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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

JOHN D. KITCHENS and GERALDINE S. CROW, husband and wife, Plaintiffs/Appellants, v. LARRY D. SIPE and CAROL J. SIPE, husband and wife; SIPE FAMILY TRUST, Defendants/Appellees.	2 CA-CV 2011-0055 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. CV200800159

Honorable Stephen M. Desens, Judge

AFFIRMED

The Law Office of Randall M. Sammons, P.L.L.C.
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K E L L Y, Judge.

¶1 Appellants Geraldine Crow and John Kitchens appeal from the trial court's denial of their motion for a new trial. The court ruled in favor of appellees, Carol and

Larry Sipe, following a bench trial on appellants' breach of contract and fraud claims. On appeal, appellants argue the court erred by finding appellees' breach of contract to be immaterial. For the following reasons, we affirm.

Background

¶2 "When reviewing issues decided following a bench trial, we view the facts in the light most favorable to upholding the court's ruling." *Bennett v. Baxter Grp., Inc.*, 223 Ariz. 414, ¶ 2, 224 P.3d 230, 233 (App. 2010). In 2005, appellants purchased real property from appellees. As sellers, appellees were contractually obligated to disclose any insurance claims made on the property within the previous five years, but they failed to disclose a claim they had made in 2002.

¶3 In 2008, appellants sued appellees alleging breach of contract and fraud and seeking rescission of the contract. The trial court found that appellees had in fact breached the contract by failing to disclose the 2002 insurance claim, but the court concluded the breach was immaterial and denied relief. Pursuant to the contract, the court also awarded attorney fees to appellees. Appellants then moved for a new trial, and the court denied the motion. This appeal followed.

Jurisdiction

¶4 Because we have an independent duty to determine whether we have jurisdiction over an appeal, *Sorensen v. Farmers Ins. Co. of Ariz.*, 191 Ariz. 464, 465, 957 P.2d 1007, 1008 (App. 1997), we must first address whether appellants' notice of appeal properly vested jurisdiction in this court to review the final judgment. Appellants' notice of appeal states they are appealing "from the denial of Motion for New Trial and

Judgment entered on the 25th day of February, 2011." The final judgment was filed on December 17, 2010.

¶5 Rule 8(c), Ariz. R. Civ. App. P., requires, inter alia, that the notice of appeal "designate the judgment . . . appealed from." This court does not acquire jurisdiction to review matters not identified in this notice. *Flagstaff Vending Co. v. City of Flagstaff*, 118 Ariz. 556, 561, 578 P.2d 985, 990 (1978); *Lee v. Lee*, 133 Ariz. 118, 124, 649 P.2d 997, 1003 (App. 1982). We may construe a notice of appeal liberally. *Gutierrez v. Gutierrez*, 193 Ariz. 343, ¶ 30, 972 P.2d 676, 683 (App. 1998). Thus, technical defects such as incorrect dates are not fatal to the appeal. *See, e.g.*, *Hanen v. Willis*, 102 Ariz. 6, 9-10, 423 P.2d 95, 98-99 (1967) (finding jurisdiction despite notice of appeal citing date of minute entry about judgment rather than date final judgment entered); *Udy v. Calvary Corp.*, 162 Ariz. 7, 10-11, 780 P.2d 1055, 1058-59 (App. 1989) (notice of appeal naming as appellants only parents, not son on whose behalf suit was brought, was simple technical defect and did not preclude appeal on his behalf). But we cannot disregard the plain requirements of Rule 8(c) and infer from the notice something that is not actually stated or reasonably implied. *Baker v. Emmerson*, 153 Ariz. 4, 8, 734 P.2d 101, 105 (App. 1986) (original notice of appeal from earlier judgment that failed to dispose of claim against party insufficient to appeal from amended judgment adding the party).

¶6 Appellants' notice of appeal does not include the December 2010 judgment, in which the trial court concluded that appellees' breach was immaterial and

denied the requested relief. Therefore, we do not have jurisdiction to review this judgment on appeal.

Discussion

¶7 Because we lack jurisdiction to review the final judgment, our review is limited to the trial court's denial of appellants' motion for a new trial. But appellants do not argue on appeal that the court erred by denying their motion. And, as appellees correctly note, an appellant's failure to develop and support its argument waives the issue on appeal. *See Polanco v. Indus. Comm'n*, 214 Ariz. 489, n.2, 154 P.3d 391, 393-94 n.2 (App. 2007); *see also* Ariz. R. Civ. App. P. 13(a)(6) ("An argument . . . shall contain the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on.").

¶8 In their reply brief, appellants contend the issue is not waived because their opening brief "directly addresses the issues raised in their Motion for New Trial." (Emphasis omitted.) And while this appears to be largely true, it is beside the point because appellants do not argue on appeal that the trial court erred in denying their motion for a new trial, which is the only issue we have jurisdiction to review. Citing *Geronimo Hotel & Lodge v. Putzi*, 151 Ariz. 477, 728 P.2d 1227 (1986), appellants assert that "[t]he resolution of such claimed waiver is based on fair notice and judicial efficiency." But in *Geronimo*, our supreme court was deciding whether an issue had been adequately preserved below or, instead, had been waived on appeal for failure to preserve the issue. *Id.* at 478-79, 728 P.2d at 1228-29. The waiver addressed in *Polanco*, and that we discuss here, is not about adequate preservation of error below but rather about failure

to sufficiently develop an argument of error on appeal. *Polanco*, 214 Ariz. 489, n.2, 154 P.3d at 393-94 n.2. Because appellants failed to argue on appeal that the trial court erred by denying their motion for a new trial, they have waived the argument on appeal.

Attorney Fees

¶9 Both parties request attorney fees on appeal. Appellees made their request pursuant to the contract and A.R.S. § 12-341.01. Because they are the prevailing parties, we grant their request for attorney fees upon compliance with Rule 21, Ariz. R. Civ. App. P. We deny appellants' request.

Disposition

¶10 We lack jurisdiction to hear appellants' arguments with respect to the final judgment, and we affirm the trial court's ruling denying appellants' motion for a new trial.

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge