

knotty alder doors almost two years after they were installed. After a bench trial, the trial court concluded that excessive moisture was introduced into the wood during the manufacturing process and that the moisture caused the cracks as it slowly released. But the court also found that neither party had proven the origin of the defect. Despite findings that negate proof of the necessary elements by a preponderance of the evidence, the court entered judgment for Chanen and awarded damages and attorney's fees. Because we find the trial court's findings of fact and conclusions of law demonstrate that Chanen failed to carry his burden to prove the legal elements of his claim, we reverse and remand for entry of judgment in favor of the subcontractor.

*FACTS AND PROCEDURAL HISTORY*¹

¶2 Chanen, owner and then-CEO of Chanen Construction Company ("CCC"), contracted with CCC to have CCC act as the general contractor for the construction of his personal residence in the Arizona Biltmore Mountain Estates. On June 17, 2004, CCC contracted with K&M Woodcrafts, Inc. ("K&M") to manufacture and install the custom millwork for the home, including interior doors made of premium-grade knotty alder.

¹ We view the facts in the light most favorable to upholding the trial court's decision. *Harris v. City of Bisbee*, 219 Ariz. 36, 37, ¶ 3, 192 P.3d 162, 163 (App. 2008).

The subcontract price for manufacture and installation of the knotty alder doors was \$78,462.

¶3 Weeks before the K&M subcontract was signed, the ongoing construction of the home was significantly damaged by a rock slide, delaying the project by several months.² CCC had included a "time is of the essence" provision in the "General Conditions of the Construction Subcontract Agreement."

¶4 K&M began manufacturing the millwork in its woodshop in July 2004. During the non-monsoon months of summer, K&M ran swamp coolers in the shop where the doors were manufactured and stored. During the monsoon season, K&M operated only the fans on the swamp coolers, but not the water pumps, and left the exterior doors to the shop open. After completing the doors in late 2004, K&M asked for a partial payment, despite a provision in the subcontract that delayed payment until placement in a bonded warehouse or after installation. As a condition for payment by CCC and Chanen, K&M submitted a bill of sale for \$36,634 for "Fabrication" with a provision that acknowledged that "risk of loss shall not pass to Contractor until delivery and acceptance of finished goods to Project Site." Another requirement for payment was that K&M deliver the doors for storage in the garage at the job site.

² Another rock slide occurred on December 6, 2004, causing further project delays.

¶15 On December 29, 2004, K&M delivered the doors to the home. Jesse Ulloa, project manager for K&M on the Chanen home, drafted a letter warning Chanen and CCC about issues related to improper acclimatization of wood products. Though the letter's address block set forth an incorrect mailing address for CCC, K&M's fax record from December 29, 2004, logs two faxes of similar duration sent to the Chanen residence and CCC at 9:15 a.m. and 9:17 a.m., respectively (though the 9:17 a.m. fax was not about the acclimatization issue). Ulloa also spoke to CCC's superintendent regarding his concerns about storage of the doors at the job site.

¶16 With the approval of CCC's COO, and despite the subcontract provision and CCC's past practices, Chanen paid K&M the \$36,634 from his own funds and allowed the doors to be stored in the garage of the unfinished home. For three months, the doors remained in the garage (which was not weathertight), stored horizontally and raised off the floor with spacers to allow airflow.

¶17 At CCC's direction, K&M began to install the doors in March 2005. At the beginning of installation, drywall preparation for painting and tiling was still occurring in the house. Throughout the March to May 2005 period in which the doors were installed, the air conditioning was not running in the house and the windows were open. The air conditioning was

not turned on until approximately June 2005, after installation of the doors was complete. Chanen moved into the house in August 2005. K&M completed its punch list in October 2005, and noted no problem with the doors. In February 2007, Chanen noticed small cracks in some of the doors.

