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

VIVIAN ROSE, as President Trustee of the Mariposa Springs Irrevocable Trust dated December 2, 1999,	No. 1 CA-CV 10-0348
	DEPARTMENT C
	MEMORANDUM DECISION
Plaintiff/Appellee/ Cross-Appellant,	(Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure)
v.	
STEWART TITLE & TRUST OF PHOENIX, INC., an Arizona corporation,	
Defendant/Appellant/ Cross-Appellee.	

Appeal from the Superior Court in Maricopa County

Cause No. CV2007-017961

The Honorable John Rea, Judge

AFFIRMED

Fennemore Craig, P.C. Phoenix
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By Gary F. Howard
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B R O W N, Judge

¶1 Stewart Title & Trust of Phoenix, Inc., ("Stewart Title") appeals the trial court's judgment entered following a jury verdict in favor of Vivian Rose, as President Trustee of the Mariposa Springs Irrevocable Trust ("Vivian"). Stewart Title challenges the denial of its motions for judgment as a matter of law ("JMOL") and motion in limine seeking to preclude an investigative report. Alternatively, Stewart Title challenges the prejudgment interest and attorneys' fees awarded by the trial court. Vivian cross-appeals, asserting that if we reverse, the trial court should not permit Stewart Title to introduce certain testimony under the "Dead Man's Statute." For the following reasons, we affirm.

BACKGROUND

¶2 Ken and Vivian Rose, a retired couple living in Florida, formed the Mariposa Springs Irrevocable Trust and were named as co-trustees. In 2001, Ken sold his $3,000,000 life insurance policy for $720,000.[1] Robert Lynes provided the Roses with tax and financial advice. He told them about an investment opportunity in Chandler, Arizona, that would yield a sixteen percent return. Lynes then introduced Ken to Michael Melnick,

[1] The policy sold for $720,000 according to Ken's affidavit, but the later investment was $750,000.

the owner of Tibbar, Inc., and Derek Sivley, a branch manager at Stewart Title.

¶3 Ken and Tibbar entered a short-term loan investment agreement, with Sivley serving as the escrow officer. The escrow instructions provided that the funds would be released when Stewart Title received a "signed receipt and acceptance from Dennis R. Primavera of the Pledge Agreement and Irrevocable Payment Guaranty," and a "written request from Tibbar to deliver the Escrow Confirmation." As soon as the two conditions were satisfied, Sivley was to provide "notice by fax and overnight courier to each of [Ken] and Tibbar at the addresses listed below their respective signatures to these instructions within one (1) business day of [] receipt of such demand." Additionally, once Tibbar secured a $53 million dollar loan from B.L. Securities, Stewart Title was to return the $750,000 plus interest to Ken. If Tibbar did not secure the loan before January 31, 2002, the $750,000 was to be returned to Ken, along with interest.

¶4 The Chandler transaction fell through, but the money was not returned to Ken. Instead, the parties and Sivley signed an amended escrow agreement, and Ken agreed to invest in the purchase of a Florida property ("Light House transaction"). The only amendment to the text of the escrow agreement was a change

in the due date, which extended the return date of the funds to May 1, 2002.

¶5 On April 4, 2002, Melnick sent Sivley a transfer order for $50,000 to be sent to the trust account of a Florida real estate attorney. The funds were to be used as an earnest deposit for the Light House transaction. There was no evidence that Ken was given a copy of the transfer order. Despite not having received a signed receipt of the Pledge Agreement from Primavera or a written request from Tibbar to deliver the Escrow Confirmation, and without sending notice to Ken and Tibbar via overnight courier or fax, Sivley released the funds. Sivley sent a fax to Melnick on April 8, 2002, confirming the transfer, but did not fax the document to Ken.

¶6 On May 10, 2002, Melnick sent a second transfer order to Sivley for an additional $50,000, with the same instructions as the April order. Sivley again released the money, with no evidence that Ken was copied on any of the correspondence.

¶7 On May 31, 2002, Melnick sent a final transfer order to Sivley for the remaining $650,000. On June 5, 2002, Melnick sent Sivley an email, apparently unhappy that the money had not yet been wired:

> I am writing this memo as a clarification of our Transfer Order dated May 31, 2002, wherein I requested an immediate transfer of $650,000.00 to the real estate trust account

of Dale A. Beardsley PA. [sic] member, Attorney's Title, Jacksonville, Florida.

1) This transfer is part of the LightHouse Plaza transaction for which you have an executed contract of purchase and sale.

2) This transfer is to be made into the same real estate trust account to which you have already transferred $100,000.00. Therefore, a known and previously dealt with entity.

3) I have a Florida bank willing to issue the necessary instruments to BL Securities, which satisfies the funder's requirement for a payment guaranty. Both the Bank and BL are currently working on the verbiage of the enclosed draft to agree on the final document to be issued. This document should be ready for issuance shortly and will trigger the necessary funding to effect the purchase of the LightHouse Plaza Center.

