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AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

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

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MANISH THAKRAR, *Plaintiff/Appellee*,

*v.*

SURENDRA PALA, *Defendant/Appellant*.

No. 1 CA-CV 19-0043  
FILED 12-12-2019

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Appeal from the Superior Court in Maricopa County  
No. CV2013-000741  
The Honorable Sherry K. Stephens, Judge

**AFFIRMED IN PART, VACATED IN PART**

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COUNSEL

McGill Law Firm, Scottsdale  
By Gregory G. McGill  
*Counsel for Plaintiff/Appellee*

Jones, Skelton & Hochuli, P.L.C., Phoenix  
By Lori L. Voepel, Jonathan P. Barnes, Jr.  
*Counsel for Defendant/Appellant*

**MEMORANDUM DECISION**

Judge Jennifer M. Perkins delivered the decision of the Court, in which Presiding Judge Samuel A. Thumma and Judge Paul J. McMurdie joined.

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**P E R K I N S**, Judge:

¶1 This appeal stems from a failed partnership to start a restaurant. Surendra Pala appeals a bench trial verdict and subsequent award of attorney’s fees and costs. For the following reasons, we affirm the trial court’s verdict and subsequent award of attorney’s fees, but vacate the award of costs to Thakrar.

**FACTUAL AND PROCEDURAL BACKGROUND**

¶2 Around 2012, Surendra Pala conceived the idea for an Indian restaurant. Pala selected a location – a former Italian restaurant in Scottsdale – but did not have any capital to invest. He then met non-party Bipin Kanabar, who introduced him to Manish Thakrar. On May 24, 2012, the trio entered into a partnership agreement (“May agreement”) to start the restaurant. Thakrar and Kanabar were each members of a limited liability company (“LLC”), which predated the partnership, and the May agreement gave Pala “the option of becoming a 50% share of the LLC name added to the lease and added to the bank account within one year of the startup date.”

¶3 The May agreement granted Pala a 50% ownership interest in the partnership, and 25% each to the other two partners. It distributed profits and costs in the same percentages, while providing that all expenses would be paid first before any withdrawals of “salary or drawings[,]” and that all costs were to be paid first before profit distribution. Under the May agreement, Pala did not make any capital contributions, while the other two partners contributed \$20,000 each. The May agreement also included handwritten provisions distributing tenant improvement monies as 50% to Thakrar, 50% to Kanabar, and zero to Pala.

¶4 The May agreement assigned different obligations to each of the partners. Pala was “[r]esponsible for the day to day management and operation of the restaurant, including food inventory, staff, hygiene, cleanliness and customer relations[.]” Pala would “draw a salary of

THAKRAR v. PALA  
Decision of the Court

\$3000.00 per month, after opening with six-month review.” Thakrar was “[r]esponsible for book keeping, accounting, administration bill payments etc and overall supervisory role[.]”

¶5 Each of the partners had a right to withdraw from the partnership under the May agreement; in the event of such a withdrawal, the other partners would have the option to buy out the remaining shares. The partnership could also be dissolved by majority vote or agreement of all partners. In the event of such a dissolution, the debts would be paid first and any remaining funds would be distributed according to the partners’ respective ownership interests.

¶6 Shortly after executing the May agreement, the parties signed the lease and began working to establish the restaurant. On September 19, 2012, the parties executed two more partnership agreements (“September agreements”). First, a one-page document meant to formalize the tenant improvement distributions hand-written on the May agreement that also restated in the same terms as the May agreement the partners’ ownership interests; Pala’s future salary; and Pala’s option to join Thakrar and Kanabar’s LLC. Second, a four-page document included the remaining provisions from the May agreement.

¶7 Not long after the parties executed the September agreements, Pala and Thakrar had a falling out. Thakrar testified that he had his attorney send Pala two letters in October 2012 detailing Pala’s failure to perform his partnership responsibilities. Thakrar further testified that Pala had stopped going to the restaurant as early as August or September of 2012. Thakrar and Pala unsuccessfully tried to reach an agreement for one partner to buy the other out.

¶8 The restaurant opened on November 1, 2012, and Thakrar took over management responsibilities. In December, Thakrar obtained an injunction against harassment barring Pala from the restaurant premises. The restaurant was in business until May 2015, when Thakrar sold it for \$65,000; trial evidence included an estimate valuing the restaurant at \$200,000 in October 2012.

