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

VM ASSOCIATES LIMITED PARTNERSHIP, an entity doing business in Arizona, Plaintiff/Appellant, v. KOWALSKI CONSTRUCTION, INC., an Arizona corporation, Defendant/Appellee, VM ASSOCIATES LIMITED PARTNERSHIP an entity doing business in Arizona, Plaintiff/Appellee, v. KOWALSKI CONSTRUCTION, INC., an Arizona corporation, Defendant/Appellant.	1 CA-CV 08-0062 DEPARTMENT B **MEMORANDUM DECISION** (Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause Nos. CV2001-004635, CV2001-008213, CV2001-021085, CV2002-006080, CV2002-006779, CV2002-090760 (Consolidated)

The Honorable Robert E. Miles, Judge

AFFIRMED

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G E M M I L L, Judge

¶1 VM Associates Limited Partnership ("VM") appeals from the superior court order granting summary judgment in favor of Kowalski Construction, Inc. ("Kowalski") on the subrogation and attorneys' fees issues. Kowalski appeals from the award of three specific items of damages to VM. For the reasons that follow, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 VM, owner of an apartment complex, hired Kowalski as the general contractor to replace defective piping in the apartment complex. Kowalski subcontracted with Walter Anderson Plumbing ("Anderson"). In April 2000, Anderson plumbers negligently caused a fire in one of the apartment buildings. Subsequently, in July 2000, Kowalski was making repairs caused by the April 2000 fire when one of its subcontractors caused a second fire resulting in additional damages to the same building.

¶3 VM submitted a claim for the property damage to its property insurer, Lexington. VM filed its complaint initiating this action against Lexington and Kowalski in March 2001.[1] VM alleged that Lexington breached its insurance contract and its duty of good faith and fair dealing and sought punitive damages. VM

[1] This action, Maricopa County Cause No. CV2001-004635, between VM and Lexington and Kowalski remained a separate action from the consolidated actions in Maricopa County Cause No. CV2001-008213.

alleged that Kowalski negligently caused the fire and resulting damages. Lexington filed a counterclaim against VM, alleging that VM breached the insurance contact by failing to assign its rights against Kowalski. Lexington sought declaratory judgment and specific performance. VM and Lexington settled their claims and counterclaims, and Lexington was dismissed from the action. VM's claims against Kowalski remained.

¶4 In December 2001, Lexington filed a subrogation action against Kowalski and its subcontractors to recover the amount Lexington paid to VM, which was $1,879,288.29. In March 2003, Lexington and Kowalski settled this lawsuit for $660,000 on behalf of Kowalski. In total, Lexington received $1,210,000 on its subrogation action against Kowalski and its subcontractors.

¶5 Kowalski filed a motion for partial summary judgment arguing that because VM was paid under its insurance policy with Lexington and because Kowalski had settled the subrogation action with Lexington, all VM was entitled to recover from Kowalski were the uninsured losses. Kowalski also argued that VM was not entitled to an award of attorneys' fees under Arizona Revised Statutes ("A.R.S.") § 12-341.01(A) (2003) because VM's claim against Kowalski did not arise out of a contract.

¶6 VM responded and filed a cross-motion for summary judgment. VM argued that Kowalski could not assert that Lexington had a right to subrogation because VM expressly refused to assign

its rights to Lexington and because Lexington's payment constituted a collateral source. VM also argued that even if Kowalski had a valid claim, it should only be entitled to credit for the $660,000 it actually paid Lexington. Finally, VM claimed that it was entitled to attorneys' fees under § 12-341.01(A) because VM and Kowalski entered into an oral agreement, which Kowalski then breached.

¶7 The superior court concluded that Lexington became subrogated to VM's claim against Kowalski for the amount Lexington paid to VM. The court found:

> That portion of the VM/Lexington claim was extinguished when Lexington settled with Kowalski. As a result, VM may recover from Kowalski only the uninsured loss - - i.e., the difference between VM's full loss and the total amount paid by Lexington to VM. Upon recovery of that amount, VM will have been fully compensated for its loss.