4) The Bank requires that the entire $750,000.00 be on deposit with them in the Dale A. Beardsley PA, Real Estate Trust Account, as a ["]good faith["] condition of doing business. They simply want to know that we are serious enough as not to waste their time.

5) It is my understanding, that once Ken Rose agreed to lend and did disburse $750,000.00 to Tibbar, Inc., said funds became the property of Tibbar, Inc. without any further consent or notification to Rose.

6) #5 above does not mean that Tibbar, Inc. is free to spend the funds at will. It does mean that the corporation is at liberty to prudently use these funds for a legitimate business purpose. Why else would Tibbar agree to pay interest on funds it could not use? The transfer of

the $650,000.00 from one escrow agent to another is safe and a prudent move if such a transfer helps to effect our goal.

7) Therefore, as President of Tibbar, Inc., it is well within my authority to have issued the transfer order of May 31, 2002.

8) NO CONTACT WITH KEN ROSE. I am amazed that you made an attempt to contact Ken Rose when you have a STANDING INSTRUCTION not to do so unless or until you have first contacted myself. In my memo of May 31, 2002, I requested that you contact Dale or me as early in your day as possible. I have yet to hear from you.

Derek, I believe we are acting prudently in our request of you to transfer funds. I do not wish to lose this deal with the necessary funds on deposit in the National Bank of Arizona. To add insult to injury, daily interest is accruing against Tibbar for the use of these funds. We must be allowed to use them!

Please telephone both Dale and myself as early in your day as possible. Your cooperation is essential to a successful closing. Thank you.[2]

¶8 Sivley released the funds to Beardsley on June 6, 2002. On July 23, 2002, Ken, Melnick, and Sivley signed another amended escrow agreement, extending the return date of Ken's funds to November 1, 2002, even though Melnick and Sivley knew that Stewart Title was no longer holding any funds in escrow.

¶9 On October 30, 2002, Melnick and Ken signed a termination agreement for the escrow. Melnick gave Ken a check

[2] We quote these documents in their entirety, without correcting for grammar and punctuation.

for $130,436.40 for "interest,"[3] shares of stock in Tibbar, the promise of a deed to the hotel after closing, and promises of a percentage of monthly net operating income, tax advantages and so forth, in exchange for cancelling the escrow. The fax cover sheet from Melnick to Sivley stated, "As you can see from the enclosed, Rose and Tibbar have come to a new agreement which does not require the funds to be held in escrow. I would appreciate your executing the enclosed on today's business[.]" The new agreement read:

> The undersigned, for good and valuable consideration, given by each to the other, hereby agree as follows:
>
> The Escrow Agreement between Kenneth H. Rose, as Executive Trustee of Mariposa Springs, hereinafter referred to as "Lender", Tibbar, Inc., hereinafter referred to as "Tibbar" and Stewart Title & Trust of Phoenix, Inc., hereinafter referred to as "Escrow Agent", dated November 9, 2001, as modified thereafter, is hereby terminated and the Escrow Agent is instructed to deliver to Tibbar the escrow funds immediately upon receipt of this agreement.

Sivley signed the agreement and closed the escrow file. The Light House transaction never occurred, B.L. Securities did not fund a loan, and the benefits promised to Ken in exchange for releasing the note never occurred because the purchase of the hotel property had failed.

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[3] The funds that Ken received from Melnick were not "interest" but actually a portion of Ken's money that had already been transferred to Florida.

¶10 In early 2003, Ken filed a complaint with the Florida Office of Financial Regulation requesting an investigation of Melnick for securities violations. Michelle Dygon investigated for approximately seven months, until Ken passed away. Dygon closed the matter on September 8, 2004, concluding that "although the analysis completed has revealed that the funds were not use[d] for the intended purpose, no other victims could be located [and] . . . the family has hired a civil attorney in order to file a lawsuit against the parties involved."

¶11 Vivian sued Stewart Title in October 2007, alleging a breach of the escrow agreement and breach of the implied covenant of good faith and fair dealing.[4] After both parties requested summary judgment, the court denied both motions. Vivian moved in limine to preclude oral statements allegedly made by Ken to Sivley as well as expert testimony opining that Ken had orally authorized or later ratified the disbursements of the money. Stewart Title sought to exclude an affidavit from Ken and the Dygon investigative report.

¶12 The court denied Vivian's motion as to the oral statements, and ruled that the expert could testify as to

[4] Vivian had previously sued Stewart Title in a complaint filed in Florida state court. The parties informed us that in that case, Stewart Title moved to dismiss for lack of personal jurisdiction, and the motion was granted by the trial court and affirmed on appeal. *Rose v. Stewart Title & Trust of Phoenix, Inc.*, 951 So. 2d 844 (Table) (Fla. Dist. Ct. App. 2007).

industry standards for ratification but not as to the ultimate question of whether there was ratification in this case. The court denied Stewart Title's motion.

