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

THEODORE J. ARUNSKI, III, and KIMBERLY A. ARUNSKI, Plaintiffs/Counterdefendants/ Appellants, v. PET POOL PRODUCTS, INC., an Arizona corporation dba AQUA POWER PLUS, Defendant/Counterclaimant/ Appellee.	No. 1 CA-CV 11-0084 DEPARTMENT C **MEMORANDUM DECISION** (Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure

Appeal from the Superior Court in Maricopa County

Cause No. CV2005-005185

The Honorable Jeanne M. Garcia, Judge

AFFIRMED

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By Robert A. Royal
and Sean P. St. Clair
Attorneys for Plaintiffs/Appellants

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By Gregg Clarke Gibbons
Attorneys for Defendant/Appellee

J O H N S E N, Judge

¶1 Theodore ("Ted") and Kimberly Arunski appeal the superior court's judgment in favor of PET Pool Products, Inc. For the following reasons, we affirm.

FACTS AND PROCEDURAL BACKGROUND

¶2 Ted Arunski formed PET Pool with Peter Wakefield and Edward Tartaglio in 2003. Each held a one-third share in the company. Ted was the president of the company and in charge of day-to-day operations. In January 2005, Wakefield and Tartaglio removed Ted as president after they discovered banking and inventory discrepancies and learned the company had been threatened with litigation.

¶3 The Arunskis sued PET Pool, Wakefield and Tartaglio in connection with Ted's termination; the superior court entered summary judgment against the Arunskis on each of their claims, and this court affirmed. After a bench trial, the court found in favor of PET Pool on its counterclaims against the Arunskis for breach of contract, breach of the duty of good faith, breach of fiduciary duty and conversion. The court entered judgment for PET Pool in the amount of $313,011.80 plus prejudgment interest, attorney's fees, and costs. The Arunskis timely appealed.

¶4 We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101(A)(1) (2012).[1]

DISCUSSION

A. The Judgment Is Supported by the Evidence.

1. Uncategorized expenses.

¶5 After it terminated Ted, PET Pool hired Lance Meilech, a certified public accountant, to audit the company's books. Meilech reviewed PET Pool's banking records and attempted to verify each expense with vendor invoices or receipts. He testified that, based upon his audit, he believed the Arunskis improperly took $313,011.80 from PET Pool. That amount included $203,875.86 of uncategorized expenditures for which Meilech testified he could find "no hint" of a valid business purpose or third-party verification.

¶6 On appeal, the Arunskis argue there was no evidence that they received or benefitted from the $203,875.86 that Meilech said was not accounted for. We review the superior court's calculation of damages for an abuse of discretion. *See Solar-West, Inc. v. Falk*, 141 Ariz. 414, 419, 687 P.2d 939, 944

[1] Absent material revisions after the relevant date, we cite a statute's current Westlaw version.

(App. 1984).[2] We view the evidence and the inferences therefrom in the light most favorable to upholding the judgment and will affirm if there is substantial evidence to support it. *SW Soil Remediation Group v. City of Tucson*, 201 Ariz. 438, 440, 442, ¶ 2, ¶ 12, 36 P.3d 1208, 1210, 1212 (App. 2001).

¶7 The Arunskis failed to challenge Meilech's audit report prior to trial, and, at trial, did not attempt to dispute specific charges Meilech classified as "uncategorized." They apparently intended to use documents they printed from the company's QuickBooks to explain the purported business purpose for some of those expenditures, but the superior court excluded their evidence for lack of foundation.

¶8 On appeal, the Arunskis argue the court erred by declining to admit their QuickBooks evidence in evidence.[3]

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[2] Contrary to PET Pool's contention, the Arunskis did not waive this issue by failing to object to the court's finding endorsing Meilech's conclusions. The authority PET Pool cites in support of that argument, *Elliott v. Elliott*, 165 Ariz. 128, 134, 796 P.2d 930, 936 (App. 1990), does not support the proposition that a party must object to all findings of fact with which he disagrees in order to preserve his arguments on appeal.

[3] We reject PET Pool's argument that the Arunskis waived this argument by failing to make an offer of proof at trial. The proffered evidence was marked and examined by the superior court and is in the record on appeal. *See* Ariz. R. Evid. 103(a)(2) ("Error may not be predicated upon a ruling which admits or excludes evidence unless . . . the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.").

Generally, 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). If the evidentiary ruling is predicated on a question of law, we review that ruling *de novo*. *Id*.

¶9 We do not accept the Arunskis' argument that PET Pool waived any objection to the evidence because it did not object to the same documents when the Arunskis submitted them on summary judgment prior to trial. The case on which the Arunskis rely, *Ancell v. Union Station Associates, Inc*., 166 Ariz. 457, 460, 803 P.2d 450, 453 (App. 1990), addresses a party's failure to move to strike documents submitted on summary judgment, and does not hold that the failure to raise an objection at that stage waives any objection to the admission of the same evidence at trial.

¶10 The Arunskis told the superior court that the exhibit at issue, marked as Exhibit 20, contained copies of documents PET Pool maintained in a QuickBooks database. According to PET Pool's counsel, the parties had agreed in discovery that PET Pool's consultant would provide a copy of the company's QuickBooks data to counsel for the Arunskis and would print for them any documents the Arunskis wanted. Contrary to that arrangement, however, the Arunskis loaded the QuickBooks data

into their home computer and printed copies of the data for their counsel. At trial, PET Pool argued that because the Arunskis could have manipulated the data when they loaded the data into their home computer, to establish a proper foundation for their exhibit, the Arunskis needed to show the documents were unchanged from the data retrieved from PET Pool's computers. When the Arunskis could not make that showing, the court excluded their exhibit for lack of foundation.

