IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

DERRY DEAN SPARLIN JR., EXECUTOR FOR THE ESTATE OF
DERRY DEAN SPARLIN SR.,
Plaintiff/Appellant,

v.

PAUL Y. SORENSEN AND ANGELA B. SORENSEN,
Defendants/Appellees.

No. 2 CA-CV 2015-0233
Filed December 27, 2016

Appeal from the Superior Court in Pima County
No. C20117971
The Honorable Gus Aragón, Judge

AFFIRMED IN PART; VACATED IN PART AND REMANDED

COUNSEL

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MEMORANDUM DECISION

Judge Espinosa authored the decision of the Court, in which Judge Miller and Judge Staring concurred.

E S P I N O S A, Judge:

¶1 Derry Dean Sparlin Jr., as executor of his late father's estate, appeals the entry of summary judgment in favor of Paul and Angela Sorensen on claims related to Sparlin Sr.'s loss of real estate investments.[1] Sparlin argues the trial court erred by finding there were no material facts in dispute, making witness credibility determinations, and failing to consider an affirmative defense. He also raises several issues related to the award of the Sorensens' attorney fees. For the reasons that follow, we find no error in the trial court's grant of summary judgment, but remand for a redetermination of the attorney fees award.

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[1]The underlying lawsuit was initiated by Derry Dean Sparlin Sr. in his own capacity. The Third Amended Complaint, however, substituted Derry Dean Sparlin Jr., as Conservator for his father who had been found an incapacitated person as a result of dementia. During the pendency of this appeal Sparlin Sr. passed away and Sparlin Jr., as executor of his father's estate, was substituted as appellant. All actions in this case having been undertaken by or on behalf of Sparlin Sr., we hereinafter refer to appellant as "Sparlin" except when differentiation may be required for clarity.

Procedural Background

¶2 This case arises out of a series of events in which Sparlin Sr. allegedly lost over one million dollars investing in southern Arizona real estate. In a complaint filed in November 2011, he asserted seven counts based on fraud and misrepresentation against five individual defendants, their spouses, and twelve corporate entities associated with those defendants.[2] Nearly two years later Sparlin was granted leave to amend his complaint to include the Sorensens, alleging that discovery had revealed Paul Sorensen was "intimately related to the remaining Defendants,"[3] with liability arising "out of the same transactions, conduct, and occurrences" alleged in the original complaint.[4] All defendants filed various summary judgment motions by the end of 2014, some of which the trial court granted and thereby limited the issues to be litigated at trial. The motions granted included the Sorensens' request for summary judgment, and after the remaining defendants settled with Sparlin in the ensuing months, the court entered a final judgment. That judgment, which included an award of attorney fees, was

[2] Sparlin's initial complaint alleged seven counts against defendants: Count I, primary statutory liability under A.R.S. § 44-2003(A); Count II, statutory control liability under A.R.S. § 44-1999(B); Count III, aiding and abetting statutory securities fraud; Count IV, breach of fiduciary duties; Count V, aiding and abetting breach of fiduciary duties; Count VI, common law fraud; and Count VII, negligent misrepresentation and non-disclosure.

[3] When Sparlin moved to amend his complaint, one defendant and his related corporate entity had been dismissed for failure to serve process, and another individual defendant and related corporate entity had settled.

[4] Sparlin's claims against the Sorensens included primary statutory liability, statutory control liability, aiding and abetting breach of a fiduciary duty, common law fraud, and negligent misrepresentation/non-disclosure.

subsequently amended to include Rule 54(c), Ariz. R. Civ. P., finality language. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1) and 12-2101(A)(1).

Factual Background

¶3 In 2003, Sparlin Sr. began investing in private real estate development projects in southern Arizona. His initial investment with defendants came in the form of a $350,000 loan for development of a 1,926-lot subdivision in southeast Pima County called Corona de Tucson ("Corona"), with an additional $250,000 loaned to the project approximately one year later. His investments were secured by a $100,000 convertible capital note and two $250,000 promissory notes issued by entities created and managed by defendants Michael Figueroa and Jeffrey Utsch. But after lot sales fell short of anticipated goals, the bank holding the note foreclosed on the Corona property.