¶13 At trial, Stewart Title moved for a directed verdict at the close of Vivian's case-in-chief, asserting that there was no ambiguity about the written terms of the escrow instructions and no breach of the terms. Stewart Title also argued that although the instructions required notice upon a demand for payment, no such demand had occurred when Melnick requested to transfer funds to a different escrow account out of state. Vivian countered that there were three conditions before any release of escrow funds could occur and that none of them were fulfilled; therefore, the express escrow terms were breached. Vivian also argued that if there was any confusion as to the meaning of the escrow instructions, it was a breach for Stewart Title to fail to make contact with the parties to resolve the ambiguity. She contended further that Sivley conceded he had breached the express terms of the escrow instructions and that whether there was a "demand for payment" under the escrow instructions was a jury question.

¶14 The court denied the JMOL motion the following morning, but Stewart Title requested to add to its motion, which the court permitted. Stewart Title asserted there was no affirmative duty to disclose the substance of the Melnick email

and that the issue should not go to the jury, particularly when there was no evidence about what Ken would have done even if he had been given the information. Vivian countered that failure to inform Ken of indications of potential fraud when an escrow agent could perceive suspicious circumstances was a sufficient basis for liability. The court denied the alternative motion. Stewart Title later unsuccessfully renewed both motions at the close of its defense.

¶15 After deliberation, the jury awarded damages to Vivian of $309,781.80. The court awarded $172,671.50 in attorneys' fees to Vivian, $2,356.80 in costs, and prejudgment interest from the date that Stewart Title released the funds, in the amount of $229,238.53. This timely appeal and cross-appeal followed.

DISCUSSION

¶16 At the outset, Vivian requests that we strike Stewart Title's brief because it fails to comply with court rules. Though we agree that many citations to the record are missing, and the opening brief fails to include a separate statement of facts, we decline to grant Vivian's request for summary dismissal of the appeal. Unless a party's brief is "totally deficient," we "prefer to decide each case upon its merits rather than to dismiss summarily on procedural grounds." *Adams v. Valley Nat'l Bank of Ariz.*, 139 Ariz. 340, 342, 678 P.2d 525,

527 (App. 1984). We note, however, that we do not approve of Stewart Title's failure to comply with explicit rules governing the preparation of appellate briefs.

¶17 Stewart Title argues the trial court erred in: (1) denying its JMOL motions; (2) admitting in evidence the Dygon report; (3) awarding prejudgment interest; (4) and awarding excessive attorneys' fees. Stewart Title also introduces, but does not develop, a causation argument. In essence, Stewart Title suggests it was entitled to JMOL because the financial loss suffered by the Roses was not precipitated by Stewart Title's actions but simply by Ken's decision to invest in Tibbar.

¶18 Vivian argues that Stewart Title has waived any argument as to causation because it was not preserved for appeal. For two reasons, we agree with Vivian on this point. First, we do not consider claims that are not adequately briefed on appeal. ARCAP 13(a)(6) ("An argument . . . shall contain the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on."); *Watahomigie v. Ariz. Bd. of Water Quality Appeals*, 181 Ariz. 20, 26, 887 P.2d 550, 556 (App. 1994) (finding that a court will not consider issues not properly briefed). Second, Stewart Title has not directed us to any portion of the record where it

requested judgment as a matter of law on the issue of causation.[5]

Based on our own review, the record shows that Stewart Title

[5] Though Stewart Title includes a footnote in its reply brief citing portions of the record where a causation argument was allegedly presented to the trial court, each of the instances arose in the context of the ratification defense. In other words, Stewart Title never requested JMOL or presented evidence supporting the theory that regardless of whether Ken had knowledge of the transaction and ratified it, any loss that he sustained was based on actions not attributable to Stewart Title. In fact, Stewart Title attempted to raise this argument in a trial management conference, but doing so was untimely, and Vivian objected. Vivian argued that though she did not object to Stewart Title presenting a ratification defense, it was unfair to allow evidence that there was no causation for the damages even absent ratification. Vivian's counsel explained:

> But now they're taking a second argument, and they're saying look, even if this ratification didn't occur, we still didn't suffer damages because Mr. Rose allegedly purchased this 10% interest in [Tibbar] and we were going to give him $750,000 anyway.
>
> That issue, Your Honor, is completely absent from their motion for summary judgment. That argument's not asserted anywhere, and it's not in their disclosure statement at all.