¶18 Chanen provided a list of problem doors to K&M. K&M attempted to repair some of the doors, but both Chanen and K&M agreed that for some of the doors, the repair efforts were aesthetically unsuccessful. An April 3, 2007 letter from CCC to K&M declared 25³ doors defective and claimed that the defects established a breach of the subcontract between CCC and K&M. The same letter demanded a prompt repair or replacement of the doors. K&M refused the demand because it believed it "only agreed to install the doors on the condition that CCC release K&M from responsibility for any resulting damage as a result of the Project's lack of necessary climate control." Chanen, as a third-party beneficiary to the CCC/K&M subcontract, then sued K&M. Chanen alleged that K&M breached its subcontract with CCC by refusing to remedy a latent defect in the 25 doors, and that this breach was also a breach of the subcontract's extended warranty covering latent defects.

³ At trial, Chanen's claim included 41 doors -- 33 interior and 8 exterior doors.

¶9 The case proceeded to a bench trial in October 2010. Witnesses from CCC and K&M testified, along with the craftsman who prepared estimates for the repairs. The court also considered deposition testimony, including the testimony of a wood scientist and an expert witness architect.

¶10 The general conditions of the subcontract provided a one-year warranty against defects in workmanship and materials, but also provided that for latent defects -- those "not reasonably ascertainable prior to or within one year following completion and acceptance" -- the warranty would extend "for a period of time equal to the statute of limitation period applicable to latent defect[s]." The general conditions also granted CCC "complete control" over the project, including the right to decide the time and order of installation.

¶11 The specifications for the project, which were incorporated into the Chanen/CCC contract and therefore into the CCC/K&M subcontract, required manufacture and installation in compliance with the American Woodworking Institute's ("AWI['s]") standards. The AWI standards warn of "dimensional problems in architectural woodwork products as the result of uncontrolled relative humidity," due to the hygroscopic nature of wood. The standards direct installation of such woodwork under the terms of § 1700. Section 1700 requires stabilization of the building environment:

Areas to receive architectural woodwork must be fully enclosed with windows installed and glazed, exterior doors in place, HVAC systems operational, and temporary openings closed. All plaster, wet grinding, and concrete work shall be fully dry.

Section 1700 also requires that factory-finished woodwork be brought to environmental equilibrium on-site over a period of three days or more.⁴

¶12 On December 16, 2010, at the conclusion of its 341 findings of fact, the trial court ruled in favor of Chanen. The trial court faulted K&M for failure to warn CCC about issues with acclimatization before installation, despite the fact that acclimatization standards were incorporated into the subcontract, and concluded that K&M breached its subcontract with CCC by failing to comply with its obligation to remedy the consequences of a latent defect. The latent defect identified by the court was excess moisture introduced by the operation of swamp coolers during manufacture, which resulted in the doors cracking approximately two years after they left K&M's shop and were installed. The court awarded Chanen \$144,500 in damages, plus attorney's fees and costs.

¶13 K&M timely appeals. We have jurisdiction under A.R.S. § 12-2101(A)(1).

⁴ The project specifications also directed CCC to provide the necessary environmental conditions to protect materials and finishes from damage due to temperature and humidity.

STANDARD OF REVIEW

¶14 On appeal, we review questions of law de novo, but will not disturb the trial court's findings of fact unless they are clearly erroneous. *Spaulding v. Pouliot*, 218 Ariz. 196, 199, ¶ 8, 181 P.3d 243, 246 (App. 2008). A trial court's mixed findings of fact and law are not binding on the appellate court upon review. *Park Cent. Dev. Co. v. Roberts Dry Goods, Inc.*, 11 Ariz. App. 58, 60, 461 P.2d 702, 704 (1969). A finding of fact is not clearly erroneous if it is supported by substantial evidence -- that is, "evidence which would permit a reasonable person to reach the trial court's result." *Davis v. Zlatos*, 211 Ariz. 519, 524, ¶ 18, 123 P.3d 1156, 1161 (App. 2005) (citation omitted).

DISCUSSION

¶15 In civil actions -- including those for breach of contract and breach of warranty -- the burden is on the plaintiff to prove the claims by a preponderance of the evidence. *Pfeil v. Smith*, 183 Ariz. 63, 65, 900 P.2d 12, 14 (App. 1995). And when parties bind themselves by a lawful contract containing clear and unambiguous terms, the court must give effect to the contract as written. *Bank One Corp. v. Indus. Comm'n*, 226 Ariz. 134, 137, ¶ 10, 244 P.3d 571, 574 (App. 2010).