¶4 In August 2004, Sparlin Sr. invested $500,000 in the residential development of a seventy-two acre parcel of land in northeast Tucson called Terra Rancho Grande ("TRG"). His initial investment was followed by subsequent $150,000 investments in July 2005 and June 2006.[5] Sparlin did not invest in the TRG project personally, but rather through his ten percent interest in an investment company, Hadrianus Terra, LLC ("Hadrianus"), formed by defendant Figueroa and owned by Figueroa's pension plan. Development of the TRG property was hindered by regulatory restrictions that defendants were unable to surmount, and in December 2009 was sold to Pima County under its conservation acquisition program. For his $800,000 investment, Sparlin Sr. saw a return of less than $250,000.

[5]In general, the defendants created separate companies to hold and develop the properties involved in each real estate investment. The individual entities, however, were managed by Figueroa and Utsch's umbrella company Western Associates Development ("WAD"), LLC.

¶5 Sparlin also invested in the residential development of a 370-acre parcel of land in Santa Cruz County known as Las Colinas Sagradas ("LCS"). In August 2005 he provided a $200,000 loan for the project to repay an advanced credit line and to fund the engineering, subdivision plan, and platting of the property. The loan was initially secured by a promissory note, but subsequently was exchanged for an equity interest in the entity created to manage project development, promoted through a Private Offering Memorandum, which, according to Sparlin, contained numerous irregularities and misrepresentations. Not all investors participated in the equity conversion, however, including the largest debt holder, who threatened foreclosure after the loan went unpaid. Pursuant to a settlement agreement, ownership of the LCS property was forfeited in exchange for an equity interest in another real estate project, and for cash considerations. The settlement agreement additionally required that all "LCS Members and LCS Creditors . . . fully and completely release any and all claims of whatever nature, whether known or unknown, that they may have against LCS and its manager [or] members," and was signed by Sparlin and his wife.

Paul Sorensen

¶6 In addition to his real estate investments, Sparlin made a number of more traditional investments through a Colorado-based, two-person investment firm ("Monument") operated by Peter Skalla and appellee Paul Sorensen. In November 2004 defendants Figueroa and Utsch, who had previously invested with Skalla, hired Monument to perform Chief Financial Officer (CFO) duties for WRS and WAD. Much of that work was performed by Sorensen, who left Monument in May 2005 and became CFO of WAD.

¶7 In an affidavit supporting his motion for summary judgment, Sorensen avowed he had not done any work for the defendant entities before November 2004, and that at all times his responsibilities at WRS and WAD were "limited to finance and accounting." Affidavits from Figueroa and Utsch supported Sorensen's limited involvement in the investments at issue in this appeal.

Summary Judgment

¶8 In November 2014, three years after the initial complaint was filed and four months after the Sorensens were added to the lawsuit, the Sorensens filed a motion for summary judgment, alleging Sparlin's claims were barred by the statute of limitations and, in any event, Sorensen was not materially involved in the transactions at issue in the lawsuit. Although Sparlin focused on the liability of the other defendants, his response to the motion relied on Sorensen's position as CFO of WAD, his access to financial information, and his inclusion on management-level emails, to support his assertion that Sorensen had intimate knowledge of the investments at issue.

¶9 In its April 2015 under-advisement ruling, the trial court found that Sparlin had failed to identify any particular instances of actual misrepresentation by Sorensen, and concluded there was "insufficient evidence to support the claims against the Sorensens." In particular, the court noted "sworn proof of facts," including affidavits from Sorensen and his co-defendants that refuted Sparlin's claims, as well as Sparlin's failure to "come forward in his Response with evidence showing a genuine dispute as to any issue of material fact as to the Sorensens." The court found that Sparlin's "multiple specific allegations" lacked "support," and granted the Sorensens' motion for summary judgment.

Standard of Review

¶10 Summary judgment is appropriate when there are no genuine disputes as to any material fact and the moving party is entitled to judgment as a matter of law. Ariz. R. Civ. P. 56(a). To obtain a judgment under Rule 56(c), the moving party must come forward with evidence that demonstrates the absence of a genuine issue of material fact and must explain why summary judgment should be entered in its favor. *See Orme Sch. v. Reeves*, 166 Ariz. 301, 310, 802 P.2d 1000, 1009 (1990); *Nat'l Bank of Ariz. v. Thruston*, 218 Ariz. 112, ¶ 14, 180 P.3d 977, 980 (App. 2008).