The reply brief also quotes from argument that occurred in a hearing on the motion for new trial, that "Plaintiff received exactly what they bargained for." However, this untimely argument was made within the context of what had already been argued in the previous JMOL motions, which did not include the causation argument. Finally, Vivian's counsel requested a hearing after closing argument to object to Stewart Title's statements made during closing. At the hearing, counsel for Stewart Title conceded that he had agreed in the final pretrial conference not to make the argument, but argued that his closing argument was permissible because Vivian had opened the door with her closing. Though the trial court took no curative action, agreeing that Stewart Title's argument was a permissible rebuttal to Vivian's closing, raising an issue in closing

moved for JMOL on two grounds: (1) no breach of the express terms of the written escrow instructions, and (2) no potential legal liability for failing to inform Ken of the June 5th Melnick letter. Stewart Title's motion for new trial also contained those two grounds, as well as asserting the evidentiary and jury instruction errors raised on appeal. Thus, the legal substance of Stewart Title's motions involved lack of breach, not lack of causation. Therefore, we decline to address Stewart Title's causation argument, raised for the first time on appeal. *See Cnty. of La Paz v. Yakima Compost Co., Inc.,* 224 Ariz. 590, 607, ¶ 51, 223 P.3d 1169, 1186 (App. 2010) (finding that failure to raise causation argument in a motion for JMOL at the close of evidence waived any entitlement to JMOL on that basis); *Dawson v. Withycombe*, 216 Ariz. 84, 99, ¶ 38, 163 P.3d 1034, 1049 (App. 2007) (failing to raise an issue in a pre-verdict JMOL motion waives any argument that a defendant is entitled to judgment as a matter of law on that issue); *Romero v. Sw. Ambulance*, 211 Ariz. 200, 204, ¶ 7, 119 P.3d 467, 471 (App. 2005) (holding that arguments not presented to the trial court are deemed waived).

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argument cannot be sufficient to preserve an issue for appeal. *Carlton v. Emhardt*, 138 Ariz. 353, 355, 674 P.2d 907, 909 (App. 1983) (finding that a defense raised only in a closing argument was waived on appeal).

In sum, we find nothing in the record supporting Stewart Title's claim that it requested JMOL based on lack of causation.

I. Rule 50(b) Motions and Motion for New Trial

¶19 A motion for JMOL should be granted "if the facts produced in support of the claim or defense have so little probative value, given the quantum of evidence required, that reasonable people could not agree with the conclusion advanced by the proponent of the claim or defense." *Orme Sch. v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990); *see also* Ariz. R. Civ. P. 50(a)(1). Our review for the denial of a JMOL is de novo. *See Felder v. Physiotherapy Assocs.*, 215 Ariz. 154, 162, ¶ 36, 158 P.3d 877, 885 (App. 2007). Additionally, "we review the evidence in a light most favorable to upholding the jury verdict and will affirm if any substantial evidence exists permitting reasonable persons to reach such a result." *Acuna v. Kroack*, 212 Ariz. 104, 111, ¶ 24, 128 P.3d 221, 228 (App. 2006) (internal citation and quotations omitted).

A. Breach of Express Terms

¶20 Stewart Title's first JMOL motion argued there was no breach of the express terms of the escrow instructions because there was never a demand for payment, but only a transfer of funds to a new escrow. Without citing any authority for the proposition, counsel argued at trial, "Just plain everyday language, payment—a demand for payment is something completely

different and distinct from a request for a transfer of funds." After hearing extensive argument, the court denied the motion.

¶21 We agree with the trial court's decision to deny JMOL on the breach of contract claim. Sivley conceded that he had breached the written terms of the escrow agreement. He specifically agreed that when he released the funds, he was not following the terms and conditions of the agreement. Stewart Title attempted to rehabilitate this admission by Sivley testifying that notification was not required because there was no demand for payment. A reasonable jury could have doubted the veracity of this theory, however, when the June 5th letter from Melnick continued to reference the requirement that B.L. Securities provide a payment guaranty, meaning that Melnick seemed to believe that the terms of the escrow agreement still applied to a certain extent.

¶22 Additionally, Vivian asked Stewart Title's expert witness whether Sivley followed the written conditions of the escrow, and the witness said, "I really was not asked to give an opinion on that." When pressed, however, he conceded that he had previously stated in his deposition that the exact written instructions had been breached. The record also reflects that testimony from both experts was in conflict as to whether there was a difference between a payment and a transfer. A reasonable jury could consider that once the money was sent to Beardsley,

it was moved outside of Ken's control, regardless of the terminology. In sum, Stewart Title has not pointed to any authority indicating that this theory required judgment as a matter of law.[6] Therefore, we find no error in the court's refusal to grant JMOL on this basis.

B. Fiduciary Duty and Implied Covenant of Good Faith and Fair Dealing

¶23 Over Stewart Title's objection, evidence was admitted at trial concerning the scope and reasonable expectations of the duties of an escrow agent. The trial court found that as long as Vivian was not asserting tort damages, an escrow agent's fiduciary duties were relevant to the reasonable expectations of the parties in making the contract. Stewart Title challenges the trial court's decisions relating to the admissibility of evidence and the propriety of jury instructions as to fiduciary duty. Specifically, Stewart Title argues that the court allowed testimony and jury instructions that misstated the scope of an