The court also found that the action did not arise out of contract and, therefore, VM was not entitled to fees pursuant to § 12-341.01(A).

¶8 VM moved for reconsideration, arguing that Kowalski was not entitled to claim equitable subrogation for more than the $660,000 it paid to Lexington. The court denied the motion for reconsideration.

¶9 The case was tried to the court. During trial, VM offered evidence of an oral agreement allegedly made between VM and Kowalski at an April 13, 2001 meeting. At the conclusion of trial,

VM moved to amend its complaint to include a breach of oral contract claim which would support its claim for fees under § 12-341.01(A).

¶10 The superior court found that VM's damages totaled $2,614,469.18. The parties stipulated that Lexington paid VM $1,879,288.29. Thus, the court, consistent with its prior ruling on partial summary judgment, concluded that VM was entitled to a judgment of $735,180.89 against Kowalski. The court rejected VM's claim of an oral contract and denied its request for attorneys' fees. VM filed a motion for new trial arguing that the evidence established a breach of an oral agreement. The court denied the motion. VM and Kowalski both filed timely notices of appeal on the same day. We have jurisdiction pursuant to A.R.S. § 12-2101(B) and (F) (2003).

DISCUSSION

I. Subrogation Issues

¶11 VM contends that the superior court erred in granting summary judgment in favor of Kowalski on Kowalski's claim that it was entitled to credit for the $1,879,288.29 that Lexington paid to VM. Alternatively, VM claims that Kowalski is entitled to no more than the $660,000 it paid to Lexington in settlement. Kowalski argues that Lexington was properly subrogated to VM's claim against Kowalski. Kowalski claims that it is entitled to full credit for the amount Lexington paid to VM because Lexington was entitled to settle its subrogation claim with Kowalski and its indemnitors.

¶12 In reviewing the superior court's rulings on cross-motions for summary judgment, we review de novo the questions of law, but view the facts in the light most favorable to the nonmoving party. *See Nelson v. Phoenix Resort Corp.,* 181 Ariz. 188, 191, 888 P.2d 1375, 1378 (App. 1994).

¶13 VM argues that it refused to assign its claims to Lexington because of Lexington's incompetent handling of its first-party claim. Thus, VM claims there was no valid subrogation. Kowalski argues that VM cited no authority to support its claim that Lexington's conduct defeated its subrogation rights. Kowalski argues that an insurer who pays all or part of an insured's loss is subrogated to the insured's rights as a matter of law.

¶14 The general rule regarding subrogation is that "'any person who, pursuant to a legal obligation to do so, has paid, even indirectly, for a loss or injury resulting from the wrong or default of another will be subrogated to the rights of the creditor or injured person against the wrongdoer or defaulter.'" *Allstate Ins. Co. v. Druke,* 118 Ariz. 315, 317, 576 P.2d 503, 505 (App. 1977), *vacated on other grounds,* 118 Ariz. 301, 304, 576 P.2d 489, 492 (1978). "Subrogation is the substitution of another person in the place of a creditor, so that the person in whose favor it is exercised succeeds to the rights of the creditor in relation to the debt." *Liberty Mutual Ins. Co. v. Thunderbird Bank,* 113 Ariz. 375, 377, 555 P.2d 333, 335 (1976) (*quoting Mosher v. Conway,* 45 Ariz. 463, 468, 46 P.2d 110, 112 (1935)).

¶15 When the insurer has paid the entire loss of the insured, the insurer becomes the real party in interest. *See United Pac./Reliance Ins. Co. v. Kelley,* 127 Ariz. 87, 89-90, 618 P.2d 257, 259-60 (App. 1980) (*citing Tucson Gas, Elec. Light & Power Co. v. Bd. of Supervisors of Pima County,* 7 Ariz.App. 164, 165, 436 P.2d 942, 943 (1968)). However, "the rule is different where only part of the claim is subrogated." *Tucson Gas, id.* at 166, 436 P.2d at 944 (*citing Bryan v. So. Pac. Co.,* 79 Ariz. 253, 261, 286 P.2d 761, 766-67 (1955)).

