Barmat* held that a legal malpractice action does not arise out of contract for purposes of A.R.S. § 12-341.01(A). *Id.* at 524, 747 P.2d at 1223. Similarly, we conclude that the fiduciary duty claim does not arise out of the agency agreement here, and the denial of fees was proper. *See id.* For these reasons, we deny Thomas & Wong's request for attorneys' fees on appeal.

III. Wallace's JMOL Motion

¶28 Wallace contends that the trial court erroneously denied her motion for JMOL because (1) Thomas & Wong lacked standing to sue pursuant to A.R.S. § 10-1502(A); and (2) Wallace owed no fiduciary duty to Thomas & Wong. We disagree.

¶29 A trial court should grant JMOL when the facts submitted in support of the claim have so little probative value that reasonable persons could not find for the claimant. *Monaco v. HealthPartners of S. Ariz.*, 196 Ariz. 299, 302, ¶ 6, 995 P.2d 735, 738 (App. 1999). We review de novo the denial of a motion for JMOL. *United Dairymen of Ariz. v. Schugg*, 212 Ariz. 133, 137, ¶ 13, 128 P.3d 756, 760 (App. 2006).

A. Standing to Sue

¶30 Pursuant to A.R.S. § 10-1502(A), a foreign corporation may not maintain a court action in Arizona if it is "transacting business in this state without a grant of authority." A foreign corporation is "a corporation for profit that is incorporated under a law other than the law of this state." A.R.S. § 10-140(25) (2004). A companion statute, A.R.S. § 10-1501(A) (2004), provides: "A foreign corporation shall not transact business in this state until it is granted authority to transact business in this state as provided in this chapter from the commission."

¶31 Wallace cites a number of transactions to support her argument that Thomas & Wong was transacting business in Arizona and therefore required to comply with A.R.S. § 10-1051(A). These transactions include: the BDV loan, alleged involvement in the sale of residential property, a loan made by Tarapaski to his girlfriend, a deal to buy property near Lake Pleasant that never closed, and the default judgments Thomas & Wong obtained against BDV and its principals.

¶32 Wallace's argument fails, however, because A.R.S. § 10-1501(B) recognizes a number of exempt activities which "among others, do not constitute transacting business within the meaning of subsection A[.]" The BDV loan transaction is exempt under this statute because it involved "[c]reating or acquiring indebtedness, mortgages and other security interests in real or personal property" under A.R.S. § 10-1501(B)(7). It also constituted "[t]ransacting business in interstate commerce" under A.R.S. § 10-1501(B)(11) because the loan proceeds were deposited in Nevada and Minnesota banks, and the collateral was scattered to Arizona, New Mexico, and Minnesota.

¶33 The residential property sale is similarly exempt. Taking title to property qualifies as "[o]wning, without more, real or personal property" under A.R.S. § 10-1501(B)(9), and liquidating it is "[s]elling through independent contractors," under § 10-1501(B)(5), and "[s]ecuring or collecting debts or

enforcing mortgages and security interests in property securing the same" under § 10-1501(B)(8).

¶34 Equally unavailing is Wallace's reliance on a loan between Tarapaski and his girlfriend. The documents reflect that Tarapaski is the holder of the promissory note and the deed of trust beneficiary, not Thomas & Wong. Even if it were a Thomas & Wong transaction, it would be exempt as "[c]reating or acquiring indebtedness, mortgages and other security interests in real or personal property" under A.R.S. § 10-1501(B)(7).

¶35 The failed transaction concerning the Lake Pleasant property likewise falls within an exemption. The record supplies no indication that this was a Thomas & Wong transaction, and even if it had closed, it would have constituted "[o]wning, without more, real or personal property" under A.R.S. § 10-1501(B)(9).

¶36 Finally, Thomas & Wong's post-default efforts to collect its money by obtaining default judgments do not qualify as transacting business. These efforts entailed "[s]ecuring or collecting debts or enforcing mortgages and security interests in property securing the same" under A.R.S. § 10-1501(B)(8), and "[m]aintaining, defending or settling any proceeding" under § 10-1501(B)(1).

