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

URSULA OPALINSKI-LEVY individually and as the Personal Representative of the ESTATE OF LEWIS LEVY, deceased; and as the agent or managing designated representative of the following: LLSO, LLLP; THE LLS FAMILY TRUST; and UA OPALINSKI-LEVY REVOCABLE TRUST, Plaintiffs/Counterdefendants/ Appellees/Cross-Appellants, And USA RIDE, LLC, an Arizona limited liability company; CENTRAL SERVICES HOLDINGS, LLC, an Arizona limited liability company; and MOPAR, INC., an Arizona corporation, Counterdefendants/Appellees/ Cross-Appellants, v. RICHARD L. BARRETT; KYLE BARRETT; CK TRANSPORTATION GROUP, INC., an Arizona corporation; STUFFINGTON BEAR FACTORY, L.L.C., an Arizona limited liability company, Defendants/Appellants/ Cross-Appellees, and	No. 1 CA-CV 11-0526 DEPARTMENT A **MEMORANDUM DECISION** (Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)

CK TRANSPORTATION GROUP, INC., an Arizona corporation; RICHARD BARRETT, individually and as General Partner and the Manager of RRKR Arizona Group, an Arizona limited liability limited partnership; and RRKR ARIZONA GROUP, an Arizona limited liability limited partnership,

Counterclaimaints/Appellants/Cross-Appellees.

Appeal from the Superior Court in Maricopa County

Cause No. CV2008-004245

The Honorable Edward O. Burke, Judge (Retired)

AFFIRMED IN PART, REVERSED IN PART, REMANDED

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T I M M E R, Presiding Judge

¶1 Richard L. Barrett, Kyle Barrett, CK Transportation Group, Inc., Stuffington Bear Factory, L.L.C., and RRKR Arizona Group, LLP (collectively, "Appellants") appeal from the superior court's amended judgment entered following trial. Ursula Opalinski-Levy, the Estate of Lewis Levy, LLSO, LLLP, The LLS Family Trust, UA Opalinski-Levy Revocable Trust, USA Ride, LLC, Central Services Holdings, LLC, and Mopar, Inc. (collectively, "Appellees") cross-appeal from the same judgment. For the reasons that follow, we affirm in part, reverse in part and remand for further proceedings.

BACKGROUND

¶2 Lewis Levy ("Lewis") owned and operated numerous transportation companies during the several decades preceding his death in 2004. Richard L. Barrett ("Richard") served as Lewis's attorney and was a close advisor to both Lewis and his wife, Ursula Opalinski-Levy ("Ursula"). Richard and his wife, Kyle Barrett ("Kyle"), also owned their own business, the Stuffington Bear Factory, L.L.C. ("Stuffington").

¶3 In 2003, Richard was planning to purchase real property on Thomas Road (the "Property") for Stuffington's use. At Lewis's urging, however, Richard agreed to purchase the

assets of five of Lewis's transportation companies.[1] To that end, Lewis and Richard signed an "Asset Purchase Agreement," and Richard signed two promissory notes: a "Purchase Asset Note" and a "Vehicle Asset Note" (collectively, the "Transportation Notes").

¶4 After his purchase of the transportation companies, Richard still wanted to purchase the Property, but he was no longer able to qualify for a loan. Consequently, Lewis borrowed $1.5 million from Bank One (the "Bank One Loan") and purchased the Property in the name of one of his entities, agreeing to hold it until Richard could obtain his own financing. In exchange, Richard agreed that the future sale of the Property to Richard would net Lewis a ten percent annual return. Following Lewis's purchase of the Property, Stuffington occupied the premises and invested $380,000 in improvements. Richard and Stuffington paid all property taxes and insurance premiums.

¶5 Shortly before Lewis's death, a customer of one of the purchased transportation companies cancelled its contract, triggering a provision in the Asset Purchase Agreement that reduced the amount Richard owed under the Purchase Asset Note. Additionally, Richard agreed to unwind the purchase of one of

[1] For ease of reference, we generally refer throughout this decision to "Richard," "Lewis," and "Ursula," intending to include any of their related entities and marital communities as appropriate.

the transportation companies, which also reduced Richard's obligation. After Lewis died, Ursula and Richard disputed the amounts Richard owed as a result of these events.

¶6 In January 2005, the parties discussed settlement of all outstanding disputes and related financial issues. According to Richard, the parties agreed, among other things, that: (1) the Purchase Asset Note would increase by $150,000 as payment for the ten percent annual return promised Lewis for purchasing the Property in the name of one of his entities, (2) Ursula would transfer ownership of the Property to Richard, and (3) Richard would assume the Bank One Loan. Ursula disputes that any agreement was reached between the parties.