¶16 *Bryan* held that when "the insurer [has] paid only part of the loss, then both the insured and the insurer have substantive rights against the tortfeasor which qualify them as real parties in interest." 79 Ariz. at 261, 286 P.2d at 766 (*citing United States v. Aetna Cas. & Sur. Co.,* 338 U.S. 366, 381 (1949)). *Aetna* recognized that under such circumstances either party may sue the tortfeasor, and the tortfeasor may compel their joinder. 338 U.S. at 381. However, *Bryan* stated that "where the loss exceeds the amount of insurance paid, the insured may sue in his own name and recover the full amount of the loss, the question of the distribution of the proceeds being a matter between the insured and the insurer only." 79 Ariz. at 262, 286 P.2d at 766-67 (citations omitted).

¶17 VM argues that *Bryan* required Kowalski to join Lexington in VM's action against Kowalski, and its failure to do so supports

VM's recovery of the entire amount of damages from Kowalski.[2] Kowalski argues that *Bryan* did not set forth procedural requirements and does not preclude the court from considering the payments VM received from Lexington. We do not believe that *Bryan* supports VM's position here.

¶18 The issue in *Bryan* was whether the insurer was required to be joined in the action brought by the insured which would then make the issue of insurance coverage relevant. *Id.* at 261, 286 P.2d at 766. In this case, VM initially sued both Kowalski for the property loss and Lexington for its alleged breach of contract and insurance bad faith. Lexington filed a counter-claim against VM for its failure to assign its rights to Lexington. Lexington filed a separate subrogation action against Kowalski several months later, seeking to recover the amounts it paid to VM for the fire loss.[3] Lexington and Kowalski settled that action in early 2003. In early 2004, VM and Lexington settled their claims in this action, leaving only VM's claims against Kowalski, which we now have before us on appeal.

¶19 VM argues that because Kowalski failed to join Lexington, VM did not have the opportunity to litigate whether Lexington was

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[2] Kowalski argues that VM waived this argument by not raising it below. However, VM's response to the motion for summary judgment/cross-motion for summary judgment makes similar arguments regarding VM's ability to bring a suit to recover the full loss under *Bryan.* Although VM does not make precisely the same point, it sufficiently raised this argument below.

[3] The parties notified the superior court of this collateral action.

precluded from claiming its subrogation rights. However, Lexington was a party to this action until VM chose to settle and dismiss Lexington. Lexington's counter-claim raised the validity of its subrogation rights. Thus, VM dismissed Lexington from the very lawsuit in which it claims Kowalski should have included Lexington. VM cannot now claim this is a reason to prevent Kowalski from relying on Lexington's subrogation rights.

¶20 VM contends that Kowalski should not receive a credit from its settlement with Lexington when it knew that VM disputed Lexington's subrogation rights. We are not persuaded by the cases on which VM relies. *Allied Mutual Insurance Company v. Heiken,* 675 N.W.2d 820, 826-29 (Iowa 2004), recognized that a tortfeasor who settles with an indemnified insured may also be sued by the insurer if that settlement prejudices the insured's subrogation rights. However, *Allied* held that because subrogation rights are based on principles of equity, even in such cases, double recovery by the insured or double payment by the tortfeasor is not allowed. *Id.* at 829 n.5 (holding that the purpose of subrogation law includes the avoidance of double payment or double recovery). We also find that *Hagar v. Wright Tire & Appliance Inc.,* 33 S.W.3d 605 (Mo. App. 2000), is not applicable based on a substantial difference between Missouri and Arizona subrogation law. Missouri law provides that legal title to a property damage claim remains with the insured until the insured recovers proceeds from the tortfeasor. *Id.* at 610. Missouri law distinguishes between a right to equitable

subrogation, which can only be asserted against the proceeds collected by the insured, and a right to assignment, which exists only if the insured "gives the insurer full legal title to the claim and permits the insurer to pursue it against the tortfeasor." *Id.* Under Arizona law, equitable subrogation rights arise upon the insurer's payment to the insured. *See United Pac./Reliance,* 127 Ariz. at 90, 618 P.2d 260. Arizona also treats equitable subrogation like an assignment. *See Sun Valley Fin. Serv. of Phx., L.L.C. v. Guzman,* 212 Ariz. 495, 499, ¶ 18, 134 P.3d 400, 404 (App. 2006). Therefore, *Hagar* is distinguishable.