¶11 The moving party's burden of persuasion does not shift at the summary judgment stage, and all evidence and justifiable inferences are viewed in a light most favorable to the non-moving party. *Nat'l Bank*, 218 Ariz. 112, ¶¶ 16-17, 180 P.3d at 980-81. The court will, however, consider the burden applicable to the claim at trial. *Id.* ¶ 21; *see also Orme Sch.*, 166 Ariz. at 309, 802 P.2d at 1008. When, as here, the burden of proving the claim rests with the nonmoving party, the moving party need only "point out by specific reference to the relevant discovery that no evidence exist[s] to support an essential element of the [non-moving party's] claim." *Nat'l Bank*, 218 Ariz. 112, ¶ 22, 180 P.3d at 982, *quoting Orme Sch.*, 166 Ariz. at 310, 802 P.2d at 1009 (alterations in *Nat'l Bank*). If that burden of production is met, it is incumbent upon the nonmoving party to present sufficient evidence demonstrating the existence of a genuine dispute of a material fact. *Id.* ¶ 26. To defeat the motion, the nonmoving party must present evidence overlooked or ignored by the moving party, *id.*, or must come forward with contradicting facts with sworn proof, *see Sato v. Van Denburgh*, 123 Ariz. 225, 228, 599 P.2d 181, 184 (1979). Summary judgment is proper if "the facts produced in support of the claim have so little probative value, given the quantum of evidence required, that reasonable people could not agree with the conclusion advanced by the proponent." *Orme Sch.*, 166 Ariz. at 309, 802 P.2d at 1008.

Genuine Disputes of Material Fact

¶12 Sparlin first argues the trial court erred in finding no material facts in dispute. He asserts the court not only made "critical factual errors in its interpretation of the evidence," but also "disregarded other extensive evidence undermining claims that [the court] took to be undisputed." Such errors, Sparlin argues, "clearly undermine[] the legitimacy of the [c]ourt's summary judgment decision."

¶13 As noted above, once the Sorensens convinced the trial court Sparlin lacked sufficient evidence to carry his ultimate burden at trial, Sparlin was required to demonstrate a genuine dispute as to a material fact. *See Nat'l Bank*, 218 Ariz. 112, ¶ 26, 180 P.3d at 984. A fact is "material" if it "might affect the outcome of the suit under the

governing law," and a dispute is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *United Bank of Ariz. v. Allyn*, 167 Ariz. 191, 195, 805 P.2d 1012, 1016 (App. 1990).

¶14 Because Sparlin Sr. lacked any memory of the events that gave rise to this lawsuit due to the onset of Alzheimer's disease, all support for his claims against the Sorensens came from documents obtained during discovery. The trial court noted, however, "that many of the exhibits relied on as support for claims offer little or no support for what [Sparlin] alleges." Notwithstanding "two emails of concern," the court concluded there was insufficient evidence "to show that Sorensen was intimately involved in the management of the projects" or that he "misrepresented or withheld information that was relied on by Sparlin, Sr. at the time he made his investments."

¶15 On appeal, Sparlin cites several of the same exhibits as "demonstrating a more expansive role for Sorensen than he admits." But he misconstrues the quantum of proof needed to withstand a summary judgment motion. Even if Sparlin is correct about Sorensen's "more expansive role," he fails to show how such evidence would affect the outcome of the action or allow a reasonable jury to return a verdict in his favor.[6] Conclusory allegations are insufficient to withstand a motion for summary judgment. *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 not defeat a motion for summary judgment").

[6]Moreover, we note it is not required that we scour the record for evidence to contradict the trial court's determination. *See Adams v. Valley Nat'l Bank of Ariz.*, 139 Ariz. 340, 343, 678 P.2d 525, 528 (App. 1984) (appellate court "not required to assume the duties of an advocate and search voluminous records and exhibits to substantiate an appellant's claims").

¶16 Sparlin provides four examples of "refuted . . . assertions" "either improperly dismissed or entirely disregarded" by the trial court as evidence of material factual disputes. His examples, however, are unsupported by admissible evidence and fail to present any dispute as to a *material* fact such that a reasonable jury would be able to return a verdict in his favor.

¶17 First, Sparlin asserts the trial court erred in concluding "many of the disputed transactions occurred before [Sorensen's] employment at WAD." In support, he relies on Sorensen's "entries and notations" in a QuickBooks file which, according to the "QuickBooks' 'audit trail' feature," predate Sorensen's employment at WAD. Sorensen explained, however, that the QuickBooks notations occurred after he was hired as a consultant in November 2004, and were made to "clarify transactions that occurred prior to [his] employment." Sorensen's explanation was supported by a sworn affidavit, in which he further avowed that "prior to his employment with WAD" in November 2004, he "had no knowledge of the Defendant entities, their operations or their projects," which Sparlin does not controvert.

