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

JGD, LLC, an Arizona limited liability company, Plaintiff/Appellant, v. AMERICAN TITLE SERVICE AGENCY, LLC, an Arizona limited liability company, Defendant/Appellee.	)	1 CA-CV 10-0466 DEPARTMENT B **MEMORANDUM DECISION** (Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. CV2008-005860

The Honorable Bethany G. Hicks, Judge

REVERSED AND REMANDED

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K E S S L E R, Presiding Judge

¶1 Plaintiff/appellant JGD, LLC, ("JGD") appeals from the trial court's summary judgment for defendant/appellee American Title Service Agency, LLC ("ATSA"), on the grounds that JGD failed to identify an expert to testify as to the standard of care required of an escrow agent. JGD contends that no expert testimony on the standard of care is necessary. We agree with JGD and reverse and remand this case for further proceedings consistent with this decision.

FACTUAL AND PROCEDURAL HISTORY

¶2 JGD was formed by its two members, Pierre E. Leroy and Jay G. Wolpe, for the purpose of developing and selling a house on a lot in Scottsdale, Arizona. In December 2004, Leroy and Wolpe executed the JGD Operating Agreement ("Agreement") which provided, among other things, that Wolpe would be the managing member; Wolpe would have full and complete authority, power, and discretion to make decisions he deemed reasonably necessary to accomplish the company's objective; and Wolpe had the authority to borrow money for the company and grant security interests in the company's assets up to, but not more than, $10,000. For any indebtedness in excess of $10,000, approval of both members was required.

¶3 In February 2006, Wolpe undertook to borrow $2.3 million on behalf of JGD from Seattle Funding Group of Arizona, LLC ("SFG"), secured by the lot in Scottsdale. Commonwealth Land Title Insurance Company, also known as Transnation, issued a lender's title policy to SFG.

¶4 SFG selected ATSA as the escrow agent for the loan. Transnation required ATSA's escrow department to provide ATSA's title department with a copy of JGD's Articles of Organization, the Agreement, and a list of JGD members. ATSA was aware that Leroy's approval was needed for the loan.

¶5 ATSA prepared and sent a Limited Liability Company Resolution to Wolpe to obtain Leroy's approval as required by the Agreement for Wolpe to execute the loan. ATSA did not attempt to contact Leroy directly to obtain approval for the transaction.

¶6 Wolpe faxed the Resolution to ATSA with a brief letter stating that it was a faxed copy he had received from Leroy. The Resolution appeared to be signed by both Wolpe and Leroy. However, there was no indication that the fax was a forward of the fax Wolpe claimed Leroy had earlier sent him. Also, there is no evidence that ATSA contacted Leroy to verify his consent to the loan. ATSA closed the loan and recorded a first deed of trust against the Scottsdale lot.

¶7 Leroy sued JGD, SFG and Wolpe, contending Wolpe had forged his signature on the Resolution. *Leroy v. JGD, LLC*, Maricopa County Superior Court No. CV2006-009362, Nov. 25, 2009. The trial court determined that Wolpe forged Leroy's signature and both loans were obtained without Leroy's knowledge or approval. The court granted an Arizona Rule of Civil Procedure 54(b) judgment for Leroy, voided the related promissory note, and awarded him damages against SFG.

¶8 In the meantime, Leroy, in the name of JGD, filed a complaint for damages against ATSA. In March 2008, JGD filed an amended complaint against ATSA asserting claims of negligence, aiding and abetting breach of fiduciary duty, and aiding and abetting fraud.[1] The complaint alleged that ATSA owed a duty of care to Leroy and JGD to obtain Leroy's approval, and that such duty was breached when ATSA failed to ask for an original signature on the purported Resolution or to confirm that Leroy had consented to the loan. Leroy averred that he had not been aware of the loan, that he had never seen and therefore had never signed the Resolution, and that he was shocked to discover that a lien had been placed on the property. Leroy claimed that the signature on the Resolution was a forgery and ATSA should have been suspicious because, if the Resolution faxed by Wolpe

[1] JGD does not appeal the trial court's determinations regarding the aiding and abetting counts, and thus we do not recount the facts surrounding those claims.

to ATSA was a copy that he had faxed to Wolpe, the copy would have had fax transmission lines, which it did not.