¶21 VM argues that Lexington had no subrogation rights under the facts of this case and, therefore, had no ability to settle with and relieve Kowalski of its obligation to pay full damages directly to VM. VM cites no authority for its argument that Lexington's alleged breach of contract and bad faith precluded its subrogation rights. One of the reasons for subrogation is to prevent injustice and to ensure that the proper party pays the debt which it is bound by "justice, equity, and good conscience" to pay. *Mosher,* 45 Ariz. at 468, 46 P.2d at 112; *see also Allied,* 675 N.W.2d at 828 and n.5 ("Subrogation law is controlled by principles of equity and its goal is to ultimately hold the wrongdoer responsible for the damage caused to the insured. . . . The purpose is not to allow a party to escape responsibility, recover extra proceeds, or pay twice."); *Leader Nat'l Ins. Co. v. Torres,* 779 P.2d 722, 723 (Wash. 1989) (resolution of subrogation issues is

guided by the equitable principle that the injured party is entitled to be made whole but not allowed a double recovery). Any objectionable conduct by Lexington could be, and presumably was, pursued by VM in its bad faith/breach of contract claim against Lexington. We do not find it to be inequitable, on this record and under these facts, to allow Lexington to maintain its subrogation rights. Moreover, VM settled with Lexington on Lexington's counterclaim on this issue. Therefore, we reject VM's argument that it did not have the opportunity to litigate whether Lexington had any subrogation rights.

¶22 VM also argues that the trial court erred in holding that the settlement between Lexington and Kowalski "extinguished" the VM/Lexington claim without analyzing whether Lexington even had subrogation rights. As stated above, VM had an opportunity to litigate Lexington's subrogation rights in the counterclaim. Additionally, the trial court's statement likely meant that when Lexington settled with Kowalski after having paid VM, the claim, as to the portion Lexington paid VM, was extinguished. We do not read this language to mean that any claims VM might have against Lexington were extinguished. VM was still free to, and did, pursue its claims against Lexington.

¶23 The manner in which these claims were procedurally handled caused a great deal of confusion that might otherwise have been avoided if there had been only one action involving the insured, the insurer, and the tortfeasor. However, under the

equitable policies of subrogation, the superior court correctly concluded that Lexington was subrogated to VM's rights to the extent it paid VM under the insurance policy. VM received full payment for the property loss by virtue of Lexington's payment plus the judgment against Kowalski. The parties' procedural choices should not usurp the court's equitable result and proper application of subrogation principles. *See Mosher,* 45 Ariz. at 468, 46 P.2d at 112 (holding that equitable principle of subrogation "rests upon the principle that substantial justice should be attained, regardless of [the] form.").

¶24 VM next argues that it is unjust for Kowalski to obtain the benefit of the full $1,879,288.29 when Kowalski paid only $660,000 to Lexington to settle Lexington's subrogation claim. Kowalski responds that if VM recovered any more, it would receive double recovery, which is not allowed. *See Bridgestone/Firestone N. Am. Tire, L.L.C. v. Naranjo,* 206 Ariz. 447, 450, ¶ 13, 79 P.3d 1206, 1209 (App. 2003); *Allied*, 675 N.W.2d at 828 n.5; *Leader*, 779 P.2d at 723. Once Lexington paid VM, Lexington was entitled to deal with Kowalski as it saw fit on the subrogation claim. It was subrogated to VM's rights and VM could not prevent Lexington from settling its subrogation claim for a lesser amount. It was Lexington's claim to settle. Although in hindsight, Kowalski did not end up paying the full amount of the loss, we do not find this result to be inequitable or unjust as to *VM.*

¶25 Because we conclude that Lexington had an equitable

subrogation right, we do not reach VM's argument that Lexington had no contractual subrogation rights.

