DIVISION ONE
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RUTH WILLINGHAM,
ACTING CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

LINDA LOU TUCKER and KEITH BOHREN, Plaintiffs-Appellants-Cross-Appellees, v. SCOTTSDALE INDEMNITY COMPANY, Defendant-Appellee-Cross-Appellant.	1 CA-CV 09-0732 DEPARTMENT E **MEMORANDUM DECISION** Not for Publication (Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in La Paz County

Cause Nos. CV20060062 and CV20060082 (Consolidated)

The Honorable Michael J. Burke, Judge

AFFIRMED

David Alan Dick and Associates — Chandler
by David Alan Dick
Attorneys for Linda Lou Tucker and Keith Bohren

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W E I S B E R G, Judge

¶1 Linda Lou Tucker and Keith Bohren (collectively, "Appellants") appeal from the trial court's grant of summary judgment in favor of Scottsdale Indemnity Company ("SIC") on Appellants' bad faith and breach of contract claims. Appellants contend the trial court erred in holding the statute of limitations barred their bad faith claims and that there were no genuine issues of material fact concerning their breach of contract claims. For the reasons that follow, we affirm.

FACTS AND PROCEDURAL BACKGROUND[1]

¶2 On September 1, 2002, Appellants were assaulted by Dennis Lee Lesnick[2] at Hogan's Saloon & Eatery ("Hogan's"), a tavern located in Parker, Arizona. Appellants suffered extensive injuries as a result of Lesnick's assault.

¶3 Kathy Richardson is the owner of Hogan's and has maintained a $1,000,000 liability insurance policy on Hogan's since it opened in 1994. Richardson purchased a renewal policy every year through her insurance agent, Donna Sue Smith of La Paz Insurance Agency of Arizona, L.L.C. SIC issued the renewal

[1]We view the facts in the light most favorable to Appellants as the non-moving parties. *Angus Med. Co. v. Digital Equip. Corp.,* 173 Ariz. 159, 162, 840 P.2d 1024, 1027 (App. 1992).

[2]Lesnick is also known as Dennis White.

insurance policy ("the policy") on Hogan's in effect during Lesnick's assault.

¶4 On August 28, 2003, Tucker filed a negligence lawsuit against Hogan's, Richardson, and two other officers/employees of Hogan's (collectively, "Hogan's defendants"). Tucker alleged Hogan's defendants violated state law and recklessly or negligently sold alcohol to Lesnick when they should have known Lesnick was intoxicated, permitted a disorderly person to remain on the premises, failed to monitor Lesnick's alcohol consumption, failed to reasonably protect Tucker's safety, failed to institute policies concerning the sale of alcohol to intoxicated persons, and failed to intervene, prevent or break up the altercation between Lesnick and Tucker. Bohren filed an identical negligence lawsuit against Hogan's defendants the following day. On October 7, 2003, SIC sent a letter to Hogan's defendants denying coverage and refusing to defend the lawsuit in the Tucker action based on an assault and battery exclusion in the policy. SIC sent a letter to Hogan's defendants on February 23, 2004, denying coverage and refusing to defend in the Bohren action for the same reason.

¶5 Tucker and Bohren's respective counsel subsequently sent SIC requests for reconsideration of the coverage denial. SIC confirmed its denial in a letter dated March 4, 2005.

¶6 On April 8, 2005, Tucker and Bohren each entered into a *Damron/Morris* Agreement[3] with Hogan's defendants.[4] Under Tucker's *Damron/Morris* Agreement, Hogan's defendants stipulated to have a $700,000[5] default judgment entered against them and assigned all their rights against SIC to Tucker in exchange for Tucker's agreement not to execute the judgment against Hogan's defendants. The court entered Tucker's default judgment on November 6, 2005.

¶7 Under Bohren's *Damron/Morris* agreement, the parties stipulated to a $1,000,000 default judgment against Hogan's defendants, who assigned their claims against SIC to Bohren in exchange for Bohren's agreement not to execute the judgment against them. The court entered Bohren's default judgment on January 4, 2006.

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[3]*See Damron v. Sledge,* 105 Ariz. 151, 460 P.2d 997 (1969); and *United Servs. Auto. Ass'n v. Morris*, 154 Ariz. 113, 741 P.2d 246 (1987); *see also Safeway Ins. Co. v. Guerrero,* 210 Ariz. 5, 7 n. 1, ¶ 1, 106 P.3d 1020, 1022 n. 1 (2005) (noting the differences between *Damron* and *Morris* agreements).