¶9 In February 2009, ATSA disclosed an expert witness on the standard of care, liability, and damages. The expert opined that ATSA had complied strictly with the terms of the escrow agreement, had acted as a reasonable escrow agent, and had not been presented with facts that would have been perceived as evidence of fraud. JGD did not proffer a controverting expert.

¶10 ATSA filed a motion for summary judgment on the grounds that JGD could not demonstrate negligence because it did not know Leroy's signature was forged, and thus did not breach the standard of care.

¶11 Shortly after ATSA filed its motion for summary judgment, the trial court granted leave for JGD to file a second amended complaint, which added a claim for breach of fiduciary duty. ATSA filed a second motion for partial summary judgment with respect to the new claim.

¶12 In its reply in support of the first summary judgment motion, ATSA argued that, because escrow agents hold themselves out as having specialized training, skills, and particularized knowledge, the standard of care of an escrow agent in closing a loan should be established by expert opinion. ATSA further argued that it had provided an expert opinion establishing the

standard and that JGD had failed to produce any controverting expert opinion, requiring summary judgment in ATSA's favor.

¶13 In October 2009, the trial court denied ATSA's motion for summary judgment, stating: "In this case, whether, under all of the circumstances, [ATSA] acted as a reasonable escrow agent in discharging its obligations with respect to this loan transaction is a question of fact for the jury." ATSA filed a motion for reconsideration, arguing that an expert on the standard of care was required, but the court denied the motion.

¶14 ATSA filed a supplement to its second motion for partial summary judgment on JGD's claim of breach of fiduciary duty, as well as another motion for reconsideration of the court's denial of its first motion for summary judgment on JGD's first three claims. ATSA argued that the ruling in *Leroy v. JGD, LLC*, fully determined the merits of JGD's claim for damages and that any recovery in the case against ATSA would constitute double recovery.

¶15 In March 2010, the trial court denied the second motion for reconsideration, but ruled: "[A]fter reconsideration, the Court does find that claims against [ATSA] cannot stand without expert testimony regarding the standard of care of a title agent." The court then granted summary judgment to ATSA.

¶16 JGD filed a timely notice of appeal. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101(B) (2003).

STANDARD OF REVIEW

¶17 Summary judgment may be granted when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Ariz. R. Civ. P. 56(c). In reviewing a motion for summary judgment, we determine *de novo* whether any genuine issues of material fact exist and whether the trial court properly applied the law. *Eller Media Co. v. City of Tucson*, 198 Ariz. 127, 130, ¶ 4, 7 P.3d 136, 139 (App. 2000).

DISCUSSION

¶18 The issue is whether JGD needed a standard of care expert concerning ATSA's duty to confirm Leroy consented to the pending loan. We agree with JGD that, on this record, no expert testimony is required to establish the standard of care of ATSA as escrow agent.

¶19 In general, "industries are not permitted to establish their own standard of conduct because they may be influenced by motives of saving time, effort or money." *Rossell v. Volkswagen of Am.*, 147 Ariz. 160, 165, 709 P.2d 517, 522 (1985) (citation and internal quotation marks omitted). Only when a person holds himself out as having the special knowledge, training, or skill

of a certain trade or profession will that person be required to "exercise the skill and knowledge normally possessed by members of that trade or profession in good standing in similar communities." *Powder Horn Nursery, Inc. v. Soil & Plant Lab., Inc.*, 119 Ariz. 78, 82, 579 P.2d 582, 586 (App. 1978). In such a case, "[s]pecial groups will be allowed to create their own standards of reasonably prudent conduct only when the nature of the group and its special relationship with its clients assure society that those standards will be set with primary regard to protection of the public rather than to such considerations as increased profitability." *Rossell*, 147 Ariz. at 166, 709 P.2d at 523.