II. Collateral Source Rule

¶26 VM also alleges that the payment from Lexington is a collateral source as to Kowalski for which Kowalski cannot receive credit in the absence of enforceable subrogation rights. "In general, the collateral source rule allows a plaintiff to fully recover from a defendant for an injury even when the plaintiff has recovered from a source other than the defendant for the same injury." *Norwest Bank (Minnesota), N.A. v. Symington*, 197 Ariz. 181, 189, ¶ 36, 3 P.3d 1101, 1109 (App. 2000). As we have already concluded, Lexington did have a right to subrogation against Kowalski. Therefore, by VM's own acknowledgement, its argument regarding the collateral source rule is not applicable. *See Ferraro v. S. Cal. Gas Co*., 102 Cal.App.3d 33, 47, 162 Cal.Rptr. 238, 246 (Cal.App. 1980) ("[W]hen an insurance carrier becomes subrogated to the claim of an insured against a third party tortfeasor, the payment of insurance proceeds is no longer a 'collateral source.' To characterize appellant's receipt of the $70,000 as a collateral source payment would violate the rule against double recovery, since both the subrogee and the subrogor have a right of action against the tortfeasor. The tortfeasor would have potential double liability if payment of insurance benefits by the subrogee to the subrogor is allowed to be designated a 'collateral source.'").

III. Attorneys' Fees Claim

¶27 VM contends that the original written contract was orally modified or a new implied-in-fact contract was entered into on April 13, 2000, one day before the first fire, and the breach of that oral agreement was what caused the fire. VM argues that the superior court, therefore, erred in denying its claim for attorneys' fees pursuant to A.R.S. § 12-341.01(A). Kowalski argues VM is not entitled to fees because the trial court correctly found that the evidence did not support VM's claim of breach of an oral agreement and, alternatively, even if there was a breach, VM did not show that the tort action would not exist but for the breach of contract. We agree with Kowalski's position.

¶28 "The trial court has broad discretion to award attorneys' fees under A.R.S. § 12-341.01, and we review the award under an abuse of discretion standard." *Robert E. Mann Const. Co. v. Liebert Corp.,* 204 Ariz. 129, 133, ¶ 13, 60 P.3d 708, 712 (App. 2003). In reviewing a trial court's finding of fact, this court will defer to the trial court's findings unless they are clearly erroneous. *Cimarron Foothills Cmty. Ass'n v. Kippen*, 206 Ariz. 455, 459, ¶ 11, 79 P.3d 1214, 1218 (App. 2003). "A finding of fact is not clearly erroneous if substantial evidence supports it, even if substantial conflicting evidence exists." *Kocher v. Dep't of Revenue of State of Ariz.*, 206 Ariz. 480, 482, ¶ 9, 80 P.3d 287, 289 (App. 2003). In regard to VM's claim for breach of an oral contract, the trial court concluded:

> VM did not provide any evidence of consideration for the alleged contract, nor did it prove breach by Kowalski (assuming an oral contract was formed). While VM argues that it would not have permitted Kowalski to remain on the property without Kowalski's promise of increased safety supervision, there was no evidence that that intent was ever communicated to Kowalski so as to provide some consideration for the alleged promise. Further, the fact that a fire occurred, in and of itself, does not prove that Kowalski breached any alleged promise to provide additional supervision. VM did not prove a breach of any oral contract by a preponderance of the evidence.

¶29 The trial court concluded there was insufficient evidence to prove the existence of a contract and a breach. Although the court might have found that there was a breach of contract, we believe that the record supports the court's finding of no breach. On this record, we will defer to the trial court on these issues of fact.