¶18 Second, Sparlin purports to refute the trial court's conclusion that Sorensen had limited-to-no interaction with investors, including Sparlin Sr. But the evidence Sparlin cites either fails to support his allegations,[7] or fails to sufficiently link Sorenson's involvement to the wrongful acts he alleges.[8] Absent any

[7] For example, Sparlin alleges "Sorensen also spoke with Sparlin [Sr.] by telephone regarding other investments with the Defendants, and followed up by documenting the conversation in writing." In support, Sparlin merely cites an email to Paul Sorensen from Peter Skalla in which a phone conversation between Skalla and Sparlin Sr. is mentioned.

[8] Sparlin asserts that Paul Sorensen participated in a series of meetings with other management principals and discussed structure of the investment entities, citing emails and meeting minutes indicating Sorensen's presence at the meetings. The cited materials, however, fail to link Sorensen to any misrepresentations made to

evidence supporting those allegations, summary judgment will not be reversed. *See Orme Sch.*, 166 Ariz. at 310, 802 P.2d at 1009 ("If the party with the burden of proof on the claim . . . cannot respond to the motion by showing that there is evidence creating a genuine issue of fact . . . then the motion for summary judgment should be granted.").

¶19 Third, Sparlin argues "Sorensen is not being honest" regarding his involvement with Hadrianus, and cites accounting entries allegedly "confirm[ing] [Sorensen's] actual detailed knowledge regarding Hadrianus'[s] organization and the transactions in which it engaged." Although the exhibits he cites arguably show Sparlin as the source of a single Hadrianus investment, this evidence, viewed in the light most favorable to Sparlin, falls far short of presenting a genuine dispute of a material fact supporting the Sorensens' knowledge of any wrongdoing. Sparlin's assertion that "Sorensen also oversaw the production of tax forms and filings" relating to Sparlin Sr.'s Hadrianus investments similarly fails to identify a genuine dispute of material fact as the documents he cites provide no link to Sorensen, but in fact support Sorensen's uncontroverted sworn affidavit disavowing any involvement in the Hadrianus tax returns.

¶20 Finally, Sparlin contests the trial court's finding that Sorensen lacked any role in either fundraising or soliciting investors. In support, he cites an email between Sorensen and a potential investor arranging a conference call "with a couple other guys [who] have more details" about an apparent loan being sought. Such evidence, however, is insufficient to raise a genuine dispute over a material fact. And the record does not support his assertion that, "[v]iewed in its entirety, the record contains ample evidence at the very least to challenge the veracity of, if not to completely disprove, each of the key representations of fact relied upon in the Court's summary judgment ruling."

Sparlin Sr., nor are they supportive of any liability theory alleged against the Sorensens.

¶21 In *Orme School*, our supreme court described the policy behind the summary judgment rule as follows:

> Summary judgment procedure is not a catchpenny contrivance to take unwary litigants into its toils and deprive them of a trial, it is a liberal measure, liberally designed for arriving at the truth. Its purpose is not to cut litigants off from their right of trial by jury *if they really have evidence which they will offer on a trial*, it is to carefully test this out, in advance of trial by inquiring and determining whether such evidence exists.

166 Ariz. at 305, 802 P.2d at 1004, *quoting Whitaker v. Coleman*, 115 F.2d 305, 307 (5th Cir. 1940) (emphasis added in *Orme Sch.*). Sparlin acknowledges that his contested facts, when considered individually, fail to "establish[] an actionable claim against Sorensen." He nevertheless asserts "they are sufficient to create a triable question of fact as to Sorensen's claim that he had no substantive involvement in the development activities at issue in this case." We disagree. Even if the facts Sparlin has alleged are conceded, he has still failed to present any dispute as to a *material* fact, such that a reasonable jury would be able to return a verdict, under any of the liability theories advanced, in his favor. Viewing the evidence in the light most favorable to Sparlin, as we must, and drawing all logical inferences in his favor, we cannot say the trial court erred in finding no genuine dispute over any material fact. *See Orme Sch.*, 166 Ariz. at 310-11, 802 P.2d 1009-10.