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[6] In fact, though Stewart Title characterizes this theory as one that is obvious in everyday business proceedings, we note that the statutory definition of "transfer" in the fraudulent transfers section of our statutes means "every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset and includes payment of money, release, lease and creation of a lien or other encumbrance." Ariz. Rev. Stat. ("A.R.S.") § 44-1001(9) (2003); *State ex. rel. Indus. Comm'n of Ariz. v. Wright*, 202 Ariz. 255, 257, ¶ 8, 43 P.3d 203, 205 (App. 2002) (holding that the broad statutory definition of a transfer in the Uniform Fraudulent Transfer Act includes any transaction in which a property interest was relinquished).

escrow agent's duties. We turn first to the jury instructions, because if they correctly stated the law, then admission of evidence consistent with the instruction was appropriate. We review de novo whether jury instructions correctly state the law. *State v. Gallardo*, 225 Ariz. 560, 567, ¶ 30, 242 P.3d 159, 166 (2010).

¶24 The jury was instructed in pertinent part as follows:

> To determine what the parties intended the terms of a contract to mean, you may consider the language of the written agreement; the acts and statements of the parties themselves before any dispute arose; the parties' negotiations; any prior dealings between the parties; any reasonable expectations the parties may have had as the result of the promises or conduct of the other party; and any other evidence that sheds light on the parties' intent.
>
> . . .
>
> A party to a contract has a duty to act fairly and in good faith. This duty is implied by law and need not be in writing. This duty requires that neither party do anything that prevents the other party from receiving the benefits of their agreement.
>
> . . .
>
> In this case you've heard a lot of testimony about escrows and escrow agents. According to the law, an escrow agent owes a special duty to the parties to an escrow transaction, which is called a fiduciary duty.
>
> The escrow agent is required to do the following: (1) Conduct the transaction with scrupulous honesty, care and diligence; (2)

> Strictly comply with the written terms of the escrow agreement; and (3) *When the terms of the instruments or any other fact known to an escrow agent, including the documents deposited in escrow, present an ambiguity of interpretation as to the intent of the parties, the agent shall call the principals for clarification to obtain more definite instructions.*[7]
>
> The escrow agent has no duty to regulate the transaction so that each party receives a fair price for its property.

(Emphasis added.)

¶25 Stewart Title argues that breach of fiduciary duty is a tort and breach of the implied covenant of good faith and fair dealing is a contract claim; therefore, any discussion or admission of evidence at trial involving fiduciary duties of escrow agents was inapplicable and improper. Vivian counters that the parties to the escrow agreement owed a duty to each other to deal fairly and in good faith and not to take action that would injure, frustrate or interfere with their respective rights or expectations under the agreement. According to Vivian, such a duty would include strict compliance with the escrow agreement, including notification prior to release of funds, and clarification of any ambiguities to safeguard against any improper release.

[7] The third prong of the jury instruction of the fiduciary duties of an escrow agent was actually offered to the court by Stewart Title.

¶26 Contrary to Stewart Title's objection, we find that the trial court did not err in instructing the jury as to the duty of an escrow officer. Our supreme court has stated, "Undoubtedly, given the nature of the contractual relationship between an escrow agent and its principal, the covenant of good faith and fair dealing recognizes a fiduciary relationship and requires the escrow agent to act with the utmost honesty and fairness." *Burkons v. Ticor Title Ins. Co. of Cal.*, 168 Ariz. 345, 355, 813 P.2d 710, 720 (1991). The remedy for breach of the implied covenant is ordinarily contract damages, but in certain circumstances, can also provide tort damages. *Id.*; *see Tucson Title Ins. Co. v. D'Ascoli*, 94 Ariz. 230, 234, 383 P.2d 119, 121 (1963) (finding a breach of fiduciary duty and that after a breach, "all damages resulting from any deviation" may be recovered). The supreme court has not addressed "the applicability of the tort of bad faith to escrow agreements generally." *Manley v. Ticor Title Ins. Co. of Cal.*, 168 Ariz. 568, 574, 816 P.2d 225, 231 (1991); *see also Burkons*, 168 Ariz. at 356, 813 P.2d at 721. However, because Vivian did not assert the right to tort damages, we need not analyze whether tort damages for breach of escrow instructions would apply. *See Burkons*, 168 Ariz. at 355, 813 P.2d at 720; *see also Rawlings v. Apodaca*, 151 Ariz. 149, 159-60, 726 P.2d 565, 575-76 (1986)

(enumerating factors for a court to consider when evaluating the availability of tort damages for a contract breach).

¶27 Instead, the relevance of a fiduciary duty turns on whether it was encompassed within the reasonable expectations of the parties. The covenant of good faith and fair dealing may be breached expressly or by conduct that denies the other party the reasonably expected benefits of the agreement. *Wells Fargo Bank v. Ariz. Laborers, Teamsters & Cement Masons Local No. 395 Pension Trust Fund*, 201 Ariz. 474, 491-92, ¶¶ 64, 66, 38 P.3d 12, 29-30 (2002). Comment d of the Restatement (Second) of Contracts § 205 (1981), explains that "bad faith may be overt or consist of inaction," and a person may "violate the obligation of good faith in performance even though the actor believes his conduct to be justified." Indeed, good faith emphasizes faithfulness to "an agreed common purpose and consistency with the justified expectations of the other party." *Id.* § 205 cmt. a.