¶7 In April 2005, the parties agreed Ursula would pay off the Bank One Loan and serve as Richard's lender. Consequently, Ursula paid off the Bank One Loan, and Richard gave her a promissory note for $1.5 million (the "Replacement Note") payable over three years with a balloon payment.

¶8 Ursula never transferred ownership of the Property to Richard. She ultimately sued Richard for breach of fiduciary duty, malpractice, breach of contract, breach of the implied covenant of good faith and fair dealing, conversion, fraud, and clouding title to real property.[2] Richard filed a counterclaim,

[2] Ursula also named Kyle and Stuffington as defendants, but the trial court granted judgment as a matter of law in favor of both

asking the court to declare the parties' rights and obligations under the agreements allegedly reached in 2003 and 2005, quiet title to the Property, and award him damages for breach of contract and libel. After initiation of this lawsuit, Richard stopped making payments on the Transportation Notes.

¶9 The case eventually proceeded to a jury trial. After Ursula's case-in-chief, the trial court granted judgment as a matter of law ("JMOL") in favor of Richard on the conversion claim. The jury ultimately returned verdicts in favor of Richard on all remaining claims but awarded him no damages for his breach-of-contract and libel claims. Significantly, the jury found that Richard and/or Kyle "are or should be the owners of the [Property]" and shall have thirty-six months to obtain financing to pay the balance of the Replacement Note.

¶10 Ursula filed post-verdict motions asking the court to award her the balances of the Transportation Notes and unpaid taxes on the Property, which the court granted. The court also granted the Appellants' request for an award of attorney's fees. Following entry of final judgment, this timely appeal and cross-appeal followed.

Kyle and Stuffington as to personal liability. The propriety of this ruling is not before us.

APPEAL

A. The Transportation Notes

¶11 Richard argues the trial court committed reversible error by granting Ursula's motion JMOL[3] and entering judgment against him for $280,638.50, the unpaid balance owed on the Transportation Notes after adjustment under the 2005 settlement agreement, because Ursula never asserted a claim for these damages before trial. We review the court's ruling de novo. *Warne Invs., Ltd. v. Higgins,* 219 Ariz. 186, 194, ¶ 33, 195 P.3d 645, 653 (App. 2008).

¶12 We agree with Richard that the trial court committed reversible error. First, Ursula failed to file a motion for JMOL pursuant to Arizona Rule of Civil Procedure ("Rule") 50(a) before submission of the case to the jury. She therefore waived her right to seek JMOL pursuant to Rule 50(b) after the verdict. *Standard Chartered PLC v. Price Waterhouse*, 190 Ariz. 6, 27, 945 P.2d 317, 338 (App. 1996).

¶13 Second, JMOL is permitted only against a party who "has been fully heard on an issue." Ariz. R. Civ. P. 50(a)(1). Ursula acknowledges she did not seek damages for nonpayment of the Transportation Notes as altered by the 2005 settlement

[3] Ursula titled her motion as one for new trial, JMOL, or to amend the verdict and asked for relief on various claims. Because she requested entry of judgment for payments under the Transportation Notes, however, she necessarily asked only for JMOL as to this claim.

agreement in the event the jury found that agreement enforceable.[4] She did not ask the jury in opening statement or closing argument to award these damages, and the jury was not instructed on the claim. In short, nothing placed Richard on notice she was seeking these damages, and he was therefore deprived of the opportunity to be heard on the issue. *Id.*; *see also Carlton v. Emhardt*, 138 Ariz. 353, 355, 674 P.2d 907, 909 (App. 1983) (noting "trial by ambush is a tactic no longer countenanced in Arizona courts").

¶14 Ursula nevertheless asserts the parties agreed the trial court could decide as a matter of equity whether Richard owed monies under the Transportation Notes if the 2005 settlement agreement was enforceable. She points to discussions among counsel and the trial court concerning jury instructions and verdict forms in which they discussed potential unjust enrichment determinations for both sides. Our review of these excerpts does not reveal that the parties agreed to have the trial court decide in equity a claim for the unpaid balances of

[4] Ursula stated a claim for non-payment of the Transportation Notes in her second amended complaint, without mentioning their alteration under the 2005 settlement agreement, and listed that issue in the joint pretrial statement. She does not assert that these filings preserved her claim for trial. But even assuming her claim was preserved and tried to the jury, she was not entitled to JMOL because she abandoned the claim by failing to raise it to the jury, *see generally Payne v. Payne*, 12 Ariz. App. 434, 436, 471 P.2d 319, 321 (1970), and she waived her right to seek JMOL post-verdict. *See supra* ¶ 12.

the Transportation Notes. At most, the parties agreed the court could decide how much Ursula would be unjustly enriched by improvements to the Property if the jury found Ursula was the owner.