¶20 Evidence of custom or practice is admissible to show the "exercise of due care by the parties, but they do not necessarily define the standard of care required." *Am. Smelting & Refining Co. v. Wusich*, 92 Ariz. 159, 164, 375 P.2d 364, 367 (1962). "A custom may exact more or less than the demands of due care, but it may be considered by the jury in determining whether the demands of due care were met." *Id.*

¶21 However, when a layperson can understand the disputed issues and decide the questions of fact without assistance, expert testimony is unnecessary in a tort action. *Rudolph v. Ariz. B.A.S.S. Fed'n*, 182 Ariz. 622, 626, 898 P.2d 1000, 1004 (App. 1995). The law requires expert testimony to establish the

standard of care only when a layperson cannot determine whether a particular practice is negligent or if factual issues are beyond a layperson's common understanding. *Rossell*, 147 Ariz. at 167, 709 P.2d at 524. However, "[e]xpert testimony is not a mechanism for having someone of elevated education or station engage in a laying on of the hands, placing an imprimatur upon the justice of one's cause, but rather is a device allowing the trier to receive information, beyond its competence, useful to a resolution of the dispute before it." *Wal-Mart v. Indus. Comm'n of Ariz.*, 183 Ariz. 145, 147, 901 P.2d 1175, 1177 (App. 1995) (citation and internal quotation marks omitted).

¶22 An escrow agent has two fiduciary duties to his clients: "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." *Maxfield v. Martin*, 217 Ariz. 312, 314, ¶ 12, 173 P.3d 476, 478 (App. 2007). "As such he must 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 latter duty "includes the duty of taking reasonable efforts to ascertain the identity of the named parties to the transaction." *Id.* at 315, ¶ 14, 173 P.3d at 479.

¶23 We hold that, on this record, an escrow agent's duties to strictly comply with the escrow agreement and to disclose evidence of fraud are not beyond a layperson's common understanding and can be determined without expert testimony. We also conclude the nature of an escrow agent's duties in reasonably identifying indicia of fraud is such that those duties may not be defined by "what is customary and usual in the profession." *Rossell*, 147 Ariz. at 165, 709 P.2d at 522 (citation and internal quotation marks omitted).

¶24 Leroy's consent was not a technical issue requiring application of knowledge which required an expert opinion to guide the jury. ATSA's contention that an expert is required to discuss what is customary practice among escrow agents would open the door to the risks meant to be protected against, namely "setting standards at a low level in order to accommodate other interests," such as motives of saving time, effort, or money.[2]

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[2] ATSA points us to two Florida cases, *Decarlo v. Griffin* and *David S. Kaufman, PA v. Moskowitz*, both of which are unpersuasive. In *Decarlo*, the relevant dispute was whether the title agency complied with the escrow agreement and the defendant presented expert testimony supporting its contention that it did comply with the agreement. 827 So. 2d 348, 351 (Fla. App. 2002). Nothing in that case supports the argument that an expert witness was required to prove the escrow agent did not comply with the agreement; that expert testimony was permitted does not mean it was required. In fact, the *Decarlo* case is helpful to JGD in that the expert testified the defendant complied with the escrow agreement by receiving a required document, reviewing it "using reasonable skill and ordinary diligence," and *obtaining confirmation of its*

Rossell, 147 Ariz. at 165, 709 P.2d at 522. Generally, on facts such as these, the escrow industry is not a special group, akin to doctors, lawyers, or insurance agents, who practice in a very specialized field of knowledge, and for that reason are allowed to create its own standards of reasonably prudent conduct.

¶25 There may be some job duties of an escrow agent that could require an expert to explain the standard of care to a fact-finder. However, on these facts, identifying indicia of fraud and taking appropriate steps to disclose those facts, including confirming the parties' identities, is not outside the common knowledge of a fact-finder.