Credibility Determinations

¶22 Sparlin next argues the trial court committed reversible error by assessing the credibility of his evidence. In support, he points to the trial court's summary judgment ruling, which voiced "serious doubts as to the credibility of many of the allegations as to the Sorensens." Asserting this "credibility" reference in its ruling constitutes "error *per se*," Sparlin cites *Orme School* and *Taser*

International, both of which extensively discuss the standards for summary judgment. In those cases, the reviewing court observed that summary judgment is inappropriate if the court must determine the credibility of witnesses, weigh the quality of evidence, or choose among competing inferences. *Orme Sch.*, 166 Ariz. at 308-09, 802 P.2d at 1007-08; *Taser Int'l, Inc. v. Ward*, 224 Ariz. 389, ¶ 12, 231 P.3d 921, 925 (App. 2010).

¶23 The Sorensens counter that the trial court "was not weighing the credibility of various witness accounts—[it] was simply expressing doubts about the claims in Sparlin, Jr.'s declaration and the lack of support in the attached exhibits." We review de novo questions of alleged legal error. *See Yauch v. S. Pac. Transp. Co.*, 198 Ariz. 394, ¶ 10, 10 P.3d 1181, 1186 (App. 2000).

¶24 We agree with the Sorensens that the trial court's comment on the credibility of Sparlin's allegations is distinct from the type of credibility determinations reserved for the trier of fact. In a footnote to the "credibility" sentence to which Sparlin takes exception, the court listed "example[s]" of "some of the more glaring unsupported allegations" in Sparlin Jr.'s statement of facts. Those examples demonstrate the court made no credibility determinations as to witnesses, but rather commented only on the lack of support found in the exhibits Sparlin cited for his factual assertions.[9]

[9]The "credibility" of the supportive evidence questioned by the trial court included a memorandum sent to Sorensen, a fax signed by "Paul," emails that Sorensen was sent copies of, a status report in which Sorensen is mentioned, an email that has no apparent connection to Sorensen, a letter from a title company addressed to Sorensen, an email from Sorensen setting up a conference call, and an email indicating Sorensen had mailed a package. As previously noted, none of the exhibits reveal any direct involvement or knowledge of wrongdoing by Sorensen, and at no point did the trial court improperly comment on the credibility of testimonial evidence.

¶25 In *Orme School*, our supreme court acknowledged that "the trial judge must evaluate the evidence to some extent in ruling on a motion for summary judgment," 166 Ariz. at 309, 802 P.2d at 1008, and we have recognized that self-serving assertions without factual support in the record are insufficient to defeat summary judgment motions, *see Florez*, 185 Ariz. at 526, 917 P.2d at 255. As previously observed, the purpose of summary judgment is to "inquir[e] and determin[e]" whether litigants have "evidence which they will offer on a trial" adequate to support their defense or claim. *Orme Sch.*, 166 Ariz. at 305, 802 P.2d at 1004, *quoting Whitaker*, 115 F.2d at 307. The trial court's assessment of factual support for claims is a proper judicial function in summary judgment proceedings, not legal error.

Affirmative Defense

¶26 Sparlin next argues the trial court erred by not considering his "affirmative defense" that consent to the LCS settlement was obtained by fraud. He claims to have identified multiple misrepresentations and omissions of fact, each "individually sufficient to support a finding that Sparlin cannot be held to have breached the settlement." He argues each individual misrepresentation is supported by "extensive evidence" cited in his "Consolidated Response to Defendants' Motions for Summary Judgment" and accompanying statement of facts.

¶27 In his opposition to the summary judgment motion, Sparlin argued that defendants had withheld "essential information about the amount of debt that . . . would [be] incur[red] and the nature of the agreement [they] intended to enter into"; that defendants misrepresented their intentions with respect to "development efforts," including commitments that had been made with respect to construction of a spine road; and that defendants "grossly overstated lot values and builder absorption rates."

¶28 In a summary judgment ruling specifically addressing the validity of the LCS settlement agreement, the trial court observed that "[Sparlin] knowingly agreed to the settlement after adequate disclosure." The court thus concluded there were "no

genuine issues of material fact and that the settlement entered into by the parties [wa]s fully binding and preclude[d] all of [Sparlin's] LCS claims." In its ruling, the court also noted that "[t]he signors, including Sparlin, Sr., acknowledged that they were represented by counsel of their own choosing and that the settlement was the best way of maximizing the value of their investments." The court further observed that Sparlin "and the other settling parties represented and warranted that no representations were made by others to induce the settlement."