¶15 Ursula also argues that Richard's counterclaim for declaratory judgment relief implicated his obligations under the Transportation Notes, and her claim for the balances due were properly before the court. We disagree. Declaratory relief "does not involve executory or coercive relief." *Lecky v. Staley*, 6 Ariz. App. 556, 559, 435 P.2d 63, 66 (1967) (holding declaratory judgment declares rights, duties, or status of parties). Consequently, Richard's request for such relief did not constitute a claim by Ursula for damages under the Notes. *See Wineglass Ranches, Inc. v. Campbell*, 12 Ariz. App. 571, 575-76, 473 P.2d 496, 500-01 (1970) (holding that although a quiet title action may determine "every interest in land, legal or equitable," the parties can choose the scope of litigation and "if an issue is clearly withheld, the court cannot nevertheless adjudicate it and grant corresponding relief"). A party may obtain relief based on a declaratory judgment by application in a complaint or other pleading. Ariz. Rev. Stat. ("A.R.S.") § 12-1838 (West 2012);[5] *Adams v. Bear*, 87 Ariz. 288, 295, 350 P.2d

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

751, 755 (1960) (awarding damages on a promissory note in a separate, subsequent action for further relief brought after a declaratory judgment had been entered resolving the rights under an agreement). Ursula did not file such a pleading in this case.

¶16 Ursula next argues the issue was tried by implied consent. *See* Ariz. R. Civ. P. 15(b) ("When issues not raised by the pleadings are tried by . . . implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings."). To prevail on this argument, Ursula must make an affirmative showing that the parties raised the issue. *See Hill v. Chubb Life Am. Ins. Co.*, 182 Ariz. 158, 161, 894 P.2d 701, 704 (1995). She points to Richard's testimony on cross-examination that he stopped making payments on the Transportation Notes. We fail to discern how this brief testimony raised Ursula's claim. The Transportation Notes were relevant to the parties' course of dealing and purported agreements. Ursula's questioning of Richard about his performance under the Notes was not so unrelated to the uncontested trial issues as to place him on notice she was seeking damages for non-payment. *See Magma Copper Co. v. Indus. Comm'n of Ariz.*, 139 Ariz. 38, 47, 676 P.2d 1096, 1105 (1983) ("[P]ermitting evidence relevant to an existing issue to be admitted without objection does not constitute implied consent

to trial of an issue which has not been raised." (internal quotation marks omitted)). And, as previously stated, Ursula failed to mention the Transportation Notes in her proposed jury instructions or forms of verdict and did not argue her entitlement to damages under these Notes in her opening statement or closing argument to the jury. On this record, we cannot agree the issue was tried by implied consent.

¶17 For this same reason, the trial court erred by ruling that Ursula's complaint was amended to conform to the evidence by adding her claim. A post-trial amendment of the pleadings to conform to the evidence cannot raise an issue never actually tried. *Wineglass Ranches*, 12 Ariz. App. at 575, 473 P.2d at 500 (noting purpose of amendments to conform to the evidence is to bring pleadings in line with issues actually tried). The court additionally erred as Ursula never moved to amend her complaint to conform to the evidence. *See Smith v. Cont'l Bank*, 130 Ariz. 320, 323, 636 P.2d 98, 101 (1981) (holding a court cannot sua sponte amend the pleadings to conform to the evidence and assert a new claim).

¶18 In sum, the trial court erred by awarding Ursula damages for breach of the Transportation Notes as altered by the

2005 settlement agreement.[6] We therefore reverse the judgment to the extent it awards $280,638.50 plus interest to Ursula.

B. The agreement for sale

¶19 After entry of the jury's verdict, the trial court granted Richard equitable title to the Property. The court required Richard to continue making payments under the Replacement Note and ordered Ursula to deliver legal title to Richard upon full payment. The court also ruled Richard would forfeit his interest in the Property if he defaulted on his payments. Richard argues the trial court erred in this ruling because (1) it wrongly disregarded the jury's verdict, and (2) insufficient evidence supports a finding the parties had agreed to enter an "agreement for sale" rather than a more typical agreement in which the seller transfers records a deed of trust to secure the buyer's obligation to pay the underlying note. We disagree.