¶28 Here, Vivian's complaint alleged both an express breach of the written terms of the contract and an implied breach based on Stewart Title's failure to notify Ken of correspondence received from Melnick. Stewart Title argues that it was only required to notify Ken if it had actual evidence of

fraud,[8] and that there was no duty to inform Ken if there was evidence that Melnick was interpreting the agreement differently than Ken. We disagree.

¶29 "An escrow agent has a fiduciary relationship of trust and confidence to the parties to the escrow." *Maxfield v. Martin*, 217 Ariz. 312, 314, ¶ 12, 173 P.3d 476, 478 (App. 2007) (citing *Maganas v. Northroup*, 135 Ariz. 573, 576, 663 P.2d 565, 568 (1983)). As such, the escrow agent is obligated to perform his responsibilities with "scrupulous honesty, skill, and diligence." *Id*. (quoting *Berry v. McLeod*, 124 Ariz. 346, 351, 604 P.2d 610, 615 (1979)). "The escrow relationship gives rise to two specific fiduciary duties to the principals: to comply strictly with the terms of the escrow agreement and to disclose facts that a reasonable escrow agent would perceive as evidence of fraud being committed on a party to the escrow." *Id*.

¶30 Likewise, Stewart Title's argument that an escrow agent is not required to clarify ambiguous terms has also been rejected. When the "agent should realize the possibility of conflicting interpretations, ordinarily [it] is not authorized to act, since it would be [its] duty to communicate with the principal and obtain more definite instructions." *Gardenhire v. Phoenix Title & Trust Co.*, 11 Ariz. App. 557, 559, 466 P.2d 776,

[8] Though Stewart Title relies heavily on its "fraud" argument, the trial court granted Stewart Title's request to remove the word "fraud" from the instructions entirely.

778 (1970) (quoting Restatement (Second) of Agency § 44 cmt. c (1958)). Therefore, the trial court did not err by instructing the jury as to an escrow agent's fiduciary duty.

¶31 As such, the court did not abuse its discretion in allowing Vivian to present evidence relating to the duties of an escrow agent. Sivley had several opportunities to speak and clarify matters with the parties. In April, after the first release of $50,000, an amended agreement was signed by the parties. Sivley also signed the agreement, and did not ask why $750,000 was still referenced as the amount in escrow, rather than $700,000.

¶32 When Stewart Title received an email from Melnick that Sivley conceded was in conflict with the express escrow instructions, he did not seek any clarification from Ken. The email specifically directed Sivley not to apprise Ken of the withdrawals, even though Ken was a principal to whom Sivley owed a fiduciary duty.

¶33 Additionally, Sivley did not have a conversation with Ken at the time of the amended escrow agreement in July of 2002, or make any attempt to discover why a new agreement would be signed when the entirety of the escrow had already been released. Sivley admitted that there was no need for that document when the money had already been released, but that he signed it anyway.

¶34 Likewise, Sivley did not have any clarification discussion with Ken after receiving the October termination agreement, even though it purported to be releasing funds that had already been released several months earlier. In sum, the trial court properly allowed Vivian to present evidence to the jury of an escrow agent's duties.[9]

II. Admission of the Dygon Report

¶35 Stewart Title argues that the court erred in admitting Exhibit 31, or the Dygon report, because the document was hearsay. We will affirm the trial court's rulings on the exclusion or admission of evidence absent an abuse of discretion. *State v. Hampton*, 213 Ariz. 167, 178, ¶ 45, 140 P.3d 950, 961 (2006).

¶36 Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Ariz. R.

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[9] Stewart Title briefly mentions that the general form of verdict submitted to the jury means that "there is no way to know on which claim the jury might have found for [Vivian]." A party who fails to present argument or authority to support a claim of error has waived the claim. *See AMERCO v. Shoen*, 184 Ariz. 150, 154 n.4, 907 P.2d 536, 540 n.4 (App. 1995). Even if this issue were not waived, it would only be reversible if there was first an underlying error in one of the claims submitted to the jury. *See Kaman Aerospace v. Ariz. Bd. of Regents,* 217 Ariz. 148, 156 n.11, ¶ 33, 171 P.3d 599, 607 n.11 (App. 2007) (collecting cases "in which an appellate court overturned a general verdict and remanded the case for a new trial because of trial error and because it was impossible for the court to tell whether the jury erroneously found for the party").

Evid. 801(c). Public records and reports serve as an exception to the hearsay rule:

> Unless the sources of information or other circumstances indicate lack of trustworthiness, records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law.

Ariz. R. Evid. 803(8).