¶9 Shortly after obtaining the injunction, Thakrar filed this lawsuit, alleging breach of contract (under the partnership agreements and a separate loan agreement between Thakrar and Pala); breach of fiduciary duty; and seeking a mandatory injunction ousting Pala from the partnership. Pala counterclaimed for breach of fiduciary duty; breach of contract; fraud; dissolution of the partnership; unjust enrichment; and a

THAKRAR v. PALA  
Decision of the Court

request for an accounting. The trial court granted summary judgment to Thakrar on his separate breach of contract claim under the loan agreement with Pala in January 2015. The parties then proceeded to a bench trial on the remaining issues.

¶10 During the trial, Thakrar withdrew his claims for breach of fiduciary duty and mandatory injunction ousting Pala; Pala withdrew his claims for fraud and dissolution of the partnership. Accordingly, trial proceeded on Thakrar's claim for breach of the partnership agreements and Pala's counterclaims for breach of partnership agreements; breach of fiduciary duty; unjust enrichment; and a request for an accounting. After a four-day bench trial, the court found both parties breached the partnership agreements, but awarded zero damages on both counts. The court also found for Thakrar on each of Pala's remaining counterclaims. The court did not make - and the parties did not request - written findings of fact or conclusions of law under Arizona Rule of Civil Procedure 52. Pala moved for reconsideration but did not challenge the verdict under Rule 49. The court awarded Thakrar \$74,500 in attorney's fees and \$3,400 in costs. After entry of final judgment, Pala timely appealed. Thakrar did not cross appeal.

#### DISCUSSION

¶11 Pala argues on appeal that the trial court: (1) issued an internally inconsistent verdict; (2) abused its discretion in finding zero damages for Pala's breach counterclaim; (3) erred in finding Pala breached the contract; (4) abused its discretion in finding against Pala on his fiduciary duties counterclaim; (5) abused its discretion in awarding costs to Thakrar because he failed to file a verified statement of costs as required by Rule 54(f)(1); and (6) abused its discretion in awarding attorney's fees to Thakrar because he was not necessarily the "net judgment" winner.

¶12 Contract interpretation, including the partnership agreements here, is a question of law, which we review *de novo*. *Horton v. Mitchell*, 200 Ariz. 523, 527, ¶ 14 (App. 2001).

¶13 The parties first executed the four-page May 24 agreement, then later executed the one-page September 19 agreement (dealing primarily with the distribution of the tenant improvement monies) and the four-page September 19 agreement (which substantially reflected the May agreement). Because the two September agreements were executed on the same day and do not contradict, we read them together. *See Childress Buick Co. v. O'Connell*, 198 Ariz. 454, 456, ¶ 9 (App. 2000) ("[S]ubstantially contemporaneous documents are to be read together to determine the

THAKRAR v. PALA  
Decision of the Court

nature of the transaction.”). Further, the two September agreements together are substantively identical to the May agreement regarding Pala’s management responsibilities and ownership interests. Thus, we will refer to the three agreements collectively (“Agreements”).

**I. Internal Inconsistency**

¶14 Pala argues the verdict is internally inconsistent because the trial judge found for Pala on his breach of contract counterclaim but awarded him zero damages. Whether the verdict is internally inconsistent is a question of law we review *de novo*. See *Warner v. Sw. Desert Images, LLC*, 218 Ariz. 121, 136, ¶ 49 (App. 2008).

¶15 First, Thakrar argues Pala waived this issue by not challenging the verdict under Rule 49(b) at trial. Rule 49(b) applies to general verdicts with answers to written questions. Ariz. R. Civ. P. 49(b). If the answers to the written questions are inconsistent with the general verdict, the court may either: approve an appropriate judgment, notwithstanding the general verdict; direct to the jury to further consider its answers and verdict; or order a new trial. *Id.* Here, the verdict was not a general verdict with answers to written questions; it was merely a general verdict. Further, the plain language of Rule 49(b) indicates that it applies in jury trials. On this record, we decline to apply waiver.

¶16 Turning to the merits, Pala argues that, because damages are an “indispensable element” of a claim for breach of contract, a verdict finding breach but zero damages is internally inconsistent. We disagree.