¶16 The Chanen/CCC contract warrants that "materials . . . will be of good quality and new unless otherwise required or permitted . . . [and] that the [w]ork will be free from defects not inherent in the quality required or permitted, and that the [w]ork will conform to the requirements of the Contract Documents." The subcontract further guarantees that the materials used by K&M will be "new unless otherwise specified" and that its work "will be of a thorough, first class, sound, workmanlike and substantial quality; constructed by qualified, careful and efficient workers; and free from defects in design, workmanship and material[.]"

¶17 Chanen's claim in this case is grounded in an alleged breach of an express warranty -- an express warranty with terms defined by the contract between Chanen and CCC and the subcontract between CCC and K&M. The Chanen/CCC contract warranted against defects "not inherent in the quality required or permitted," and the CCC/K&M subcontract warranted against defects "in design, workmanship and material."

¶18 These contracts did not guarantee the doors' performance -- that is, they were not an insurance policy against failure. The warranty was against certain types of faulty performance -- those caused by defects in design, workmanship and material. Accordingly, Chanen's burden was not simply to prove that the doors failed, or that they failed

because of the release of moisture. Rather, he was legally required to prove by a preponderance of the evidence that: (1) a defect in K&M's design, workmanship or material existed; (2) the defect was not inherent in the "quality required or permitted;" and (3) the defect was not reasonably ascertainable within the one-year period following completion and acceptance of K&M's work. To support a judgment in favor of Chanen, the trial court's findings of fact and conclusions of law must indicate that Chanen carried his burden of proof on each element. Upon review, we conclude that they do not. In reaching our conclusion, we do not substitute our own view of the facts for those of the trial court. Instead, we examine the findings to determine whether they support a judgment for plaintiff under the applicable legal standard.

¶19 The 341-paragraph section of the trial court's ruling entitled "Findings of Fact" does not actually contain findings of fact -- it merely recites and summarizes the trial and deposition testimony. That section of the ruling does not indicate what, if anything, the court found to have been proven by a preponderance of the evidence. It also does not reveal the court's resolution of the conflicts in the evidence. This is insufficient to satisfy the trial court's obligation to make such findings in a manner that assists the appellate court -- and the parties -- in determining whether the judgment is, as a

matter of fact and law, supported by the record. See *In re U.S. Currency in the Amount of \$26,980.00*, 199 Ariz. 291, 294, ¶ 7, 18 P.3d 85, 88 (App. 2000); *State Tax Comm'n v. Magma Copper Co.*, 41 Ariz. 97, 100, 15 P.2d 961, 962 (1932) (agreeing that "[i]t is the trial court's duty to make findings of the essential or determining facts, on which its conclusions in the case [were] reached, specific enough to enable [the appellate court] to review its decision on the same grounds as those on which it stands") (emphasis omitted) (citation omitted).

¶20 Though Chanen and K&M disputed who was responsible for protecting the doors, neither party disputed that the inherent hygroscopic nature of wood and the inevitable cycle of moisture absorption and release resulted in the cracks in the doors. And the court focused much of its attention on this inherent and inevitable quality, ultimately surmising that this quality, combined with humid seasonal and environmental factors during manufacture in K&M's shop, caused a latent defect. Throughout its conclusions of law, the trial court speculated as to causation when the relevant inquiry was whether the warranty -- as defined by the contract -- was breached.

¶21 The trial court's first conclusion of law illustrates the problem:

The difficulty in this case is that *no one has satisfactorily explained why the doors failed*, except that it was because moisture

in the doors exceeded the final stationary point under living conditions in the home, and that the doors cracked as they lost moisture to reach that point. *But when the doors became saturated is not clear.*

(Emphases added.) The emphasized text is contrary to any finding that the doors were saturated to the point of defect when they left K&M's control. And it is also inconsistent with the notion that Chanen carried his burden of proof.