¶37 The exception is justified by an assumption that public officials perform their duties properly and probably do not independently recall details reflected in records. Fed. R. Evid. 803(8), advisory committee note 8; *see also Shotwell v. Donahoe*, 207 Ariz. 287, 293, ¶ 19, 85 P.3d 1045, 1051 (2004) (stating Arizona's rule mirrors the federal rule). Rule 803(8) gives discretion to the trial court to evaluate trustworthiness, and consider such issues as the report's hearsay content and sources. *See Bright v. Firestone Tire & Rubber Co.*, 756 F.2d 19, 22-23 (6th Cir. 1984).

¶38 Stewart Title argues that the report was not sufficiently trustworthy. The only arguments in support of this

statement though, are "we know nothing of Ms. Dygon's qualifications," the document does not indicate that "any hearing was held," and that the document itself contained hearsay. [10]

¶39 We find the facts here similar to those present in *Hudgins v. Sw. Airlines, Co.*, 221 Ariz. 472, 212 P.3d 810 (App. 2009). In *Hudgins*, defendant Southwest Airlines moved to preclude three FBI reports prepared by an FBI special agent, asserting the reports were inadmissible hearsay. *Id.* at 483, ¶ 25, 212 P.3d at 821. The reports detailed contacts made by the agent, but also reported third party statements,[11] such as "Batista (sic) was advised that no response had been received[.]" *Id.* at 484, ¶ 27, 212 P.3d at 822. The report concluded by recommending that the FBI close its case. *Id.* at ¶ 28. The court found that the report was properly admitted under Rule 803(8) because it contained factual accounts of the agent's actions in investigating the case and a recommendation to close the case, and there was no indication the report was inaccurate. *Id*. at ¶ 30.

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[10] The disputed statement said, "Unbeknown to Rose these funds had already been transferred to the trust account of Attorney Dale Beardsley."

[11] Southwest Airlines did not challenge the admissibility of the third party statements as inadmissible hearsay, and the court did not address that issue. *Id.* at n.7, ¶ 34.

¶40 Here, Dygon was an investigator with the Florida Bureau of Financial Regulations. The document was a final report, certified as complete and accurate by Dygon. As in *Hudgins*, the report reflected matters observed or heard and reported pursuant to her official duties. *See id*. at ¶ 31 (citing 1 Morris K. Udall et al., *Arizona Practice: Law of Evidence* § 131 at 287-88 (3d ed. 1991) (noting that police reports are admissible under Rule 803(8)(B) in civil cases but not in criminal cases)). Additionally, Stewart Title could have deposed or called Dygon as a witness to impeach the credibility of the report or to clarify the source of the disputed statement and chose not to do so.

¶41 To the extent that Stewart Title challenges the possibility of third party statements included in the report as another level of hearsay, we note that although Stewart Title assumes that Dygon must have used a statement from Ken in coming to this conclusion, the statement itself does not conclusively indicate that to be so. There is no clear indication that the statement was not the result of observations or conclusions of Dygon, formed after reviewing the case.

¶42 Even assuming that the statement was hearsay, multiple hearsay is allowed if each part of the combined statements meets a recognized exception. Ariz. R. Evid. 805 (permitting hearsay within hearsay where each part conforms with an exception to the

hearsay rule); *State v. McGann*, 132 Ariz. 296, 298 n.1, 645 P.2d 811, 813 n.1 (1982). As Ken was unavailable[12] as a witness, his statement could have been allowed, in the discretion of the trial court. Ariz. Rule Evid. 804(b)(7).[13] Stewart Title was free to challenge the weight to be given the evidence, and did so with Sivley's testimony that he did contact Ken. The weight to be given the report and statement was properly within the province of the jury. *Estate of Reinen v. N. Ariz. Orthopedics, Ltd.*, 198 Ariz. 283, 287, ¶ 12, 9 P.3d 314, 318 (2000) (finding that the credibility of witnesses and the weight of the evidence are within the province of the jury). Therefore, we find no error in the admission of the Dygon report.[14]

III. Prejudgment Interest

¶43 Whether a party is entitled to interest is a legal question we review de novo. *In re US Currency in Amount of $26,980.00*, 199 Ariz. 291, 298, ¶ 24, 18 P.3d 85, 92 (App. 2000). A party may receive prejudgment interest on a liquidated

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[12] A witness is unavailable when he "is unable to be present or to testify at the hearing because of death[.]" Ariz. R. Evid. 804(a)(4).

[13] For example, Ken's own affidavit, submitted to Dygon during the investigation, was admitted by the stipulation of both parties.