[4]Although Tucker did not sign her *Damron/Morris* Agreement, no one disputes the validity of the agreement.

[5]The *Damron/Morris* agreement is actually for $750,000, but the default judgment subsequently entered is for $700,000, thus, we use $700,000.

¶8 Tucker filed a complaint against SIC on December 14, 2005, and Bohren filed a complaint against SIC in April, 2006.[6] The complaints alleged SIC breached its contract with Hogan's defendants by refusing to indemnify and denying coverage. Further, Appellants alleged SIC committed bad faith by violating the covenant of good faith and fair dealing. The two cases were subsequently consolidated.

¶9 SIC filed a motion for partial summary judgment on the bad faith claims, contending the claims were barred by the two year statute of limitations. Appellants responded, disputing the accrual date. The court granted SIC's motion, concluding SIC's initial letters denying coverage in Tucker's action on October 7, 2003, and in Bohren's action on February 23, 2004, commenced the running of the statute of limitations. Because each complaint was filed over two years after the pertinent denial letter, the court ruled that both bad faith claims were time barred.

[6]Both parties also named Smith and La Paz Insurance as defendants. Upon stipulation, the court dismissed Tucker's complaint against Smith and La Paz with prejudice in July 2006. Bohren, however, maintained his claims against Smith and La Paz, which was the subject of a prior appeal. *See Bohren v. Smith,* 1 CA-CV 07-0352, 2008 WL 4173578 (Ariz. App. Feb. 7, 2008) (mem. decision). Ultimately, the court dismissed Bohren's claims with prejudice upon stipulation of the parties.

¶10 SIC also filed a motion for summary judgment concerning the breach of contract claims, arguing the policy did not provide coverage for injuries arising out of assault and battery.[7] Appellants responded there were genuine issues of material fact precluding summary judgment including ambiguity of the policy, Richardson's reasonable expectation of coverage, and whether an exception to the assault and battery exclusion applied requiring coverage. The court granted summary judgment. It found that the assault and battery provision was unambiguous, the reasonable expectations doctrine did not apply, the exception to the assault and battery provision did not apply, and no other provision in the policy covered Appellants' injuries. Appellants timely appealed.[8] We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101(B) (2003).

[7]SIC initially filed the motion against Tucker, but subsequently filed the motion against Bohren as well.

[8]Appellants' notice of appeal was premature, but the trial court later entered a final appealable judgment. *See Barassi v. Matison,* 130 Ariz. 418, 422, 636 P.2d 1200, 1204 (1981). SIC filed a notice of cross-appeal concerning the court's finding that Appellants' bad faith claims were third-party bad faith claims instead of first party bad faith claims. SIC, however, withdrew its notice of cross-appeal.

DISCUSSION

I. Standard of Review

¶11 We review a grant of summary judgment de novo. *L. Harvey Concrete, Inc. v. Argo Const. & Supply Co.,* 189 Ariz. 178, 180, 939 P.2d 811, 813 (App. 1997). Summary judgment is appropriate when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Arizona Rule of Civil Procedure 56(c). The interpretation of an insurance contract is a question of law we review de novo. *First Am. Title Ins. Co. v. Action Acquisitions, LLC,* 218 Ariz. 394, 397, ¶ 8, 187 P.3d 1107, 1110 (2008). Similarly, we review de novo questions of law concerning the statute of limitations, including "when a particular cause of action accrues". *Montano v. Browning,* 202 Ariz. 544, 546, ¶ 4, 48 P.3d 494, 496 (App. 2002) (citation omitted).

II. Breach of Contract Claims

A. Whether the Policy is Ambiguous

¶12 Appellants argue the policy is ambiguous, creating genuine issues of material issue of fact regarding coverage. An insurance "policy is ambiguous if it is subject to 'conflicting reasonable interpretations.'" *Desert Mountain Props. Ltd. P'ship v. Liberty Mut. Fire Ins. Co.,* 225 Ariz. 194, 200, ¶ 14, 236 P.3d 421, 427 (App. 2010) (quoting *State Farm Mut. Auto.*

Ins. Co. v. Wilson, 162 Ariz. 251, 258, 782 P.2d 727, 734 (1989)).