¶22 Taken together, the court's findings cannot support a legal conclusion that K&M breached the warranty by supplying doors made of defective materials. The trial court did not find that the moisture content of the wood fell outside industry standards. Indeed, it found: "No one knows the moisture content of the wood when received by K&M. While everyone except [Chanen's wood expert] assumes that the moisture content met industry standards, we can't know for sure." When we apply the burden of proof, the finding that "no one knows," coupled with the absence of a finding based on some other evidence that the wood was defective, can only support a conclusion that the wood was *not* defective.

¶23 The court opined that the doors "would presumably lose moisture" at the end of monsoon season in September 2004 and during storage in the garage, and "might gain some moisture" during the January 2005 rainy season. The conjectural nature of this language reveals that the court speculated as to the cause

of the cracks, and the court's conclusion that "when the doors were installed they had the same moisture they would have had had they come directly from the shop" is unsupported by substantial evidence.

¶24 The issue whether the architect's choice of knotty alder was an inappropriate choice for the doors was also directly before the trial court. On that point, the court opined:

Knotty alder *seems* to be more of a mystery than some woods. *Perhaps* it dries slower than other woods. Since it took a year and a half after installation for the cracks to occur (and the Court takes this to be proven), *perhaps* alder wood takes longer for the acclimatization process than advised or expected.

(Emphases added.) The court's musings about what might be the case may accurately reflect the lack of probative value of the evidence presented. But it does not serve as a finding of fact that Chanen proved by the requisite quantum of evidence that the inherent quality of the materials he selected did not doom the doors to fail. And Chanen was required to prove that a defect in design, materials or workmanship led to his damages. The court's ruling demonstrates that he did not do so -- under the court's own findings, even perfect performance by K&M could have

resulted in cracking.⁵ This is not proof of a breach that can give rise to liability.

¶125 Further, as for whether there was a defect in design, we note that based on the record, the only design element questioned is the use of knotty alder. “[I]n product design defect cases, the focus is on the inherent nature and quality of all products of similar design.” *Jones v. Pak-Mor Mfg. Co.*, 145 Ariz. 121, 128, 700 P.2d 819, 826 (1985). There is a complete lack of evidence in the record that doors made of knotty alder can be expected to remain crack-free for any period of time.

¶126 The trial court also found that the use of sealer retarded the release of moisture for more than two years between manufacture in November 2004, and the appearance of cracks in February 2007. But there is no evidence in the record to support such a finding. Chanen presented no testimony or evidence that sealants can or do retard moisture release for any period of time beyond the recommended acclimatization period.⁶

⁵ The trial court found the absence of any failure in the other knotty alder products in the Chanen home to be due in part to a difference in the dimensions of the wood required for those other products. We note that if this is in fact true, K&M cannot be faulted for the dimensions of the doors -- these were dictated by the architect.

⁶ The trial court concluded that K&M failed to warn CCC regarding “a problem of acclimatizing the doors.” We note that CCC was bound by the same contract documents which required an acclimatization period as K&M was bound to. K&M was not required to warn CCC of the requirements of a contract to which

¶127 Finally, the court concluded that excess moisture introduced by environmental conditions during manufacture constituted a defect -- but this conclusion does not comport with the express provisions of the contracts, which define the scope of the warranty and the defects covered. In a colloquial sense, any failure of a product could be considered a "defect." But under the contractual warranty at issue in this case, Chanen was required to demonstrate that the wood was infused with moisture to a degree that did not meet industry standards.

¶128 We cannot say whether the doors were or were not defective when they left K&M's control, and upon this record, neither could the trial court. The trial court's conclusions of law did not hold Chanen to his burden to prove his claim, and this was error.

CCC was a party. In any event, a finding that K&M failed to adequately warn about acclimatization suggests that the court found acclimatization to be material -- a finding in direct conflict with earlier findings that suggest acclimatization was immaterial.

CONCLUSION

¶129 We reverse the decision of the trial court and remand for entry of judgment in favor of K&M, and for consideration of a single award of the attorney's fees and costs requested by K&M both in the trial court proceedings and on this appeal.

/s/

PETER B. SWANN, Presiding Judge

CONCURRING:

/s/

MICHAEL J. BROWN, Judge

/s/

JON W. THOMPSON, Judge