¶11 A proponent of evidence must authenticate it by offering "evidence sufficient to support a finding that the matter in question is what its proponent claims." Ariz. R. Evid. 901(a). "A proponent of evidence may satisfy foundation requirements with the identification testimony of a witness who has knowledge of the exhibit." *State v. Maximo*, 170 Ariz. 94, 97, 821 P.2d 1379, 1382 (App. 1991).

¶12 The Arunskis offered no evidence that their proposed exhibit was what it purported to be; they made no showing of how PET Pool's accounting records were maintained or how and when Exhibit 20 was created. Further, the exhibit was not marked with Bates labels and did not match the QuickBooks copy that PET

Pool's expert obtained. Based upon this record, the superior court did not abuse its discretion in excluding the exhibit.[4]

¶13 Accordingly, in the absence of evidence to rebut PET Pool's showing that $203,875.86 had been taken from the company without authorization, the superior court did not abuse its discretion in concluding that the Arunskis had misappropriated those funds.

2. Salary.

¶14 The Arunskis admitted they took some money from PET Pool for their personal use, but argued Tartaglio had authorized such expenditures as loans or advances on salary. On appeal, they contend Tartaglio acknowledged that they had borrowed funds from PET Pool and had agreed that those monies would be treated as salary and did not need to be repaid.

¶15 PET Pool presented evidence that Ted, Tartaglio and Wakefield had agreed when they formed the company that it would not pay any salaries or bonuses until the company was profitable or the shareholders otherwise agreed. The shareholders agreed in June 2004 that PET Pool would pay Ted a salary of approximately $1,200 per week, and Meilech's audit revealed a

[4] We decline to consider the Arunskis' argument that PET Pool did not comply with Arizona Rules of Civil Procedure 26 and 26.1 because it failed to disclose the QuickBooks data. *McDowell Mountain Ranch Land Coal. v. Vizcaino*, 190 Ariz. 1, 5, 945 P.2d 312, 316 (1997) (refusing to consider issues not raised in the trial court).

total of $12,506.23 paid to the Arunskis as salary. The court did not include this amount in its damage award.

¶16 However, the Arunskis assert that PET Pool agreed that *all* amounts they removed from the company's accounts were to be treated as salary and not repaid. They rely on an email from Tartaglio to Ted dated June 8, 2004, in which Tartaglio wrote:

> Even though you have taken mon[ies] out of the corporation it should be documented as salary instead of a loan. You will not have to pay it back this way but you will owe taxes for this money. There should be agreements by all 3 of us regarding your salary at this time. Until we are profitable[,] [t]his amount should be taken and nothing else.

Based on this email, the Arunskis argue the court's finding that they improperly removed funds from PET Pool is not supported by the evidence. Tartaglio testified, however, that he wrote the June 8, 2004 email just after he learned the Arunskis had been taking money from PET Pool without authorization and because he thought the amount they had misappropriated was minimal. In addition, he maintained the shareholders never approved the suggestions he made in his email. Further, Kimberly admitted that the Arunskis did not pay income tax on the monies they claimed were salary from PET Pool.

¶17 Given this evidence, substantial evidence supported the superior court's conclusion that Tartaglio's email did not

constitute an agreement by the company that all of the Arunskis' withdrawals from the company would be treated as salary.

B. Trial Management.

¶18 Finally, the Arunskis argue the superior court erred by denying them sufficient time at trial to challenge Meilech's report. The superior court may impose reasonable time limits on trial proceedings. Ariz. R. Civ. P. 16(h); Ariz. R. Evid. 611(a) (court shall exercise reasonable control over trial proceedings and may impose reasonable time limits); *Brown v. U.S. Fid. & Guar. Co.*, 194 Ariz. 85, 90-91, ¶ 29, 977 P.2d 807, 812-13 (App. 1998). We review the imposition of such limits only for an abuse of discretion. *Id.* at 91, ¶ 30, 977 P.2d at 813.

¶19 Based on the parties' estimations, the superior court scheduled three trial days. The Arunskis did not request additional time before trial, and, in the Joint Pretrial Statement, they estimated their cross-examination of Meilech would take only three hours.

¶20 Nevertheless, the Arunskis complain that within the time allotted, they were unable to fully present their defense because they were unable, either through cross-examination of Meilech or during their direct testimony, to establish that the expenditures Meilech identified as unsupported were, in fact,

proper business expenses. However, the Arunskis did not ask the court for additional time to present evidence, nor did they object to the court's management of the trial schedule. *See Trantor v. Fredrikson*, 179 Ariz. 299, 300-01, 878 P.2d 657, 658-59 (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.").

¶21 Moreover, although Ted indicated at trial that if he had additional time he would have questioned Meilech regarding the expenditures he had classified as "uncategorized" in his report, the Arunskis did not make an offer of proof concerning the evidence they could not present because of time considerations. *Cf.* Ariz. R. Evid. 103(a)(2) (to establish error in the exclusion of evidence, party must show that its substance was made known to the trial judge).

¶22 Accordingly, we find no abuse of the court's discretion in managing the time at trial.

CONCLUSION

¶23 For the foregoing reasons, we affirm. We award PET Pool its reasonable attorney's fees on appeal, pursuant to A.R.S. §§ 12-341.01, -342 (2012) and A.R.S. § 10-746 (2012). As

the prevailing party on appeal, PET Pool also is entitled to an award of costs upon its compliance with Arizona Rule of Civil Appellate Procedure 21.

/s/
DIANE M. JOHNSEN, Judge

CONCURRING:

/s/
PATRICIA K. NORRIS, Presiding Judge

/s/
MARGARET H. DOWNIE, Judge