¶13 The policy contains a "Liquor Liability Coverage" section, which provides in pertinent part:

> **1. Insuring Agreement**
>
> a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "injury" to which this insurance applies if liability for such "injury" is imposed on the insured by reason of the selling, serving or furnishing of any alcoholic beverage. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "injury" to which this insurance does not apply. . . .

The policy also contains an assault and battery exclusion which provides:

> THIS ENDORESEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.
>
> **ASSAULT AND/OR BATTERY EXCLUSION**
>
> This insurance does not apply to "Injury," "Bodily Injury," "Property Damage" or "Personal and Advertising Injury" . . . arising from:
>
> 1. Assault and/or Battery committed by any insured, any employee of any insured, or any other person;
>
> 2. The failure to suppress or prevent Assault and/or Battery by any person in 1. above;

3. The selling, serving or furnishing of alcoholic beverages which results in an Assault and/or Battery.

4. The negligent:

a. Employment;

b. Investigation;

c. Supervision;

d. Reporting to the proper authorities, or failure to so report; or

e. Retention by a person for whom any insured is or ever was legally responsible and whose conduct would be excluded by paragraphs 1, 2 or 3 above.

¶14 Appellants contend the assault and battery exclusion does not say which specific coverage it applies to and does not state it modifies the liquor liability coverage.[9] But the assault and battery exclusion applies to the entire policy, as it explicitly states it "changes the policy" and "this insurance" does not apply to assault and battery. Indeed, the liquor liability coverage specifically provides the insured has no duty to defend a lawsuit seeking damages "to which *this insurance* does not apply." (Emphasis added). We will not create ambiguity to find coverage when the policy language is

[9]In addition to the liquor liability coverage, the policy also provides commercial general liability coverage, including commercial property coverage, building and personal property coverage, and personal and advertising injury coverage.

unambiguous. *Am. Family Mut. Ins. Co. v. White,* 204 Ariz. 500, 503, ¶ 8, 65 P.3d 449, 452 (App. 2003); *accord Lawrence v. Beneficial Fire & Cas. Ins. Co.*, 8 Ariz. App. 155, 158, 444 P.2d 446, 449 (1968).

¶15 Further, Appellants' contention that Richardson was unaware of this exclusion and "still did not understand" the exclusion after reading it does not create an ambiguity because the terms of the assault and battery exclusion are clear and unambiguous. *See Emp'r's Admin. Servs., Inc. v. Hartford Acc. & Indem. Co.*, 147 Ariz. 202, 205, 709 P.2d 559, 562 (App. 1985) (we interpret a contract according to its terms when those terms are clear and unambiguous); *see also Sletten v. St. Paul Fire and Marine Ins. Co.*, 161 Ariz. 595, 598, 780 P.2d 428, 431 (App. 1989) (no ambiguity when language is clear according to an ordinary understanding). There is no other reasonable way to read the assault and battery exclusion other than as applying to the entire policy. Accordingly, there is no ambiguity.

B. Other Liability Under the Policy

¶16 Next, Appellants argue not all of their claims are excluded from coverage. Specifically, Appellants contend their allegations concerning Hogan's defendants' failure to institute and enforce policies for removing intoxicated persons, selling alcohol to intoxicated persons, monitoring alcohol consumption,

protecting patrons, removing disorderly persons, and negligently allowing a disorderly person to remain on the premises are not precluded by the assault and battery exclusion. We, however, disagree.

¶17 All of Appellants' injuries stem from Lesnick's assault. The assault and battery exclusion excludes coverage for injuries arising from assault and battery as well as "[t]he selling, serving or furnishing of alcoholic beverages which results in an" assault or battery, and failing to "suppress or prevent" an assault or battery. Accordingly, all of Appellants' claims are barred by the assault the battery exclusion.

C. Reasonable Expectations

¶18 Appellants next argue the assault and battery exclusion is contrary to Richardson's reasonable expectation of coverage and thus, summary judgment was inappropriate.