¶30 Additionally, the alleged breach of an oral agreement asserted by VM would not give rise to an award of fees under § 12-341.01(A), as a matter of law. This statute allows an award of attorneys' fees to the prevailing party "in any contested action arising out of a contract, express or implied." Our cases have held that when contract and tort theories are both involved, an award of fees under § 12-341.01(A) is appropriate only when "the tort cause of action could not exist **but for** the breach of contract." *Robert E. Mann Const.*, 204 Ariz. at 134, ¶ 15, 60 P.3d at 713 (*citing Sparks v. Rep. Nat'l Life Ins. Co.,* 132, Ariz. 529,

543, 647 P.2d 1127, 1141 (1982))(emphasis in original); *see also A.H. v. Ariz. Prop. & Cas. Ins. Guar. Fund,* 190 Ariz. 526, 529, 950 P.2d 1147, 1150 (1997) ("The inquiry is whether the tort action could not have existed but for the breach of . . . the contract."), *superseded by statute on other grounds, Jangula v. Ariz. Prop. & Cas. Ins. Guar. Fund,* 207 Ariz. 468, 470, ¶ 11, 88 P.3d 182, 184 (App. 2004); *Barmat v. John and Jane Doe Partners A-D,* 155 Ariz. 519, 524, 747 P.2d 1218, 1223 (1987) ("The legislature clearly did not intend that every tort case would be eligible for an award of fees whenever the parties had some sort of contractual relationship . . . .").

¶31 Kowalski's duty to VM existed regardless of the alleged oral agreement and breach thereof. Therefore, the court properly denied VM attorneys' fees under A.R.S. § 12-341.01(A).

¶32 For these reasons, we uphold the superior court's denial of VM's attorneys' fees.

IV. Damages Issues

¶33 Kowalski appealed from the damage award. Kowalski argues on appeal that the court erred in awarding VM its public adjuster fees ($186,287.31), repair costs that exceeded the fair market value of the building at the time of the fire, and the management fee paid to the property management company that worked for the complex ($135,000). VM argues that these damages were properly awarded and supported by the evidence. We will affirm the superior court's judgment if there is reasonable evidence to support it.

Spaulding v. Pouliot, 218 Ariz. 196, 199, ¶ 8, 181 P.3d 243, 246 (App. 2008).

¶34 Art Powell ("Powell") is one of two partners in VM. CJ Management is the property management company that manages VM's apartment complex. Powell and his VM partner, Dan Donahoe, also own CJ Management. VM paid CJ Management a project management fee of $135,000 to handle issues relating to the two fires. VM was also awarded $2,500 in overtime expenses incurred in dealing with the fires.

¶35 Prior to the fires in this case, VM hired a public adjuster, Victor Beard ("Beard"), to help with VM's claim against the manufacturer of the defective pipes in its apartment complex and later, against VM's previous insurance carrier, State Farm, for the piping claim. VM had previously agreed to pay CJ Management a fee of ten percent to manage the re-piping project. It was during the re-piping project that Kowalski's subcontractors apparently caused the two fires. The day of the first fire, VM hired Beard as its public adjuster for the fire damage claim.

A. Public Adjuster's Fees

¶36 VM paid its public adjuster, Beard, $186,287.31. Kowalski claims that the public adjuster fee is not a legally recoverable element of VM's damages. Kowalski argues that Beard did not and could not assist VM in its claim against Kowalski, a third party. Kowalski claims that VM's own insurer, Lexington, could have assisted it in making a claim against any third-parties,

but because VM immediately hired Beard, Lexington was not given that opportunity. Kowalski claims Beard's fee was not necessary for VM to present its claim to Lexington. Finally, Kowalski claims that this expense was not caused by the fire and argues that it is analogous to a request for attorneys' fees or accountant fees as an element of damages.

¶37 VM argues that the evidence supported the award of Beard’s fee. Powell and Rossi of CJ Management both testified that they did not have the time or expertise needed to handle the insurance issues relating to the fire. CJ Management was busy dealing with tenant and construction issues. Beard was hired to make decisions about the insurance issues and Kowalski's initial offer to take care of things. Once Kowalski reneged on its offer, Beard had to begin presenting a first party claim to Lexington.

¶38 A public adjuster represents property owners in preparing, presenting, and resolving loss claims with the owner's first-party insurer. As a consultant, someone in Beard's capacity could assist the property owner with evaluating and documenting claims against third parties. These are the duties which Beard performed for VM as a result of the fires. The trial court, as the finder of fact, considered and resolved the issues of necessity and proximate causation.