¶20 Even assuming the jury intended Richard to have legal title of the Property, the trial court did not err by disregarding this aspect of the verdict because the jury was merely advisory on the quiet title claim. An action for quiet title is an action in equity, *Chantler v. Wood*, 6 Ariz. App. 134, 138, 430 P.2d 713, 717 (1967), for which there is no

[6] In light of our holding, we need not reach Richard's additional arguments concerning the propriety of the court's ruling regarding the Transportation Notes.

constitutional right to trial by jury. *In re Estate of Newman*, 219 Ariz. 260, 273-74, ¶¶ 55-56, 196 P.3d 863, 876-77 (App. 2008). Consequently, the jury served in an advisory role on the quiet title claim unless the parties agreed to be bound by the jury's verdict. *See* Rule 39(m) (authorizing court to use an advisory jury in actions "not triable of right by a jury" but permitting parties to agree to be bound by a jury verdict). We disagree with Richard's assertion the parties consented to be bound by the verdict. The transcript excerpts he relies on for this assertion reflect discussions with the court in the context of selecting verdict forms and did not result in any stipulation to be bound by the jury's verdict. Therefore, the jury served only to advise the court on the quiet title claim, and the court was free to reject the jury's findings. *Wooldridge Constr. Co. v. First Nat'l Bank of Ariz.*, 130 Ariz. 86, 88, 634 P.2d 13, 15 (App. 1981).

¶21 We will uphold the trial court's finding that the parties entered in an agreement-for-sale arrangement if supported by substantial evidence. *Mullins v. Horne*, 120 Ariz. 587, 591, 587 P.2d 773, 777 (App. 1978). "Substantial evidence is evidence which would permit a reasonable person to reach the trial court's result." *In re Estate of Pouser*, 193 Ariz. 574, 579, ¶ 13, 975 P.2d 704, 709 (1999). Richard contends such evidence is lacking in this record. We disagree.

¶22 An “agreement for sale” is a contract “through which a seller has conveyed to a purchaser equitable title in property and under which the seller is obligated to convey to the purchaser the remainder of the seller's title in the property, whether legal or equitable, on payment in full of all monies due under the contract.” A.R.S. § 33-741(2). In contrast, a deed of trust conveys property title to a trustee, who holds it as security for the trustor’s performance of the underlying contract. A.R.S. §§ 33-801(8), -805. Substantial evidence supports a finding that the parties entered in the former arrangement rather than the latter.

¶23 The Replacement Note provides that the Property would “be held in the name of USA Ride, LLC [one of Ursula’s entities] to guarantee performance of this note.” No transfer to a trustee under a deed of trust is mentioned. Keeping legal title in the name of the selling party to “guarantee performance” is a hallmark of an agreement for sale. And expert witness Scott O’Connor testified that the original transaction in 2003 between Lewis and Richard most closely resembled an agreement for sale. The court could have concluded that this structure was maintained when Ursula paid off the Bank One loan in order to serve as lender and reap the interest.

¶24 Richard nevertheless argues the court’s interpretation of the Replacement Note ignores the fact that Ursula had agreed

to assign to Richard "all LLSO/USA Ride, LLC interest in Thomas Road building." Again, we disagree. First, the memorandum reflecting this alleged agreement was written by Richard but not acknowledged by Ursula. Second, the Replacement Note was executed after the date of the memorandum, supporting a conclusion the parties intended the terms of the Note to apply, to the extent of any inconsistencies. Third, Richard ignores the language appearing after the above-quoted portion of the memorandum: "(note [Richard] must pay to USA Ride, LLC or Bank One the $1,500,000.00 + or – loan Bank One made in connection with Thomas Road property.)." Although ambiguous, this language can be interpreted consistently with the plain terms of the Replacement Note – the transfer of title was to be made after repayment of the loan. Fourth, and finally, Richard's interpretation of the memorandum and Replacement Note would lead to absurd results. If Richard had been immediately assigned USA Ride's interest in the Property, under the terms of the later Replacement Note Richard would essentially hold title in the Property and guarantee his own performance under the Note. *See Bryceland v. Northey*, 160 Ariz. 213, 216, 772 P.2d 36, 39 (App. 1989) ("We will interpret a contract in a manner which gives a reasonable meaning to the manifested intent of the parties rather than an interpretation that would render the contract unreasonable.").

¶25 The trial court did not err by finding the parties intended to enter in an agreement for sale. Although Richard is at greater risk under an agreement-for-sale structure, we are mindful that "equity follows the law and a court will enforce a valid contract according to its terms, even though enforcement may be harsh or result in a forfeiture." *Freedman v. Cont'l Serv. Corp.*, 127 Ariz. 540, 545, 622 P.2d 487, 492 (App. 1980). It is not inequitable for the trial court to create an agreement for sale when that structure best reflects the parties' agreement.

C. Stuffington's risk of forfeiture

¶26 Stuffington spent $380,000 on improvements to the Property. It argues the trial court erred as a matter of equity by failing to require Ursula to reimburse Stuffington in the event Richard defaults under the Replacement Note. We disagree.

