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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 03/30/10
PHILIP G. URRY, CLERK
BY: JT

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

LYLE D. HANSON and LISA J.) 1 CA-CV 08-0770
HANSON, husband and wife,)
) DEPARTMENT D
Plaintiffs-Appellants,)
) **MEMORANDUM DECISION**
v.)
) (Not for Publication -
TOM HALL and DOREEN HALL, husband) Rule 28, Arizona Rules of
and wife,) Civil Appellate Procedure)
)
Defendants-Appellees.)
)

Appeal from the Superior Court in La Paz County

Cause No. CV20050156

The Honorable Michael J. Burke

AFFIRMED

Law Office of John C. Churchill) Parker
By John A. Shannon, Jr.)
John C. Churchill)
Attorneys for Plaintiffs-Appellants)

Cruise Law Offices PLLC) Parker
By Charles E. Cruise)
Attorneys for Defendants-Appellees)

G E M M I L L, Judge

¶1 Plaintiffs-Appellants Lyle D. and Lisa J. Hanson
appeal from a jury verdict in favor of Defendants-Appellees

Tom and Doreen Hall on the Hansons' claims for breach of contract and fraud arising out of the Hansons' purchase of a home from the Halls. The Hansons argue the trial court improperly refused to allow them to amend their complaint to conform to the evidence at trial and erroneously admitted irrelevant and prejudicial photographs. They also challenge the court's award of attorneys' fees to the Halls. For the following reasons, we affirm the judgment and the trial court's denial of the Hansons' motion for new trial.

FACTUAL AND PROCEDURAL BACKGROUND¹

¶2 On February 1, 2001, the Hansons submitted an offer to Tom Hall to purchase the house located at 1417 Mohave Avenue in Parker, Arizona (the "Property"), which Tom owned as his sole and separate property.

¶3 Prior to making their offer, the Hansons visited and inspected the Property several times. During one of their visits, they discovered a roof leak, and Tom agreed as part of the purchase contract to hire a licensed roofing company, Parker Roofing, to install a new roof on the Property.

¹ We view the evidence in the light most favorable to upholding the jury's verdict. *Larsen v. Nissan Motor Corp.*, 194 Ariz. 142, 144, ¶ 2, 978 P.2d 119, 121 (App. 1998).

¶14 In connection with the sale, Tom completed a Seller's Property Disclosure Statement regarding the condition of the Property. In that document, as relevant, Tom stated that he had no actual knowledge of any plumbing, electrical or other systems problems or any building code, sanitary, or fire safety violations. He stated it was "unknown" whether there were any waste disposal system problems or whether there was any other information that might affect the Hansons' decision to buy the Property or affect its value or use. Tom disclosed that he had improved the property with "new roofs & electric serv. new paint ect [sic]." In addition, David Plunkett, the real estate agent who represented both parties to the transaction as a dual agent, showed the Hansons the Exclusive Agency Agreement between himself and Tom. The Exclusive Agency Agreement included a comment that the house had been "guttled and remodeled in 1999."

¶15 After the Hansons completed the purchase of the Property, they did not immediately occupy the premises, but lived in a recreational vehicle on the Property and then departed in May 2001 for their original home in the State of Washington. Lisa Hanson returned to the Property in November 2001 and remained there until May 2002. Lyle Hanson was also absent from the Property for months at a

time in 2001 and 2003.

¶16 In May 2003, Lisa Hanson observed a puddle of water in the bathroom and, while investigating the source of the water, discovered dry rot and deterioration of the plumbing in the bathroom. Thereafter, the Hansons determined that the entire plumbing and electrical systems for the house needed to be replaced, found water damage and mold in the kitchen and underneath the carpet throughout the home, and discovered termite damage.

¶17 On November 8, 2005, the Hansons filed a complaint against Tom for breach of contract and fraud.² The Hansons named Doreen Hall as a defendant "for the sole purpose of holding [the marital community] liable." They alleged Tom affirmatively misrepresented the condition of the Property and covered up latent defects in the Property. In particular, the Hansons claimed Tom told them that the house had been "gutted," which they understood to mean that the interior of the Property had been "taken down to the studs, and the subsystems of the house, such as electrical and plumbing were either replaced or inspected." The Halls denied that they had any knowledge of the defects in the Property and claimed that the Hansons had no right to rely

² The Hansons also asserted a claim for breach of an implied construction warranty, but the trial court granted summary judgment for the Halls on that claim.

on any representation that the Property had been "gutted" and that any such reliance by the Hansons was unreasonable.