¶39 Kowalski fails to cite any statute or case law that prohibits the award of such expenses that result from a tort-feasor's negligence. Therefore, we do not believe such expenses

are like attorneys' fees, which have a history of being unrecoverable in tort actions. *See Lewin v. Miller Wagner & Co., Ltd.,* 151 Ariz. 29, 37, 725 P.2d 736, 744 (App. 1986). The trial court concluded that the evidence established that Beard's fees were reasonable and customary for this type of work. We cannot say on this record that awarding this element of damages was clearly erroneous.

B. Repair Costs

¶40 Kowalski argues that the cash value of the building just prior to the fire was $1,043,688.61 and that the repair cost was $1,476,261.81, so VM was overpaid by approximately $400,000. Kowalski claimed that VM was only entitled to recover "the decrease in value of the building caused by the fire, rather than the cost of repair," but the superior court found Kowalski failed to establish sufficient evidence of the difference in value of the building before and after the fire.

¶41 The rule for measuring damages has been described in *City of Globe v. Rabogliatti*, 24 Ariz. 392, 210 P. 685 (1922) as:

> [F]or the destruction or injury of buildings, fences, and the like improvements, which may at once be replaced, where the exact cost of restoring the property is capable of definite ascertainment, there being no damage to the realty itself, *is the cost of restoring or replacing such property* with compensation for the loss or impairment of its use during the reasonable time necessary to make such repairs or to effect such restoration.

24 Ariz. at 398-99, 210 P. at 687 (emphasis added) (citations

omitted). However, "[t]he c[o]st of repair or replacement cannot exceed the difference between the fair market value of the structure before and after the injury." *A.I.D. Ins. Ser. v. Riley,* 25 Ariz.App. 132, 136, 541 P.2d 595, 599 (1975) (*citing City of Globe v. Rabogliatti,* 24 Ariz. at 398-99, 210 P. at 687). If the plaintiff presents evidence as to only one measure of damage, the defendant has the burden of showing the other, less costly, measure. *See Mikol v. Vlahopoulos*, 86 Ariz. 93, 95, 340 P.2d 1000, 1001 (1959).

¶42 Kowalski presented evidence at trial that the "Actual Cash Value" of the building before the first fire was between $1,059,310.45 and $1,043,688.61. At trial, VM and Kowalski disagreed as to whether the "Actual Cash Value" and "Fair Market Value" are the same measurement of value. Additionally, the only evidence as to the value of the building after the fire came from witness Powell, who said it was not worth any more after the fire because it was renting for the same amounts as the other buildings in the complex and that one reconstructed building in the entire complex did not raise the value of the complex as a whole.

¶43 Based on our review of the record, we conclude the superior court has reasonably found that Kowalski failed to meet its burden of proving the decrease in value. We also note that the diminution in value measure of damages may not always apply when there have been two successive fires with repair and restoration expenses incurred between these events.

¶44 We affirm the award of this element of damages.

C. Management Fee

¶45 Kowalski contends that the court erred in allowing recovery of the management fee VM paid to CJ Management because this, in effect, allowed VM to pay itself. VM argues that long before the fire, VM used CJ Management as its property manager for the apartment complex.

¶46 It is undisputed that Powell is the co-owner of both VM and CJ Management. VM is the limited partnership formed to own the apartment complex. CJ Management is the company that provides property management services to VM and the office buildings. It is customary to pay a ten percent management fee for overseeing a project of the scope involved here. VM had entered into management agreements with CJ Management for other special projects. The fact that the two entities have the same owners is insufficient to disallow the fee in this case. There was no evidence that CJ Management was a sham company or that money it was paid went directly back to Powell. CJ Management had other employees which we assume it had to pay, and one of those employees, Rossi, did substantial work in managing the rebuilding project in addition to her regular duties. The record reveals that the trial court examined this evidence carefully, and on this record we do not conclude that awarding the management fee as an element of VM's damages was clearly erroneous.

CONCLUSION

¶47 We affirm the judgment of the superior court in its entirety.

_____
JOHN C. GEMMILL, Judge

CONCURRING:

_____
JON W. THOMPSON, Presiding Judge

_____
DONN KESSLER, Judge