¶27 First, any loss by Stuffington is speculative as Richard may not default. And if he defaults, the value of any enrichment to Ursula may have changed. *See Coury Bros. Ranches, Inc. v. Ellsworth*, 103 Ariz. 515, 521, 446 P.2d 458, 464 (1968) (holding damages that are speculative or uncertain cannot support a judgment; the plaintiff must prove the fact of damage with certainty). Second, in the event of a default, Stuffington may bring suit against Ursula for unjust enrichment. *See Hines v. Wells*, 814 P.2d 437, 439 (Idaho Ct. App. 1991) (holding when

forfeiture occurs under an agreement for sale, the "purchaser may seek restitution for that part of the forfeiture deemed to constitute an unconscionable penalty"); *see also* 77 Am. Jur. 2d *Vendor and Purchaser* § 289 (1997); 77 Am. Jur. 2d *Vendor and Purchaser* § 467 (1997). The trial court did not err by failing to order contingent relief for Stuffington.

D. The balloon payment

¶28 Richard continued to make payments under the Replacement Note throughout the dispute with Ursula, but he did not make the final balloon payment. The jury found Richard had thirty-six months to make the balloon payment, but it did not suggest a starting date for that period. The trial court ordered the balloon must be paid by September 1, 2013. Richard argues the court acted inequitably choosing this date because it means the thirty-six-month period started running prior to the entry of final judgment, and the ruling fails to account for the legal and financial clouds of a pending appeal. We review a trial court's equitable remedy for an abuse of discretion. *Loiselle v. Cosas Mgmt. Grp., LLC*, 224 Ariz. 207, 210, ¶ 8, 228 P.3d 943, 946 (App. 2010).

¶29 Thirty-six months prior to September 1, 2013 is September 1, 2010. The jury returned its verdict on September 16, 2010. By starting the thirty-six-month period anew near the time of the jury's verdict, the court acted equitably by giving

Richard the time he originally had under the terms of the Replacement Note. Consequently, Richard was ultimately granted more than eight years to pay the balloon rather than three years; we cannot say the court acted inequitably by granting this much additional time. And although the court started the period on September 1, 2010, before the jury returned its verdict, the court acted reasonably by selecting a date to ensure the balloon would be due on the first day of the month.

¶30 Richard also argues the balloon due date is inequitable because while this case is on appeal, it is highly unlikely he will be able to secure a loan to pay off the balloon. He contends the court should have started the thirty-six-month period after issuance of the mandate. We cannot say the trial court abused its considerable discretion by failing to start the thirty-six-month period after the appeal. First, as previously mentioned, the court was generous in renewing the entire thirty-six-month balloon period. The court did not abuse its discretion by failing to afford Richard even more time. Second, the appeal and cross-appeal do not place at risk the part of the judgment awarding equitable title in the Property to Richard and requiring Ursula to transfer legal title upon full payment of the Replacement Note. We fail to discern from this record, therefore, how the fact of the appeal and cross-appeal might dissuade a lender from refinancing the Property.

¶31 For all these reasons, the trial court did not abuse its discretion by ruling the balloon payment is due by September 1, 2013.

E. Delivery of the payoff deed

¶32 The trial court ordered Ursula to convey a "payoff deed" to Richard within ten days after full payment of the Replacement Note. Richard argues the trial court erred because our statutes require immediate delivery of the deed upon payment. Because this aspect of the court's ruling formed part of its equitable remedy, we review for an abuse of discretion. *Id.* The trial court abuses its discretion when it commits an error of law in the process of reaching a discretionary conclusion, *Flying Diamond Airpark, LLC v. Meienberg*, 215 Ariz. 44, 50, ¶ 27, 156 P.3d 1149, 1155 (App. 2007), and the applicability of a statute is an issue of law we review de novo. *Stein v. Sonus USA, Inc.*, 214 Ariz. 200, 201, ¶ 3, 150 P.3d 773, 774 (App. 2007)

¶33 Agreements for sale are governed by A.R.S. §§ 33-741 to -750. Section 33-750(A) provides, "[a] seller who is entitled to payment and who receives full payment of all monies due under the contract shall deliver to the person who made full payment a payoff deed that conveys to the purchaser the real property described in the contract." This statute does not provide a specific time frame by which the deed must be

delivered. Nevertheless, Richard argues that A.R.S. § 33-741(4), which defines "payoff deed," clarifies that the deed must be delivered immediately upon payoff of the note.