¶29 Contrary to Sparlin's assertion that the trial court "did not consider or even address" his evidence, the court expressly stated that it had "reviewed and considered the motion papers, responses, statements of fact[s], and oral argument" before issuing its ruling. We presume a trial court considers all the evidence properly before it. *Fuentes v. Fuentes*, 209 Ariz. 51, ¶ 18, 97 P.3d 876, 880-81 (App. 2004). Although Sparlin is correct that the trial court failed to make any specific finding regarding his proffered evidence, a court is not required to respond to each and every piece of evidence, especially where, as here, there is such an extensive record.[10] Rather, it is incumbent upon the appellant to show the court erred; conclusory allegations do not meet that burden. Ariz. R. Civ. P. 56(e)(4) (response to summary judgment motion must set forth specific facts showing a genuine issue for trial); *Florez*, 185 Ariz. at 526, 917 P.2d at 255. Sparlin's unsupported allegations are insufficient to show the trial court did not consider the evidence allegedly supporting his challenge to the validity of the LCS settlement agreement.

Attorney Fees

¶30 Sparlin raises a number of additional issues concerning the attorney fees awarded to the Sorensens. He first argues that

[10] For example, Sparlin Jr.'s consolidated response to the motion for summary judgment, which is one hundred pages long, relies on a statement of facts that is more than four hundred pages long, which, in turn, cites over 350 exhibits spanning 3,000 pages.

because he raised only tort claims, the trial court erred in awarding fees under A.R.S. § 12-341.01(A), which allows a fee award only for claims which arise out of contract. Alternatively, he argues that even if some of his claims did involve a contract, the trial court erred by "failing to limit the attorney fee award to the claims it determined to be contractual." We address each of these arguments in turn.

Applicability of § 12-341.01

¶31 Under § 12-341.01(A), "[i]n any contested action arising out of a contract, express or implied, the court may award the successful party reasonable attorney fees." Whether a cause of action arises from a contract is a question of law we review de novo. *Caruthers v. Underhill*, 230 Ariz. 513, ¶ 58, 287 P.3d 807, 820 (App. 2012); *Murphy Farrell Dev., LLLP v. Sourant*, 229 Ariz. 124, ¶ 31, 272 P.3d 355, 364 (App. 2012) (court's interpretation of fee provisions is issue of law subject to de novo review).

¶32 In determining whether a claim arises out of contract for purposes of the fee-shifting statute, courts are not bound by the mere "form of the pleadings," but should consider the "nature of the action and the surrounding circumstances." *Marcus v. Fox*, 150 Ariz. 333, 335, 723 P.2d 682, 684 (1986). The "mere existence of a contract somewhere in the transaction" is insufficient to support a fee award, *id.*, nor does "[t]he existence of a contract that merely puts the parties within tortious striking range of each other . . . convert ensuing torts into contract claims," *Ramsey Air Meds, L.L.C. v. Cutter Aviation, Inc.*, 198 Ariz. 10, ¶ 27, 6 P.3d 315, 320 (App. 2000). However, where tort and contract claims are sufficiently "intertwined," our supreme court has held the fee-shifting provision applicable to tort claims "as long as the cause of action in tort could not exist but for the breach of contract." *Sparks v. Republic Nat'l Life Ins. Co.*, 132 Ariz. 529, 543, 647 P.2d 1127, 1141 (1982).

¶33 Here, the trial court awarded the Sorensens attorney fees and costs "on the basis of [Sparlin's] breach of the settlement contract in making the LCS claims part of the lawsuit." Sparlin argues that the trial court's consideration of the Sorensens' contract

defense, rather than the "actual causes of action pleaded by the parties," violated the "plain language of the statute." We agree that contract defenses to tort claims are insufficient to bring the action within the purview of the fee-shifting statute. *See Benjamin v. Gear Roller Hockey Equip., Inc.*, 198 Ariz. 462, ¶ 23, 11 P.3d 421, 425 (App. 2000), *abrogated on other grounds by Phelps v. Firebird Raceway, Inc.*, 210 Ariz. 403, 111 P.3d 1003 (2005).