¶37 Wallace alternatively contends that the aggregate of these exempted activities amount to conducting business under

the statute. Again, we disagree. To be covered by the statutory provisions requiring registration as a foreign corporation, the corporation "must be engaged in an enterprise of some permanence and durability, and must transact within the state some substantial part of its ordinary business." *Nat'l Union Indem. Co. v. Bruce Bros., Inc.*, 44 Ariz. 454, 461, 38 P.2d 648, 651 (1934). The activities Wallace points to do not reflect permanence and durability of Thomas & Wong's business in Arizona and were not a substantial part of their ordinary business, which is buying and selling oil field equipment.

¶38 We likewise reject Wallace's claim that Thomas & Wong is a "peripatetic[11] institution, not necessarily having a fixed and permanent place where it conducted its operations," similar to the entity in *Nat'l Union*. *Id*. at 462, 38 P.2d at 652. Unlike the entity in *Nat'l Union*, that "construct[ed]. . . highways wherever it could obtain a contract so to do[,]" such that "[a]ll of its operations might at one time be within the state of Nevada, at a second within the state of California, and at a third within the state of Utah, or it might be engaged simultaneously in the construction of highways within the three states[,]" Thomas & Wong consistently ran its operations from its

[11] Peripatetic means "traveling from place to place, esp. working or based in various places for relatively short periods[.]" The New Oxford American Dictionary 1256 (2d ed. 2005). Synonyms: ambulant, roaming, roving, wandering. *See* http://thesaurus.reference.com/browse/peripatetic.

principal office in Brunei. The mere fact that Tarapaski ventures abroad to view, purchase, and sell equipment, or to vacation, does not make Thomas & Wong a roaming or wandering corporation. Thomas & Wong's contacts with Arizona are exempt and fail to support application of A.R.S. §§ 10-1501(A) and 10-1502(A).

B. Breach of Fiduciary Duty

¶39 Wallace also contends that, as a matter of law, she was entitled to a defense verdict on the breach of fiduciary duty claim and the denial of her JMOL motion was therefore erroneous. In conducting our de novo review, "we view the evidence and all reasonable inferences in the light most favorable to the nonmoving party." *Murcott v. Best W. Int'l, Inc.*, 198 Ariz. 349, 356, ¶ 36, 9 P.3d 1088, 1095 (App. 2000).

¶40 Thomas & Wong premised its breach of fiduciary duty claim on the argument that Wallace was the company's agent. Agency is generally a question of fact to be determined by the jury. *Schenks v. Earnhardt Ford Sales Co.*, 9 Ariz. App. 555, 557, 454 P.2d 873, 875 (1969). An agency relationship arises when one person, a principal, manifests assent to another person, an agent, that the agent "shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act." Restatement (Third) of Agency § 1.01 (2006). Wallace's testimony that she

did not consider herself Thomas & Wong's agent, and the absence of any formal agency agreement, are not determinative. *See Phoenix W. Holding Corp. v. Gleeson*, 18 Ariz. App. 60, 66, 500 P.2d 320, 326 (1972) (explaining that the oral or written declarations of an alleged agent are not evidence of the fact of agency or the extent thereof); Restatement (Third) of Agency § 1.02 cmt. a (2006) ("Although agency is a consensual relationship, how the parties to any given relationship label it is not dispositive.").

¶41 Likewise, Tarapaski's authority to bind Thomas & Wong does not obviate an agency role for Wallace. That Tarapaski may have served as the principal's agent for some matters does not preclude Wallace from also serving as an agent. *See* Restatement (Third) of Agency § 1.01 cmt. c ("Agents who lack authority to bind their principals to contracts nevertheless often have authority to negotiate or to transmit or receive information on their behalf.").

¶42 Construing the facts most favorably to Thomas & Wong, we find that the record supports the claim that Thomas & Wong gave Wallace express authority to transfer its funds from the Cane O'Neill account, later expanding the duty to include collection, and Wallace agreed to act accordingly. Wallace admitted she served as Thomas & Wong's agent for the purpose of releasing funds from the Cane O'Neill account. Even before the

written authorization of March 12, 2003, there was evidence of an oral agreement as to the division of responsibilities. Wallace agreed to investigate the BDV transaction, gather relevant documents, report on the transaction's status, develop a checklist, view the gold collateral, and obtain certificates of safekeeping and insurance. These facts support an agency relationship with Thomas & Wong.