¶19 "[A] contracting party's reasonable expectations may affect the enforceability of non-negotiated terms in a standardized agreement." *Averett v. Farmers Ins. Co. of Ariz.,* 177 Ariz. 531, 532, 869 P.2d 505, 506 (1994). Under the reasonable expectations doctrine, an insured may be relieved of unambiguous standardized terms in an insurance agreement if the insurer had "reason to believe" the insured would not have assented to the agreement if the insured knew the agreement

contained a particular term. *Darner Motor Sales, Inc. v. Universal Underwriters Ins. Co.,* 140 Ariz. 383, 391-92, 682 P.2d 388, 396-97 (1984); (quoting Restatement (Second) of Contracts § 211(3) (1981)); *Gordinier v. Aetna Cas. & Sur. Co.,* 154 Ariz. 266, 272, 742 P.2d 277, 283 (1987). In determining an insurer's reason to believe, courts can consider the parties' prior negotiations, the circumstances of the transaction, whether the term is "bizarre or oppressive," if the term eviscerates the non-standard terms explicitly agreed to, or if the term eliminates the dominant purpose of the transaction. *State Farm Fire & Cas. Ins. Co. v. Grabowski,* 214 Ariz. 188, 193, ¶ 17, 150 P.3d 275, 280 (App. 2007).

¶20 The reasonable expectations doctrine, however, "requires more than the insured's 'fervent hope' that coverage exists, and therefore only applies in certain limited circumstances." *Id*. at 192, ¶ 14, 150 P.3d at 279 (quoting *Darner,* 140 Ariz. at 390, 682 P.2d at 395). Those circumstances include when an insured does "not receive full and adequate notice" of a particular provision and the provision is unusual, unexpected, or emasculates apparent coverage.[10] *Gordinier,* 154 Ariz. at 273, 742 P.2d at 284.

[10]Other circumstances in which the reasonable expectations doctrine may apply is when (1) a reasonably intelligent consumer cannot understand the policy language, (2) some activity

¶21 Appellants have failed to provide any evidence creating a genuine material issue of fact regarding Richardson's reasonable expectations. At her deposition, Richardson testified she met with Smith in 1994 to purchase $1,000,000 worth of insurance, had no questions for Smith, and simply renewed her insurance policy through Smith every year. Richardson also testified she "never really talked" with Smith and she never indicated to Smith she was seeking coverage for assault and battery. Richardson simply relied on Smith's expertise and expected Smith to sell her whatever she needed to cover the tavern. Additionally, Smith never said anything to suggest Richardson was covered for assault and battery.[11] *See, e.g., First Am. Title*, 218 Ariz. at 401, ¶ 36, 187 P.3d at 1114 (failure to ask if a policy covered a particular matter and the

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reasonably attributable to the insurer would create an objective impression of coverage in the mind of a reasonable insured; or (3) some activity reasonably attributable to the insurer has induced an insured to reasonably believe that coverage exits, although the policy clearly denies such coverage. *Gordinier,* 154 Ariz. at 272-73, 742 P.2d at 283-84. Because Appellants do not argue that these other limited situations apply, we do not address them.

[11]Appellants' reliance on a Hogan's employee's deposition concerning Richardson's reasonable expectations is inapposite because the employee was not a party to the insurance contract. *See generally, Ogden v. U.S. Fid. & Guar. Co.,* 188 Ariz. 132, 138-39, 933 P.2d 1200, 1206-07 (App. 1996) (non-party's expectations have little effect upon the enforceability of an insurance contract).

lack of representation that a matter would be covered does not create reasonable expectations); and *Cont'l Ins. Co. v. McDaniel*, 160 Ariz. 183, 186, 772 P.2d 6, 9 (App. 1988) (finding beliefs and expectations of the insured insufficient to support the reasonable expectation doctrine when there was no evidence the agent did anything to make the insured believe he was covered for intentional torts). Given Richardson's testimony, Smith had no reason to believe Richardson would not agree to the policy including the assault and battery exclusion.

¶22 Appellants have not submitted evidence or authority that an assault and battery exclusion is bizarre, oppressive, unusual, unexpected or emasculates apparent coverage. Indeed, assault and battery exclusions are not uncommon. *See, e.g., Trainwreck West Inc. v. Burlington Ins. Co.,* 235 S.W.3d 33, 43 (Mo. Ct. App. 2007) (Missouri courts routinely uphold assault and battery exclusions in cases involving bar patrons); *Mouton v. Thomas,* 924 So.2d 394, 398 (La. Ct. App. 2006); and Kimberly J. Winbush, Annotation, *Validity, Construction, and Effect of Assault and Battery in Liability Insurance Policy at Issue,* 44 A.L.R. 5th 91 (1996). Moreover, Appellants do not contend the assault and battery exclusion eviscerates any non-standard terms to which they explicitly agreed. *Harrington v. Pulte Home*

Corp., 211 Ariz. 241, 248, ¶ 23, 119 P.3d 1044, 1051 (App. 2005).