¶34 In *Benjamin*, a participant in a roller hockey league sued the owner of the rink after he was injured by an allegedly raised floor tile. *Id.* ¶¶ 1, 5. The owner successfully defended the tort claim by presenting a release plaintiff had signed absolving the rink of all liability. *Id.* ¶ 1. On appeal, the release was found to be valid and encompassing plaintiff's injuries, but the owner's request for attorney fees pursuant to § 12-341.01(A) was rejected because the "thrust of Plaintiff's claim was in tort." *Id.* ¶¶ 21-23. Other cases are in accord. *See In re Bertola*, 317 B.R. 95, 101-02 (B.A.P. 9th Cir. 2004) (no attorney fees where alleged violation of an implied bailment contract found to be insufficient contractual predicate for fraud and conversion claims); *Kennedy v. Linda Brock Auto. Plaza, Inc.*, 175 Ariz. 323, 325-26, 856 P.2d 1201, 1203-04 (App. 1993) (fees denied where automotive dealer successfully defended against plaintiff's statutory "Lemon Law" claims per lease agreement with warranty disclaimer explicitly assigning to plaintiff all rights and remedies under the new car warranty, vehicle was leased "as is," and dealer provided no warranties); *Sirek v. Fairfield Snowbowl, Inc.*, 166 Ariz. 183, 188, 800 P.2d 1291, 1296 (App. 1990) (attorney fees denied where ski resort defended personal injury claims on basis of release).

¶35 In contrast, tort and contract claims have been found to be sufficiently intertwined when the validity of the underlying contract is contested. In *Lamb v. Arizona Country Club*, plaintiffs filed a motion under Rule 60(c), Ariz. R. Civ. P., which the court characterized as an attempt to invalidate a negotiated settlement agreement. 124 Ariz. 32, 34, 601 P.2d 1068, 1070 (App. 1979). Concluding the matter "'aros[e] out of a contract' as contemplated by § 12-341.01," the court awarded the defendants attorney fees on appeal. *Id.* A similar result was had in *Hays v. Fisher*, 161 Ariz. 159,

167, 777 P.2d 222, 230 (App. 1989), where attorney fees incurred establishing the existence and breach of a settlement agreement were awarded to the prevailing party. *See also Flood Control Dist. of Maricopa Cty. v. Conlin*, 148 Ariz. 66, 71, 712 P.2d 979, 984 (App. 1985) (same).

¶36 Here, Sparlin brought a number of fraud, misrepresentation, and statutory claims in relation to three separate investments, including a claim that the LCS settlement agreement was obtained by fraud. Although the parties disagree whether Paul Sorensen was a party to the LCS settlement agreement, it appears both signed the settlement agreement, Sorensen as a "Class A Member[]" of the LCS LLC and Sparlin as a "Class B Member[]," arguably providing sufficient privity of contract for purposes of § 12-341.01.[11] We need not resolve that issue, however, because even if Paul Sorensen was not a party to the settlement agreement, he was clearly an intended third-party beneficiary, as Sparlin conceded at oral argument, and the award of attorney fees was justified on that ground. *See Nationwide Mut. Ins. Co. v. Granillo*, 117 Ariz. 389, 394-95, 573 P.2d 80, 85-86 (App. 1977) (rejecting argument that successful defendant must be party to contract to recover attorney fees under § 12-341.01); *W. Techs., Inc. v. Sverdrup & Parcel, Inc.*, 154 Ariz. 1, 7-8, 739 P.2d 1318, 1324-25 (App. 1986) (allowing attorney fee award where party alleged it was third-party beneficiary of contract).

Amount of Award

¶37 Sparlin alternatively argues that even if the claims relating to the LCS settlement can be construed as contractual, the court erred by not limiting its attorney fee award to those claims. The Sorensens counter that the entire matter "arose from a contractual dispute," as "Sparlin, Sr. was a member of limited

[11] Although not all signature pages to the LCS Settlement Agreement have been included in the appellate record, the evidence suggests the agreement was signed by all LCS members, a point not contested by Sparlin. His dispute focuses instead on the capacity of Sorensen's signature and its effect on the applicability of § 12-341.01.

liability corporations governed by operating agreements, as well as a beneficiary of various development and lending agreements." They characterize the allegations here as Sparlin being "tricked into entering or defrauded during these contractual relationships," which they argue is "the essence of what it means for a matter to arise from a contractual dispute."