¶34 Section 33-741(4) provides in relevant part that a "payoff deed" is "the deed that the seller is obligated to deliver to the purchaser *on payment* in full of all monies due under the contract." (Emphasis added.) We disagree with Richard that the legislature's use of the words "on payment" in a definitional statute evidences its intent under § 33-750(A) that the payoff deed be delivered immediately upon the payoff. Our supreme court has held that similar language does not convey immediacy. *Hays v. Ariz. Corp. Comm'n*, 99 Ariz. 358, 361, 409 P.2d 282, 284 (1965) (holding the word "upon" in a statute "does not necessarily imply immediacy, but within a reasonable time"). *See also Banning v. Commercial Orchards Co. of Wash.*, 156 P. 547, 548 (Wash. 1916) ("Where a specific time is not fixed for the delivery of a deed, the vendor shall have a reasonable time after payment to make and tender it."). Following *Hays* and *Banning*, we hold that a seller must deliver a payoff deed within a reasonable time after the note is fully paid. Because ten days after payoff constitutes such a reasonable time, the trial court did not err in its ruling.

CROSS-APPEAL

¶35 The trial court awarded Appellants approximately $700,000 in attorney's fees and costs. The court ruled that Richard was entitled to recover fees pursuant to A.R.S. § 12-1103. The court additionally concluded all Appellants were entitled to fees for prosecution and defense of all claims pursuant to A.R.S. § 12-341.01. Significantly, the court reasoned that "because all claims are based on the same operative facts, the case is deemed to arise out of contract . . . . The entire action arose out of the 2003 Asset Purchase Contract and the 2005 Settlement Agreement." Ursula challenges the award on several bases, which we address in turn.

A. A.R.S. § 12-1103

¶36 Ursula argues the trial court erred by awarding attorney's fees to Richard pursuant to A.R.S. § 12-1103. Section 12-1103(B) authorizes an award of attorney's fees to a successful claimant who tendered $5 and requested execution of a quit claim deed twenty days prior to initiating the quiet title action.

¶37 The trial court apparently misstated its intended ruling. The minute entry provides Richard is "entitled to recover attorneys' fees under A.R.S. § 12-1103, because plaintiffs did not have to issue a quit claim deed until the purchase price was paid." The court explained that Richard's entitlement to the Property was conditioned on payment of the

balance of the loan. It is evident from the court's explanation supporting a denial of fees under § 12-1103 that the court omitted the word "not" before "entitled" in the minute entry. And a contrary interpretation of the ruling would result in error, as Ursula was not required to disclaim all rights and title in the Property until Richard paid the loan in full. *See Overson v. Cowley*, 136 Ariz. 60, 72, 664 P.2d 210, 222 (App. 1982) (noting in passing that § 12-1103 "applies only to situations in which the party requesting the quit claim deed is entitled to it at the time of the request").

¶38 In sum, the trial court was not authorized to award Richard attorney's fees pursuant to A.R.S. § 12-1103.

B. A.R.S. § 12-341.01(A)

1. "Successful" party on contract claims

¶39 Section 12-341.01(A) permits a court to "award the successful party reasonable attorney fees" in "any contested action arising out of a contract." Appellants were eligible to recover fees pursuant to this provision only if they were successful in litigating at least one contract claim. *See Ramsey Air Meds, L.L.C. v. Cutter Aviation, Inc.*, 198 Ariz. 10, 13, ¶ 17, 6 P.3d 315, 318 (App. 2000). Assuming they met this threshold, they could recover fees expended on interwoven tort claims. *Id*. We review the trial court's determination that Appellants were eligible for a fee award under § 12-341.01(A)

for an abuse of discretion. *Sanborn v. Brooker & Wake Prop. Mgmt., Inc*., 178 Ariz. 425, 430, 874 P.2d 982, 987 (App. 1994).

¶40 Ursula argues the trial court erred by awarding fees pursuant to A.R.S. § 12-341.01(A) because Appellants were not successful parties on any claim arising out of a contract. Appellants counter they qualified for fees under § 12-341.01(A) because they prevailed on Ursula's claims for breach of contract and wrongful recordation of a lis pendens pursuant to A.R.S. § 33-420, and they were successful on the counterclaims for declaratory judgment and breach of contract.

Richard

¶41 Richard was successful on one contract-based claim asserted by Ursula. She alleged a claim for breach of the Asset Purchase Agreement and sought compensatory damages.[7] The jury returned a verdict in favor of Richard on this claim making him the "successful" party. We disagree that Ursula's claim for wrongful recordation of a lis pendens arose out of a contract, however, as this was a statutory cause of action that did not depend on a breach of contract. *See O'Keefe v. Grenke*, 170 Ariz. 460, 472, 825 P.2d 985, 997 (App. 1992).