¶18 After both parties had rested their cases at trial, the Hansons moved to amend their complaint to conform to the evidence pursuant to Arizona Rule of Civil Procedure 15(b). They sought to add a claim for fraudulent concealment against Tom Hall and a claim for aiding and abetting fraud against Doreen Hall. The trial court initially denied the motion to add a claim against Doreen Hall but allowed the amendment to add a fraudulent concealment claim. The following day, however, the court reversed its ruling regarding the fraudulent concealment claim, reasoning that it would be prejudicial to the Halls to allow the Hansons to first assert the claim after the presentation of evidence had concluded.

¶19 The jury returned a verdict for the Halls on both the breach of contract and fraud claims. The trial court entered judgment on the verdict and awarded the Halls their reasonable attorneys' fees pursuant to Arizona Revised Statutes ("A.R.S.") section 12-341.01 (2003).

¶10 The Hansons moved for new trial on the basis that the court had improperly denied their request to amend and erroneously admitted prejudicial photographs of the Property during the trial. They also argued the Halls were

not entitled to an award of the attorneys' fees they incurred in defending the fraud claim because it did not arise out of contract as required by A.R.S. § 12-341.01. The court denied the motion and entered an amended judgment for the Halls, awarding them the additional attorneys' fees they incurred in responding to the new trial motion.

¶11 The Hansons timely appealed. We have jurisdiction pursuant to A.R.S. § 12-2101(B) & (F)(1) (2003).

ISSUES

¶12 The Hansons raise three issues on appeal. First, they argue the trial court improperly denied their request to amend the complaint. Second, they challenge the court's admission into evidence of several photographs of the Property. Finally, the Hansons argue the court erred as a matter of law by awarding the Halls the attorneys' fees they incurred defending the Hansons' fraud claim. We discuss each issue below.

ANALYSIS

Amendment of the Complaint

¶13 The Hansons challenge the trial court's denial of their motion for leave to amend the complaint to add claims for fraudulent concealment and aiding and abetting fraud. We review the denial of a motion to amend a pleading for an

abuse of discretion. *MacCollum v. Perkinson*, 185 Ariz. 179, 185, 913 P.2d 1097, 1103 (App. 1996).

¶14 First, the Hansons argue that the trial court abused its discretion by refusing to allow the amendments under the third and fourth sentences of Rule 15(b). This last portion of the Rule provides that when a party objects to the admission of evidence at trial on the grounds that it is not within the issues framed by the pleadings, the court shall freely allow amendment of the pleadings if it will serve the presentation of the merits of the action and the objecting party has not demonstrated that it will be prejudiced by the admission of such evidence. Ariz. R. Civ. P. 15(b).³ Generally, amendments to a pleading are liberally allowed; however, a court should not permit such amendments at trial when one party will be surprised or prejudiced. *Bujanda v. Montgomery Ward & Co.*, 125 Ariz. 314, 315, 609 P.2d 584, 585 (App. 1980) (finding no abuse

³ Although the Hansons maintain that this portion of the rule applies to both an objection to evidence and an objection to the addition of a new legal theory, the authority they cite does not support that contention. See *Usery v. Marquette Cement Manuf. Co.*, 568 F.2d 902, 908 (2d Cir. 1977) (stating that the third sentence of Federal Rule of Civil Procedure 15(b), which is identical to Arizona Rule of Civil Procedure 15(b), "deals expressly with objection to evidence at trial, and so is not technically applicable to the instant case where the objection was not to the admission of evidence but to a change in legal theory.").

of discretion in trial court's denial of motion to amend during trial because amendment would present a different theory of liability and would prejudice defendant); *Czarnecki v. Volkswagen of Am.*, 172 Ariz. 408, 418, 837 P.2d 1143, 1153 (App. 1991) (finding no abuse of discretion in trial court's denial of motion to amend after discovery because allowing amendment to add an "entirely new theory of liability at that late date would have required additional research and discovery, resulting in substantial delays").⁴

¶15 Here, the trial court concluded that the proposed amendments to the complaint would be "prejudicial to the [Halls]" and, therefore, denied the Hanson's motion to amend. According to the court:

[The Halls] prepared for trial and they made their decision to take this case to trial without maybe trying to settle it out based on the fact that [the Hansons] had the heavy burden of proving the nine elements of common law fraud in order to get the jury to even look at punitive damages.

The court also noted that the Hall's attorney, in preparing

⁴ The Hansons cite *MacCollum v. Perkinson*, 185 Ariz. 179, 913 P.2d 1097 (App. 1996), for the proposition that a trial court abuses its discretion by not granting leave to amend when the amendment seeks only to add a new legal theory. We find *MacCollum* distinguishable, however, as in that case, the plaintiff sought to amend his complaint prior to trial and the court evaluated the request pursuant to Rule 15(a). *Id.* at 185, 913 P.2d at 1103.

his defense, had relied on the Hanson's having to prove all nine elements of common law fraud. Consequently, the court decided that the only issues that would go before the jury would be the "breach of contract and the common law fraud" claims.