¶38 To find contract and tort claims "intertwined" under § 12-341.01, Arizona courts have consistently required contract actions to be an essential basis of plaintiff's claims, not merely a factual predicate to the action. *See Sparks*, 132 Ariz. at 544, 647 P.2d at 1142 (concluding that plaintiff's insurance bad faith claim was "so intrinsically related to the [insurance] contract" as to support an attorney fee award, but "[t]he same cannot be said for an action for misrepresentation," which "sounds mainly in tort" and "does not depend upon a breach of the contract"); *Kennedy*, 175 Ariz. at 325-26, 856 P.2d at 1203-04 (lease contract merely factual predicate to statutory Lemon Law claim); *O'Keefe v. Grenke*, 170 Ariz. 460, 472-73, 825 P.2d 985, 997-98 (App. 1992) ("peripheral involvement" of contract does not require application of § 12-341.01 where cause of action arose out of statutory, not contractual, obligation); *Cashway Concrete & Materials v. Sanner Contracting Co.*, 158 Ariz. 81, 83, 761 P.2d 155, 157 (App. 1988) (foreclosure of mechanic's lien did not arise out of contract even though breach of contract was factual predicate).

¶39 In *Modular Mining Systems, Inc. v. Jigsaw Technologies, Inc.*, this court upheld an attorney fee award for a trade secrets claim "interwoven and overlapping" with breach of employment agreements claims. 221 Ariz. 515, ¶¶ 22-23, 212 P.3d 853, 860 (App. 2009). In doing so, we expressly noted that the tort and contract claims "were based on the same set of facts" and involved common allegations, thus requiring the same factual and legal development. *Id.* ¶ 24. In contrast, the claims brought by Sparlin in the instant matter relate to three separate and distinct investments, each factually unique and implicating different levels of involvement by Sorensen. The LCS settlement agreement, the "contract" in this case, relates to one of those investments.

¶40 We first note that the Sorensens have provided no support for their assertion that operating and lending agreements are sufficient to bring Sparlin's claims within the purview of § 12-341.01(A), nor are we aware of any. Moreover, even if such support did exist, the operating and lending agreements here cannot reasonably be considered an essential basis of Sparlin's TRG and Corona claims. Accordingly, the Sorensens are not entitled to attorney fees incurred in defense of those claims. *Cf. Ader v. Estate of Felger*, 240 Ariz. 32, ¶ 46, 375 P.3d 97, 109-10 (App. 2016) (attorney fees denied where no breach of operating agreements were alleged). Nonetheless, the trial court awarded the full amount of attorney fees requested by the Sorensens because it found the "fees and costs in defending the LCS claims and other claims made by [Sparlin wer]e intertwined and [could]not be effectively separated for the purpose of this analysis." But that is not the correct legal standard. *See Sparks*, 132 Ariz. at 543, 647 P.2d at 1141 (fees sufficiently intertwined "as long as the cause of action in tort could not exist but for the breach of the contract"). Accordingly, we remand to the trial court with instructions to reevaluate an appropriate attorney fee award in light of the case law and analysis discussed above. In doing so, we recognize that the parties have previously intimated that separating fees by claim would be "very difficult." We note, however, that the trial court has significant discretion in awarding attorney fees under to § 12-341.01(A), which we will not disturb absent a clear abuse of that discretion. *See, e.g.*, *Vortex Corp. v. Denkewitz*, 235 Ariz. 551, ¶ 40, 334 P.3d 734, 745 (App. 2014).

¶41 Sparlin additionally alleges the trial court erred in awarding costs for an expert who was not timely disclosed, and requests that those costs be appropriately reduced. The Sorensens argue the witness was adequately disclosed in both their third and fourth supplemental disclosure statements, albeit not in the "Expert Witnesses" section. Because the timely disclosure clearly conveys the Sorensens' intent to use the witness as both a fact witness and an expert witness to rebut Sparlin's forensic accountant, we see no abuse of the trial court's discretion in awarding those costs to the Sorensens. *See Lohmeier v. Hammer*, 214 Ariz. 57, ¶ 18, 148 P.3d 101, 106 (App. 2006) (trial court has "wide latitude" in assessing expert

fee awards); *see also Scottsdale Ins. Co. v. Cendejas*, 220 Ariz. 281, ¶ 42, 205 P.3d 1128, 1136 (App. 2009) (fees awarded for expert who did not testify but provided some services after Rule 68 offer made).

Disposition

¶42 For the foregoing reasons, the summary judgment in favor of the Sorensens is affirmed, but we vacate the award of attorney fees and remand the case to the trial court for further determination of an appropriate award of attorney fees, consistent with our decision regarding this issue.