¶43 As Thomas & Wong's agent, Wallace had a duty to use reasonable efforts to provide the company with material information she was aware of or should have been aware of that could affect Thomas & Wong's decision to enter into the loan transaction. Restatement (Third) of Agency § 8.11 (2006). Like the existence of an agency relationship, the breach of an agent's duty is a question of fact. *Musselman v. Southwinds Realty, Inc.*, 146 Ariz. 173, 175, 704 P.2d 814, 816 (App. 1985).

¶44 The record reflects sufficient evidence for the jury to find that Wallace breached this duty to Thomas & Wong by failing to disclose material information. First, although the evidence is conflicting, there was some evidence that Wallace disbursed the first $275,000 from the Cane O'Neill account without authority and without Tarapaski's knowledge. Specifically, she instructed the funds to be disbursed nearly a week before the loan documents were executed, in contravention of Tarapaski's intentions, and never informed him of the

premature transfer. She also did not disclose that those funds were sent to L Trust for the purchase of the condominium, not to BDV as Tarapaski believed. Further, without Tarapaski's knowledge, she authorized the release of an additional $20,000 to L Trust for reasons she could not explain. She also stated that the gold had been viewed, but failed to disclose she had not attended the viewing. Moreover, Wallace accepted responsibility for completing the checklist, and even though the record contains evidence that the items were never completed, Wallace represented that they had been. Indeed, the remaining $700,000 of the loan was disbursed specifically based upon Wallace's representation that the checklist items had been completed. Finally, Wallace urged Tarapaski to close the loan based upon the ability to liquidate the stock and the assignment of the insurance certificate and safekeeping receipt; asserting that she had protected him well. In the end, Tarapaski consummated a deal in a matter of weeks when the evidence indicated that Wallace knew due diligence normally would take over sixty days.

¶45 In addition to her fiduciary duty to disclose material information to Thomas & Wong, Wallace also had a duty not to acquire a material benefit from a third party in connection with transactions conducted on Thomas & Wong's behalf. *See* Restatement (Third) of Agency § 8.02 (2006). The evidence

supports a finding that Wallace received $50,000 as a result of her role in the BDV-Thomas & Wong transaction. Contrary to Wallace's assertion that no evidence indicated the money came from Thomas & Wong, Beardmore testified[12] that BDV had no other source from which to pay Wallace apart from the funds obtained through the Thomas & Wong transaction Wallace coordinated.

¶46 Wallace contends that Thomas & Wong's losses were exclusively the result of others' misconduct and negligence. Sufficient evidence of causation, however, existed to present to the jury the issue of whether Wallace's actions constituted a contributing factor. *See Koory v. W. Cas. & Sur. Co.*, 153 Ariz. 412, 414, 737 P.2d 388, 390 (1987) (recognizing that in Arizona, as in most jurisdictions, an act need not be the sole cause of damage for causation to exist). Tarapaski testified that, had he known about the initial $275,000 transfer, the deal would have been off.

¶47 Moreover, the jury was instructed to consider Thomas & Wong's own fault in causing the damages and assuming the risk, and we presume it followed that instruction. *Elliott v. Landon*, 89 Ariz. 355, 357, 362 P.2d 733, 735 (1961). In sum, the record supports the jury's verdict of breach of fiduciary duty. This conclusion obviates the need to address whether Wallace's

[12] Although Beardmore was not available to testify at trial, his deposition testimony was read into the record.

activities on behalf of Thomas & Wong created a conflict of interest with respect to BDV, and whether Thomas & Wong waived the conflict.

CONCLUSION

¶48 Based on the foregoing, we reverse the trial court's grant of the new trial motion and affirm its denial of Wallace's motion for JMOL and its denial of Thomas & Wong's request for attorneys' fees under A.R.S. § 12-341.01(A).

/s/
_____
MICHAEL J. BROWN, Judge

CONCURRING:

/s/
_____
PETER B. SWANN, Presiding Judge

/s/
_____
LAWRENCE F. WINTHROP, Judge