¶17 Pala cites *Walsh v. Advanced Cardiac Specialists Chartered*, in which our Supreme Court stated: “Damages are an indispensable element of a common-law negligence claim. Thus, in a negligence case, a verdict in favor of the plaintiff awarding zero damages is internally inconsistent.” 229 Ariz. 193, 196, ¶ 9 (2012) (citations omitted). Pala cites no authority stating that damages are an indispensable element in breach of contract claims in the same way that they are in common law negligence claims. Contract claims are fundamentally different from tort claims in several respects. See, e.g., *Samaritan Health Sys. v. Superior Court*, 194 Ariz. 284, 290, ¶¶ 23–29 (App. 1998) (declining to extend the Anti-Abrogation Clause, Ariz. Const. art. 18, § 6., beyond tort claims). We thus decline to find that a verdict finding a breach of contract but awarding zero damages is internally inconsistent.

## II. Zero Damages Finding

¶18 Notwithstanding the internal inconsistency issue, Pala contends the trial court abused its discretion by ignoring undisputed evidence in awarding him zero damages. The record belies this contention.

¶19 Pala argues both parties valued the restaurant at “\$200,000 (or more) before Pala’s ouster[,]” and thus, as a 50% owner under the Agreements, Pala was entitled to half of that amount (or at least half of the \$65,000 sale price the restaurant eventually sold for). But this argument assumes Thakrar ousted Pala from the partnership, which the parties disputed at trial. While the trial court made no written findings of fact or conclusions of law (and the parties did not request them), the judge indicated in a post-trial oral argument that she intended to find Pala “left” or “withdrew from” the partnership.

¶20 The parties also disputed the fact and amount of damages at trial; indeed, the parties disagreed as to whether the restaurant was profitable. Further, while Pala was a 50% owner under the Agreements, he was also responsible for 50% of the costs. Pala admitted at trial that he did not pay any of the costs required under the Agreements. Because the trial court was not asked to, and did not, make findings of fact or conclusions of law, we must presume the trial court “found every fact necessary to support the judgment, and such presumptive findings must be sustained if the evidence on any reasonable construction justified it.” *Neal v. Neal*, 116 Ariz. 590, 592 (1977). The record supports a finding that Pala failed to establish both the fact and the amount of damages. The court did not abuse its discretion in awarding zero damages for Pala’s breach of contract counterclaim. *See Castro v. Ballesteros-Suarez*, 222 Ariz. 48, 51, ¶ 11 (App. 2009) (quoting *In re Estate of Zaritsky*, 198 Ariz. 599, 601, ¶ 5 (App. 2000)) (“We will not set aside the trial court’s findings of fact unless clearly erroneous, giving due regard to the opportunity of the court to judge the credibility of witnesses.”).

## III. Breach by Pala

¶21 Pala argues the trial court erred in finding he breached the Agreements. As discussed *supra*, we must presume the trial court made the requisite factual findings to support its ruling. But this assumes the trial court did not otherwise err in applying the law. *Horton*, 200 Ariz. at 526, ¶ 13. “We construe the meaning of a contract provision from the language the

THAKRAR v. PALA  
Decision of the Court

parties used and in view of all the circumstances.” *Cty. of La Paz v. Yakima Compost Co.*, 224 Ariz. 590, 599, ¶ 16 (App. 2010).

¶22 The Agreements provided that Pala “will draw a salary of \$3000.00 per month, *after opening* with six month review.” (emphasis added). This could be read as indicating Pala’s management responsibilities also would not begin until after opening. But the parties to the Agreements all testified that they began working to establish the restaurant and initiate operations months before the restaurant opened in November 2012. Thus, the surrounding circumstances indicate the parties intended to fulfill their partnership responsibilities during the pre-opening stages. *See Taylor v. State Farm Mut. Auto. Ins.*, 175 Ariz. 148, 159 (1993) (looking to the “surrounding circumstances” to interpret the language of a contract provision).

¶23 Turning to Pala’s management responsibilities, the Agreements held Pala “[r]esponsible for the day to day management and operation of the restaurant, including food inventory, staff, hygiene, cleanliness and customer relations.” Substantial record evidence supports a finding that Pala breached this provision.

¶24 Thakrar testified that Pala stopped going to the restaurant sometime in August or September of 2012, and that there were multiple instances of Pala being absent from the restaurant when he was supposed to meet with prospective employees or accept deliveries from vendors. Thakrar also testified that Pala mismanaged inventory and staff. Pala disputed this evidence but admitted that it happened “once or twice” when his wife was ill. Pala also admitted that he lacked knowledge about various county or municipal requirements resulting in failed inspections during the pre-opening stages. While Pala disputed much of this evidence, “[w]e will not reweigh the evidence or substitute our evaluation of the facts.” *Castro*, 222 Ariz. at 52, ¶ 11. The trial court did not err in finding that Pala breached his management responsibilities under the Agreements.