¶23 Appellants do assert, but without citation to the record or authority, that the dominant purpose of the purchasing insurance "was to cover the tavern for injuries and damages arising from bar fights." Nevertheless, "[i]f . . . all that was required to defeat the operation of a policy exclusion under the reasonable expectation doctrine was a provision attempting to qualify or limit the scope of policy coverage, then every policy exclusion would be invalid as contrary to the insured's reasonable expectation of coverage." *Millar v. State Farm Fire & Cas. Co.,* 167 Ariz. 93, 97-98, 804 P.2d 822, 826-27 (App. 1990). The assault and battery exclusion does not eviscerate the primary purpose of the insurance policy: providing coverage for dram shop liability, such as selling alcohol to minors, *Estate of Hernandez v. Ariz. Bd. of Regents,* 177 Ariz. 244, 251-52, 866 P.2d 1330, 1337-38 (1994), or serving alcohol to an intoxicated person who might drive a car, *Ontiveros v. Borak,* 136 Ariz. 500, 507, 667 P.2d 200, 207 (1983), and property damage or risks other than assault and battery over which a business or person has no control.

¶24 Further, Richardson had adequate notice of the assault and battery exclusion. An insurer gives adequate notice of a

policy's clear and unambiguous terms if it gives a copy of the policy to the insured and takes reasonable steps to make sure any exclusions or limitations are made apparent to the insured. *See, e.g., Averett,* 177 Ariz. at 534, 869 P.2d at 508 (notice is a factual issue when parties dispute whether the insurer provided the policy to the insured). To determine whether the exclusion is apparent, factors such as typeface, size and location are relevant. *Harrington,* 211 Ariz. at 248 n.8, ¶ 19, 119 P.3d at 1051 n.8.

¶25 Richardson testified she received the policy and renewal letters in the mail that contained the exclusions, but did not read them. Further, the assault and battery exclusion is a full page with typeface in bold and a full capitalized heading. *See White,* 204 Ariz. at 507, ¶ 19, 65 P.3d at 456 (adequate notice where "exclusion is not lengthy, confusing, complex, or buried in the policy"). Moreover, Richardson testified that she thought assault and battery was excluded but she did not quite understand what that meant. Thus, Richardson had full and adequate notice of the assault and battery exclusion, and consequently, her failure to read the policy and exclusion does not create an issue of material fact regarding notice. *See Rocz v. Drexel Burham Lambert, Inc.*, 154 Ariz. 462,

466, 743 P.2d 971, 975 (App. 1987) (party bound by arbitration clause in contract whether or not she read it).

¶26 To the extent Appellants argue Smith failed to explain there was an assault and battery exclusion, Smith had no such obligation. There is no fiduciary relationship between Smith and Richardson, and nothing in the record suggests Smith knew that Richardson was unaware of the assault and battery exclusion or that Richardson would not have purchased the policy with an assault and battery exclusion.[12] *See Rawlings v. Apodaca,* 151 Ariz. 149, 155, 726 P.2d 565, 571 (1986) (insurer is not a fiduciary but does have some duties of a fiduciary nature).

¶27 A reasonable expectations "issue is not raised simply by putting the insured on the stand and asking [her], 'Did you reasonably expect that you would be covered?'" *Shade v. U.S. Fid. and Guar. Co.*, 166 Ariz. 206, 208, 801 P.2d 441, 443 (App. 1990) (quoting *State Farm Fire & Cas. Co. v. Powers,* 163 Ariz. 213, 215, 786 P.2d 1064, 1066 (App. 1989)). Thus, Richardson's belief that she was covered for anything that might occur in a bar without her communication to Smith about such belief is

[12]Although Richardson's deposition testimony conflicts as to whether she would have purchased the policy if she had known there was an assault and battery exclusion, she never communicated this information to Smith. *See Florez v. Sargeant,* 185 Ariz. 521, 526, 917 P.2d 250, 255 (1996) ("affidavits that only set forth ultimate facts or conclusions of law can neither support nor defeat a motion for summary judgment.").

insufficient to raise an issue of material fact concerning Richardson's reasonable expectations.