¶16 We conclude based upon this record that the trial court acted within its discretion in denying the Hanson's motion to amend their complaint. See *Czarnecki*, 172 Ariz. at 418, 837 P.2d at 1153. The trial court observed the proceedings and was in the best position to know whether the Halls would have been prejudiced by instructing the jury on different theories of liability other than those in the original complaint. See *Colfer v. Ballantyne*, 89 Ariz. 408, 409, 363 P.2d 588, 589 (1961) ("The atmosphere or climate of the trial is peculiarly within the knowledge and experience of the trial court."); *Hutcherson v. City of Phoenix*, 192 Ariz. 51, 53, ¶ 12, 961 P.2d 449, 451 (1998) (noting that an appellate court defers to a trial judge's decision on whether to upset a verdict because "[t]he judge sees the witnesses, hears the testimony, and has a special perspective of the relationship between the evidence and the verdict which cannot be recreated by a reviewing court from the printed record.") (citations omitted). Accordingly, we find no error.

¶17 The Hansons also argue that the parties tried the fraudulent concealment and the aiding and abetting fraud issues by implied consent. We disagree. The first portion of Arizona Rule of Civil Procedure 15(b) allows amendment of the pleadings if an issue was tried by express or implied consent of the parties. The Hansons contend the parties tried their fraudulent concealment and aiding and abetting claims by implied consent because the same evidence presented at trial regarding the breach of contract and fraud claims is relevant to the new claims. Permitting evidence relevant to an existing issue to be admitted without objection, however, does not constitute "implied consent" to trial of an issue which was not previously raised. *Magma Copper Co. v. Indus. Comm'n of Ariz.*, 139 Ariz. 38, 46-47, 676 P.2d 1096, 1104-05 (1983) (failure to object to evidence relevant to the issue raised in the pleadings did not constitute implied consent to trial of a new issue); *Bujanda*, 125 Ariz. at 316, 609 P.2d at 586 (introduction of evidence on issue of ownership of beauty shop was insufficient to show implied consent because such evidence was relevant to the issue within the pleadings). We therefore find no abuse of discretion in the trial court's denial of the Hansons' motion to amend

the pleadings to conform to the evidence.⁵

Admission of the Photographs

¶18 The Hansons challenge the trial court's admission of several photographs on the grounds that the photographs were irrelevant and unfairly prejudicial. In particular, the Hansons contend that the court erred in admitting Trial Exhibits 543, 546, 547, 569, 576, 577, 586, 608, 609, and 748, photographs of the Property taken in 2007 that depict the condition of the Property after the Hansons repaired and upgraded it. We review challenges to the court's admission or exclusion of evidence for an abuse of discretion. *Yauch v. S. Pac. Transp. Co.*, 198 Ariz. 394, 399, ¶ 10, 10 P.3d 1181, 1186 (App. 2000).

¶19 The trial court has broad discretion to determine the relevance and admissibility of evidence. *State v. Smith*, 136 Ariz. 273, 276, 665 P.2d 995, 998 (1983). "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less

⁵ We also note that the record on appeal does not contain a complete trial transcript. Appellants have the burden of providing this Court with a complete record, and in the absence of a complete record on an issue, we presume that the record before the trial court supported its decision. See ARCAP 11(b) (appellant bears the burden of ordering certified transcripts that "appellant deems necessary for inclusion in the record"); *Ashton-Blair v. Merrill*, 187 Ariz. 315, 317, 928 P.2d 1244, 1246 (App. 1996).

probable than it would be without the evidence." Ariz. R. Evid. 401. The Hansons argue the photographs were irrelevant to the claims and defenses at trial because they did not tend to prove or disprove whether the Halls breached the sale agreement or committed a fraud, but only represented the condition of the house in 2007, which was not in dispute. The Halls respond that the photographs were relevant to (1) whether the Hansons reasonably could have earlier discovered the electrical and plumbing problems so as to commence the running of the statute of limitations; (2) whether the Hansons created the plumbing defects when they undertook their remodeling project; and (3) whether the scope and expense of the Hansons' remediation was necessary. In addition, the Halls argue that the photographs were merely illustrative of Doreen Hall's testimony, to which the Hansons did not object, regarding the Hansons' improvements to the home.

¶120 The record on appeal does not contain the complete trial transcript. However, that portion of the transcript that is in the record, which contains an excerpt of the court's admission of the photographs, supports the trial court's ruling. The excerpt includes Doreen Hall's testimony regarding the Hansons' improvements to the Property and evidences that the Hansons did not object to

the testimony. As the photographs tended to support, assist, and clarify Doreen Hall's testimony, they were relevant.