¶26 ATSA relies on *Burkons v. Ticor Title Ins. Co. of Cal.*, 168 Ariz. 345, 353, 813 P.2d 710, 718 (1991), to argue that an escrow agent's duties are limited to what is customary and usual in the profession so that an expert on the standard of care is needed. We disagree. In *Burkons*, the court stated "when the agent is aware of facts and circumstance that a *reasonable escrow agent* would perceive as evidence of fraud, then there is a duty to disclose." *Id.* (emphasis added)

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authenticity. *Id.* In *Moskowitz*, the Florida court implied that expert testimony was needed to show the defendant was negligent while acting as an escrow agent, but there the role of the defendant was to hold funds for the plaintiff in a complicated escrow transaction to avoid tax consequences on the sale of real estate. 610 So. 2d 642, 643 (Fla. App. 1992). Our holding is limited to the facts of the case before us, which involves no technical knowledge or expertise in deciding whether sufficient indicia of fraud was present.

(citation and internal quotation marks omitted). The statement merely reflects the rule that in applying the reasonable and prudent man standard, we view the facts from the context of a person in the position of the defendant. *See* Restatement 2d of Torts § 283 (stating "the standard of conduct . . . is that of a reasonable man in like circumstances").

¶27 Moreover, the issues of the standard of care required of an escrow agent and whether an expert is needed to inform the jury about what is customary in the escrow field were not before the *Burkons* court. Nor did the court make mention of an expert's testimony in the analysis of the duty; rather, it stated that the inquiry of whether a reasonable escrow agent would have perceived indicia of fraud, triggering the duty to disclose, "is easily answered on the record before [the court]." *Burkons*, 168 Ariz. at 353-54, 813 P.2d at 718-19. Therefore, the *Burkons* court did not adopt the usual and customary standard of care for escrow agents.

¶28 Here, JGD argues ATSA should have recognized a "red flag," which was that Wolpe stated Leroy faxed him the Resolution and he claimed to forward that fax to ATSA, but the fax ATSA received did not have two sets of fax-confirmation data. The clear reason for the Agreement's requirement that both members sign for any encumbrance over $10,000 was to prevent one member from undertaking a large encumbrance without

the other member's consent. ATSA may have been required to do more than send the Resolution to Wolpe for him to obtain Leroy's signature and accept an alleged fax of a fax as sufficient to comply with the Agreement. *Maxfield* arguably required ATSA to take steps to confirm Leroy's identity, including at the least sending the Resolution directly to Leroy, notifying SFG of the circumstances surrounding Leroy's signature, or calling Leroy after receipt of the Resolution from Wolpe to confirm he indeed signed it. *See Maxfield*, 217 Ariz. at 315, ¶ 14, 173 P.3d at 479 (holding the "duty of an escrow agent to act with scrupulous honesty, skill, and diligence includes the duty of taking reasonable efforts to ascertain the identity of the named parties to the transaction") (citation and internal quotation marks omitted). Additionally, requesting Wolpe and Leroy to notarize their signatures could have been reasonably prudent. Because whether ATSA should have perceived the possible fraud and taken steps to disclose the fraud are issues a layperson can understand, JGD was not required to offer expert testimony on the standard of care.[3] [4]

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[3] Nothing in this decision implies that ATSA's expert's opinion is admissible on remand. *See generally Webb v. Omni Block, Inc.*, 216 Ariz. 349, 353-54, ¶¶ 12-17, 166 P.3d 140, 144-45 (App. 2007) (setting forth the law on allowing expert testimony on ultimate issues to be decided, including that some "courts have concluded that expert opinions addressing ultimate issues are excluded when couched as legal conclusions because such beliefs by expert witnesses tend to blur the separate and

CONCLUSION

¶29 We reverse the trial court's entering of summary judgment for ATSA and remand for proceedings consistent with this decision.

/s/
DONN KESSLER, Presiding Judge

CONCURRING:

/s/
DIANE M. JOHNSEN, Judge

/s/
SHELDON H. WEISBERG, Judge*

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distinct responsibilities of the judge, jury, and witness, and create the danger that jurors may turn to the expert for guidance on applicable law rather than the judge") (citation and internal quotation marks omitted). We leave that determination to the trial court.

[4] Because we find no expert on the standard of care was required here, we need not address JGD's additional arguments.

* Pursuant to Article 6, Section 3, of the Arizona Constitution, the Arizona Supreme Court designated the Honorable Sheldon H. Weisberg, as appointed to serve as a judge pro tempore in the Arizona Court of Appeals, Division One, to sit in this matter.