[14] Based on our conclusion that the jury's verdict should be upheld, we need not address Vivian's cross-appeal as to whether the court on remand should preclude Sivley from testifying concerning conversations with Ken in light of the "Dead Man's Statute." *See* A.R.S. § 12-2251 (2003).

claim as a matter of right in both contract and tort actions. *Employer's Mut. Cas. Co. v. McKeon,* 170 Ariz. 75, 78, 821 P.2d 766, 769 (App. 1991). "Whether a claim is liquidated is a question of fact." *Able Distrib. Co., Inc. v. James Lampe, Gen. Contractor*, 160 Ariz. 399, 406, 773 P.2d 504, 511 (App. 1989). A liquidated claim occurs when "the evidence furnishes data which, if believed, makes it possible to compute the amount with exactness, without reliance upon opinion or discretion." *John C. Lincoln Hosp. & Health Corp. v. Maricopa Cnty.*, 208 Ariz. 532, 544, ¶ 39, 96 P.3d 530, 542 (App. 2004) (citations and quotations omitted).

¶44 Here, Stewart Title asserts that the damages were unliquidated because the jury awarded less than half of the amount sought by Vivian and no sufficient information was given to allow for the determination of the amount owed. Additionally, Stewart Title argues that even if the claim were liquidated, the date of accrual should have been the date the claim was filed, not the date the funds were paid out by Stewart Title. We disagree.

¶45 The fact that the amount of damages ultimately awarded differs from the amount of damages claimed does not preclude an award of prejudgment interest. *Paul R. Peterson Const., Inc., v. Ariz. State Carpenters Health and Welfare Trust Fund*, 179 Ariz. 474, 485, 880 P.2d 694, 705 (App. 1994). A plaintiff must

merely provide a basis for a precise calculation. For example, a Plaintiff may reference an agreement between the parties. *Id.* Here, Stewart Title's own account ledger of the escrow provides such a basis.

¶46 As to the date of accrual, we agree with Stewart Title that prejudgment interest generally accrues from the date of demand, not from the date of loss, often occurring by the filing of a complaint. *See Dawson*, 216 Ariz. at 113, ¶¶ 100-01, 163 P.3d at 1063. However, *Dawson* was a tort case, and the instant case involves contract-related claims concerning the unauthorized diversion of funds. Therefore, Vivian was entitled to prejudgment interest beginning at the date the funds were unlawfully diverted. *See Gemstar Ltd. v. Ernst & Young*, 185 Ariz. 493, 509, 917 P.2d 222, 238 (1996) (holding in a contract dispute that when one investor unlawfully diverted funds, the investor was required to pay prejudgment interest from the date of the transfer); *Fleming v. Pima Cnty.*, 141 Ariz. 149, 155, 685 P.2d 1301, 1307 (1984) (holding in a contract dispute, that prejudgment interest was proper from the date of wrongfully withheld paychecks).

IV. Attorneys' Fees

¶47 The superior court may award the successful party its attorneys' fees in an action arising out of contract. A.R.S. § 12-341.01(A) (2003). An award of attorneys' fees to a

prevailing party in a contract action or for bad faith contract claims is left to the sound discretion of the trial court, absent an abuse of discretion. *Kuehn v. Stanley*, 208 Ariz. 124, 132, ¶¶ 32-33, 91 P.3d 346, 354 (App. 2004). If there is any reasonable basis for the exercise of the discretion, the court's decision as to the amount of attorneys' fees will not be disturbed. *Fulton Homes Corp. v. BBP Concrete*, 214 Ariz. 566, 569, ¶ 9, 155 P.3d 1090, 1093 (App. 2007).

¶48 Stewart Title argues that Vivian was only partially successful and that the court should not have awarded full fees because the litigation could have been avoided or settled. Additionally, Stewart Title asserts that the fee application failed to comply with case law requirements because many entries were not itemized and were duplicative, with multiple attorneys billing. *See Schweiger v. China Doll Rest., Inc.,* 138 Ariz. 183, 187-89, 673 P.2d 927, 931-33 (App. 1983) (establishing requirements for fee applications).

¶49 Here, we find no error in the reasonableness of the fee award. Attorneys' fees are not unreasonable simply because the successful party recovers less than they asked for from a jury. "While the award of money is an important item to consider when deciding who is prevailing party, the fact that a party does not recover the full measure of relief it requests does not mean that it is not the successful party." *Sanborn v.*

Brooker & Wake Prop. Mgmnt., Inc., 178 Ariz. 425, 430, 874 P.2d 982, 987 (App. 1994). Stewart Title does not contend that Vivian was unsuccessful in the litigation, and the amount of fees to be awarded based on the degree of successfulness at trial falls squarely within the discretion of the trial court.[15]

V. Attorneys' Fees on Appeal

¶50 Both parties have requested attorneys' fees on appeal pursuant to A.R.S. § 12-341.01. In our discretion, we award reasonable attorneys' fees and costs to Vivian, as the prevailing party, upon her compliance with ARCAP Rule 21.

CONCLUSION

¶51 For the foregoing reasons, we affirm the judgment of the trial court.

/s/
_____
MICHAEL J. BROWN, Judge

CONCURRING:

/s/
_____
PATRICIA A. OROZCO, Presiding Judge

/s/
_____
DONN KESSLER, Judge

[15] We also note that Stewart Title requested oral argument, but not an evidentiary hearing, to challenge the attorneys' fees application.