[7] Ursula's claim for breach of the covenant of good faith and fair dealing against Richard, which formed part of her breach-of-contract claim, did not arise from contract as it was fundamentally a legal malpractice claim. *See Barmat v. John & Jane Doe Partners A-D*, 155 Ariz. 519, 523-24, 747 P.2d 1218, 1222-23 (1987); *Ramsey Air Meds*, 198 Ariz. at 15-16, ¶ 27, 6 P.3d at 320-21.

¶42 Richard was also successful on one contract-based counterclaim. He sought declaratory relief concerning the parties' rights and obligations concerning the Property as reflected by the Asset Purchase Agreement and the 2005 settlement agreement. Richard prevailed because the jury found that Richard and/or Kyle "are or should be the owners" of the Property. We reject Ursula's contention that Richard was unsuccessful because he failed to obtain legal title with a deed of trust. Richard was successful in obtaining ownership of the Property via a structure granting him immediate equitable title and a process for acquiring legal title. Considering the significant difference between tenancy and equitable ownership of real property, Richard's failure to obtain his preferred form of ownership did not undermine his status as the successful party on his declaratory judgment claim.[8] His immediate success in obtaining affirmative relief distinguishes this case from *Ahwatukee Custom Estates Mgmt. Ass'n v. Turner*, 196 Ariz. 631, 637, ¶ 22, 2 P.3d 1276, 1282 (App. 2000), in which this court upheld the trial court's ruling that an association was not the

[8] In a related argument, Ursula asserts the trial court erred by failing to reconsider the fee award after it determined Richard was entitled only to equitable title and awarded Ursula damages for the unpaid Transportation Notes. Ursula contends she became the successful party at that time. We reject this argument because (1) Richard was successful on his declaratory judgment action, and (2) as previously explained, the trial court erred by awarding damages to Ursula on the Notes.

successful party because despite "vindicate[ing] its future enforcement authority," it failed in its principal effort to obtain injunctive relief.

¶43 Finally, Richard was not successful on his breach-of-contract and libel claims. Although the jury found in his favor, it did not award him any damages. *See Chartone, Inc. v. Bernini*, 207 Ariz. 162, 170, ¶ 30, 83 P.3d 1103, 1111 (App. 2004) (noting existence of damages is essential element of breach-of-contract action).

¶44 In sum, Richard was successful in defending Ursula's claim for breach of the Asset Purchase Agreement and in prosecuting his declaratory judgment counterclaim. He therefore qualified for an award of attorney's fees pursuant to A.R.S. § 12-341.01(A).

Kyle and Stuffington

¶45 Ursula did not assert any claims against Kyle based on Kyle's acts or omissions. Moreover, Kyle did not assert any counterclaims against Ursula. But Ursula named Kyle a defendant to reach the community assets of Richard and Kyle. Kyle was not required to be a party to a contract to qualify for fees under § 12-341.01(A). *See Chaurasia v. Gen. Motors Corp.*, 212 Ariz. 18, 30, ¶ 47, 126 P.3d 165, 177 (App. 2006). Consequently, she qualified for fees expended in defending Ursula's claims against Richard that arose from contract and any interwoven tort claims.

¶46 Ursula did not assert any claims against Stuffington but named it a defendant because it occupied the Property. Stuffington did not assert any counterclaims. Consequently, even though Stuffington was not required to be a party to a contract to qualify for fees under § 12-341.01(A), *id.*, it needed to succeed on a claim arising out of a contract. *Ramsey Air Meds,* 198 Ariz. at 13, ¶ 17, 6 P.3d at 318. It did not. And having failed to reach this threshold, Stuffington was not entitled to any fees expended to defend any tort claims interwoven with a contract claim involving Richard. *See id*. We therefore reverse the judgment to the extent it awards fees to Stuffington.

2. Interwoven tort claims

¶47 As previously noted, the successful party on a contract claim can also recover attorney's fees expended litigating "interwoven" tort claims. *Id.* Although a precise definition for "interwoven claims" does not exist in our caselaw, we have held that claims are interwoven when they are based on the same set of facts and involve common allegations, which require the same factual and legal development. *Modular Mining Sys., Inc. v. Jigsaw Technologies, Inc.,* 221 Ariz. 515, 522-23, ¶¶ 23-24, 212 P.3d 853, 860-61 (App. 2009); *see also Bennett v. Baxter Grp., Inc.*, 223 Ariz. 414, 420, ¶ 23, 224 P.3d 230, 236 (App. 2010) (concluding fees can be awarded on non-

contract claims "when these claims are so factually connected to a contract claim that they require the same work that is already necessary for the defense or prosecution of the contract claim alone"); *Zeagler v. Buckley*, 223 Ariz. 37, 39, ¶ 9, 219 P.3d 247, 249 (App. 2009) (holding fees may be awarded when "claims are so interrelated that identical or substantially overlapping discovery would occur"). With these characteristics in mind, we consider whether the non-contract claims in this case were interwoven with Ursula's claim for breach of the Asset Purchase Agreement and/or Richard's counterclaim for declaratory judgment (the "contract-based claims").[9]