#### IV. Fiduciary Duties

¶25 Pala argues insufficient evidence supported the trial court’s finding that Thakrar fulfilled his fiduciary duties to Pala. “When sufficiency of the evidence is questioned on appeal, we will examine the record only to determine if there is substantial evidence below to support the judgment.” *State ex rel. Herman v. Schaffer*, 110 Ariz. 91, 96 (1973).

¶26 Pala contends Thakrar breached his fiduciary duty as Pala’s partner by ousting him from the partnership and selling the restaurant at a

THAKRAR v. PALA  
Decision of the Court

low price without paying Pala his 50% ownership interest. As we noted above, the parties disputed at trial whether Thakrar ousted Pala from the partnership or Pala stopped showing up sometime in August or September 2012. Pala also failed to show that he was entitled to any money from the sale because: (1) the parties disputed whether the restaurant was profitable, and (2) the Agreements required Pala to pay 50% of the costs, which he admittedly did not do. Thus, substantial evidence supported the court's finding.

**V. Attorney's Fees and Costs at Trial**

¶27 We review the court's award of attorney's fees for an abuse of discretion but review the interpretation of statutes and court rules *de novo*. See *Tucson Estates Property Owners Ass'n, Inc. v. McGovern*, 239 Ariz. 52, 54, ¶ 7 (App. 2016).

*a. Costs*

¶28 Pala argues the trial court erred in awarding costs to Thakrar because he failed to file a verified statement of costs under Rule 54. We agree.

¶29 Rule 54(f)(1) provides: "If a party seeking costs also seeks an award of attorney's fees, a verified request for an award of taxable costs under A.R.S. § 12-322 must be filed on the same day the party files its motion for attorney's fees under Rule 54(g)." Thakrar's counsel did not do so. Instead, when asked by the court at oral argument whether he had, he directed the judge to pick out certain costs from the exhibits he filed with his request for attorney's fees. Pala's counsel raised this issue explicitly at oral argument on fees and did not waive it. Nor did Thakrar ever cure the deficiency. Because the verified statement of taxable costs is required under Rule 54(f)(1) and Thakrar did not file one here, we vacate the court's award of costs to Thakrar.

*b. Fees*

¶30 Pala also argues the trial court abused its discretion by awarding attorney's fees to Thakrar under A.R.S. § 12-341.01 when he was not necessarily the successful party under the "net judgment rule." The trial court has broad discretion to award attorney's fees, "and we will not reverse its decision unless there is no reasonable basis for it." *Democratic Party of Pima Cty. v Ford*, 228 Ariz. 545, 548-49, ¶ 12 (App. 2012); see also *Associated Indem. Corp. v. Warner*, 143 Ariz. 567, 570 (1985) (listing the



THAKRAR v. PALA  
Decision of the Court

various factors trial courts should consider when deciding whether to award attorney's fees).

¶31 In cases where there are multiple parties and multiple claims, courts can apply the "net judgment rule," which deems a party successful when he or she obtains a judgment above any setoff or counterclaim awarded to the other party. *See Schwartz v. Farmers Ins. Co. of Ariz.*, 166 Ariz. 33, 38 (App. 1990). Alternatively, courts may also use the "percentage of success factor" test, or the "totality of the litigation" test. *Id.*

¶32 Here, the trial court did not state explicitly whether it was applying any of these tests. Instead, the court issued a detailed minute entry laying out numerous factors it considered, including those from *Associated Indemnity* and various other cases. Thus, the court looked to the totality of the litigation in awarding fees to Thakrar. The trial court's minute entry provides a reasonable basis for the fee award, and the court did not abuse its discretion.

**VI. Attorney's Fees on Appeal**

¶33 Both parties request an award of attorney's fees under A.R.S. § 12-341.01(A). In exercising our discretion, we decline to award fees on appeal.

**CONCLUSION**

¶34 For the forgoing reasons, we affirm the trial court's verdict and subsequent award of attorney's fees, but vacate the award of costs to Thakrar.



AMY M. WOOD • Clerk of the Court  
FILED: AA