D. Protection of Others

¶28 Appellants also argue there is an exception to the assault and battery exclusion that provides coverage in the instant case. The relevant provision Appellants rely upon is found in the liquor liability coverage form that provides:

> **1. Exclusions**
>
> This Insurance does not apply to:
>
> **a. Expected or Intended Injury**
>
> "Injury" expected or intended from the standpoint of the insured. This exclusion does not apply to "bodily injury" resulting from the use of reasonable force to protect persons or property.

Appellants contend they were injured "while trying to protect others" and interpret this provision as requiring coverage under these circumstances.

¶29 Appellants misinterpret this provision. The first sentence is an intentional act exclusion that is "designed to exclude coverage when an insured acts." *K.B. v. State Farm Fire and Cas. Co.*, 189 Ariz. 263, 264-65, 941 P.2d 1288, 1289-90 (App. 1997) (quoting *Republic Ins. Co. v. Feidler,* 178 Ariz. 528, 531, 875 P.2d 187, 190 (App. 1993)); *see also Pekin Ins. Co. v. Wilson,* 930 N.E.2d 1011, 1014, (Ill. 2010) (citing

identical language and classifying it as an intentional act exclusion). The second sentence is an exception to the intentional act exclusion, providing that acts of self-defense by the insured are not excluded from coverage. *See, e.g., Pekin,* 930 N.E.2d at 1014 (classifying identical language as "self-defense"); *accord Firemen's Ins. Co. of Wash., D.C. v. 860 West Tower, Inc.*, 667 N.Y.S.2d 718, 719 (N.Y. App. Div. 1998).

¶30 This provision is inapplicable in the present case because neither Appellants, nor Lesnick, are insured under the policy. *See Penn-Star Ins. Co. v. Griffey*, 306 S.W.3d 591, 597 (Mo. Ct. App. 2010) ("The plain sense of the policy language is that if a bouncer employs a reasonable degree of force to physically eject someone from the premises, the insurer cannot deny coverage on the basis that the bouncer 'expected or intended' the injury . . . ."). Accordingly, the fact that Appellants were protecting others when they were injured by Lesnick is irrelevant to coverage under the policy.

¶31 Because Appellants failed to raise any genuine issue of material fact concerning their breach of contract claims, the court properly granted summary judgment on those claims.

III. Bad Faith

¶32 Appellants also argue the court erred in ruling their bad faith claims were barred by the statute of limitations. The

tort of bad faith in the insurance context derives from the duty of good faith and fair dealing that is implied in law in every insurance contract. *Rawlings,* 151 Ariz. at 153-54, 726 P.2d at 569-70.

¶33 In order to have a claim for bad faith, a plaintiff must show the defendant lacked a reasonable basis for denying benefits of the policy. *Noble v. Nat'l Am. Life Ins. Co.,* 128 Ariz. 188, 190, 624 P.2d 866, 868 (1981) (quoting *Anderson v. Cont'l Ins. Co.,* 271 N.W.2d 368, 376-77 (1978)). "[A] bad faith claim based solely on a carrier's denial of coverage will fail on the merits if a final determination of non-coverage ultimately is made." *Manterola v. Farmers Ins. Exch.,* 200 Ariz. 572, 579, ¶ 20, 30 P.3d 639, 646 (App. 2001).

¶34 Because we have determined SIC properly denied coverage to Appellants based on the assault and battery exclusion, Appellants' bad faith claims fail as a matter of law. Therefore, we need not address whether the bad faith claims are barred by the statute of limitations because that issue is moot. *See Radkowsky v. Provident Life & Acc. Ins. Co.,* 196 Ariz. 110, 113, ¶ 17, 993 P.2d 1074, 1077 (App. 1999) (bad faith claim moot in light of the court's disposition of the contract claim); and *Farmers Ins. Co. of Ariz. v. Young,* 195 Ariz. 22, 28, ¶ 20, 985 P.2d 507, 513 (App. 1998).

IV. Attorneys' Fees

¶35 SIC requests attorneys' fees on appeal pursuant to A.R.S. § 12-341.01 (2003) as the prevailing party in an action arising out of contract. In the exercise of our discretion, we grant SIC its reasonable attorneys' fees and costs on appeal subject to compliance with Arizona Rule of Civil Appellate Procedure 21.

CONCLUSION

¶36 For the foregoing reasons, we affirm the summary judgment granted by the trial court.

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SHELDON H. WEISBERG, Judge

CONCURRING:

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PHILIP HALL, Presiding Judge

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ANN S. TIMMER, Judge