¶48 We disagree with the trial court that Ursula's claims for malpractice, breach of fiduciary duty, and breach of the implied covenant of good faith and fair dealing (the "malpractice claims") were sufficiently interwoven with the contract-based claims to qualify Richard for a fee award pursuant to A.R.S. § 12-341.01(A). These claims stemmed from Richard's purported misdeeds in his role as a lawyer and

[9] Richard argues Ursula waived her challenge to the fee award on this basis by failing to object to billing entries in the fee application with sufficient specificity to enable the court to allocate the fees among the claims. We disagree. Ursula preserved her objection in her response to the application for fees. *Nolan v. Starlight Pines Homeowners Ass'n*, 216 Ariz. 482, 491, ¶ 38, 167 P.3d 1277, 1286 (App. 2007), which Richard relies on, is inapplicable as it concerned the insufficiency of general objections that particular billing entries were inflated. Here, we address whether fees expended on non-contract claims qualified for an award.

fiduciary rather than as a party to the Asset Purchase Agreement or the 2005 settlement agreement and did not depend on a finding that Richard breached these agreements. Indeed, the jury could have found that Richard breached his fiduciary duty to Ursula and committed malpractice even while concluding Richard owned the Property as a result of the parties' agreements. *Cf. Pettay v. Ins. Mktg. Svcs., Inc. (West)*, 156 Ariz. 365, 368, 752 P.2d 18, 21 (App. 1987) (allowing fees for misrepresentation claim when claim "could not exist but for the alleged breach of contract"); *Modular Mining Sys.*, 221 Ariz. at 522-23, ¶¶ 24-25, 212 P.3d at 860-61 (finding trade secret misappropriation claim interwoven with breach of employment contract claim when breach consisted of misappropriating trade secrets).

¶49 We are further persuaded that the malpractice claims were not interwoven with the contract-based claims because the former required factual and legal development irrelevant to the latter. For example, the contract-based claims did not require evidence whether Richard acted as Ursula's attorney or expert testimony regarding lawyer standards or ethics. Fees expended on such factual and legal issues are easily culled from fees expended on the contract-based claims; thus, awarding fees exclusively expended on the malpractice claims would not further the legislature's intent in enacting § 12-341.01(A). *See Bennett*, 223 Ariz. at 420, ¶ 23, 224 P.3d at 236 (noting that

permitting fees for interwoven tort claims furthers legislative intent to ensure successful party on contract-related claim is reimbursed appropriate fees).

¶50 Conversely, we cannot conclude the trial court abused its discretion by ruling that the remaining non-contract-based claims and counterclaims were interwoven with the contract-based claims. Ursula's claims for conversion, fraud, and wrongful recordation of the lis pendens, and Richard's counterclaims for quiet title and conveyance of real property all depend on the scope and meaning of the Asset Purchase Agreement and the 2005 settlement agreement – the subject of Richard's declaratory judgment claim. These claims all involve the development of the same factual and legal issues.

¶51 In summary, the trial court erred by awarding fees to Richard for his successful defense of the malpractice claims and his prosecution of the counterclaims for breach of contract and libel. We therefore reverse the judgment to the extent it awards attorney's fees on these claims. We remand to the trial court to enter an award that excludes these fees.

ATTORNEY'S FEES ON APPEAL

¶52 Richard and Ursula request attorney's fees on appeal. Because each is partially successful and partially unsuccessful, we decline to award fees or costs to either party.

CONCLUSION

¶53 For the foregoing reasons, we reverse the judgment to the extent it awards damages on the Transportation Notes to Ursula and awards attorney's fees to Appellants. The court is authorized by A.R.S. § 12-341.01(A) to award Richard and Kyle attorney's fees expended to (1) defend Ursula's claims for breach of the Asset Purchase Agreement, conversion, fraud, and wrongfully filing the lis pendens and (2) prosecute Richard's claims for declaratory relief, quiet title, and conveyance of real property. We remand for the court to determine the appropriate amount of fees. We affirm all remaining aspects of the judgment.

/s/
Ann A. Scott Timmer, Presiding Judge

CONCURRING:

/s/
John C. Gemmill, Judge

/s/
Margaret H. Downie, Judge