¶21 The Hansons also assert that any probative value of the photographs was outweighed by their prejudicial impact. However, they did not object at trial to the admission of any of the photographs on the grounds that they were unduly prejudicial and we will usually not consider such arguments for the first time on appeal. See *Trantor v. Fredrickson*, 179 Ariz. 299, 300, 878 P.2d 657, 658 (1994) (absent extraordinary circumstances, errors not raised in the trial court cannot be raised on appeal).⁶ Moreover, the balancing of factors under Rule 403, Arizona Rules of Civil Procedure, is peculiarly a function of trial, not appellate courts. *Yauch*, 198 Ariz. at 403, ¶ 26, 10 P.3d at 1190. "The balancing process under Rule 403 . . . is left to the trial judge, who must determine whether the probativeness of the offered evidence is

⁶ The Hansons complain they were unable to properly object to the photographs at trial because they did not timely receive copies of them as required by Arizona Rule of Civil Procedure 16. Again, however, they did not raise that objection in the trial court, and we will not consider it for the first time on appeal. *McDowell Mountain Ranch Land Coal. v. Vizcaino*, 190 Ariz. 1, 5, 945 P.2d 312, 316 (1997) (indicating appellate court will generally not consider legal issues or arguments raised for the first time on appeal).

substantially outweighed by its unfair prejudice, confusion of the issues, etc." *English-Clark v. City of Tucson*, 142 Ariz. 522, 526, 690 P.2d 1235, 1239 (App. 1984).

¶22 For these reasons, we find no abuse of discretion in the trial court's admission of Trial Exhibits 543, 546, 547, 569, 576, 577, 586, 608, 609, and 748.

Award of Attorneys' Fees

¶23 Finally, the Hansons challenge the trial court's award of attorneys' fees to the Halls pursuant to A.R.S. § 12-341.01, arguing that the fees incurred by the Halls defending the fraud claim do not arise out of contract, as required under A.R.S. § 12-341.01, and should not have been included in the award. The Halls contend the court properly awarded all of their requested attorneys' fees because the Hansons' fraud claim was "inextricably intertwined" with their breach of contract claim. The application of the statute is a question of statutory interpretation, which we review de novo. *Chaurasia v. Gen. Motors Corp.*, 212 Ariz. 18, 26, ¶ 24, 126 P.3d 165, 173 (App. 2006).

¶24 We agree with the Halls that the Hansons' claims were inextricably interwoven and conclude the trial court did not abuse its discretion in awarding the Halls the full amount of their fee request. We therefore need not

determine whether the Hansons' fraud claim "arose out of contract" for purposes of A.R.S. § 12-341.01. See *Modular Mining Sys., Inc. v. Jigsaw Tech., Inc.*, 221 Ariz. 515, 522, ¶ 23, 212 P.3d 853, 860 (App. 2009) ("It is well-established that a successful party on a contract claim may recover not only attorneys' fees expended on the contract claim, but also fees expended in litigating an 'interwoven' tort claim.") (quoting *Ramsey Air Meds, LLC v. Cutter Aviation, Inc.*, 198 Ariz. 10, 13, ¶ 17, 6 P.3d 315, 318 (App. 2000)).

¶25 Both the Hansons' claims for breach of contract and fraud were based on the same set of facts, namely, the Hansons' allegations that Tom Hall knowingly and intentionally misrepresented the condition of the Property in order to induce the Hansons to enter the sales agreement and that he did not convey the bargained-for Property to the Hansons because it was not as represented. Thus, these claims required the same factual development -- what representations were made and what was the true condition of the Property -- and all discovery conducted was necessary to both claims. *Modular Mining Sys., Inc.*, 221 Ariz. at 522-23, ¶ 24, 212 P.3d at 860-61. In addition, the legal issues concerning the claims overlapped, as both claims required the Hansons to prove that the condition of

the Property varied from that represented by Tom Hall and contemplated by the sales agreement. Accordingly, we determine the trial court did not abuse its discretion in awarding the Halls the full amount of their requested attorneys' fees pursuant to A.R.S. § 12-341.01.

CONCLUSION

¶126 For the foregoing reasons, we affirm the superior court judgment. The Hansons request an award of attorneys' fees on appeal based upon A.R.S. § 12-341.01. The Halls request fees based on A.R.S. § 12-341.01 and the parties' purchase agreement. In accordance with the parties' agreement and also pursuant to A.R.S. § 12-341.01, we will award the Halls their taxable costs and an amount of reasonable attorneys' fees on appeal upon their compliance with Arizona Rule of Civil Appellate Procedure 21.

_____/s/_____
JOHN C. GEMMILL, Presiding Judge

CONCURRING:

_____/s/_____
JON W. THOMPSON, Judge

_____/s/_____
PATRICK IRVINE, Judge